STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 16, 2006
v JAIRUS ANDRAE PERKINS, Defendant-Appellant.	No. 259865 Wayne Circuit Court LC No. 04-008291-02
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v JUANITA MICHELLE-LYNN ELAM, Defendant-Appellant.	No. 259866 Wayne Circuit Court LC No. 04-008291-03
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v JOHN HENRY RAY, Defendant-Appellant.	No. 260161 Wayne Circuit Court LC No. 04-008291-01

Before: Smolenski, P.J., and Owens and Donofrio, JJ.

PER CURIAM.

In these consolidated appeals, defendants appeal as of right from their respective jury trial convictions. All three defendants were tried together after the trial court denied pretrial motions

for separate trials. Defendants were involved in the killing of a man and a pregnant woman during the course of a robbery at a residence in Romulus, Michigan in July 2004.

Defendant Perkins was convicted and sentenced as follows: two counts of first-degree premeditated murder, MCL 750.316(1)(a), vacated sentence of life without parole; killing an unborn child, MCL 750.322, 10 to 15 years'; two counts of first-degree felony murder, MCL 750.316(1)(b), life without parole; two counts of assault with intent to murder, MCL 750.83, 225 months' to 80 years'; two counts of armed robbery, MCL 750.529, 225 months' to 80 years'; first-degree home invasion, MCL 750.110a(2), vacated sentence of 12 to 20 years'; possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b, 2 years' imprisonment. Because we are not persuaded by any of defendant Perkins's arguments on appeal, we affirm his convictions and sentences.

Defendant Elam was convicted and sentenced as follows: two counts of first-degree premeditated murder, MCL 750.316(1)(a), vacated sentence of life without parole; killing an unborn child, MCL 750.322, 10 to 14 years'; two counts of first-degree felony murder, MCL 750.316(1)(b), life without parole; two counts of assault with intent to murder, MCL 750.83, 20 to 60 years'; two counts of armed robbery, MCL 750.529, 120 months' to 60 years'; and first-degree home invasion, MCL 750.110a(2), vacated sentence of 10 to 20 years. Because we are not persuaded by any of defendant Elam's arguments on appeal, we affirm her convictions and sentences.

Defendant Ray was convicted and sentenced as follows: two counts of second-degree murder, MCL 750.317, vacated sentence of life without parole; two counts of first-degree felony murder, MCL 750.316(1)(b), life without parole; killing an unborn child, MCL 750.322, 228 months' to 60 years'; two counts of assault with intent to do great bodily harm less than murder, MCL 750.84, 228 months' to 80 years'; two counts of armed robbery, MCL 750.529, 45 to 80 years'; first-degree home invasion, MCL 750.110a(2), 10 to 50 years'; felon in possession of a firearm, MCL 750.224f, 10 to 25 years'; felony firearm MCL 750.227b, 2 years' imprisonment. Because we are not persuaded by any of defendant Ray's arguments on appeal, we affirm his convictions and sentences, but we remand for correction of his judgment of sentence to reflect that the trial court vacated his conviction and sentence for first-degree home invasion.

I. Substantive Facts

Defendant Perkins, aged twenty-one, his girlfriend, defendant Elam, aged twenty-eight, and defendant Ray, aged thirty-eight, were involved in the killing of a man, Deshone Douglas Moore, aged twenty-eight, and a pregnant woman, Amanda Zarbaugh, aged twenty, and her unborn child, during the course of an armed robbery at Zarbaugh's residence in Romulus, Michigan in July 2004. Defendant Elam was already in the house with the two victims when defendants Perkins and Ray arrived with guns. Defendant Perkins and Ray encountered Christopher Straughter and Ebonie Booker exiting the house when they arrived. Defendant Perkins ran into the house just prior to fatal shots being heard, and defendant Ray stayed outside and held the witnesses at gunpoint.

I. Defendant Perkins

A.

Defendant Perkins first argues that the magistrate abused its discretion when it denied his request for a lineup on the day of the preliminary examination because the witnesses' identifications were material and questionable. A trial court's decision to deny a request for a lineup is reviewed for abuse of discretion. *People v McAllister*, 241 Mich App 466, 471; 616 NW2d 203 (2000). A decision constitutes an abuse of discretion where it is so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of passion and/or bias. *Id*.

"Michigan law permits a trial court to grant a defendant's motion for a lineup if the court chooses to do so in an exercise of its discretion." *People v Gwinn*, 111 Mich App 223, 249; 314 NW2d 562 (1981). In making its decision, the trial court should consider the benefits to the accused, the burden to the prosecution, police, courts, and witnesses, and the timeliness of the motion. *Id*. at 249. "A right to a lineup arises when eyewitness identification has been shown to be a material issue and when there is a reasonable likelihood of mistaken identification that a lineup would tend to resolve." *McAllister, supra* at 471.

In *Gwinn, supra*, there was no reasonable likelihood of misidentification where the witness spent one to two hours with her attacker and where she had adequate light in which to observe him. *Gwinn, supra* at 250. In *McAllister, supra*, this Court also found that the time the witness spent with his attacker prior to the assault, a few minutes at best, was sufficient to ensure that there was not a reasonable likelihood of mistaken identification. *McAllister, supra* at 471. There were two witnesses in this case, Straughter who was certain he could identify defendants, and Booker, who stated that she would not be able to identify anyone. Straughter in fact did identify the perpetrators in a corporeal lineup and a photographic lineup. Since Straughter had seen defendant Perkins less than twenty-four hours before the crimes, had in fact met and shook hands with defendant Perkins while he was in a silver Explorer, the same vehicle used the night of the crimes, there was no reasonable likelihood of misidentification of defendant Perkins. A neighbor had reported seeing a silver Explorer at the scene of the crime on the night in question, and it was known that defendant Perkins was romantically linked to defendant Elam who had introduced Straughter and defendant Perkins earlier that day. These were independent bases further supporting defendant Perkins's identification.

