STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DEAN SCOTT YANNA,

Defendant-Appellee.
_____/

Court of Appeals No. 304293

Bay Circuit Case No. 10-10536-FH
Hon. Joseph K. Sheeran

BRIEF *AMICUS CURIAE* OF ARMING WOMEN AGAINST RAPE & ENDANGERMENT

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RECEIVED by Michigan Court of Appeals 12/2/2011 3:41:15 PM

TABLE OF CONTENTS

RECEIVED by Michigan Court of Appeals 12/2/2011 3:41:15 PM

TABLE OF AUTHORITIES

Constitutional Provisions **Page**

Cases

RECEIVED by Michigan Court of Appeals 12/2/2011 3:41:15 PM

RECEIVED by Michigan Court of Appeals 12/2/2011 3:41:15 PM

Statutes and Rules

Treatises and Other Authorities

RECEIVED by Michigan Court of Appeals 12/2/2011 3:41:15 PM

Briefs

RECEIVED by Michigan Court of Appeals 12/2/2011 3:41:15 PM

RECEIVED by Michigan Court of Appeals 12/2/2011 3:41:15 PM

INTRODUCTION AND STATEMENT OF INTEREST

Amicus curiae AWARE (Arming Women Against Rape & Endangerment) is a Massachusetts non-profit, tax-exempt charitable organization registered under chapter 501(c)(3) of the Internal Revenue Code. AWARE was founded in 1990 to provide information and training to enable people, particularly women, to avoid, deter, repel, or resist crimes ranging from minor harassment to violent assault.

AWARE's board members and instructors are certified to teach a wide range of self-defense techniques ranging from chemical defensive sprays to firearms. Its staff has been trained by many of the premier instructional organizations for training police and private citizens in the judicious use of force, including the American Society of Law Enforcement Training (ASLET), the International Association of Law Enforcement Firearms Instructors (IALEFI), the Annual Threat Management Conference, the American Women's Self-Defense Association, the Smith & Wesson Training Academy, and many other prominent organizations. Its staff members have given presentations at the American Society of Criminology and at annual training meetings of ASLET, Women in Federal Law Enforcement, and the International Women Police Association. One of its board members has published more than a hundred articles in various magazines and journals regarding the defensive use of firearms and other aspects of personal protection.

AWARE's staff members have often been sought out for interviews and commentaries on self-defense by magazines, newspapers, and the broadcast media.

This case is of significant interest to AWARE because it involves the issue of whether MCL 750.224a, which makes the mere possession of a stun gun or a Taser by a private citizen a four-year felony, improperly abridges the right to keep and bear arms protected by the Second Amendment.

ARGUMENT

I. Many People Have Good Reason to Choose Stun Guns or Tasers as Self-Defense Tools.

Michigan rightly allows people to possess and carry guns. *See* MCL 28.422. But different people have different self-defense needs, and they should be able to choose other means of defending themselves, as well—especially when those means are much *less* deadly than guns, as is the case for stun guns (electric weapons that require the user to touch the target with the weapon) and Tasers (electric weapons that shoot a probe that delivers the electric shock). See Appellant's Appendix VIII (parties' stipulations that such weapons are "generally nonlethal").

Some people, for instance, have religious or ethical compunctions about killing. For example, noted Mennonite theologian John Howard Yoder, noted Pentecostalist theologian David K. Bernard, and the Dalai Lama have expressed the view that while one ought not use deadly force even in self-defense, self-defense

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using nondeadly force is permissible.[1] Some members of other religious groups, such as Quakers, share this view.[2] Other religious and philosophical traditions, such as the Jewish and Catholic ones, take the view that defenders ought to use the least violence necessary.[3] Some religious believers might therefore conclude that, when fairly effective nondeadly defensive tools are available, they should be used in preference to deadly tools.

Other people might feel they will be emotionally unable to pull the trigger on a deadly weapon, even when doing so would be ethically proper. Thus, for instance, Cao et al, *Willingness to Shoot: Public Attitudes Toward Defensive Gun Use*, 27 Am J Crim Just 85, 96 (2002), reports that 35 percent of a representative sample of Cincinnati residents age 21 and above said they would *not* be willing to shoot a gun at an armed and threatening burglar who had broken into their home. (The fraction

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[1] *See* Yoder, *Nevertheless: The Varieties of Religious Pacifism* 31 (1971); Yoder, *What Would You Do?* 28-31 (1983); Bernard, *Practical Holiness: A Second Look* 284 (1985); Bernton, *Students Urged to Shape World: Dalai Lama Preaches Peace in Portland*, SEATTLE TIMES, May 15, 2001, at B1 (paraphrasing the Dalai Lama).

[2] *See* Gastil, *Queries on the Peace Testimony*, Friends J, Aug. 1992, at 14, 15 (noting the views of some Quakers); *Czubaroff v Schlesinger*, 385 F Supp 728, 739–40 (ED Pa, 1974) (describing a conscientious objector application that expressed such a view as a matter of humanist philosophy).

[3] *See Catechism of the Catholic Church*, http://www.vatican.va/archive/ENG0015/__P7Z.HTM, at ¶ 2264 (accessed November 30, 2011); *Babylonian Talmud*, Sanhedrin 74a (I. Epstein ed., Jacob Schacter & H. Freedman trans., Soncino Press 1994); *The Code of Maimonides*, Book Eleven, The Book of Torts 197-98 (Hyman Klein trans., Yale Univ Press 1954).

RECEIVED by Michigan Court of Appeals 12/2/2011 3:41:15 PM

was higher for women respondents. *Id* at 100.) It seems likely that many of the 35 percent feel they would be psychologically unprepared to shoot an attacker, even if they were ethically permitted to do so.

Others might worry about erroneously killing someone who turns out not to be an attacker. Still others might be reluctant to kill a particular potential attacker, for instance when a woman does not want to kill her abusive ex-husband because she does not want to have to explain to her children that she killed their father, even in self-defense. Others might fear a gun they own might be misused, for instance by their children or by a suicidal adult housemate. Still others, such as people with past criminal convictions, may be barred from owning firearms. *See People v Swint*, 225 Mich App 353, 362; 572 NW2d 666 (1997) (upholding MCL 750.224f's ban on gun possession by felons because it "[a]rguably" "does not completely foreclose defendant's constitutional right to bear 'arms,' i.e., nonfirearm weapons, in defense of himself"). And even people who own guns may still want to have both a gun and a stun gun or Taser accessible, so that they can opt for a nonlethal response whenever possible, and for a lethal one when absolutely necessary. (This, of course, is part of the reason that police officers carry both kinds of weapons.)

These are not just aesthetic preferences, such as a person's desire to have a particular gun that she most likes when other equally effective guns are available.

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These are preferences that stem from understandable and even laudable moral belief systems, emotional reactions, or pragmatic concerns. Members of Arming Women Against Rape & Endangerment generally believe that killing in self-defense is morally proper. But people who take the opposite view should be presumptively free to act on their beliefs without having to forgo effective self-defense tools; and people who have practical reasons to prefer nonlethal self-defense weapons should likewise be presumptively free to have the weapons that they need to effectively defend themselves.

II. The "Right to Keep and Bear Arms" Extends Beyond Just Firearms.

The Second Amendment and the Michigan Constitution each speak of the "right to keep and bear arms," not of a right to keep and bear guns or firearms. US Const, Am II; Const 1963, art 1, § 6; *see* Addendum, pg. 19. And the United States Supreme Court, the Michigan Supreme Court, this Court, and courts of other states have treated the right as extending beyond firearms.

A. The United States Supreme Court Has Treated the "Right to Keep and Bear Arms" as Extending Beyond Just Firearms.

The Supreme Court concluded in *District of Columbia v Heller*, 554 US 570; 128 S Ct 2783; 171 L Ed 2d 637 (2008), that "arms" refers to "weapons of offence, or armour of defence," or "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another," *id* at 647 (quotation marks and citations omitted)—terms that cover more than just guns. And the Court, in the

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section discussing the phrase "keep and bear arms," *id* at 581–92, four times expressly discussed non-firearms as "arms."

First, in showing that "keep and bear arms" included civilian possession of arms for self-defense, the Court noted that, "Timothy Cunningham's important 1771 legal dictionary" "gave as an example of usage: 'Servants and labourers shall use bows and arrows on *Sundays,* & c. and not bear other arms,'" *id* at 581 (citation omitted). Including the Cunningham quotation would have been pointless—indeed, counter-productive to the Court's argument—if the Court saw "arms" as limited to firearms.

Later in that section, the Court said that various "legal sources frequently used 'bear arms' in nonmilitary contexts," *id* at 587, and cited several examples. One such citation was a repeat of the Cunningham quote. *See id* at 587–88 ("Cunningham's legal dictionary, cited above, gave as an example of its usage a sentence unrelated to military affairs ('Servants and labourers shall use bows and arrows on *Sundays,* & c. and not bear other arms')"). The other quoted the great international law scholar Vattel. *See id* at 587 n10 ("E. de Vattel, The Law of Nations, or, Principles of the Law of Nature 144 (1792) ('Since custom has allowed persons of rank and gentlemen of the army to bear arms in time of peace, strict care should be taken that none but these should be allowed to wear swords')"). Both examples treated "arms" as including non-firearms; again, both would have been pointless and counterproductive if the Court believed "arms" meant only guns.

RECEIVED by Michigan Court of Appeals 12/2/2011 3:41:15 PM

Three pages later, the majority mentioned knives as an example of "arms." The dissent had pointed to a proposed version of the Second Amendment that included a conscientious-objector provision—a provision that was deleted as the Bill of Rights made its way through Congress—in support of its view that "bear arms" must have been limited to military contexts. The majority disagreed:

> [The deleted provision] was not meant to exempt from military service those who objected to going to war but had no scruples about personal gunfights. Quakers opposed the use of *arms* not just for militia service, but for any violent purpose whatsoever—so much so that Quaker frontiersmen were forbidden to use *arms* to defend their families, even though "[i]n such circumstances the temptation to seize a hunting rifle or *knife* in self-defense ... must sometimes have been almost overwhelming." [554 US at 590 (emphasis added) (citation omitted)].

The Court thus included knives alongside rifles as examples of "arms" for Second Amendment purposes.

To be sure, *Heller* speaks mostly about guns. But the law challenged in *Heller* was a gun ban, so it makes sense that guns would be the Court's primary focus. The quotes given above, though, show that the Court's references to firearms were not intended to limit the Second Amendment to a right to bear only firearms.

B. The Michigan Supreme Court Has Treated the "Right to Keep and Bear Arms" as Extending Beyond Firearms.

The Michigan Supreme Court in interpreting the Michigan Constitution appears to likewise view the phrase "right to keep and bear arms" as covering weapons other than guns. In *People v Brown*, 253 Mich 537; 235 NW 245 (1931), the

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Court noted that the right to keep and bear arms is subject to regulations, but stressed that such regulations "cannot constitutionally result in the prohibition of the possession of those arms which, by the common opinion and usage of law-abiding people, are proper and legitimate to be kept upon private premises for the protection of person and property." 253 Mich at 541. And in noting the narrowness of the statute in question, the Court stressed that the law "does not include ordinary guns, *swords*, revolvers, or other weapons usually relied upon by good citizens for defense or pleasure." *Id* at 542 (emphasis added).

Brown thus makes clear that, for 70 years, Michigan law has viewed "the right to keep and bear arms" as extending beyond firearms, treating swords and revolvers analogously as potentially the sort of "arms" that "are proper and legitimate to be kept . . . for the protection of person and property," and that are therefore constitutionally protected.

C. This Court Has Treated the "Right to Keep and Bear Arms" as Extending Beyond Just Firearms.

Likewise, this Court has treated the "right to keep and bear arms" in the Michigan Constitution as covering weapons other than guns. In *Swint*, this Court upheld Michigan's ban on gun possession by felons, relying expressly on the view that the "right to keep and bear arms" covered more than just guns (and thus left felons with other weapons for self-defense):

RECEIVED by Michigan Court of Appeals 12/2/2011 3:41:15 PM

> We also note that while [Const 1963,] art 1, § 6 ensures a Michigan citizen's right to keep and bear "arms," that term is not defined. Black's Law Dictionary (6th ed.), p 109, defines "arms" as "anything that a man wears for his defense, or takes in his hands as a weapon." While MCL § 750.224f; MSA § 28.421(6) only precludes a former felon's use, possession, receipt, sale or transportation of a "firearm," it is silent regarding other "weapons." Arguably, MCL § 750.224f; MSA § 28.421(6) does not completely foreclose defendant's constitutional right to bear "arms," i.e., nonfirearm weapons, in defense of himself. [*Swint*, 225 Mich App at 362].

As the Court went on to note,

> [A]s long as our citizens have available to them *some types of weapons* that are adequate reasonably to vindicate the right to bear arms in self-defense, the state may proscribe the possession of other weapons without infringing on the constitutional right to bear arms. [*Id* at 362 (emphasis in original) (citation and internal quotation marks omitted)].

Swint thus made clear that "arms" includes "nonfirearm weapons," and expressly relied on that in concluding that the ban on felon gun possession was constitutional because it left felons free to possess "some types of weapons"—other than guns—"that are adequate reasonably to vindicate the right to bear arms in self-defense." *Id*.

Note that *Heller* does not undermine the soundness of *Swint* with regard to felons' continuing rights to possess some non-firearms weapons. The Supreme Court in *Heller* held only that "nothing in [the] opinion should be taken to cast doubt on longstanding prohibitions on the possession of *firearms* by felons." *Heller*, 554 US at 626 (emphasis added).

RECEIVED by Michigan Court of Appeals 12/2/2011 3:41:15 PM

D. Other Courts Have Treated the "Right to Keep and Bear Arms" as Extending Beyond Just Firearms.

More recently, state courts in Delaware, Ohio, and Oregon have likewise concluded that the right to keep and bear arms extends beyond just firearms. *See State v Griffin*, 2011 WL 2083893, *7 n62; 2011 Del Super LEXIS 193, *26 n62 (Del Super Ct, May 16, 2011) (holding that the "right to keep and bear arms" under the Delaware Constitution extends to knives, and concluding that the Second Amendment right does the same); *City of Akron v Rasdan*, 105 Ohio App 3d 164, 171-172; 663 NE2d 947 (1995) (treating a restriction on knife possession as implicating the "right to keep and bear arms" under the Ohio Constitution, though concluding that the restriction is constitutional because "[t]he city of Akron properly considered this fundamental right by including in [the knife restriction] an exception from criminal liability when a person is 'engaged in a lawful business, calling, employment, or occupation' and the circumstances justify 'a prudent man in possessing such a weapon for the defense of his person or family'"); *State v Delgado*, 298 Or 395, 397-404; 692 P2d 610 (1984) (holding that the "right to keep and bear arms" under the Oregon Constitution extends to knives); *State v Blocker*, 291 Or 255, 257-258; 630 P2d 824 (1981) (same as to billy clubs), *citing State v Kessler*, 289 Or 359; 614 P2d 94 (1980); *also Barnett v State*, 72 Or App 585, 586; 695 P2d 991 (1985) (same as to blackjacks).

RECEIVED by Michigan Court of Appeals 12/2/2011 3:41:15 PM

Likewise, Florida's Attorney General has expressly concluded that the right to keep and bear arms covers stun guns and Tasers, determining that "the term ['arms'] is generally defined as 'anything that a man wears for his defense, or takes in his hands as a weapon.'" 1986 Fla Op Att'y Gen 2, 1986 Fla AG LEXIS 107 (January 6, 1986). And the Attorney General relied on this to conclude that county-level regulation of stun guns and Tasers is unconstitutional, because the Florida Constitution's right to bear arms reserves regulation of arms—including stun guns and Tasers—to the legislature.

We do not know of any recent cases that have disagreed with this consensus, and that have read "arms" as limited to guns. Indeed, the only two cases cited by the State as supposedly limiting "arms" to guns, *Wooden v United States*, 6 A3d 833 (DC, 2010), and *Mack v United States*, 6 A3d 1224 (DC, 2010), held only that the question was unresolved in the D.C. courts. This is all the D.C. Court of Appeals needed to decide in those cases, because the defendants in both cases failed to properly object at trial, and their convictions were thus reviewed only for "plain" or "obvious" error. *Wooden*, 6 A3d at 839; *Mack*, 6 A3d at 1236–37.

