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STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff- Appellee,

v.

TRAVIS TRAVON SAMMONS,
Defendant-Appellant.

_____/

SUPREME COURT
No. 156189

COURT OF APPEALS
No. 332190

CIRCUIT COURT
No. 15-041848-FC

PLAINTIFF-APPELLEE'S RESPONSE TO DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL
(ORAL ARGUMENT REQUESTED)

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Exhibit B - *People v Ramsey*, unpublished Order of the Court of Appeals, issued December 29, 2016 (Docket No. 334614).

Exhibit C - *People v Dominique Arnett Ramsey, Jr.*, unpublished opinion per curiam of the Court of Appeals, issued April 24, 2018 (Docket No. 334614) (Ronayne Krouse, P.J., concurring).

STATEMENT OF JURISDICTION

This case comes before the Court on the defendant-appellant's Application for Leave to Appeal the Michigan Court of Appeals' decision in *People v Sammons*, unpublished opinion per curiam of the Court of Appeals, issued July 6, 2017 (Docket No. 332190), filed on July 27, 2017, pursuant to MCL 7.305 *et seq*.

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COUNTERSTATEMENT OF QUESTIONS INVOLVED

I. Did the trial court abuse its discretion when it denied the defendant-appellant's Motion for Judgement Notwithstanding the Verdict or in the Alternative Motion for New Trial where sufficient evidence existed to sustain his jury conviction for conspiracy to commit first-degree premeditated murder?

Defendant-Appellant says "YES".
Plaintiff-Appellee says "NO".
Trial Court says "NO".

II. Did the trial court abuse its discretion when it denied the defendant-appellant's motion to suppress identification evidence from his preliminary examination?

Defendant-Appellant says "YES".
Plaintiff-Appellee says "NO".
Trial Court says "NO".

III. Did the prosecutor did commit misconduct during opening statements, thereby violating the defendant-appellant's rights to due process and a fair trial?

Defendant-Appellant says "YES".
Plaintiff-Appellee says "NO".
Trial Court says "NO".

IV. Was trial counsel ineffective for failing to wage meritless objections to the prosecutor's opening statement and closing argument, thereby depriving the defendant-appellant his constitutional right to effective assistance of counsel?

Defendant-Appellant says "YES".
Plaintiff-Appellee says "NO".
Trial Court says "NO".

V. Did the prosecutor present improper closing and rebuttal arguments and vouch for the credibility of a witness, thereby violating the defendant-appellant's rights to due process and a fair trial?

Defendant-Appellant says "YES".
Plaintiff-Appellee says "NO".
Trial Court says "NO".

KEY TO ABBREVIATIONS

Kindly note that The People of the State of Michigan utilize the following abbreviations in their response to defendant-appellant's brief on appeal:

1. "TT2" refers to Volume II of IV of the Trial Transcript dated January 21, 2016.

2. "TT3" refers to Volume III of IV of the Trial Transcript dated January 26, 2016.

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COUNTERSTATEMENT OF FACTS

This case comes before the Court on the defendant-appellant's Application for Leave to Appeal the Michigan Court of Appeals' decision in *People v Sammons*, unpublished opinion per curiam of the Court of Appeals, issued July 6, 2017 (Docket No. 332190). Exhibit A. By way of that opinion, the Court of Appeals summarized the record evidence as follows:

> Defendant's conviction arises from the murder of Humberto Casas in the afternoon of June 21, 2015, in Saginaw, Michigan. Police charged defendant and codefendant, Dominique Ramsey, with the crime, and the same jury tried the two men. Two eyewitnesses testified to the fatal shooting at the trial. Rosie Watkins testified that she was driving north on Cumberland Street when she observed three men on the opposite side of the road. She testified that the first man shot the second man, who bent over, and the third man got into a vehicle while the first man continued shooting. Then the shooter got into the vehicle. Watkins described the vehicle as a gray or silver Jeep. Approximately 11 minutes after dispatch received a call regarding the shooting, police pulled over a Jeep matching that description. Watkins positively identified a photograph of the Jeep admitted into evidence at trial as the Jeep she saw at the shooting. In the Jeep were defendant and Ramsey.
>
> Dyjuan Jones, who was 16–years old at the time of the shooting, testified that he was riding in the backseat of his mother's car when he heard what sounded like three firecrackers going off. He looked in the direction of the sound and witnessed the shooting, including the assailant's firing at least seven more shots into the victim, who was rolling from the sidewalk into the street in an apparent attempt to avoid being hit. Jones was approximately 20 to 25 feet away from the shooting. He, too, observed a gray Jeep at the scene that he agreed looked similar to the one in the photograph identified by Watkins.
>
> The prosecution produced a composite video made from nine or ten surveillance tapes that depicted a silver Jeep Commander starting from the corner where the homicide occurred to the location where defendant and Ramsey were detained after a traffic stop. Jones described the shooter as an African–American male wearing a white T-shirt. Michigan State Police Sergeant David Rivard testified that Jones identified defendant as the shooter at a showup conducted at the police station a few hours after the shooting. However, Jones maintained that he did not identify defendant while at the police station.
>
> The jury found both defendant and Ramsey guilty of conspiracy to commit open murder. Both men filed motions for a directed verdict or a new trial. The trial court denied defendant's motion, but granted Ramsey's, holding that there was insufficient evidence to convict him. [*Sammons*, unpub op at *1–2.]

Subsequent to the trial court's granting of co-defendant Ramsey's renewed motion for

directed verdict, the People filed a delayed application for leave to appeal and a motion for peremptory reversal in the Court of Appeals, both of which were denied. See *People v Ramsey*, unpublished Order of the Court of Appeals, issued December 29, 2016 (Docket No. 334614). Exhibit B. The People sought leave to appeal that denial in the Michigan Supreme Court. This Court, finding that the issues raised on appeal were meritorious enough to be addressed by the Court of Appeals, remanded the case for consideration as on leave granted. *People v Ramsey*, 500 Mich 980; 893 NW2d 342 (2017).

In *People v Dominique Arnett Ramsey, Jr.*, unpublished opinion per curiam of the Court of Appeals, issued April 24, 2018 (Docket No. 334614) (Ronayne Krouse, P.J., concurring), the Court of Appeals held that the trial court abused its discretion and impeded upon the jury's duty to determine witness credibility and resolve factual issues when it granted co-defendant Ramsey's motion. See Exhibit C. Accordingly, the Court of Appeals vacated the trial court's Order granting co-defendant Ramsey's renewed motion for directed verdict and its conditional granting of the corresponding motion for new trial, reinstated codefendant Ramsey's conviction, and remanded for sentencing. See *Id.*

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ARGUMENT I

The trial court did not abuse its discretion when it denied the defendant-appellant's Motion for Judgement Notwithstanding the Verdict or in the Alternative Motion for New Trial where sufficient evidence existed to sustain his conviction for conspiracy to commit first-degree premeditated murder by a jury.

A. STANDARD OF REVIEW

This Court reviews a trial court's grant of a directed verdict de novo, considering the evidence in the light most favorable to the prosecution. *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). "[A] directed verdict is inappropriate where a rational trier of fact could find that the essential elements of the crime charged were proven beyond a reasonable doubt." *Id.*

Claims of insufficient evidence are reviewed de novo. *People v Cline,* 276 Mich App 634, 642; 741 NW2d 563 (2007). "In doing so, we must view all the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crimes were proven beyond a reasonable doubt." *People v Harrison*, 283 Mich App 374, 377-378; 768 NW2d 98, 100 (2009), citing *People v Schumacher*, 276 Mich App 165, 167; 740 NW2d 534 (2007). "The credibility of witnesses and the weight accorded to evidence are questions for the jury, and any conflict in the evidence must be resolved in the prosecutor's favor." *Harrison*, 283 Mich App at 378, citing *People v McGhee,* 268 Mich App 600, 624; 709 NW2d 595 (2005). "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman,* 466 Mich 417, 428; 646 NW2d 158 (2002).

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B. LEGAL STANDARDS

"The credibility of witnesses *and the weight accorded to evidence are questions for the jury*, and any conflict in the evidence must be resolved in the prosecutor's favor." *Harrison*, 283 Mich App at 378(emphasis added), citing *McGhee*, 268 Mich App at 624. "The credibility of identification testimony is a question for the trier of fact that we do not resolve anew." *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000), citing *People v Daniels*, 172 Mich App, 374, 378; 431 NW2d 846 (1988). "Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove all the elements of an offense beyond a reasonable doubt." *Harrison*, 283 Mich App at 378, citing *Schumacher*, 276 Mich App at 167.

MCL 750.157a, Michigan's criminal conspiracy statute provides, in relevant part, that:

> [a]ny person who conspires together with 1 or more persons to commit an offense prohibited by law, or to commit a legal act in an illegal manner is guilty of the crime of conspiracy punishable as provided herein:
> (a) Except as provided in paragraphs (b), (c) and (d) if commission of the offense prohibited by law is punishable by imprisonment for 1 year or more, the person convicted under this section shall be punished by a penalty equal to that which could be imposed if he had been convicted of committing the crime he conspired to commit and in the discretion of the court an additional penalty of a fine of $10,000.00 may be imposed. [MCL 750.157a(1)(a).]

"The gist of conspiracy lies in the illegal agreement; once the agreement is formed, the crime is complete." *People v Seewald*, 499 Mich 111, 117; 879 NW2d 237(2016)(internal quotation and citation omitted. "Michigan law requires no proof of an overt act taken in furtherance of the conspiracy. And, because the crime is complete upon the conspirators' agreement, the prosecution need not prove that "'the purpose contemplated by the unlawful agreement was accomplished.'" *Id.*, quoting *People v Asta*, 337 Mich 590, 611; 60 NW2d 472 (1953).

MCL 750.316, commonly known as first-degree murder, provides in part that:

> Except as provided in sections 25 and 25a of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.25 and 769.25a, a person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life without eligibility for parole:
> (a) Murder perpetrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing. [MCL 750.316(1)(a).]

C. DISCUSSION

Initially, in support of their response to this argument, the People rely on the Court of Appeals' Opinion in *People v Sammons*, unpublished opinion per curiam of the Court of Appeals, issued July 6, 2017 (Docket No. 332190), annexed hereto as Exhibit A.

In the case at bar, the trial judge denied the defendant-appellee's motion for directed verdict after the close of the People's proofs, stating:

> [w]ith regard to the Defendant Sammons, I'm going to deny the motion as well. Based upon the fact that there is direct and indirect circumstantial evidence related to his guilt or innocence.
>
> Also, the question of identification would be one for the jury to determine whether they believe Mr. Jones or Detective Rivard on that identification issue, and if so, what weight they want to give it in determining his guilt or not guilt. [TT 3, pp. 64-65.]

The defendant-appellee did not present any evidence to the jury and rested, as is his right. *Id.* at pp. 65-66. The defendant-appellee's jury then returned a verdict of guilty of conspiracy to commit first-degree murder. TT 4, p. 4. Consequently, the defendant-appellant renewed his motion for directed verdict. That motion was denied. Most notable, however, is the fact that the defendant-appellee neither admitted nor attempted to admit any new or additional evidence other than what the trial judge relied on when denying the original motion for directed verdict.

Regarding the trier of fact's role in trial court proceedings, this Honorable Court has previously held that, "[t]he fact finder, be it jury or judge, is the sole judge of the facts as they pertain to the defendant whose guilt or innocence it is to decide. It is beyond peradventure that

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the fact finder may choose to believe or disbelieve any witness or any evidence presented in reaching a verdict." *People v Cummings*, 139 Mich App 286, 293-294; 362 NW2d 252 (1984), referencing by example *People v Lewis,* 415 Mich 443; 330 NW2d 16 (1982), and *People v Chamblis,* 395 Mich 408; 236 NW2d 473 (1975). "Furthermore, *the credibility of witnesses is a matter of weight, not sufficiency*. Determinations of credibility are made by the jury which heard the testimony and observed the witnesses, and this Court will not substitute its judgment on this issue." *People v Scotts*, 80 Mich App 1, 9; 263 NW2d 272 (1977)(emphasis added), citing *People v Atkins*, 397 Mich 163, 172; 243 NW2d 292 (1976).

"[T]his Court has stated that positive identification by witnesses may be sufficient to support a conviction of a crime." *Davis*, 241 Mich App at 700, referencing *People v Malone*, 193 Mich App 366, 371; 483 NW2d 470, 472 (1992), aff'd 445 Mich 369; 518 NW2d 418 (1994). "Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove all the elements of an offense beyond a reasonable doubt." *Harrison*, 283 Mich App at 378, citing *Schumacher,* 276 Mich App at 167.

Defendant-appellant asserts that The People presented insufficient evidence that he committed conspiracy to commit first-degree murder, contrary to MCL 750.157a and MCL 750.316. His argument hinges on the argument that the prosecution did not prove the defendant-appellant's identity and the existence of a conspiracy beyond a reasonable doubt. See DBA.

The lower court reflects that the defendant-appellant's jury was given specific instructions on what evidence is. Accordingly, the trial judge instructed the jury, in pertinent part, as follows:

> [r]emember that you have taken an oath to return a true and just verdict based only on the evidence and on my instructions on the law. *You must not let sympathy or prejudice influence your decision.* As jurors, you must decide what the facts of this case are.

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* * *

> It is my duty to instruct you on the law. You must always take the law as I give it to you. *If a lawyer says something different about the law, follow what I say.*

* * *

> *The lawyers' statement and arguments are not evidence*. They are only meant to help you understand the evidence and each side's legal theories. You should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge.
>
> The lawyers' questions to the witnesses and my questions to the witnesses are also not evidence. You should consider these questions only as they give meaning to the witness's answers.

