

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LANCE DELOREAN HARDON,

Defendant-Appellant.

UNPUBLISHED

October 13, 2026

10:56 AM

No. 367759

St. Clair Circuit Court

LC No. 22-001169-FH

Before: GADOLA, C.J., and RIORDAN and LETICA, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial convictions of intentional discharge of a firearm from a motor vehicle, MCL 750.234a, intentional discharge of a firearm at a dwelling, MCL 750.234b, being a felon in possession of a firearm, MCL 750.224f(2) (felon-in-possession of firearm), being a felon in possession of ammunition, MCL 750.224f(4) (felon-in-possession of ammunition), and three counts of possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b(1). He was sentenced as a fourth-offense habitual offender, MCL 769.12, to 8 to 40 years’ imprisonment for the intentional discharge of a firearm from a motor vehicle conviction, 8 to 40 years’ imprisonment for the intentional discharge of a firearm at a dwelling conviction, 6 to 40 years’ imprisonment for the two felon-in-possession convictions, and five years’ imprisonment for each felony-firearm conviction. Defendant was ordered to serve his sentences consecutively to his sentence arising from a parole violation. Further, the sentences for the discharge of a firearm convictions and the felon-in-possession of a firearm were ordered to run concurrently with each other, but consecutive to their corresponding five-year terms for the felony-firearm convictions. We affirm.

I. FACTUAL AND PROCEDURAL HISTORY

Defendant’s convictions arise out of events that occurred on March 7, 2022, in Port Huron, Michigan. At approximately 4:45 a.m., the victim was asleep when he was awakened by an extraordinarily loud noise that he dismissed as possibly a nearby breaker box explosion. Later that morning, the victim discovered several bullet holes in the walls of his home on 9th Street. There were no eyewitnesses to the shooting and a firearm was never found.

The victim testified that when he moved into the home, he was unaware of drug problems in the area. He later discovered that the home next door was a drug house. The victim described the home as a restaurant drive-thru and how he frequently chased drug dealers off his front lawn. In fact, the victim had been assaulted a couple of times. The victim could not say whether he had ever seen defendant before the shooting. The victim's neighbor confirmed that there were altercations involving the victim and that the police were called.

Nearby security cameras at a home, a church, a smoke shop, and a gas station captured events relevant to the shooting. Officers determined the vehicle involved in the shooting was a silver four-door sedan, and the driver was recorded entering the gas station to use the ATM. Facial recognition software led the police to defendant, and defendant's neck tattoo was captured in the gas station video. Locating the vehicle and identifying defendant as the driver took months. Although the car was registered to another person, it contained three pieces of mail addressed to defendant. And, inside the glove compartment, the police located a nine-millimeter bullet; however, it was from a different manufacturer than the ones located at the shooting site.

At the shooting site, the police found three nine-millimeter bullet casings, even though four shots are heard in the video. The police also recovered three bullet slugs.

At trial, defendant testified on his own behalf that he was on parole and was a drug dealer. He initially denied driving the Toyota Avalon depicted in the gas station video. He later admitted the vehicle belonged to a relative and he had driven it from Port Huron to Detroit to report in while on parole. Defendant denied knowing the victim and testified that there was no contact between them. Defendant knew the victim's neighbor but denied having "an axe to grind" with the victim due to defendant's relationship with the victim's neighbor. Specifically, defendant visited the victim's neighbor's home to buy and sell "all kinds of drugs[.]" Defendant, however, testified that he left the gas station, went home, and was innocent of the shooting at the victim's home.

After the jury convicted defendant of the charged offenses, defendant appealed to this Court. While this appeal was pending, the trial court considered and denied defendant's motion for new trial.

II. ANALYSIS OF THE ISSUES

A. SEARCH WARRANT

Defendant contends the trial court erred by admitting into evidence the result of the forensic search of his cell phone and his T-Mobile cell phone data. He argues the affidavits supporting the warrants were insufficient and thus did not demonstrate probable cause to search the cell phone data. Defendant also contends trial counsel was ineffective because he failed to move to suppress the evidence obtained from the forensic examination of the cell phone and the T-Mobile data. We conclude that any error in the introduction of the cell phone data was harmless.

To preserve a claim that evidence should have been suppressed, a defendant must move to suppress the evidence in the trial court and specify the same ground for objection that he asserts on appeal. *People v Clark*, 330 Mich App 392, 414; 948 NW2d 604 (2019); *People v Unger*, 278 Mich App 210, 243; 749 NW2d 272 (2008). Although defendant raised the issue regarding the admissibility of the cell phone records in the lower court, he did not challenge the evidence or the

validity of the search warrant on the same grounds that he asserts on appeal. Accordingly, defendant's challenge to the validity of search warrants is unpreserved. This Court reviews unpreserved constitutional claims for plain error affecting a defendant's substantial rights. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). In general, an error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings. *Id.* Once these requirements are satisfied, "an appellate court must exercise its discretion in deciding whether to reverse." *Id.* Reversal is not warranted if the plain, forfeited error does not seriously affect the fairness, integrity, or public reputation of judicial proceedings, or result in the conviction of an actually innocent defendant. *Id.* at 763-764.