Based on Straughter's knowledge and familiarity with defendant Perkins before the crimes and the opportunity he had to observe him and interact with him during the crimes, we conclude that the trial court had significant evidence on which to base its ruling that there was not a reasonable likelihood of mistaken identification in this case even considering Booker's late in-court identification. The trial court did not abuse its discretion by denying defendant Perkins's motion for a lineup.

B.

Defendant Perkins next argues that the trial court denied his right to a fair and impartial jury when it performed only a cursory voir dire that was not adequate to provide for the intelligent exercise of both challenges for cause and peremptory challenges. Defendant Ray's counsel lodged an objection to the trial court's conduct of the voir dire process. Brother counsel's general objection also pertains to defendant Perkins. However, since defendant Perkins made no specific objections thus allowing the trial court to address the objection on the record, we review this issue for plain error affecting defendant Perkins's substantial rights.

People v Carines, 460 Mich 750, 763-764; 597 NW2d 130 (1999). It is within the trial court's discretion to conduct voir dire itself, and, accordingly, this Court reviews questions concerning the conduct or scope of voir dire for an abuse of discretion. MCR 6.412(C)(1); *People v Tyburski (Tyburski II)*, 445 Mich 606, 618-619; 518 NW2d 441 (1994); *People v Sawyer*, 215 Mich App 183, 186-187; 545 NW2d 6 (1996).

"The function of voir dire is to elicit sufficient information from prospective jurors to enable the trial court and counsel to determine who should be disqualified from service on the basis of an inability to render decisions impartially." *Sawyer, supra* at 186. What constitutes acceptable and unacceptable voir dire practice "does not lend itself to hard and fast rules." *Tyburski II, supra* at 623. Instead, trial courts "should be allowed wide discretion in the manner they employ to achieve the goal of an impartial jury." *Id*. If a trial court undertakes to conduct voir dire itself, it must ask "probing questions" and "consider relevant questions posed by the attorneys." *People v Tyburski (Tyburski I)*, 196 Mich App 576, 589; 494 NW2d 20 (1992). Therefore, in reviewing the trial court's conduct of voir dire, this Court must determine whether the trial court conducted a voir dire "sufficiently probing . . . to uncover potential juror bias." *Tyburski II, supra* at 609. A trial court abuses its discretion when it limits voir dire to exclude an adequate showing of facts that could be employed in exercising challenges for cause and peremptory challenges. *Tyburski II, supra* at 619.

Our review of the record reveals that the trial court's conduct of voir dire was sufficiently probing to uncover potential juror bias. The trial court introduced to the potential jurors all the parties, attorneys, and expected witnesses, and asked if any of them knew any of these people, and whether that would interfere with their judgment. The trial court explored whether any of the potential jurors had been or had family members who had been the victim of a crime or accused of committing a crime, and whether that would interfere with their judgment. The trial court inquired whether any potential juror had a bias either for or against the police. The trial court explained the presumption of innocence and explored whether any potential juror could not accept this tenet. The trial court questioned the potential jurors to make sure that they all could return a verdict of guilty if the prosecution proved its case beyond a reasonable doubt, and conversely that they all could return a verdict of not guilty if it did not. The trial court individually questioned each potential juror regarding their profession, marital status, and if any, spouse's profession. The trial court inquired whether there was any other reason why the potential jurors could not fairly sit and hear the case and decide it based solely on the evidence presented in court. Further , the trial court repeatedly inquired of counsel if they had anything to add.

This voir dire was not merely a "perfunctory exercise," *Tyburski I, supra* at 591, was sufficiently probing to uncover potential juror bias and contrary to defendant Perkins's argument, and was adequate to provide for the intelligent exercise of challenges for cause and peremptory challenges. The trial court did not abuse its discretion when it performed voir dire, and defendant's substantial right were not violated in the voir dire process.

C.

Defendant Perkins argues that he was denied his right to a fair trial due to prosecutorial misconduct, ineffective assistance of counsel, the trial court's actions, as well as any cumulative effect of all three combined. Defendant Perkins specifically argues the prosecutor denied him

his due process right to a fair trial when she engaged in various instances of misconduct. Because defendant Perkins failed to preserve his assertions of prosecutorial misconduct, this Court reviews for plain outcome-determinative error affecting defendant's substantial rights. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *Id*.

Defendant Perkins first asserts that the prosecutor injected highly prejudicial evidence of defendant Perkins's alleged involvement in drug trafficking when asking questions of witnesses Kenneth Bolton and Jarrell James. Defendant Perkins points to two questions in a lengthy trial regarding defendant Perkins's style of dress, the car he drove, and whether he was legitimately employed. Defendant Perkins has not established bad faith or prejudice as a result of these two questions. "The prosecutor's good-faith effort to admit evidence does not constitute misconduct." *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003), citing *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999).

Defendant Perkins next asserts that the prosecutor intentionally humiliated him when she compared him to the 9/11 terrorists during her closing argument. The challenged comments are as follows:

Prosecutor:

> And finally, ladies and gentlemen, it's insulting for any counsel , for all three counsel, in behalf of all three Defendants to somehow suggest that this truly was outside the scope, like you just committed a robbery, and somehow one person decided to do all these murders.
>
> Ladies and gentlemen, the best analogy I can give for that is when somebody flew that airplane into the World Trade Center, they flew it on – one hit the 99th floor, the other one hit the 71st floor. And that's like someone saying I only have to kill the people from that floor above. I'm not responsible for the building coming down or the police officers who responded or the fire fighters who responded or the civilians. I only have to do this much. I didn't set anything in motion that resulted in the death of 5000 –

Trial Court:

> Ms. Kowal, let's stick to this case please.

After reviewing the challenged comments in context, it is clear that the prosecutor was attempting to respond to the defendants' claims that the murders were not their responsibility, i.e. that if only a robbery was planned, any deaths resulting from the robbery would not be their responsibility. The prosecutor's argument was accurate in the context of the evidence presented at trial that defendants Perkins and Ray came to the house armed, held Straughter and Booker at gun point, and Perkins went into the house and shot and killed Moore and Zarbaugh. The prosecutor's argument was meant as an analogy for the fact that under the people's theory of the

case, the defendants would be responsible for any and all consequences resulting from their individual roles in the armed robbery. Indeed the analogy was a colorful one, however, defense counsel did not object, and the trial court did instruct the prosecutor to "stick to this case." And, a prosecutor need not use the least prejudicial evidence available to establish a fact at issue, nor must he state the inferences in the blandest terms possible. *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995). We find no error.

