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EXHIBIT A

No. 18-2057

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 02, 2019
DEBORAH S. HUNT, Clerk

NOAH RICHARD LOVELL, III,

Petitioner-Appellant,

v.

NOAH NAGY, Warden,

Respondent-Appellee.

O R D E R

Noah Richard Lovell, III, a Michigan prisoner represented by counsel, appeals from the district court's judgment denying his 28 U.S.C. § 2254 habeas corpus petition. Lovell applies for a certificate of appealability (COA). *See* Fed. R. App. P. 22(b).

In 2009, after a joint trial with co-defendant, Harry T. Riley, a jury convicted Lovell of armed robbery, unlawful imprisonment, torture, and first-degree home invasion. *See People v. Riley*, Nos. 295838/298164, 2011 WL 4501765 (Mich. Ct. App. Sept. 29, 2011) (unpublished). These convictions arose from an incident during which Riley posed as a utility worker to distract eighty-four-year-old John Pickett while Lovell ransacked Pickett's home. Riley attacked, beat, and bound Pickett, and the two stole Pickett's coin collection.

The trial court sentenced Lovell to concurrent terms of thirty-six years and eight months to seventy-five years in prison for his armed-robbery and torture convictions, and ten to fifteen years in prison for his unlawful-imprisonment conviction. These sentences were to be served before a consecutive prison term of thirteen years and four months to twenty years in prison for the first-degree home-invasion conviction.

The Michigan Court of Appeals affirmed his conviction and sentences, *id.*, and the Michigan Supreme Court denied leave to appeal, *People v. Lovell*, 810 N.W.2d 583 (Mich. 2012) (mem.). In April 2013, Lovell filed a motion for relief from judgment under Michigan Court Rule 6.500, which the trial court denied, and the Michigan Court of Appeals and Michigan Supreme Court denied leave to appeal that decision.

In April 2015, Lovell filed his § 2254 habeas petition, raising claims that: (1) affidavits by Riley and prosecution witness George Wilson—obtained after his trial—would establish his actual innocence; (2) his trial counsel performed ineffectively by failing to renew a motion to sever his trial from Riley's; (3) the prosecutor committed misconduct by shifting the burden of proof to Lovell and commenting on Lovell's pre-arrest silence; (4) the evidence was insufficient to support his convictions; (5) the trial court erroneously based the sentence on inaccurate information in the presentence report; and (6) appellate counsel performed ineffectively by failing to raise the issues that were raised by different counsel in his motion for relief from judgment. The district court denied the habeas petition and denied a COA.

In his COA motion, Lovell argues only three of his claims: (1) he is entitled to a new trial because of the "newly-discovered" affidavits by Riley and Wilson that support a "fair probability that a different result would be rendered on retrial"'; (2) the evidence was insufficient to support his conviction for torture; and (3) he was erroneously sentenced based on inaccurate information. Because Lovell raised only these three claims in support of his COA request, he has effectively abandoned the other issues raised in his habeas petition. *See Elzy v. United States*, 205 F.3d 882, 885 (6th Cir. 2000).

A COA may issue when an "applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, a petitioner must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Habeas corpus relief may be granted on claims that were adjudicated in state court only if the state-court

adjudication was "contrary to, or involved an unreasonable application of, clearly established federal law," or the state-court adjudication "was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d). Where the state courts adjudicate the petitioner's claims on the merits, the relevant question is whether the district court's application of 28 U.S.C. § 2254(d) to those claims is debatable by jurists of reason. *Miller-El*, 537 U.S. at 336-37.

Request for New Trial and Claim of Actual Innocence

Lovell's request for a retrial based on the affidavits by Riley and Wilson is actually a claim that, upon retrial, he would be found innocent of the charges. The affidavit by Riley, dated January 2013, stated that "Noel Lovell was not involved in the crimes committed against John Pickett," and that Lovell "was not involved in the planning of the crimes." The affidavit by state witness Wilson, dated June 2010, stated that his trial testimony about Lovell was false and obtained by police coercion. Wilson had testified that he had met with Lovell and Riley the day after the incident and "heard them discussing how they were going to sell coins" and "also heard Riley berate Lovell for his time-consuming method of ransacking drawers." *Riley*, 2011 WL 4501765, at *2. Lovell presented Wilson's affidavit on direct appeal, but the state appellate court refused to consider it because it was not part of the lower court record. *Id.* at *8. The appellate court also concluded that even without Wilson's unfavorable testimony, the evidence was sufficient for a reasonable jury to have found Lovell guilty on all charges. *Id.*

In his habeas petition, Lovell emphasized that Pickett could not positively identify him so that, without Pickett's identification, the jury had only Wilson's statement to implicate him and that, in light of Wilson's recanting affidavit, there was no evidence left to support his conviction. In his COA motion, Lovell acknowledges that such "[f]reestanding claims of actual innocence are . . . not cognizable on federal habeas review, absent independent allegations of constitutional error at trial" (quoting *Herrera v. Collins*, 506 U.S. 390, 400 (1993)). He argues, however, that *Herrera* left open the question of whether a habeas petitioner may bring a freestanding claim of actual innocence when "compelling evidence" is presented that would result in the fundamental unfairness embodied in the Due Process Clause if it were not considered.

The district court properly determined that this claim failed under *Herrera* because Lovell presented no independent constitutional violation that would have permitted the district court to review it. The district court viewed the affidavits with a "fair degree of skepticism." *See Herrera*, 506 U.S. at 423; *see also Lewis v. Smith*, 100 F. App'x 351, 355 (6th Cir. 2004). As the district court explained, Riley's affidavit was signed and dated over three years after Lovell's trial, and Riley offered no explanation for this delay. The court added that Riley's written exonerating statement was produced after he was sentenced to 75 to 115 years in prison and after he was no longer subject to any further punishment or adverse consequences. In addition, such "[r]ecanting affidavits and witnesses are viewed with extreme suspicion." *United States v. Chambers*, 944 F.2d 1253, 1264 (6th Cir. 1991), *superseded by statute on other grounds as recognized in United States v. Avery*, 128 F.3d 966, 972 (6th Cir. 1997).

The district court considered the significant circumstantial evidence presented at trial that supported the jury's finding of guilt, which rendered Riley's potential exculpatory testimony irrelevant to the outcome. Actual innocence requires that a petitioner demonstrate that "in light of . . . new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *See McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013); *Schlup v. Delo*, 513 U.S. 298, 329 (1995). The trial court had noted that a receipt was found on Pickett's driveway evidencing Lovell's purchase of a hard hat, pry bar, and work gloves shortly before the crime, and the pry bar was used to beat Pickett inside his home. Lovell was also identified as the one who purchased these items. Evidence showed that Lovell had rented the vehicle that was seen in Pickett's driveway, and cell phone logs revealed that Lovell had made several calls in the vicinity of Pickett's house at the time of the crime to support a finding that he was talking with Riley, who was inside the house. Reasonable jurists would not debate the district court's conclusion that Lovell failed to demonstrate that "in light of . . . new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 329.

Insufficient Evidence

Lovell argues that the evidence was insufficient to support his conviction for torture, even under an aiding and abetting theory. He argues that: (1) because the evidence established that his codefendant, Riley, was the "sole assailant," he (Lovell) could not be charged as a principal for the torture and (2) that the evidence did not prove that he physically assisted Riley with an assault or knowingly encourage or assist Riley with torturing Pickett when he was tied up in the basement.

When reviewing a claim for insufficiency of the evidence, a federal habeas court must apply a "twice-deferential standard." *Parker v. Matthews*, 567 U.S. 37, 43 (2012). First, the court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Even if the petitioner makes this showing, a federal habeas court may overturn a state court's rejection of an insufficient-evidence claim only if the state court's decision was unreasonable under § 2254(d). *Coleman v. Johnson*, 566 U.S. 650, 652 (2012) (per curiam).

Michigan law requires the prosecution to establish, as an element of torture, that the defendant had the *intent* to inflict great bodily injury or severe mental pain or suffering. *See* Mich. Comp. Laws § 750.85(1). To establish that a defendant aided and abetted a crime, the prosecution must show that:

> (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or knew that that principal intended to commit the crime at the time he gave aid and encouragement.

Riley v. Berghuis, 481 F.3d 315, 322 (6th Cir. 2007). A reviewing court may infer aiding and abetting from all the facts and circumstances, including the close association between the defendant and the principal, the defendant's participation in the planning and execution of the

crimes, and evidence of flight after the crimes. *People v. Turner*, 540 N.W.2d 728, 733-34 (Mich. Ct. App. 1995).

While Lovell may be correct that the evidence did not show that he—"the second man" in Pickett's house—physically assaulted Pickett, the prosecution's burden was not to show that Lovell was "aware that Mr. Riley had the specific intent to subject" Pickett to "the intentional infliction of intense or severe pain for the purpose of sadistic pleasure, coercion of punishment," as Lovell argues. Rather, it was sufficient for the prosecution to show that Lovell assisted or encouraged Riley and knew that that Riley intended to commit the crime. As noted above, the state appellate court relied on strong circumstantial evidence at trial identifying Lovell as the second person in Pickett's house as well as his involvement in planning the crime and his presence during the beating, and this circumstantial evidence is sufficient to support his convictions as an aider and abettor. *See Johnson v. Coyle*, 200 F.3d 987, 992 (6th Cir. 2000). Based on this evidence, reasonable jurists would not debate the district court's conclusion that the state court did not unreasonably apply the *Jackson* standard.

Sentencing Claim

Lovell challenges the upward sentencing departure, contending it is based on allegedly inaccurate information. Lovell asserts that the trial court relied on "misinformation of a constitutional magnitude," allowing the district court to review his state law sentence. *See Koras v. Robinson*, 123 F. App'x 207, 213 (6th Cir. 2005) (quoting *Roberts v. United States*, 445 U.S. 552, 556 (1980)).

In support of his habeas petition, Lovell disagreed with the presentence report's reference to his "making a living employing scams in the home improvement trade," and to the trial court's belief that he had engaged in a pattern of "preying on good natured citizens who . . . have only to be brutalized or swindled ultimately and almost killed because . . . good heartedness and giving work to solicitors." Lovell argued that this information was wholly inaccurate because he had no prior felony convictions and had not used his paving business to prey on elderly homeowners.

On direct appeal, the state court upheld the trial court's upward departure of twelve years and eleven months because the court had provided "substantial and compelling reasons" for the departure. *Riley*, 2011 WL 4501765, at *10. The court listed the following reasons: "the unusual nature of the home invasion in that it was planned to occur while the victim was present; the steps Lovell took to prevent the victim from calling for help, leaving [the victim] to die, and Lovell's pattern of using his paving business to prey on elderly homeowners." *Id.* The appellate court determined that these reasons were "not clearly erroneous . . . were objective and verifiable," and were "of considerable worth in determining the length of the sentence," quoting *People v. Smith*, 754 N.W.2d 284, 290 (2008).

As the district court explained, a claim regarding the calculation of a sentence under state law was typically not cognizable in a federal habeas corpus proceeding when the sentence fell within the limits proscribed by the State, unless the petitioner could show that the sentence violated due process by its being based upon "material information of constitutional magnitude." *See Hutto v. Davis*, 454 U.S. 370, 373-74 (1982); *Roberts*, 445 U.S. at 556. To prevail, Lovell was required to show that (1) the information before the sentencing court was materially false, and (2) the court relied on the false information in imposing the sentence. *See United States v. Tucker*, 404 U.S. 443, 447 (1972).

The sentencing transcript revealed that the state court had not relied on the allegedly false information. Rather, the state courts referred to the unusual nature of the home invasion, the steps Lovell took to prevent the victim from calling for help, and his leaving the victim to die. Although the state appellate court also referred to "Lovell's pattern of using his paving business to prey on elderly homeowners," this information was not "materially false" for the reasons stated by the district court regarding Lovell's subsequent misleading activities. Because the information relied upon in sentencing was not materially false information of constitutional magnitude, reasonable jurists would not debate the district court's resolution of this state-law sentencing claim.