* * *

> You should use your own common sense and general knowledge in weighing and judging the evidence, but you should not use any personal knowledge you may have about a place, person or event. *To repeat once more, you must decide this case based only on the evidence admitted during this trial.* [TT 3, pp. 136-37, 138-40 (emphasis added).]

Regarding the contested convictions, this Court resolves a challenge to the sufficiency of evidence, "by considering the evidence presented in a light most favorable to the prosecution and determining whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Daniels*, 172 Mich App at 378. This Court has previously stated that the credibility of identification testimony was a matter for the trier of fact to decide, and it will not resolve it anew. See *Davis*, 241 Mich App at 700.

The prosecution can prove conspiracy by demonstrating 1) an understanding or agreement to accomplish an unlawful act or 2) or an understanding or agreement to accomplish a lawful act by unlawful means. *Seewald*, 499 Mich at 117. See also *People v Tenerowicz*, 266 Mich 276, 285; 253 W 296 (1934). "The gist of conspiracy lies in the illegal agreement; once the agreement is formed, the crime is complete." *Seewald*, 499 Mich at 117 (internal quotation and

citation omitted). "Michigan law requires no proof of an overt act taken in furtherance of the conspiracy. Moreover, because the crime is complete upon the conspirators' agreement, the prosecution need not prove that "'the purpose contemplated by the unlawful agreement was accomplished.'" *Id.*, quoting *Asta*, 337 Mich at 611.

The elements of first-degree premeditated murder are (1) an intentional killing of a human being (2) with premeditation and deliberation. *People v Hoffmeister*, 394 Mich 155, 158–159; 229 NW2d 305 (1975); *People v DeLisle*, 202 Mich App 658, 660; 509 NW2d 885 (1993). The specific intent to kill element of first-degree murder may be inferred from any facts in evidence. *People v Unger*, 278 Mich App 210, 223; 749 NW2d 272 (2008). "Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient to establish a defendant's intent to kill." *Id.* The premeditation and deliberation element requires "sufficient time to allow defendant to take a second look." *Id.* The finder of fact may find the following factors persuasive: (1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995).

Regarding the trial court's instruction of defendant-appellant's jury on the elemental requirements of conspiracy to commit first-degree murder, first-degree murder, and the requisite state of mind necessary at the time of the killing, the trial court instructed the jury as follows:

> [i]n Count I, the defendants are charged with the crime of conspiracy to commit first-degree premeditated murder. I will define first-degree premeditated murder for you in other instructions.
>
> Anyone who knowingly agrees with someone else to commit first-degree premeditated murder is guilty of conspiracy. To prove the defendant's guilt, the prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> First: That the defendant and someone else knowingly agreed to commit first-degree premeditated murder.
>
> Second: That the defendant specifically intended to commit or help commit that crime.

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Third: That this agreement took place or continued during June 21, 2015.

An agreement is the coming together or meeting of the minds of two or more people, each person intending and expressing the same purpose. It is not necessary for the people involved to have made a formal agreement to commit the crime or to have written down how they were going to do it. In deciding whether there was an agreement to commit a crime, you should think about how the members of the alleged conspiracy acted and what they said as well as all the other evidence.

To find the defendant guilty of conspiracy, you must be satisfied beyond a reasonable doubt that there was an agreement to commit first-degree premeditated murder. However, *you may infer that there was an agreement from the circumstances, such as how the members of the alleged conspiracy acted.*

If there was a conspiracy, you must decide whether the defendant was a member of it. You may only consider what the defendant did and said during the time the conspiracy took place. A finding that the defendant was merely with other people who were members of a conspiracy is not enough, by itself, to prove that the defendant was also a member.

In addition, the fact that a person did an act that furthered the purpose of an alleged conspiracy is not enough, by itself, to prove that that person was a member of the conspiracy. It is not necessary for all the members to know each other or know all the details of how the crime will be committed, but it must be shown beyond a reasonable doubt that the defendant agreed to commit the crime and intended to commit or help commit it.

The defendant is not responsible for the acts of other members of the conspiracy unless those acts are part of the agreement or further the purposes of the agreement. If the defendant agreed to commit a completely different crime, then he is not guilty of conspiracy to commit first-degree premeditated murder.

A person who joins a conspiracy after it has already been formed is only responsible for what he agreed to when joining, not for any agreement made by the conspiracy before he joined. Members of a conspiracy are not responsible for what other members do or say after the conspiracy ends.

Each defendant in this case is entitled to have his guilt or innocence decided individually. You must decide whether each defendant was a member of the alleged conspiracy as if he were being tried separately. To determine whether each defendant was a member of the alleged conspiracy, you must decide whether each individual defendant intentionally joined with anyone else to commit first-degree premeditated murder.

In conspiracy cases it is often difficult to decide each defendant's case on its own because of the amount of evidence that is admitted against the other defendant. If any evidence was limited to one defendant, you should not consider it as to any other defendant.

It is not enough to find that there was a criminal agreement to commit first-degree premeditated murder. Even if you do find that there was a conspiracy, you must still determine whether each defendant separately was a member of that conspiracy.

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> In Count III the defendants are charged with open murder. Under Count III you should first consider the charge of first-degree premeditated murder. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> First: That the defendant caused the death of Humberto Casas; that is, that Humberto Casas died as a result of being shot by the defendant or by someone else that the defendant intentionally assisted in committing the crime.
>
> Second; that the defendant intended to kill, or that the defendant participated in this crime, knowing that the person he was assisting intended to kill.
>
> Third: That this intent to kill was premeditated, that is, thought out beforehand.
>
> Fourth: That the killing was deliberate, which means that the defendant considered the pros and cons of the killing and thought about and chose his actions before he did it. There must have been real and substantial reflection for long enough to give a reasonable person a chance to think twice about the intent to kill. The law does not say how much time is needed. It is for you to decide if enough time passed under the circumstances of this case. The killing cannot be the result of a sudden impulse without thought or reflection.
>
> * * *
>
> You must think about all the evidence in deciding what the defendant's state of mind was at the time of the alleged killing. The defendant's state of mind may be inferred from the kind of weapon used, the type of wounds inflicted, the acts and words of the defendant, and any other circumstances surrounding the alleged killing. You may infer that the defendant intended to kill if he used a dangerous weapon in a way that was likely to cause death.
>
> Likewise, you may infer that the defendant intended the usual results that follow from the use of a dangerous weapon. A gun is a dangerous weapon.
>
> Premeditation and deliberation may be inferred from any actions of the defendant which show planning, or from any other circumstances surrounding the killing. The prosecutor need not prove a motive for the killing.
>
> The prosecutors need not prove a motive for the killing, but you may consider evidence of motive in deciding if there was premeditation and deliberation. Motive, by itself, does not prove premeditation and deliberation. [TT 3, pp. 149-155, quoting CJI 10.1-10.5, 16.1, & 16.21(emphasis added).]

In his closing argument, the prosecutor summarized the evidence supporting the conviction for conspiracy, specifically the video documentation, as follows:

> [c]onspiracy to commit first-degree murder. It is relatively simple. The two of these people had to have some kind of agreement to do what they did.
>
> * * *

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> They don't have to negotiate some type of contract where, you know, Mr. Ramsey will go obtain a vehicle, and Mr. Ramsey will do this and all that. It doesn't have to be that precise or that – that formal. It can be something that the – that's very informal, and you can also determine that it happened – and this is most important – by their actions.
>
> What the video shows . . . is that Dominique Ramsey drives north on Cumberland, here. And as he's approaching and they see Mr. Casas, he turns there. Would he do that if there wasn't some type of an agreement for him to do it, some type of understanding that that was his role in it? [TT 3, pp. 79-80.]

Because the jury was allowed to infer that there was an agreement to commit first-degree murder from the circumstances, such as how the members of the alleged conspiracy acted, it is important to discuss the evidence and testimony that underpinned the first-degree murder charge. While presented in a targeted contextual analysis above, in his closing argument the prosecutor summarized the evidence supporting a conviction for first-degree murder. First, Rosei Watkins identified the Jeep commander stopped by Officer Poirer as the same Jeep that was used in the murder. TT 3, pp. 70-71. The defendant-appellant's co-defendant was driving the Jeep when it was stopped by police a short time later. *Id.* at 72. The defendant-appellant, the shooter, was his passenger. *Id.* The defendant-appellant's co-defendant made furtive movements in the back seat of the patrol car as the officer talked to the defendant-appellant, showing his interest in the subject of the conversation. *Id.* at 72-73.

Next, prosecutor discussed the testimony of the medical examiner, Dr. Virani, indicating that the victim was shot in the back of the head. He also testified that the victim's body contained no less than seven gunshot wounds. *Id.* at 74-75. The prosecutor argued that intent can be shown through actions, specifically the multiple gunshot wounds. *Id* at 75. The prosecutor also argued that intent and premeditation could be seen in the video exhibit. *Id.* at *75*, 81-88. Specifically, the co-defendant acquired the Jeep, the video shows the vehicle being purposefully driven to the scene of the murder, the vehicle then drives away. *Id.* at 75-77. Before the Jeep turns on

Baldwin, the prosecutor argued that the driver can be seen wearing a light-colored shirt, similar to the description of the co-defendant. *Id* at 85. The prosecutor than presents the video taken of the Baldwin residence previously discussed. *Id.* at 86.

The prosecutor then discussed the testimony of the witnesses who gave descriptions of the Jeep's driver and the shooter, descriptions that matched the defendant-appellant. *Id.* at 85, 86. Specifically, the prosecutor highlights the testimony of Dyjuan Jones. Jones identified the defendant-appellant as the shooter. *Id.* at 91. As previously indicated, the co-defendant was stopped by police driving a Jeep Commander with the defendant-appellant as his passenger. However, as discussed above, Jones' testimony conflicts with Watkins whose testimony regarding the size and facial hair of the driver. *Id.* at 121. The Court will note that Watkins description matches the defendant-appellee. *Id.* at 85, 89, 91, 126.

Taken as a whole, this evidence supported an inference that defendant-appellant conspired with co-defendant to commit first-degree murder. *Hardiman*, 466 Mich at 428. This Court defers to the jury's superior ability to assess the credibility of the witnesses. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). When taken in the light most favorable to the prosecution, and resolving any conflicts in testimony and evidence in favor of the prosecution, there can be but one conclusion: sufficient evidence supported defendant-appellee's conviction of conspiracy to commit first-degree murder.

As this Court is aware, jurors are presumed to follow their instructions. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818, 827 (2003). Accordingly, the trial court instructed defendant-appellant's jury on the various ways that facts can be proven, stating that:

> [y]ou should use your own common sense and general knowledge in weighing and judging the evidence . . ..

* * *

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> Facts can be proved by direct evidence from a witness or an exhibit. Direct evidence is evidence about what we actually see or hear. For example, if you look outside and see rain falling, that is direct evidence that it is raining.
>
> Facts can also be proved by indirect or circumstantial evidence. Circumstantial evidence is evidence that normally or reasonably leads to other facts. So, for example, if you see a person come in from outside wearing a raincoat covered with small drops of water, that would be circumstantial evidence that it is raining. You may consider circumstantial evidence. Circumstantial evidence by itself or a combination of circumstantial evidence and direct evidence can be used to prove the elements of a crime. In other words, you should consider all the evidence that you believe. [TT 3, pp. 139-140, quoting CJI2d 4.3.]

The trial court next instructed the jury, in relevant part, as follows:

> [y]ou must decide which witness you believe, and how important you think their testimony is.
>
> You do not have to accept or reject everything a witness said. *You are free to believe all, none or part of any person's testimony.* In deciding which testimony you believe, you should rely on your own common sense and everyday experience.
>
> * * *
>
> Sometimes the testimony of different witnesses will not agree, and you must decide which testimony you accept. You should you should think about whether the disagreement involves something important or not, and whether you think someone is lying or is simply mistaken. People see and hear things differently, and witnesses may testify honestly, but simply be wrong about what they thought they saw or remembered. It is also a good idea to think about which testimony agrees best with the other evidence in the case.
>
> However, you may conclude that a witness deliberately lied about something that is important to how you decide the case. If so, you may choose not to accept anything that the witness said. On the other hand, if you think the witness lied about some things but told the truth about others, you may simply accept the part you think is true, and ignore the rest. [TT 3, p. 140, 143, quoting CJI2d 3.6(emphasis added).]

Regarding the trier of fact's role in trial court proceedings, this Honorable Court has previously held that, "[t]he fact finder, be it jury or judge, is the sole judge of the facts as they pertain to the defendant whose guilt or innocence it is to decide. It is beyond peradventure that the fact finder may choose to believe or disbelieve any witness or any evidence presented in

reaching a verdict." *Cummings*, 139 Mich App at 293-294. "Furthermore, *the credibility of witnesses is a matter of weight, not sufficiency*. Determinations of credibility are made by the jury which heard the testimony and observed the witnesses, and this Court will not substitute its judgment on this issue." *Scotts*, 80 Mich App at 9. "[T]his Court has stated that positive identification by witnesses may be sufficient to support a conviction of a crime." *Davis*, 241 Mich App at 700, referencing *Malone*, 193 Mich App at 371. "Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove all the elements of an offense beyond a reasonable doubt." *Harrison*, 283 Mich App at 378, citing *Schumacher,* 276 Mich App at 167.

Again, this Court resolves a challenge to the sufficiency of evidence, "by considering the evidence presented in a light most favorable to the prosecution and determining whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Daniels*, 172 Mich App at 378. This Court has previously stated that the credibility of testimony was a matter for the trier of fact to decide, and it will not resolve it anew. See *Davis*, 241 Mich App at 700.

