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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v JENNIFER ANN GALVAN, Defendant-Appellant.	UNPUBLISHED August 14, 2026 2:18 PM No. 370009 St. Clair Circuit Court LC No. 10-000597-FC

Before: LETICA, P.J., and O'BRIEN and REDFORD, JJ.

PER CURIAM.

In this criminal postjudgment proceeding brought under Subchapter 6.500 of the Michigan Court Rules, defendant, Jennifer Ann Galvan, appeals as by leave granted[1] the trial court's reissued order that denied her motion for relief from judgment. We affirm.

I. BACKGROUND

In 2010, defendant was convicted following a jury trial of first-degree felony murder, MCL 750.316(1)(b); torture, MCL 750.85; first-degree child abuse, MCL 750.136b(2), and possession of marijuana, MCL 333.7403(2)(d). Defendant was tried before a jury in a joint trial with her husband, Joe Guy Galvan.[2]

Their convictions arise from the abuse and murder of three-year-old Prhaze Galvan, who was Joe's daughter and defendant's stepdaughter. Defendant's convictions were affirmed upon direct appeal to this Court. *People v Galvan*, unpublished per curiam opinion of the Court of Appeals, issued September 24, 2013 (Docket Nos. 299814 and 299822). The following arguments

[1] *People v Galvan*, ___ Mich ___; 26 NW3d 428 (2025).

[2] Because defendant and Joe were married and have the same last name, we will use Joe's first name when referring to him. Joe was convicted of first-degree felony murder, torture, first-degree child abuse, possession of marijuana (second or subsequent offense), and felon in possession of a firearm.

were raised in direct appeal: (1) the trial court erred by reversing the district court's determination to not bind her over on a charge of open murder, (2) the trial court erred by denying her request to have her attorney withdraw so he could testify regarding a confession Joe made in his presence, (3) the trial court erred by denying her request to sever the trials, (4) the trial court erred by denying her motion to change venue on account of pretrial publicity, (5) there was insufficient evidence to prove that she aided and abetted in the homicide, torture, or abuse, (6) it was erroneous to admit evidence that she hated Prhaze and evidence of other instances of abuse in 2008 and 2009, and (7) it was erroneous for the court to exclude evidence of inculpatory statements made to defendant by Joe. This Court found no ground for reversal and affirmed. *Id*. at 16. Defendant applied for leave to appeal in the Supreme Court, which was denied. *People v Galvan*, 495 Mich 963 (2014). Defendant filed a pro se petition for habeas corpus relief in federal court that was denied as well. *Galvan v Stewart*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued March 21, 2016 (Case No. 2:15-CV-10882), aff'd in *Galvan v Stewart*, unpublished opinion of the United States Court of Appeals for the Sixth Circuit, issued Augst 23, 2017 (Case No. 16-1441); 705 F Appx 392.

This Court in *Galvan*, unpub op at 2-3, summarized the background of this case as follows:

> Prhaze Galvan died on January 15, 2010. The medical examiner, Daniel Spitz, M.D., concluded that the death was a homicide and that she died of "multiple blunt force head injuries." More specifically, Dr. Spitz concluded that she died of "impact involving the right side of the head," which resulted in "injury to the brain, bleeding over the surface of the brain, and then the reaction of the brain to that bleeding which is brain swelling." Dr. Spitz noted that Prhaze had injuries and bruising all over her body in various stages of healing. The injuries included pattern injuries, several of which were caused by "a white plastic spatula type spoon with a fairly long handle." Dr. Spitz estimated that there were 20 or more injuries to her head and neck. Defendants initially reported that Prhaze had fallen in the bathroom and hit her head. However, Dr. Spitz and a pediatric expert both concluded that the bathtub injury story "didn't fit" and could not account for the type of trauma that existed.
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> Other evidence indicated that the abuse had been unrelenting. Defendant Jennifer Galvan's sister, Kathleen LaFave, had on one occasion seen Prhaze with two black eyes, on another with one black eye, and on still another saw her with a bruise that covered her whole butt cheek. On another occasion she discovered Prhaze in the shower in her clothes; defendant Jennifer Galvan explained that she had wet her pants. Another sister witnessed a scabbed chin with a mark by her eye, a bruise on her lower back and blackened eyes. John Mugnano, a long-time friend of defendant Jennifer Galvan who sometimes watched Prhaze, said that "[a]nytime that I ever had her[,] her left eye was black or her right eye was black." Further, he once observed Prhaze standing with her nose to the wall for 30 to 40 minutes. Mugnano testified that defendant Jennifer Galvan dropped Prhaze off at his home and asked for masking tape. After Jennifer left his home, he called out to Prhaze, but she did not answer. He found Prhaze with her mouth, arms, and knees taped together. He later made an anonymous report to Child Protective Services because he did not see the couple's treatment of Prhaze improving.