A claim of ineffective assistance of counsel is preserved by moving for a new trial or *Ginther*¹ hearing in the lower court. See *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). Similarly, this issue can be preserved by filing in this Court a motion to remand for a *Ginther* hearing. *People v Abcumby-Blair*, 335 Mich App 210, 227; 966 NW2d 437 (2020). Defendant pursued both measures, accordingly this issue is preserved. Because the trial court denied defendant's motion for new trial or evidentiary hearing, and this Court denied defendant's motion to remand for a *Ginther* hearing, this Court's review of defendant's ineffective assistance of counsel claim is limited to errors apparent on the record. *Id.* at 227.

The issue of ineffective assistance of counsel is a mixed question of fact and law. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012). Effective assistance of counsel is presumed, and a party claiming ineffective assistance bears a heavy burden to prove otherwise. *People v Putman*, 309 Mich App 240, 248; 870 NW2d 593 (2015). "To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient, and that counsel's deficient performance prejudiced the defense." *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003), citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See also *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "In order to demonstrate that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *Riley*, 468 Mich at 140. Establishing prejudice necessarily requires demonstrating a reasonable probability that the result of the proceeding would have been different but for counsel's error. *People v Nix*, 301 Mich App 195, 207; 836 NW2d 224 (2013). Further, the party claiming ineffective assistance bears the burden of establishing the factual predicate for the claim. *Putman*, 309 Mich App at 248.

Both the United States and Michigan Constitutions guarantee the right of a person to be free from unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. The Fourth Amendment provides that warrants shall not be issued except "upon probable cause supported by [o]ath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." US Const, Am IV. Similarly, the Michigan Constitution provides

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

that “[n]o warrant to search any place or to seize any person or things or to access electronic data or electronic communications shall issue without describing them, nor without probable cause, supported by oath or affirmation.” Const 1963, art 1, § 11. Unless there are compelling reasons to do otherwise, our Supreme Court construes the Michigan Constitution “to provide the same protection as that secured by the Fourth Amendment[.]” *People v Collins*, 438 Mich 8, 25; 475 NW2d 684 (1991).

“The purpose of the particularity requirement in the description of [the] items” is twofold: (1) “to provide reasonable guidance to the executing officers” and (2) “to prevent their exercise of undirected discretion in determining what is subject to seizure.” *People v Brcic*, 342 Mich App 271, 278; 994 NW2d 812 (2022) (quotation marks and citation omitted). This Court has adopted a two-part test when considering a challenge to the particularity of a search warrant. *People v Hampton*, 237 Mich App 143, 151; 603 NW2d 270 (1999). In *Hampton*, a case addressing the search of a premises, this Court stated:

Thus, the test for determining the sufficiency of the description of the place to be searched is (1) whether the place to be searched is described with sufficient particularity to enable the executing officer to locate and identify the premises with reasonable effort, and (2) whether there is any reasonable probability that another premises might be mistakenly searched. The requirement is designed to avoid the risk of the wrong property being searched or seized. [*Id.*]

Whether a search warrant satisfies the particularity requirement depends on the circumstances and the types of items involved. *Unger*, 278 Mich App at 245. Moreover, “a search warrant and the underlying affidavit are to be read in a common-sense and realistic manner.” *People v Russo*, 439 Mich 585, 604; 487 NW2d 698 (1992).

Defendant challenges two search warrants in this case. Applying the foregoing principles, we conclude that the search warrant regarding the Samsung cell phone lacked the necessary particularity to withstand constitutional scrutiny. By contrast, the warrant addressing the T-Mobile cell phone data is sufficiently particular.

The search warrant issued on February 8, 2023, seeking to search defendant’s Samsung cell phone, was supported by an affidavit from Officer Travis Reed. The property to be searched was identified in the affidavit as:

Any and all digitally stored media related to this investigation including but not limited to: phone identification, Short Media Service (“SMS”) and Multimedia Messaging Service (“MSM”) and/or text messages including messages both sent and received or text message threads; any and all phone logs including incoming and outgoing calls; any stored contact information including phone numbers and email addresses; any and all emails both sent and received; any and all photographs or videos; any and all web browsing including internet searches; any and all applications, application data and/or files, any multi-media storage (internal and removable), cloud based media accounts accessed through listed device, global positioning systems (GPS) data and complete mobile device forensic analysis.

The “particularity” analysis in this case is governed by our Supreme Court’s decision in *People v Carson*, ___ Mich ___, ___ NW3d ___ (2025) (Docket No. 166923) (opinion by CAVANAGH, CJ, joined by WELCH, J. and THOMAS, J.) (BOLDEN, J. concurring in part; dissenting in part).