Lovell argues for the first time in his COA motion that (1) the sentencing court erroneously sentenced him for the torture conviction because that conviction was not supported by sufficient evidence, and (2) the sentencing court had no factual basis for stating that Lovell had a "primary role" in planning the confrontation and beating and had failed to put[] a stop to the beating despite seeing and hearing what was happening." In addition, Lovell refers to the trial court's allegedly misinformed statement that Lovell left the victim "for dead." Because Lovell failed to present these specific challenges regarding the sentencing court's statements to the district court, this court will not consider them for the first time in deciding his COA. *See Weinberger v. United States*, 268 F.3d 346, 352 (6th Cir. 2001). Based on the above, reasonable jurists would not debate the district court's rationale for rejecting Lovell's challenge to his sentence.

Accordingly, the court **DENIES** Lovell's application for a COA.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NOAH RICHARD LOVELL, III,

Petitioner,

v.

Case No. 15-11541
Honorable Linda V. Parker

PAUL KLEE,[1]

Respondent.
_____/

OPINION AND ORDER DENYING THE PETITION FOR A WRIT OF HABEAS CORPUS AND DECLINING TO ISSUE A CERTIFICATE OF APPEALABILITY

Petitioner Noah Richard Lovell, III ("Petitioner"), through counsel, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner is challenging his Michigan state court convictions for armed robbery in violation of Michigan Compiled Laws § 750.529, unlawful imprisonment in violation of Michigan Compiled Laws § 750.349b, torture in violation of Michigan Compiled Laws § 750.85, and first-degree home invasion in violation of Michigan Compiled Laws § 750.110a(2). For the reasons stated below, the Court is denying Petitioner habeas relief. The Court also is denying Petitioner a certificate of appealability.

[1] The Court sua sponte amends the case caption to reflect the warden of the Lakeland Correctional facility in Coldwater, Michigan, where Petitioner currently is confined. *See* Rule 2(a) of the Rules Governing § 2254 Cases.

I. Background

Petitioner was convicted of the above-listed offenses following a jury trial in the Circuit Court for Livingston County, Michigan. Petitioner was tried with his co-defendant, Harry Riley. The trial court sentenced Petitioner, as a fourth habitual offender, fourth offense, to concurrent terms of imprisonment of 36 years and 8 months to 75 years for his armed robbery and torture convictions and 10 to 15 years for his unlawful imprisonment conviction, and a consecutive term of imprisonment of 13 years and 4 months to 20 years for the first-degree home invasion conviction. Petitioner's convictions and sentence were affirmed on direct appeal. *People v. Riley*, No. 295838, 2011 WL 4501765 (Mich. Ct. App. Sept. 29, 2011), *lv. den.*, 810 N.W.2d 582 (Mich. 2012).

This Court recites verbatim the relevant facts relied upon by the Michigan Court of Appeals when denying Petitioner's appeal:

> This case arises out of the armed robbery, unlawful imprisonment, torture, and home invasion of an 84-year-old victim. On the day of the incident, Riley went to the victim's back door wearing a work vest and a hard hat under the guise that he worked for a utility company and wanted to look at the victim's property. The victim walked his property with Riley for approximately 45 minutes. Riley was talking on his cellular telephone during a substantial portion of that time. Cellular telephone call logs showed that Lovell's telephone was in the vicinity of the victim's house and that numerous calls were made to Riley at the time of the crime. Riley's vehicle was rented by Lovell.

> Riley followed the victim into his house; at that point, the victim noticed a pry bar on the table in his dinette. As the victim reached for the pry bar, Riley punched the victim in the face so hard that it knocked his dentures out of his mouth and knocked his glasses off of his face. Riley then grabbed the victim and pushed him down the stairs. At the bottom of the stairs, Riley continued to beat the victim, punching and kicking his face and body. Riley repeatedly demanded to know where the victim kept his money, and threatened to kill him. Riley also repeatedly poked the victim's arms, chest, and neck with a knife. The victim lost consciousness several times during the beating. Riley then sat the victim in a chair and bound his wrists and ankles with duct tape. Riley kicked the victim's face with such force that if [sic] left a shoe print. During the incident, the victim heard a second individual come halfway down the stairs; from his vantage point, the victim could only see the second individual, a white male, from the waist down. The second individual threatened to kill the victim if he did not reveal the location of the money. Meanwhile, Riley took the victim's coin collection. The victim had a broken jaw, broken nose, cracked eye sockets, three broken ribs, and blood on the brain. The victim stayed in the hospital for over a week, and then spent nearly two months in a rehabilitation center.
>
> The next day, Lovell and Riley met with George Wilson who heard them discussing how they were going to sell coins. Wilson also heard Riley berate Lovell for his time-consuming method of ransacking drawers. A receipt from a hardware store indicating the purchase of a hard hat, pry bar, and work gloves was found in the victim's driveway, and Lovell was identified as the individual who purchased the goods.

Riley, 2011 WL 4501765, at *1-2. These facts are presumed correct on habeas review pursuant to 28 U.S.C. § 2254(e)(1). *See Wagner v. Smith,* 581 F.3d 410, 413 (6th Cir. 2009).

Petitioner filed a post-conviction motion for relief from judgment in the state trial court (ECF No. 5-20), which the court denied. (ECF No. 5-21.) The Michigan appellate courts denied Petitioner leave to appeal. *People v. Lovell*, No. 319508 (Mich. Ct. App. June 3, 2014) (ECF No. 5-22); *lv. den.* 858 N.W.2d 53 (Mich. 2015).

Petitioner asserts the following grounds in support of his application for federal habeas relief:

I. Mr. Lovell is entitled to a new trial under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution where newly discovered evidence after trial—co-defendant Riley's affidavit exonerating him and prosecution witness Mr. Wilson's affidavit recanting his trial testimony against him—show a fair probability that a different result would be rendered on retrial.

II. Mr. Lovell was denied the effective assistance of counsel under the Sixth and Fourteenth Amendments to the U.S. Constitution when his trial counsel, before testimony was given, failed to renew his motion for separate trials or juries when co-defendant Riley offered to testify at trial to exonerate Mr. Lovell.

III. Prosecutorial misconduct in rebuttal closing argument deprived Mr. Lovell of his right to a fair trial under the Fourteenth Amendment to the U.S. Constitution when the prosecutor shifted the burden of proof and commented on his silence in violation of his privilege against self-incrimination under the Fifth and Fourteenth Amendments to the U.S. Constitution.

IV. Mr. Lovell was denied his right to due process under the Fourteenth Amendment to the U.S. Constitution because the evidence was insufficient to sustain the convictions.

V. Mr. Lovell was denied due process under the Fourteenth Amendment to the U.S. Constitution when he was sentenced on the basis of inaccurate information in the presentence report that was improperly used to support an upward departure in his sentences.

VI. Mr. Lovell was denied the effective assistance of counsel under the Sixth and Fourteenth Amendments to the U.S. Constitution when his appellate counsel failed to raise the issues presented in the motion for relief from judgment under MCR 6.500 *et al*, which were also presented to the Michigan Court of Appeals and the Michigan Supreme Court on appeal and raised in the present habeas petition.

II. Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes the following standard of review for habeas cases:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). A decision of a state court is "contrary to" clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a

case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). An "unreasonable application" occurs when "a state court decision unreasonably applies the law of [the Supreme Court] to the facts of a prisoner's case." *Id.* at 409. A federal habeas court may not "issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 410-11.

"[A] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). In order to obtain habeas relief in federal court, a state prisoner is required to show that the state court's rejection of his or her claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103. A habeas petitioner should be denied relief as long as it is within the "realm of possibility" that fairminded jurists could find the state court decision to be reasonable. *See Woods v. Etherton,* 136 S. Ct. 1149, 1152 (2016).

III. Discussion

A. Actual Innocence Claim

Petitioner claims that he is entitled to habeas relief because he is actually innocent of the charges. Petitioner submits two affidavits in support of this claim. In one affidavit, Petitioner's co-defendant, Mr. Riley, asserts that Petitioner was not involved in the planning or commission of the crimes. (*See* ECF No. 5-20 at Pg ID 2646.) Mr. Riley's affidavit was signed and dated January 3, 2013, over three years after Petitioner was convicted. (*Id.*) The other affidavit is a declaration from prosecution witness, George Wilson, in which Wilson claims that he testified falsely at Petitioner's criminal proceedings (i.e., the evidentiary and preliminary hearings and trial) about Petitioner's involvement in the crimes. (*Id.* at Pg ID 2649.) Mr. Wilson blames his false testimony on undescribed police coercion. (*Id.*) Mr. Wilson's declaration is dated June 30, 2010. (*Id.*)

Petitioner first presented Mr. Riley's affidavit and Mr. Wilson's declaration when he moved for relief from judgment in the state trial court. Petitioner also attempted to present Mr. Wilson's declaration during his appeal of right with the Michigan Court of Appeals. The Michigan Court of Appeals refused to consider Mr. Wilson's declaration because it was not part of the lower court record. *Riley*, 2011 WL 4501765, at *8.

In *Herrera v. Collins*, 506 U.S. 390 (1993), the Supreme Court held that "[c]laims of actual innocence based on newly discovered evidence" fail to state a claim for federal habeas relief "absent an independent constitutional violation occurring in the underlying state criminal proceeding."[1] *Id*. at 400; *see also House v. Bell*, 547 U.S. 518, 554-55 (2006) (declining to answer the question left open in *Herrera* of whether a habeas petitioner may bring a freestanding claim of actual innocence). Federal habeas courts "sit to ensure that individuals are not imprisoned in violation of the Constitution, not to correct errors of fact." *Herrera*, 506 U.S. at 400 (citations omitted); *see also McQuiggin v. Perkins,* 569 U.S. 383, 392 (2013) ("We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence"). Freestanding claims of actual innocence are thus not cognizable on federal habeas review, absent independent allegations of constitutional error at trial. *See Cress v. Palmer,* 484 F.3d 844, 854-55 (6th Cir. 2007) (collecting cases).

Furthermore, a long-delayed affidavit which seeks to exonerate the defendant or petitioner and shift the blame for the crime to another person is "treated with a fair degree of skepticism." *Herrera*, 506 U.S. at 423; *see also*

[1] The *Herrera* Court assumed without deciding that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." 506 U.S. at 417. The Supreme Court, however, has not extended such a freestanding claim beyond the death penalty context and Petitioner's case is not a capital case.

Lewis v. Smith, 100 F. App'x 351, 355 (6th Cir. 2004) (holding that it was proper for the district court to reject as suspicious a witness' recanting affidavit made two years after the petitioner's trial). In particular, "[p]ostconviction statements by codefendants [which attempt to exculpate a criminal defendant] are inherently suspect because codefendants may try to assume full responsibility for the crime without any adverse consequences." *See Allen v. Yukins,* 366 F.3d 396, 405 (6th Cir. 2004) (post-conviction affidavits of habeas petitioner's two codefendants were legally insufficient to establish that she was actually innocent, so as to toll the AEDPA's statute of limitations; affidavit was inherently suspect because the codefendant could have signed it to help petitioner without endangering his own interests); *In re Byrd,* 269 F.3d 561, 574 (6th Cir. 2001) (petitioner did not satisfy the miscarriage of justice exception necessary to reach the merits of a successive habeas petition, where the evidence of actual innocence was an affidavit from a co-defendant which was made six years after the co-defendant had been convicted and sentenced for his part in the crime and the co-defendant's confession was made only after he was no longer subject to further punishment for his actions for these crimes).

Mr. Riley, Petitioner's co-defendant, signed and dated his affidavit exonerating Petitioner over three years after their trial. In the affidavit, Mr. Riley does not offer any convincing explanation as to why he waited so long to come

forward and attempt to exonerate petitioner. Furthermore, the statements come after Mr. Riley was sentenced to 75 to 115 years in prison and is no longer subject to any further punishment or other adverse consequences for his actions. Affidavits from fellow inmates that are created after trial are not sufficiently reliable evidence to support a finding of actual innocence. *See Milton v. Secretary, Dep't Of Corr.,* 347 F. App'x 528, 531-32 (11th Cir. 2009). The fact that Mr. Riley did not come forward in a timely manner, when he claimed he knew Petitioner was wrongly convicted undermines his credibility, particularly when there is also no indication that Mr. Riley ever contacted the police or law enforcement about his allegedly exculpatory information. *See Ashmon v. Davis*, 508 F. App'x 486, 488 (6th Cir. 2012).