Defendant Jennifer Galvan's mother twice saw Prhaze with black eyes; Jennifer explained that on one occasion she fell in the tub. She also noted a bruise on Prhaze's hip and one on her butt. A babysitter, noted "[b]lack eyes, like horrible bruises like on her head," including "a tennis ball swelling out of her head," and bruising "[o]n her butt. Bruises everywhere," including her arms, legs, thighs and back. On one occasion, Prhaze explained the presence of a bruise by saying she had been spanked with a spoon when she tried to get out of a cold shower. When family members questioned defendant Jennifer Galvan about the condition of the child, she claimed that the child was clumsy and received bruises from playing with the family puppy. Other family members never saw Prhaze after they complained about the child's condition.

There was also evidence that Prhaze was not being fed. She weighed 32 pounds 14 months before her death and 32 pounds at the time of death. Indeed, family members testified that Prhaze frequently woke up at night and would search the home, even the garbage can for food. As a result, defendant Jennifer Galvan would withhold meals from the child as a punishment. The couple would force their children to face a wall as a form of punishment. Witnesses testified that Prhaze was consistently on punishment and for extended periods of time. There was also testimony that defendant Jennifer Galvan's biological children were not dressed or treated the same as Prhaze. Also, witnesses observed Prhaze transform during the course of the ongoing abuse from a happy child to a child who was withdrawn, non-interactive, not playful, and "emotionless."

Defendant Jennifer Galvan was a licensed practical nurse. Her co-workers testified that Jennifer hated Prhaze, referred to the child as the devil, blamed Prhaze for the death of the couple's infant son, and claimed that the child was ruining her marriage. Defendant Jennifer Galvan testified in her own defense and denied the claims raised by family, friends, and co-workers. She asserted that she loved Prhaze and claimed that the witnesses were mistaken or misconstrued her statements. She denied ever calling Prhaze the devil, but rather mentioned that the child would dress as the devil for Halloween. Additionally, she denied withholding meals from the child as a form of punishment or that the duration of time standing at the wall was ever excessive. She also denied ever tying or restraining the child. However, when confronted with a text that she sent to defendant Joe Galvan wherein she purportedly referred to Prhaze as an expletive brat who could walk while tied up, she could not recall what the text meant. Rather, defendant Jennifer Galvan questioned the conduct of babysitters and family members, claiming that one family member left Prhaze on the porch at night. Defendant Joe Galvan did not testify, but his history of abuse with Prhaze's half-brother and others was presented during trial, and his admission to hitting Prhaze with a belt to defendant Jennifer Galvan's co-worker was admitted at trial. [Second alteration added; others in original.]

In February 2023, defendant moved in the trial court for relief from judgment under Subchapter 6.500. In the motion, defendant raises the following issues: (1) she was denied a fair trial because the jury instructions for felony murder did not identify the cause of death, (2) she

was denied a fair trial because first responders, Assistant Fire Chief Edmond Gratz and paramedic Michael Ulrich, were not qualified as expert witnesses and yet allowed to offer their opinions as to the time of Prhaze's death allegedly in violation of MRE 701 and MRE 702, (3) she was denied the effective assistance of trial counsel because counsel failed to challenge the jury instructions and the opinion testimony, and (4) she was denied the effective assistance of appellate counsel because counsel failed to raise these other issues on direct appeal.