Thus, *Wooden* noted that *Heller* focused only on firearms—understandable, since the law at issue in *Heller* was a gun ban—and went on to acknowledge that "[p]erhaps a detailed *Heller*-type analysis would result in a conclusion that some kinds of knives today" "may qualify for Second Amendment protection." 6 A3d at

RECEIVED by Michigan Court of Appeals 12/2/2011 3:41:15 PM

839. Likewise, *Mack* said only that "it is not at all clear that the Second Amendment right to keep and bear arms applies to the ice pick carried by Mr. Mack." 6 A3d at 1235. The court was, in the words of *Mack*, "disinclined" in both cases "to delve further into these questions when our review is limited by the plain error standard." 6 A3d at 1236-37.

III. The Second Amendment "Right to Keep and Bear Arms" Covers Stun Guns and Tasers.

The Supreme Court in *Heller* did stress that the Second Amendment does not cover all arms:

> We also recognize another important limitation on the right to keep and carry arms. [*United States v Miller*, 307 US 174; 59 S Ct 816; 83 L Ed 1206 (1939)] said, as we have explained, that the sorts of weapons protected were those "in common use at the time." We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of "dangerous and unusual weapons." See 4 Blackstone 148-149 (1769); 3 B. Wilson, Works of the Honourable James Wilson 79 (1804). [*Heller*, 554 US at 627 (some citations omitted)].

Thus, "dangerous and unusual" weapons are seen as historically excluded from the scope of the right to keep and bear arms.

But this suggests that the exception is indeed limited to weapons that are not only "unusual" but also "dangerous." *See Amerisure Ins Co v Plumb*, 282 Mich App 417, 428-429; 766 NW2d 878 (2009) ("and" is a conjunction between two phrases that, when given its plain, ordinary meaning, requires that both conditions be met). And since all weapons are "dangerous" to some extent, the reference to "dangerous .

RECEIVED by Michigan Court of Appeals 12/2/2011 3:41:15 PM

. . weapons" must mean weapons that are more dangerous than some threshold, or more dangerous than the norm—likely weapons that are unusually dangerous.

Whatever else might fall under that description, stun guns and Tasers are not unusually dangerous weapons. They are much less dangerous than guns, which are constitutionally protected and broadly allowed in Michigan. They are less dangerous even than knives, clubs, and other such devices—including, in some circumstances, bare hands. *Caldwell v Moore*, 968 F2d 595, 602 (CA 6, 1992) ("It is not unreasonable for the jail officials to conclude that the use of a stun gun is less dangerous for all involved than a hand to hand confrontation").

To be sure, all attacks are potentially deadly: pushing or punching someone may cause him to fall the wrong way and die. But stun guns and irritant sprays are so rarely deadly that they merit being viewed as tantamount to generally non-deadly force, such as a punch or a shove. The best estimates seem to be that deliberate uses of Tasers are deadly in less than 0.01% of all cases, as compared to an estimated 20% death rate from gunshot wounds in deliberate assaults, and an estimated 2% death rate from knife wounds in deliberate assaults). Eugene Volokh, *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Rights to Keep and Bear Arms and Defend Life*, 62 Stan L Rev 199, 205 (2009). This is why we label stun guns as "nonlethal" or "nondeadly" weapons, consistent with the

RECEIVED by Michigan Court of Appeals 12/2/2011 3:41:15 PM

parties' stipulations in this case that stun guns are "generally nonlethal," Appellant's Appendix VIII (stipulation and amended stipulation).

Likewise, though stun guns and Tasers can be used in crimes as well as in lawful self-defense, that is true of all weapons. If private ownership of arms posed no risks, there would be no movements to ban arms, and no need to secure constitutional protection of arms. The premise of the constitutional right to keep and bear arms in self-defense is that self-defense is a basic right, and that people must be able to possess the tools needed for effective self-defense *despite* the risk that some people will abuse those tools. And if that is true for deadly weapons such as handguns, it is *especially* true for almost entirely nonlethal weapons, such as stun guns and Tasers.

Of course, stun guns and Tasers were unknown when the Second Amendment was enacted, but *Heller* expressly rejected the view "that only those arms in existence in the 18th century are protected by the Second Amendment." 554 US at 582. Instead, *Heller* held, "[j]ust as the First Amendment protects modern forms of communications [such as the Internet], and the Fourth Amendment applies to modern forms of search [such as heat detection devices], the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id* (citations omitted).

RECEIVED by Michigan Court of Appeals 12/2/2011 3:41:15 PM

People v Smelter, 175 Mich App 153, 155; 437 NW2d 341 (1989), did conclude that stun guns were not protected by the Michigan Constitution's Second Amendment analog, Const 1963, art 1, § 6, because the state may "prohibit weapons whose customary employment by individuals is to violate the law." But *Smelter* does not control here, for several reasons. First, it predates 1990, and thus is not binding under MCR 7.215(J)(1). Second, it based its analysis solely on the Michigan constitutional provision and not the Second Amendment, and in any event predated *Heller*. Third, *Smelter* offered no evidence in support of its bald assertion that stun guns were customarily used to violate the law in the late 1980s; and the briefs to this Court (as well as the application papers to the Supreme Court) offered no such evidence, either. *See* 11/10/87 Brief of Appellant, *People v Smelter*, (Docket No. 100234), available at http://www.law.ucla.edu/volokh/smelter/ctapp1.pdf and 2/24/88 Brief of Appellee, *People v Smelter*, (Docket No. 100234), available at http://www.law.ucla.edu/volokh/smelter/ctapp2.pdf; *see also* 3/14/89 Application for Leave to Appeal, *People v Smelter*, SC No. 85674, available at http://www.law.ucla.edu/volokh/smelter/sct1.pdf and 4/17/89 Answer in Opposition to Application, *People v Smelter*, SC No. 85674, available at http://www.law.ucla.edu/volokh/smelter/sct2.pdf. Indeed, Taser Corp. reports that it has sold 241,000 Tasers to civilians as of September 30,[4] and there is also an unknown number of non-Taser stun guns that

[4] Taser Corp., *Press Kit*, http://www.taser.com/press-kit (accessed Dec. 1, 2011).

RECEIVED by Michigan Court of Appeals 12/2/2011 3:41:15 PM

have been lawfully sold to civilians in the 43 states that do not ban Tasers and stun guns. *See* Volokh, *supra*, 62 Stan L Rev at 244 (collecting statutes). Naturally, there is no census of how many of the buyers are criminals; but there is no evidence at all that such criminal buyers form a majority, or even a large minority, of all buyers.

The State cites 25 published cases nationwide, over a nearly 20-year period (1993-2011), in which stun guns or Tasers were possessed or used by criminals, Appellant's Brief at 22–26. It argues that "[t]hese cases clearly demonstrate that Tasers and stun guns are *not* 'typically possessed . . . for lawful purposes' as required by *Heller*," *Id* at 26. But those cases demonstrate no such thing. Even if they represent only 1 percent of all the criminal uses of stun guns and Tasers, so that there were 2,500 hypothetical criminal uses nationwide over those three decades—or nearly 140 hypothetical cases per year—those cases would tell us nothing about the typical behavior of the over 200,000 civilian owners of stun guns, the overwhelming majority of whom no doubt are law-abiding women and men who, like AWARE's members, carry them solely for self-protection.

Indeed, in just the past 36 months, this Court has seen more than a dozen cases in which a baseball bat was used to inflict serious injury or death,[5] and others

[5] *People v Grullon*, unpublished per curiam opinion of the Court of Appeals, issued November 15, 2011 (Docket No. 299410); *People v Archey*, unpublished per curiam opinion of the Court of Appeals, issued August 30, 2011 (Docket No. 296757); *People v Jones*, unpublished per curiam opinion of the Court of Appeals, issued December 21, 2010 (Docket No. 293824); *People v Green*, unpublished per

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in which a bat was used in furtherance of crimes such as felonious assault, vehicle theft, and witness intimidation.[6] Yet we would not infer from these cases that the "customary employment" of a baseball bat is crime, as opposed to the Tuesday night softball league. Likewise, the State's cases do not show that the "customary employment" of stun guns is crime, as opposed to lawful possession for lawful self-defense.

Finally, as noted above, this Court in *Swint* held that felons may be barred from owning firearms because they remain free to own "nonfirearm weapons." 225

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curiam opinion of the Court of Appeals, issued December 16, 2010 (Docket No. 294741); *People v Conner*, unpublished per curiam opinion of the Court of Appeals, issued August 19, 2010 (Docket No. 290284); *People v Buchanan*, unpublished per curiam opinion of the Court of Appeals, issued July 15, 2010 (Docket No. 290942); *People v Scarborough*, unpublished per curiam opinion of the Court of Appeals, issued January 12, 2010 (Docket No. 286545); *People v Edwards*, unpublished per curiam opinion of the Court of Appeals, issued October 22, 2009 (Docket No. 288037); *People v Hector*, unpublished per curiam opinion of the Court of Appeals, issued June 23, 2009 (Docket No. 283849); *People v Cobb*, unpublished per curiam opinion of the Court of Appeals, issued May 5, 2009 (Docket No. 278973); *People v Kelley*, unpublished per curiam opinion of the Court of Appeals, issued April 28, 2009 (Docket No. 276269); *People v Mott*, unpublished per curiam opinion of the Court of Appeals, issued February 17, 2009 (Docket No. 280671); *People v Muntaqim-Bey*, unpublished per curiam opinion of the Court of Appeals, issued February 5, 2009 (Docket No. 280323). Copies of the unpublished cases cited in nn 5 and 6 are attached at Ex A.

[6] *People v Thomas*, unpublished per curiam opinion of the Court of Appeals, issued October 13, 2011 (Docket No. 297763); *People v Warren*, unpublished per curiam opinion of the Court of Appeals, issued June 16, 2009 (Docket No. 285029); *People v Goble*, unpublished per curiam opinion of the Court of Appeals, issued June 11, 2009 (Docket No. 283889); *People v Atkins*, unpublished per curiam opinion of the Court of Appeals, issued June 9, 2009 (Docket No. 282697).

RECEIVED by Michigan Court of Appeals 12/2/2011 3:41:15 PM

Mich App at 362-363. And it expressly relied on that in concluding that the ban on felon possession of guns was constitutional because it left felons free to possess "some types of [nonfirearm] weapons that are adequate reasonably to vindicate the right to bear arms in self-defense." *Id* at 362. Any such nonfirearm weapons—such as knives or clubs—necessarily involve some risk of abuse and injury, and indeed considerably greater risk of death than stun guns do. *See*, nn 5 & 6. It would make little sense for the right to bear arms to be read as allowing felons to possess quite lethal nonfirearm weapons, while at the same time denying everyone (felon or not) the right to possess much less lethal stun guns.

RECEIVED by Michigan Court of Appeals 12/2/2011 3:41:15 PM

CONCLUSION

For these reasons, AWARE asks the Court to affirm the Circuit Court decision.

Respectfully submitted,

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ADDENDUM - CONSTITUTIONAL AND STATUTORY PROVISIONS

US Const, Am II:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Const 1963, art 1, § 6:

Every person has a right to keep and bear arms for the defense of himself and the state.

MCL 750.224a:

Portable device or weapon directing electrical current, impulse, wave, or beam; sale or possession prohibited; exceptions; use of electro-muscular disruption technology; violation; penalty; definitions.

Sec. 224a.

(1) Except as otherwise provided in this section, a person shall not sell, offer for sale, or possess in this state a portable device or weapon from which an electrical current, impulse, wave, or beam may be directed, which current, impulse, wave, or beam is designed to incapacitate temporarily, injure, or kill.

(2) This section does not prohibit any of the following:

> (a) The possession and reasonable use of a device that uses electro-muscular disruption technology by any of the following individuals, if the individual has been trained in the use, effects, and risks of the device, and is using the device while performing his or her official duties:
>
> > (i) A peace officer.
> >
> > (ii) An employee of the department of corrections who is authorized in writing by the director of the department of corrections to possess and use the device.

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(iii) A local corrections officer authorized in writing by the county sheriff to possess and use the device.

(iv) An individual employed by a local unit of government that utilizes a jail or lockup facility who has custody of persons detained or incarcerated in the jail or lockup facility and who is authorized in writing by the chief of police, director of public safety, or sheriff to possess and use the device.

(v) A probation officer.

(vi) A court officer.

(vii) A bail agent authorized under section 167b.

(viii) A licensed private investigator.

(ix) An aircraft pilot or aircraft crew member.

(x) An individual employed as a private security police officer. As used in this subparagraph, "private security police" means that term as defined in section 2 of the private security business and security alarm act, 1968 PA 330, MCL 338.1052.

(b) Possession solely for the purpose of delivering a device described in subsection (1) to any governmental agency or to a laboratory for testing, with the prior written approval of the governmental agency or law enforcement agency and under conditions determined to be appropriate by that agency.

(3) A manufacturer, authorized importer, or authorized dealer may demonstrate, offer for sale, hold for sale, sell, give, lend, or deliver a device that uses electro-muscular disruption technology to a person authorized to possess a device that uses electro-muscular disruption technology and may possess a device that uses electro-muscular disruption technology for any of those purposes.

(4) A person who violates this section is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both.

(5) As used in this section:

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(a) "A device that uses electro-muscular disruption technology" means a device to which all of the following apply:

(i) The device is capable of creating an electro-muscular disruption and is used or intended to be used as a defensive device capable of temporarily incapacitating or immobilizing a person by the direction or emission of conducted energy.

(ii) The device contains an identification and tracking system that, when the device is initially used, dispenses coded material traceable to the purchaser through records kept by the manufacturer.

(iii) The manufacturer of the device has a policy of providing the identification and tracking information described in subparagraph (ii) to a police agency upon written request by that agency.

(b) "Local corrections officer" means that term as defined in section 2 of the local corrections officers training act, 2003 PA 125, MCL 791.532.

(c) "Peace officer" means any of the following:

(i) A police officer or public safety officer of this state or a political subdivision of this state, including motor carrier officers appointed under section 6d of 1935 PA 59, MCL 28.6d, and security personnel employed by the state under section 6c of 1935 PA 59, MCL 28.6c.

(ii) A sheriff or a sheriff's deputy.

(iii) A police officer or public safety officer of a junior college, college, or university who is authorized by the governing board of that junior college, college, or university to enforce state law and the rules and ordinances of that junior college, college, or university.

(iv) A township constable.

(v) A marshal of a city, village, or township.

(vi) A conservation officer of the department of natural resources or the department of environmental quality.

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(vii) A law enforcement officer of another state or of a political subdivision of another state or a junior college, college, or university in another state, substantially corresponding to a law enforcement officer described in subparagraphs (i) to (vi).

(viii) A federal law enforcement officer.

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDRES GRULLON,

Defendant-Appellant.

UNPUBLISHED
November 15, 2011

No. 299410
Kent Circuit Court
LC No. 09-013143-FH

Before: JANSEN, P.J., and SAWYER and SHAPIRO, JJ.

PER CURIAM.

Defendant, Andres Grullon, appeals as of right his conviction for assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant was sentenced to 23 to 120 months' imprisonment. We affirm.

Defendant first argues that there was insufficient evidence to support his conviction. We review "de novo a claim of insufficient evidence." *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In analyzing a sufficiency of the evidence claim, this Court must view the "evidence in a light most favorable to the prosecution." *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). "This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). In making our determination, we "consider whether there was sufficient evidence to justify a rational trier of fact in finding that all the elements of the crime were proved beyond a reasonable doubt." *People v Phelps*, 288 Mich App 123, 131-132; 791 NW2d 732 (2010).

The elements of assault with intent to do great bodily harm less than murder are: "(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997); MCL 750.84. Assault with intent to do great bodily harm less than murder is a specific intent crime. *Parcha*, 227 Mich App at 239. Intent to do great bodily harm has been defined as "'an intent to do serious injury of an aggravated nature.'" *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005), quoting *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986).

Viewed in a light most favorable to the prosecution, the evidence showed that defendant, with three friends, approached the victims with the intent to injure those he believed responsible

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for damaging his car. There was testimony that defendant was angry, exited his vehicle and charged at the victims armed with a baseball bat, and he used the bat to strike several of the victims. "An intent to harm the victim can be inferred from defendant's conduct." *Parcha*, 227 Mich App at 239. A rational juror, viewing the evidence in a light most favorable to the prosecution, could find that the evidence proved beyond a reasonable doubt that defendant committed an assault with the specific intent to cause a "serious injury of an aggravated nature." *Brown*, 267 Mich App at 147. Additionally, viewed in a light most favorable to the prosecution, the prosecutor disproved defendant's claim of self-defense beyond a reasonable doubt because defendant did not have an "honest and reasonable belief that he was in imminent danger." *People v James*, 267 Mich App 675, 678; 705 NW2d 724 (2005).