In *Carson*, our Supreme Court cautioned that because cell phones in the modern world hold the “privacies of life,” it is necessary to “jealously guard the requirements of the Fourth Amendment, including the particularity requirement.” *Carson*, ___ Mich at ___; slip op at 16. The opening sentence in the *Carson* search warrant purported to limit the inquiry to information related to the investigation. *Id.* at ___; slip op at 13. Regardless, our Supreme Court determined that while arguably having some limiting language, the first sentence did not provide “any meaningful affirmative limitation on the remaining sentences.” *Id.* at ___; slip op at 18. The Court explained that “a practical reading of the search warrant at issue would not sufficiently inform an executing officer how to reasonably conduct a limited and constitutionally particular search.” *Id.* Indeed, the Court continued: “The lack of instruction on the scope, breadth, or focus of the search shifts the particularity requirement from the warrant, where it belongs, to the executing officer’s discretion.” *Id.* Ultimately, the *Carson* Court concluded that the warrant in that case did not inform the executing officers how to reasonably direct their search to uncovering the evidence related to the criminal activity identified in the warrant. *Id.* In particular, the Court determined that

[t]he authorization to search every nook and cranny of the cell-phone data for “any and all records or documents” and “any and all data” related to safebreaking and larceny provides no meaningful constraint in this case. Although such a wide-ranging search might uncover incriminating evidence, such exploratory rummaging is not “reasonably directed at obtaining evidence” of safebreaking or larceny. [*Id.* at ___; slip op at 19.]

Thereafter, the Court held:

We conclude that the search warrant in this case was insufficiently particular. It allowed officers to comb through every conceivable type of information on the cell phone limited only, at best, to evidence “pertaining to the investigation of Larceny in a Building and Safe Breaking.” In our modern age, when cell phones carry a virtually unlimited amount of private information, such wide-ranging exploratory rummaging is constitutionally intolerable and clearly violates the Fourth Amendment. [*Id.* at ___; slip op at 24.]

The search warrant in *Carson* is substantially similar to the search warrant in the instant case. Applying the *Carson* analysis, the search warrant relative to the cell phone itself did not describe with sufficient particularity the items to be searched. Accordingly, the February 8, 2023 search warrant violated both the Fourth Amendment and the Michigan Constitution.

Addressing the search warrant governing the T-Mobile data, we reach a different conclusion regarding the particularity requirement. The search warrant was issued on March 25, 2022. It sought T-Mobile cell phone data relative to the telephone number associated with defendant and was supported by an affidavit from Officer Reed. The property to be searched was identified in the affidavit as:

Copies of all records and subscriber information for the following cellular/wireless number: [] including name, date of birth, mailing address, email addresses, contact number or alternate phone number, date of activation and other numbers (ESN, MDN/MIN, MSIN, IMSI, MAC address, Make and Model of handset) on the same account.

Copies of call detail records for all communications for the following cellular/wireless number, [], for the time period of **03/06/22 to 03/08/22** to include incoming/outgoing cellular numbers, dates, time and durations of calls and incoming/outgoing SMS (text) messages data, including content, dates, and time.

Copies of call detail records for all communications for the following cellular/wireless number, [] for the time period of **03/06/22 to 03/08/22** to include the Cell Site activations for each cell used, including azimuths for sectors, Cell Site tower locations, (physical address with latitudes and longitudes), number of sectors, orientations and azimuths and Switch used to access by cell site.

In the event the requested Call Detail Records contain other MetroPCS customer numbers, identified as either incoming or outgoing communications, MetroPCS will provide subscriber information only to the specific numbers identified, if requested.

Provide a Certification of all business records submitted in response to this search warrant.

Lastly, provide a detailed definitions page(s) which identified all information in the records.

This affidavit was sufficient to withstand constitutional muster. After concluding the search warrant at issue in *Carson* lacked the necessary particularity, our Supreme Court considered what *would* satisfy the particularity requirement. The Court emphasized that it could not and was not creating a “per se rule of specificity that applies to all cell-phone searches.” *Id.* at ____; slip op at 19. The Court recognized that an exact description of what law enforcement should be searching for and where they should look for it was “not necessarily feasible.” *Id.* at ____; slip op at 19-20. And looking to cases from other jurisdictions, the Court noted that “[m]any cases, for example, emphasize the importance of temporal limitations on the data being searched.” *Id.* at ____; slip op at 19-20 (citations omitted). The Court reasoned:

[S]uch temporal information will generally be easy to include in the search warrant. That is, even if the drafter of a search warrant cannot specifically describe the evidence sought, generally an investigating officer will be able to identify a relevant time frame for the criminal activity. Put simply, when information concerning the relevant time frame of the criminal activity exists, this time limitation should be included in the search warrant to ensure adequate particularity. [*Id.* at ____; slip op at 21.]

Related to the use of temporal limitations, the *Carson* Court also cautioned against the use of “any and all” in a search warrant, and instead, emphasized categorical limitations. In this regard, the Court commented:

Applying such considerations to the facts of this case, the warrant here might have contained adequate particularity if it had directed law enforcement to search for text messages or communications (categorical limitation) between defendant and [his girlfriend and accomplice] during August and September 2019 (temporal limitation). [*Id.* at ___; slip op at 23 n 20.]