The trial court denied the motion. It noted that because all of defendant's issues, save for the claim of ineffective assistance of appellate counsel, could have been raised on direct appeal, defendant had to establish both "good cause" and actual prejudice.

Regarding the jury instruction and lay opinion testimony, the trial court ruled that plaintiff failed to establish good cause or actual prejudice. Even if the instruction was less than perfect, the trial court was not convinced that defendant would have had a reasonably likely chance of acquittal if the trial court had given the instructions that defendant requests, including a specific reference to the cause of death being the blow to Prhaze's head. Both the medical examiner and a doctor admitted as an expert in child-abuse pediatrics testified that the cause of Prhaze's death was injury to her brain from multiple impact points on her head. While other injuries indicated systematic, longer-term abuse, neither expert suggested these injuries led to or caused Prhaze's death. The jury was instructed to consider each defendant separately and each crime separately in light of all the evidence. Moreover, with respect to the opinion testimony, the trial court determined that their testimony was admissible under MRE 701 because it was offered as the witnesses' opinions based on the injuries they witnessed first-hand and not overly dependent on scientific, technical, or other specialized knowledge.

For defendant's claims of ineffective assistance of counsel, the trial court ruled that because there was no error related to the felony-murder instruction and the lay-opinion testimony, counsel was not ineffective for failing to object. Moreover, counsel did in fact object to the opinion testimony from Gratz. Related to the failure to request a unanimity instruction, the court ruled that defendant failed to establish good cause for failing to raise this issue in her direct appeal and that assuming good cause existed, defendant also failed to show actual prejudice. The trial court noted there was no evidence that the jury was confused or disagreed about the factual basis for defendant's guilt. The court further ruled that there was more than sufficient evidence to support defendant's guilt based on either principal or aider-and-abettor liability. Lastly, the trial court ruled that because all the raised issues lacked merit, appellate counsel was not ineffective by failing to raise them on appeal.

This appeal followed.

II. PERTINENT LEGAL PRINCIPLES

A. SUBCHAPTER 6.500

This Court reviews a trial court's decision whether to grant a motion for relief from judgment under Subchapter 6.500 for an abuse of discretion, but the findings underlying the trial court's decision are reviewed for clear error. *People v Spears*, 346 Mich App 494, 502; 13 NW3d 20 (2023). A trial court abuses its discretion when its decision falls outside the range of reasonable

and principled outcomes or constitutes an error of law. *People v Duncan*, 494 Mich 713, 723; 835 NW2d 399 (2013). A trial court's finding is clearly erroneous if, after reviewing the entire record, this Court is left with the definite and firm conviction that the trial court made a mistake. *Spears*, 346 Mich App at 502.

MCR 6.508(D)(3) imposes limits on a trial court's ability to grant a motion brought under Subchapter 6.500:

> The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion
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> * * *
>
> (3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates
>
> (a) good cause for failure to raise such grounds on appeal or in the prior motion, and
>
> (b) actual prejudice from the alleged irregularities that support the claim for relief. . . .

In the situation where a defendant is convicted after a trial, as is the case here, the court rule defines "actual prejudice" as "but for the alleged error, the defendant would have had a reasonably likely chance of acquittal." MCR 6.508(D)(3)(b)(*i*)(A).

Good cause may be waived if the trial court "concludes that there is a significant possibility that the defendant is innocent of the crime." MCR 6.502. Moreover, a defendant can establish good cause for his or her failure to raise a claim earlier by showing that an external factor prevented appellate counsel from raising an issue in an earlier appeal or motion for relief from judgment. See *People v Christian*, 510 Mich 52, 75; 987 NW2d 29 (2022). Defendant argued before the trial court and, also, here on appeal that the good-cause requirement was satisfied because her appellate counsel was ineffective by failing to raise the grounds for reversal set forth here. This is a recognized way to establish good cause. *People v Kimble*, 470 Mich 305, 314; 684 NW2d 669 (2004); *People v Reed*, 449 Mich 375, 382; 535 NW2d 496 (1995) (opinion by BOYLE, J.).