Defendant next argues it was error for the trial court not to instruct the jury on the lesser offense of aggravated assault, MCL 750.81a(1). Because this issue was not raised before the trial court, it is unpreserved and reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). To demonstrate plain error, a defendant must show: (1) error occurred; (2) the error was plain; and (3) the plain error affected substantial rights. *Id*. at 763. "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*. The burden is on defendant to demonstrate prejudice. *Id*.

An instruction on a lesser offense is only warranted where "the lesser offense is necessarily included in the greater offense, meaning, all the elements of the lesser offense are included in the greater offense, and a rational view of the evidence would support such an instruction." *People v Mendoza*, 468 Mich 527, 533; 664 NW2d 685 (2003). A defendant is not entitled to an instruction on cognate lesser offenses. *Id.* at 533. Cognate lesser offenses are those that "share several elements, and are of the same class or category as the greater offense, but the cognate lesser offense has some elements not found in the greater offense." *Id.* at 532 n 4.

As noted above, the elements of assault with intent to do great bodily harm less than murder are: "(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *Parcha*, 227 Mich App at 239. A showing of actual physical injury is not necessary. *People v Harrington*, 194 Mich App 424, 430; 487 NW2d 479 (1992). In contrast, the elements of aggravated assault are met where a defendant "assaults an individual without [using] a weapon and inflicts serious or aggravated injury upon that individual without intending to commit murder or to inflict great bodily harm less than murder." MCL 750.81a(1). Unlike assault with intent to do great bodily harm less than murder, aggravated assault requires a showing of an injury and requires the assault be committed without a weapon. Thus, aggravated assault is a cognate lesser offense of assault with intent to do great bodily harm less than murder, and defendant was not entitled to a jury instruction on aggravated assault. See *Mendoza*, 468 Mich at 533. Further, any error would be harmless because the jury "was given the option of an intermediate lesser offense—felonious assault—and rejected it in favor of the greater offense." *People v Wilson*, 265 Mich App 386, 395; 695 NW2d 351 (2005).

Defendant next argues his sentence was invalid because the trial court improperly enhanced his sentence beyond the statutory maximum based on judicially ascertained facts. In

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People v Drohan, 475 Mich 140; 715 NW2d 778 (2006), the Michigan Supreme Court recognized that, under the Sixth Amendment of the United States Constitution, a court may not use "judicially ascertained facts" to increase a defendant's sentence beyond the statutory maximum. *Id.* at 157 (citing *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004)). However, because Michigan uses an indeterminate sentencing scheme, "departures from the minimum guidelines are not implicated by *Blakely*." *Id.* at 162 n 15. Because the trial court was bound to follow *Drohan* and defendant's sentence did not exceed the statutory maximum,[1] defendant cannot demonstrate plain error or prejudice affecting his substantial rights.

Finally, defendant suggests that the trial court should have sentenced him to a "boot camp" program. The trial court stated that it would consider such a program if the Department of Corrections recommended it, but only after defendant first served a portion of his sentence. Defendant has not cited any authority, nor could we find any, suggesting that the trial court was required to sentence him to boot camp at all, let alone that it was improper for the court to require that he first serve part of his sentence as provided for in MCL 791.234a(4).

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Douglas B. Shapiro

[1] The statutory maximum is 120 months. MCL 750.84. Defendant was sentenced to 23 to 120 months.

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 30, 2011
v	No. 296757 Bay Circuit Court
JOSHUA JAMES ARCHEY, Defendant-Appellant.	LC No. 09-010143-FC

Before: OWENS, P.J., and O'CONNELL and METER, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of assault with intent to commit great bodily harm less than murder, MCL 750.84,[1] assault with a dangerous weapon (felonious assault), MCL 750.82, and interfering with electronic communications causing injury or death, MCL 750.540(5)(b). The trial court sentenced him as a fourth-offense habitual offender, MCL 769.12, to concurrent prison terms of 24 to 50 years, 10 to 15 years, and 10 to 15 years, respectively. We affirm.

I

According to the prosecution's theory of the case, on February 13, 2009, at approximately 10:30 p.m., defendant struck the victim, Zachary Jones, repeatedly with a baseball bat on the head, body, and legs, and caused Jones to suffer severe injuries. A prosecution witness, Jenny Beson, who was with Jones at the time of the assault and witnessed its immediate aftermath, testified that she was walking from defendant's home to a bar across the street to obtain assistance for Jones's truck when she heard Jones yell. She returned to find Jones lying on the ground, with defendant standing over him. Defendant was holding a baseball bat. Beson covered Jones with her body and told defendant to stop. She then tried to call 911, but defendant took her cellular telephone and, according to Beson, told her that she was going to watch Jones die. She managed to obtain Jones's telephone and called the police as defendant fled.

[1] Defendant was acquitted of the greater charge of assault with intent to commit murder.

RECEIVED by Michigan Court of Appeals 12/2/2011 3:41:15 PM

II

Defendant raises two concurrent claims of error concerning the trial court's jury instructions with regard to felonious assault. He maintains that, given the plain language of MCL 750.82,[2] the trial court erred when it failed to instruct the jury that, in order to find him guilty of felonious assault, it had to determine that he did not intend to murder or inflict great bodily harm on the victim. He also argues that trial counsel made a serious error by failing to request such an instruction. Because defendant failed to preserve a challenge to the trial court's jury instructions, defendant must establish plain error affecting his substantial rights in order to obtain relief. *People v Gonzalez*, 468 Mich 636, 643; 664 NW2d 159 (2003); *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Substantial rights are affected when the defendant is prejudiced, meaning the error affected the outcome of the trial. *Carines*, 460 Mich at 763. With respect to defendant's claim of ineffective assistance of counsel, defendant acknowledges that he failed to move for a new trial on the basis of ineffective assistance of counsel and failed to request a *Ginther*[3] hearing. Thus, our review is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

A trial court must instruct the jury concerning the law applicable to the case and must fully and fairly present the case to the jury in an understandable manner. MCL 768.29; *People v Mills*, 450 Mich 61, 80; 537 NW2d 909, modified on other grounds 450 Mich 1212 (1995); *People v Jones*, 419 Mich 577, 579; 358 NW2d 837 (1984). Jury instructions should be considered in their entirety, rather than extracted piecemeal, to determine whether there was error requiring this Court to reverse. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). "Even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id.*

"'Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden of proving otherwise.'" *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005), quoting *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). "'In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and

---

[2] MCL 750.82(1) provides, in pertinent part:

> [A] person who assaults another person with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon *without intending to commit murder or to inflict great bodily harm less than murder* is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both. [Emphasis added.]

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

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according to prevailing professional norms.'" *Id*., quoting *Solmonson*, 261 Mich App at 663. "'Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different.'" *Id*., quoting *Solmonson*, 261 Mich App at 663-664. Defendant must also show that the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

The elements of assault with intent to commit great bodily harm less than murder are "'(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder.'" *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005), quoting *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997) (emphasis removed). The elements of felonious assault are "(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

To the extent defendant argues that he could not properly be convicted of both assault with intent to commit great bodily harm and felonious assault, we note that the Michigan Supreme Court has held that convictions for both offenses arising out of one assault did not violate double jeopardy. *People v Strawther*, 480 Mich 900; 739 NW2d 82 (2007),

To the extent defendant argues that the trial court should have sua sponte instructed the jury on the intent element contained in MCL 750.82, we find that defendant is not entitled to relief. In light of *Strawther*, and in light of the Supreme Court's previous decision that "negative elements" such as that concerning state of mind in MCL 750.82 need not be proven beyond a reasonable doubt by the prosecution, see, generally, *People v Doss*, 406 Mich 90, 98-99; 276 NW2d 9 (1979), the trial court's error, if any, in providing the standard criminal jury instruction on felonious assault, CJI2d 17.9, was not "clear or obvious" so as to afford defendant relief. See *Carines*, 460 Mich at 763.

In addition, defendant cannot prevail on his concurrent ineffective assistance of counsel claim. In order to reach the conclusion that the trial court's jury instructions were erroneous, one has to adopt what is essentially a novel legal theory, i.e., that while pursuant to *Strawther* it does not violate double jeopardy for a jury to convict a defendant of both felonious assault and assault with intent to commit great bodily harm, the jury should still not convict a defendant of felonious assault if it finds he has the particular intent necessary to convict him of assault with intent to commit great bodily harm. Trial counsel does not provide ineffective assistance in failing to make a novel legal argument. *People v Reed*, 453 Mich 685, 695; 556 NW2d 858 (1996).

III

Defendant next challenges the trial court's scoring of 50 points for offense variable (OV) 7 under the sentencing guidelines. When scoring the guidelines, "[a] sentencing court has discretion in determining the number of points to be scored provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). This Court reviews scoring decisions to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular

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score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). Any interpretation of the sentencing statutes when considering the application of the sentencing guidelines presents a question of law subject to de novo review on appeal. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

Under MCL 777.37(1)(b), the trial court is to score OV 7 at 50 points if the court finds evidence of, among other things, "excessive brutality." In arguing that the actions here did not amount to excessive brutality, defendant attempts to distinguish the facts at issue from those in *People v Hernandez*, 443 Mich 1; 503 NW2d 629 (1993), abrogated in part on other grounds by *People v Mitchell*, 454 Mich 145, 176; 560 NW2d 600 (1997). In *Hernandez*, the Court reviewed "excessive brutality" with respect to OV 2 of the judicial sentencing guidelines. *Id*. at 5-6. The plaintiff in that case pleaded guilty to a charge of assault with intent to commit murder after he attacked the victim with a baseball bat, knocking him to the ground, and then continued to hit the victim until the bat broke. *Id*. at 3-4. The Court held that "[t]here clearly [was] evidence supporting the judge's initial scoring of fifty points for excessive brutality." *Id*. at 21.

We find the facts in the instant case substantially similar to those in *Hernandez*. While defendant argues that the circumstances are different because the current assault occurred in a short period of time, the evidence presented supports a finding that defendant struck Jones many times, not only the three he admitted to. Along with testimony concerning Jones's head wound, one of Jones's treating physicians testified that Jones had facial abrasions, a laceration on his right leg, and bruises on his abdomen and "backside" that appeared consistent with blows from a baseball bat. He also had "multiple bruises on both sides of the chest and back and head and leg" that involved blunt force trauma. The physician testified that the head injury appeared consistent with a blow from a baseball bat, as did the blows to the abdomen and back, and thought that the other "major" injuries also looked to have been caused by the same blunt instrument. A paramedic who treated Jones also testified, describing, among other injuries, bruising along the whole right side of Jones's torso.

In addition, not only did the prosecution provide evidence that defendant struck Jones repeatedly, another treating physician opined that Jones's injuries were consistent with Jones having been struck either while his head was at "some lower position" or while he lay on the ground. This testimony is consistent with a statement made in a letter to the court by Jones's mother, who recited Jones's repeated assertions to her through gestures and basic speech that defendant struck him in the legs, abdomen, upper chest, and back before striking him in the head. Thus, the evidence supports a finding that defendant struck Jones in the head when he was already incapacitated from the previous blows.

Moreover, Beson testified that defendant was about to strike the obviously defenseless and bleeding Jones when she came upon the scene and was only deterred by Beson's act of throwing herself over Jones to protect him.

Under the circumstances, we conclude that the trial court did not abuse its discretion when it decided to score 50 points for OV 7.

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IV

Defendant next argues that the trial court erred when it scored five points for OV 10 on the ground that defendant exploited Jones either because Jones was intoxicated or because he was rendered unconscious at some point during the attack. MCL 777.40 provides, in pertinent part:

> (1) Offense variable 10 is exploitation of a vulnerable victim. Score offense variable 10 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> * * *
>
> (c) The offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious . . . 5 points
>
> * * *
>
> (2) The mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability.
>
> (3) As used in this section:
>
> * * *
>
> (b) "Exploit" means to manipulate a victim for selfish or unethical purposes.
>
> (c) "Vulnerability" means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation.

In deciding whether a score of 15 points for OV 10 was appropriate in *Cannon* (for predatory conduct under MCL 777.40(1)(a)), our Supreme Court held that to score OV 10 at 15 points there had to be exploitive conduct directed at a vulnerable victim. *Cannon*, 481 Mich at 156-159. Regarding vulnerability, the *Cannon* Court stated:

> Thus, we conclude that points should be assessed under OV 10 only when it is readily apparent that a victim was "vulnerable," i.e., was susceptible to injury, physical restraint, persuasion, or temptation. Factors to be considered in deciding whether a victim was vulnerable include (1) the victim's physical disability, (2) the victim's mental disability, (3) the victim's youth or agedness, (4) the existence of a domestic relationship, (5) whether the offender abused his or her authority status, (6) whether the offender exploited a victim by his or her difference in size or strength or both, (7) whether the victim was intoxicated or under the influence of drugs, or (8) whether the victim was asleep or unconscious. The mere existence of one of these factors does not automatically render the victim vulnerable. [*Id*. at 158-159.]

RECEIVED by Michigan Court of Appeals 12/2/2011 3:41:15 PM

Examining the instant case in light of *Cannon*, we find that one of the trial court's reasons for scoring OV 10 at five points, i.e., because Jones may have lost consciousness during the attack, was erroneous. Indeed, no evidence was presented to suggest that Jones was unconscious or semi-conscious before the attack. Instead, to the extent he was rendered unconscious from the blow to the head, it was due to a circumstance of the attack, not due to a particular susceptibility of Jones.

However, with regard to intoxication, evidence was introduced from which a reasonable person could find that Jones was intoxicated and that it was evident to defendant. Defendant and Jones had been drinking together. Further, evidence was introduced about the amount of alcohol Jones and the others drank while together. Perhaps the strongest evidence, however, was the blood test Jones was given at the hospital that showed he had a blood alcohol level of .08. Defendant's expert witness calculated that this would mean that Jones would have had to have consumed approximately nine drinks in the three hours before the assault. Given the effect of this amount of alcohol on, among other things, coordination, the trial court's inference that defendant would have been able to know that Jones was intoxicated was reasonable. Also, given Beson's testimony that defendant struck Jones without provocation rather than in self-defense, the trial court could have reasonably found that defendant deliberately chose a time when Jones was at least somewhat more vulnerable due to his intoxication to carry out the assault. Defendant has not shown that the trial court abused its discretion in finding that defendant exploited Jones's intoxication and in scoring five points for OV 10.

V

Defendant next argues that the trial court erred when it sentenced defendant to a 288-month minimum sentence for his conviction of assault with intent to commit great bodily harm, when 152 months was the upper limit for the minimum sentence range as scored. When we review a departure from the sentencing guidelines, the existence of a particular departure factor is a factual determination reviewed for clear error, the determination that the factor is objective and verifiable is reviewed de novo, the determination that the factor constituted a substantial and compelling reason for departure is reviewed for an abuse of discretion, and the extent of the departure is reviewed for an abuse of discretion. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). In ascertaining whether the departure was proper, this Court defers to the trial court's knowledge of the facts and familiarity with the offender. *Babcock*, 469 Mich at 270. An abuse of discretion occurs when the trial court chooses an outcome falling outside the "principled range of outcomes." *Id*. at 269.

A court may depart from the sentencing guidelines if it has substantial and compelling reasons to do so and states the reasons for departure on the record. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). A court may not depart from the guidelines based on an offense or offender characteristic already considered in scoring the guidelines unless the court finds, based on facts in the record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b). Factors meriting departure must be objective and verifiable, must keenly attract the court's attention, and must be of considerable worth in determining a sentence. *Babcock*, 469 Mich at 257-258. To be objective and verifiable, factors must be actions or occurrences external to the mind and must be capable of being

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confirmed. *Abramski*, 257 Mich App at 74. This Court reviews a departure from the guidelines to determine whether the sentence imposed is proportionate to the seriousness of the defendant's conduct and criminal history. *Babcock*, 469 Mich at 263 n 20, 264; *People v Smith*, 482 Mich 292, 299-300, 318-319; 754 NW2d 284 (2008). "The departure from the guidelines recommendation must contribute to a more proportionate criminal sentence than is available within the guidelines range." *Smith*, 482 Mich at 305 (internal quotation marks and citation omitted).