Defendant next argues that the prosecutor inappropriately appealed to juror sympathy in a civic duty type argument when she deliberately distracted the jurors from engaging in an objective and unbiased appraisal of relevant evidence. The bulk of the challenged comments are as follows:

> We're going to talk about that time line, how these folks came together, they did not come together by accident, the three Defendants seated before you, it was intentional and it was planned. And I say to you as it related to that, but for Defendant Juanita Elam, who was the only connection to Chris Straughter. She's the only one that knew him. She's the only one that had contact with him. And she was the only who one enticed him over Amanda's.
>
> Because remember Chris just met Mr. Perkins in a fleeting moment that Saturday morning, had never met John Ray before. But for Juanita Elam, ladies and gentlemen, but for Juanita Elam, Amanda Zarbaugh would be eight months pregnant at home waiting for the birth of her child. Deshone Moore would be with his four kids getting ready for Christmas at home with his mother.
>
> But for Juanita Elam, he would have never met Chris Straughter, he wouldn't have had his life threatened, he never would have met Ebonie Booker, she wouldn't have had her life threatened and their property stolen at gunpoint.
>
> Another factor, the motive here, ladies and gentlemen was robbery and killing. Let me repeat myself, the motive here was robbery and killing. Ladies and gentlemen, based on the contact that Defendant Elam had with Chris, she knows he's a drug dealer. Chris didn't hide that from you. If Chris got caught with drugs, and he was prosecuted, Chris Straughter would be sitting here. But don't misbelieve him because he says I sell drugs. You may not like him, you may not like what he does, but he's going to have to live with the fact that he brought two people along with him to Amanda's house, one of whom is dead and now. And one who will forever have this impact on her life.

After reading the prosecutor's comments in context, we conclude that defendant Perkins's argument is without merit. The prosecutor's argument is not an improper civic duty argument, but rather a simple recitation of the evidence presented to the jury throughout the trial. We find no error here because the prosecutor is allowed to argue reasonable inferences from the presented evidence. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). And again, a prosecutor need not argue inferences in the blandest terms possible. *Fisher, supra* 452.

In his Standard 4 brief, defendant Perkins alleges that "[t]he prosecutor spent the entire trial bound and determined to deny the [d]efendant a fair trial by any means possible," and that,

she resorted to "unfair prejudice at any cost." In support of this argument, defendant Perkins lists many other alleged allegations of prosecutorial misconduct as well as arguments that his counsel was ineffective for not objecting, and the trial court denied him a fair trial by not acting independently to curtail the prosecutor's alleged rampage of misconduct. Our careful review of the full record reveals that defendant Perkins has not established that the prosecutor engaged in a pattern of "egregious prosecutorial misconduct" that denied him a fair and impartial trial. *Watson*, *supra* 586. And, only actual errors may be aggregated to determine if their cumulative effect merits reversal when separately they do not. *People v Rice (On Remand)*, 235 Mich App 429, 448; 597 NW2d 843 (1999). Therefore, defendant Perkins's argument that he was denied a fair trial based on the cumulative effect of the errors fails for the reason that he has not presented any errors. *Id*.

Defendant Perkins also argues that he was denied effective assistance of counsel. Defendant Perkins must overcome the strong presumption counsel provided constitutionally adequate assistance by showing "(1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms, and (2) a reasonable probability exists that, but for counsel's unprofessional error, the outcome of the proceedings would have been different." *Rice (On Remand)*, *supra* at 444; *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant Perkins argues that counsel was ineffective for failing to object to matters that were not errors. Thus, any objection by counsel would have been futile. Counsel is not ineffective for failing to make futile objections. *Rodgers*, *supra* at 715. Likewise, since defendant Perkins has not shown any error, the trial court's alleged inaction in defendant Perkins's view, did not deny him a fair trial and did not amount to error.

D.

Finally, defendant Perkins argues that his convictions and sentences for both felony murder and the underlying larcenous offenses of armed robbery violate double jeopardy and thus his convictions and sentences for armed robbery should be vacated. A double jeopardy claim presents a question of law, which is reviewed de novo on appeal. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). The double jeopardy provisions of the United States and Michigan Constitutions protect citizens from multiple prosecutions for the same offense. *Id*. at 599. It is a violation of double jeopardy protections to convict a defendant of both felony murder and the predicate felony because the evidence necessary to prove felony murder requires proof of the underlying lesser-included felony. *People v Wilder*, 411 Mich 328, 342; 308 NW2d 112 (1981).

Defendant Perkins was convicted of two counts of first-degree premeditated murder, killing an unborn child, two counts of first-degree felony murder, two counts of assault with intent to murder (Straughter and Booker), two counts of armed robbery, first-degree home invasion, and felony firearm. Our review of defendant Perkins's judgment of sentence shows that the trial court vacated defendant Perkins's convictions and sentences for first-degree murder and for first-degree home invasion so as not to violate defendant Perkins's double jeopardy protections. Defendant Perkins is not entitled to vacation of his conviction and sentence for the armed robberies of Booker and Straughter because double jeopardy does not apply to crimes committed against different victims. *People v Hall*, 249 Mich App 262, 273; 643 NW2d 253 (2002).

II. Defendant Elam

A.

Defendant Elam first argues that her convictions for felony murder and the predicate felony, armed robbery, violate her double jeopardy protections, so her convictions and sentences for armed robbery should be vacated. However, for the same reasons as defendant Perkins's who made the exact same argument, defendant Elam is not entitled to vacation of her conviction and sentence for the armed robberies of Booker and Straughter because double jeopardy does not apply to crimes committed against different victims. *Hall, supra* at 273.

B.