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendants have the guaranteed right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Aceval*, 282 Mich App 379, 386; 764 NW2d 285 (2009). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Generally, to establish a claim of ineffective assistance, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Trakhtenberg*, 493 Mich 38, 51; 826

NW2d 136 (2012). However, such performance must be measured without the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

III. JURY INSTRUCTIONS

Defendant argues that she is entitled to a new trial because the jury was given an erroneous instruction regarding felony murder. Because this jury-instruction issue could have been raised in defendant's direct appeal to this Court, she must establish both good cause and actual prejudice to be entitled to relief. The record supports the trial court's conclusions that the record refutes a finding that there is a significant possibility of innocence, such that the good-cause requirement could be waived, or that defendant has demonstrated good cause for failing to raise this issue in her direct appeal. This finding suffices to address this issue on appeal.

However, assuming defendant established good cause, she has failed to show how she is entitled to any relief. "A criminal defendant has the right to have a properly instructed jury consider the evidence against [her]." *People v Ogilvie*, 341 Mich App 28, 34; 989 NW2d 250 (2022) (quotation marks and citation omitted). Jury instructions must be read as a whole, balancing the "general tenor of the instructions in their entirety against the potentially misleading effect of a single isolated sentence." *People v Waclawski*, 286 Mich App 634, 675; 780 NW2d 321 (2009). The instructions must include "the law applicable to the case," including "all the elements of the charged offenses and any material issues, defenses, and theories that are supported by the evidence." *People v Montague*, 338 Mich App 29, 37-38; 979 NW2d 406 (2021) (quotation marks, and citation omitted).

Defendant claims that she was denied a fair trial on account of improper jury instructions related to the count of felony murder.

> The elements of felony murder are (1) the killing of a person, (2) with the intent to kill, do great bodily harm, or create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) (3) while committing, attempting to commit, or assisting in the commission of an enumerated felony. First-degree child abuse is an enumerated felony. . . . Circumstantial evidence and reasonable inferences arising from the evidence may be sufficient to prove the elements of a crime. [*People v Lane*, 308 Mich App 38, 57-58; 862 NW2d 446 (2014).]

In addition to being charged as a principal, defendant was charged under an aiding-and-abetting theory. To prove felony murder under an aiding-and-abetting theory,

> the prosecution must show that the defendant (1) performed acts or gave encouragement that assisted the commission of the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of the predicate felony. [*People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003).]

The pertinent portions of the jury instructions related to the felony-murder count are as follows:

> In Count 1, the defendants are charged with first-degree felony murder. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt.
>
> First, that the defendants caused the death of Prhaze Rosemary Galvan, that is, that Prhaze Rosemary Galvan died as a result of the acts of the defendants, either directly or through the principle of aiding and abetting, which I defined earlier in these instructions.
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> * * *
>
> Third, that when they did the act, either directly or by aiding and abetting, that *caused* the death of Prhaze Rosemary Galvan, the defendants were committing or attempting to commit or helping someone else commit the crime of Child Abuse first degree or torture. [Emphasis added.]

Defendant's claims that the above instruction created a judicial presumption that she had already been determined to have caused death and that this fault allowed her to be convicted of this crime without a jury finding of causation are refuted by the plain and clear language of the instructions. Jury instructions are to be reviewed as a whole and not piecemeal. *People v Alter*, 255 Mich App 194, 203 n 2; 659 NW2d 667 (2003). The trial court plainly stated that the prosecutor had the burden of proving that defendant caused the death of Prhaze beyond a reasonable doubt and, also, that defendant had to have, either directly or by aiding and abetting, caused Prhaze's death.

Defendant also argues that the trial court should have added the act that allegedly caused Prhaze's death. This position is based in the model instruction, M Crim JI 16.4, which reads as follows:

> First, that the defendant caused the death of *[name deceased]*, that is, that *[name deceased]* died as a result of *[state alleged act causing death]*.

Consequently, defendant maintains that without the instructions stating which particular act the jury was to consider, it could consider *any* of the acts of abuse that were introduced at trial. Defendant further contends that the jury should have been provided with M Crim JI 16.4b, which provides:

> In determining whether the act causing death occurred while the defendant was *[committing/attempting to commit/helping someone else commit]* the crime of *[state felony]*, you should consider:
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> (1) the length of time between the commission of *[state felony]* and the murder,

(2) the distance between the scene of *[state felony]* and the scene of the murder,

(3) whether there is a causal connection between the murder and *[state felony]*,

(4) whether there is continuity of action between *[state felony]* and the murder, and

(5) whether the murder was committed during an attempt to escape.

