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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v JOEY MICHAEL HAAS, Defendant-Appellant.	UNPUBLISHED August 14, 2026 1:17 PM No. 367201 Otsego Circuit Court LC No. 2019-005817-FC

Before: CAMERON, P.J., and MALDONADO and WALLACE, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of unlawful use of a motor vehicle under MCL 750.414, arguing that his due process right to a fair trial was violated by the improper admission of several pieces of evidence, the violation of defendant's Sixth Amendment right to confront his accusers, prosecutorial errors, and an improper jury instruction on flight. In addition, defendant argues that his trial counsel was ineffective. We affirm.

I. BACKGROUND

Defendant was paid to repair Wayne Alan Kirk's Chevrolet Blazer, which had a white and yellow snowplow attachment. Kirk gave defendant permission to drive the Blazer, fix it, and then return it. Kirk did not give defendant permission to leave Michigan with the Blazer. At some point, defendant drove the Blazer off Kirk's property. Kirk subsequently texted defendant regarding the whereabouts of the Blazer, and defendant respondent that the Blazer was "gone." Defendant had previously had a romantic relationship with Kirk's daughter, Nicole Foster. So, Foster also texted defendant regarding the Blazer asking why defendant "stole" it, to which defendant responded: "Lol. Yeah? It's whatever. He lost it regardless." Shortly thereafter, Kirk reported to the police that the vehicle was stolen and, later that month, the police located the vehicle in Las Vegas, Nevada. Defendant was arrested and charged with one count of unlawful use of an automobile without authority under MCL 750.414.

On April 26, 2023, a one-day jury trial commenced. The prosecution presented only three witnesses: Kirk, Foster, and Trooper Zachary Helton of the Michigan State Police. The prosecution offered several different text messages into evidence, including the messages between

defendant and Kirk and the messages between defendant and Foster discussed earlier. The prosecution also offered several Facebook messages from a profile titled "Lou Lou." At trial, Foster testified that these messages came from her phone and that defendant was messaging from the "Lou Lou" profile because he sent a picture of himself and responded to his name when it was used. These messages contained a picture of defendant inside the Blazer, which was identified by Kirk and Foster at trial; a picture of the front windshield and hood taken from inside the vehicle; and messages that revealed that defendant was in the "Carolina's." Although defendant initially objected on the basis of insufficient foundation, defendant did not object when the evidence was ultimately admitted by the trial court.

Kirk testified that he had learned that the Blazer was found in Las Vegas from a phone call. Similarly, Foster testified that she learned that the vehicle was in Las Vegas when she received a phone call from a Las Vegas telephone number.[1] Trooper Helton explained that the vehicle was ultimately found using the Law Enforcement Information Network (LEIN) and that the Michigan State Police were notified by an officer in Las Vegas that they had found the vehicle. Trooper Helton also testified that the Blazer was found in a "no longer drivable" condition, "had been vandalized with spray paint," and "had some fire damage."[2] The prosecution rested, and defendant did not testify.

At closing arguments, defense counsel argued that there was no evidence that the Blazer that was found was Kirk's vehicle because it did not have the snowplow attachment. In a rebuttal closing argument, the prosecution stated the following:

> We'd like to know where the snowplow is but the only person who may have that information you haven't heard from, and he's under no obligation to do so, but don't be fooled to say that, well, gee, it's not the same vehicle because it didn't have the snow plow on it when it was recovered.

The trial court then provided the jury instructions that the parties agreed upon, and the jury subsequently found defendant guilty of unauthorized use of a motor vehicle.

After sentencing, defendant moved for a new trial or a *Ginther*[3] hearing arguing that the prosecution's case was based upon improperly admitted evidence, that the improperly admitted evidence violated the confrontation clause of the Sixth Amendment, that the prosecution erred when it commented on defendant's silence during closing arguments, and that the trial court gave an improper flight instruction. Defendant also argued that his trial counsel was ineffective for failing to object to these alleged errors. After holding a hearing on the motions, the trial court held

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[1] Defense counsel did not object to either of these testimonies.