In this case, not only does the search warrant identify the particular categories to be searched, but also contains a temporal limitation for the search. For these reasons, we conclude that the March 25, 2022 search warrant relative to the T-Mobile cell phone data was sufficiently particular.

The inquiry, however, does not end with the particularity analysis because defendant also contends that “the probable cause underlying the warrant failed to establish the required nexus between his alleged criminal activity and his cell phone.” *People v Hughes*, 506 Mich 512, 527 n 6; 958 NW2d 98 (2020). Probable cause for issuing a warrant “exists if there is a substantial basis for inferring a fair probability that contraband or evidence of a crime exists in the stated place.” *People v Ventura*, 316 Mich App 671, 778; 894 NW2d 108 (2016). Thus, “some context must be supplied by the affidavit and the warrant that connects the particularized descriptions of the venue to be searched and the objects to be seized with the criminal behavior that is suspected, for even particularized descriptions will not always speak for themselves in evidencing criminality.” *Id.*, at 539.

In this case, both affidavits included extensive facts in support of a determination that defendant was the person who drove by the victim’s home on March 7, 2022, and shot into the occupied dwelling. In addition, both affidavits included the statement attesting to the belief that the items to be searched would yield information related to the crimes. But the affidavits failed to contain specific facts that connected information potentially stored on defendant’s cell phone to the shooting. Accordingly, a reasonably cautious person could not have concluded that there was a substantial basis for finding a fair probability that evidence of the crime would be found on defendant’s cell phone or in the carrier’s data.

Even so, we hold that defendant is not entitled to relief because he has failed to establish that the admission of this evidence affected his substantial rights. The evidence discovered from the search of defendant’s cell phone data was primarily used to map out the vehicle’s course of travel. During trial, however, there was alternative evidence, perhaps even more compelling, that defendant was the individual who drove by the victim’s home and shot into the occupied dwelling.

Defendant admitted that at 4:14 a.m. on March 7, 2022, he stopped to use the ATM at the Speedy Q, located at 10th Street in Port Huron. The Speedy Q is approximately two blocks from the scene of the shooting on 9th Street. Defendant further admitted that he was operating a silver Toyota Avalon and that he was the only one in the vehicle at the time. Moreover, there was overwhelming video evidence that a vehicle, not simply similar, but matching the description of defendant’s vehicle, left the Speedy Q at 4:20 a.m., and in the few minutes that followed, drove around several streets in the immediate vicinity of the shooting. The vehicle’s travels were picked

up by no fewer than three other security cameras. Then, at 4:45 a.m., the security cameras at Court Street recorded defendant's vehicle drive by the victim's home and showed that four shots were fired from the driver's side of the vehicle. In addition to this video evidence documenting defendant's course of travel, defendant admitted that he had been to the house next door to the victim's dwelling to buy and sell drugs on several occasions in the past. Given the compelling nature of the evidence presented at trial, the introduction of the information gathered from the search of defendant's phones was not outcome-determinative, and defendant therefore has not demonstrated plain error affecting his substantial rights.²

Lastly, defendant has raised the related claim that he was denied the effective assistance of counsel. "[T]o obtain a new trial because of ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome of the case could have been different." *People v Yeager*, 511 Mich 478, 488; 99 NW2d 490 (2023) (quotation marks and citation omitted). In *Carson*, the defendant similarly argued that his trial counsel's failure to move to suppress the evidence premised on an invalid search warrant deprived him of the effective assistance of counsel. *Carson*, ___ Mich at ___; slip op at 24. However, the *Carson* Court found no merit to this argument. *Id.* at ___; slip op at 29.

As indicated by our previous analysis, a motion to suppress based on the lack of particularity in the search warrant at issue would not have been substantively meritless. *People v Riley (After Remand)*, 468 Mich 135, 142; 659 NW2d 611 (2003). However, as we must, we consider counsel's performance in light of the facts and circumstances that existed at the time of counsel's conduct. *Strickland*, 466 US at 690. Unlike the Court of Appeals majority, we believe that defendant has not shown that counsel's performance was constitutionally deficient. *Id.* While we are not prepared to call the Fourth Amendment particularity argument in this

² The prosecution contends that the good-faith exception to the exclusionary rule applies because the police conducted their searches only after obtaining search warrants signed by a magistrate. In the prosecutor's view, the police acted in good faith because the law pertaining to cell phone searches has evolved since the warrants were issued in this case.