However, the use note for M Crim JI 16.4b states that the instruction is to be used "where there is a dispute as to whether the murder was committed during the 'perpetration of, or attempt to perpetrate' the predicate felony." In this case, the medical experts were in agreement that the cause of Prhaze's death was recent blunt-force trauma to her head. Dr. Jere Baldwin, the doctor who treated Prhaze at the hospital, testified that the significant and recent head injury was the cause of death. The medical examiner also testified that the cause of death was multiple blunt-force head injuries that occurred relatively close in time to Prhaze's death. Finally, Dr. Marcus DeGraw testified that based on his review of the evidence, "the most important" injury that "directly led to her death was massive head trauma." Because this unrebutted evidence demonstrated that there was no dispute regarding what act caused Prhaze's death, defendant cannot show how she was denied a fair trial by failing to specify the alleged act causing Prhaze's death in the jury instructions themselves because the jury was plainly aware of this. The jury instructions, taken as a whole, "fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v Brown*, 239 Mich App 735, 746; 610 NW2d 234 (2000); see also *People v Miller*, 482 Mich 540, 559; 759 NW2d 850 (2008) (stating that defendants are guaranteed a fair trial, not a perfect trial).

Defendant also argues that the flawed jury instruction allowed the prosecutor to raise an improper "lower standard of causation to the jury." At the outset, to the extent defendant argues that the prosecutor made inappropriate remarks, that issue is abandoned by failing to list it in the statement of the questions presented. See *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999). Regardless, assuming the prosecutor stated something about the law that was inconsistent with what the court instructed, the presumption is that the jury followed the proper law as provided by the court. *People v Zitka*, 335 Mich App 324, 348; 966 NW2d 786 (2020). Indeed, the jury was specifically instructed to ignore the comments from attorneys if those attorney comments differed from the court's instructions. Defendant's allegation that she was denied a fair trial because of inadequate jury instructions is not supported by the law and does not warrant relief from judgment under MCR 6.508.

Defendant also argues that her trial counsel was ineffective by failing to object to the jury instructions and by failing to request a unanimity instruction. As explained above, there was no error in failing to object to the jury instructions. Consequently, any objection would have been futile, and counsel is not ineffective by failing to raise a futile objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Moreover, because the evidence made it clear that the alleged cause of death was trauma to Prhaze's head, there is not a reasonable likelihood that a different outcome would have occurred had the trial court included this cause of death in its instructions.

Defendant also maintains that her trial counsel should have requested a specific instruction regarding unanimity of the cause of death. "A defendant has the right to a unanimous verdict and it is the duty of the trial court to properly instruct the jury on this unanimity requirement." *People v Martin*, 271 Mich App 280, 338; 721 NW2d 815 (2006), aff'd 482 Mich 851 (2008). "Under most circumstances, a general instruction on the unanimity requirement will be adequate." *Id*. The trial court in this instance provided such a general instruction on unanimity. Defendant claims that the jury was required to agree "on the same specific act that provided the factual basis of their verdict." In essence, defendant argues that because the prosecutor argued that either defendant acted as the principal or acted as an aider or abettor, the jury was required to agree as to the specific conduct to convict her. Defendant's position is not supported by the law. In Michigan, a special unanimity instruction is not needed merely because the jury could find that the defendant committed an offense as a principal or as an aider and abettor, where both theories are supported by the evidence and encompass the commission of a single offense. *People v Smielewski*, 235 Mich App 196, 209; 596 NW2d 636 (1999).

Defendant's reliance on *People v Cooks*, 446 Mich 503; 521 NW2d 275 (1994), is misplaced. In *Cooks*, the Court held that

> when the state offers evidence of multiple acts by a defendant, each of which would satisfy the actus reus element of a single charged offense, the trial court is required to instruct the jury that it must unanimously agree on the same specific act if the acts are materially distinct or if there is a reason to believe the jurors may be confused or disagree about the factual basis of the defendant's guilt. [*Id*. at 530.]