When Petitioner presented Mr. Riley's affidavit in support of his motion for relief of judgment, the trial court judge found that the evidence was not newly discovered because "if the Defendant was truly not involved with the crime, he was aware or should have been aware that Riley had the ability to offer the testimony contained in the current declaration." *People v. Lovell*, No. 09-18082-FC, at *6 (ECF No. 5-21 at Pg ID 2655.) The trial court judge further found that "[i]n the face of all the other circumstantial evidence connecting the Defendant to the crime, it does not appear Riley's testimony would render a different result." *Id.*

This Court agrees that Riley's affidavit is not "newly discovered" evidence that would have rendered a different result.

The Court similarly views Mr. Wilson's declaration with "extreme suspicion." *United States v. Willis*, 257 F.3d 636, 645 (6th Cir. 2001) ("[A]ffidavits by witnesses recanting their trial testimony are to be looked upon with extreme suspicion.") (internal quotation marks omitted); *United States v. Chambers*, 944 F.2d 1253, 1264 (6th Cir. 1991) (stating that "[r]ecanting affidavits and witnesses are viewed with extreme suspicion"), superseded by statute on other grounds as recognized in *United States v. Avery*, 128 F.3d 966, 972 (6th Cir. 1997). Mr. Wilson's recantation is also suspect because his trial testimony was consistent with other evidence and testimony presented in the case, while his recantation is inconsistent with such evidence. *See e.g., Allen v. Woodford*, 395 F.3d 979, 994 (9th Cir. 2005) (uncorroborated recantation is "even more unreliable" where trial testimony was consistent with other evidence and recantation was not). Moreover, Mr. Wilson's declaration is dated June 30, 2010, before Petitioner's direct appeal became final. As such, it is not "new" evidence for purposes of establishing actual innocence. *Moore v. Woods*, -- F.3d --, 2018 WL 3089822, at *3 (6th Cir. June 20, 2018).

For these reasons, the Court concludes that Petitioner is not entitled to relief on his actual innocence claim.

B. Ineffective Assistance of Trial Counsel Claim

Petitioner alleges that he was denied the effective assistance of counsel when his trial attorney failed to renew his motion for severance. Respondent contends that this claim is procedurally defaulted due to Petitioner's failure to provide legal support for his claim in the state court.

Petitioner initially raised this ineffective assistance claim in his motion for relief from judgment. In rejecting the claim, the state trial court judge found that Petitioner waived it and another ineffective assistance of counsel claim by failing to provide citations to the record or any legal authority (besides a general citation to *Strickland v. Washington*, 466 U.S. 668 (1984), and *People v. Ginther*, 212 N.W.2d 922 (1973)). *People v. Lovell*, No. 09-18082-FC, at *7-8 (ECF No. 5-21 at Pg ID 2657). When the state courts clearly and expressly rely on a valid state procedural bar, federal habeas review is also barred unless the petitioner can demonstrate "cause" for the default and actual prejudice as a result of the alleged constitutional violation, or can demonstrate that failure to consider the claim will result in a "fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750-51 (1991). If a petitioner fails to show cause for his procedural default, it is unnecessary for the court to reach the prejudice issue. *Smith v. Murray*, 477 U.S. 527, 533 (1986).

In an extraordinary case, however, where a constitutional error has probably resulted in the conviction of one who is actually innocent, a federal court may consider the constitutional claims presented even in the absence of a showing of cause for procedural default. *Murray v. Carrier*, 477 U.S. 478, 479-80 (1986). To be credible, such a claim of innocence requires a petitioner to support the allegations of constitutional error with new reliable evidence that was not presented at trial. *Schlup v. Delo*, 513 U.S. 298, 324 (1995). "'[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 624 (1998).

Under Michigan law, a party who fails to develop any argument or cite any authority in support of his or her claim waives appellate review of the issue. *People v. Griffin*, 597 N.W.2d 176, 186 (Mich. Ct. App. 1999). "A party may not merely state a position and then leave it to [the reviewing court] to discover and rationalize the basis for the claim." *Id*. (citations omitted). A state court conclusion that an issue was waived is considered a procedural default. *See e.g. Shahideh v. McKee*, 488 F. App'x 963, 965 (6th Cir. 2012).

As cause for the procedural default, Petitioner argues that his post-conviction counsel was ineffective for failing to adequately brief Petitioner's claim based on trial counsel's failure to renew the request for severance. Petitioner cannot rely on ineffective assistance of post-conviction counsel as cause because

there is no constitutional right to an attorney in post-conviction proceedings.[2] *See Coleman,* 501 U.S. at 752-53, *see also Landrum v. Mitchell,* 625 F.3d 905, 919 (6th Cir. 2010). Because Petitioner has not demonstrated any cause for his procedural default, it is unnecessary to reach the prejudice issue regarding his second claim. *Smith*, 477 U.S. at 533.

Additionally, for the reasons asserted earlier, Petitioner does not present any new reliable evidence to support an assertion of innocence allowing this Court to consider his claim as a ground for a writ of habeas corpus in spite of the procedural default.

In short, the Court finds that Petitioner's second claim is procedurally defaulted.

C. Prosecutorial Misconduct Claim

Petitioner claims he was denied a fair trial because of prosecutorial misconduct.

"On habeas review, claims of prosecutorial misconduct are reviewed deferentially." *Bowling v. Parker*, 344 F.3d 487, 512 (6th Cir. 2003) (citing *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)). A prosecutor's improper

[2] The Supreme Court has stated an exception to this rule for claims that could not have been raised on direct appeal. *Martinez v. Ryan*, 566 U.S. 1 (2012). In Michigan, however, defendants may assert ineffective-assistance claims on direct appeal. *Bell v. Howe*, 701 F. App'x 408, 413 (6th Cir. 2017) (citing *Taylor v. McKee*, 649 F.3d 446, 452 (6th Cir. 2011)). As such, Petitioner cannot rely on his claim of ineffective assistance of post-conviction counsel to excuse his default.

comments will be held to violate a criminal defendant's constitutional rights only if they "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.* (quoting *Darden*, 477 U.S. at 181 (additional citation omitted)). Therefore, a claim of prosecutorial misconduct provides a basis for habeas relief only if the conduct was so egregious as to render the entire trial fundamentally unfair based on the totality of the circumstances. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643-45 (1974). Moreover, to obtain federal habeas relief on a prosecutorial misconduct claim, the petitioner must show that the state court's rejection of the claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Parker v. Matthews*, 567 U.S. 37, 48 (2012) (quoting *Harrington*, 562 U.S. at 103).

Petitioner first contends that the prosecutor committed misconduct in closing rebuttal argument by shifting the burden of proof to Petitioner by stating: "You [referring to defense counsel] sat and attacked everybody in this case and you didn't once tell us what did your client do. What's he responsible for?" (11/4/09 Trial Tr. at 217, ECF No. 5-14 at Pg ID 2212.) The trial court instructed the jury that Petitioner was presumed innocent and that the prosecutor had the burden of

proving Petitioner's guilt beyond a reasonable doubt.[2] (*Id.* at 99, Pg ID 2094.) The trial court further instructed the jury:

> Next section, defendant not testifying. Every defendant has the absolute right not to testify. When you decide the case you must not consider the fact that defendants Riley and Lovell did not testify. It must not effect your verdict in any way.

(*Id.* at 100, Pg ID 2095.) Any possible prejudice that might have resulted from the prosecutor's comment was cured by the trial court's instructions regarding the proper burden of proof. *See Scott v. Elo,* 302 F.3d 598, 603-04 (6th Cir. 2002) (denying habeas relief and concluding that even if prosecutor committed misconduct during closing argument, it was not an error that "jury instructions could not cure."); *see also United States v. Carter*, 236 F.3d 777, 786-87 (6th Cir. 2001) (finding that the prosecutor's misstatement during closing arguments regarding witness's testimony was inherently prejudicial to the defendant and indicating that such prejudice could have been cured or at least minimized by curative instructions to the jury, but concluding that no instructions directed at the misstatements were given).

Petitioner further alleges that the prosecutor committed misconduct by commenting on Petitioner's pre-arrest silence in response to comments by co-defendant Riley. Petitioner contends that "co-defendant Riley's alleged utterances,

[2] The judge in this case instructed the jurors prior to closing arguments.

as reported by Mr. Wilson, were improperly used against [him] as an 'adoptive admission,' even though he said nothing in reply and thus there was no indication that he assented to the statements made." (Habeas Pet. at 35, ECF No. 1-1 at Pg ID 53).[3]

The Supreme Court has held that prosecutors may use a defendant's pre-arrest silence as substantive evidence of his guilt so long as the defendant did not expressly invoke his right to remain silent. *Salinas v. Texas*, 133 S. Ct. 2174, 2179, 2184 (2013); *see also Abby v. Howe*, 742 F.3d 221, 228 (6th Cir. 2014). When viewed in context, the prosecutor's comments referred to Petitioner's silence in response to Lovell's statements the day after the incident and before he was arrested or invoked his right to remain silent.

[3] Respondent argues that this second prosecutorial misconduct claim is procedurally defaulted because it was never exhausted with the state courts and Petitioner no longer has an available state court remedy to exhaust the claim. Respondent, however, acknowledges that Petitioner did allude to the claim in his post-conviction motion for relief from judgment. In any event, a habeas petitioner's failure to exhaust his or her state court remedies does not deprive a federal court of its jurisdiction to consider the merits of the habeas petition. *Granberry v. Greer*, 481 U.S. 129, 131 (1987). An unexhausted claim may be adjudicated by a federal court on habeas review if the unexhausted claim is without merit, such that addressing the claim would be efficient and would not offend the interest of federal-state comity. *Prather v. Rees*, 822 F.2d 1418, 1422 (6th Cir. 1987); see also 28 U.S.C. § 2254(b)(2)(habeas petition may be denied on the merits despite the failure to exhaust state court remedies). Even if the claim is unexhausted, the claim is without merit.

For these reasons, Petitioner is not entitled to relief on his prosecutorial misconduct claim.

D. Sufficiency of the Evidence Claim

Petitioner next claims that there was insufficient evidence to convict him.

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In Re Winship,* 397 U.S. 358, 364 (1970). When reviewing a sufficiency of the evidence claim, the court must ask "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). The court does not "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." *Id.* at 318-19 (emphasis in original).

A federal habeas court may not overturn a state court decision that rejects a sufficiency of the evidence claim merely because the federal court disagrees with the state court's resolution of the claim. Instead, a federal court may grant habeas relief only if the state court decision was an objectively unreasonable application of the *Jackson* standard. *See Cavazos v. Smith,* 565 U.S. 1, 2 (2011). "Because rational people can sometimes disagree, the inevitable consequence of this settled

law is that judges will sometimes encounter convictions that they believe to be mistaken, but that they must nonetheless uphold." *Id.* For a federal habeas court reviewing a state court conviction, "the only question under *Jackson* is whether that finding was so insupportable as to fall below the threshold of bare rationality." *Coleman v. Johnson*, 566 U.S. 650, 656 (2012). A state court's determination that the evidence does not fall below that threshold is entitled to "considerable deference under AEDPA." *Id.*

Petitioner argues that there was insufficient evidence to establish his identity as one of the victim's assailants. Petitioner also contends that the evidence presented was insufficient to sustain his convictions. Petitioner does not contest the elements of the charged offenses; rather, he argues that there was insufficient evidence to find him guilty beyond a reasonable doubt of aiding and abetting his co-defendant in the commission of the crimes for which he was convicted.[3]

The Michigan Court of Appeals found strong circumstantial evidence supporting Petitioner's identity as a principal and an aider-and-abettor:

---

[3] To find a defendant guilty of aiding and abetting in the commission of a crime, the prosecutor must show that: (1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. *Riley v. Berghuis,* 481 F.3d 315, 322 (6th Cir. 2007) (citing *People v. Carines*, 597 N.W.2d 130, 135 (1999)).