Regarding the trial court and defendant-appellee's apparent claim that this jury was not rational, and that no rational jury could have convicted him based on the evidence of record, the trial court instructed the defendant-appellee's jury as follows:

> [a] verdict in a criminal case must be unanimous. In order to return a verdict, it is necessary that each of you agrees on that verdict. In the jury room you will discuss the case among yourselves, but ultimately each of you will have to make up your own mind. Any verdict must represent the individual considered judgment of each juror.
>
> It is your duty as jurors to talk to each other and make every reasonable effort to reach agreement. Express your opinions and the reasons for them, but keep an open mind as you listen to your fellow jurors. Rethink your opinions, and do not hesitate to change your mind if you decide you were wrong. Try your best to work out your differences.

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> However, although you should try to reach agreement, none of you should give up your honest opinion about the case just because other jurors disagree with you or just for the sake of reaching a verdict. In the end, your vote must be your own and you must vote honestly and in good conscience. [TT 3, pp. 157-158, quoting CJI2d 3.11.]

It is the People's position that this instruction serves as a vehicle for rational discussion. When the Court considers the plain language of the instruction, CJI2nd 3.11 encourages individual considered judgement, open-minded discussion, cooperation, and honesty. Again, jurors are presumed to follow their instructions. A review of the defendant-appellant's brief reveals no claim that the jurors in question failed to adhere to their instructions. Accordingly, the controlling presumption is that they engaged in the required rational discussion as directed by the trial court.

After hearing the testimony of the People's witnesses and having viewed all the record evidence, defendant-appellee's jury returned a unanimous verdict of guilty of conspiracy to commit first degree murder, contrary to MCL 750.157a(1)(a) and MCL 750.316. It is squarely within the providence of the jury to believe or disbelieve a witness or weigh evidence when reaching a verdict. The defendant-appellant's jury also had the opportunity to personally observe the testimony and demeanor of witness testifying on behalf of the People. Further, the defendant-appellee's closing argument focused almost exclusively on witness credibility, testimonial inconsistencies, and evidentiary inconsistencies. TT 3, pp. 92-99. The People's position that the jury carefully weighed the testimonial and physical evidence and found defendant-appellant guilty. Accordingly, the issue regarding the credibility of the witness's testimony and the sufficiency of the evidence was resolved by way of a rational trier of fact finding that, "the essential elements of a crime were proved beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). Therefore, one can conclude that the evidence was

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sufficient to establish the elements of conspiracy to commit first-degree murder required under MCL 750.157a and MCL 750.316.

In further support of their response to this argument, the People rely on the Court of Appeals' Opinion in *People v Sammons*, unpublished opinion per curiam of the Court of Appeals, issued July 6, 2017 (Docket No. 332190), annexed hereto as Exhibit A.

D. CONCLUSION

In the case at bar, the trial court properly denied the motion for directed verdict made by the defendant-appellee at the close of the People's proofs. The jury in this case heard the direct testimony of several witnesses, and also considered several pieces of forensic evidence and video. That testimony established all of the elements of the crime and identified the defendant-appellant as the perpetrator. Further, the defendant-appellant's jury heard testimony from several law enforcement officers. The jury also heard the closing arguments for both parties and the trial court's jury instructions. Applying the evidence presented to the law, a jury found defendant guilty of conspiracy to commit first-degree murder, contrary to MCL 750.157a and MCL 750.316.

Therefore, The People ask this Honorable Court to find no error under this issue.

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ARGUMENT II

The trial court did not abuse its discretion when it denied the defendant-appellant's motion to suppress identification evidence from his preliminary examination.

A. STANDARD OF REVIEW

"A trial court's determination in a suppression hearing regarding the admission of identification evidence will generally not be reversed unless clearly erroneous." *People v McDade*, 301 Mich App 343, 356; 836 NW2d 266 (2013), citing *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995). When reviewing a trial court's ruling on a motion to suppress, this Court reviews de novo the trial court's rulings on questions of law and on constitutional issues considered in the motion. *People v Keller*, 479 Mich 467, 473-474; 739 NW2d 505 (2007). The trial court's findings of fact are reviewed for clear error. *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005). "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made." *McDade*, 301 Mich App at 356, citing *Barclay*, 208 Mich App at 675. "But the '[a]pplication of constitutional standards by the trial court is not entitled to the same deference as factual findings.'" *Jenkins*, 472 Mich at 31, quoting *People v Nelson*, 443 Mich 626, 631 n. 7; 505 NW2d 266 (1993).

B. LEGAL STANDARDS

The Sixth Amendment right to counsel, "'attaches only to corporeal identifications conducted "at or after the initiation of adversary judicial criminal proceedings-whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."' *People v Hickman*, 470 Mich 602, 607; 684 NW2d 267 (2004), quoting *Moore v Illinois*, 434 US 220,

226-27; 98 S Ct 458; 54 L Ed2d 424 (1977). An identification procedure "violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification." *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). "[A]n improper suggestion often arises when 'the witness when called by the police or prosecution either is told or believes that the police have apprehended the right person.'" *Gray*, 457 Mich 107, 111; 577 NW2d 92, 94 (1998), quoting *People v Anderson*, 389 Mich 155, 178; 205 NW2d 461 (1973). "Moreover, when 'the witness is shown only one person or a group in which one person is singled out in some way, he is tempted to presume that he is the person.'" *Id.*

The court evaluates the fairness of an identification procedure by considering the totality of the circumstances to determine whether the procedure was so impermissibly suggestive that constitutes a substantial likelihood of misidentification. *People v Murphy (On Remand)*, 282 Mich App 571, 584; 766 NW2d 303 (2009). "When examining the totality of the circumstances, relevant factors include: the opportunity for the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of a prior description, the witness' level of certainty at the pretrial identification procedure, and the length of time between the crime and the confrontation." *People v Colon*, 233 Mich App 295, 304–05; 591 NW2d 692 (1998).

The failure to include an issue in the statement of questions presented on appeal constitutes an improper presentation of the issue. MCR 7.212(C)(5); *Health Care Ass'n Workers Compensation Fund v Director of the Bureau of Workers Compensation*, 265 Mich App 236, 243, 694 NW2d 761 (2005). Therefore, this Court should not consider any argument relative to the trial court's denial of defendant-appellant's motion in limine regarding identification.

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C. DISCUSSION

Initially, in support of their response to this argument, the People rely on the Court of Appeals' Opinion in *People v Sammons*, unpublished opinion per curiam of the Court of Appeals, issued July 6, 2017 (Docket No. 332190), annexed hereto as Exhibit A.

Essential to the resolution of this issue is an examination of the totality of the circumstances under which the witness identified the defendant-appellant. In the case at bar, the witness identified the defendant-appellant within several hours of the homicide. Based on this narrow timeline, the details of the crime and the physical attributes of the perpetrator were presumably easier to recall. Detective Rivard testified that the identification procedure in question was used as an investigative tool to determine if the investigation was on course. PE, p. 66. While the witness may have identified the defendant-appellant in isolation, there is no record evidence that suggests that the witness was pressured or coached into a positive identification. Additionally, at no time was the witness informed that the defendant-appellant had been arrested in connection with this homicide. *Id.* at 69. Further, the fact that the witness identified the defendant-appellant suggests that the identification was made based on his independent recollection of the crime and not the allegedly suggestive nature of the procedure. Accordingly, the out-of-court identification of the defendant-appellant was not violative of his right to due process.

As noted above, the failure to include an issue in the statement of questions presented on appeal constitutes an improper presentation of the issue. MCR 7.212(C)(5); *Health Care Ass'n Workers Compensation Fund v Director of the Bureau of Workers Compensation*, 265 Mich App 236, 243, 694 NW2d 761 (2005). Therefore, this Court should not consider any argument

relative to the trial court's denial of defendant-appellant's motion in limine regarding identification.

In further support of their response to this argument, the People rely on the Court of Appeals' Opinion in *People v Sammons*, unpublished opinion per curiam of the Court of Appeals, issued July 6, 2017 (Docket No. 332190), annexed hereto as Exhibit A.

D. CONCLUSION

In the case at bar, the trial court properly denied the defendant-appellant's Motion to Suppress the Identification. When the Court considers the totality of the circumstances surrounding the identification, it becomes apparent that the out-of-court identification was reliable and did not violate the defendant-appellant's right to due process.

Therefore, The People ask this Honorable Court to find no error under this issue.

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ARGUMENT III

The prosecutor did not commit misconduct during opening statements; therfore, the defendant-appellant rights to due process and a fair trial were not violated.

A. STANDARD OF REVIEW

Because defendant-appellant failed to preserve this issue with a timely objection in the trial court, this issue is reviewed for plain error. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). Issues of prosecutorial misconduct are reviewed "on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of defendant's arguments." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). "Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). "Where there is no allegation that prosecutorial misconduct violated a specific constitutional right, a court must determine whether the error so infected the trial with unfairness as to make the resulting conviction a denial of due process of law." *People v Blackmon*, 280 Mich App 253, 262; 761 NW2d 172 (2008).

B. LEGAL STANDARDS

"A prosecutor may not make a statement of fact to the jury that is not supported by evidence presented at trial and may not argue the effect of testimony that was not entered into evidence." *Unger*, 278 Mich App at 241. However, prosecutors are "free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *Id.* at 236. Further, a prosecutor's opening statement is "the appropriate time to state the facts that will be proven at trial." *People v Ericksen*, 288 Mich App 192, 200; 793 NW2d 120 (2010).

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C. DISCUSSION

Initially, in support of their response to this argument, the People rely on the Court of Appeals' Opinion in *People v Sammons*, unpublished opinion per curiam of the Court of Appeals, issued July 6, 2017 (Docket No. 332190), annexed hereto as Exhibit A.

Next, defendant-appellant asserts that the prosecutor violated his rights by stating during his opening statements that he and Ramsey "agreed and worked together with each other to commit the brutal killing of Mr. Casas[.]" TT2, p. 7. He also takes issue with the prosecutor's statement that the evidence presented would show that defendant and Ramsey were in a vehicle and that defendant got out and shot Casas, that Ramsey aided and abetted defendant, and that the men possessed a firearm. Defendant-appellant also takes issue with the prosecutor's description of the shooting and statements about the witnesses' anticipated testimony.

However, these statements reveal that the prosecutor was properly stating the facts that he intended to prove at trial, *Ericksen*, 288 Mich App at 200, or making reasonable inferences from the evidence he intended to introduce as it related to his theory of the case, *Unger*, 278 Mich App at 236. Fundamentally, defendant-appellant has failed to indicate any statement made by the prosecutor that was actually outside the scope of the evidence later presented at trial or that was not a reasonable inference derived from the evidence later presented.

Defendant-appellant also asserts that the prosecutor violated his Sixth Amendment right to confrontation and cross-examination because the prosecutor argued facts not in evidence, thereby effectively becoming an unsworn witness. This claim lacks merit because the record clearly reflects that prosecutor did not argue facts not in evidence or in any other way testify against defendant.

D. CONCLUSION

Based on the above discussion, the People ask this Honorable Court to find no error under this issue.

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ARGUMENT IV

Trial counsel was not ineffective for failing to wage meritless objections to the prosecutor's opening statement and closing argument; therfore, the defendant-appellant was not denied his constitutional right to effective assistance of counsel.

A. STANDARD OF REVIEW

"Generally, whether a defendant had the effective assistance of counsel 'is a mixed question of fact and constitutional law." *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012), quoting *People v LeBlanc,* 465 Mich 575, 579; 640 NW2d 246 (2002). "This Court reviews findings of fact for clear error and questions of law de novo." *Heft*, 299 Mich App at 80, citing *LeBlanc,* 465 Mich at 579. "But a defendant must move in the trial court for a new trial or an evidentiary hearing to preserve the defendant's claim that his or her counsel was ineffective." *Heft*, 299 Mich App at 80, citing *People v Ginther,* 390 Mich 436, 443; 212 NW2d 922 (1973), and *People v Odom,* 276 Mich App 407, 415; 740 NW2d 557 (2007). "When a defendant did not move in the trial court for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent from the record." *Heft*, 299 Mich App at 80, citing *People v Hoag,* 460 Mich 1, 7; 594 NW2d 57 (1999), and *Odom,* 276 Mich App at 415.

B. LEGAL STANDARDS

"To establish ineffective assistance of counsel, the defendant must first show: (1) that counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008). "Effective assistance of counsel is presumed. The defendant bears a

heavy burden of proving otherwise." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999), citing *People v Eloby* (*After Remand*), 215 Mich App 472, 476; 547 NW2d 48 (1996).

C. DISCUSSION

Initially, "[w]hen a defendant did not move in the trial court for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent from the record." *Heft*, 299 Mich App at 80. Defendant-appellant's claim of error hinges on the assertion that his trial counsel failed object to alleged prosecutorial misconduct in opening statements and closing arguments. Because defendant-appellant did not raise these issues in the trial court, "this Court's review is limited to mistakes apparent from the record." *Heft*, 299 Mich App at 80. Because this Court's review is limited to the lower court record, any assertions made by defendant-appellant based on non-record evidence in support of this issue should not be considered. See *People v Canter,* 197 Mich App 550, 556-557; 496 NW2d 336 (1992), citing *People v Taylor,* 383 Mich 338, 362; 175 NW2d 715 (1970).

Regarding defendant-appellant's claims of ineffective assistance, "[d]efense counsel's performance must be measured against an objective standard of reasonableness." *Rockey*, 237 Mich App 76, citing *People v LaVearn,* 448 Mich 207, 216; 528 NW2d 721 (1995). As previously stated, "[t]o establish ineffective assistance of counsel, the defendant must first show: (1) that counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Yost*, 278 Mich App at 387. The underlying premise of this panel's review of this issue is that, "[e]ffective assistance of counsel is presumed. The defendant bears a heavy burden of proving otherwise." *Rockey*, 237

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Mich App at 76, citing *Eloby*, 215 Mich App, at 476.