[2] Defense counsel did object to Trooper Helton's testimony regarding the information from LEIN and the Las Vegas police. Specifically, defendant's trial counsel objected as follows: "[H]e's talking about what's going on between LEIN and everything else, but it should be—the foundation should be the person who discovered the vehicle in Las Vegas." The trial court overruled the objection without explanation.

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

that even assuming that the issues alleged by defendant were errors, the errors did not affect the ultimate outcome of the case. Accordingly, the trial court denied defendant's motions, and this appeal followed.

II. EVIDENTIARY ISSUES

On appeal, defendant argues that the following pieces of evidence were improperly admitted: (1) Kirk's and Foster's testimonies about receiving a phone call that the Blazer was found in Las Vegas; (2) Trooper Helton's testimony regarding the information he received from LEIN about where the Blazer was found and the condition it was in; and (3) the Facebook messages. Specifically, defendant argues that all three witnesses provided inadmissible hearsay evidence, and that the Facebook messages were not properly authenticated. We agree in part and disagree in part.

The evidentiary issues that defendant raises on appeal are unpreserved because defendant either did not object to their admission or objected on different grounds than raised in this appeal. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). We review unpreserved claims of error for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "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." *Id*. "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id*. (quotation marks and citation omitted).

A. KIRK'S AND FOSTER'S TESTIMONIES

Defendant first argues that Kirk's and Foster's testimonies that the Blazer was found in Las Vegas was inadmissible hearsay. We agree.

Hearsay is generally inadmissible unless it falls within an enumerated exception. MRE 802. "Hearsay" is a statement that "(1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." MRE 801(c). MRE 801(a) defines "statement," in relevant part as "an oral or written assertion."

Kirk's and Foster's testimonies were hearsay because they both testified that they received a phone call informing them that the Blazer was found in Las Vegas, and the prosecution elicited that testimony to prove that the vehicle was taken out of the state of Michigan. Accordingly, they were testifying about an out-of-court statement, i.e., the contents of the phone call, offered to prove the truth of the matter asserted, i.e., that the Blazer was found outside the State of Michigan. Further, there is no applicable hearsay exception. Thus, this testimony was inadmissible hearsay and the trial court erred by allowing Kirk's and Foster's testimonies about the phone calls.

However, this does not end the inquiry because defendant's trial counsel did not object on hearsay grounds. Therefore, defendant must also demonstrate that the admission of this testimony affected his substantial rights to warrant reversal. "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error

seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Carines*, 460 Mich at 763 (quotation marks and citation omitted).

Defendant was charged with the unlawful use of the vehicle under MCL 750.414. "To be convicted of this offense, a defendant must have intended to take or use the vehicle, knowing he had no authority to do so." *Landon v Titan Ins Co*, 251 Mich App 633, 644; 651 NW2d 93 (2002) (quotation marks and citation omitted). In the present case, testimony from Kirk and Foster established that defendant was given permission to drive the Blazer, fix it, and then bring it back. Defendant was not given permission to leave the state with the Blazer.

Even excluding the inadmissible evidence, there was sufficient evidence to support beyond a reasonable doubt that defendant unlawfully used Kirk's Blazer. Defendant admitted over text that he had no intent of returning the Blazer to the victim by saying that the Blazer was "gone" and the victim had "lost it." Further, there was no dispute that the vehicle was never returned to Kirk. In addition, defendant's own statement in the Facebook messages, which as discussed later were properly admitted, indicated that he took the vehicle out of the state of Michigan, which was far beyond the scope of Kirk's permission as there was no suggestion that this was necessary to fix the vehicle. Accordingly, the evidentiary errors did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings because defendant's admissions, and the fact that the Blazer was never returned, sufficiently established that defendant exceeded his scope of authority to fix the vehicle. Therefore, defendant has not established plain error justifying reversal.

B. TROOPER HELTON'S TESTIMONY

Defendant next argues that Trooper Helton's testimony about information he received from LEIN and the officer in Nevada regarding where the Blazer was found and the condition that it was in was inadmissible hearsay and violated the Confrontation Clause of the Sixth Amendment. We disagree.