Defendant Elam next argues that the evidence presented was insufficient to bind her over on the charges, that her motion for directed verdict should have been granted, and that the evidence was insufficient to convict her of all crimes. Initially, we note that although defendant Elam introduces her argument by alleging that there was not enough evidence to convict her of *all* charges, in fact defendant Elam argues specifically that the prosecution did not present enough evidence to convict her of felony murder on an aiding and abetting theory and the underlying felony of armed robbery. Defendant Elam's argument is fundamentally flawed because the enumerated predicate felony was first-degree home invasion, and not armed robbery. Our review is limited, therefore, to her argument against the bindover and denials of her motions for directed verdict on the felony murder charges as a principal or aider and abettor. A defendant may not simply announce a position or assert an error and leave it to this Court to "'discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *People v Kevorkian*, 248 Mich App 373, 388-389; 639 NW2d 291 (2001), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Defendant Elam argues that the trial court erred in denying her motion for directed verdict, where there was insufficient evidence to prove beyond a reasonable doubt that she was a principal or an aider and abettor in the murders and armed robbery, in that the prosecutor failed to establish more than her mere presence because the evidence did not show that she "set in motion a preconceived plan that could possibly result in death." Again, we point out that the enumerated underlying offense was actually first-degree home invasion.

This Court review claims of insufficient evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. *Id*. at 514-515. Circumstantial evidence and reasonable inferences that

arise from such evidence can constitute satisfactory proof of the elements of the crime. *Carines, supra* at 757. All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). These principles are equally applicable in the context of an argument that the court erred in denying a motion for directed verdict. *People v Kris Aldrich*, 246 Mich App 101, 122-123; 631 NW2d 67 (2001).

The jury determined that defendant Elam was guilty of felony murder based on the predicate felony of first-degree home invasion. Felony murder requires: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result (collectively known as the "malice" element), (3) while committing, attempting to commit, or assisting in the commission of any of the enumerated felonies in the statute. MCL 750.316(1)(b); *Carines, supra* at 758-759. The first-degree home invasion statute, MCL 750.110a(2), provides:

> A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:
>
> (a) The person is armed with a dangerous weapon.
>
> (b) Another person is lawfully present in the dwelling.

"Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense." MCL 767.39. In general, to convict a defendant of aiding and abetting a crime, the prosecutor must establish that (1) the crime charged was committed by the defendant or some other individual; (2) the defendant performed acts or gave encouragement that assisted in the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that the defendant gave aid and encouragement. *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004). Aiding and abetting includes any and all forms of assistance. *People v Lawton*, 196 Mich App 341, 352; 492 NW2d 810 (1992). "The quantum of aid or advice is immaterial as long as it had the effect of inducing the crime." *Id*. However, mere presence at the crime scene, even with knowledge that an offense is about to be committed, is insufficient to establish that a defendant aided or assisted in the commission of the crime. *People v Norris*, 236 Mich App 411, 419-420; 600 NW2d 658 (1999).

Conviction of first-degree felony murder pursuant to an aiding and abetting theory requires the prosecution to prove, in part, that the defendant had the intent to kill, intent to do great bodily harm, or wantonly and willfully disregarded the likelihood of the natural tendency of his behavior to cause death or great bodily harm. *People v Barrera*, 451 Mich 261, 294; 547

NW2d 280 (1996), quoting *People v Kelly*, 423 Mich 261, 278-279; 378 NW2d 365 (1985). Additionally, if the aider and abettor participates in a crime with the knowledge that the principal has the intent to kill or to cause great bodily harm, he is acting with wanton and willful disregard sufficient to support a finding of malice. *Barrera, supra* at 294, quoting *Kelly, supra* at 278-279.

Here, the record contains sufficient evidence to support defendant Elam's convictions. The evidence showed that defendant Elam was the only person who knew both Straughter and Zarbaugh. Defendant Elam also knew that Straughter always carried large sums of money. Despite the fact that defendant Elam's boyfriend, defendant Perkins, sold drugs, defendant Elam attempted to entice Straughter to come over to Zarbaugh's house to buy $50 worth of drugs stating she wanted to talk business. Defendant Elam was insistent that Straughter come over to Zarbaugh's house and would not leave until he arrived. After the final telephone call with Straughter when he stated he was going to be heading over shortly, less than one minute later a telephone call was placed from Zarbaugh's home phone to defendant Perkins's cellular telephone. After they arrived, Straughter, Booker, and Moore were only in the house for about five minutes. Straughter gave Zarbaugh over $500 cash and then Straughter and Booker headed out the front door of the house while defendant Elam spoke with Moore. As they headed out of the house defendants Perkins and Ray were already there and rushed them with handguns drawn. Defendants Perkins and Ray robbed Straughter and Booker at gunpoint, then while defendant Ray stood over Straughter and Booker outside the house at gunpoint, defendant Perkins joined defendant Elam inside the house where Zarbaugh and Moore were both shot execution style and the cash Straughter left for Zarbaugh was taken. After once again threatening Straughter and Booker with guns, discussing killing them, but the guns did not discharge, all three defendants fled the scene in defendant Perkins's silver Explorer.

This evidence is enough to fulfill all the elements of the crimes. At a minimum, the evidence showed that defendant Elam worked in unison with her codefendants and that she performed acts or gave encouragement, i.e., enticing Straughter to come to Zarbaugh's house, repeatedly letting him know throughout the night that she was still at Zarbaugh's house, calling defendant Perkins only one minute after she had confirmation that Straughter was expected at Zarbaugh's house shortly, remaining inside the house after defendant Perkins ran in armed with a loaded weapon, remaining inside the house as shots were fired, and then ultimately exiting the house and fleeing the scene with defendant Perkins. The overwhelming evidence displayed that defendant Elam was an active participant in the crimes, not an innocent, passive bystander. To the extent that there was any conflicting evidence regarding the nature of her involvement and credibility issues relative to the prosecution's witnesses, such matters are left to the jury for resolution and not this Court. *Wolfe, supra* at 514-515. Furthermore, the fact that multiple victims were shot in the head at close range (execution style), clearly provides evidence of malice, premeditation, and deliberation. Defendant Elam's convictions are affirmed.