However, "[w]hen neither of these factors is present, . . . a general instruction to the jury that its verdict must be unanimous does not deprive the defendant of [her] right to a unanimous verdict." *Id*.

In a single sentence, defendant avers that a special unanimity instruction under *Cooks* was needed because the prosecutor argued "three different and alternative causes of death." This is incorrect. The prosecutor did not argue that there were three different "causes of death"; the prosecutor argued that defendant was responsible for Prhaze's death because she either acted as the principal or as an aider and abettor.[3] Again, the cause of death being trauma to the head was

[3] During closing argument, the prosecutor stated that defendant should be found guilty of felony murder because she either (1) directly caused Prhaze's death, (2) aided and abetted the death, or (3) created an atmosphere where death was "inevitable." Defendant seems to focus on this third argument. This third aspect is counsel's argument that Prhaze's death was a "natural and probable consequence" of the first-degree child abuse directed toward her. *People v Robinson*, 475 Mich 1, 9; 715 NW2d 44 (2006). Simply put, because defendant was found to be responsible for the abuse, i.e., the trauma to the head, she cannot expect to not be held responsible when that same abuse leads to death. Indeed, this Court has already established that there was sufficient evidence to find defendant guilty of felony murder because "a natural consequence" of such abuse is death. *Galvan*, unpub op at 12.

not in dispute. As *Smielewski* instructs, no special unanimity instruction is warranted under that circumstance.

IV. OPINION TESTIMONY

Defendant next argues that she is entitled to postjudgment relief under Subchapter 6.500 because two witnesses, i.e., Ulrich and Gratz, allegedly provided improper lay-opinion testimony by relating their opinions of how much time had passed since Prhaze sustained the head trauma and when they saw her. We disagree.

Gratz testified that, in his experience as assistant fire chief and first responder, the injuries that Prhaze exhibited indicated that she had been "down for a while," which he explained meant that she had been down a "long" time and longer than five minutes. Ulrich, the paramedic who accompanied Prhaze in the ambulance on the way to the hospital, testified, with no objection, that Prhaze's pupils were fixed and dilated, which he had only seen in someone that "has already been dead." He testified that her eyes should not have been in this condition if the trauma only occurred a few minutes before his arrival. Ulrich also testified that the whites of Prhaze's eyes, i.e., the sclera, were drying but not totally dry. He testified that he had not seen drying eyes before in the approximately 200 cardiac arrests to which he had responded. The above evidence was inconsistent with defendants' assertions that the accident occurred immediately before calling 911.[4]

Assuming good cause was established, defendant cannot show actual prejudice. This case involves the application of MRE 701 and MRE 702, which govern the admissibility of opinion testimony. MRE 701 governs lay opinion testimony and has been "liberally applied . . . to help develop a clearer understanding of facts for the trier of facts." *People v Oliver*, 170 Mich App 38, 50; 427 NW2d 898 (1988), mod on other grounds by 433 Mich 862 (1989). Under MRE 701, a lay witness may offer opinions that are "(a) rationally based on the witness's perception; and (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue." On the other hand, if a 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," an expert witness can provide opinions. MRE 702(a).

This Court has previously recognized an interplay between MRE 701 and MRE 702 in the context of witnesses comparable to Gratz and Ulrich here. See *People v Dixon-Bey*, 321 Mich App 490, 497; 909 NW2d 458 (2017), citing *People v Dobek*, 274 Mich App 58, 77; 732 NW2d 546 (2007) ("[T]he interplay between MRE 701 and MRE 702 is somewhat unclear when a police officer provides testimony based on his or her training and experience.") The Court's analysis in *Dobek* involved a challenge to the admissibility of a police officer's testimony about delayed disclosure in sexual-assault cases, without qualifying the police officer as an expert. *Dobek*, 274 Mich App at 76. Initially, this Court found that it appeared that this testimony constituted expert opinion testimony because it was based on his knowledge, experience, and training. *Id.* at 77. However, a review of prior caselaw indicated mixed opinions here. For example, in *Chastain v*

[4] The first responders were on the scene within a few minutes of receiving the 911 call.