The purpose of the exclusionary rule is to deter police misconduct and that purpose is not furthered when the police act objectively in good-faith reliance on a search warrant. See *People v Goldston*, 470 Mich 523, 526; 682 NW2d 479 (2004). The law requires that the "exclusionary rule should be employed on a case-by-case basis and only where exclusion would further the purpose of deterring police misconduct." *Id.* at 531. Accordingly, "a police officer's reliance on a magistrate's probable cause determination and on the technical sufficiency of the warrant must be objectively reasonable." *Id.* Further, "the good-faith exception does not apply where the magistrate wholly abandons his judicial role or where an officer relies on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Id.* (quotation marks and citations omitted.) In this case, despite recognizing that the law pertaining to cell phone searches has evolved over the years, the lack of particularity as to one affidavit and the lack of probable cause as to both affidavits, we conclude that the good-faith exception does not apply. *Id.*

case “novel,” [*People v Reed*, 453 Mich 685, 695; 556 NW2d 858 (1996)], we also recognize that the application of Fourth Amendment principles in the cell-phone and digital-data sphere is an area of the law that continues to rapidly evolve. [*Riley v California*, 573 US 373, 403; 134 S Ct 2473; 189 L Ed 2d 430 (2014)], which was decided several years before this case arose, recognizes the important privacy implication at stake when a cell phone is searched, but its holding is that the police must obtain a search warrant before searching a cell phone seized incident to arrest. It does not speak to particularity. And [*People v Hughes*, 506 Mich 512; 958 NW2d 98 (2020)]—the case we build on today and in which this Court first discussed particularity in the context of a cell-phone search—was not decided until more than six months after counsel filed his unsuccessful motion to suppress. Additionally, many of our sister state courts—whose opinions we rely on today—did not take up the question of particularity in this context until after 2020. See, e.g., [*State v Short*, 310 Neb 81; 964 NW2d 272 (2021)]; [*Richardson v State*, 481 Md 423; 282 A3d 98 (2022)]; [*State v Wilson*, 315 Ga 613; 884 SE2d 298 (2023)].

While hindsight, our *Hughes* decision, and five additional years of technological advances and court decisions may now render the lack-of-particularity argument an obvious basis for a motion to suppress, the record supports that counsel’s decision to file a motion to suppress on a different basis was not based on a misunderstanding of the law as it existed at the time and may be fairly characterized as an exercise of reasonable professional judgment under the facts and circumstances that existed when the decision was made. *Strickland*, 466 US at 689. Therefore, defendant’s claim of ineffective assistance of counsel fails. [*Id.* at ____; slip op at 29-30.]

Applying the foregoing, we conclude that defendant’s ineffective assistance of counsel claim in this case is similarly without merit.

To establish ineffective assistance, defendant must demonstrate deficient performance and prejudice. Here, defendant failed to establish that trial counsel’s performance was objectively unreasonable, rendering a determination regarding prejudice unnecessary. Regardless, we also conclude that defendant failed to demonstrate that he was prejudiced. In light of the overwhelming evidence of defendant’s guilt, there is no reasonable probability that the outcome of the case likely would have changed had the evidence been suppressed.

B. EXPERT TESTIMONY

Next, defendant argues that defense counsel provided ineffective assistance by failing to object to the admission of, or request a *Daubert*³ hearing regarding, Detective Sergeant (Det. Sgt.) Randy Khan’s testimony. First, trial counsel did not provide ineffective assistance of counsel by failing to object to Det. Sgt. Khan’s testimony or requesting a *Daubert* hearing to challenge it. The detective testified about his extensive training and experience in cell site mapping. Any objection on the basis of Det. Sgt. Khan’s qualifications would have been futile. And counsel does not

³ *Daubert v Merrell Dow Pharm, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

perform deficiently by failing to raise a meritless objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Additionally, under the second prong of the ineffective assistance test, defendant has failed to establish that there is a reasonable probability that the outcome of the proceedings would have been different but for defense counsel's failure to object to Det. Sgt. Khan's testimony or request a *Daubert* hearing. In support of his claim that Det. Sgt. Khan's expert testimony was unreliable, defendant relies on the affidavits of James Taylor, an individual trial counsel consulted but did not call, and an affidavit from Eric M. Grabski.⁴ Both of these individuals opined that when mapping out the cell phone's location, Det. Sgt. Khan should have used a cell tower list that was created closer in time to March 7, 2022, the day of the shooting. Det. Sgt. Khan apparently used a tower list dated December 2, 2022 and Grabski and Taylor opined that he should have used the cell tower list dated February 1, 2022. Indeed, Grabski goes so far as to speculate that it was possible that Det. Sgt. Khan not only used the wrong tower list but also may have used a cell site list from Verizon Wireless that was relabeled "T-Mobile Dec 2022." Grabski opined that it is "forensically unsound to use a cell site listing that was produced months after the time period in the call detail records. Doing this *could* yield inaccurate and incorrect results that falsely indicate that a phone was in a particular area when in fact it was not there." (Emphasis added.)

Although the alleged experts consulted by defendant's appellate counsel critiqued on many levels the detective's process, particularly Grabski, neither Taylor nor Grabski concluded that Det. Sgt. Khan's conclusion regarding the mapping of defendant's cell phone was inaccurate or that had a different process been used, it would have potentially exonerated defendant or placed defendant's cell phone in a different location than projected by Det. Sgt. Khan. Instead, both alleged experts provided affidavits and reports that are filled with speculation and conjecture. Indeed, their opinions fall far short of establishing that defendant was not in the vicinity at the time the shooting occurred. Consequently, defendant has failed to show that if trial counsel had challenged the prosecution's expert a different outcome would have ensued. Defendant has the burden of establishing the factual predicate for his claim of error. *People v White*, 331 Mich App 144, 148; 951 NW2d 106 (2020). He failed to satisfy this burden.