Finally, a magistrate's erroneous conclusion that sufficient evidence was presented at the preliminary examination is rendered harmless by the presentation at trial of sufficient evidence to convict. *People v Johnson*, 427 Mich 98, 116; 398 NW2d 219 (1986). Therefore, any error at the bindover is moot given that defendant Elam was found guilty under a more stringent standard at trial.

C.

Defendant Elam also asserts that the trial court abused its discretion when it admitted photographs of the scene and the victims into evidence. Specifically, defendant Elam argues that the trial court erred in admitting into evidence a photograph of Zarbaugh's and Moore's dead bodies. Defendant Elam alleges that the gruesome nature of the photographs substantially outweighed any probative value. MRE 403. This Court ordinarily reviews a trial court's decision whether to admit evidence for an abuse of discretion, but where that decision involves a preliminary question of law, it reviews the trial court's resolution of the legal question de novo. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

Photographs of a murder victim are "not inadmissible merely because they accurately portrayed a brutal murder." *People v Herndon* 246 Mich App. 371, 414; 633 NW2d 376 (2001). Photographs that do not present an enhanced or altered presentation of the injuries, though graphic, may be admissible. *People v Mills*, 450 Mich 61, 77; 537 NW2d 909, mod 450 Mich. 1212 (1995). Defendant Elam has presented no evidence that the photographs here were taken to particularly emphasize the gore, or were taken from a particularly gruesome angle, or were in any way altered or enhanced. The photographs provided the jury with a visual depiction of the scene of the murders. The photographs oriented the jury regarding the position of the bodies. Contrary to defendant Elam's argument, the photographs were relevant to show that the location of the gunshot wounds on the victims was plausibly consistent with the prosecutor's theory that defendants murdered the victims "execution" style. Although unpleasant, we do not find that the trial court abused its discretion in finding that the photographs' prejudicial effect did not substantially outweigh their probative value..

D.

Defendant Elam argues that the prosecution committed misconduct by introducing photographs of the victims with their children thus appealing to the juror's sympathies and denying her a fair trial. Defendant Elam did not preserve these claimed errors by "timely and specifically object[ing]" to the allegedly improper conduct below. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 95 (2002). This Court reviews for plain error affecting the defendant's substantial rights, and will only reverse if the "error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence." *Ackerman, supra* at 448-449, citing *Carines, supra* at 763. Issues of prosecutorial misconduct are considered "on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of the defendant's argument." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

It was a defense theory that Zarbaugh's home was a drug house. The prosecutor could have been showing pictures of the victims with their children to respond to the defense theory. Further, the identities of the victims were also relevant to the charged crimes. In any event, we conclude that the prosecutor's introduction of photographs of the victims before the murders with their children was an action "not so inflammatory as to prejudice defendant." *Watson, supra* at 591. Even if we were to conclude that the prosecutor attempted to appeal to the jury's sympathies when she showed these photographs, any error was minor, and clearly could have been cured by a timely, cautionary instruction. *Callon, supra* at 312. Moreover, the trial court specifically instructed the jurors only to consider the facts of the case when deliberating. See *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). And, in light of the overwhelming evidence present in this case, defendant Elam has not shown that any "error resulted in the

conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence." *Ackerman, supra* at 448-449, citing *Carines, supra* at 763.

III. Defendant Ray

A.

Defendant Ray first argues that the trial court's voir dire was insufficient for the trial court to fulfill its duty by ensuring the jurors were impartial, and also that the trial court tainted the proceedings when it asked a juror to imagine himself the victim of a car theft. As we found *supra*, the trial court's voir dire was sufficient because it elicited sufficient information to provide all three defendants with a reasonable opportunity to ascertain whether any of the prospective jurors were not impartial, and allowed them to intelligently exercise challenges. See above Section I. A.

However, defendant Ray also argues that the trial court tainted the proceedings. Specifically, defendant Ray asserts that certain statements made by the trial court and exchanges it had with potential jurors during the voir dire process encouraged the jury to imagine themselves as victims and then find defendants guilty because they could imagine being victims of a hypothetical car theft. After reading the exchanges defendant Ray points to in context, it is obvious that the trial court was only attempting to clarify a question posed by one of the jurors about the concept of aiding and abetting. While attempting to answer the question and at the same time assure that the juror could be impartial, the trial court explained that the jury was there to decide the facts and not degrees of culpability of guilt or innocence. Within that exchange, the trial court posed a hypothetical situation wherein the trial court and the clerk colluded to steal a juror's car. Defendant Ray's assertion is partially true that within this exchange the trial court did indeed ask a juror to imagine being the victim of a hypothetical car theft, however, defendant Ray's argument on appeal that the exchange inappropriately injected bias into the trial because it encouraged jurors to find the three defendants guilty is illogical and not supported by the record. The trial court is "allowed wide discretion in the manner they employ to achieve the goal of an impartial jury." *Tyburski II, supra* at 623. The trial court did not abuse its discretion when it performed voir dire, and defendant's substantial right were not violated in the voir dire process.

B.

Defendant Ray argues that he was denied his right to a fair trial due to prosecutorial misconduct, ineffective assistance of counsel, the trial court's actions regarding the admission of evidence, and any cumulative effect of the alleged errors.

Defendant Ray argues particularly that the prosecutor denied him his due process right to a fair trial when she engaged in various instances of misconduct. Defendant Ray asserts that the prosecutor intentionally intended to provoke a strong emotional response from the jurors when she used an analogy comparing him to the 9/11 terrorists during her closing argument. Defendant Perkins also raised this argument, and for the same reasons, we find it without merit. See Section I. C.

Defendant Ray also argues that the prosecutor improperly said the phrase the "Lord works in mysterious ways" fours times within the course of her closing argument. Defendant Ray claims that the repeated mention appealed to the jurors' "religious obligation." However, after reading the prosecutor's comments in context, we conclude that defendant Ray's argument is without merit. The prosecutor was in no way invoking some religious duty to convict the three defendants. Read in context, the prosecutor was advancing the theory that if fate had not intervened (i.e. both guns not firing) during defendants' commission of the crimes, that there would be two more victims dead, Straughter and Booker. The facts of the case show that one gun used was empty and would not fire and the other gun would not fire apparently because it was jammed. Defendants discovered that their guns did not work while pointing them and pulling the triggers at Straughter. Only after determining that their guns were inoperable, did defendants flee the scene leaving Straughter and Booker alive. Considering this evidence, we find no error here because the prosecutor is allowed to argue reasonable inferences from the presented evidence. *Bahoda, supra* at 282. And again, a prosecutor need not argue inferences in the blandest terms possible. *Fisher, supra* 452.