> Lovell argues that there was no evidence that he was in the victim's house during the crimes, or was Riley's accomplice. Thus, he is challenging the evidence of his identity as a perpetrator. Lovell also argues that there was insufficient evidence that the second person in the house intended the crimes of armed robbery, unlawful imprisonment, and torture.
>
> In viewing the evidence in the light most favorable to the prosecution, we find that the prosecutor established that Lovell purchased a hard hat, pry bar, and work gloves at a hardware store the day before the crimes. In reference to the pry bar, the hardware store manager heard Lovell's companion inquire: "are you going to buy that tool to beat that guy's ass[?]" Lovell was identified as the individual who rented the vehicle seen in the victim's driveway at the time the crimes occurred. Cellular telephone call logs showed that Lovell's telephone was in the vicinity of the victim's house and that numerous calls were made to Riley at the time of the crime. While the victim was bound (false imprisonment), Riley severely beat him (torture) and poked him with a knife while stealing his coin collection (armed robbery). While this was occurring, the other individual in the house threatened to kill the victim if he did not reveal the location of his money. When Lovell and Riley met Wilson the next day, Wilson heard them talking about how they were going to sell coins, and heard Riley berate Lovell for the method he used to ransack drawers.
>
> Identity may be shown by either direct testimony or circumstantial evidence. Here, ample circumstantial evidence exists, as set forth above, identifying Lovell as one of the perpetrators of the charged offenses.

Riley, 2011 WL 4501765, at *7–8. (internal citation and footnote omitted).

Under Michigan law, "[T]he identity of a defendant as the perpetrator of the crimes charged is an element of the offense and must be proved beyond a reasonable doubt." *Byrd v. Tessmer*, 82 F. App'x 147, 150 (6th Cir. 2003) (citing *People v. Turrell*, 181 N.W.2d 655, 656 (Mich. Ct. App. 1970)). Michigan law further provides that "'[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.'" *People v. Nowack*, 614 N.W.2d 78, 81 (Mich. 2000) (quoting *People v. Carines*, 597 N.W.2d 130 (1999)). As the Sixth Circuit has stated: "Circumstantial evidence alone is sufficient to support a conviction, and 'it is not necessary for the evidence at trial to exclude every reasonable hypothesis except that of guilt.'" *Johnson v. Coyle,* 200 F.3d 987, 992 (6th Cir. 2000) (quoting *United States v. Reed*, 167 F.3d 984, 992 (6th Cir. 1999)) (additional citations and brackets omitted).

The state court reasonably concluded that circumstantial evidence established Petitioner's identity as the second offender and that his actions at the crime scene aided and abetted Mr. Riley. Because there were multiple pieces of evidence to establish Petitioner's identity as one of the perpetrators of the offenses, the state court did not unreasonably apply the *Jackson* standard in rejecting Petitioner's sufficiency of evidence claim. *See Moreland v. Bradshaw,* 699 F.3d 908, 919-21 (6th Cir. 2012).

The state court also reasonably concluded that there was sufficient evidence for a rational trier of fact to conclude that Petitioner aided and abetted Mr. Riley with the crimes, including the torture charge. As noted above, to be convicted as an aider and abettor, the defendant must either possess the required intent to commit the crime or have participated while knowing that the principal had the requisite intent; such intent may be inferred from circumstantial evidence. *See Long v. Stovall,* 450 F. Supp. 2d 746, 753 (E.D. Mich. 2006); *People v. Wilson*, 196 Mich. App. 604, 614; 493 N.W.2d 471 (1992). The intent of an aider and abettor is satisfied by proof that he knew the principal's intent when he gave aid or assistance to the principal. *People v. McCray*, 533 N.W. 2d 359, 361 (Mich. Ct. App. 1995) (citations omitted). An aider and abettor's state of mind may be inferred from all of the facts and circumstances, including close association between the defendant and the principal, the defendant's participation in the planning and execution of the crime, and evidence of flight after the crime. *People v. Turner*, 540 N.W.2d 728, 733-34 (Mich. Ct. App. 1995) (citations omitted).

In Petitioner's case, there was sufficient evidence to establish that he aided and abetted Mr. Riley in all of the offenses for which he was convicted. This includes the torture conviction, even if Petitioner never actually touched the victim. Petitioner is not entitled to relief on his sufficiency of the evidence claim.

E. Sentencing Guideline Claim

Petitioner argues that he was denied due process when inaccurate information in the presentence report was used to support an upward departure in his sentences. Specifically, Petitioner refers to the report's reference to him as a "gyps[y]" "who travel[s] throughout the country, including all the states Lovell … has worked in, making a living employing scams in the home improvement trade." (Pet. at 40-41, ECF No. 1-1 at Pg ID 58-59.) He also refers to the report's statement that he has a history of exploiting elderly people, which the trial judge described as "a pattern of, of practices of preying on good natured citizens who are willing to give tradesman work who come to their door. And have only to be brutalized or swindled ultimately and almost killed because … good heartedness and giving work to solicitors." (12/11/09 Hr'g Tr. at 54-55 ECF No. 5-16 at Pg ID 2321-22.)

Claims concerning the trial court's calculation of a defendant's sentencing guidelines range under state law are state-law claims and typically not cognizable in federal habeas corpus proceedings. *See Hutto v. Davis*, 454 U.S. 370, 373-74 (1982) (federal courts normally do not review a sentence for a term of years that falls within the limits prescribed by the state legislature); *Austin v. Jackson*, 213 F.3d 298, 301-02 (6th Cir. 2000) (alleged violation of state law with respect to sentencing is not subject to federal habeas relief). However, "an alleged violation of state law could, potentially, 'be sufficiently egregious to amount to a denial of

equal protection or due process of law guaranteed by the Fourteenth Amendment.'" *Koras v. Robinson*, 123 F. App'x 207, 213 (6th Cir. 2005) (quoting *Bowling v. Parker*, 344 F.3d 487, 521 (6th Cir. 2003)) (additional quotation marks and citation omitted). A sentence may violate due process if it is based upon "material 'misinformation of constitutional magnitude.'" *Koras*, 123 F. App'x at 213 (quoting *Roberts v. United States*, 445 U.S. 552, 556 (1980)); *see also United States v. Tucker*, 404 U.S. 443, 447 (1972); *Townsend v. Burke*, 334 U.S. 736, 741 (1948).

To prevail on such a claim, the petitioner must show that (1) the information before the sentencing court was materially false, and (2) the court relied on the false information in imposing the sentence. *Tucker*, 404 U.S. at 447; *United States v. Polselli*, 747 F.2d 356, 358 (6th Cir. 1984); *Koras*, 123 F. App'x at 213 (quoting *United States v. Stevens*, 851 F.2d 140, 143 (6th Cir. 1988)). The sentencing court demonstrates actual reliance on misinformation when the court give "explicit attention" to it, "found" its sentence "at least in part" on it, or gives "specific consideration" to the information before imposing sentence. *Tucker*, 404 U.S. at 444, 447.

The sentencing transcript does not reflect the state trial court's reliance on information Petitioner claims to be false. When speaking about Petitioner, specifically, the trial judge did not state that Petitioner had travelled around the

United States taking advantage of elderly homeowners or scamming homeowners. What the trial court discussed instead was Mr. Riley's out-of-state conduct after the incident in question which undisputedly did involve taking advantage of several elderly homeowners.

With respect to Petitioner, the trial judge referred only "in passing" to "issues that occurred in Midland county and Tawas and Clair" and "those business practices[.]" (12/11/09 Hr'g Tr. at 56, ECF No. 5-16 at Pg ID 2324) However, Petitioner does not show that this information was false. Moreover, the transcript reflects that the facts primarily influencing the trial court's sentencing decision were those presented at trial, which Petitioner has not shown to be false. (*See id.* at 54-58, Pg ID 2321-2325.) Specifically, the trial court concluded that Petitioner posed "a clear and present danger" warranting sentences above the guidelines due to his conduct with respect to the victim, including Petitioner's primary role in planning and "put[ting] in motion" the confrontation, robbery and severe beating of the victim, not putting a stop to the beating despite seeing and hearing what was happening, and leaving the victim for dead, bound and gagged in his basement. (*Id.*) To the extent the trial court relied on any materially false information, it is not "misinformation of constitutional magnitude." *See supra.*

Petitioner is not entitled to habeas relief based on his sentencing claim.

F. Ineffective Assistance of Appellate Counsel Claim

In his final claim, Petitioner contends that his appellate counsel was ineffective for failing to raise on direct appeal the issues presented in his motion for relief from judgment.

The Sixth Amendment guarantees a defendant the right to the effective assistance of counsel on the first appeal by right. *Evitts v. Lucey*, 469 U.S. 387, 396-397 (1985). Court appointed counsel, however, does not have a constitutional duty to raise every nonfrivolous issue a defendant requests. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). The issues presented in the motion for relief from judgment were found to be meritless. "[A]ppellate counsel cannot be found to be ineffective for 'failure to raise an issue that lacks merit.'" *Shaneberger v. Jones*, 615 F.3d 448, 452 (6th Cir. 2010) (quoting *Greer v. Mitchell*, 264 F.3d 663, 676 (6th Cir. 2001)).

The Court therefore concludes that Petitioner is not entitled to habeas relief based on his ineffective assistance of appellate counsel claim.

IV. Conclusion & Certificate of Appealability

For the reasons set forth above, the Court concludes that Petitioner is not entitled to habeas relief pursuant to § 2254. Therefore, the Court is denying Petitioner's application for the writ of habeas corpus.

In order to appeal this decision, Petitioner must obtain a certificate of appealability. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). A certificate of

appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327.

Reasonable jurists could not debate the Court's assessment of Petitioner's claims, nor conclude that the issues deserve encouragement to proceed further. The Court therefore declines to issue a certificate of appealability.

Accordingly,

IT IS ORDERED that the Petition for a Writ of Habeas Corpus is **DENIED WITH PREJUDICE**.

IT IS FURTHER ORDERED that a Certificate of Appealability is **DENIED**.

s/ Linda V. Parker
LINDA V. PARKER
U.S. DISTRICT JUDGE

Dated: August 21, 2018

I hereby certify that a copy of the foregoing document was mailed to counsel of record and/or pro se parties on this date, August 21, 2018, by electronic and/or

U.S. First Class mail.

s/ R. Loury
Case Manager

EXHIBIT C

Order

Michigan Supreme Court
Lansing, Michigan

February 3, 2015

Robert P. Young, Jr.,
Chief Justice

Stephen J. Markman
Mary Beth Kelly
Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein,
Justices

149783

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 149783
COA: 319508
Livingston CC: 09-018082-FC

NOAH RICHARD LOVELL, III,
Defendant-Appellant.

_____/

On order of the Court, the application for leave to appeal the June 3, 2014 order of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

February 3, 2015

Clerk

s0126

EXHIBIT D

Court of Appeals, State of Michigan

ORDER

People of MI v Noah Ricard Lovell III

Docket No. 319508

LC No. 09-018082-FC

Michael J. Talbot
Presiding Judge

E. Thomas Fitzgerald

William C. Whitbeck
Judges

The Court orders that the motion to remand is DENIED.

The delayed application for leave to appeal is DENIED for failure to meet the burden of establishing entitlement to relief under MCR 6.508(D).

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

JUN - 3 2014
Date

Chief Clerk

EXHIBIT E

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

PEOPLE OF MICHIGAN,

v.

Case No. 09-18082-FC
Hon. Michael P. Hatty

NOAH LOVELL.
_____/

OPINION

At a session of the 44th Circuit Court,
held in the City of Howell, Livingston County,
on the 6 day of June, 2013.

THIS MATTER COMES before the Court on the Defendant's Motion for Relief from Judgment. After reviewing the Defendant's motion with all the files, records, and transcripts relating to the judgment under attack, the Court summarily DENIES the motion pursuant to MCR 6.504(B)(2) for the reasons below.

I. Relevant Facts & Procedural History.

This case arose out of an incident that occurred on October 29, 2008. On that date, the Defendant's co-defendant, Henry Riley, went to the backdoor of the victim, an 84 year old man, under the guise of a utility company worker. After gaining access to the victim's house, Riley punched and beat the victim until he was able to bind the victim in a chair. During the incident, the victim heard a second individual in his house and was able to view this individual, a white male, from the waist down. During the course of the robbery, the victim was repeatedly threatened with death by both Riley and the second individual as they both demanded the location of the victim's money. In the end, the victim was left with a broken jaw, broken nose, cracked eye sockets, three broken ribs, and blood on the brain.