As with any claim of ineffective assistance of counsel, this Court's analysis must begin with the question of whether counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms. See *Yost*, 278 Mich App at 387. The record reflects that there is no evidence of record to suggest that the trial court would have granted any objection made by defendant-appellant's trial counsel. "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010), citing *People v Snider,* 239 Mich App 393, 425; 608 NW2d 502 (2000).

As noted above, and below pursuant to Argument V, defendant-appellant has failed to demonstrate that there were any instances of prosecutorial misconduct. Therefore, defendant-appellant has not shown that counsel's performance fell below an objective standard of reasonableness by failing to object. Indeed, any such objection would have been futile, and counsel is not ineffective for failing to raise a futile objection. *Ericksen*, 288 Mich App at 201.

When the panel considers the relevant case law, this Court's review is limited to mistakes made on the record. A review of the lower court record reveals that defendant has not established the first prong of his ineffective assistance claim: that counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms.

Regarding the second prong defendant must satisfy to establish an ineffective assistance of counsel claim, he must show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. See *Yost*, 278 Mich App 387. This is done by showing a factual predicate for his claim. See *Ackerman*, 257 Mich App at 455. To show the requisite factual predicate, defendant must have offered proof that not only did his trial

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counsel refuse to make the requested objections, he must also prove that the objections would have been sustained. Because defendant did not object at trial, this Court's review is limited to mistakes apparent from the record. See *Heft*, 299 Mich App at 80. A review of the trial court transcripts fails to reveal any evidence suggesting that his trial counsel refused to make the requested objections. Additionally, a review of the trial court transcripts reveal that there was no prosecutorial misconduct upon which to make any such objection, and therefore fails to establish that there is a reasonable probability that the result of the proceedings would have been different but for counsel's alleged error.

Defendant-appellant also cannot show that, but for the failure to object to the alleged prosecutorial misconduct, the result of the trial would have been different. See *People v Matuszak,* 263 Mich App 42, 57–58; 687 NW2d 342 (2004). While he certainly offers speculation regarding the impact of the alleged should lead offensive statements, the resulting effect of objections thereto, and the jury's possible interpretation of testimony and evidence, the defendant-appellant offers no concrete proof upon which to meet his factual burden.

Fundamentally, defendant-appellant fails to demonstrate that a different outcome would have resulted if trial counsel would have objected during the opening statements and closing argument based on prosecutorial misconduct. Further, the defendant-appellant fails to establish that the trial court would have even sustained any such objections made by his trial counsel. Finally, the defendant-appellant cannot establish that he would have been acquitted if the objections would have been made and granted. Accordingly, defendant-appellant's trial counsel's failure to object based on prosecutorial misconduct did not fall below an objective standard of reasonableness under the prevailing professional norms.

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D. CONCLUSION

The record reflects that the failure to object based on prosecutorial misconduct was a sound strategic one. In fact, because there was no prosecutorial misconduct, any such objection would have been futile. Therefore, there is no reasonable basis upon which the trial court would have granted the objections had they been made. After carefully reviewing the statements made by trial counsel, and the trial judge's instruction of the jury, the record reflects that trial court satisfied its duty to ensure that defendant received a fair trial. See *Ericksen*, 288 Mich App at 201, citing *People v Ullah,* 216 Mich App 669, 674; 550 NW2d 568 (1996). Unfortunately, when this Court limits its review to potential mistakes made on the record, defendant offers no proof to substantiate his claims of ineffective assistance.

Therefore, the People ask this Honorable Court to find no error under this issue.

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ARGUMENT V

The prosecutor did not present improper closing and rebuttal arguments, nor did he vouch for the credibility of a witness; therfore, the defendant-appellant's rights to due process and a fair trial were not violated

A. STANDARD OF REVIEW

Because defendant-appellant failed to preserve this issue with a timely objection in the trial court, this issue is reviewed for plain error. *Aldrich*, 246 Mich App AT 110. Issues of prosecutorial misconduct are reviewed "on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of defendant's arguments." *Thomas*, 260 Mich App 454. "Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *Dobek*, 274 Mich App 63. "Where there is no allegation that prosecutorial misconduct violated a specific constitutional right, a court must determine whether the error so infected the trial with unfairness as to make the resulting conviction a denial of due process of law." *Blackmon*, 280 Mich App 262.

B. LEGAL STANDARDS

"A prosecutor may not make a statement of fact to the jury that is not supported by evidence presented at trial and may not argue the effect of testimony that was not entered into evidence." *Unger*, 278 Mich App at 241. However, prosecutors are "free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *Id.* at 236. Further, a prosecutor's opening statement is "the appropriate time to state the facts that will be proven at trial." *Ericksen*, 288 Mich App 200;

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C. DISCUSSION

Initially, in support of their response to this argument, the People rely on the Court of Appeals' Opinion in *People v Sammons*, unpublished opinion per curiam of the Court of Appeals, issued July 6, 2017 (Docket No. 332190), annexed hereto as Exhibit A.

Defendant-appellant contends that the prosecutor made statements during closing arguments that were not by facts or evidence. However, as noted by the Court of Appeals, defendant abandoned these claims by simply providing citation to multiple pages of the transcript without specifying what statements he takes issue with and without briefing the merits of his claims. See *People v Lopez*, 305 Mich App 686, 694; 854 NW2d 205 (2014) (holding that failure to properly argue the merits of an issue results in abandonment on appeal). But, as discussed by the Court of Appeals, after reviewing the pages in question, they contain the prosecutor's arguments relating to his theory of the case or the summary of the witnesses' testimony. Accordingly, as discussed above, none of the statements made by the prosecutor were improper. This is because prosecutors are "free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *Unger*, 278 Mich App at 236.

The defendant-appellant also argues that the prosecutor improperly bolstered the testimony of Detective Rivard and vouched for his credibility during closing arguments. Seemingly, this is because the prosecution's case hinged on Rivard's testimony that Jones identified defendant. "A prosecutor may not vouch for the credibility of his witnesses by suggesting that he has some special knowledge of the witnesses' truthfulness." *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009). However, a prosecutor may base an argument that a witness should be believed on the facts. *Id.* It is proper for a prosecutor to "comment on his own

witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes."

Specifically, defendant-appellant takes issue with the following statement made by the prosecutor that referenced Rivard's testimony that Jones identified defendant and Jones's conflicting testimony that he did not:

> Who has more to lose? When you talk about analyzing the testimony of witnesses and when you—and the court will instruct you about motives to say things and whether they're truthful, untruthful, deliberate, un-in-deliberate [sic], that sort of thing, who has more to lose here? A 13–year veteran of the Michigan State Police Department who's conducted a number of investigations, or a 16–year-old kid whose mom recognizes, they shoot witnesses. Who has more to lose?
>
> This kid has to survive in society. He has to function in a day-to-day living in a place where they shoot witnesses. [TT3, p. 123.]

Defendant-appellant asserts that this statement is an example of the prosecutor improperly vouching for the credibility of Rivard. But, when this Court takes the above statements in context, this line of argument was in response to defense counsel's argument that Jones had no reason to be a lie. Additionally, the prosecutor was not implying that he had special knowledge of the truthfulness of the police officer. In fact, the prosecutor made no comment about his personal knowledge or belief regarding the truthfulness of Rivard; he merely argued that Jones had a reason to be untruthful while Rivard did not. Therefore, defendant has failed to demonstrate that the prosecutor impermissibly bolstered Rivard's testimony or vouched for his credibility.

D. CONCLUSION

Based on the above discussion, the People ask this Honorable Court to find no error under this issue.

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SUMMARY AND RELIEF SOUGHT

WHEREFORE, the People respectfully request that this Honorable Court affirm Defendant-appellant's convictions.

Respectfully submitted,

JOHN A. MCCOLGAN, JR. (P37168)
PROSECUTING ATTORNEY

Dated: May 2, 2018

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EXHIBIT A

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2017 WL 2882493
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff–Appellee,
v.
Travis Travon SAMMONS, Defendant–Appellant.

No. 332190
|
July 6, 2017

Saginaw Circuit Court, LC No. 15–041848–FC.

Before: TALBOT, C.J., and BECKERING and M.J. KELLY, JJ.

Opinion

Per Curiam.

*1 A jury convicted defendant, Travis Sammons, of conspiracy to commit open murder, MCL 750.157a. [1] The trial court sentenced him as a third habitual offender, MCL 769.11, to life in prison with the possibility of parole. Defendant appeals as of right. We affirm.

1 The jury acquitted defendant of open murder, MCL 750.316, possession of a firearm by a felon, MCL 750.224f, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b.

I. BASIC FACTS

Defendant's conviction arises from the murder of Humberto Casas in the afternoon of June 21, 2015, in Saginaw, Michigan. Police charged defendant and codefendant, Dominique Ramsey, with the crime, and the same jury tried the two men. Two eyewitnesses testified to the fatal shooting at the trial. Rosie Watkins testified that she was driving north on Cumberland Street when she observed three men on the opposite side of the road. She testified that the first man shot the second man, who bent over, and the third man got into a vehicle while the first man continued shooting. Then the shooter got into the vehicle. Watkins described the vehicle as a gray or silver Jeep. Approximately 11 minutes after dispatch received a call regarding the shooting, police pulled over a Jeep matching that description. Watkins positively identified a photograph of the Jeep admitted into evidence at trial as the Jeep she saw at the shooting. In the Jeep were defendant and Ramsey.

Dyjuan Jones, who was 16–years old at the time of the shooting, testified that he was riding in the backseat of his mother'scar when he heard what sounded like three firecrackers going off. He looked in the direction of the sound and witnessed the shooting, including the assailant'sfiring at least seven more shots into the victim, who was rolling from the sidewalk into the street in an apparent attempt to avoid being hit. [2] Jones was approximately 20 to 25 feet away from the shooting. He, too, observed a gray Jeep at the scene that he agreed looked similar to the one in the photograph identified by Watkins.

2 Felicia Little, Jones' mother, testified that she was driving northbound on Cumberland when she witnessed the victim walking along the sidewalk, at which time the assailant walked up from around a truck and started shooting the victim, who then fell into the southbound lane of the street. She testified that two trucks were parked at the scene, one burgundy and one silver or gray. She described Cumberland as a "two-lane very small street," and she was trying not to run over the victim as she attempted to get away from the shooting.

The prosecution produced a composite video made from nine or ten surveillance tapes that depicted a silver Jeep Commander starting from the corner where the homicide occurred to the location where defendant and Ramsey were detained after a traffic stop. Jones described the shooter as an African–American male wearing a white T-shirt. Michigan State Police Sergeant David Rivard testified that Jones identified defendant as the shooter at a showup conducted at the police station a few hours after the shooting. However, Jones maintained that he did not identify defendant while at the police station.

*2 The jury found both defendant and Ramsey guilty of conspiracy to commit open murder. Both men filed motions for a directed verdict or a new trial. The trial court

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denied defendant'smotion, but granted Ramsey's, holding that there was insufficient evidence to convict him.[3] This appeal ensued.

3 We note that this Court had denied the prosecutor'sapplication for leave to appeal the trial court'sdecision. *People v Ramsey*, unpublished order of the Court of Appeals, entered December 29, 2016 (Docket No. 334614). In lieu of granting leave to appeal, on May 2, 2017, our Supreme Court has remanded the case to this Court for consideration as on leave granted. *People v. Ramsey*, —— Mich. ——; —— N.W.2d —— (Issued May 2, 2017, Docket No. 155321).

II. ADMISSION OF IDENTIFICATION TESTIMONY

On appeal, defendant contends that the trial court clearly erred by denying his motion to suppress the testimony about Jones'sidentification of defendant at a police-station showup.[4] This Court reviews a trial court'sdetermination in a suppression hearing regarding the admission of identification evidence for clear error. See *People v. McDade*, 301 Mich. App. 343, 356; 836 N.W.2d 266 (2013). The Court reviews the trial court'sfindings of fact for clear error, *People v. Jenkins*, 472 Mich. 26, 31; 691 N.W.2d 759 (2005), and its rulings on questions of law, including constitutional issues, de novo, *People v. Keller*, 479 Mich. 467, 473–474; 739 N.W.2d 505 (2007). "A decision is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v. Barclay*, 208 Mich. App. 670, 675; 528 N.W.2d 842 (1995).

4 A showup is "a police procedure in which a suspect is shown singly to a witness for identification, rather than as part of a lineup." *Black'sLaw Dictionary* (10th ed.), p 1591.

Defendant first asserts that absent exigent circumstances, police must use a corporeal lineup instead of a showup if a suspect is in custody. Defendant cites for support of this proposition *People v. Kurylczyk*, 443 Mich. 289, 298 n 8; 505 N.W.2d 528 (1993) and *People v. Franklin Anderson*, 389 Mich. 155, 186 n 22; 205 N.W.2d 461 (1973), overruled by *People v. Hickman*, 470 Mich. 602; 684 N.W.2d 267 (2004).[5] Defendant'sreliance is misplaced. *Franklin Anderson*, 389 Mich. at 186 n 22, primarily cites journal and law review articles in support of the position to which footnote 22 is appended, i.e., that to use "photographs beforehand to see whether important witnesses can identify an accused person whom they are afterwards going to see is to pursue a course which is not a proper one." *Franklin Anderson*, 389 Mich. at 186, quoting an English case, *Rex v. Gross*, 17 Crim App Rep 196, 197 (1923). Parenthetical explanations in the footnote indicate that the articles distinguish photographic from corporeal identification, and generally prefer the latter to the former. Defendant makes no meaningful argument regarding how any of the articles cited support his position, and nothing in the footnote indicates that the articles collected address corporeal showups of the type at issue. *Kurylczyk*, 443 Mich. at 298 n 8, refers to a rule set forth by the *Franklin Anderson* Court that "prohibits the use of photographic lineups only when a suspect is in custody or when he can be compelled by the state to appear at a corporeal lineup." Again, however, defendant fails to explain how or why a rule that seems to prefer corporeal over photographic identification procedures applies to the instant case.