Defendant Ray next argues that the prosecutor erred when she argued evidence that was not in the record during her closing argument when she stated that there would be blood and brain matter inside the gun barrel and that Straughter had a bullet in his neck after the crimes. Regarding the prosecutor's statement that there would be blood and brain matter inside the gun barrel, we find no error. The facts plainly show that both victims received direct contact gunshot wounds with the gun being placed directly on their heads. It is a reasonable inference that after firing shots directly into a victim's head, blood and brain matter would be present on or in the weapon. *Bahoda, supra* 282. And again, a prosecutor need not argue inferences in the blandest terms possible. *Fisher, supra* 452.

The prosecutor did state that Straughter had a bullet in his neck after the incidents when the evidence showed that the bullet just grazed Straughter's neck. A review of the record reveals that the prosecutor only made one reference to the bullet being in Straughter's neck and after reading the prosecutor's statements it appears that the prosecutor simply misspoke. The misstatement was isolated and brief and of course subject to the trial court's instructions to the jury both at the beginning and end of trial that the attorney's statements were not evidence. Defendant Ray was not denied a fair trial by the prosecutor's isolated misstatement.

Defendant Ray also asserts in his brief on appeal that it was error for the prosecutor to state in her closing argument that defendants "can deny, deny, deny, to their attorneys." However, other than making the allegation, defendant Ray does not explain how this constituted error. We decline to review the allegation since a defendant may not simply announce a position or assert an error and leave it to this Court to "'discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *Kevorkian, supra* at 388-389, quoting *Mitcham, supra* at 203.

Defendant also contends that the prosecutor purposely withheld exculpatory evidence and as a result he was denied the right to present a defense. The intentional suppression of exculpatory evidence will warrant reversal, as will the suppression of potentially useful evidence if done in bad faith. *People v Johnson*, 197 Mich App 362, 365, 494 NW2d 873 (1992); *People v Leigh*, 182 Mich App 96, 97-98, 451 NW2d 512 (1989). In reading defendant Ray's Standard 4 brief it is difficult to discern exactly what evidence he believes the prosecutor suppressed.

Defendant Ray references review of "in-camera proceedings that took place a week and a half ago with the Court" but does not explain what was captured in the in-camera proceedings. Defendant Ray also references an apparent message left by Straughter about "getting money" and further testimony from Straughter with no more explanation. Defendant Ray has barely identified the evidence he claims the prosecutor suppressed and has failed to show how any missing evidence was exculpatory in nature or that the prosecutor suppressed any evidence in bad faith. From defendant Ray's characterization, we cannot conclude that the prosecutor engaged in misconduct amounting to plain error affecting defendant Ray's substantial rights.

Defendant next argues in his Standard 4 brief that the trial court abused its discretion when it denied his request for substitute counsel. A trial court's decision on a defendant's motion for substitute counsel will not be disturbed absent an abuse of discretion. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). While an indigent defendant is not entitled to choose his lawyer, he or she may be entitled to have the assigned lawyer replaced for cause. *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973). Appointment of substitute counsel is warranted where "a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic." *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991), citing *People v Charles O Williams*, 386 Mich 565; 194 NW2d 337 (1972). In determining whether to grant the request, the trial court may consider whether the appointment will unduly disrupt the trial process. *Mack, supra* at 14; see also *Charles O Williams, supra* at 577 (noting that the trial court may consider whether the request is merely a delaying tactic). Finally, the defendant must not be guilty of negligence in informing the court of his or her desire for different counsel. *Charles O Williams, supra* at 576.

Defendant Ray requested substitute counsel immediately before the trial court was to begin instructing the jurors at the beginning of trial. Defendant initially stated he wanted a new attorney because "I feel that and I know that Mr. Perkins – I just feel that there's an intimidation factor. I don't know what's going on or whatever, but I mean I just feel that Mr. Perkins isn't advocating for me to the full extent that he could. I mean I know some of the things that we been bringing forth, sir." Defendant Ray also explained that he wanted to request an interlocutory appeal and a stay, and that he had been "reading up on the law," and that his attorney had disagreed.

The trial court explained that defendant Ray's counsel had been acting as a zealous advocate in the proceedings thus far and explained that it was a difficult job to try to provide a "crash course" on the law to defendant Ray while putting on a defense against the prosecutor. The trial court stated that it would not grant a stay for an interlocutory appeal, but that defendant Ray's attorney had properly preserved his rights on the record in the event of an appeal following a final judgment. Especially considering the fact that defendant Ray did not make this request until just before trial was to begin, based on this record, we cannot conclude that the trial court abused its discretion in refusing to grant defendant Ray's request for substitute counsel.

Defendant Ray also argues in his Standard 4 brief that he was denied the effective assistance of counsel. Defendant Ray must overcome the strong presumption counsel provided constitutionally adequate assistance by showing "(1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms, and (2) a reasonable probability exists that, but for counsel's unprofessional error, the outcome of the proceedings would have been different." *Rice (On Remand), supra* at 444; *Rodgers, supra* at

714. Defendant Ray specifically argues that he was denied the effective assistance of counsel because there was a breakdown in the relationship between defendant and his counsel, and because counsel did not present any witnesses or other exculpatory evidence in support of defendant Ray's theory of the case that "he was an innocent bystander who had no idea of what was to transpire." Defendant Ray claims that his counsel failed to present a substantial defense because he did not engage in a reasonable amount of pretrial investigation, did not present any exculpatory evidence, and attempted to oppose the prosecutor's testimony with argument alone. However, defendant Ray has not shed any light on any evidence whatsoever that his counsel could have presented to support defendant Ray's theory of the case. Defense counsel cannot manufacture evidence. Defendant Ray has not established error.