The trial court provided a number of reasons for its decision to depart from the guidelines. Defendant first argues that the trial court erred when it found that departure was warranted in part because the scoring of 25 points under OV 3 for a permanent, incapacitating injury was inadequate under the circumstances. MCL 777.33(1)(c) provides that 25 points are to be scored for OV 3 when "[l]ife threatening or permanent incapacitating injury occurred to a victim." The trial court found that this scoring, as well as the 10 points scored under OV 4 for psychological injury, was inadequate under the circumstances. As for OV 3, the court noted that this score would apply where, for example, there was a permanent injury to a victim's legs or hands so that he could not work. In comparison, however, the victim in the instant case was so totally incapacitated mentally and physically that he could no longer be left alone and could do "practically nothing." The trial court's reasoning was sound, and we will not disturb it.

Defendant next argues that the trial court improperly found that the act of taking the telephone away from Beson was not otherwise reflected in the guidelines scoring because this led to the scoring of 10 points for prior record variable (PRV) 7 (concurrent felony convictions), due to defendant's concurrent conviction for interfering with electronic communications. While it is true that defendant received PRV points for the phone-related action, the trial court analyzed this issue in light of its earlier decision that defendant could not be scored points for this action under OV 19 (interference with the administration of justice or the rendering of emergency services, see MCL 777.49), pursuant to *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009). The trial court was incorrect about whether OV 19 could be scored for actions that occurred after the completion of the assault, see *People v Smith*, 488 Mich 193, 195; 793 NW2d 666 (2010), although it had no way of knowing that at the time. Nevertheless, given the trial court's finding that the phone-related action could not be taken into account in scoring OV 19, the trial court correctly decided that it could instead form a basis for guideline departure. See, e.g., *McGraw*, 484 Mich at 129-130 n 31. Defendant's argument is without merit.

Similarly, defendant's assertion that neither his flight nor his actions in throwing away the bat could be considered as proper reasons to depart is unpersuasive. As with the fact that defendant took Beson's cellular telephone, the trial court viewed each of these actions as attempts to interfere with the administration of justice that occurred after the assault and were thus not able to be scored under OV 19. In addition, the trial court found defendant's actions out of the ordinary in that they also involved threats to the safety of others—the officer who had to retrieve the bat in a frozen river, and defendant's child and the mother of defendant's child, whom defendant involved in the flight. Contrary to defendant's assertion, the trial court did not abuse its discretion in finding these to be valid reasons to depart from the guidelines.

Defendant also argues that the fact that he was drinking while he was on parole should not keenly attract this Court's attention. As noted by the trial court, defendant was not only

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drinking on parole, but had only been paroled 18 days before the offense, was on a tether, and had already determined how to avoid having his tether alarm go off when he went across the street to drink at the bar near his home. This tends to keenly grab our attention, was not already taken into account by the guidelines, and was a justifiable reason on which to base a sentence departure.

Defendant also challenges using the psychological injuries to Jones's family as a rationale for departure. He asserts that because the Legislature only allows the scoring of OV 5 (psychological injury to victim's family) for murder, attempted murder, or assault with intent to murder, see MCL 777.22 and MCL 777.35, it was inappropriate to use the injuries as a factor here. However, defendant presents no authority for the proposal that the trial court would be unable to use the facts here as a basis for guideline *departure* when they cannot be used to score OV 5. The situation is an objective and verifiable factor that keenly grabs one's attention. In addition, the trial court's discussion of this finding was intertwined with its discussion concerning the "practical effect" that defendant's actions have had on Jones's family, in that they are now Jones's caregivers for life. To the extent this consideration played into the court's decision, it would not be subject to scoring under OV 5 and would be objective, verifiable, and compelling.

Defendant argues that while the trial court also based its decision on defendant's prior chances to reform, this should not keenly grab this Court's attention. However, that defendant has been placed on probation seven times, was placed in jail 13 times, and has had numerous other chances at rehabilitation are facts that are objective and verifiable, are not accounted for in the guidelines, and, contrary to defendant's assertion, tend to grab ones' attention keenly.

Defendant also argues that the trial court's rationale behind the extent of its departure from the guidelines is flawed. He notes that the *Smith* Court used, as a method of deciding whether the extent of a departure was justified, a comparison in the sentencing grid of a defendant's actual sentence to the recommended guidelines sentence. *Smith*, 482 Mich at 306. The *Smith* Court assigned the defendant's actual sentence, which was above the guidelines scoring range (C-IV cell) for his offense but within the grid, to what it would represent as a score in the grid. *Id*. at 306-307. Finding that the trial court's score would place the defendant in the E-VI, F-V or F-VI cells of the grid, the *Smith* Court noted that to receive that sentence the guidelines would had to have been scored with 20 to 40 extra OV points and with 30 to 45 additional PRV points. *Id*. at 307. The Court then used this comparison as one reason for finding that the defendant was entitled to resentencing. *Id*. at 307-308.

Here, defendant argues that because his offense was a class D offense, the trial court erred by analyzing defendant's sentence using the C category. The trial court looked to the C category because defendant's points were greater than those necessary to reach the top grid for a class D offense. The class D offense chart has top PRV and OV scores of 75+ points, MCL 777.65, and defendant was scored at 82 PRV points and 126 OV points. The trial court found that defendant's point score, if analyzed for a C class offense (also with top PRV and OV scores of 75+ points, MCL 777.64), would result in a maximum minimum of 228 months, given defendant's status as an habitual offender. The court then found that this minimum sentence, too, would be inadequate given the factors it had recited, and stated that it would add five years to that, to result in a 24-year minimum sentence. Defendant argues that, under *Smith*, the trial

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court should have instead "expanded" the class D chart, extrapolated what defendant would have received under such a chart, and arrived at a lower appropriate minimum sentence. However, *Smith* expressly provided that, even in a case where a defendant's initial score falls within the grid, "a trial court that is contemplating a departure is not *required* to consider where a defendant's sentence falls in the sentencing range grid." *Smith*, 482 Mich at 309 (emphasis in original). The Court merely noted that it can be helpful. *Id*. Given the nonbinding nature of the *Smith* Court's procedure and given defendant's scores here, we cannot find a basis for reversal with regard to the trial court's analysis. Moreover, given the circumstances surrounding the offense and the offender, we find no abuse of discretion concerning the extent of the sentencing departure.

Affirmed.

/s/ Donald S. Owens
/s/ Peter D. O'Connell
/s/ Patrick M. Meter

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 21, 2010
v	No. 293824 Calhoun Circuit Court
JERRELL JERMAINE JONES, Defendant-Appellant.	LC No. 2009-000327-FC

Before: MARKEY, P.J., and WILDER and STEPHENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83, armed robbery, MCL 750.529, unlawful imprisonment, MCL 750.349b, felon in possession of a firearm, MCL 750.224f, and four counts of possession of a firearm during the commission of a felony, MCL 750.227b(1). Defendant was sentenced as an habitual offender, second offense, MCL 769.10, to life in prison for his assault with intent to commit murder conviction, 30 to 50 years' imprisonment for his armed robbery conviction, 10 to 22-1/2 years' imprisonment for his unlawful imprisonment conviction, 3 to 7-1/2 years' imprisonment for his felon in possession of a firearm conviction, and two years' imprisonment for each of his four felony-firearm convictions. Defendant appeals as of right. We affirm.

Defendant's convictions arose from an incident on January 23, 2009, when he and another male used a handgun and aluminum baseball bat to beat Clifton Stouder. On appeal, defendant argues that the evidence was insufficient to support his convictions for assault with intent to commit murder and armed robbery, and, alternatively, that the trial court erred by denying his motion for directed verdict as to the armed robbery and attendant felony-firearm count. In reviewing the sufficiency of the evidence in a criminal case, this Court must review the record de novo and, viewing the evidence in a light most favorable to the prosecution, determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). "Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime." *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996), quoting *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). The standard of review for a directed verdict motion is the same as that for the sufficiency of the evidence. *People v Aldrich*, 246 Mich App 101, 122-123; 631 NW2d 67 (2001).

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The elements of the crime of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *Hoffman*, 225 Mich App at 111. Here, defendant argues that there was insufficient evidence of his intent to kill. We disagree. Intent to kill may be proved by inference from any facts in evidence. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). "Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *Id.*

Stouder testified that on January 22, between 11:45 p.m. and midnight, he solicited a prostitute, Wendy Hale, in order to engage in sexual intercourse and "do some drugs." Stouder and Hale did not have any drugs in their possession, and Hale desired that they stop at a duplex apartment complex in the area to secure drugs. As soon as Stouder and Hale were admitted into the kitchen of the apartment, the backdoor was barricaded. Defendant and three other women, two Caucasian and one African-American, were present. Defendant immediately began accusing Stouder of being an undercover police officer, and he ordered Stouder to remove all of his clothes. When Stouder refused to do so, defendant pointed a handgun two inches from Stouder's head and said, "I said take your clothes off." Stouder complied. Defendant then called out, "Come here a minute, cuz," and a male entered the kitchen carrying an aluminum baseball bat. Defendant asked, "Well, what are we going to do with him, 'cuz,' and the male walked up to Stouder and hit him across the front of the head with the bat. Defendant ran up to Stouder and punched him in the nose, and the other male hit Stouder again on the head with the bat. Defendant hit Stouder across the back of his head with the handgun, and the men took turns beating Stouder on the head and upper body. Stouder suffered from lacerations, bruises, scrapes, and abrasions, and CAT scans were later ordered to test for possible life-threatening head injuries. The continuous beatings defendant and the other male inflicted are circumstantial evidence of defendant's intent to murder Stouder. See *Hoffman*, 225 Mich App at 111.

Defendant's actions after the beating showed he had no remorse or concern for the injuries inflicted, and in fact, he continued to inflict injury on Stouder. While holding the gun, defendant ordered one of the females to take Stouder into a bathroom, and he forced Stouder to stand in an ice-cold shower for close to an hour while the females were directed to clean up the blood in the kitchen. Defendant then ordered one of the females to "[g]et [Stouder] out of the shower" and told Stouder to get dressed. Defendant led Stouder into a bedroom and commented to the other male, "Damn, big man, look at the damage you did to this guy." Defendant eventually told two of the females, "I want you to get this guy out of here before he dies in my apartment," and Stouder was escorted out of the apartment.

Defendant argues that the evidence was sufficient only to convict him for assault with intent to commit great bodily harm less than murder, and that intent to place the victim in fear of being murdered is insufficient to satisfy the intent to kill element. Defendant points to Stouder's testimony that as defendant was walking Stouder into the bedroom, defendant said, "Don't worry. . . . [W]e're not going to hurt you no more," as evidence that he had not intended to kill Stouder. Viewing the evidence in the light most favorable to the prosecution, however, this statement made *after* the assault occurred does not detract from the circumstantial evidence of defendant's intent to kill during the assault or his recognition of the severity of the injuries he caused, specifically his recognition that he did not want defendant to die in the apartment.

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Defendant next argues that the evidence was insufficient to support his conviction for armed robbery, and that the trial court should have granted his motion for directed verdict on this charge. The court instructed the jury on the elements of aiding and abetting and denied defendant's motion for directed verdict based on this theory. The offense of armed robbery includes: "(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." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). The elements of aiding and abetting include: (1) the offense charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement to assist the commission of the offense; and (3) the defendant intended to commit the offense or had knowledge that the principal intended its commission at the time the defendant gave aid and encouragement. *Id.* at 768.

After Stouder was forced to remove his clothes, and while defendant held the gun up to him, the African-American female grabbed Stouder's clothes and began going through the pockets, which contained his cellular telephone, wallet, and $144. The female later looked through Stouder's wallet while defendant held the gun and forced Stouder to stay in the shower. Stouder could not recall whether defendant told the female to "go through [his] belongings," and he did not observe defendant touch his wallet, the contents, or the telephone. Defendant thus argues that there was no evidence that he ordered the female to go through Stouder's pockets or performed any act or gave any encouragement to assist her, and that there was no evidence that he acquiesced in the permanent deprivation of Stouder's property. We disagree.

"'Aiding and abetting' describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime. . . ." *People v Bulls*, 262 Mich App 618, 625; 687 NW2d 159 (2004), quoting *Carines*, 460 Mich at 757. "An aider and abettor's state of mind may be inferred from all the facts and circumstances." *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995), overruled in part on other grounds *People v Mass*, 464 Mich 615; 628 NW2d 540 (2001). The evidence sufficiently showed that defendant aided and abetted the robbery where he held a gun to Stouder's head, forced him to remove his clothes, and continued holding the gun as the female went through Stouder's pockets. Although defendant did not instruct her to perform these actions, Stouder testified that the females did "what they were told to do" and did not do anything not requested by defendant. Furthermore, Stouder's property was not returned to him before he left the apartment. Viewing the evidence in the light most favorable to the prosecution, a reasonable juror could infer that defendant used the handgun in order to deprive Stouder of his property, and the trial court was correct in denying defendant's motion for directed verdict.[1]

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[1] In light of our conclusion that there was sufficient evidence to prove that defendant aided and abetted the armed robbery, defendant's argument that the trial court erred by failing to dismiss the attendant felony-firearm count because there was insufficient evidence that he committed armed robbery also fails. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999) ("The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony.").

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Affirmed.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens

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Defendant further argues that he was not charged in the criminal information with aiding and abetting the armed robbery, but rather was charged only with armed robbery. However, aiding and abetting is not a separate charge, but is merely a separate theory for conviction under the same charge, and the amended information provided adequate notice of the charge to defendant.

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MAURICE CHARLES GREEN,

Defendant-Appellant.

UNPUBLISHED
December 16, 2010

No. 294741
Wayne Circuit Court
LC No. 09-014650-FC

Before: JANSEN, P.J., and SAWYER and O'CONNELL, JJ.

PER CURIAM.

Defendant appeals by right his jury convictions of two counts of felonious assault, MCL 750.82.[1] We affirm, but remand for further proceedings. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions resulted from his assaults on Lora Curry and Montclair Jones on the evening of May 28, 2009, while the two were spending the night in defendant's home. According to the prosecution, defendant had a fight with complainants about the placement of a space heater. Defendant ordered the two to leave, went upstairs, returned with a baseball bat, and struck complainants while stating that he was going to kill them. The defense maintained that defendant struck complainants in self-defense after Jones had attacked defendant's brother Roderick Lowe, and after Curry had reached into her purse and retrieved a knife and attempted to give it to Jones during the fight. In his opening statement, defense counsel also maintained that defendant called 911 multiple times, that Lowe would testify to this effect, and was prepared to introduce a phone record to substantiate this fact. Counsel further stated that the reason that the police arrested defendant instead of Curry and Jones was because they won the "race to the police."

During trial Curry and Jones testified about their versions of the assault, and Lowe testified on defendant's behalf. In addition, the prosecution elicited the testimony of a police

[1] Defendant was initially also charged with alternate counts of assault with intent to murder, and assault with intent to do great bodily harm.

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witness who was permitted to testify, over defense counsel's objection, that defendant did not make an exculpatory statement to the police while in custody. Despite counsel's objection, the trial court agreed with the prosecution's assertion that defense counsel had "opened the door" to this testimony by his opening statement. On appeal, defendant first maintains that defense counsel rendered ineffective assistance when he "opened the door" to this testimony. He argues that, as a matter of law, no reasonable defense counsel would have claimed that the police investigation was one-sided, knowing that the prosecutor would jump at the chance to show that defendant declined an opportunity to give his version of events.

Defendant did not move for a new trial on the basis of ineffective assistance of counsel, and failed to request a *Ginther*[2] hearing before the trial court; therefore, his ineffective assistance of counsel claim is not preserved. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Our review of an unpreserved claim of ineffective assistance of counsel is limited to mistakes apparent on the record. *Id.* at 368. A defendant has waived the issue if the record on appeal does not support the defendant's assignments of error. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). A claim of ineffective assistance of counsel is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's findings of fact, if any, for clear error, and review de novo the ultimate constitutional issue arising from an ineffective assistance of counsel claim. *Id.*

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). "In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *Id.* "Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different." *Id.*

We note that on appeal, defendant does not argue that the use of the silence was improper, only that counsel was ineffective for maintaining during opening statement that the police believed complainants because they won "the race to the police" and thus allowing the introduction of this allegedly highly damaging evidence. Given defendant's specific arguments here, he cannot prevail. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *Davis*, 250 Mich App at 368. Defense counsel clearly had a purpose in mind while making his opening statement, including the reference to defendant's 911 calls, and counsel's theory that the police chose to believe complainants' version because they spoke with the police first, i.e., to provide support for the defense theory of self-defense. According to Lowe's testimony, defendant called the police to try to get complainants out of his house when they would not leave. Defendant's theory was that

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

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their continued unwanted presence in the home, and their subsequent attack on Lowe, was what caused defendant to attack complainants in self-defense. Thus, defense counsel's statements in furtherance of defendant's chosen defense was strategic. That counsel's strategy did not work did not render its use ineffective assistance. *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008). In addition, we note that defense counsel appropriately objected, albeit unsuccessfully, to the introduction of the fact defendant did not make a statement while in custody, which had led to the trial court providing a limiting instruction. Under the circumstances, defendant cannot show objectively unreasonable behavior on the part of defense counsel.