5 *Hickman* impliedly overruled *Kurylczyk* to the extent that *Kurylczyk* relied upon *Franklin Anderson* for the proposition that a suspect in custody is entitled to counsel. See *People v. Perry*, 317 Mich. App 589; —— N.W.2d —— (2016).

***3** In short, the authorities cited by defendant are inapt to the extent that they address photographic showups rather than the corporeal showup conducted in this instance. Even assuming that the police should have conducted a lineup rather than a showup because defendant was in custody, defendant produced no caselaw holding that his identification at the showup must be excluded automatically.

Defendant next asserts that the showup violated his right to due process because it was impermissibly suggestive. Due process protects the accused against evidence obtained through unnecessarily suggestive identification procedures. *Hickman*, 470 Mich. at 607, citing *Moore v. Illinois*, 434 U.S. 220, 227; 98 S.Ct. 458; 54 L.Ed. 2d 424 (1977). "In order to sustain a due process challenge, a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *Kurylczyk*, 443 Mich. at 302. When examining the totality of the circumstances, a court should consider relevant factors such as "the opportunity for the

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witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of a prior description, the witness' level of certainty at the pretrial identification procedure, and the length of time between the crime and the confrontation." *People v. Colon*, 233 Mich. App. 295, 304–305; 591 N.W.2d 692 (1998).

In the case at bar, Jones and his mother went to the police station within four or five hours of the shooting to be interviewed separately regarding the incident. At some point, Rivard asked Jones to walk down the hallway and look left and right into two interview rooms. Jones observed one male seated in each room. According to Rivard, Jones identified the man in Room 2—i.e., defendant—as the shooter. Defendant moved to suppress the alleged identification that Jones made of him, arguing that the showup violated his right to counsel and that the police should have held a lineup because he was in custody. Relying on *Hickman*, the trial court ruled that defendant was not denied the right to counsel because that right attaches only at or after the initiation of adversarial proceedings, and the showup occurred before defendant was charged with any crime. The court also held that the showup was reliable and declined to suppress the identification based on the totality of the circumstances even though defendant was shown to Jones individually.

Defendant contends on appeal that the showup was unduly suggestive, and thus violative of his due-process rights, because the police singled him out by presenting him to Jones alone in an interview room. The fact that a procedure is suggestive does not necessarily render it constitutionally defective. *Kurylczyk*, 443 Mich. at 306. Rather, the procedure is defective only if under the totality of the circumstances there is a substantial likelihood of misidentification. *Id.* at 302. An identification procedure can be unduly suggestive when a witness is led to believe that the police have apprehended the right person or where the witness is shown only one person or a group in which one person is singled out. *People v. Gray*, 457 Mich. 107, 111; 577 N.W.2d 92 (1998).

In the case at bar, although defendant was singled out to the extent that he was alone in an interview room, he was unrestrained and wearing street clothes, and there were no improper suggestions from Rivard that the police had arrested anyone for the shooting or even that defendant and Ramsey were suspected to be involved in the shooting. In fact, Jones agreed that Rivard did not indicate who the men were and only asked him to see if he knew who was in the rooms, and if so, how he knew them. [6] Thus, to the extent that defendant's appearing in a room alone was suggestive, there is no indication that comments or actions by the police rendered the identification procedure unnecessarily suggestive.

6 Rivard testified at trial that he did not indicate to Jones that he had any knowledge or information regarding either one of the persons in the rooms with respect to their involvement in criminal activity. Rather, Jones was being interviewed by another detective about the shooting when he stepped into the hallway to use the restroom. Rivard then asked Jones to walk down the hallway, look into Interview Room 2 and Interview Room 3, and return to him, at which time he asked Jones if he knew who was in the two rooms, and if so, how he knew them. Rivard testified that he did not suggest to Jones, using facial expressions, gestures, or anything, that either defendant or Ramsey should be identified or were connected with anything. According to Rivard, Jones walked back to him and stated that the individual in Room 2—defendant—was the shooter.

***4** Further, we conclude that the trial court correctly reasoned that there was not a substantial likelihood of misidentification under the totality of the circumstances. Jones witnessed the shooting and identified defendant as the shooter within hours of the event, when the details of the crime would still be fresh in his mind. [7] Moreover, that Jones identified defendant as the shooter but not Ramsey as the getaway driver—or in any way involved, for that matter—supports the trial court's reasoning that Jones relied on his recollection of the event and was not influenced by the suggestiveness of the procedure.

7 The shooting occurred shortly after Jones and his mother left church at around 1:00 p.m., and Jones asserted that he went to the police station where the showup occurred around 5:00 or 6:00 p.m.

Based on the foregoing, we conclude that the showup procedure was not "so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *Kurylczyk*, 443 Mich. at 302. Therefore, we are not left with a definite and firm conviction that the trial court erred by denying defendant'smotion to suppress the identification, and defendant has not sustained his due process challenge.

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Defendant also contends that the trial court erred by relying on MRE 801(d)(1)(C) to allow Rivard to testify that Jones had identified defendant, and that the testimony was more prejudicial than probative. Defendant raised this issue in the trial court in a motion in limine, but did not include it in his statement of issues presented to this Court. An argument is not properly presented for review if it is not within the scope of the question presented. See MCR 7.212(C)(5); *People v. Albers*, 258 Mich. App. 578, 584; 672 N.W.2d 336 (2003) (indicating that this Court can decline to consider an argument not within the scope of the question presented).

Even if defendant had properly presented this issue on appeal, he could not prevail because his argument lacks merit. Rivard's testimony about Jones's prior identification of defendant falls squarely within the ambit of MRE 801(d)(1)(C), which provides that a statement is not hearsay if "the declarant testifies at the trial and is subject to cross-examination concerning the statement," and the statement is "one of identification of a person made after perceiving the person[.]" See also *People v. Malone*, 445 Mich. 369, 377; 518 N.W.2d 418 (1994) ("As long as the statement is one of identification, Rule 801(d)(1)(C) permits the substantive use of any prior statement of identification by a witness as non-hearsay, provided the witness is available for cross-examination"). Jones testified at trial and was available for cross-examination; therefore, the requirements of MRE 801(d)(1)(C) were met.

The crux of defendant's argument is that admission of Rivard's testimony was more prejudicial than probative because the showup was improper. However, as discussed above, defendant did not demonstrate that the showup was improper or that there was a substantial likelihood of misidentification under the totality of the circumstances. Therefore, defendant's argument that Rivard's testimony was more prejudicial than probative because of alleged errors relative to the showup identification procedure must fail.

III. SUFFICIENCY AND GREAT WEIGHT OF THE EVIDENCE

Defendant also contends that there was insufficient evidence to convict him of conspiracy and that his conviction was against the great weight of the evidence. This Court reviews a defendant's challenge to the sufficiency of the evidence de novo, *People v. Cline*, 276 Mich. App. 634, 642, 741 N.W.2d 563 (2007), and a trial court's denial of a motion for a new trial based on the great weight of the evidence for an abuse of discretion, *People v. Unger*, 278 Mich. App. 210, 232; 749 N.W.2d 272 (2008). "A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes." *People v. Young*, 276 Mich. App. 446, 448; 740 N.W.2d 347 (2007).

*5 When reviewing a challenge to the sufficiency of the evidence, this Court reviews "the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt." *People v. Robinson*, 475 Mich. 1, 5; 715 N.W.2d 44 (2006). "Circumstantial evidence and reasonable inferences therefrom may be sufficient to prove all the elements of an offense beyond a reasonable doubt." *People v. Schumacher*, 276 Mich. App. 165, 167; 740 N.W.2d 534 (2007). "The credibility of witnesses and the weight accorded to evidence are questions for the jury, and any conflict in the evidence must be resolved in the prosecutor's favor." *People v. Harrison*, 283 Mich. App. 374, 378; 768 N.W.2d 98 (2009).

The jury convicted defendant of conspiracy to commit open murder, MCL 750.157a. MCL 750.157a provides that "[a]ny person who conspires together with 1 or more persons to commit an offense prohibited by law, or to commit a legal act in an illegal manner is guilty of the crime of conspiracy ...." In other words, "[a] criminal conspiracy is a partnership in criminal purposes, under which two or more individuals voluntarily agree to effectuate the commission of a criminal offense." *People v. Jackson*, 292 Mich. App. 583, 588; 808 N.W.2d 541 (2011). The individuals must specifically intend to combine to commit the underlying substantive offense, and evidence of the conspiracy can be established through circumstantial evidence including the acts and conduct of the parties. *Id.* While defendant was convicted of conspiracy to commit open murder, the underlying substantive offense was first-degree murder,[8] the elements of which are "(1) the intentional killing of a human (2) with premeditation and deliberation." *People v. Bennett*, 290 Mich. App. 465, 472; 802 N.W.2d 627 (2010); MCL 750.316(1)(a).

8 The substantive offense underlying the conspiracy could not be conspiracy to commit second-degree

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murder. See *People v. Hammond*, 187 Mich. App. 105, 108–109; 466 N.W.2d 335 (1991) (holding that conspiracy to commit second-degree murder is not recognized as a crime under Michigan law because conspiracy to commit such an offense is logically inconsistent).

The trial court correctly concluded that there was sufficient evidence, when viewed in the light most favorable to the prosecution, for the jury to find defendant guilty of conspiracy to commit murder beyond a reasonable doubt. The acts of the parties established an implied agreement to commit first-degree murder. Witnesses Jones and Watkins both testified that they saw a man shoot the victim, and they saw a second man that they described as the driver of the getaway vehicle. Watkins described the vehicle as a gray or silver Jeep, and she identified a photograph of the Jeep stopped by police and in which were defendant and co-defendant Ramsey as the vehicle she saw that day. Sergeant Rivard testified that Jones identified defendant as the shooter after observing defendant in an interview room at the police station. Although the record contains no evidence of an explicit agreement, the coordinated actions of defendant and the driver of the getaway vehicle warrant a fair inference that defendant and the driver conspired together to accomplish the shooting, which they intended to result in the death of the victim.

There was also sufficient evidence of premeditation and deliberation, which can be established through the circumstances of the killing itself and the conduct after the homicide. *People v. Robert Anderson*, 209 Mich. App. 527, 537; 531 N.W.2d 780 (1995). "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *Id.* In the instant case, there was testimony establishing that the victim was shot seven times in the head, back, abdomen, thigh and arm. Jones also testified that the shooter's gun appeared to jam briefly, and then he continued firing at the victim. The multiple shots and the fact that the shooter had to unjam the firearm support the inference that there was sufficient time for a "second look" to evaluate his actions.

***6** Defendant also challenges the sufficiency of the evidence with respect to defendant's identity. Defendant is correct that Jones contradicted Rivard by testifying that he did not tell Rivard that defendant was the shooter. However, this is an issue of witness credibility and conflicting evidence, and the credibility of witnesses is a question for the jury to resolve while this Court resolves any conflict in evidence in the prosecutor's favor when examining the sufficiency of the evidence. *Harrison*, 283 Mich. App. at 378. Thus, that Jones contradicted Rivard's testimony does not warrant relief. Defendant also points out that the partial license plate of the vehicle given by Jones did not match the plate of the Jeep that defendant and Ramsey were stopped in,[9] and Little recalled seeing "trucks" at the scene but did not mention a Jeep. But Watkins testified that the vehicle she saw was a silver or gray "Jeep" and she positively identified the Jeep Commander defendant and Ramsey were in as the one she saw that day. Again, this Court resolves conflicting evidence in favor of the prosecution, *Harrison*, 283 Mich. App. at 378, so conflicting evidence regarding the getaway vehicle does not warrant relief. Defendant also points out that Jones testified that the shooter was bald, Watkins testified that she initially told police the shooter was bald but also testified that his hair was cut short, and Rivard agreed that defendant did not have a shaved or bald head when he was identified by Jones. Again, Rivard testified that Jones identified defendant, and conflicting testimony is resolved in favor of the prosecution. *Harrison*, 283 Mich. App. at 378. Thus, defendant brought to light no discrepancy that renders the evidence against him insufficient to secure a conviction after resolving conflicts in favor of the prosecution.

9 Jones agreed that he "probably" told officers that the vehicle had a license plate with the letters "CE" or "GE" on it. The Jeep Commander defendant and Ramsey were stopped in had a license plate reading DFQ9593.

Defendant also challenges the sufficiency of the evidence with respect to the conspiracy asserting that there can be no one-man conspiracy, and that the trial court violated this rule when it allowed defendant's conviction to stand, but granted co-defendant Ramsey's motion for a directed verdict and acquitted Ramsey of conspiracy to commit murder. Defendant relies on *People v. James Anderson*, 418 Mich. 31, 35–36; 340 N.W.2d 634 (1983), in which our Supreme Court explained that the common-law "no one-man conspiracy" rule applies to Michigan's criminal conspiracy statute, MCL 750.157a. "That rule provides that 'if two are tried together for a conspiracy in which no additional persons are implicated, a verdict finding one guilty and the other not guilty requires a judgment of acquittal of both'." *Id.* at 36, quoting Perkins, Criminal Law (2d ed), p 622. The purpose of this rule was to prevent

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the enforcement of "inherently defective or inconsistent verdicts in conspiracy cases." *Id.* Defendant contends that the no one-man conspiracy rule applies to the instant case because he and Ramsey were tried jointly and found guilty of conspiracy, but the trial court granted Ramsey's renewed motion for a directed verdict.