The Defendant was connected to the crime and identified based on a large amount of circumstantial evidence. Specifically, his purchase of a hard hat, pry bar, and work gloves at a hardware store shortly before the crime as well as references about the use of the pry bar made while at the store. Additionally, the Defendant was shown to have rented the vehicle seen in the victim's driveway at the time the crimes occurred. Further, cellular telephone call logs showed that the Defendant's phone was in the vicinity of the victim's house and that numerous calls were made to Riley at the time of the crime. Moreover, the day after the incident, George Wilson heard Riley berate Lovell for the method he used to sort through the drawers at the house, and further, Mr. Wilson testified that he had heard Riley and Lovell talking about how they were going to sell coins (an item stolen from the victim's residence).

On November 5, 2009, following a jury trial the Defendant was found guilty of Armed Robbery, Unlawful Imprisonment, Torture, and Home Invasion in the First Degree. Subsequently, the Defendant was sentenced on December 11, 2009. After articulating substantial and compelling reasons for doing so this Court made an upward departure from the guidelines and sentenced the Defendant to 36 years and 8 months to 75 years on the charge of armed robbery, to 10 years to 15 years on the charge of unlawful imprisonment, to 36 years and 8 months to 75 years on the charge of torture, and to 13 years to 4 months to 20 years on the charge of home invasion in the first degree. The Defendant was given 37 days credit on counts 1 through 3, but was ordered to serve his sentences on counts 1, 2, and 3, consecutive to the sentence on count 4.

The Defendant filed a claim of appeal on April 14, 2010, raising a number of the same issues addressed in the current motion. On September 29, 2011, the Court of Appeals issued a per curiam opinion in the Defendant's appeal, affirming the verdict as well as the various

challenged rulings of this Court. Following this opinion, the Defendant filed an application for leave with the Michigan Supreme Court. This application was denied on April 23, 2012, and now, the Defendant petitions this Court pursuant to the rules/procedures set forth in MCR 6.500 *et seq*.

II. Law & Analysis.

To be entitled to relief from judgment under MCR 6.500 *et seq*., the Defendant has the burden of establishing entitlement to the relief requested and this Court may not grant relief to the defendant if the motion "alleges grounds for relief which were decided against the defendant in a prior appeal...unless the defendant establishes that a retroactive change in the law has undermined the prior decision." Furthermore, the Court may not grant relief if the motion "alleges grounds for relief...which could have been raised on appeal from the conviction and sentence...unless the defendant demonstrates good cause for failure to raise such grounds on appeal or in the prior motion, and actual prejudice from the alleged irregularities that support the claim for relief." MCR 6.508(D)(3). "Actual prejudice" means that "in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal" or "the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case." MCR 6.508(D)(3)(b)(i) and (iii). Furthermore, the Court may waive the "good cause" requirement if it concludes that there is a significant possibility that the defendant is innocent. MCR 6.508(D).

In this case, the Defendant asserts that nevertheless "good cause" exists in this circumstance, because his prior appellate counsel was ineffective in failing to investigate and

raise obviously meritorious issues. Good cause can be established by showing ineffective assistance of counsel, or by demonstrating that "some external factor prevented counsel from previously raising the issue." *People v. Reed,* 449 Mich. 375, 378 (1995). Here, however, as explained in the following sections, the Court finds no ineffective assistance of counsel, and accordingly, the Defendant has failed to meet the good cause requirement. The Court will also note that Defendant has also requested that the Court dispense with the "good cause" requirement based upon the significant possibility that he is innocent; however, because the court finds no factual or legal support for such a claim, it will decline to waive the requirement. Furthermore, regardless, all of the Defendant's legal arguments fail, and accordingly, he is unable to demonstrate "actual prejudice" as required.

A.

First and foremost, the Defendant argues that he is entitled to a new trial based on newly discovered evidence. This evidence comes in the form of a declaration from his co-defendant, Henry Riley, indicating that the Defendant was not involved in the crime as well as a declaration from George Wilson, which indicates that he gave false testimony. The Defendant argues that this "evidence" falls squarely within the "newly found evidence" test and requires a new trial. The Court, however, disagrees with the Defendant's analysis.

The test for newly discovered evidence requiring a new trial is as follows:

> "(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial"

People v. Cress, 468 Mich 678, 692 (2003). However, the proffered declarations do not fall within the requirements of this test, as the "evidence" cannot be said to be "newly discovered," and further, even to the extent that it could be considered "unknown," this could have been

corrected by reasonable diligence. Consequently, such evidence cannot serve as a basis for a new trial.

The Court of Appeals in *People v Terrell*, 289 Mich App 553 (2010) addressed a somewhat similar situation. In that case, the trial court and court of appeals were faced with a situation in which an acquitted co-defendant, whom had asserted his Fifth Amendment right at the joint trial, agreed to testify in support of a post trial motion that the Defendant had not committed the crime. The trial court while recognizing that the evidence was not "newly discovered," noted that it was evidence which was unavailable at trial due to the co-defendants assertion of his Fifth Amendment right. On the basis of unavailability, the trial court ordered a new trial. On appeal, the Court of Appeals was confronted with this question: Did the co-defendant's testimony satisfy the first element of the newly discovered evidence test when the co-defendant chose to invoke his Fifth Amendment right not to incriminate himself and therefore did not testify at trial, but later agreed to testify after being acquitted.

Following a survey of the federal circuits that had addressed this question, the *Terrell* Court held that a new trial is not warranted "on the basis of such evidence because it is not newly discovered, but merely newly available." *Id.* at 567. In so finding, the Court noted:

> We are aware of the fact that when a codefendant invokes the privilege against self-incrimination and refuses to testify, a defendant can be denied the benefit of any potentially exculpatory testimony the codefendant might have provided. This is a consequence of the Fifth Amendment privilege.

The Court also went on to note that there are procedural remedies in place for the Defendant to take advantage. Specifically, the Court noted that the Defendant could request severance from the trial court as well as limited immunity for the co-defendant.

The Court also went on to note several legal policy considerations that support the conclusion that a codefendant's posttrial testimony does not and should not constitute newly

discovered evidence. The first of these considerations was the lack of reliability and the possibility that it might encourage perjury. *Id.* at 565. Specifically, the Court noted that regardless of whether the codefendant's trial ends in an acquittal or conviction, he cannot be retried. The second of these legal considerations was the concern with legal "sandbagging." *Id.* at 566. In particular, the Court expressed concern that to hold otherwise would prejudice the fairness of the trial by withholding or failing to seek material, probative evidence and later attempting to collaterally attack their convictions. *Id.*

In the present case, the Court cannot find that Riley's potential testimony meets the newly discovered evidence test, and further, the Court finds that the legal policy considerations addressed by the *Terrell* court are present. According to the Defendant's arguments at trial and pretrial proceedings as well as his assertions contained in his motion for severance, the Defendant knew Riley and, based on the evidence, was assured that Riley was involved in the crime. Consequently, regardless of whether defense counsel had any conversation with Riley or about potential testimony Riley could proffer, if the Defendant was truly not involved with the crime, he was aware or should have been aware that Riley had the ability to offer the testimony contained in the current declaration. Accordingly, the potential testimony cannot fit the definition of "newly discovered." Furthermore, the Court will note, as discussed in *Terrell*, Riley's declaration is inherently untrustworthy, and moreover, in the face of all the other circumstantial evidence connecting the Defendant to the crime, it does not appear Riley's testimony would render a different result.

Additionally, the Defendant claims that the affidavit George Wilson in which Mr. Wilson asserts that he gave false testimony during the trial proceedings, is "newly discovered" evidence demanding a new trial. Not only is the credibility of Wilson's new affidavit questionable, but

also, as the Court of Appeals has already observed, there was ample evidence, which was completely independent of Wilson's testimony, to support the Defendant's conviction. That being the case, even if the Court was to consider Wilson's recantation to be "newly discovered," the deletion of Wilson's testimony would not render a different result probable on retrial.[1] Furthermore, the Court will note that traditionally recantation testimony, has been regarded as suspect and untrustworthy. As noted in *People v. Van Den Dreissche*, 233 Mich. 38, 46 (1925), "[t]here is no form of proof so unreliable as recanting testimony. In the popular mind it is often regarded as of great importance. Those experienced in the administration of the criminal law know well its untrustworthy character." In this case, it is no different.

B.

Next, the Defendant has argued that he was denied the effective assistance of counsel when his trial attorney failed to object to the prosecution's argument/comments regarding alternate defense theories. The Court finds this argument unavailing for two reasons. First and foremost, the Defendant has failed to provide citations to the record or citations to any legal authority (besides a general citation to *Strickland* and *Ginther*), and accordingly, this Court finds that the Defendant's argument has been waived. As the Defendant well knows, this Court is not required to discover and rationalize the basis for his claims and then search for legal authority to sustain or reject his position. *Mudge v. Macomb Co.*, 458 Mich 87, 105 (1998). Second, the Court believes that the Defendant is referring to the comments made by the prosecutor that were already reviewed by the Court of Appeals, and although, the Court of Appeals reviewed the comments under the unpreserved error standard, it did find that "the prosecutor's *comments on*

[1] The Court also questions the probative value of Wilson's trial testimony. Although Wilson's testimony connected the Defendant to the crime in terms of his reactions to Riley's statements, the Defendant's attorney thoroughly cross-examined Wilson on his ability to actually hear the conversation as well as his motivations, delay in coming forward, and pretrial research. Accordingly, the reliability of Wilson's testimony was thoroughly questioned and it is unclear how much weight the jury actually gave his testimony.

Lovell's alternate defense theories were appropriate." *People v. Lovell*, Docket No. 298164 (Mich App Sept. 29, 2011). Accordingly, because the comments were proper, the failure to object cannot serve as a basis for ineffective assistance of counsel.

C.

The Defendant has also argued that his trial counsel was ineffective in failing to renew his motion for severance when Riley offered to testify to exonerate him. However, similar to the above claim of ineffective assistance of counsel, the Court finds that the Defendant has failed to properly support this claim. Specifically, the Defendant asserts that "[b]efore the testimony at trial began…while the parties and their counsel were in court…Riley told Lovell he would testify and exonerate him at trial. Lovell's attorney heard Riley's statement." (Def.'s Mot. p. 10). Not only is this statement not reflected or alluded to anywhere in the official record, but also the Defendant has not even submitted the affidavit that this assertion is based on. Furthermore, after the close of the prosecution's case, both Riley and the Defendant were questioned by their attorneys in regards to their desire to testify, while Riley noted that he originally wanted to testify he affirmatively declined to testify based on his attorney's advice. At no time during this colloquy did Riley mention exonerating Lovell. That being the case, this Court finds that the Defendant's argument is waived on the basis of his failure to support it.

D.

Next, the Defendant argues that the admission of George Wilson's testimony and tape recording against Mr. Lovell was erroneous because the statements were inadmissible as they were not adoptive admissions and his pre-arrest silence was used as substantive evidence. In an October 20, 2009, evidentiary hearing the Defendant challenged the admissibility of George Wilson's statements on the basis that it didn't meet the requirements of MRE 801(d)(2)(E) and

violated the confrontation clause. This Court ruled that the statements were admissible to show guilty knowledge, and thus not hearsay, and further, that the demand/question regarding the coins was not an assertion. Furthermore, the Court ruled that even if the question/demand could be considered an assertion it was admissible under MRE 801(d)(2)(E) because it was made during the furtherance of the conspiracy. Additionally, as to the confrontation clause challenge, this Court ruled that the challenged statements were not testimonial in nature because they were not made under circumstances that would lead Riley to reasonably believe that the statements would be available for use at a later trial. Lastly, the Court will note that Defendant at the time of trial challenged the admission of the recorded conversation between Wilson and Detective Furlong as there was no showing of memory lapse to justify admission under MRE 803(5).[2]

Currently, while seemingly conceding that Wilson's recorded statement regarding Riley's questions about dividing the coins was properly admitted, the Defendant argues that Wilson's statements regarding Riley's admonishment of the Defendant with regard to the searching of the victim's drawers was impermissible hearsay. In particular, the Defendant argues that the admonishment was hearsay as to him, that it was not excluded from hearsay under the co-conspirator provision because it did nothing to further the conspiracy, that the admonishment could not be an adoptive admission, and that the Defendant's pre-arrest silence in the face of an accusation could not be used as substantive evidence of his guilt pursuant to the rule in *People v. Bigge,* 288 Mich 417 (1939).