Defendant next maintains that the trial court violated his due process rights by precluding defense counsel from cross-examining Curry about the effects of intoxication on her memory and perception of the incident. At trial, defense counsel argued that he should be permitted to question Curry concerning whether she thought her perception was altered by consuming drugs and alcohol, and the trial court appeared to agree with the prosecution's objection that this would constitute an improper conclusion that should be left to the factfinder. This evidentiary issue was thus raised and decided below and is thus preserved. However, defense counsel did not specifically raise this constitutional argument in the trial court. Accordingly, defendant's appellate challenge on this latter ground is not preserved. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004) (an objection on one ground is insufficient to preserve an appellate attack on a different ground).

We review defendant's preserved evidentiary issue to determine whether the trial court abused its discretion by limiting the scope of defendant's cross-examination. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). An abuse of discretion occurs when the trial court's decision falls outside the principled range of outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). However, because defendant did not raise this constitutional argument in the trial court, we review that unpreserved issue for plain error affecting defendant's substantial rights. *People v Hanks*, 276 Mich App 91, 92; 740 NW2d 530 (2007).

MRE 611(c) provides:

> Scope of cross-examination. A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. The judge may limit cross-examination with respect to matters not testified to on direct examination.

However, logically relevant evidence may be excluded as "otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court." MRE 402. At trial, the prosecutor's argument concerning the proposed question was based on the assertion that the question whether Curry's intoxication affected her perception of the incident was a conclusion that only the trier of fact could resolve. However, under MRE 701:

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

RECEIVED by Michigan Court of Appeals 12/2/2011 3:41:15 PM

Under MRE 701, Curry could form a lay opinion on whether her perception was altered due to alcohol and marijuana consumption, which itself was based on her perception, and such an opinion would certainly be helpful to a clear understanding of a fact in issue, namely the credibility of her recollection of the circumstances surrounding the assaults. Moreover, under MRE 704:

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Thus, the fact that the jury would ultimately decide whether Curry's perception of the event was accurate despite her alcohol and marijuana use was not a reason for the trial court to sustain the prosecution's objection. We thus find that the trial court erred in sustaining the prosecution's objection for this reason. Nor was this, as the prosecution represents on appeal, merely cumulative evidence to the remainder of Curry's testimony.

However, defendant is not entitled to relief based on the trial court's error.

> In order to overcome the presumption that a preserved nonconstitutional error is harmless, a defendant must persuade the reviewing court that it is more probable than not that the error in question was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). An error is deemed to have been "outcome determinative" if it undermined the reliability of the verdict. See *People v Snyder*, 462 Mich 38, 45; 609 NW2d 831 (2000), citing *Lukity*, *supra* at 495-496. In making this determination, the reviewing court should focus on the nature of the error in light of the weight and strength of the untainted evidence. See *Lukity*, *supra* at 495; *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996). [*People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000).][3]

Here, while defense counsel was not permitted to question Curry as to whether she felt that her perceptions were altered by her alcohol and marijuana use that day, counsel was permitted to question Curry extensively about the amount of alcohol and marijuana that she had consumed, and she had already testified that she agreed with counsel's assertions that using alcohol or illegal drugs "could alter your perception of reality or impair your judgment." And while defendant maintains on appeal that Curry would have likely agreed that her perception was actually affected by her alcohol and drug use, we find it just as likely that Curry would have answered that her perception was not impaired. We thus cannot say that the lack of an answer was prejudicial under these circumstances.

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[3] As noted above, this is similar to the burden defendant must show if this issue is reviewed as an unpreserved constitutional error. For the reasons stated below, we find that defendant is not entitled to relief under this alternate standard of review.

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Defendant has filed a supplemental brief raising an additional issue alleging an inaccuracy in the presentence report that would require resentencing. In reply, the prosecutor admits that the presentence report may be inaccurate. Accordingly, we remand the matter to the trial court to determine whether the presentence report is, in fact, inaccurate with respect to defendant's prior convictions. If the trial court determines that the presentence report did contain inaccurate information, it shall proceed to resentence defendant in light of the correct information.

Defendant's convictions are affirmed, but the matter is remanded to the trial court for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Peter D. O'Connell

RECEIVED by Michigan Court of Appeals 12/2/2011 3:41:15 PM

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES CONNER,

Defendant-Appellant.

UNPUBLISHED
August 19, 2010

No. 290284
Wayne Circuit Court
LC No. 08-002783-FC

Before: MURRAY, P.J., and DONOFRIO and GLEICHER, JJ.

PER CURIAM.

Defendant James Conner appeals as of right his bench trial convictions of armed robbery, MCL 750.529; two counts of assault with intent to commit great bodily harm less than murder, MCL 750.84; malicious destruction of personal property $200 or more but less than $1,000, MCL 750.377a(1)(c)(*i*); and unlawful driving away an automobile, MCL 750.413. Conner was sentenced to concurrent terms of 15 to 30 years' imprisonment for armed robbery, 19 months' to 10 years' imprisonment for assault, 10 months' to 5 years' imprisonment for the unlawful driving away of an automobile, and time served for malicious destruction of property.[1] Conner was assessed costs and fees of $1,360 and was awarded 356 days' credit for time served. Conner was subsequently resentenced on the armed robbery conviction to 10 to 25 years' imprisonment and was awarded 497 days' jail credit. We affirm but remand for correction of the judgment of sentence.

Conner contends there was insufficient evidence to support his armed robbery conviction. Specifically, Conner argues that the prosecution failed to show: (1) he intended to permanently deprive the victim of his property; (2) he used actual force or violence or placed the victim in fear as required by the statute. Conner further asserts that he lacked the requisite intent due to having incurred a head injury. While Conner's arguments rely on acceptance of the evidence that supports his version of the events, this Court must apply the correct standard of review that requires viewing the evidence in a light most favorable to the prosecution. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). "Circumstantial evidence and reasonable

[1] These sentences were all made consecutive to another case, Wayne Circuit Court number 08-000127-FH, because defendant committed the offenses while he was free on bond.

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inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

The armed robbery statute references the unarmed robbery statute to define the conduct that constitutes robbery. MCL 750.529. The unarmed robbery statute provides:

> (1) A person who, in the course of committing a larceny of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony punishable by imprisonment for not more than 15 years.
>
> (2) As used in this section, "in the course of committing a larceny" includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property. [MCL 750.530.]

To elevate an unarmed robbery to an armed robbery requires that a defendant "possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon." MCL 750.529.

There is no question that Conner committed an armed robbery. Conner approached the driver's side of the victim's vehicle carrying a baseball bat and demanded money. When the victim refused, Conner smashed the vehicle's window with the baseball bat. When the victim exited the vehicle, Conner rushed at him while swinging the baseball bat and then jumped into the van. Conner was attempting to leave when the victim reached inside, grabbed the steering wheel, and attempted to hang on to the vehicle. Conner tried to dislodge the victim by alternately braking and accelerating and then shifted into reverse and accelerated, proceeding approximately 25 to 30 feet while the victim was dragged alongside the vehicle. The victim was able to enter the van and force Conner out of the vehicle.

The armed robbery statute is satisfied if a defendant uses force or violence, *or* assaults *or* puts another person in fear. MCL 750.530(1). Conner is mistaken in his assertion that the statute requires the use of actual force for a conviction. His argument is unavailing as his use of the baseball bat as a weapon to assault the victim sufficed to meet the statutory requirement regardless of the victim's professed or displayed level of fear. Even if, as alleged by Conner, he did not have the baseball bat in his possession while he attempted to flee, the purported absence of the weapon at this point in the commission of the crime is irrelevant, as the statute only requires possession of the weapon while engaged in "conduct" occurring "in the course of committing a larceny," not at its completion or culmination. MCL 750.529; MCL 750.530. In addition, the victim testified that he was in fear of being injured while Conner was wielding the baseball bat. "This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of the witnesses." *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007) (internal citations omitted).

Recognizing that armed robbery is a specific intent crime, Conner next asserts he lacked the intent necessary to sustain his conviction. He contends that the prosecutor failed to demonstrate the intent to permanently deprive the victim of his property rather than merely an attempt to procure a ride. Conner relies in part on the fact that, immediately before confronting

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the victim, he asked a mailman for a ride. While no one disputes that this interaction occurred, the evidence was sufficient to show that Conner possessed the requisite intent when he approached the victim. "Intent is a mental attitude made known by acts" and has been defined as "a secret of the defendant's mind," which can be ascertained through words or actions, with recognition that a defendant's actions often "speak louder than words." *People v Strong*, 143 Mich App 442, 452; 372 NW2d 335 (1985) (citation omitted). "Because the law recognizes the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient to sustain a conclusion that a defendant entertained the requisite intent." *Id.* When Conner approached the victim he did not ask for a ride but demanded money. When refused, Conner smashed the vehicle's window and then attempted to drive away in the victim's van. Based on these established facts it was neither a leap in logic nor unreasonable to infer that Conner had the requisite intent to commit an armed robbery.

Conner also alleges that because he incurred head trauma from a confrontation that occurred immediately preceding his attempt to steal the van, he was incapable of forming the necessary intent to commit an armed robbery. Conner relies on medical records and his own testimony to support this claim, which he failed to raise in the trial court. In *People v Carpenter*, 464 Mich 223; 627 NW2d 276 (2001), the defendant attempted to avoid or reduce his criminal culpability by demonstrating that he suffered from organic brain damage. *Id.* at 228. The defendant in *Carpenter* asserted, while not legally insane, "he lacked the mental capacity to form the [requisite] specific intent[.]" *Id.* at 225. Our Supreme Court ruled such evidence inadmissible in accordance with MCL 768.21a, ruling:

> The Legislature has enacted a comprehensive statutory scheme setting forth the requirements for and the effects of asserting a defense based on either mental illness or mental retardation. We conclude that, in so doing, the Legislature has signified its intent not to allow evidence of a defendant's lack of mental capacity short of legal insanity to avoid or reduce criminal responsibility by negating specific intent. [*Id.* at 241.]

"In effect, the *Carpenter* ruling removed diminished capacity as a viable defense" thereby precluding Conner's assertion that he was unable to form the intent necessary to sustain his conviction. *People v Tierney*, 266 Mich App 687, 713; 703 NW2d 204 (2005).

Finally, we note *sua sponte* that Conner's conviction for malicious destruction of property is not included on the judgment of sentence and we remand this matter to the trial court solely for this ministerial correction.

Affirmed but remanded solely for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher

RECEIVED by Michigan Court of Appeals 12/2/2011 3:41:15 PM

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICKY LAVENTAE BUCHANAN,

Defendant-Appellant.

UNPUBLISHED
July 15, 2010

No. 290942
Muskegon Circuit Court
LC No. 08-056513-FH

Before: HOEKSTRA, P.J., and JANSEN and BECKERING, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit a felony (extortion), MCL 750.87, and assault with a dangerous weapon, MCL 750.82. The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11, to concurrent prison terms of nine years and six months to 20 years for the assault with intent to commit extortion conviction and four to eight years for the felonious assault conviction. Defendant appeals as of right. We affirm.

I. BASIC FACTS

On July 1, 2005, Tiffany Cole and her cousin, Amanda Bissell, spent the night at her brother's apartment. Her brother, James Bissell, along with his girlfriend, lived in an upstairs apartment in a house on Octavious Street in Muskegon. Curtis James lived in the other upstairs apartment, and defendant lived in the downstairs apartment.

The next morning, after James and his girlfriend left the apartment, Tiffany and Amanda went to Curtis's apartment to borrow a telephone. Curtis gave the girls his cellular telephone, and Tiffany called her mother. While the two girls stood in the doorway to James's apartment, defendant came up the stairs and went into Curtis's apartment. Amanda and Tiffany heard defendant tell Curtis to give him his money. Defendant then left.

Tiffany finished speaking with her mom, and the two girls returned Curtis's cellular telephone. According to Amanda, they gave the telephone to Curtis's friend that was in the apartment. As the two girls returned to James's apartment, defendant and another man, Derrick Farmer, came upstairs. Defendant was holding a silver "half sized" baseball bat. Defendant opened the door to Curtis's apartment, and hit Curtis with the bat. Curtis dropped to the floor, but defendant continued to hit him. Amanda testified that defendant hit Curtis with the bat four

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or five times, hitting Curtis "[e]verywhere," in the head, shoulder, side, and stomach. While he was hitting Curtis, defendant told Curtis to give him his money and that if Curtis did not pay him, he would either hurt or kill Curtis. Before defendant and Farmer left, defendant told Amanda and Tiffany that if they told anybody what they saw, he would hurt them.

Curtis died later that day. According to the medical examiner, Curtis died of a blunt force head injury. A baseball bat, or any other blunt object, could have caused the injury. The medical examiner also found a bruise on Curtis's right scapula, which he opined was an injury consistent with being struck by a blunt object. The medical examiner could not, however, determine the manner of death. The toxicology report indicated that Curtis used a substantial amount of cocaine before he died, and the medical examiner stated that it was possible that Curtis injured his head after ingesting cocaine and falling into a door handle.

II. SUFFICIENCY OF THE EVIDENCE

Defendant argues that his convictions are not supported by sufficient evidence because there was no evidence from which a rational trier of fact could find that defendant assaulted Curtis. We disagree. In reviewing the sufficiency of the evidence to sustain a conviction, we view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the elements of the crime were proven beyond a reasonable doubt. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007).

To be convicted of either assault with intent to commit extortion or felonious assault, one must commit an assault. See MCL 750.87; *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007). An assault is either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery. *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). A battery is an intentional, unconsented, and harmful or offensive touching of another person. *Id.*

Amanda testified that defendant, on his second trip to Curtis's apartment, hit Curtis with a silver "half-sized" baseball bat four to five times. According to Amanda, defendant hit Curtis "[e]verywhere," including the head. Amanda further testified that defendant, while hitting Curtis, demanded his money and threatened Curtis with physical injury or death if Curtis did not pay him his money. Tiffany also testified that defendant hit Curtis with a bat. The medical examiner testified that Curtis died of blunt force trauma to the head, an injury consistent with being hit by a baseball bat. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that defendant assaulted Curtis. Defendant's convictions are supported by sufficient evidence.

III. OV 3

Defendant argues that the trial court erred in scoring 100 points for offense variable (OV) 3, MCL 777.33, because there was no evidence to support a finding that he killed Curtis. OV 3 was originally scored at 100 points. But, at the sentencing hearing, the prosecutor stated, "It's [defense counsel's] position that OV-3, which is scored 100 points, should score 10 points. I agree." The trial court then corrected the scoring of OV 3 to be 10 points. Accordingly, defendant's argument that 100 points were scored for OV 3 is not supported by the record.

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VI. OTHER SENTENCING ISSUES

Defendant raises several other issues regarding his sentences. We review these unpreserved claims of sentencing error for plain error affecting defendant's substantial rights. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002).

Defendant argues that he is entitled to be resentenced because the trial court sentenced him to the maximum sentences permitted by the habitual offender statute, MCL 769.11, without recognizing that it was not required to impose the allowed maximum sentences. MCL 769.11(1)(a) provides that "the court . . . may sentence the person to imprisonment for a maximum term that is not more than twice the longest term prescribed by law . . . ." The term "may" is permissive. *People v Brown*, 249 Mich App 382, 386; 642 NW2d 382 (2002). A trial court is presumed to know the law. *People v Alexander*, 234 Mich App 665, 675; 599 NW2d 749 (1999). Because nothing in the record indicates that the trial court was unaware of its discretion in setting the maximum sentences, we reject defendant's argument.

Defendant does not contest that his minimum sentence of nine years and six months for his conviction of assault with intent to commit extortion is within the recommended minimum sentence range. Because there was no error in the scoring of the guidelines,[1] we must affirm defendant's sentence unless the trial court relied upon inaccurate information, MCL 769.34; *People v Babcock*, 469 Mich 247, 268; 666 NW2d 231 (2003), or committed an error of constitutional magnitude, *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006).