Again, hearsay is an out-of-court statement that is offered to prove the truth of the matter asserted. *People v Musser*, 494 Mich 337, 350; 835 NW2d 319 (2013). See also MRE 801(c). Further, "[t]he Confrontation Clause prohibits the admission of out-of-court statements that are testimonial in nature," unless the defendant has an opportunity to cross-examine the declarant." *People v Putman*, 309 Mich App 240, 246; 870 NW2d 593 (2015). However, out-of-court testimonial statements are not barred by the Confrontation Clause when they are offered for "purposes other than establishing the truth of the matter asserted." *Id*. See also *People v Henry (After Remand)*, 305 Mich App 127, 153; 854 NW2d 114 (2014). For example, "a statement offered to show the effect of the out-of-court statement on the hearer does not violate the Confrontation Clause." *Henry*, 305 Mich App at 153 (quotation marks and citation omitted). Relevant here, "a statement offered to show why police officers acted as they did is not hearsay." *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007).

In the present case, Trooper Helton testified that he received information from Las Vegas officers that the Blazer was found in Las Vegas and the condition that it was in. Trooper Helton provided this testimony while he was describing the steps of his investigation. Therefore, the issue here is whether this testimony was offered to prove the truth of the matter asserted, i.e., that the

Blazer was found in Las Vegas and its condition, or if it was offered to detail Trooper Helton's investigation and how defendant came to be charged in connection with the vehicle.

Trooper Helton testified that when Kirk reported the Blazer stolen, he entered a description of the vehicle and its vehicle identification number (VIN) into LEIN so that law enforcement could "be on the lookout" for the vehicle. The prosecution asked if this produced any results and Trooper Helton explained that when information is entered into LEIN, any police officer in the United States can access the information. Eventually, an officer in Las Vegas found the Blazer, saw that it had been reported stolen in LEIN, and contacted the Michigan State Police. When the Las Vegas officer reached out to the Michigan State Police, they also informed the police of the condition of the Blazer, which was no longer drivable, had fire damage, and had been vandalized. Trooper Helton also explained that during his investigation, he determined that defendant was a suspect. After receiving the information regarding where the vehicle was found and its condition, Trooper Helton requested criminal charges against defendant, who had already been identified as a suspect.

Viewing the challenged testimony in context, we conclude that Trooper Helton's testimony that the Blazer was recovered in Las Vegas and its condition was not offered solely to prove the Blazer's condition and location, but rather to explain why Trooper Helton chose to request charges against defendant and how the present charge was filed against defendant. Therefore, the testimony was not hearsay. Accordingly, Trooper Helton's testimony was properly admitted and also did not violate the Confrontation Clause because it was not offered to prove the truth of the matter asserted. See *Chambers*, 277 Mich App at 10-11 (holding that the testimony of information received from an FBI agent was not hearsay and did not violate the Confrontation Clause because it was offered to explain how defendant came to be arrested).

C. FACEBOOK MESSAGES

Next, defendant argues that the Facebook messages were inadmissible because they were not properly authenticated. We disagree.

"To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what its proponent claims it is." MRE 901(a). "[T]he trial court must determine whether the proponent of the evidence has made a prima facie showing that a reasonable juror might conclude that the proffered evidence is what the proponent claims it to be." *People v Smith*, 336 Mich App 79, 106; 969 NW2d 548 (2021) (quotation marks and citation omitted). "The judge should permit the evidence to go to the jury unless the showing as to authenticity is so weak that no reasonable juror could consider the evidence to be what its proponent claims it to be." *Id*. at 107 (quotation marks and citation omitted). For written messages, courts may consider the content of the message, its distinctive characteristics, and the circumstances surrounding the writing to determine whether the message is sufficiently genuine. *People v Ford*, 262 Mich App 443, 461-462; 687 NW2d 119 (2004). Witness testimony is sufficient for this prima facie showing, as are distinctive characteristics and features of an item. MRE 901(b).