[2] The recording of George Wilson's interview with Detective Furlong was admittedly hearsay, and that being the case, its presentation at trial required an applicable exception. The Court notes that despite the proper admission of the recording, pursuant to MRE 803(5), at the evidentiary hearing on October 20, 2009, it was likely erroneous to admit the recording at trial on November 3, 2009 without again establishing that Mr. Wilson lacked adequate memory of the conversation. However, that being said, the Defendant has not challenged this particular ruling, and regardless, the Court would still find this error is harmless, as it was not outcome determinative. Specifically, as noted by the Court of Appeals, even if Mr. Wilson's testimony had been severed in its entirety, there was still ample evidence to show Defendant's criminal responsibility beyond a reasonable doubt.

To even get into the Defendant's more specific arguments, the Court would first have to find that the admonishment regarding the drawers was hearsay. Here, the Court cannot make such a conclusion. At the October 20, 2009, evidentiary hearing the Court found that the admonishment was not offered for the truth of the matter asserted. This ruling is legally correct, and accordingly, the Defendant's subsequent arguments must fail.

Specifically, MRE 801(c) defines hearsay as "as statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Here, the utterances attributed to Riley by Wilson were as follows: "[m]an, that's stupid and time consumin' doin' that" and "[s]tart at the bottom when you're doin' that." In response to these utterances, Wilson asserted that the Defendant "laughs it off because he don't want to be called stupid." Reviewing the utterances attributed to Riley, it is clear that these statements were not offered for the truth of the matter that they assert. Specifically, these statements were not admitted for the purpose of showing that the Defendant's actions were "stupid" or "time consuming."" Rather, these statements were admitted as circumstantial proof of a fact in issue (i.e. knowledge, identity, etc.). Furthermore, Defendant's "laugh" or "oh" in response to Riley's utterance is not an assertion, and accordingly, cannot be categorized as hearsay. Therefore, the analysis behind the Defendant's challenge fails at the outset and the Court need not consider MRE 801(d)(2)(B) and *Bigge*.

E.

Next, the Defendant challenges the Court's upward departure from the sentencing guidelines as well as this Court's failure to provide a presentence report containing sentencing guidelines for home invasion first degree. First, to the extent that the Defendant is attempting to challenge this Court's upward departure on Counts 1 through 3, this argument is unavailing as

said departure was already previously affirmed by the Michigan Court of Appeals in the Defendant's direct appeal of right. Consequently, because the Defendant has not shown that a retroactive change of law has undermined the Court of Appeals' ruling, he is not entitled to relief under MCR 6.500 *et seq.*.

Second, as to the Defendant's challenge to the PSIR's failure to contain sentencing guidelines for count 4, home invasion in the first degree, the Court finds that any existing error is harmless. Specifically, the Defendant has argued that "[t]he court did not utilize the guidelines for home invasion first degree, because the prosecutor incorrectly advised the court that guidelines did not apply…since it carried the possibility of a consecutive sentence. The Court did not indicate it was departing from the guidelines…and did not offer a justification for departure." The Court will note that this argument was available to the Defendant during his direct appeal of right, and consequently, the Defendant necessarily has the burden of showing "good cause" and "actual prejudice" before he is entitled to any relief. As noted above, the Defendant has argued that "good cause" exists due to the ineffective assistance of his appellate counsel. However, evening assuming that the Defendant could overcome the presumption of effective counsel, *see People v. Solmonson,* 261 Mich.App. 657, 663 (2004), the Defendant cannot show actual prejudice. In the context of sentencing, "actual prejudice" means "the sentence is invalid." MCR 6.508(D)(3)(b)(i) and (iii).

MCL 771.14(2)(e)(i) requires that a presentence investigation report to include a sentence grid that contains the recommended minimum sentence range "[f]or each conviction for which a consecutive sentence is authorized or required." In this case, the charge of home invasion—first degree gave this Court the discretion to order that the sentence imposed in connection with count 4 be served consecutively with those imposed in Counts 1 through 3, as MCL 750.110a(8) states

"[t]he court *may order a term of imprisonment imposed for home invasion in the first degree to be served consecutively* to any term of imprisonment imposed for any other criminal offense arising from the same transaction." That being the case, the PSIR prepared in connection with the defendant's case should have included sentencing guidelines for count 4, which it did not. However, at sentencing, the Defendant did not object to the absence of sentencing guidelines for count 4; accordingly, as an unpreserved sentencing error it is reviewed for plain error affecting substantial rights. *People v. Callon,* 256 Mich.App 312, 332 (2003).

Here, it is clear that the error is plain as it is plain and obvious. However, although the PSIR contains plain error in that it fails to provide sentencing grid for Count 4, the error does not deprive the defendant of any substantial right, making vacation of the sentence or resentencing unnecessary. Specifically, regardless of the error, this Court would have given the Defendant the exact same sentence as pronounced on December 11, 2009.

Additionally, in connection with this, the Court recognizes that the Defendant is correct in pointing out that this Court did not specify that it was departing from the guidelines or specifically relate its substantial and compelling reasons when sentencing the Defendant on Count 4, home invasion—first degree. However, not only did this Court repeatedly rely on the nature of the home invasion in specifying its substantial and compelling reasons[3], this Court currently sits in a unique position. Specifically, although this Court currently sits as a reviewing Court, it had the opportunity to preside over both the Defendant's trial and sentencing. Accordingly, despite the fact that the Court did not specify that it was departing from the guidelines on Count 4 and did not reiterate or specifically adopt its substantial and compelling

[3] Specifically, this Court stated "I think the degree of danger to home invasion with the citizen being there—the victim being there was not accounted for in the guidelines and it's one of the reasons I'm going to depart" and "[t]hat this indeed was an unusually home invasion. The defendants did not attempt to avoid detection but instead they actually planned the confrontation,"

reasons in relation to Count 4, the Court can unequivocally state that it was the Court's express intention to adopt the prosecution's argument and ensure that the Defendant served a minimum of 50 years (A minimum of 36 years and 8 months on Counts 1 and 3 and a consecutive sentence of 13 years and 4 months on Count 4) in the Michigan Department of Corrections. Moreover, it was this Court's express intention that substantial and compelling reasons articulated on the record apply to Count 4 and that this Court impose a sentence falling in line with the "two thirds" rule of *People v Tanner*, 387 Mich 683, 688 (1972). Accordingly, because the same sentence would have been imposed regardless of any potential error, there is no need for resentencing. *See e.g. People v Mutchie*, 468 Mich 50, 51 (2003).

F.

Next, the Defendant argues that his conviction must be vacated based on the fact that there was insufficient evidence to sustain Mr. Lovell's convictions. However, this issue was already decided by the Court of Appeals in the Defendant's appeal of right, and accordingly, because the Defendant has failed to show that there has been a retroactive change of law undermining the Court of Appeals prior ruling, the Defendant is not entitled to relief under MCR 6.500 *et seq*.

G.

Lastly, the Court notes that the Defendant has argued that "good cause" existed under MCR 6.508(D) due to appellate counsel's failure to assert a number of the above arguments in the Defendant's initial appeal. However, because all the arguments currently made by the Defendant lack merit, the Defendant has not overcome the presumption of effective assistance of counsel in relation to appellate counsel's failure to pursue such arguments.

III. Conclusion.

For the reasons discussed above, the Defendants motion is summarily ***DENIED*** pursuant to MCR 6.504(B)(2).

IT IS SO ORDERED.

Hon. Michael P. Hatty

6-6-13

EXHIBIT F

Order

Michigan Supreme Court
Lansing, Michigan

April 23, 2012

Robert P. Young, Jr.,
Chief Justice

Michael F. Cavanagh
Marilyn Kelly
Stephen J. Markman
Diane M. Hathaway
Mary Beth Kelly
Brian K. Zahra,
Justices

144141

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 144141
COA: 298164
Livingston CC: 09-018082-FC

NOAH RICHARD LOVELL, III,
Defendant-Appellant.
_____/

On order of the Court, the application for leave to appeal the September 29, 2011 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 23, 2012

Clerk

d0416

EXHIBIT G

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 29, 2011
v HARRY T. RILEY, a/k/a HARRY T. RILEY, JR., Defendant-Appellant.	No. 295838 Livingston Circuit Court LC No. 09-018081-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v NOAH RICHARD LOVELL, III, Defendant-Appellant.	No. 298164 Livingston Circuit Court LC No. 09-018082-FC

Before: M. J. KELLY, P.J., and OWENS and BORRELLO, JJ.

PER CURIAM.

In Docket No. 295838, Harry T. Riley appeals as of right his convictions of armed robbery, MCL 750.529; unlawful imprisonment, MCL 750.349b; torture, MCL 750.85; and first-degree home invasion, MCL 750.110a(2). Riley was convicted following a jury trial and was sentenced as a habitual offender, fourth offense, MCL 769.12, to concurrent terms of 75 to 115 years in prison for his armed robbery, unlawful imprisonment, and torture convictions, to be served before a consecutive term of 13 years, 4 months to 20 years in prison for his first-degree home invasion conviction. For the reasons set forth in this opinion, we affirm the convictions and sentences of both defendants.

In the consolidated appeal, Docket No. 298164, Noah Richard Lovell, III appeals as of right his convictions of armed robbery, MCL 750.529; unlawful imprisonment, MCL 750.349b; torture, MCL 750.85; and first-degree home invasion, MCL 750.110a(2). Lovell was convicted following a jury trial and was sentenced to concurrent terms of 36 years, 8 months to 75 years in prison for his armed robbery and torture convictions, and 10 to 15 years in prison for his

unlawful imprisonment conviction, to be served before a consecutive term of 13 years, 4 months to 20 years in prison for his first-degree home invasion conviction. We affirm.

This case arises out of the armed robbery, unlawful imprisonment, torture, and home invasion of an 84-year-old victim. On the day of the incident, Riley went to the victim's back door wearing a work vest and a hard hat under the guise that he worked for a utility company and wanted to look at the victim's property. The victim walked his property with Riley for approximately 45 minutes. Riley was talking on his cellular telephone during a substantial portion of that time. Cellular telephone call logs showed that Lovell's telephone was in the vicinity of the victim's house and that numerous calls were made to Riley at the time of the crime. Riley's vehicle was rented by Lovell.

Riley followed the victim into his house; at that point, the victim noticed a pry bar on the table in his dinette. As the victim reached for the pry bar, Riley punched the victim in the face so hard that it knocked his dentures out of his mouth and knocked his glasses off of his face. Riley then grabbed the victim and pushed him down the stairs. At the bottom of the stairs, Riley continued to beat the victim, punching and kicking his face and body. Riley repeatedly demanded to know where the victim kept his money, and threatened to kill him. Riley also repeatedly poked the victim's arms, chest, and neck with a knife. The victim lost consciousness several times during the beating. Riley then sat the victim in a chair and bound his wrists and ankles with duct tape. Riley kicked the victim's face with such force that if left a shoe print. During the incident, the victim heard a second individual come halfway down the stairs; from his vantage point, the victim could only see the second individual, a white male, from the waist down. The second individual threatened to kill the victim if he did not reveal the location of the money. Meanwhile, Riley took the victim's coin collection. The victim had a broken jaw, broken nose, cracked eye sockets, three broken ribs, and blood on the brain. The victim stayed in the hospital for over a week, and then spent nearly two months in a rehabilitation center.

The next day, Lovell and Riley met with George Wilson who heard them discussing how they were going to sell coins. Wilson also heard Riley berate Lovell for his time-consuming method of ransacking drawers. A receipt from a hardware store indicating the purchase of a hard hat, pry bar, and work gloves was found in the victim's driveway, and Lovell was identified as the individual who purchased the goods.

Riley first argues that his trial counsel was ineffective for failing to move to suppress evidence pertaining to a photographic lineup and for failing to move for a separate trial. "A claim of ineffective assistance of counsel is a mixed question of law and fact." *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). "A trial court's findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo." *Id*. "A defendant that claims he has been denied the effective assistance of counsel must establish (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different." *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "A defendant must overcome a strong presumption that the

assistance of his counsel was sound trial strategy, and he must show that, but for counsel's error, the outcome of the trial would have been different." *Id.*

Three weeks after the incident, a state trooper conducted a photographic lineup with the victim at the rehabilitation center. The victim was unable to identify any of the individuals; subsequently, the trooper pointed to Riley's photograph and asked the victim if he recognized that individual. The victim did not. Six weeks after the incident, a detective conducted a corporeal lineup with the victim at the jail, and the victim identified Riley, primarily by voice. The victim also identified Riley at trial.