Although the *James Anderson* Court addressed a hypothetical situation similar to the instant case, stating that if two conspirators were tried jointly and the case against the first was dismissed as a matter of law while a jury convicted the second, the no one-man conspiracy rule would be violated, *id.* at 37 n 1, the "no one-man conspiracy" rule does not apply to the specific facts of this case. This case is analogous to *People v. Williams*, 240 Mich. App. 316; 614 N.W.2d 647 (2000). In *Williams*, the defendant contended that his conviction for conspiracy to possess with intent to deliver over 650 grams of cocaine violated the "no one-man conspiracy" rule because his codefendant was found guilty only of conspiracy to possess with intent to deliver more than 225 but less than 650 grams of cocaine. This Court reasoned that the verdicts did not violate the "no one-man conspiracy" rule because the codefendant was not acquitted, and the convictions were not sufficiently inconsistent, and rejected the defendant's claim "in its entirety because of the involvement of others." *Id.* at 329. This Court held that the "no one-man conspiracy" rule did not apply because the felony information charged that the defendant and the codefendant had conspired "together and with *others*," and there was evidence presented from which a jury could find beyond a reasonable doubt that the defendant did conspire with others aside from the codefendant to commit the underlying offense. *Id.* at 330–331.

*7 In the case at bar, as in *Williams*, the felony information charged defendant with conspiring with Ramsey "and/or other unknown persons" to commit open murder. The trial court granted Ramsey's renewed motion for a directed verdict indicating that there was insufficient evidence to convict him of participation in the conspiracy as the driver of the getaway vehicle.[10] Nevertheless, there was testimony from Jones and Watkins that there was a driver of the getaway vehicle, and the jury could find beyond a reasonable doubt that defendant conspired with the unidentified driver to commit murder. Thus, defendant's assertion that the "no one-man conspiracy" rule bars his conviction lacks merit.

10 The video compilation that tracked the Jeep after the shooting shows that it stopped for three minutes and 12 seconds at a house, at which time the passenger exited the vehicle, another person entered the house, and then multiple people walked out of the house. The video was shot from a distance and the individuals could not be clearly seen; further, the driver's side was not visible. The trial court concluded that it was impossible to determine whether Ramsey was the getaway driver in light of the stop at the house and because there was no direct evidence that he was involved. The trial court denied defendant'smotion for a directed verdict or a new trial in light of all of the evidence, including Rivard's testimony that Jones positively identified defendant as the shooter.

Defendant also asserts that the jury would not have convicted him of conspiracy if it had known there was insufficient evidence to convict Ramsey of conspiracy. Further, defendant argues that the jury must have believed that defendant was not the shooter because it acquitted him of murder. While not explicitly stated, the crux of these arguments is that the verdict on the conspiracy charge is illogical or inconsistent with the verdict of not guilty on the other charges. However, consistency in jury verdicts is not required. *People v. Vaughn*, 409 Mich. 463, 465–466; 295 N.W.2d 354 (1980). Indeed, juries must make an independent evaluation of each element of a charge, and they are free to reach different conclusions concerning an identical element of two different offenses. *People v. Goss (After Remand)*, 446 Mich. 587, 597; 521 N.W.2d 312 (1994). As our Supreme Court explained:

> Juries are not held to any rules of logic nor are they required to explain their decisions. The ability to convict or acquit another individual of a crime is a grave responsibility and an awesome power. An element of this power is the jury's capacity for leniency. Since we are unable to know just how the jury reached their conclusion, whether the result of compassion or compromise, it is unrealistic to believe that a jury would intend that an acquittal on one count and conviction on another would serve as the reason for defendant's release. These considerations change when a case is tried by a judge sitting without

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> a jury. But we feel that the mercy-dispensing power of the jury may serve to release a defendant from some of the consequences of his act without absolving him of all responsibility. [*Vaughn*, 409 Mich. at 466 (citation omitted).]

Thus, defendant's argument fails because juries are not held to rules of logic or required to return consistent verdicts.

Defendant also contends that his conviction was against the great weight of the evidence. A verdict is against the great weight of the evidence when "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v. Musser*, 259 Mich. App. 215, 218–219; 673 N.W.2d 800 (2003). Questions involving credibility should be left to the trier of fact, and "[c]onflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *People v. Lemmon*, 456 Mich. 625, 647; 576 N.W.2d 129 (1998). This Court must defer to the jury's verdict unless the testimony contradicted indisputable physical facts or the witnesses were so far impeached that their testimony lost all probative value. *Id.* at 645–646. In general, "a verdict may be vacated only when the evidence does not reasonably support it and it was more likely the result of causes outside the record, such as passion, prejudice, sympathy, or some other extraneous influence." *People v. Lacalamita*, 286 Mich. App. 467, 469; 780 N.W.2d 311 (2009).

***8** In the instant case, defendant's argument that the verdict was against the great weight of the evidence is coextensive with his argument that there was insufficient evidence. Thus, for the same reasons discussed above, defendant failed to demonstrate that the evidence preponderates so heavily against the verdict that it would be an injustice to allow it to stand. Instead, defendant brought to light questions of witness credibility and inconsistent testimony, which are properly left to the jury to resolve. *Lemmon*, 456 Mich. at 647.

IV. STANDARD 4 BRIEF

Defendant filed a brief *in propria persona* pursuant to Administrative Order 2004–6, Standard 4. Defendant contends that the prosecutor committed misconduct by referencing facts during his opening statements and closing arguments that were never presented in evidence. We review this issue for plain error because defendant failed to preserve it with a timely objection below. *People v. Aldrich*, 246 Mich. App. 101, 110; 631 N.W.2d 67 (2001). Issues of prosecutorial misconduct are reviewed "on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of defendant's arguments." *People v. Thomas*, 260 Mich. App. 450, 454; 678 N.W.2d 631 (2004). "Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v. Dobek*, 274 Mich. App. 58, 63; 732 N.W.2d 546 (2007). "Where there is no allegation that prosecutorial misconduct violated a specific constitutional right, a court must determine whether the error so infected the trial with unfairness as to make the resulting conviction a denial of due process of law." *People v. Blackmon*, 280 Mich. App. 253, 262; 761 N.W.2d 172 (2008).

"A prosecutor may not make a statement of fact to the jury that is not supported by evidence presented at trial and may not argue the effect of testimony that was not entered into evidence." *Unger*, 278 Mich. App. at 241. However, prosecutors are "free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *Id.* at 236. Further, a prosecutor's opening statement is "the appropriate time to state the facts that will be proven at trial." *People v. Ericksen*, 288 Mich. App. 192, 200; 793 N.W.2d 120 (2010).

Defendant asserts that it was error for the prosecutor to state during opening statements that defendant and Ramsey "agreed and worked together with each other to commit the brutal killing of Mr. Casas[.]" He takes issue with the prosecutor's statement that the evidence presented would show that defendant and Ramsey were in a vehicle and that defendant got out and shot Casas, that Ramsey aided and abetted defendant, and that the men possessed a firearm. Defendant also takes issue with the prosecutor's description of the shooting and statements about the witnesses' anticipated testimony. But these statements reveal that the prosecutor was properly stating the facts that he intended to prove at trial, *Ericksen*, 288 Mich. App. at 200, or making reasonable inferences from

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the evidence he intended to introduce as it related to his theory of the case, *Unger*, 278 Mich. App. at 236. In short, defendant has not pointed to any statement made by the prosecutor that was actually outside the scope of the evidence later presented at trial or that was not a reasonable inference derived from the evidence later presented.

Defendant also contends that the prosecutor violated his Sixth Amendment right to confrontation and cross-examination because the prosecutor effectively became an unsworn witness by arguing facts not in evidence. This claim lacks merit because the prosecutor did not argue facts not in evidence or in any other way testify against defendant.

***9** Defendant further contends that the prosecutor made statements during closing arguments that were unsupported by facts or evidence. However, defendant abandoned these claims by merely providing citation to multiple pages of the transcript without specifying what statements he takes issue with and without briefing the merits of his claims. See *People v. Lopez*, 305 Mich. App. 686, 694; 854 N.W.2d 205 (2014) (holding that failure to properly argue the merits of an issue results in abandonment on appeal). In any event, after reviewing the pages identified by defendant, they merely contain the prosecutor's arguments relating to his theory of the case or his summary of the witnesses' testimony. Nothing stated by the prosecutor was improper because, as we indicated above, prosecutors are "free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *Unger*, 278 Mich. App. at 236.

Finally, defendant argues that the prosecutor improperly bolstered the testimony of Rivard and vouched for his credibility during closing arguments because the prosecution's case hinged on Rivard's testimony that Jones identified defendant. "A prosecutor may not vouch for the credibility of his witnesses by suggesting that he has some special knowledge of the witnesses' truthfulness." *People v. Seals*, 285 Mich. App. 1, 22; 776 N.W.2d 314 (2009). Nevertheless, a prosecutor may argue from the facts that a witness should be believed. *Id.* It is proper for a prosecutor to "comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes."

Defendant takes issue with the following statement made by the prosecutor that referenced Rivard's testimony that Jones identified defendant and Jones's conflicting testimony that he did not:

> Who has more to lose? When you talk about analyzing the testimony of witnesses and when you—and the court will instruct you about motives to say things and whether they're truthful, untruthful, deliberate, un-in-deliberate [sic], that sort of thing, who has more to lose here? A 13–year veteran of the Michigan State Police Department who's conducted a number of investigations, or a 16–year-old kid whose mom recognizes, they shoot witnesses. Who has more to lose?
>
> This kid has to survive in society. He has to function in a day-to-day living in a place where they shoot witnesses.

Defendant argues that this statement constitutes improper vouching for the credibility of Rivard. In context, this line of argument was clearly a response to defense counsel's argument that Jones had no reason to be untruthful. Additionally, the prosecutor was not implying that he had special knowledge of the truthfulness of the police officer. In fact, the prosecutor made no comment about his personal knowledge or belief regarding the truthfulness of Rivard; he merely argued that Jones had a reason to be untruthful while Rivard did not. Thus, defendant failed to demonstrate that the prosecutor impermissibly bolstered Rivard's testimony or vouched for his credibility.

Finally, defendant argues that his counsel was ineffective for failing to object to the alleged instances of prosecutorial misconduct described above. Review of a claim of ineffective assistance of counsel is limited to the existing record where, as here, the defendant fails to move for a new trial or an evidentiary hearing. *People v. Odom*, 276 Mich. App. 407, 415; 740 N.W.2d 557 (2007). "To prove that defense counsel was not effective, the defendant must show that (1) defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and (2) there is a reasonable probability that defense counsel's deficient performance prejudiced the defendant." *People v. Heft*, 299 Mich. App. 69, 80–81; 829 N.W.2d 266 (2012). "The defendant was prejudiced if, but for defense counsel's errors, the result of the proceeding would have been different." *Id.* at 81. "A defendant may meet this burden 'even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.' "

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People v. Trakhtenberg, 493 Mich. 38, 56; 826 N.W.2d 136 (2012), quoting *Strickland v. Washington*, 466 U.S. 668, 694; 104 S.Ct. 2052, 2068; 80 L.Ed. 2d 674 (1984). "The defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy." *People v. Stanaway*, 446 Mich. 643, 687; 521 N.W.2d 557 (1994).

***10** For the reasons discussed above, defendant failed to demonstrate that there were any instances of prosecutorial misconduct. Thus, defendant has not shown that counsel's performance fell below an objective standard of reasonableness by failing to make objections. Indeed, any objection would have been futile, and counsel is not ineffective for failing to raise a futile objection. *Ericksen*, 288 Mich. App. at 201.

V. CONCLUSION

We conclude for the reasons stated above that the station-house showup was not unnecessarily suggestive and, accordingly, that the trial court did not clearly err in denying defendant'smotion to suppress Jones'sidentification. Defendant having thus failed to show that the "pretrial identification process was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification[,]" he has failed to sustain his due process challenge. *Kurylczyk*, 443 Mich. at 302. We further conclude that Rivard's testimony of Jones'sidentification of defendant was admissible pursuant to MRE 801(d)(1)(C) as non-hearsay, and reject defendant's contention that the trial court should have excluded the testimony based on the suggestiveness of the showup. Likewise, for the reasons stated above, we conclude that evidence presented at trial was sufficient to sustain defendant's conviction for conspiracy to commit open murder, and that said conviction is not against the great weight of the evidence. Finally, we conclude that defendant has not sustained his claims of prosecutorial misconduct, and has not shown that the conduct of the prosecutor "so infected the trial with unfairness as to make the resulting conviction a denial of due process of law." *Blackmon*, 280 Mich. App. at 262.

Affirmed.

All Citations

Not Reported in N.W.2d, 2017 WL 2882493

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EXHIBIT B

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Court of Appeals, State of Michigan

ORDER

People of MI v Dominique Arnett Ramsey Jr

Docket No. 334614

LC No. 15-041847-FC

Stephen L. Borrello
Presiding Judge

Michael J. Kelly

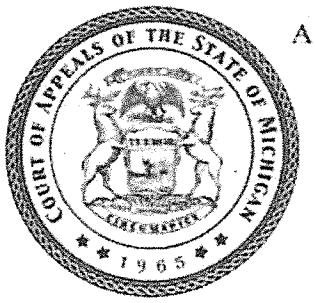
Amy Ronayne Krause
Judges

The Court orders that the motion for immediate consideration is GRANTED.

The motion to file a late answer is GRANTED.

The motion for peremptory reversal pursuant to MCR 7.211(C)(4) is DENIED for failure to persuade the Court of the existence of manifest error requiring reversal and warranting peremptory relief without argument or formal submission.