The record reflects that Foster identified the Facebook messages as being from her phone and taken from her phone, supporting their general authenticity. Further, the content of the messages supported an inference that defendant was communicating with Foster. Notably,

defendant sent a picture of himself. Then, Foster asked why the name of the profile was "Lou Lou," to which defendant sent a picture of a woman and said, "That's Lou Lou." When Foster later asked defendant, "Where are you Joey?"; defendant replied that he was in the Carolinas. Accordingly, Foster's corroboration, the picture of defendant, and the response to Foster's use of defendant's name allow a reasonable juror to conclude that the Facebook messages were from defendant. See *Smith*, 336 Mich App at 106 ("The judge should permit the evidence to go to the jury unless the showing as to authenticity is so weak that no reasonable juror could consider the evidence to be what its proponent claims it to be.").

In addition, both Foster and Kirk testified that the messages showed that shortly after defendant sent a picture of himself, he sent a picture that was taken from inside the vehicle showing the view out of the front windshield. Both Foster and Kirk were able to identify that it was the Blazer because of the "red-colored clips" on the windshield wipers and the white color of the hood. Therefore, there was also a prima facie showing that the messages were from defendant while he was driving the Blazer.

"Evidence that is properly authenticated may nonetheless be inadmissible hearsay if it contains out-of-court statements, written or oral, that are offered for the truth of the matter asserted and do not fall under any exception to the hearsay rule," *Smith*, 336 Mich App at 110. However, given that the messages were authenticated to have come from defendant, the messages fall under the "party opponent" exception, MRE 801(d)(2). A statement that is offered against an opposing party and that was made by the opposing party is not hearsay. MRE 801(d)(2). Accordingly, the Facebook messages were properly admitted.

III. PROSECUTORIAL ERROR[4]

Defendant next argues that the prosecution committed error by making various statements and references in its closing argument. We conclude that to the extent that the prosecution did commit error, it does not warrant appellate relief.

Defendant did not object to the prosecution's closing argument; therefore, this issue is also unpreserved. *People v Thurmond*, 348 Mich App 715, 735; 20 NW3d 311 (2023). We review unpreserved claims of prosecutorial error for plain error affecting substantial rights. *People v Evans*, 335 Mich App 76, 88; 966 NW2d 402 (2020). Unpreserved claims of prosecutorial error do not warrant relief "if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Aikens*, ___ Mich App ___, ___; ___ NW2d ___ (2025) (Docket No. 368187); slip op at 3 (quotation marks and citation omitted). "Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements and jurors

[4] Defendant uses the term "prosecutorial misconduct." "[A]lthough the term 'prosecutorial misconduct' has become a term of art often used to describe any error committed by the prosecution, claims of inadvertent error by the prosecution are better and more fairly presented as claims of 'prosecutorial error,' with only the most extreme cases rising to the level of 'prosecutorial misconduct.' " *People v Jackson (On Reconsideration)*, 313 Mich App 409, 425 n 4, 884 NW2d 297 (2015) (cleaned up).

are presumed to follow their instructions." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008) (citations omitted).

Prosecutors are generally "accorded great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (quotation marks and citations omitted). "Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008). When determining if a prosecutor's statement at trial was an error, we must examine the record and evaluate the prosecutor's statement in context to determine whether defendant substantial rights were affected. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010).

Defendant first argues that the prosecution committed reversible error when it discussed the lack of a snowplow attachment during its closing arguments. The prosecution did not commit error in this regard because defendant's counsel was the first party to discuss the lack of the snowplow attachment in his closing argument. The "prosecutor may fairly respond to an issue raised by the defendant," and the prosecutor's "comments must be read as a whole and evaluated in light of defendant arguments and the relationship they bear to the evidence admitted at trial." *Brown*, 279 Mich App at 135. The prosecution only mentioned the lack of the snowplow attachment in response to defendant's argument. Defendant opened the door to the prosecution's argument concerning the snowplow, and, in any event, the prosecution was merely responding to defendant's argument that the snowplow was never recovered.

Defendant next argues that the prosecution committed reversible error by commenting on defendant's silence. It is error for a prosecutor to comment on a defendant's silence in the face of accusation. *People v McGhee*, 268 Mich App 600, 634; 709 NW2d 595 (2005). However, a reference to a defendant's silence that is minimal and does not submit defendant's silence to the jury as evidence may not be prosecutorial error warranting appellate relief. See *People v Shafier*, 483 Mich 205, 214-215; 768 NW2d 305 (2009), cert den sub nom *Michigan v Shafier*, 558 US 992 (2009).