At a *Ginther*[1] hearing, Riley's trial counsel testified that he made a strategic decision not to file a motion to suppress evidence pertaining to the photographic lineup because he wanted to introduce evidence of the trooper's misconduct at the photographic lineup. The trial court found that defense counsel was not ineffective for failing to file a motion to suppress, and that, in any event, it would have denied the motion because an alternative basis existed for the subsequent identifications.

"A photographic 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). "If the trial court finds that the pretrial procedure was impermissibly suggestive, testimony concerning that identification is inadmissible at trial." *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). "However, in-court identification by the same witness may be allowed if an independent basis for in-court identification can be established that is untainted by the suggestive pretrial procedure." *Id.*

In this case, the procedure followed by the trooper at the photographic lineup was clearly impermissibly suggestive. See *People v Anderson*, 389 Mich 155, 178; 205 NW2d 461 (1973), overruled in part on other grounds *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004) (when "the witness is shown . . . a group in which one person is singled out in some way, he is tempted to presume that he is the person"). However, no identification occurred at the photographic lineup. The appropriate inquiry is whether an independent basis existed for the victim's subsequent identifications of Riley. *Gray*, 457 Mich at 114-115. "[T]he independent basis inquiry is a factual one and . . . the validity of a victim's in-court identification must be viewed in light of the totality of the circumstances." *People v Davis*, 241 Mich App 697, 702; 617 NW2d 381 (2000). In determining if an independent basis exists for the admission of a subsequent identification, a court should weigh the following non-exhaustive list of factors: "(1) prior relationship with or knowledge of the defendant; (2) opportunity to observe the offense, including length of time, lighting, and proximity to the criminal act; (3) length of time between the offense and the disputed identification; (4) accuracy of the description compared to the defendant's actual appearance; (5) previous proper identification or failure to identify the defendant; (6) any prelineup identification lineup of another person as the perpetrator; (7) the

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

nature of the offense and the victim's age, intelligence, and psychological state; (8) any idiosyncratic or special features of the defendant." *Id*. at 702-703.

Here, the victim, who was 84 years old at the time of trial, walked his property with his assailant for 45 minutes in the afternoon before he was beaten at great length by that individual. The victim did not identify Riley in a photographic lineup three weeks after the incident, even after the trooper impermissibly suggested that Riley was the assailant. However, the victim positively identified Riley in a corporeal lineup at the jail six weeks after the incident, primarily by voice recognition. The record reveals that the victim was extremely concerned about misidentification, and only made a positive identification when he was absolutely certain, after hearing the individuals in the lineup ask "where's the money?[,]" that Riley was his assailant. On these facts, the trial court did not clearly err in concluding that an independent basis existed for the victim's subsequent identifications of Riley. Accordingly, even if defense counsel had moved to suppress evidence pertaining to the photographic lineup and the trial court had granted the motion, evidence of the victim's subsequent positive identifications of Riley was admissible at trial because an independent basis existed for the identifications. "[T]rial counsel cannot be faulted for failing to raise . . . a motion that would have been futile." *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Any suppression of the photographic lineup, which did not result in an identification, would have made no difference at trial. Additionally, a review of the record indicates that failing to move to suppress the pretrial identification procedure was a matter of trial strategy, "an area in which this Court will not substitute its judgment for that of counsel." *Id*. at 182-183. Defense counsel repeatedly reiterated that he made a strategic decision not to move to suppress evidence concerning the pretrial photographic lineup because he wanted to introduce evidence of the impermissibly suggestive procedure employed by the trooper to try to discredit the remainder of the case. Had defense counsel moved to suppress evidence of the pretrial photographic lineup, and had the motion been granted, he would have been unable to introduce evidence to discredit the police, but the subsequent positive identifications of his client would have still been admitted into evidence. Defendant has not met his burden of demonstrating ineffective assistance of counsel. *Sabin (On Second Remand)*, 242 Mich App at 659.

Riley next argues ineffective assistance of counsel related to the failure to move to sever his trial from Lovell's trial. Riley's trial counsel confirmed at the *Ginther* hearing that it was his professional judgment, after reviewing all of the facts and circumstances in the case, that there was not a basis for either a separate trial or for separate juries, and that there was no tactical advantage to trying to obtain severance. The trial court concluded that defense counsel was not ineffective for failing to move for a separate trial because the defenses of the codefendants were not irreconcilable. "Codefendants do not have an absolute right to separate trials." *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992). "In fact, there is a strong presumption in favor of joint trials." *Id*. MCR 6.121(C) provides that "[o]n a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendants." "Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994). "The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact

occurred at trial, will preclude reversal of a joinder decision." *Id*. at 346-347. "Inconsistency of defenses is not enough to mandate severance; rather, the defenses must be 'mutually exclusive' or 'irreconcilable.'" *Id*. at 349. "'[I]ncidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice.'" *Id*., quoting *United States v Yefsky*, 994 F2d 885, 896 (CA 1, 1993). "The 'tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other.'" *Id*., quoting *Yefsky*, 994 F2d at 897.

Here, Riley's defense theory was misidentification coupled with police misconduct. Lovell's defense theory was that he was not present, or that if he was present, he was merely present, and not an aider and abettor. The defenses were neither inconsistent nor mutually exclusive or irreconcilable; the jury would not have to believe one codefendant at the expense of the other. *Id*. at 349. If the jury found that Riley was misidentified, it could also find that Lovell was not present, or that if he was present, he was not an aider and abettor. Moreover, this Court has held that where a trial court denied a motion for a separate trial filed by a codefendant, as occurred here, defense counsel was not ineffective for failing to move for a separate trial because it would have been unsuccessful and therefore defense counsel "was not obligated to pursue the matter." *People v Daniel*, 207 Mich App 47, 59; 523 NW2d 830 (1994). Riley has not established that his trial counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *Sabin (On Second Remand)*, 242 Mich App at 659. Further, he has not demonstrated that a reasonable probability exists that, but for defense counsel's strategic decisions not to move for a separate trial, the outcome of the proceedings would have been different. *Id*.

Riley next argues that the trial court erred in admitting Wilson's testimony that the conversation he heard between the codefendants led him to conclude that they were guilty of the charged offenses. However, the challenged testimony was not admitted at trial, but rather, at an evidentiary hearing; therefore, no error occurred.

Riley next argues that the trial court erred in compelling Wilson to testify regarding his delivery of marijuana. "[W]here . . . immunity is sufficient, the witness is required to answer even though such answers are self-incriminating." *In re Watson*, 293 Mich 263, 274; 291 NW 652 (1940). Riley does not dispute this. Rather, he argues the testimony was irrelevant and unfairly prejudicial. We review unpreserved evidentiary errors for plain error affecting substantial rights. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003). "Relevant evidence is evidence 'having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.'" *People v Fletcher*, 260 Mich App 531, 552-553; 679 NW2d 127 (2004), quoting MRE 401. "Generally, all relevant evidence is admissible, unless otherwise provided by law, and evidence that is not relevant is not admissible." *Id*. at 553; MRE 402. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." *Id*.; MRE 403.

Here, defense counsel for Lovell sought to impugn Wilson's credibility by demonstrating that his motivation for contacting and cooperating with the police was to avoid prosecution for delivery of marijuana. The evidence of Wilson's involvement with drugs was thus relevant to his credibility. And "[t]he credibility of a witness is always an appropriate subject for the jury's consideration." *People v Coleman*, 210 Mich App 1, 8; 532 NW2d 885 (1995). Further, the

probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Discerning Wilson's motivation for contacting and cooperating with the police was highly probative of the veracity of the information he provided to the authorities, as well as his overall credibility. That Wilson happened to deliver marijuana to Riley was a peripheral yet requisite detail necessary to discredit Wilson by attacking his motivation for contacting and cooperating with the police. While the testimony was prejudicial, it was downplayed: once defense counsel for Lovell established that Wilson delivered marijuana to Riley as a point from which to start his line of questioning, he thereafter used the universal term "somebody" in reference to the recipient of the marijuana. On the record, the probative value of evidence of Wilson's involvement with marijuana (and related delivery of marijuana to Riley) was not substantially outweighed by the danger of unfair prejudice. Riley has failed to demonstrate plain error affecting his substantial rights.

Riley next argues that his trial counsel was ineffective for failing to object when the trial court compelled Wilson to testify regarding his delivery of marijuana to Riley. Our review is limited to errors apparent on the record in this regard. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). "To prove that counsel has been ineffective, defendant must show that his counsel's performance was deficient, and that there is a reasonable probability that but for that deficient performance, the result of the trial would have been different." *Id*. at 57-58. The trial court did not err in compelling Wilson to testify regarding his delivery of marijuana to Riley, "and any objections by defense counsel on those grounds would have been meritless." *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). "[C]ounsel is not ineffective for failing to raise futile objections[.]" *Id*. Moreover, "[d]efense counsel is given wide discretion in matters of trial strategy and there is accordingly a strong presumption of effective assistance of counsel." *People v Unger*, 278 Mich App 210, 253; 749 NW2d 272 (2008). "Declining to raise objections can often be consistent with sound trial strategy." *Id*. Here, defense counsel for Riley may have decided that raising an objection to Wilson's response would emphasize Riley's receipt of marijuana. Further, both codefendants greatly benefited from the elaborate attack on Wilson's credibility by focusing on his motivation for contacting and cooperating with the police. Riley has failed to overcome the strong presumption that counsel's failure to object was a matter of trial strategy, and has not demonstrated that, but for counsel's failure to object, the result of the proceeding would have been different. *Sabin (On Second Remand)*, 242 Mich App at 659.

Lastly, Riley argues that the prosecutor's comments highlighting the victim's and Wilson's military service constituted improper vouching and improper civic duty arguments. Where "there was no contemporaneous objection or request for a curative instruction in regard to any alleged error [of prosecutorial misconduct] . . . review is limited to ascertaining whether plain error affected [the] defendant's substantial rights." *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). While "[a] prosecutor may not vouch for the credibility of his witnesses by suggesting that he has some special knowledge of the witnesses' truthfulness . . . 'the prosecutor may argue from the facts that a witness should be believed.'" *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009), quoting *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005). Further, "a prosecutor may not urge the jurors to convict the defendant as part of their civic duty." *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003).

The prosecutor's comments during opening statement regarding the victim's military service were made in the context of providing personal background information about the victim. "The purpose of an opening statement is to tell the jury what the advocate proposes to show." *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976), aff'd *People v Tilley*, 405 Mich 38; 273 NW2d 471 (1979). When the victim was called to the stand, he testified regarding his military service. The prosecutor's comments during closing argument regarding Wilson's military service were made in the context of explaining Wilson's motivation for contacting the police—his military solidarity with the victim. The prosecutor was not suggesting that he had special knowledge of the victim's and Wilson's truthfulness, nor was he urging the jurors to convict Riley as part of their civic duty. *Seals*, 285 Mich App at 22; *Abraham*, 256 Mich App at 273. Indeed, the prosecutor was not even arguing, as is permissible, that the victim and Wilson should be believed. *Seals*, 285 Mich App at 22. Rather, the prosecutor's comments concerning the victim's life history and Wilson's motivation for contacting the police were benign and did not unfairly place issues into the trial that were more comprehensive than Riley's guilt or innocence, and did not "unfairly encourage[] jurors not to make reasoned judgments." *Abraham*, 256 Mich App at 273. Riley has failed to demonstrate plain error. Moreover, even if the challenged remarks were determined to constitute plain error, the error did not affect Riley's substantial rights. The jury was instructed that the arguments of the attorneys were not evidence, and jurors are presumed to follow their instructions. *People v Parker*, 288 Mich App 500, 512; 795 NW2d 596 (2010).

Riley also argues that his trial counsel was ineffective for failing to object to the allegedly improper comments. As noted above, the prosecutor's comments regarding the victim's and Wilson's military service were not improper, "and any objections by defense counsel on those grounds would have been meritless." *Cox*, 268 Mich App at 453. "Because counsel is not ineffective for failing to raise futile objections, defendant is not entitled to relief on this unpreserved issue." *Id*.