Furthermore, it is clear from the record that trial counsel elected to pursue an alternative course. Trial counsel's decisions regarding the choice of theories to present are presumed to be matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). The record establishes that trial counsel contemplated calling an expert witness to address the cell

⁴ Defendant relies on Grabski's unsigned affidavit, but defendant never provided it to the trial court. Specifically, it was not attached to defendant's motion for new trial. Thus, defendant is attempting to expand the record on appeal. This Court may not consider evidence not presented to the trial court. See MCR 7.210(A)(1), which provides that the original record, to which this Court's review is limited, consists of "the original documents filed in [the lower] court or a certified copy, the transcript of any testimony or other proceedings in the case appealed, and the exhibits introduced." Simply put, our appellate rules do not allow a party to expand the lower court record on appeal. See *People v Morrison*, 328 Mich App 647, 655; 939 NW2d 728 (2019).

phone mapping.⁵ However, at the time of trial, counsel pursued an alternative defense. Counsel called Michael Primeau, an expert in audio, video, and image forensic analysis. Rather than challenging the cell phone mapping, this witness's testimony challenged the credibility of the surveillance videos and the prosecution's theory that the vehicle seen at the Speedy Q, which defendant admitted he was driving, was the same vehicle seen in the various surveillance videos, particularly the video from Court Street, which demonstrated that four shots were fired toward the victim's dwelling at 4:45 a.m. on March 7, 2022. Counsel's decision to pursue this theory was reasonable, and the fact that this strategy ultimately proved unavailing "does not constitute deficient performance." *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008).

Lastly, defendant briefly argues that the trial court erred when it qualified Det. Sgt. Khan as an expert. Because defendant did not object to the court qualifying the detective as an expert, this alleged error is subject to a plain error analysis.⁶ In addition to establishing that the trial court plainly erred, defendant must also establish that the court's error affected his substantial rights. *Carines*, 460 Mich 763. In general, an error affects substantial rights if it caused prejudice, that is, if it affected the outcome of the proceedings. Because defendant has not established that the outcome would have been different if Det. Sgt. Khan's testimony had been excluded, defendant has failed to establish that he was prejudiced. Defendant has not demonstrated that the trial court should have sua sponte excluded Det. Sgt. Khan's testimony.

C. LAY OPINION TESTIMONY

Next, defendant argues that the trial court erred when it permitted the opinion testimony of Officer Jakub Kierblewski and that trial counsel was ineffective when he failed to object to the testimony. Defendant filed a motion in limine seeking to exclude the testimony of Officer Kierblewski, claiming that his testimony about vehicle identification was inadmissible because he was not tendered as an expert witness and any lay opinion invaded the province of the jury. Although defendant objected to Officer Kierblewski's testimony in a motion in limine, the trial court reserved its ruling for trial and defendant did not renew his objection during trial. This issue

⁵ On June 26, 2023, trial counsel filed on defendant's behalf a motion to permit Taylor to testify by Zoom technology.

⁶ Generally, "[t]o preserve an evidentiary issue for review a party opposing the admission of evidence must object at the trial and specify the same ground for objection that it asserts on appeal." *People v Thorpe*, 504 Mich 230, 252; 934 NW2d 693 (2019). Defendant did not object to Khan's testimony at trial, accordingly, this issue is not preserved. Defendant did challenge the admissibility of Khan's testimony in his motion for new trial. However, this Court recently held that "permitting a party to raise an evidentiary issue for the first time in a postjudgment motion for new trial, whether in this Court or in the trial court, controverts the purpose of the preservation requirement because the opportunity for the trial court to correct the error and its prejudice has passed." *People v Butsinas*, ____ Mich App ____, ____; ____ NW3d ____ (2025) (Docket No. 364778); slip op at 12, lv pending. Accordingly, this Court held that "making such a posttrial motion does not preserve the issue sought to be raised in the same manner a timely motion or objection during trial would have, so review of the unpreserved issue is for plain error affecting substantial rights." *Id.*

is arguably unpreserved. *People v Caddell*, 332 Mich App 27, 56; 955 NW2d 488 (2020). Therefore, we will review this issue for plain error affecting defendant's substantial rights. *Id.*

During trial, Officer Kierblewski testified that the vehicle observed in the Speedy Q video appeared to be the same vehicle depicted in the other surveillance videos. This testimony was properly admitted under MRE 701, which governs the admission of lay opinion testimony. At the time of trial,⁷ MRE 701 provided:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

MRE 702 governs the admission of expert testimony and, at the time of defendant's July 2023 trial, it stated:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Lay opinions must not derive from scientific, technical, or other specialized knowledge. See e.g., *People v Dobek*, 274 Mich App 58, 77; 732 NW2d 546 (2007). In this case, Officer Kierblewski's testimony did not derive from some specialized training or knowledge but, perhaps, his powers of observation. Accordingly, it is apparent that his testimony was simply a lay opinion.