Here, the prosecution's comment was short and not emphasized. The prosecution stated in relevant part as follows:

> Defendant is not charged with stealing a snow plow. We're not here on a larceny complaint; we're here on a motor vehicle theft. As far as what happened with the snow plow, we don't know, and quite frankly, the People don't have to prove it to you. We'd like to know, but the only person who may have that information you haven't heard from, and he's under no obligation to do so . . . .

The crux of plaintiff's argument was that it does not matter what happened to the snowplow because it was not an element of the offense for which defendant was on trial. Accordingly, the prosecutor's brief reference to the fact that defendant was likely the only person who would know what happened to the snowplow was not used as evidence of defendant's guilt. See *id*.

Additionally, the trial court instructed the jury that defendant was presumed innocent, that defendant had the absolute right not to testify, and that defendant's lack of testimony could not

affect the verdict. "Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements, and jurors are presumed to follow their instructions." *Unger*, 278 Mich App at 235 (citation omitted). Accordingly, if the prosecution's reference to defendant's silence had a prejudicial effect, the trial court's jury instructions would presumptively have cured it. Therefore, reversal is not warranted.

Defendant lastly argues that the prosecution improperly referenced inadmissible hearsay evidence during closing arguments by referencing that the Blazer was taken to Las Vegas and was found in a vandalized and inoperable state. It is true that the trial court erred by admitting the evidence from Kirk and Foster regarding the fact that the Blazer was found in Las Vegas because, as discussed, the evidence was inadmissible hearsay. However, the trial court did not rule that this evidence was inadmissible, so it cannot be said that the prosecution's argument on the basis of improperly admitted evidence was plainly erroneous. See *People v Taylor*, 275 Mich App 177, 185; 737 NW2d 790 (2007) ("Because the trial court had not ruled on the statement's admissibility before the prosecutor commented on the anticipated testimony, nothing indicates that the comment amounted to misconduct."). Also, as discussed above, Trooper Helton's testimony that the Blazer was found vandalized and inoperable was properly admitted; therefore, the prosecution did not improperly reference the admissible evidence.

Further, even if these references were improper, defendant has not demonstrated that he is entitled to relief in light of the significant other evidence supporting his conviction, i.e., his own admission and the fact that the vehicle was never returned, and the trial court's instruction to the jury that the counsels' statements were not evidence. See *Aikens*, ___ Mich App at___; slip op at 3; *Unger*, 278 Mich App at 235. Accordingly, defendant is also not entitled to relief on these grounds.

IV. FLIGHT INSTRUCTION

Defendant further argues that the trial court erred by providing a jury instruction regarding flight because there was no evidence that defendant fled *after* being charged. We agree but conclude that the instruction did not affect defendant's substantial rights.

Defendant did not object to the jury instructions in the trial court; therefore, this issue is not preserved. Again, unpreserved errors are reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 763. Further, "an imperfect instruction is not grounds for setting aside a conviction if the instruction fairly presented the issues to be tried and adequately protected the defendant's rights." *People v Kowalski*, 489 Mich 488, 501-502; 803 NW2d 200 (2011).

"A criminal defendant is entitled to have a properly instructed jury consider the evidence against him." *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). Jury instructions must be considered as a whole and not as piecemeal when determining whether error occurred. *Kowalski*, 489 Mich at 501. "[A] trial court is required to give requested instructions only if the instructions are supported by the evidence or the facts of the case." *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). "[A]n instruction that is without evidentiary support should not be given." *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999). In the context of a flight instruction, "mere departure from the scene is insufficient to give rise to 'flight' in the legal sense." *People v Hall*, 174 Mich App 686, 691; 436 NW2d 446 (1989).

During the trial, the prosecution presented evidence that defendant failed to return to Michigan after learning that Kirk reported the Blazer stolen. Prior to deliberations, the trial court gave the following instruction to the jury:

> There has been some evidence that the Defendant tried to hide, ran away, or hid after he was charged with the alleged crimes. This evidence does not prove guilt. A person may run or hide for innocent reasons, such as panic, mistake, or fear.
>
> However, a person may also run or hide because of a consciousness of guilt. You must decide whether the evidence is true, and if true, whether it shows that the Defendant had a guilty state of mind.