Defendant claims that the trial court did not sentence him on accurate information because, contrary to MCR 6.425(A)(5), the court failed to conduct an assessment of his rehabilitative potential through alcohol, drug, and psychiatric treatment. However, MCR 6.425(A)(5) only requires a probation officer to include in a presentence information report (PSIR) "the defendant's medical history, substance abuse history, if any, and, if indicated, a current psychological or psychiatric report[.]" A PSIR is presumed to be accurate, and the trial court may rely upon the report unless effectively challenged. *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). The PSIR for defendant indicated that defendant had no history of mental health problems and that he occasionally used alcohol and drugs. Defendant has made no challenge to the accuracy of the statements in the PSIR. Accordingly, defendant has failed to establish that the trial court relied on inaccurate information in sentencing him.

Defendant claims that his sentence for assault with intent to commit extortion is disproportionate to the offense and the offender and, therefore, constitutes cruel and unusual punishment. "However, a sentence within the guidelines range is presumptively proportionate, and a sentence that is proportionate is not cruel or unusual punishment." *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008) (internal citations omitted). Defendant offers no

[1] Defendant's claim that the trial court made factual findings in contravention of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), is without merit. *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006).

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argument to overcome the presumption of proportionality. There is no constitutional sentencing error. We affirm defendant's sentences.[2]

V. DEFENDANT'S STANDARD 4 BRIEF

In his standard 4 brief, defendant raises issues of ineffective assistance of counsel and prosecutorial misconduct regarding the absence of Bruce Hunter from trial. Hunter was the friend in Curtis's apartment when Amanda and Tiffany returned Curtis's cellular telephone.

A. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Defendant claims that counsel was ineffective for failing to investigate Hunter and to call him as a witness at trial. According to defendant, Hunter would have testified that defendant, on his second visit to Curtis's apartment, did not have a bat and that Curtis was only punched one time by Farmer. Because no *Ginther*[3] hearing has been held on this claim, our review is limited to mistakes apparent on the record. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009).

Effective assistance of counsel is presumed, and a defendant bears the heavy burden of proving otherwise. *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). To establish a claim for ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008).

Defendant attached an affidavit from Hunter to his standard 4 brief. However, the affidavit is not a part of the lower court record and, therefore, it may not be considered. *People v Seals*, 285 Mich App 1, 21; 776 NW2d 314 (2009). The references to Hunter in the lower court record are minimal. The prosecution listed Hunter as a res gestae witness on its witness list, and, at trial, Hunter was identified as the friend who was in Curtis's apartment. Detective Cory Luker testified that Hunter was interviewed during the investigation but that he "simply disappeared" and could not be found for defendant's trial. The lower record contains no indication of what Hunter saw at Curtis's apartment or that defense counsel failed to investigate Hunter. Accordingly, defendant has failed to establish that counsel's performance fell below an objective standard of reasonableness.

We do note that a summary of Hunter's statement to the police is contained in defendant's PSIR. According to the PSIR:

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[2] Because felonious assault is of a lesser crime class than assault with intent to commit extortion, MCL 777.16d, and because defendant received concurrent sentences, the sentencing guidelines do not apply to defendant's sentence for felonious assault. *People v Mack*, 265 Mich App 122, 127-130; 695 NW2d 342 (2005). Defendant makes no argument regarding his felonious assault sentence that is separate from his argument concerning his sentence for assault with intent to commit extortion; therefore, we do not address defendant's sentence for felonious assault.

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

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> Hunter stated at approximately 7:30 a.m. that day, someone started knocking on the door and the victim didn't answer it. Whoever was knocking left and returned approximately 15 minutes later. The victim answered it and Hunter advised that he was in the living room and could not see who was at the door, but he heard the conversation and could hear a male subject asking for money owed to him. Hunter advised the subject left, however, a short time later, he heard the door open hard and heard a scuffle by the front door. Hunter advised this time he left the living room and entered the front door area to see the victim on the ground and two black males standing over him yelling at him about the money he owed them. Hunter further stated he saw a bat in the hand of one of the subjects who wore a white T-shirt. Hunter advised he got between this subject and the victim, who was still on the ground, and asked him not to hit him with the bat.

Hunter's statement to the police is inconsistent with his affidavit, in which he averred that Curtis was only punched one time in the head by Farmer, that defendant never had a bat, and that Curtis was never hit with a bat. Decisions regarding whether to call a witness at trial involve matters of trial strategy. *Seals*, 285 Mich App at 21. This Court will not second-guess counsel on matters of trial strategy, nor assess counsel's competence with the benefit of hindsight. *People v Henry*, 239 Mich App 140, 148; 607 NW2d 767 (1999). Thus, even if Hunter could have been found for trial, given his statement to the police, defendant has failed to establish that counsel's decision not to call Hunter fell below objective standards of reasonableness.

B. PROSECUTORIAL MISCONDUCT

Defendant claims that the prosecutor committed misconduct when he failed to use the subpoena power to produce Hunter at trial. According to defendant, the prosecutor's failure to secure Hunter's presence violated *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). We review this unpreserved claim of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

In *Brady*, 373 US at 87, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." To establish a *Brady* violation, a defendant must show that (1) the prosecutor possessed evidence favorable to him, (2) he did not possess the evidence, and he could not have obtained the evidence with reasonable diligence, (3) the prosecution suppressed the favorable evidence, and (4) there is a reasonable probability that, had the evidence been disclosed, the outcome of the proceedings would have been different. *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998). Defendant does not claim that the prosecutor suppressed any evidence. Rather, he argues a *Brady* violation based on the prosecution's failure to secure Hunter's presence at trial. Defendant, however, cites no authority for the assertion that *Brady* requires the prosecution to secure a witness's presence at trial. Accordingly, defendant has abandoned his claim. *People v Schumacher*, 276 Mich App 165, 178; 740 NW2d 534 (2007).

Regardless, a prosecutor is not required to produce res gestae witnesses at trial. MCL 767.40a; *People v Kevorkian*, 248 Mich App 373, 441; 639 NW2d 291 (2001). A prosecutor is required to provide notice of res gestae witnesses and to give reasonable assistance in locating a

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witness if a defendant requests assistance. *Kevorkian*, 248 Mich App 441-442. Defendant makes no assertion that he requested assistance from the prosecutor in locating Hunter for trial.

C. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Defendant argues that he was denied effective assistance of appellate counsel when appellate counsel failed to pursue claims of ineffective assistance of counsel regarding trial counsel's failure to investigate and call Hunter as a witness and to raise a *Brady* violation claim for the prosecutor's failure to produce Hunter at trial. We disagree.

The test for ineffective assistance of appellate counsel is the same test applicable to a claim of ineffective assistance of trial counsel. *People v Uphaus (On Remand)*, 278 Mich App 174, 186; 748 NW2d 899 (2008). "Hence, defendant must show that his appellate counsel's decision not to raise a claim of ineffective assistance of trial counsel fell below an objective standard of reasonableness and prejudiced his appeal." *Id.* We found no merit to defendant's claims, raised in his standard 4 brief, that trial counsel was ineffective for failing to investigate Hunter and calling him as a witness or that the prosecutor violated *Brady* when he failed to produce Hunter at trial. Because the claims have no merit, appellate counsel's failure to raise claims of ineffective assistance of trial counsel did not prejudice defendant's appeal. Defendant was not denied effective assistance of appellate counsel.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kathleen Jansen
/s/ Jane M. Beckering

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN WILLIS SCARBOROUGH,

Defendant-Appellant.

UNPUBLISHED
January 12, 2010

No. 286545
Kent Circuit Court
LC No. 07-009422-FC

Before: Markey, P.J., and Bandstra and Murray, JJ.

PER CURIAM.

I. Introduction

Following a jury trial, defendant was convicted of voluntary manslaughter, MCL 750.321, in the killing of Victor Manious, and sentenced as a habitual offender, fourth offense, MCL 769.12, to 19 to 60 years' imprisonment. Defendant appeals as of right, arguing that statements he made to agents of the Federal Bureau of Investigation and Grand Rapids police officers, in which he admitted to the killing, should have been suppressed. Additionally, defendant argues that the trial court made several scoring errors. We affirm.

II. Analysis

A. Suppression Issues

Defendant argues that his statements made during four post-arrest interviews with FBI agents and Grand Rapids police on August 2 and 3, 2007, were improperly admitted, because those statements were not voluntary and because the police improperly questioned him after he invoked his right to remain silent. The United States and Michigan Constitutions guarantee the right against self-incrimination. US Const, Am V; Const 1963, art 1, § 17. To admit into evidence a statement obtained from defendant during a custodial interrogation, the defendant must have voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003). "Whether a defendant's statement was knowing, intelligent, and voluntary is a question of law that the court must determine under the totality of the circumstances." *People v Snider*, 239 Mich App 393, 417; 608 NW2d 502 (2000). We review de novo a trial court's determination that a statement was voluntary, but will not

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disturb the trial court's findings of fact absent clear error. *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000).

We consider the following factors in determining whether a statement is voluntary:

> [T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.
>
> The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made. [*People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988) (citations omitted).]

Defendant's challenge is to the four factors relating to (1) whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; (2) whether the accused was deprived of food, sleep, or medical attention; (3) whether the accused was physically abused; and (4) whether the suspect was threatened with abuse. After a close review of the record, we hold that the trial court's factual findings were not clearly erroneous, and that defendant's statements were knowing, intelligent, and voluntary. *Snider*, 239 Mich App 417.

With respect to the first two factors noted above, defendant asserts on appeal that he "was in no physical or mental condition to withstand the coercive atmosphere created by the police . . . due to the length and frequency of the interrogations, the denial of sleep, the overcrowded nature of the detention cells, the denial of epilepsy medication and [defendant's] constant concern over seizures, implied promises made by the police, and the abusive conduct of one of the officers involved." Contrary to this argument, and consistent with the trial court's findings, is that (1) defendant indicated that he felt fine before the initial August 3, 2007, interview commenced, (2) although defendant mentioned his medication during the interviews, he did not indicate that the lack of medication was affecting him physically, and there is no indication that the police withheld defendant's medication to coerce him into making any statements, and (3) defendant admitted that he never had any epileptic seizures during his incarceration in Texas. The recorded interviews also reveal that defendant was in no means pressured or coerced by police, or that he was under any stress or ill health. For these reasons, we conclude the record refutes defendant's argument that he could not mentally or physically withstand the questioning by police. *Cipriano*, 431 Mich 334.

With respect to the latter two factors, defendant argues that Detective Gregory Griffin's abusive conduct during the August 3, 2007, interviews rendered defendant's statements involuntary. Regarding this argument, the trial court found that "[w]hile Detective Griffin's interview style could be deemed argumentative and confrontational at times, Detective Griffin

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never engaged in physical abuse or threats of abuse." We agree, as there is nothing in the record to suggest that defendant was physically abused or that the police threatened him with physical abuse during any of the interviews. *Id.*

Defendant also argues that the Grand Rapids police improperly coerced defendant's statements by promises of leniency. Though a promise of leniency may impact the voluntariness of a statement, *People v Givans*, 227 Mich App 113, 120; 575 NW2d 84 (1997), there is again no evidence in the record to support that such a promise was made. Instead, Detective Griffin told defendant that he needed to grab a "lifeline," and while defendant now interprets that assertion as an offer of leniency in exchange for a confession, by the time of that statement he had already admitted to the operative facts in this case, i.e., that defendant hit the victim with a baseball bat after some kind of altercation, stuffed the victim's body in a trunk, and then abandoned the car with the victim's body still inside. We conclude that the trial court correctly observed that in context, there was no promise of leniency by the police. *Id.*

Defendant's final argument on this issue is that he invoked his right to remain silent, and that the Grand Rapids police failed to honor that request on various occasions at the August 3, 2007, interviews. "[A] suspect is free at any time to exercise his right to remain silent, and all interrogation must cease if such right is asserted." *People v Catey*, 135 Mich App 714, 722; 356 NW2d 241 (1984). The police, however, are permitted to continue an interview where defendant does not unequivocally invoke his right to remain silent. *People v Adams*, 245 Mich App 226, 234-235; 627 NW2d 623 (2001). We have reviewed the specific portions of the record cited by defendant, and while defendant made several assertions that he no longer wished to speak to the police, these assertions were equivocal. Defendant's right to remain silent was not violated by the continuation of the interviews. *Id.*

B. Scoring

As noted, defendant also challenges the trial court's scoring of offense variables (OVs) 5, 7, and 13. A trial court's scoring decision will be upheld if there is any evidence in the record to support it. *People v Kegler*, 268 Mich App 187, 190; 706 NW2d 744 (2005).

Defendant challenges the sentencing court's scoring of 15 points for OV 5, reflecting that "[s]erious psychological injury requiring professional treatment occurred to a victim's family." MCL 777.35(1)(a). "Offense variables are properly scored by reference only to the sentencing offense except when the language of a particular offense variable specifically provides otherwise." *People v McGraw*, 484 Mich 120, 135; 771 NW2d 655 (2009). Defendant specifically argues that there was no evidence of "serious psychological injury" as required by OV 5. We disagree, as the evidence showed that the victim's wife was present when his body was found in the trunk of the car, and that fact establishes serious psychological injury sufficient to score 15 points for OV 5.[1]

[1] Neither party has raised application of *McGraw* to the scoring of OV 5, and so that issue is not properly before us. Nonetheless, we point out that scoring OV 5 at 15 points for discovering the victim's body in the trunk of the car was not a scoring related to defendant's conduct after the

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Defendant next challenges the sentencing court's scoring OV 7 at 50 points, reflecting that "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). The trial court found that defendant acted with excessive brutality, where defendant bragged about hitting the victim "Babe Ruth" style. Although defendant's friends testified that defendant made these statements, additional facts support this score. Specifically, defendant admitted that he hit the victim in the head with a baseball bat and rendered him unconscious, dragged the victim's body down a flight of stairs, placed the victim into the trunk of the victim's car, and then drove the victim's car to downtown Grand Rapids, leaving the car downtown with the victim inside. The record reflects that victim was inside the trunk from the late evening hours of July 28, 2007, to July 30, 2007. "Brutality" is not defined in the statute, but Random House Webster's College Dictionary (1997) defines it as "the quality or state of being brutal," and "brutal" as "savage; cruel; inhuman" or "harsh; severe." The aforementioned facts certainly demonstrate that defendant acted with excessive brutality. Thus, the record supports a score of 50 points for OV 7. *Id.*

Defendant finally challenges the trial court's OV 13 score of 25 points for a continuing pattern of criminal behavior. MCL 777.43. MCL 777.43(2)(a) provides that "[f]or determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." At sentencing, the prosecution argued that defendant had been convicted of aggravated burglary and two counts of theft in Tennessee, and the trial court accepted those convictions as sufficient to support an OV 13 score of 25 points. However, defendant correctly observes on appeal that his convictions for theft and aggravated burglary are not crimes against a person.[2]

Nevertheless, there is record support for the OV 13 score of 25 points. First, defendant was convicted of the instant offense. Second, defendant's presentence investigation report (PSIR), indicated that he was arrested and charged with aggravated assault in Tennessee on May 7, 2007, and that such charge was pending. Such an offense is a class C or D felony depending on the circumstances, and it is part of the chapter of crimes against a person. Tenn Code Ann § 39-13-102(d). A defendant's PSIR is presumed to be accurate, unless challenged by the defendant; and a trial court is entitled to rely on the factual information within the PSIR. *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997). And, pending charges may be used for OV 13 purposes. *People v Wilkens*, 267 Mich App 728, 743-744; 705 NW2d 728 (2005). Third, there was testimony at trial that defendant attacked and robbed Carlos Barbaran before the

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offense was committed. Instead, finding the body in the trunk result from defendant's commission of the crime, i.e., defendant hitting the victim in the head and leaving him to die in the trunk. Thus, our case is unlike the hypothetical utilized by Justice Corrigan in *McGraw*, 484 Mich 137, where the hypothetical defendant *sent* photos of the victim *after* the murder.

[2] On November 17, 2006, defendant was convicted of two counts of theft, a class D felony, and one count of aggravated burglary, a class C felony. According to Chapter 14 of the Tennessee Code Annotated, theft of property or services worth $1,000 to $10,000, Tenn Code Ann § 39-14-105(3), and aggravated burglary, Tenn Code Ann § 39-14-403, are crimes against property. MCL 777.43(1)(b) provides that 25 points will be scored if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more *crimes against a person*." (Emphasis supplied.)

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instant offense took place, and defendant could have been charged with the felony of unarmed robbery, MCL 750.530, which is a crime against a person, MCL 777.16y. Defendant concedes on appeal that the uncharged offense against Barbaran constituted a suitable crime against a person for OV 13 scoring purposes. See MCL 777.43(2)(a).

Affirmed.