This conclusion is consistent with this Court's opinion in *People v Fomby*, 300 Mich App 46, 50; 831 NW2d 887 (2013). In *Fomby*, testimony regarding the identity of individuals in still photographs and surveillance footage was properly admitted as lay opinion testimony. *Id.* at 50. Having resolved the preliminary inquiry, it is necessary to determine whether the testimony was properly admitted under MRE 701.

At the time of trial, defendant admitted that he was the driver of the vehicle depicted in the Speedy Q video and that at 4:14 a.m. on March 7, 2022, he had driven to the Speedy Q to use the ATM. Officer Kierblewski's testimony identified features of defendant's vehicle that were visible from the Speedy Q video. He then compared them to the features in the vehicle seen in the other surveillance videos discovered during the investigation. The officer concluded that the vehicle seen in the Court Street. video had the same attributes as the vehicle seen in the Speedy Q video, including, among other things, color; headlight, fog light, and brake light configuration and color;

⁷ The Michigan Rules of Evidence were substantially amended on September 20, 2023, effective January 1, 2024. See 512 Mich 1xviii (2023). All references to the Michigan Rules of Evidence in this analysis pertain to the version of the rules in effect at the time of trial.

presence of a sunroof, damage to the body and bumper, and turn signal illumination. The purpose was to determine whether defendant was driving the vehicle from which shots were fired at the victim's dwelling.

Officer Kierblewski's testimony was rationally premised on his perception. He watched all of the surveillance videos and isolated certain images. Officer Kierblewski noted distinguishing features in the vehicle depicted in the Speedy Q video and compared them to features in the vehicle from the other videos and then gave his opinion regarding the similarity of the vehicles.

Moreover, Officer Kierblewski's testimony satisfied the second prong of the MRE 701 analysis: the testimony was helpful to the determination of a fact in issue. Officer Kierblewski's testimony was intended to assist the jury in determining whether the vehicle depicted in the Speedy Q video was the same vehicle depicted in the Court Street video, a fact at issue in the case. To this end, Officer Kierblewski pointed out vehicle characteristics that someone might not notice or appreciate for a variety of reasons.

Finally, Officer Kierblewski's testimony did not invade the province of the jury. Officer Kierblewski did not identify defendant as the shooter, nor did he even express an opinion that defendant was driving the vehicle depicted in the Court Street video. Under these circumstances, we cannot conclude that Officer Kierblewski invaded the province of the jury. *Fomby*, 300 Mich App at 53. On this record, there is no evidence that Officer Kierblewski impermissibly opined on the ultimate question of defendant's guilt or innocence. *Id.* at 52.

Officer Kierblewski's testimony was (1) rationally based on his own perceptions and (2) helpful for the jury to determine whether defendant was the individual shooting out of the driver's side of the Toyota Avalon. Therefore, his testimony was admissible under MRE 701. Accordingly, the trial court did not plainly err when it permitted Officer Kierblewski to testify to his lay opinions. Moreover, because the testimony was admissible, trial counsel's failure to object to the testimony did not constitute ineffective assistance of counsel. Counsel cannot be expected to raise a meritless objection. *Ericksen*, 288 Mich App at 201.

D. HEARSAY

During the prosecution's case-in-chief, Officer Reed testified that a review of the search history from defendant's phone revealed that someone had Googled several times between March 7, 2022 and March 8, 2022, "shooting in Port Huron today." When defendant attempted to explain during his trial testimony why he was searching the internet in this manner, the trial court limited the defendant's testimony on hearsay grounds. After reviewing the record, we agree that the trial court erred when it sustained the prosecution's hearsay objection. But because defendant was able to explain to the jury his actions, any error was harmless.

This Court reviews a trial court's evidentiary rulings for an abuse of discretion. *People v Thorpe*, 504 Mich 230, 251-252; 934 NW2d 693 (2019). "The decision to admit evidence is within the trial court's discretion and will not be disturbed unless that decision falls outside the range of principled outcomes. A decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *Id.* (quotation marks and citations omitted). That said, "[t]he trial court necessarily abuses its discretion when it makes an error of law." *People v Wisniewski*, ___ Mich App ___,

___; ___ NW3d ___ (2025) (Docket No. 361978); slip op at 7. “Preliminary questions of law, including whether a rule of evidence precludes the admission of evidence, are reviewed de novo.” *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013).