The delayed application for leave to appeal is DENIED for lack of merit in the grounds presented.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

DEC 29 2016
Date

Chief Clerk

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EXHIBIT C

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2018 WL 1940190
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,
v.
DOMINIQUE ARNETT RAMSEY, JR., Defendant-Appellee.

No. 334614
|
April 24, 2018

Saginaw Circuit Court
LC No. 15-041847-FC

Before: RONAYNE KRAUSE, P.J., and FORT HOOD and O'BRIEN, JJ.

Opinion

PER CURIAM.

*1 This case is before this Court on remand from the Michigan Supreme Court for consideration as on leave granted. *People v Ramsey*, 500 Mich 980; 893 NW2d 342 (2017). Following a jury trial, defendant was convicted of conspiracy to commit first-degree murder, MCL 750.157a; MCL 750.316. After defendant moved for a directed verdict of acquittal and a new trial, the trial court granted defendant's motion. The prosecution filed a delayed application for leave to appeal the trial court's order, and we reverse and remand for sentencing proceedings and for entry of a judgment of sentence consistent with the jury's verdict.

I. FACTS

This case arises out of the homicide of Humberto Casas, who was gunned down in the early afternoon hours of Father's Day, June 21, 2015, at the intersection of Cumberland and Holland in Saginaw, Michigan. Defendant and Travis Sammons were jointly tried on charges of open murder, MCL 750.316, conspiracy to commit murder, MCL 750.157a, possession of a firearm by a felon, MCL 750.224f, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b. The prosecution's theory at trial was that defendant drove the vehicle carrying Sammons, who fired the shots at Casas. Following the prosecution's case-in-chief, defendant moved the trial court for a directed verdict, arguing that no evidence placed him at the scene of the murder. The trial court denied the motion, acknowledging that the record evidence was sufficient to submit the case to the jury. Notably, the trial court stated, in pertinent part:

> If I look at the testimony that's been presented so far against Defendant Ramsey, I believe that, taken in – [sic] evidence in the light most favorable to the nonmoving party, which is the prosecution, there is a mixture for the jury to at least consider as it relates to his guilt or innocence, and therefore, I'm going to deny the motion at this time.

Subsequently, the jury returned a verdict finding defendant and Sammons guilty of the conspiracy to commit first-degree murder charge, but not guilty on all other charges. [1] Defendant then renewed his motion for a directed verdict, also seeking a new trial, arguing that no evidence established that he was part of an agreement to participate in Casas's murder. The trial court thereafter granted defendant's motion. The thrust of the trial court's ruling was that the record evidence was devoid of any reliable direct or circumstantial evidence establishing that defendant was the driver of the vehicle carrying Sammons. The trial court also "conditionally" granted defendant's motion for a new trial, concluding that the jury's verdict was against the great weight of the evidence, resulting in a miscarriage of justice.

1 This Court affirmed Sammons' conviction. *People v Sammons*, unpublished opinion per curiam of the Court of Appeals, issues July 6, 2017 (Docket No. 332190).

The prosecution filed a delayed application for leave to appeal and a motion for peremptory reversal in this Court, both of which were denied. *People v Ramsey*, unpublished order of the Court of Appeals, issued December 29,

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2016 (Docket No. 334614). The prosecution then sought leave to appeal in the Michigan Supreme Court, which remanded the case to this Court for consideration as on leave granted. *People v Ramsey*, 500 Mich 980; 893 NW2d 342 (2017).

***2** On appeal, the prosecution contends that the trial court erred in granting defendant's motion for a directed verdict of acquittal and for a new trial. We agree.

II. STANDARDS OF REVIEW

This Court reviews de novo a trial court's decision on a motion for a directed verdict of acquittal. *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). This Court also reviews de novo a challenge to the sufficiency of the evidence. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). "Considering all the evidence presented by the prosecution in the light most favorable to the prosecution, a directed verdict is inappropriate where a rational trier of fact could find that the essential elements of the crime charged were proven beyond a reasonable doubt." *Hammons*, 210 Mich App at 556. To determine on appeal whether the evidence was sufficient to support a criminal conviction, this Court must discern, viewing the evidence in the light most favorable to the prosecution, whether "a rational trier of fact could find that the prosecution had proved the crime's elements beyond a reasonable doubt." *People v Lane*, 308 Mich App 38, 57; 862 NW2d 446 (2014). Any conflicts in the record evidence are resolved in favor of the prosecution. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). "Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). "This Court will not interfere with the jury's role of determining the weight of the evidence or deciding the credibility of the witnesses." *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004). When deciding a defendant's motion for a directed verdict, "it is not permissible for a trial court to determine the credibility of witnesses[,] ... no matter how inconsistent or vague that testimony might be." *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997).

Defendant also moved for a new trial pursuant to MCR 6.431(B), challenging the weight of the record evidence. "This Court reviews for an abuse of discretion a trial court's decision to grant or deny a motion for a new trial. An abuse of discretion occurs when the trial court renders a decision falling outside the range of principled decisions." *People v Powell*, 303 Mich App 271, 276-277; 842 NW2d 538 (2013) (quotation marks and citation omitted). *In People v Anderson*, ___ Mich App ___, ___; ___ NW2d ___ (2018) (Docket No. 334219); slip op at 5, this Court recently recited the applicable principles of law in determining whether a jury's verdict is against the great weight of the evidence:

> The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. When a defendant claims on appeal that his convictions were against the great weight of the evidence,
>
> [c]onflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial. [U]nless it can be said that directly contradictory testimony was so far impeached that it was deprived of all probative value or that the jury could not believe it, or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination.
>
> ***3** Additionally, [i]t is the province of the jury to determine questions of fact and assess the credibility of witnesses. [Footnotes, citations and quotation marks omitted.]

III. ANALYSIS

As noted above, the jury convicted defendant of conspiracy to commit first-degree murder. MCL 750.157a provides that "[a]ny person who conspires together with 1 or more persons to commit an offense prohibited by law, or to commit a legal act in an illegal manner is guilty of the crime of conspiracy. ..." "The gist of conspiracy lies in the illegal agreement; once the agreement is formed, the crime is complete." *People v Seewald*, 499 Mich 111, 117; 879 NW2d 237 (2016) (citation, footnote and quotation marks omitted). As this Court recognized in *People v Jackson*, 292 Mich App 583, 588; 808 NW2d 541 (2011):

> A criminal conspiracy is a partnership in criminal purposes,

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> under which two or more individuals voluntarily agree to effectuate the commission of a criminal offense. The individuals must specifically intend to combine to pursue the criminal objective, and the offense is complete upon the formation of the agreement. The intent, including knowledge of the intent, must be shared by the individuals. Thus, there must be proof showing that the parties specifically intended to further, promote, advance, or pursue an unlawful objective. Direct proof of a conspiracy is not required; rather, proof may be derived from the circumstances, acts, and conduct of the parties. [Citations and quotation marks omitted.]

"The elements of first-degree murder are (1) the intentional killing of a human (2) with premeditation and deliberation." *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010).

At trial, the prosecution called DyJuan Jones, who was an eyewitness to the shooting. Jones was travelling home from church with his mother, Felicia Little, sitting in the backseat of her vehicle, when he heard what he initially thought were firecrackers. As relevant to this appeal, Jones testified that the driver of the vehicle carrying the individual that shot and killed Casas was between 280 and 320 pounds. Jones observed the individual sitting in the vehicle from 25 to 30 feet away. According to Jones, the driver of the Jeep was wearing a "big, white T-shirt[,]" and had a long beard which extended to his collar. Jones identified the vehicle carrying the shooter that killed Casas as a silver Jeep. When he visited the Saginaw Police Department in the early evening hours following the shooting, Jones, after observing defendant and Sammons held individually in separate interview rooms, was able to identify Sammons as the individual that shot and killed Casas, but he did not identify defendant as the driver of the Jeep. Sergeant David Rivard with the Michigan State Police also testified that Sammons and defendant were placed in separate interview rooms at the Saginaw Police Department, and that Jones positively identified Sammons as the shooter, but that Jones did not identify defendant.

Little testified that between 1:15 and 1:30 p.m. on June 21, 2015, she was driving northbound on Cumberland Street, approaching the intersection of Cumberland and Holland, when she saw a "body" come from behind a grey truck and a "guy" walking up the street. According to Little, the grey truck and a burgundy truck were parked in a nearby parking lot. Specifically, Little testified that she saw someone "come on the sidewalk and start shooting." However, according to Little, all she saw was "a body ... and a hand and fire." Afraid for her safety and that of her son, Little sped away, so she did not see the shooter or the driver of the truck that the shooter came from behind, and therefore could not identify the shooter or the driver.

***4** Rosei Watkins came upon the shooting as she and her eight-year-old grandson were driving home from visiting a local cemetery. Watkins observed three men on the side of the road, and she saw one of the men shoot one of the other men, while the third man got back in the driver's seat of a silver or grey Jeep. Specifically, Watkins described the Jeep as "box[y]." Given the circumstances of the shooting, Watkins was afraid for her grandson's safety, and quickly tried to manoeuver her vehicle away from the shooting, therefore she did not see the driver's face. According to Watkins, the driver of the Jeep "wasn't a real tall person[,]" and he was "in between" being of stocky and/or heavy and thin build. According to Watkins, the driver was of a "normal" build, and was not heavyset or in the range of 300 pounds. When questioned if the driver of the Jeep had a long beard, Watkins stated, "I don't remember seeing it." Watkins was not able to identify the driver of the Jeep or the shooter in a photographic lineup provided by the police on June 23, 2015.

Officer Bradley Holp with the City of Saginaw Police Department attended the scene of the shooting at approximately 1:15 p.m. after receiving a dispatch call about a shooting. When he arrived at the scene of the shooting, Officer Holp observed Casas lying in the street with multiple gunshot wounds, one to the head, and noted that he was in possession of two cellular telephones and crack cocaine. Officer Tyler Poirer of the Bridgeport Police Department was working the day shift on June 21, 2015, and sometime between 1:15 and 1:35 p.m., as he was travelling northbound on Dixie Highway, he observed a silver Jeep Commander, and he noted that "based off some incident earlier that day, [he] had obtained some information regarding this car." Noticing that the silver

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Jeep had a defective brake light, Officer Poirer pulled the vehicle over, and defendant was driving the Jeep, and Sammons was his passenger. Officer Poirer recalled that defendant was wearing a white T-shirt. Officer Poirer also noticed during a pat-down search that Sammons's hands were "sweating heavily." When Officer Poirer searched defendant, Sammons and the silver Jeep, his search did not yield any firearms or drugs. Officer Poirer also described defendant's demeanor as normal. Officer Poirer also testified on recross-examination that defendant was not 320 pounds, and that he did not have a long beard that extended to his chin.

The prosecution also introduced as evidence a surveillance video mosaic, comprised of 11 different surveillance videos from varying locations, detailing the movements of the Jeep Commander in the time period contemporaneous with Casa's murder to the time that it was stopped by Officer Poirer. This evidence was admitted during the testimony of Detective Robert Scott with the Michigan State Police during the prosecution's case-in-chief. Specifically, the video commenced at the scene of Casas's murder, 1501 Cumberland Street, and shows the Jeep Commander entering the driveway at 1:21 p.m. where the homicide occurred. At one point during the surveillance video, at 1:26 p.m., the Jeep Commander stopped at 2573 Baldwin, a residential home, where it remained for 3 minutes and 12 seconds. The surveillance video shows 2573 Baldwin from about 400 yards away. Detective Scott attended 2573 Baldwin on June 26, 2015, and that is where Sammons was apprehended for his involvement in Casas's murder. Detective Scott was questioned extensively regarding the portion of the surveillance video mosaic at 2573 Baldwin. While the Jeep Commander was parked at 2573 Baldwin, Detective Scott noted that the passenger exited the vehicle and went into the house and then can no longer be seen in front of the house, and that no other vehicles pull into the driveway of the home at that time. The following colloquy took place between defendant's counsel and Detective Scott:

Q. And let's pause it right there. Okay. Now, Detective Trooper, once again, no other cars pulled up, correct?

A. Correct.

Q. And at this time, we do not have a clear shot of the driver's side of the vehicle, correct?

*5 *A*. Correct.

Q. And you don't see anyone walking down the street over here towards the end of Baldwin; do you?

A. Doesn't appear so, no, sir.

Referring to another individual that was standing on the doorstep to the home at 2573 Baldwin, defendant's counsel further questioned Detective Scott as follows:

Q. What is that that you see standing in front of the doorway?

A. I'm not sure if someone exited the residence or – it appears someone's –

Q. But it appears that there's someone standing outside of the door; correct?

A. Yes.

Q. But we don't see any other cars pull up, correct?

A. Correct.

Defendant's counsel also confirmed with Detective Scott that after the passenger left the Jeep Commander and went inside 2573 Baldwin, another individual can be seen entering the home, and then later, multiple people are seen leaving the home.

Q. So, Detective Scott, it appears from this video that we had two people enter this house; correct?

A. Yes, sir.

Q. And we had multiple people exiting the house; correct?

A. Yes, sir.

Q. And upon those multiple people exiting the house, the vehicle pulls off; correct?

A. That's correct, sir.

Q. And we can't tell with absolute certainty based on this vehicle evidence –based on the video evidence of who that is exiting the vehicle; can you?

A. The only difference I can see between the people is one had a white shirt – or a white top on, and [the] other had a darker top on. That was the only difference that I

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could see from playing it over several times and getting as close to my computer screen as possible.

During cross-examination by Sammons's counsel, Detective Scott conceded that he could not describe the individuals getting in and out of the Jeep Commander at 2573 Baldwin.

Q. Okay. On the Baldwin [address], as we're seeing, you really can't –doesn't give a description of who the person was, just that a person, you know, went into the house, another person came back out, or something of that nature; is that correct?