This instruction was consistent with the model criminal jury instruction.

The prosecution concedes that no evidence was presented of defendant fleeing *after* he was *charged* with the offense in this case and that the instruction should not have been given, and we agree. The instruction required evidence that defendant fled or hid *after* he was *charged*; therefore, the trial court should not have given the instruction because it did not have evidentiary support. *Wess*, 235 Mich App at 243.

Nonetheless, we conclude that the instructions as a whole adequately protected defendant's rights. Notably, the instruction provided that the jury should determine whether it found that the evidence proved defendant fled and whether that evidence supported a finding of a consciousness of guilt—it did not *require* such a finding. Accordingly, if there was no evidence presented, then the jury had no evidence that would indicate defendant's guilty mind. Again, juries are presumed to follow trial court instructions. *Unger*, 278 Mich App at 235. In addition, the prosecution presented very little evidence of flight in general, and the parties did not focus on the flight issue. Accordingly, defendant has not demonstrated that the instruction affected his substantial rights.

V. CUMULATIVE ERROR

We recognize that "[t]he 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 the confidence in the reliability of the verdict before a new trial is granted." *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007). Further, "each of the errors must be of some consequence." *People v Lowrey*, 342 Mich App 99, 119; 993 NW2d 62 (2022).

As discussed, the trial court erred when it admitted Kirk's and Foster's testimonies regarding where the vehicle was found, and when it provided the jury with a flight instruction that was not supported by evidence. Further, the prosecution erred when it commented on defendant's silence. However, we conclude that reversal is unwarranted because the errors were not of consequence. See *id.* As discussed, there was significant other admissible evidence that supported defendant's conviction and the minor instance of prosecutorial error and the imperfect jury instruction were sufficiently cured by the remaining instructions provided to the jury. Moreover, as these were the only errors that this Court found, they do not undermine the confidence in the

reliability of the verdict. See *id*; *Dobek*, 274 Mich App at 106. Accordingly, even considering the errors cumulatively, reversal is not warranted.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant argues that trial counsel was ineffective for failing to object to the alleged errors. We conclude that trial counsel was defective in some respects; however, defendant has not demonstrated that his trial counsel's performance prejudiced him.

This issue is preserved for appellate review because defendant moved for a new trial and a *Ginther* hearing, even though the trial court denied the motion. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). "Generally, whether a defendant had the effective assistance of counsel is a mixed question of fact and constitutional law." *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012). "This Court reviews findings of fact for clear error and questions of law de novo." *Id*. When an evidentiary hearing is not held, this Court's review is limited to mistakes apparent from the record. *People v Thorne*, 322 Mich App 340, 347; 912 NW2d 560 (2017).

The United States Constitution and the Michigan Constitution each guarantee a criminal defendant the right to the effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. Counsel is ineffective if "(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 would have been different." *People v Yeager*, 511 Mich 478, 488; 999 NW2d 490 (2023) (quotation marks and citation omitted). "A defendant must also show that the result that did occur was fundamentally unfair or unreliable." *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Eisen*, 296 Mich App 326, 329; 820 NW2d 229 (2012) (quotation marks and citation omitted). "Failure to raise a futile objection or advance a meritless argument does not constitute ineffective assistance of counsel," and "failing to raise an objection may be consistent with a sound trial strategy." *People v Isrow*, 339 Mich App 522, 532; 984 NW2d 528 (2021).

As discussed, it was not error for the trial court to admit evidence of the Facebook messages, Trooper Helton's testimony, or for the prosecution to make closing arguments that referenced the snowplow attachment. Therefore, objections to these alleged errors would have been unsuccessful. Because failure to raise a futile objection does not render counsel ineffective, defendant has not shown ineffective assistance of counsel on these grounds. *Id*.

However, trial counsel's performance was deficient by failing to object to Kirk's and Foster's testimonies about receiving a phone call that the Blazer had been found in Las Vegas. This evidence would naturally be damaging, and there is no conceivable strategic reason for trial counsel not to raise a hearsay objection to prevent its admission. Nevertheless, we are unconvinced that trial counsel's performance prejudiced defendant because there was more than sufficient admissible evidence of defendant using the Blazer beyond the scope of authority given by Kirk.