Gen Motors Corp (On Remand), 254 Mich App 576, 586-590; 657 NW2d 804 (2002), an officer's testimony based on an officer's "perceptions at the scene of the accident" and his past experience did not form the basis of the opinion testimony. *Id.* at 78. However, in *Co-Jo, Inc v Strand*, 226 Mich App 108, 117; 572 NW2d 251 (1997), an off-duty fireman's opinion testimony regarding the speed at which a building burned was appropriately considered lay testimony because the "conclusions were based on observation of the fire for over thirty minutes" and the "reliability of his conclusions was premised on his extensive experience in observing other building fires and investigating their cause." *Id.* at 78-79. In *Dobek*, the trial court resolved this by finding that the police officer could have been qualified as an expert given the record and, therefore, the disputed testimony was admissible. *Id.* at 79.

The same result applies in the instant case. Assuming expert testimony was necessary, Gratz and Ulrich, with their extensive experience,[5] were qualified to opine on how Prhaze's condition was distinguishable from the other patients to whom they have responded. Accordingly, the trial court did not abuse its discretion when it denied defendant's motion for relief from judgment.

Defendant also argues that her trial counsel was ineffective by failing to object to Gratz's and Ulrich's testimony. At the outset, counsel did object to Gratz's testimony, rendering that portion of the argument meritless. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999) (stating that a defendant has the burden of establishing the factual predicate for a claim of ineffective assistance of counsel). Consequently, the only remaining question is whether counsel was ineffective by failing to object to Ulrich's testimony.

Defendant cannot establish the requisite prejudice to prevail on this issue. As already described, it is apparent that Gratz and Ulrich were qualified to offer their testimony under MRE 702. As such, even if counsel had objected and the court sustained those objections on the basis that the testimony was inadmissible under MRE 701, the witnesses could have been qualified as experts and provided the same testimony under MRE 702.

V. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Defendant argues that the trial court erred by denying her motion for relief from judgment on the basis of the ineffective assistance of appellate counsel. We disagree.

A criminal defendant's rights to appeal and to counsel on appeal include the right to the effective assistance of counsel on appeal. *Evitts v Lucey*, 469 US 387, 396; 105 S Ct 830; 83 L Ed 2d 821 (1985); *People v Caston*, 228 Mich App 291, 304; 579 NW2d 368 (1998). The same test

[5] MRE 702 provides that a witness may be qualified as an expert "by knowledge, skill, *experience*, training, or education." (Emphasis added.) Gratz was certified as an emergency medical technician specialist and had been with the fire department for approximately 20 years. Over his career, he had responded to approximately 425 calls a year, with about half of them requiring him to provide medical care to a patient. And Ulrich testified that he had been a paramedic for 10 years, with 7 of those years being a critical care paramedic. Ulrich also estimated that he had responded to approximately 200 cardiac arrests during his career.

used to assess trial counsel's performance is used to assess appellate counsel's performance. *People v Uphaus (On Remand)*, 278 Mich App 174, 186; 748 NW2d 899 (2008). "Hence, defendant must show that [her] appellate counsel's decision to not raise a claim [in the direct appeal] fell below an objective standard of reasonableness and prejudiced [her] appeal." *Id*. Although appellate counsel must be an active advocate, not all arguable claims need to be advanced for review. *Reed*, 449 Mich at 391. Appellate counsel may legitimately discard weaker arguments in order to focus on those arguments that are more likely to prevail. *Jones v Barnes*, 463 US 745, 751-752; 103 S Ct 3308; 77 L Ed 2d 987 (1983); *People v Gardner*, 482 Mich 41, 49 n 11; 753 NW2d 78 (2008).

As described in this opinion, defendant's claims of error have no merit. It necessarily follows that appellate counsel was not ineffective by winnowing out these arguments and failing to raise them on direct appeal. See *Ericksen*, 288 Mich App at 201.

Affirmed.

/s/ Anica Letica
/s/ Colleen A. O'Brien
/s/ James Robert Redford