A. That's correct.

Q. You can't give a description of who, if anybody sitting in this courtroom or anybody else, was – was that person in the vehicle; correct?

A. That would be correct.

Q. And you cannot tell whether or not the people that left that Jeep there were the same people that left the house and got back into the vehicle; can you?

A. Correct.

Q. Okay. Could've been completely different people; you cannot testify any different, correct?

A. That's correct, sir.

Subsequently, during redirect examination by the prosecution, Detective Scott answered the following inquiry regarding his observations of the individual that got out of the Jeep Commander at 2573 Baldwin:

Q. Okay. And [a] lot of discussion about people—people leaving the residence. As I understood it, correct me if I'm wrong, the video, does it show more than one person exiting the vehicle or just the passenger?

A. All I can observe is the passenger exiting the vehicle. It doesn't appear that the driver gets out of the vehicle.

Detective Scott was then questioned extensively by defendant's counsel during recross examination.

***6** *Q*. Now, Mr. Scott, you testified on cross-examination about the vehicle being parked at Baldwin Street; correct?

A. Yes, sir.

Q. And you couldn't ascertain from this vehicle whether or not it was parked or still running – or still running, I should say; correct?

A. That's correct, sir.

Q. So we don't know if it was stopped or if it was still running; right?

A. Correct.

Q. And we clearly see the passenger side door open on that vehicle; correct?

A. Yes, sir.

Q. And because of the way the video is stationed, you can't see the driver's side of the vehicle; correct?

A. Correct.

Q. And we clearly see on this video the passenger go inside the house; correct?

A. Yes, sir.

Q. And after he goes inside the house, roughly 35 seconds later, we see another person appear on the doorstep, correct?

A. Yes, sir.

Q. And we didn't see any cars pull up at that time; did we?

A. Correct.

Q. So its's safe to – we could reasonably assume that the driver is standing outside of the vehicle when the passenger goes inside; correct?

A. You said we can assume the driver is standing outside the vehicle? Is that your question, sir?

Q. We can assume that there's another person outside the vehicle; correct?

A. I'm sorry sir. I don't –

Q. Did you personally see on this video where that second person came from?

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A. From inside the house.

Q. So it's your testimony now that the second person came from inside the house and not from outside?

A. I don't believe I testified to that before, but yes.

Q. Let's go back to the video. If we can cue this up?

A. I'm sorry, sir, but I'm confused.

Q. You can just go back roughly 10 seconds. We can just stop it right here. Okay. Now if we look at the scene —if we can go back roughly five more seconds, all the way to two minutes. You can go back a little further. All right. Right here. Okay. Now, we don't see anyone standing outside of the vehicle; correct?

A. That's correct, sir.

Q. And we don't see anyone at the door; do we?

A. I believe there's someone in a white shirt and someone in a dark shirt standing there.

Q. Okay. So there's two people standing outside of the door at this time. If we can press "play."

A. I think the "play," it skips a little bit, but I believe they entered the house at that point in time.

Q. So press "pause." And right now, at this time, someone has entered the house. There's no one standing on the doorstep; correct?

A. Correct, sir.

Q. All right. Let's press "play" again. No cars pull up during this time; correct?

A. Correct.

Q. All right. Press "pause." So now, what is this standing in front of the door?

A. Appears the same two people, one in the white shirt and one in a dark shirt.

Q. So the two people went inside and then came right back out?

A. Yes, sir.

Q. So they went in and came right back out. That's your testimony.

A. Yes, sir.

Q. And that's consistent with what you said on direct examination?

A. I believe so. I –

Q. Okay. Press "play." Pause. Is there anybody out on the doorstep at this time?

A. No, sir.

Q. Okay. And you're able to tell me with absolute certainty that those people are the same people, or that's the same passenger that you saw exit the vehicle standing on the doorstep?

*7 *A*. I can't say that, sir.

Q. You can't say that, but you can say that those are two people; correct?

A. Yes.

Q. And you don't know what two people those are; correct?

A. Correct.

Q. And if we've – you've testified that you saw multiple different shirts out there; correct?

A. Yes, sir.

Q. All right. Let's fast forward it to 3 minutes and 50 seconds. All right. And we can press "play" from here. Pause. Okay. Did it appear that the door just opened recently?

A. Yes, sir.

Q. Okay. You can play it again. And pause. And we saw the door open on the passenger side; correct?

A. Yes, sir.

Q. Now, you put in your report that you saw multiple people walk outside the house at this time; correct?

A. Correct.

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Q. And it's true that multiple people do walk outside of the house at this time; correct?

A. Correct.

Q. And we can't see what's happening on the driver's side of the car; can we?

A. No, sir.

Q. We can't even tell who that was who got into the passenger side of the vehicle; can we?

A. Correct.

Q. But we did, once again, see multiple people exit the residence at roughly 3:50 on this video; correct?

A. Yes, sir.

In its written opinion and order granting defendant's motion seeking a directed verdict of acquittal, the trial court noted Jones's description of the driver of the Jeep Commander, as well as the fact that Little and Watkins could not identify the driver. According to the trial court, Jones's description "did not even come close to describing defendant who weighed approximately 140 pounds and had minimal facial hair when he was arrested following the shooting." Thus, it is clear that the trial court was troubled by the lack of direct evidence identifying defendant as the driver of the Jeep Commander. With regard to the circumstantial evidence against defendant, the trial court focused on the surveillance video, stating that "the occupants of the vehicle are not visible on the video. Further, unknown individuals appeared to exit and enter the vehicle while it was stopped on Baldwin before the traffic stop." Specifically, the trial court went on to state, in pertinent part, as follow:

> From the video, it is impossible to determine whether the individuals that were in the vehicle at the time of the traffic stop, Defendant and Sammons, were the same individuals that were in the vehicle before it arrived at the location on Baldwin.
>
> The uncertainties created by the video, coupled with the lack of any direct evidence implicating Defendant in a conspiracy, leads this Court to the conclusion that the evidence presented at trial was deficient as a matter of law to permit a rational trier of fact to find beyond a reasonable doubt that Defendant was a member of a conspiracy to commit first-degree premeditated murder. Therefore, in accordance with Defendant's right to due process of law, the Court will enter a directed verdict of acquittal on the charge of conspiracy to commit first-degree premeditated murder.

Contrary to the trial court's determination, we determine that the record evidence, viewed in the light most favorable to the prosecution, amply supported the prosecution's circumstantial case against defendant, as well as the jury's ultimate verdict finding defendant guilty of conspiring with Sammons to commit first-degree premeditated murder. While Jones may not have identified defendant, and his description of the driver of the Jeep Commander did not comport with defendant's physical appearance on the day of the murder, notably, Jones identified the vehicle carrying Casas's assailants to be a silver Jeep. Additionally, Watkins joined in the identification of the silver Jeep as transporting the individuals who carried out Casas's murder, while Little also recalled seeing a silver truck at the scene of the murder. Significantly, Jones clearly identified Sammons as the shooter who fired multiple shots at Casas, and in a very short time period following the murder, defendant and Sammons were apprehended, driving together with Sammons as the passenger, in the same Jeep Commander that the witnesses described as being at the scene of the shooting. Moreover, Watkins's description of the driver of the Jeep was consistent with defendant's physical appearance. Again, as the trial court recognized, Jones's description of defendant did not align with defendant's physical appearance, and Jones, together with Watkins and Little, could not identify defendant as the driver of the silver Jeep carrying Sammons. However, the jury was presented with this evidence, and it was within the province of the jury to gauge the credibility of the witnesses, as well as the weight to be given to their testimony concerning the identification, or lack thereof, of defendant. *Fletcher*, 260 Mich App at 561.

***8** Further, while defendant's counsel vigorously questioned Detective Scott about the surveillance video mosaic, in an effort to cast doubt on the prosecution theory that defendant was driving the Jeep Commander continuously from when Casas was shot to the time that defendant and Sammons were apprehended by Officer Poirer, we also note that the surveillance video mosaic was played for the jury's consideration. Therefore, any alleged inconsistencies and deficiencies regarding that

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evidence, including issues concerning what individuals could be seen exiting and entering the Jeep Commander, as well as the house located at 2573 Baldwin, were thoroughly canvassed before the jury, which carried the ultimate responsibility of determining what credence and weight to give to that evidence. *Id.* While we recognize the prosecution's case against defendant was indeed circumstantial, we conclude that the record evidence and all reasonable inferences drawn from that evidence, viewed in the prosecution's favor, with all inconsistencies resolved in favor of the prosecution, certainly gave the jury a reasonable basis to find that defendant was driving the Jeep Commander at the time that Sammons gunned down Casas. The record evidence was also such that the jury, by defendant's participation in the shooting, could find that defendant had the requisite intent to conspire with Sammons to commit first-degree murder. Therefore, the trial court erred in granting defendant's motion for a directed verdict of acquittal. For the same reasons, we hold that the trial court also abused its discretion in conditionally granting defendant's motion for a new trial where the record evidence did not preponderate against the jury's verdict to the extent that a miscarriage of justice has occurred. *Anderson*, ___ Mich App at ___; slip op at 5.

IV. CONCLUSION

Accordingly, we reverse the trial court's order granting defendant's motion for a directed verdict of acquittal and conditionally granting defendant a new trial, and remand for sentencing proceedings and for entry of a judgment of sentence consistent with the jury's verdict. We do not retain jurisdiction. [2]

2 Given our disposition of this appeal, we need not address the prosecution's claim that its motion for peremptory reversal was improperly denied in this Court.

Karen M. Fort Hood

Colleen A. O'Brien

RONAYNE KRAUSE, P.J. (concurring)

I concur in the result arrived at by the majority. I write separately because I believe the outcome of this appeal turns significantly on the surveillance video, and I therefore believe it calls for more explication of *why* we find the jury could have found the video inculpatory. The core issue is whether it is possible to determine whether the driver of the Jeep got out when it parked and went into the house, thereby breaking the link between whoever drove the Jeep during the shooting and the driver, defendant, when the Jeep was subsequently pulled over. After carefully scrutinizing the video myself, frame by frame, I conclude that either it shows only the passenger getting out and back in, or at least enough ambiguity that the jury was entitled to make its own determination. As a consequence, I agree with the majority that the jury had a reasonable basis for concluding that the driver during the shooting was the same person as the driver when the Jeep was stopped.

The video itself is, admittedly, of poor quality. Its total screen resolution is 960 by 480 pixels, and the portion of the video depicting the Jeep parking at the house is approximately one frame per second. Although the Jeep is in plain view and there appear to be no obstructions to seeing the space between the Jeep and the house, that view is from across a field, and the Jeep is approximately 7 pixels high. In the real world, unlike the world of certain entertainment shows, one cannot simply push an "enhance" button to conjure up a better image. Nevertheless, I find enough data with which to work.

I count seven relevant frames after the Jeep pulls in to the driveway, with the passenger side facing the camera:

1:24: Individual opens the passenger side door

1:25-1:26: That individual appears to be heading toward the back end of the car

1:27: Passenger door is now closed, nobody between the car and the camera, nothing that obviously looks like a person present

1:27: Individual dressed in white on the far side of the car; by comparing this and the prior frame it appears that they had actually been on the far side of the car in the previous frame and is moving in the direction of the house

1:28: Individual is now well in front of the car in the direction of the house

1:29: Individual now appears to be at the front door of the house

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1:30: Individual now not apparent

And nine additional frames appear relevant when the Jeep leaves:

*9 3:52: Jeep sitting in the driveway, no people readily apparent

3:53: What appears to be a single individual emerges on the porch of the house

3:54: Individual apparently standing at the front of the Jeep

3:55: No apparent change from previous frame

3:56: Individual getting into passenger side of the Jeep

3:57: Jeep passenger-side door in the process of closing

3:58: Jeep passenger-side door now closed

3:59: No apparent change from previous frame

4:00: Jeep in the process of pulling out

Thus, there is very little in the video with which to work. Nevertheless, I believe it is sufficient.

Later in the video, when the Jeep is pulled over, it is readily apparent that defendant, the driver, was shorter than the top of the Jeep. Because the driver side of the Jeep was on the opposite side from the camera, defendant would not have been visible while getting into or out of the Jeep. However, there is a clear view of the path between the Jeep and the front door of the house, and at no time was more than one person visible in that space. At one frame a second while people were running, it is *possible* that a second person, if any, *might* not have ever appeared in the recording. Nevertheless, there is nothing in the video that could constitute actual evidence of a second person getting out of the Jeep, and the brief time between the passenger getting in and the Jeep pulling out strongly suggests that the Jeep remained running the entire time it was in the driveway. In short, because of its technical limitations, the video does not completely preclude the possibility that two people got out and then back in. However, the video does not in any way support such an occurrence, and it is fairly strongly suggestive of only one person, the passenger, exiting the vehicle and getting back in.

As a general matter, the jury is usually entitled to choose at whim what evidence it wishes to accept and reject, limited by a prohibition against speculation and drawing conclusions that would require evidence to be invented. *People v Howard*, 50 Mich 239, 242-243; 15 NW 101 (1883); *People v Bailey*, 451 Mich 657, 673-675, 681-682; 549 NW2d 325 (1996). Clearly, that freedom is not totally unbounded, and the courts will step in at some point if it becomes too apparent that no rational trier of fact could draw a particular conclusion from a particular array of evidence. I find no reason to do so here. It is conceivable that a different outcome would be warranted if the video unambiguously showed both the driver and passenger getting out of the Jeep, but we need not address that particular hypothetical at this time. As the majority states, the jury was able to view the video for itself and draw its own conclusions, which could reasonably include the conclusion that the driver of the Jeep never left the vehicle between the shooting and when it was pulled over.

I therefore join in the majority's resolution of this appeal.

Amy Ronayne Krause

All Citations

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