In order to fully appreciate the nature of this issue, we must consider the court’s ruling in its full context, which necessarily requires a lengthy reproduction of the trial testimony. During defendant’s case-in-chief, on direct examination of defendant, the following occurred:

Q. . . . You heard the testimony of the officers with respect to some of your internet searches?

A. Yes, sir.

Q. On March 7th and March 8th of 2022?

A. Yes, sir.

Q. Did you make those internet searches?

A. Uh, yes, sir.

Q. Why?

A. Because I was, because I gotta make sure where I’m going I’m gonna be safe. I’m gonna be, I’m gonna be good at. Because in my field, in my field I don’t know if anybody know about, like, if certain things, if you gang bang or if you sell drugs or if you –whatever you doing, like, it’s going to be a group for your, or, or like people you sell to, they going to look out for you. You see what I’m saying? They do stuff like that or, uh, it’s hot around here. Don’t come around here because, uh, such and such happened, like stuff like that. You see what I’m saying?

Q. Okay.

A. Or—

Q. Why did you think you needed to know that information on March 7th and March 8th?

A. Because I got info. Somebody told me.

Q. What’s that?

A. I got info.

Q. Okay.

A. From Detroit.

Q. About what?

A. About something that happened at a place that I got to. At a place that somebody told me about. If you tell me about a weed spot that I go to frequently and you know people over there, and if something happened like – okay, let's say I got a weed spot and if the house get raided, I'm gonna send a text message out to everybody who come. Hey, don't come here, man. Something happens, you know what I'm saying? And so—

Q. So you're saying, you're saying that you got alerted –

A. Yes.

Q. –that there had been a shooting at [the victim's] house?

A. Yes.

Q. When did you –

A. No no no no. Not, uh, I don't know [the victim]. Somebody said something happened over there. Shot somebody. Somebody, um somebody shot up something over there. That's why somebody told me to be –

[Prosecutor]: Your Honor, I've tried to give some latitude. But if we're going to keep talking about what other people say and not have a context to it and, or an exception to the hearsay rule. I mean, I understand.

The Court: Yeah, no I agree, the objection is hearsay and whatever information that he learned that was provided to him from some other third party source is hearsay.

[Defense Counsel]: Understood.

BY [DEFENSE COUNSEL]:

Q. You understand you can't be talking about what other people told you?

A. Yes, sir.

Q. You can talk about what you did in response to that information.

A. And why I did it.

The Court: And just so that it is clear, ladies and gentlemen of the jury, to the extent that there has been some testimony that is hearsay and that shouldn't be part of the record, I'm going to order that it be stricken, and you'll just have to follow my rules or my instructions later on when we get to that sometime tomorrow.

BY [DEFENSE COUNSEL]:

Q. So you got info that something had happened in that neighborhood?

A. Yes.

Q. At a place you frequent?

[*Prosecutor*]: That, that testimony has been stricken, your Honor.
So if that's the testimony that you just struck.

The Court: Yeah, the info. I mean, the information, obviously, I mean, he – something was told to him and yeah. So it's – I think we still have a problem with hearsay, [defense counsel], because he's obviously in some form of contact with some of his people, whether they're local, whether they're from Detroit or not but they're telling him certain things and, and if he acts or reacts to that the content or the subject matter is still a hearsay problem. So we need to move on.

Considering the court's ruling, in context, the trial court erred when it precluded defendant from testifying to what others told him about the shooting on March 7, 2022 on hearsay grounds. To the extent that the statements explained why defendant Googled "shootings in Port Huron today," they were not hearsay. Hearsay is defined by MRE 801(c) as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted." Generally, hearsay is inadmissible. MRE 802. When, however, evidence is offered for a purpose other than to prove the truth of the matter asserted, then by definition it is not hearsay. *People v Musser*, 494 Mich 337, 350; 835 NW2d 319 (2013). Specifically, when a statement is offered to explain why certain action was taken, it is not hearsay. *People v Chambers*, 277 Mich App 1, 11; 742 NW2d 610 (2007). Accordingly, an out-of-court statement is admissible to show the effect of the statement on the hearer or reader, if that effect is relevant. *People v Ortiz*, 249 Mich App 297, 309; 642 NW2d 417 (2002). In this case, the statements made to defendant were not offered to prove the truth of the matter asserted but rather were offered to demonstrate that the statements had the effect of causing defendant to Google additional information.

Although the trial court erred when it precluded defendant from testifying to the content of these statements, the error was harmless. Defendant sought to explain his actions, and on this record, it is clear that despite the court's ruling, he was still able to do so. Before defendant started to suggest that people had told him things about the shooting, he testified that his Google search was designed to ensure his safety. That statement was not stricken and it clearly conveyed to the jury what defendant intended to convey. Accordingly, we conclude that although the trial court erred in limiting defendant's testimony, its error was harmless.

E. CUMULATIVE ERROR

Defendant also argues that the cumulative nature of the errors denied him a fair trial such that he is entitled to a new trial. The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit reversal, but the cumulative effect of the errors must undermine confidence in the reliability of the verdict

before a new trial is granted. *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002). Absent the establishment of errors, there can be no cumulative effect of errors meriting reversal. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999). Because this case does not involve multiple errors, reversal on the basis of cumulative error is not warranted. *LeBlanc*, 465 Mich at 591-592.

Affirmed.

/s/ Michael F. Gadola
/s/ Michael J. Riordan
/s/ Anica Letica