Defendant Ray next argues in his Standard 4 brief that the trial court erred in denying his motion to suppress statements made to police. An appellate court reviews de novo a trial court's ultimate decision on a motion to suppress evidence. *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000). This Court will not disturb a trial court's factual findings from a *Walker*[1] hearing unless clearly erroneous. *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003). "A finding is clearly erroneous when, although evidence supports it, this Court is left with a firm conviction that the trial court made a mistake." *People v Walters*, 266 Mich App 341, 352; 700 NW2d 424 (2005) (punctuation and citation omitted). This Court gives deference to the trial court's determination of credibility, and will not substitute its judgment for that of the trial court. *Id*. The prosecution bears the burden of proving voluntariness by a preponderance of the evidence. *Daoud, supra* at 634. This Court considers the totality of the circumstances, including, but not limited to, the age, education, and intelligence of the suspect as well as his capacity to understand the warnings, his rights, and the consequences of waiving his rights. *Id*. at 633-634.

Defendant Ray first challenges a statement that he made immediately after being arrested. Upon being arrested, defendant Ray asked why he was being arrested and the officer responded that he was from the Romulus police department and defendant Ray should "think about it." Defendant Ray stated, "you need to talk to my cousin." Defendant Ray states that this was a police tactic used to elicit an incriminating response. At the *Walker* hearing, the trial court found that the police statement was sarcastic, but in fact was just that, a statement, and not a question designed to elicit any response at all. As such, the trial court disallowed the challenge. On appeal, defendant Ray has presented no other evidence or any alternate characterization of the facts, and thus, defendant Ray has not demonstrated clear error on appeal.

Next, defendant Ray argues that the police also engaged in questionable conduct at the police department when he was being interviewed following his arrest. However, defendant Ray admitted that police had administered his rights to him and in fact signed and initialed the rights forms. Initially defendant Ray asked for an attorney and would not speak to police without one so he was placed in a cell. The trial court found that later, defendant Ray initiated contact with

[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

police by pounding on a glass window. At the *Walker* hearing, defendant Ray denied making any statements to officers and stated that he instead argued with them. After hearing lengthy testimony, the trial court found the police officers' testimony to be credible and defendant Ray's memory to be "sketchy." But he also found that whether or not defendant Ray actually made statements to police was a question of fact for the jury. On appeal, defendant Ray simply states that any statements he made were "involuntary" and argues that any statements he made were the result of his will being "overborne at the time of his statement," and that "his statement was not the product of a rational intellect and free will." Defendant Ray, however, does not substantiate these claims in any meaningful way in his Standard 4 brief.

"This Court will not disturb a trial court's ruling at a suppression hearing unless that ruling is found to be clearly erroneous. Resolution of facts about which there is conflicting testimony is a decision to be made initially by the trial court. The trial judge's resolution of a factual issue is entitled to deference. This is particularly true where a factual issue involves the credibility of the witnesses whose testimony is in conflict." *People v Geno*, 261 Mich App 624, 629; 683 NW2d 687 (2004), quoting *People v Burrell*, 417 Mich 439, 448-449; 339 NW2d 403 (1983). Here, the outcome of the suppression hearing hinged entirely on the credibility of the witnesses. Given the trial court's credibility determinations and the deference owed to its factual findings, we conclude that the trial court did not clearly err in admitting statements defendant Ray made to police into evidence.

Finally, defendant Ray argues he is entitled to reversal due to the cumulative effect of the errors at trial. Since only actual errors may be aggregated to determine if their cumulative effect merits reversal when separately they do not, and defendant Ray has demonstrated no errors, reversal is not warranted. *Rice (On Remand), supra* at 448.

C.

Defendant Ray next argues that the record does not contain sufficient evidence to support his convictions. The jury determined that defendant Ray was guilty as an aider and abettor of two counts of felony murder based on the predicate felony of first-degree home invasion, two counts of second-degree murder, killing an unborn child, two counts of assault with intent to do great bodily harm less than murder, two counts of armed robbery, felony firearm, and felon in possession of a firearm. On appeal, defendant Ray challenges the sufficiency of the evidence supporting all of his convictions stating in general that he did not possess the requisite intent and does not challenge specific elements of the crimes.

Felony murder requires: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result (collectively known as the "malice" element), (3) while committing, attempting to commit, or assisting in the commission of any of the enumerated felonies in the statute. MCL 750.316(1)(b); *Carines*, *supra* at 758-759. Conviction of first-degree felony murder pursuant to an aiding and abetting theory requires the prosecution to prove, in part, that the defendant had the intent to kill, intent to do great bodily harm, or wantonly and willfully disregarded the likelihood of the natural tendency of his behavior to cause death or great bodily harm. *Barrera*, *supra* at 294, quoting *Kelly*, *supra* at 278-279. Additionally, if the aider and abettor participates in a crime with the knowledge that the principal

has the intent to kill or to cause great bodily harm, he is acting with wanton and willful disregard sufficient to support a finding of malice. *Barrera, supra* at 294, quoting *Kelly, supra* at 278-279.

The first-degree home invasion statute, MCL 750.110a(2), provides:

> A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:
>
> (a) The person is armed with a dangerous weapon.
>
> (b) Another person is lawfully present in the dwelling.

The elements of second-degree murder are as follows: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse. *Kris Aldrich, supra* at 123.

MCL 750.322 provides that, "[t]he wilful killing of an unborn quick child by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter."

The elements of assault with intent to do great bodily harm less than murder are: (1) an assault through an attempt or offer with force and violence to do corporal hurt to another with (2) a specific intent to do great bodily harm less than murder. *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995).

"The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute [MCL 750.529]." *Carines, supra* at 757.

"The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

To sustain a conviction for felon in possession of a firearm, the prosecution must establish beyond a reasonable doubt that the defendant (1) possessed a firearm, (2) had been convicted of a prior felony, and (3) less than five years had elapsed since the defendant was discharged from probation. MCL 750.224(f); *People v Parker*, 230 Mich App 677, 684-685; 584 NW2d 753 (1998).

"Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly

committed such offense." MCL 767.39. In general, to convict a defendant of aiding and abetting a crime, the prosecutor must establish that (1) the crime charged was committed by the defendant or some other individual; (2) the defendant performed acts or gave encouragement that assisted in the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that the defendant gave aid and encouragement. *Moore, supra* at 67-68. Aiding and abetting includes any and all forms of assistance. *Lawton, supra* at 352. "The quantum of aid or advice is immaterial as long as it had the effect of inducing the crime." *Id*. However, mere presence at the crime scene, even with knowledge that an offense is about to be committed, is insufficient to establish that a defendant aided or assisted in the commission of the crime. *Norris, supra* at 419-420.

Here, the record contains sufficient evidence to support defendant Ray's convictions. The facts demonstrate that defendant Ray was an aider and abettor in all of the enumerated crimes. Viewing the evidence in the light most favorable to the prosecution, there is overwhelming evidence establishing all the elements of the convicted crimes. Defendant Ray's argument that the evidence showed that he was upset and hysterical when he heard shots being fired inside the house tended to show that he did not expect defendant Perkins to be shooting anyone with his gun is not persuasive. We are charged with viewing the evidence in the light most favorable to the prosecution. In doing that, defendant Ray's outward emotional state could be just as easily attributed to the fact that he had not expected to hear so many shots which may have indicated a gun battle inside the house, not a concern that gunshots were fired at all. Further, the evidence showed that once defendants Perkins and Elam exited Zarbaugh's home, defendant Ray was no longer hysterical. And defendant Ray's argument that he was outside of the house when the shootings occurred and therefore he could not have expected them to take place fails because both defendants Ray and Perkins came to Zarbaugh's house armed with handguns intending to rob Straughter and leave no witnesses. The fact that defendant Ray stayed outside the house holding Straughter and Booker at gunpoint could just as easily point to a scenario where defendant Ray was intended to be the look-out while defendant Perkins performed the shootings inside the residence.

At trial, defendant Ray did not contest that Zarbaugh's unborn child died as a result of Zarbaugh's gunshot wounds and did not contest that it was viable. On appeal, defendant Ray argues for the first time that there was no evidence that the unborn fetus was viable. However, there was testimony from the medical examiner that the unborn fetus was approximately seventeen weeks gestational age. And Zarbaugh's aunt testified that Zarbaugh was pregnant at the time she died. Defendant Ray has presented no evidence rebutting the inference of viability. And considering the fact that this evidence was enough for the factfinder to find viability of the unborn quick child, when viewing the evidence in the light most favorable to the prosecution, we must also find the inference of viability. Further, since defendant Ray did not preserve this issue for appeal, this Court should reverse only when defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Carines, supra*. Since defendant Ray has established neither, we do not disturb his conviction.

In sum, the evidence was overwhelming and showed that defendant Ray worked in unison with his codefendants to carry out these crimes. To the extent that there was any conflicting evidence regarding the nature of his involvement and credibility issues relative to the prosecution's witnesses, such matters are left to the jury for resolution and not this Court. *Wolfe,*

supra at 514-515. Furthermore, the fact that multiple victims were shot in the head at close range (execution style), clearly provides evidence of malice, premeditation, and deliberation. Defendant Ray's convictions should be affirmed.

D.

Defendant Ray argues that he is entitled to vacation of his conviction and sentence for first-degree home invasion. Our review of defendant Ray's judgment of sentence shows that the first-degree home invasion conviction is intact on the judgment of sentence although it appears from the record that the trial court did vacate this conviction and sentence. The prosecution admits on appeal that the judgment of sentence should be corrected by removing the conviction and sentence for home invasion because the trial court vacated this conviction so as not to violate defendant Ray's double jeopardy protections. We remand to the trial court for the ministerial task of correction of defendant Ray's judgment of sentence.

E.

Finally, defendant Ray argues that the trial court abused its discretion when it denied his motion to suppress his in-court identification. A trial court's decision to deny a request for a lineup is reviewed for abuse of discretion. *McAllister, supra* at 471. A decision constitutes an abuse of discretion where it is so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of passion and/or bias. *Id*. "Michigan law permits a trial court to grant a defendant's motion for a lineup if the court chooses to do so in an exercise of its discretion." *Gwinn, supra* at 249. In making its decision, the trial court should consider the benefits to the accused, the burden to the prosecution, police, courts, and witnesses, and the timeliness of the motion. *Id*. at 249. "A right to a lineup arises when eyewitness identification has been shown to be a material issue and when there is a reasonable likelihood of mistaken identification that a lineup would tend to resolve." *McAllister, supra* at 471.

There were two witnesses in this case, Straughter who was certain he could identify defendants and Booker, who stated that she would not be able to identify anyone. Straughter in fact did identify the perpetrators in a corporeal lineup and a photographic lineup. Straughter had spent time with defendant Ray during the commission of the crimes since defendant Ray stayed outside of the house with Straughter and Booker. Defendant Ray and Straughter were in close proximity to each other during this time, and even spoke. There was no reasonable likelihood of misidentification of defendant Ray.

Based on Straughter's knowledge and familiarity with defendant Ray because of the opportunity he had to observe him and interact with him during the crimes, we conclude that the trial court had significant evidence on which to base its ruling that there was not a reasonable likelihood of mistaken identification in this case even considering Booker's late in-court identification. Defendant Ray has provided no evidence at all supporting his assertion that the witnesses' identification of him was some sort of retaliation. A defendant may not simply announce a position or assert an error and leave it to this Court to "'discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *Kevorkian, supra* at 388-389, quoting *Mitcham, supra* at 203. The trial court did not abuse its discretion by denying defendant Ray's motion for a lineup.

V.

We affirm the convictions and sentences of defendants Perkins and Elam. We affirm defendant Ray's convictions and sentences, but we remand for the ministerial task of correction of his judgment of sentence to reflect that the trial court vacated his conviction and sentence for first-degree home invasion.

Affirmed and remanded. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Donald S. Owens
/s/ Pat M. Donofrio