Lovell first argues on appeal that insufficient evidence existed to sustain his convictions. We review "de novo a challenge on appeal to the sufficiency of the evidence." *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). In reviewing sufficiency of the evidence claims, we "examine the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *Id*. at 196. We "will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of the witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). "The prosecutor is not required to present direct evidence linking the defendant to the crime." *People v Wolford*, 189 Mich App 478, 480; 473 NW2d 767 (1991). "Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime." *Kanaan*, 278 Mich App at 619. "All conflicts in the evidence must be resolved in favor of the prosecution." *Id.*

Lovell argues that there was no evidence that he was in the victim's house during the crimes, or was Riley's accomplice. Thus, he is challenging the evidence of his identity as a perpetrator. Lovell also argues that there was insufficient evidence that the second person in the house intended the crimes of armed robbery, unlawful imprisonment, and torture.

In viewing the evidence in the light most favorable to the prosecution, we find that the prosecutor established that Lovell purchased a hard hat, pry bar, and work gloves at a hardware store the day before the crimes. In reference to the pry bar, the hardware store manager heard Lovell's companion inquire: "are you going to buy that tool to beat that guy's ass[?]" Lovell was identified as the individual who rented the vehicle seen in the victim's driveway at the time the crimes occurred. Cellular telephone call logs showed that Lovell's telephone was in the vicinity of the victim's house and that numerous calls were made to Riley at the time of the crime. While the victim was bound (false imprisonment), Riley severely beat him (torture) and poked him with a knife while stealing his coin collection (armed robbery). While this was occurring, the other individual in the house threatened to kill the victim if he did not reveal the location of his money. When Lovell and Riley met Wilson the next day, Wilson heard them talking about how they were going to sell coins, and heard Riley berate Lovell for the method he used to ransack drawers.[2]

"Identity may be shown by either direct testimony or circumstantial evidence." *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967). Here, ample circumstantial evidence exists, as set forth above, identifying Lovell as one of the perpetrators of the charged offenses. Additionally, "a person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense." *People v Izarraras-Placante*, 246 Mich App 490, 495; 633 NW2d 18 (2001); MCL 767.39. "To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime[,] had knowledge that the principal intended its commission at the time he gave aid and encouragement[,]" *id*. at 495-496 (quotation omitted), or "that the charged offense was a natural and probable consequence of the commission of the intended offense." *People v Robinson*, 475 Mich 1, 15; 715 NW2d 44 (2006). "The aiding and abetting statute encompasses all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime." *Izarraras-Placante*, 246 Mich App at 496. Further, "[a] defendant is criminally liable for the offenses the defendant specifically intends to aid or abet, or has knowledge of, as well as those crimes that are the natural and probable consequences of the offense he intends to aid or abet." *Robinson*, 475 Mich at 15. Here, the evidence showed that Lovell performed acts and gave encouragement that assisted the commission of the crimes. *Izarraras-Placante*, 246 Mich App at 495-496. Further, circumstantial evidence exists that Lovell intended the charged offenses of armed robbery, unlawful imprisonment, and torture. Viewing the evidence in a light most favorable to the

[2] Lovell argues that Wilson recanted this testimony, pointing to a "Declaration of George Wilson[,]" attached as an appendix to Lovell's brief on appeal. However, MCR 7.215(A)(1) provides that "[i]n an appeal from a lower court, the record [on appeal] consists of the original papers filed in that court or a certified copy, the transcript of any testimony or other proceedings in the case appealed, and the exhibits introduced." The Wilson declaration is "not a part of the lower court record and, therefore, cannot be considered" by this Court. *Seals*, 285 Mich App at 21.

prosecution, resolving all evidentiary conflicts in its favor, a rational trier of fact could have found beyond a reasonable doubt that Lovell was guilty of the charged offenses.

Lovell next argues he is entitled to a new trial on the basis of newly discovered evidence in the form of a declaration by Wilson recanting his trial testimony. However, we will not consider the allegedly newly discovered evidence because it is not a part of the lower court record and not properly before this Court. *Seals*, 285 Mich App at 21; MCR 7.215(A)(1). Even if we were to sever Wilson's testimony from the record, we would find that legally sufficient evidence existed for a reasonable jury to have found Lovell guilty on all charges beyond a reasonable doubt.

Lovell next argues that the trial court erred in denying his motion for a separate trial. We review unpreserved claims of error for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). As previously set forth, MCR 6.121(C) provides that "[o]n a defendant's motion, the court must sever the trial of defendants on related offense on a showing that severance is necessary to avoid prejudice to substantial rights of the defendants." A defendant must show in the trial court that his rights will be prejudiced if severance is not granted. If a defendant does not make that showing in the trial court or show on appeal that such prejudice actually occurred at trial, he is not entitled to relief. *Hana*, 447 Mich at 346-347. "[A] defendant might suffer prejudice if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial." *Id*. at 346 n 7.

Here, Lovell has failed to demonstrate that his substantial rights were prejudiced at trial due to the trial court's denial of his motion for a separate trial. On appeal, Lovell argues that severance was necessary so that Riley could testify to *exculpate* him. However, Lovell argued in the trial court, and provided a sworn affidavit averring, that severance was necessary because Riley could testify to *inculpate* him. Because Riley did not testify at all, there is no significant indication on appeal that the requisite prejudice in fact occurred at trial. Accordingly, Lovell has failed to demonstrate plain error affecting his substantial rights and reversal of the joinder decision is precluded.

Lovell next argues that the prosecutor engaged in misconduct when he made the following comments during rebuttal closing argument:

> [W]hat did [defense counsel for Lovell] tell us about what your client did[?] You sat and attacked everybody in this case and you didn't once tell us what did your client do. What's he responsible for[?]

We review preserved claims of prosecutorial misconduct de novo. *Abraham*, 256 Mich App at 272. "A prosecutor may not imply in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof." *People v Fyda*, 288 Mich App 446, 463-464; 793 NW2d 712 (2010). Here, the prosecutor critiqued defense counsel for Lovell's strategy during closing argument of attacking the prosecutor, police, and prosecution witnesses instead of discussing the actions taken by Lovell or lack thereof. This implied that Lovell had to prove something, and arguably, it impermissibly shifted the burden of proof. However, "an otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's

argument." *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Here, the objectionable narrative was made in response to the argument of Lovell's defense counsel, and does not rise to the level of an error requiring reversal. *Id*. Further, the jury was instructed that the arguments of the attorneys were not evidence, and jurors are presumed to follow their instructions. *Parker*, 288 Mich App at 512. While we find the remark improper, Lovell was not entitled to relief based on the challenged comment. *Kemmebrew*, 220 Mich App at 608.

Lovell also argues that the prosecutor's comments regarding his strategy of alternate defenses were improper. Where "there was no contemporaneous objection or request for a curative instruction in regard to any alleged error [of prosecutorial misconduct] . . . review is limited to ascertaining whether plain error affected [the] defendant's substantial rights." *Brown*, 279 Mich App at 134. "[W]here a defendant . . . advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory" is appropriate. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). "[O]nce the defendant advances . . . a theory, argument on the inferences created" is permissible. *Id*. Here, the prosecutor's comments on Lovell's alternate defense theories were appropriate, and Lovell has failed to establish plain error affecting his substantial rights.

Lovell next argues that the trial court erred in its instructions concerning circumstantial evidence and aiding and abetting. However, Lovell waived any error concerning those instructions by affirmatively agreeing to them. *People v Harper*, 479 Mich 599, 642-643 n 72; 739 NW2d 523 (2007). Additionally, no mistakes are apparent on the record concerning the jury instruction for circumstantial evidence; therefore, Lovell is not entitled to relief on this unpreserved claim of ineffective assistance of counsel.

Lastly, Lovell takes issue with the trial court's imposition of an upward departure from the minimum sentencing guidelines range. "[C]ourts review the reasons given for a departure for clear error. The conclusion that a reason is objective and verifiable is reviewed as a matter of law. Whether the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion, as is the amount of the departure. A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes." *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008).

> Under MCL 769.34(3), a minimum sentence that departs from the sentencing guidelines recommendation requires a substantial and compelling reason articulated on the record. In interpreting this statutory requirement, the [Michigan Supreme] Court has concluded that the reasons relied on must be objective and verifiable. They must be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention. Substantial and compelling reasons for departure exist only in exceptional cases. "In determining whether a sufficient basis exists to justify a departure, the principle of proportionality . . . defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed." For a departure to be justified, the minimum sentence imposed must be proportionate to the defendant's conduct and prior criminal history. [*Id*. at 299-300, quoting *People v Babcock*, 469 Mich 247, 262; 666 NW2d 231 (2003).]

The trial court sentenced Lovell to 36 years, 8 months to 75 years in prison for his armed robbery and torture convictions, an upward departure of 12 years, 11 months. "Substantial and compelling reasons for departure exist only in exceptional cases." *Smith*, 482 Mich at 299. This was such a case. Here, the trial court's stated substantial and compelling reasons for departure were the unusual nature of the home invasion in that it was planned to occur while the victim was present; the steps Lovell took to prevent the victim from calling for help, leaving him to die; and Lovell's pattern of using his paving business to prey on elderly homeowners. Those reasons were not clearly erroneous. *Id*. at 300. Further, those reasons were objective and verifiable, of considerable worth in determining the length of the sentence, and keenly or irresistibly grabbed the court's attention. *Id*. at 299. The trial court did not abuse its discretion in determining that the reasons given were substantial and compelling enough to justify the departure. *Id*. at 300. The minimum sentence imposed was proportionate to Lovell's conduct and prior criminal history, and constituted an appropriate exercise of discretion. *Id*. at 300. The sentences imposed fall within the range of principled outcomes; therefore, Lovell is not entitled to relief on this issue.

Affirmed.

/s/ Michael J. Kelly
/s/ Donald S. Owens
/s/ Stephen L. Borrello

EXHIBIT H

STATE OF MICHIGAN

IN THE 44TH CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v

No. 09-019-8081 and
09-018082-FC
HONORABLE MICHAEL HATTY

HARRY T. RILEY AND
NOAH R. LOVELL,

Defendants.
_____/

AFFIDAVIT OF HARRY T. RILEY

I, Harry T. Riley, having been duly sworn, do solemnly attest as follows:

1. I was a co-defendant, with Noah R. Lovell, in the above-captioned case.

2. I can state, of my own personal knowledge, that Noah Lovell was not involved in the crimes committed against John Pickett on October 29, 2008.

3. I can state, of my own personal knowledge, that Noah Lovell was not involved in the planning of the crimes committed against John Pickett, nor did he assist or help in any way in the commission of those crimes.

Further deponent sayeth not.

Harry T Riley
HARRY T. RILEY

Subscribed and sworn to before me
this 3rd day of January, 2013

Phyllis S. Brown

Phyllis S. Brown
Notary Public, Muskegon County, MI
My Commission Expires 6/22/2017

EXHIBIT I

DECLARATION OF GEORGE WILSON

Pursuant to 28 U.S.C. sec. 1746, I, HERMAN WESTON, give this statement based on personal knowledge and declare under penalty of perjury and the laws of the United States that the following is true and correct. Under oath, I so state the following:

1. I am GEORGE WILSON, who testified in the matter of PEOPLE OF THE STATE OF MICHIGAN VS NOAH RICHARD LOVELL, III, 44th Circuit Court, Livingston County, Case No. 09-018081 - FC, The Honorable Judge Michael Hatty, Presiding, in the Evidentiary Hearing, the Preliminary Hearing, at trial and in the statements given to police, the District Attorney and investigators.

2. The testimony and statements I gave at all stages of the proceedings regarding the participation of Noah Richard Lovell, III, in the crime charged was false, and obtained through coercion by the police and other authorities.

3. Specifically, I was never told by anyone that Noah Richard Lovell, III, participated in the crime charged or was even at the scene of the crime charged.

4. Specifically, I have no proof, did not witness and did not hear any evidence that Noah Richard Lovell, III, participated in or had anything to do with the crime charged.

5. I specifically recant the testimony given at trial regarding Noah Richard Lovell, III, and deeply regret the harm that I have caused him through the coerced and forced testimony.

The statements contained in this declaration are true and correct to the best of my own personal knowledge.

Executed this 30 Th day of June, 2010.

George Wilson
Address:

Witness Investigator
Kasim Abdur-Rahman
6/30/10 — 8:15 p.m. EST

EXHIBIT J

EXHIBIT K

EXHIBIT L