Notably, Kirk asked defendant about the Blazer and defendant simply responded that it was "gone." Similarly, when Foster asked about the vehicle and suggested that defendant had

stolen it, defendant told her, in effect, that it did not matter and that Kirk had "lost" it. The record also included the Facebook messages in which defendant sent a picture from the inside of the Blazer and admitted to taking it to the Carolinas. And finally, Kirk testified that defendant never returned the vehicle to him. Therefore, even if trial counsel had successfully objected to Kirk's and Foster's testimonies about receiving a phone call about the location of the vehicle, the jury still would have heard testimony that defendant had taken the vehicle to the Carolinas and never returned it to Kirk. Moreover, the jury would have heard Trooper Helton's testimony about the vehicle being found in Las Vegas. This makes it unlikely that the exclusion of Kirk's and Foster's limited testimonies about how they learned the vehicle was in Las Vegas would have affected the outcome of the trial.

In addition, trial counsel also gave deficient performance by failing to object to the inclusion of the flight instruction because as discussed, the instruction was not supported by evidence. See *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001) (noting that the failure to object to an improper jury instruction may constitute ineffective assistance of counsel). However, defendant has again not demonstrated that the result of the proceeding would have been different. As discussed, jurors are presumed to follow the court's instructions, and in the present case, the jury instructions did not mandate a finding of guilt because of the presented evidence of flight. Instead, the trial court explained that first the jury must determine if the evidence was true, and if it was true, then the jury must also determine whether it supported an inference that defendant had a guilty mind. Therefore, defendant has not demonstrated prejudice on this issue because it is just as likely that the jury did not find that there was evidence of flight that supported defendant's guilt.

Lastly, trial counsel also gave deficient performance by failing to object to the prosecution's reference to defendant's silence during closing arguments. However, again, defendant has failed to demonstrate that this reference affected the outcome of the trial. As discussed earlier, the reference was brief and any prejudice was presumably cured when the trial court provided further instruction to the jury regarding the fact that defendant was not required to testify, that his decision not to testify could not be used against him, and that the comments of counsel are not evidence. See *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004) (determining that the prejudice of the prosecutor's comments can be alleviated by the trial court's instruction to the jury that the case is to be decided on the evidence and that the comments of counsel are not evidence). Accordingly, the failure to object to this error did not affect the outcome of the trial.

Although defendant's trial counsel may have failed to raise the objections discussed above, overall trial counsel's performance was not so deficient that defendant was denied a fair trial. Throughout the proceedings, trial counsel raised various objections to pieces of evidence on the basis of foundation, even if those objections were ultimately overruled. Further, trial counsel cross-examined Foster and Trooper Helton on their testimonies emphasizing the weaknesses in their testimonies and their lack of personal knowledge of certain facts. Trial counsel also gave a closing argument that pointed out the flaws in the prosecution's case, emphasizing that there was little evidence that the Blazer that was found was the one defendant was tasked with fixing, that there was little evidence that defendant was driving the Blazer in the pictures sent via Facebook messenger, and that there was no evidence detailing how the Blazer got to Las Vegas, much less evidence that indicated that defendant was involved. Accordingly, although trial counsel certainly

erred in some respects, ultimately defendant has not carried his burden of demonstrating that trial counsel's performance prejudiced him.[5]

In sum, we recognize that trial counsel and the trial court made a few errors throughout this proceeding. However, considering the admissible evidence of defendant's guilt and the defendant's failure to demonstrate prejudice, we conclude that defendant is not entitled to relief.

Affirmed.

/s/ Thomas C. Cameron
/s/ Allie Greenleaf Maldonado
/s/ Randy J. Wallace

[5] Courts should not conflate effective-assistance-of-counsel prejudice with plain-error prejudice. See *People v Randolph*, 502 Mich 1, 9-15; 917 NW2d 249 (2018). However, in the present case, defendant has not provided any facts outside the lower court record that makes the prejudice analysis different. Further, the overarching question is the same—would the jury have reached a different verdict if not for the errors—and as discussed earlier, the answer is no.