/s/ Jane E. Markey
/s/ Richard A. Bandstra
/s/ Christopher M. Murray

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH LLOYD EDWARDS,

Defendant-Appellant.

UNPUBLISHED
October 22, 2009

No. 288037
Dickinson Circuit Court
LC No. 07-003890-FC

Before: Hoekstra, P.J., and Bandstra and Servitto, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84. The trial court sentenced defendant as an habitual offender, second offense, MCL 769.10, to six years and 11 months to 15 years' imprisonment. Defendant appeals as of right. Because we conclude that the trial court committed no evidentiary, instructional, or scoring error, we affirm defendant's conviction and sentence.

On September 28, 2007, defendant struck his neighbor, Brian Marentette, several times with a child's aluminum baseball bat. A female witness interfered in the assault and called 911. Defendant ran to the residence of James Miller, a friend, and asked Miller to hide him. Miller refused. Defendant then asked Miller's son to drive him away from the area. The son refused. Defendant was arrested without incident shortly thereafter. The prosecutor charged defendant with assault with intent to commit murder, MCL 750.83. At trial, defendant claimed he struck Marentette in self-defense. The jury rejected defendant's claim and found him guilty of the lesser included offense of assault with intent to do great bodily harm.

I

Defendant argues that the trial court erred by excluding as irrelevant the testimony of a 12-year-old girl that Marentette had touched her in a sexual manner while tickling her. According to defendant, the evidence was relevant to his self-defense claim because the incident influenced his perception of the risks he faced from defendant. We review a preserved claim of evidentiary error for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). Defendant also claims that the evidence was admissible under MRE 405(b) and that the exclusion of the evidence violated his constitutional right to present a defense. We review these unpreserved claims of error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

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Relevant evidence, which is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," is generally admissible. MRE 401; MRE 402. Defendant maintains that the evidence was relevant to the issue whether he honestly believed that he was in danger from Marentette, an element of a self-defense claim. See *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). However, defendant fails to explain how Marentette's alleged inappropriate behavior with the girl contributed to his fear of danger. The record contains no reference to establish the date of the alleged inappropriate touching. Moreover, defendant acknowledged that the alleged incident involved no violence between him and Marentette. Under these circumstances, the trial court was within its discretion to find the evidence irrelevant. Cf. *People v Rockwell*, 188 Mich App 405, 410-411; 470 NW2d 673 (1991). Because the evidence was not relevant, the evidence was not admissible. MRE 402.[1]

In addition, the exclusion of the evidence did not violate defendant's constitutional right to present a defense. The exclusion of irrelevant evidence does not infringe on a defendant's right to present a defense. *People v Unger*, 278 Mich App 210, 250; 749 NW2d 272 (2008).

II

Defendant next argues that the trial court erred in failing to instruct the jury to disregard gestures made by Officer Edwin Mattson during trial. We review claims of instructional error de novo. *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). We review jury instructions in their entirety, and "there is no error requiring reversal if the instructions sufficiently protected the rights of the defendant and fairly presented the triable issues to the jury." *Id.*

The trial court found Mattson's gestures unseemly, but it chose not to instruct the jury regarding the gestures because it did not want to draw further attention to them. The trial court did instruct the jury that it was to consider only properly admitted evidence, which only included the sworn testimony of witnesses and the admitted exhibits. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). The trial court's instructions as a whole were sufficient to protect defendant's rights.

III

Finally, defendant argues that the trial court erred in scoring 50 points for offense variable (OV) 7, MCL 777.37, and ten points for OV 19, MCL 777.49. A trial court has discretion in scoring the sentencing guidelines, and we will affirm scoring decisions for which

[1] Even if the evidence was relevant, defendant has not shown that the trial court plainly erred in not admitting the evidence pursuant to MRE 405(b). Defendant concedes that, because he was not charged with homicide, MRE 404(a)(2) does not apply. MRE 405 does not provide an independent basis for admission of character evidence; rather, it establishes the method for proving character after it has been determined that character evidence is admissible under MRE 404. Dubin, Weissenberger & Stephani, Michigan Evidence Courtroom Manual, (2009 ed), Chapter 405, p 101.

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there is any evidence in support. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2004).

Fifty points may be scored for OV 7 if "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). At trial, Marentette and witnesses to the assault described defendant repeatedly pounding Marentette with a baseball bat. Marentette suffered serious injuries, including facial fractures. The trial court's scoring of 50 points for OV 7 is supported by record evidence.

Ten points may be scored for OV 19 if the defendant "interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). Knowing the police had been called, defendant ran to Miller's residence and asked Miller to hide him, but Miller refused. He then asked Miller's son to drive him away from the area, but the son also refused. Defendant then hid in a dark crevice, where eventually the police located and arrested him. Defendant's actions support the trial court's scoring of OV 19.[2]

Affirmed.

/s/ Joel P. Hoekstra
/s/ Richard A. Bandstra
/s/ Deborah A. Servitto

[2] Even if we were to conclude that the trial court abused its discretion in scoring OV 19, defendant would not be entitled to be resentenced because a ten-point reduction in defendant's OV score would not alter the appropriate guidelines range. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

RECEIVED by Michigan Court of Appeals 12/2/2011 3:41:15 PM

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GIAVONNI RAMARR HECTOR,

Defendant-Appellant.

UNPUBLISHED
June 23, 2009

No. 283849
Wayne Circuit Court
LC No. 07-014486-FC

Before: Borrello, P.J., and Meter and Stephens, JJ.

PER CURIAM.

Defendant was convicted by a jury of felonious assault, MCL 750.82, and sentenced to a term of 23 to 48 months' imprisonment. He appeals as of right. We affirm.

Defendant was convicted of assaulting an employee of a police impound lot with a baseball bat that had nails in one end. The jury rejected defendant's claim that he acted in self-defense.

Defendant first argues that there was insufficient evidence to support his conviction for felonious assault. We disagree.

Defendant incorrectly asserts that evidence that raises an inference of guilt is insufficient to support a conviction, and that any doubts about the evidence must be resolved in his favor. In reviewing a challenge to the sufficiency of the evidence, this Court reviews the evidence de novo in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979); *People v Oliver*, 242 Mich App 92, 94-95; 617 NW2d 721 (2000). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999) (citation omitted). A reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

"The elements of felonious assault are: (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

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Evidence was presented that defendant struck the employee in the head with a baseball bat at least three times. Defendant admitted striking the employee twice. Viewed most favorably to the prosecution, the evidence was sufficient to enable a rationale trier of fact to find beyond a reasonable doubt that defendant assaulted the employee with a dangerous weapon (a baseball bat), with the intent to injure him or place him in reasonable fear or apprehension of an immediate battery.

Defendant also argues that the prosecution did not meet its burden of disproving his claim of self-defense, or defense of his brother. A defendant acts in self-defense, or defense of others, when he honestly and reasonably believes that his life, or the life of another, is in imminent danger or that there is a threat of serious bodily harm. *People v James*, 267 Mich App 675, 677; 705 NW2d 724 (2005). Once a defendant introduces evidence of self-defense, the prosecutor bears the burden of disproving it beyond a reasonable doubt. *Id.*

Conflicting testimony was presented concerning the circumstances of the altercation that preceded defendant striking the employee with the baseball bat. Although defendant asserted that his brother and the lot manager were both fighting each other, testimony of other witnesses indicated that the manager was not fighting back and was being beaten by defendant's brother. Defendant also asserted that the employee who obtained the bat was swinging the bat at defendant's brother. The employee testified that he did not swing or hit defendant's brother with the bat, but only twice poked defendant's brother with the bat in an attempt to stop him from assaulting the lot manager. The employee also denied using the end of the bat with the nails to attempt to stop the assault.

Viewed in a light most favorable to the prosecution, the jury reasonably could have found that the employee was not using the bat in manner that created a threat of serious bodily harm. Further, the jury could have found that once defendant obtained the bat, any perceived threat was no longer imminent. Thus, there was sufficient evidence to allow the jury to find that defendant was not acting in lawful self-defense when he assaulted the employee in the head with the bat.

Finally, defendant argues that the trial court abused its discretion by refusing to admit another bat, which defendant testified was substantially similar to the bat used during the offense, as demonstrative evidence. We disagree. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000).

"Demonstrative evidence, including physical objects alleged to be similar to those involved in the incident at issue, is admissible where it may aid the fact finder in reaching a conclusion on a matter material to the case." *People v Castillo*, 230 Mich App 442, 444; 584 NW2d 606 (1998). Although there is no "specific criteria" for determining when to admit demonstrative evidence, it must first satisfy traditional requirements for relevance and probative value. *People v Unger*, 278 Mich App 210, 247; 749 NW2d 272 (2008). In this case, the actual bat that was used during the offense was admitted into evidence. Defense counsel explained that the demonstrative exhibit was prepared because he believed that the actual bat could not be located. However, that concern had been resolved. Although defendant claimed that the condition of the actual bat had changed since the incident because many nails had been removed, the jury was able to view the bat and see the number and placement of the nail holes in the wood.

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Because the actual bat was available and could be examined by the jury, the trial court did not abuse its discretion by excluding the demonstrative exhibit.

Affirmed.

/s/ Stephen L. Borrello
/s/ Patrick M. Meter
/s/ Cynthia Diane Stephens

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER COBB,

Defendant-Appellant.

UNPUBLISHED
May 5, 2009

No. 278973
Wayne Circuit Court
LC No. 05-011055

Before: Sawyer, P.J., and Murray and Stephens, JJ.

PER CURIAM.

Pursuant to a plea and sentencing agreement, defendant pleaded guilty of assault with intent to commit murder, MCL 750.83, and was sentenced to a prison term of 15 to 30 years. We granted defendant's delayed application for leave to appeal, and now affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that he was "coerced" into pleading guilty because defense counsel was ineffective when, rather than advising defendant that he had a valid self-defense, he instead advised defendant to accept the plea to avoid potential murder charges if the victim died.

To evaluate a claim of ineffective assistance of counsel arising out of a guilty plea, a court must determine whether the plea was tendered voluntarily and understandingly. *People v Davidovich*, 238 Mich App 422, 425; 606 NW2d 387 (1999), aff'd 463 Mich 446 (2000); *People v Mayes* (*After Remand*), 202 Mich App 181, 183; 508 NW2d 161 (1993). With respect to a claim that counsel was ineffective in advising a defendant to accept a plea, the issue is whether counsel's advice was within the range of competence demanded of attorneys in criminal cases, not whether the court in retrospect considers the advice to have been wrong. *Mayes*, *supra* at 183-184.

The record does not support defendant's argument that he had a viable defense of others defense. A person may act in defense of others when the person honestly and reasonably believes that another person (a fetus in this case) is in danger of imminent death or great bodily harm and the use of deadly force is necessary. See *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002); *People v Kurr*, 253 Mich App 317, 328; 654 NW2d 651 (2002). The witnesses who testified at the preliminary examination did not see or hear the complainant threatening defendant's pregnant fiancée. No one saw the complainant with a weapon. Defendant's statements to the police indicated that he thought the complainant was going to hurt

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his fiancée because he looked at her with "evil eyes" and started walking in her direction. A competent attorney could reasonably conclude that these observations would not persuade a jury that defendant held an honest and reasonable belief that the fetus was in danger of imminent death or great bodily harm. Further, the evidence showed that defendant did not attempt to first restrain the complainant, and that he repeatedly struck him in the head with a baseball bat. The likelihood of persuading a jury that the repeated strikes were necessary was negligible.

Defendant argues that, at a minimum, imperfect self-defense would have mitigated second-degree murder to voluntary manslaughter, for which the guidelines range would have been only 19 to 38 months. Imperfect self-defense applies when self-defense fails *only* because the defendant was the initial aggressor. *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992). It does not apply if the killing was not immediately necessary. *Id*. An imperfect self-defense theory would not ameliorate the deficiencies in defendant's defense of others theory and the likelihood of persuading a jury that he was guilty of voluntary manslaughter on this theory was also negligible. Under the circumstances, counsel's advice to accept the plea agreement was within the range of competence demanded of criminal attorneys. Therefore, counsel was not ineffective for advising defendant to accept the plea.

Defendant also argues that there was an insufficient factual basis for his plea because he denied intending to murder the complainant. In reviewing the adequacy of the factual basis for a plea, this Court examines whether a factfinder could properly convict on the facts elicited from the defendant at the plea proceeding. *People v Brownfield* (*After Remand*), 216 Mich App 429, 431; 548 NW2d 248 (1996). The elements of assault with intent to commit murder are an assault with an actual intent to kill, which, if successful, would make the killing murder. *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005).

Although defendant denied having an intent to kill, that intent may be reasonably inferred from his admission that he hit the complainant twice in the head with a baseball bat. "Disclaimers by the defendant during the plea taking . . . of intent to kill . . . do not preclude acceptance of a plea since on the defendant's own recital a jury could properly infer the requisite . . . intent." *People v Haack*, 396 Mich 367, 376-377; 240 NW2d 704 (1976). "A guilty plea may be accepted even though the defendant is unsure of his guilt and even where he denies his guilt if after *careful* inquiry the judge satisfies himself that there is a substantial factual basis for the plea and that the plea represents a well-considered and well-advised choice by the defendant." *Id*. at p 378 (citation and internal quotation marks omitted) (emphasis in original). Thus, the trial court did not abuse its discretion by denying defendant's motion to withdraw the plea on the grounds that the factual basis was deficient.

Defendant argues that, at most, he should have been charged with assault with intent to do great bodily harm. He cites *People v Hogan*, 225 Mich App 431, 433; 571 NW2d 737 (1997), and *People v Kotesky*, 190 Mich App 330, 331; 475 NW2d 473 (1991), for the proposition that a guilty plea does not waive a claim that a charge was brought under an "inapplicable statute." In the latter case, the defendant claimed that a more specific statute proscribed her actions. In the former case, the defendant was essentially challenging the factual basis for the plea.

In this case, defendant's assertion that the assault with intent to commit murder statute was "inapplicable" is based on his contention that the prosecution would not have been able to prove his factual guilt of that offense. Such an issue is waived by a guilty plea. *People v New*,

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427 Mich 482, 491; 398 NW2d 358 (1986). Therefore, the trial court did not abuse its discretion by denying defendant's motion to withdraw on this ground.

Relying on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), defendant argues that he is entitled to resentencing because offense variables 5, 6, and 10 of the sentencing guidelines were improperly scored on the basis of facts that were not proven beyond a reasonable doubt to a jury. However, the principles set forth in *Blakely* do not apply to Michigan's indeterminate sentencing system. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006).[1]

Finally, defendant argues that defense counsel was ineffective for "allowing [him] to plead to a sentence above the highest level of the properly scored guidelines." The issue is whether the advice was within the range of competence demanded of attorneys in criminal cases, and not whether the court in retrospect considers the advice to have been wrong. *Mayes*, *supra*, pp 183-184.

The record indicates that at the time of the plea, the parties believed that 15 years was at the high end of the sentencing guidelines range for assault with intent to commit murder. Even if the properly scored guidelines range is lower, that does not establish that counsel was ineffective. Parties may agree to a sentence that exceeds the guidelines range. See, e.g., See *People v Wiley*, 472 Mich 153, 154; 693 NW2d 800 (2005). The premise of defendant's argument seems to be that defense counsel erred in anticipating what the guidelines range would be, and had counsel been more accurate, a better deal could have been reached. However, "[c]ounsel's incorrect prediction concerning defendant's sentence . . . is not enough to support a claim of ineffective assistance of counsel." *In re Oakland Co Prosecutor*, 191 Mich App 113, 124; 477 NW2d 455 (1991). Moreover, defendant assumes that the prosecutor would have agreed to a lesser sentence, but there is no factual support for that assumption.

Affirmed.

/s/ David H. Sawyer
/s/ Christopher M. Murray
/s/ Cynthia Diane Stephens

[1] To the extent that defendant challenges the scoring of the offense variables and argues that he is entitled to resentencing because he agreed to a 15-year minimum sentence as part of a plea agreement and was sentenced in accordance with that agreement, he has waived the right to challenge his sentence on appeal. See *People v Blount*, 197 Mich App 174, 175-176; 494 NW2d 829 (1992) ("a defendant who pleads guilty and is sentenced in accordance with a plea bargain and sentencing agreement waives the right to challenge the sentence unless there is also an attempt to withdraw the plea for a sound legal reason.").

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY MICHAEL KELLEY,

Defendant-Appellant.

UNPUBLISHED
April 28, 2009

No. 276269
St. Clair Circuit Court
LC No. 06-000982-FH

Before: Beckering, P.J., and Talbot and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, carrying a weapon with unlawful intent, MCL 750.226, and possession of marijuana, MCL 333.7403(2)(d). Defendant was sentenced to 1½ to ten years' imprisonment for the assault offense, 1½ to five years' imprisonment for carrying a weapon with unlawful intent, and 90 days in jail for possession of marijuana. We affirm.

Defendant's initial claim on appeal is that there was insufficient evidence to sustain the jury's verdict.[1] Defendant was accused of assaulting Timothy Vandewalle with a baseball bat in the driveway of the Vandewalle home while an unidentified woman was assaulting Timothy's wife Christine Vandewalle. Defendant's argument is based on three assertions that will be considered in turn. First, defendant argues that the jury should not have convicted him because the testimony of the prosecution's witnesses was inconsistent and inherently incredible. This is, in effect, a "great weight of the evidence" argument. In order to find that a jury's verdict is against the great weight of the evidence, this Court must determine that "'the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result.'" *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998), quoting *State v Ladabouche*, 146 Vt 279, 285; 502 A2d 852 (1985); see also *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003) ("The test . . . is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to

[1] Defendant makes no specific claim, however, that there was insufficient evidence to support his conviction for marijuana possession.

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stand."). "[A]bsent exceptional circumstances, issues of witness credibility are for the jury . . . ." *Lemmon*, *supra* at 642.

Defendant seeks to show unreliability in the testimony of the prosecution's witnesses primarily by comparing the testimony of the various witnesses and pointing out inconsistencies between trial testimony and preliminary examination testimony or statements made to the police. The types of inconsistencies identified by defendant (some of minor relevance, such as whether the car at the scene of the assault was green, "greenish," or teal green and whether Timothy fought, wrestled, held, or scuffled with his assailant) are exactly what are regularly revealed whenever multiple witnesses testify and prior statements are compared with trial testimony. Such inconsistencies are routinely used by trial counsel to cast doubt on a witness's trial testimony, as defense counsel did here. It was for the jury to decide the value of this impeachment, and the credibility and weight of the witnesses' testimony. *Id.* at 642, 646-647. Based on our review of the record evidence, defendant has failed to establish "that an innocent person [was] found guilty, or that the evidence preponderates heavily against the verdict so that it would be a serious miscarriage of justice to permit the verdict to stand." *Id.* at 647.

Second, defendant makes a more straightforward "insufficiency of the evidence" claim. Defendant asserts that the evidence was insufficient to establish his identity as the assailant. Specifically, defendant argues that there were reasonable explanations for the presence of his workplace timecard near the Vandewalles' driveway, and that a comparison of the testimony of the prosecution's witnesses concerning the time the assault must have occurred and defendant and his witnesses concerning his whereabouts at that time, established that he could not have committed the assault. We review the evidence de novo, viewing it in the light most favorable to the prosecution, in order to determine whether any 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; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Defendant's argument is meritless because it considers the evidence in the light most favorable to him. Reviewing the evidence in the light most favorable to the prosecution supports the jury's conclusion that defendant was the man who assaulted Timothy. The Vandewalles gave a description of the man who committed the assault that basically matched defendant's appearance. Defendant can be circumstantially linked to the scene of the crime by the fact that his workplace timecard was found there. Defendant's car was identified as the car the assailants used to follow the Vandewalles to their home and flee the scene after the assault was committed. Defendant admitted he was a close associate of the man allegedly behind the assault, Marshall Coleman.[2] Finally, defendant initially lied to the police by claiming that his girlfriend was with him at the time of the assault. This evidence was sufficient to prove defendant's guilt beyond a reasonable doubt.

Third, defendant claims that the prosecution failed to use due diligence to locate and produce two witnesses he characterizes as "essential," Coleman and Coleman's brother Delvin

[2] Coleman had sold a car to Christine a year earlier and was allegedly threatening her regarding completion of payment.

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Harper. Defendant did not object below to the non-production of the witnesses, or argue that the prosecution failed to use due diligence in attempting to locate or produce them. Because the claim was not preserved, our review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The prosecution's responsibility to locate or produce Coleman and Harper is dependent on MCL 767.40a, which provides, in part:

> (1) The prosecuting attorney shall attach to the filed information a list of all witnesses known to the prosecuting attorney who might be called at trial and all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers.
>
> (2) The prosecuting attorney shall be under a continuing duty to disclose the names of any further res gestae witnesses as they become known.
>
> (3) Not less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial.
>
> * * *
>
> (5) The prosecuting attorney or investigative law enforcement agency shall provide to the defendant, or defense counsel, upon request, reasonable assistance, including investigative assistance, as may be necessary to locate and serve process upon a witness. The request for assistance shall be made in writing by defendant or defense counsel not less than 10 days before the trial of the case or at such other time as the court directs. If the prosecuting attorney objects to a request by the defendant on the grounds that it is unreasonable, the prosecuting attorney shall file a pretrial motion before the court to hold a hearing to determine the reasonableness of the request.

Pursuant to MCL 767.40a(1), a prosecutor must list the names of known res gestae witnesses with the information. The purpose of this requirement is merely to notify the defendant of the witness's existence and res gestae status. *People v Gadomski*, 232 Mich App 24, 36; 592 NW2d 75 (1998). A res gestae witness is "an eyewitness to some event in the continuum of a criminal transaction and whose testimony will aid in developing a full disclosure of the facts surrounding the alleged commission of the charged offense." *People v Hadley*, 67 Mich App 688, 690; 242 NW2d 32 (1976). If a prosecutor endorses a witness, he must use due diligence to produce that witness at trial regardless whether the endorsement was required. *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004). Here, defendant has failed to establish that either Coleman or Harper was a res gestae witness. There is no evidence that either man was present at the scene of the assault and observed the assault, or that their testimony, if they were willing to give it, would aid in developing a full disclosure of the facts surrounding the

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commission of the charged offenses.[3] Therefore, the prosecution had no duty to list or produce these men. Nor did the prosecution have any duty to assist defendant in locating or serving them. Defendant requested no such assistance. See MCL 767.40a(5). Moreover, even if Coleman and Harper were res gestae witnesses, defendant cannot establish that he was prejudiced in any way by the prosecution's failure to list or produce them considering that defendant was fully aware of their existence. *Gadomski*, *supra* at 36.

Defendant also argues that, in effect, the police failed to conduct a thorough enough investigation because they failed to arrest Coleman for allegedly attempting to run the Vandewalles off the road in an unrelated incident, or at least question Coleman and Harper about their alleged involvement in events leading up to the assault. While an investigating officer's lack of due diligence or reasonable effort in identifying witnesses is imputed to the prosecution, *People v DeMeyers*, 183 Mich App 286, 293; 454 NW2d 202 (1990), defendant has not established that Detective Loxton's attempts to contact Coleman were less than reasonable or that he was prejudiced in any away by the prosecution's failure to list or further investigate Coleman and Harper. Defendant has failed to demonstrate plain error that affected his substantial rights. *Carines*, *supra* at 763.

In his second appellate issue, defendant claims his trial counsel was ineffective for failing to request the assistance of the prosecution in locating and producing witnesses, object to the prosecution's lack of due diligence, and request a "missing witness" instruction. "[T]o prove a claim of ineffective assistance of counsel mandating reversal of a conviction the Sixth Amendment requires not only that counsel's performance fell below an objective standard of reasonableness, but also that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994); see also *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The first part of the *Strickland* test mandates a showing that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, *supra* at 687. Defendant must overcome a strong presumption that the defense was not part of a sound trial strategy. *Id.* at 689. The second part of the *Strickland* test requires a showing that counsel's deficient performance prejudiced the defense. *Id*. at 687. "To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for the counsel's error, the result of the proceeding would have been different." *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), citing *Strickland*, *supra* at 694.

As noted, the prosecution did not list Coleman or Harper on its pretrial witness lists and defendant never requested assistance in locating or serving them as required by MCL 767a(5). "Neither the prosecution nor the defense has an affirmative duty to search for evidence to aid the other's case." *People v Burwick*, 450 Mich 281, 289 n 10; 537 NW2d 813 (1995). Therefore, the prosecution was not required to exercise due diligence to locate or produce these men and an objection to the failure to exercise due diligence would have been meritless. Defense counsel

[3] Detective Duane Loxton testified that he attempted to contact Coleman, but Coleman would not speak with him.

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was not ineffective for failing to make a meritless objection. See *People v Unger*, 278 Mich App 210, 255; 749 NW2d 272 (2008).

Because the prosecution did not have the duty to list, locate, or produce Coleman and Harper, we must consider whether defense counsel chose not to seek production of these two men as part of his trial strategy. Defendant has not overcome the strong presumption that defense counsel's decision was a matter of trial strategy. *Strickland*, *supra* at 689; *Carbin*, *supra* at 600. Defense counsel used the absence of Coleman at trial to suggest to the jury during closing argument that the police had conducted a shoddy investigation. Moreover, defendant does not provide any evidence that either Coleman or Harper would have testified and, if they had, that their testimony would have aided his case. Accordingly, defense counsel's performance did not fall "outside the wide range of professionally competent assistance." *Strickland*, *supra* at 690.

As for a missing witness instruction, such an instruction can only be used when a prosecutor has a duty to produce a witness. *People v Perez*, 469 Mich 415, 418-420; 670 NW2d 655 (2003). As indicated, the prosecution had no duty to list, locate, or produce Coleman and Harper, and defendant did not request law enforcement assistance in locating these men. MCL 767.40a. Thus, there was no basis for requesting the missing witness instruction, *Perez*, *supra*, and defense counsel was not ineffective for failing to do so, *Unger*, *supra*.

Affirmed.

/s/ Jane M. Beckering
/s/ Michael J. Talbot
/s/ Pat M. Donofrio

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARL WESLEY MOTT,

Defendant-Appellant.

UNPUBLISHED
February 17, 2009

No. 280671
Berrien Circuit Court
LC No. 2006-403209-FC

Before: Markey, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Defendant was convicted by a jury of involuntary manslaughter, MCL 750.321, and felonious assault, MCL 750.82(1). He was sentenced as a fourth-felony habitual offender, MCL 769.12, to concurrent prison terms of 60 to 180 months for the manslaughter conviction and 12 to 48 months for the assault conviction. He appeals as of right. For the reasons set forth in this opinion, we affirm.

I. Facts and Procedural History

Charles Sorrels and Rodger Little had been friends since childhood. Little moved in with Sorrels and slept in the living room. Sorrels and Little met defendant in a bar in June 2006 to discuss the possibility of defendant doing some construction work for Sorrels' friend. On June 19, 2006, at approximately 11:00 p.m., defendant and his friend, Shannon Berndt, appeared at Sorrels' house, each bringing a couple of 22-ounce bottles of beer. Sorrels believed defendant was intoxicated when he arrived. Sorrels and Little had been drinking since noon. Defendant and Berndt came in through Sorrels' back door and the men sat at the kitchen table, talking and drinking. Berndt left the house at about 11:30 p.m. or midnight. According to Sorrels, defendant seemed irritated that Sorrels was not going to look at the job until the next day. When it became clear that defendant was annoyed that Sorrels did not have work for him immediately, defendant "flip[ped] [Sorrels] off" and told him to "(expletive) off." Sorrels asked defendant to leave two or three times. Little remained seated at the kitchen table.

Defendant eventually went out the back door, taking his last beer. Sorrels looked outside, made sure that defendant had left, locked the door, cleaned up, and got another beer. Sorrels then walked into the living room and saw that the front door was wide open. Little was lying in the middle of the front yard, directly in front of the porch. Defendant was standing over

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Little, holding a baseball bat and kicking Little in the head and shoulder area. Little was not defending himself and appeared to be knocked out.

Sorrels ran outside. Defendant stepped over Little and came at Sorrels with a baseball bat. Defendant struck Sorrels on the left knee two or three times and once in the kidney area, but Sorrels was able to tackle him to the ground, where they continued fighting. Sorrels got defendant in a headlock and yelled at Little to take the bat, which defendant was still holding, and to call the police. Little took the bat and went inside. After more fighting between Sorrels and defendant, defendant finally left, and Sorrels went inside. Little was sitting on the couch, and Sorrels asked him how he was doing. Little said he would be all right and that there was no need to call anyone. The police had not arrived. Sorrels continued to drink and called the police himself at 3:12 a.m. The police never came and Sorrels eventually went to bed.

The next day, Sorrels got up at 1:00 p.m. He attempted to awaken Little several times, but could not do so. At 3:30 p.m., Sorrels called 911 and Little was taken to the hospital. Little had a massive brain injury that was probably caused by a blow to the head. He died four days later. There was testimony that Little probably would have survived if he had been treated sooner.

The police interviewed defendant before Little died. Defendant's version of the events that occurred inside Sorrels' home was similar to Sorrels' version. Defendant denied fighting with Little, but he admitted that he had an altercation with Sorrels after Sorrels struck him in the back of the head with nunchucks. Testimony adduced at trial included some telephone conversations that defendant had with his mother in which he claimed that he kicked Little in the stomach. Defendant initially denied that he made these statements, but after a tape was played to the jury, he stated that he may have kicked Little in the abdomen as he was falling, but could not remember how the second kick could have happened.[1]

On the second day of trial, defendant informed the court that although he had made prior arrangements for Eddie Mings to come from Missouri to testify, Mings had been taken to a hospital suffering from chest pains and heart problems. Defendant then asked for an adjournment to secure Mings testimony, or in the alternative, that Mings be allowed to testify via telephone. The trial court initially held its ruling in abeyance but eventually concluded that it would not grant the adjournment, seemingly unsure if Mings was actually in a hospital and unable to testify. Defendant then made an offer of proof that Mings would testify that Sorrels told Mings that "he [Mings] had better watch [it] or words to that [e]ffect, or he—Sorrels—was going to put him—Mings—in a coma just like he had done to [Little.]" Defendant also indicated that Mings would offer testimony that would be probative of Sorrels' perception of reality by introduction of evidence that Sorrels claimed that Mings was present on the night of the assault.

II. Analysis

[1] During a different telephone call to his mother, defendant stated that the clothes seized by police were not the clothes that he was wearing and attempted to dissuade her from telling the police what he was really wearing on the night of the assault.

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Defendant first argues that the trial court deprived him of a fair trial by denying his motion for an adjournment to secure the testimony of a missing witness. A trial court's denial of a motion for a continuance is reviewed for an abuse of discretion. *People v Charles O Williams*, 386 Mich 565, 575; 194 NW2d 337 (1972); *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). An abuse of discretion occurs only when the trial court's decision falls outside the range of "reasonable and principled outcome[s]." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). A motion for an adjournment must be based on good cause. *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002). In determining whether good cause exists, the trial court should consider whether the defendant: (1) asserted a constitutional right; (2) had a legitimate reason for asserting the right; (3) had been negligent; and (4) had requested previous adjournments. *Williams*, *supra* at 578; see also *People v Coy*, 258 Mich App 1, 18; 669 NW2d 831 (2003). Defendant must also demonstrate prejudice. *People v Sinistaj*, 184 Mich App 191, 201; 457 NW2d 36 (1990); see also *Williams*, *supra* at 574-575; *Lawton*, *supra* at 348.

MCR 2.503(C) governs adjournments based on the unavailability of a witness. *Jackson*, *supra* at 276-277. The court rule states:

> (1) A motion to adjourn a proceeding because of the unavailability of a witness or evidence must be made as soon as possible after ascertaining the facts.
>
> (2) An adjournment may be granted on the ground of unavailability of a witness or evidence only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence.
>
> (3) If the testimony or the evidence would be admissible in the proceeding, and the adverse party stipulates in writing or on the record that it is to be considered as actually given in the proceeding, there may be no adjournment unless the court deems an adjournment necessary.

In this case, the trial court did not articulate the reasons for its decision or discuss the requirements of the court rule. See *Jackson*, *supra*. The court questioned whether the missing witness, Eddie Mings, was a critical witness. The court stated that defendant had a good excuse for the witness's absence. The court added that defendant had the burden of demonstrating materiality and potential resulting injustice, and that the court had discretion concerning whether to grant the request. The court later refused to adjourn the trial "because of the possibility that [the witness] may or may not be in the hospital." Thus, it appears that the court believed that defendant did not sufficiently prove that the witness was unavailable. It does not appear that the court found a lack of due diligence in defendant's efforts to produce the witness.

Concerning the requirements of the court rule, the record shows that defense counsel moved for a continuance as soon as he learned that the witness was in the hospital. The witness's testimony was material to defendant's claim that Sorrels, not defendant, inflicted the fatal injuries, and to the jury's evaluation of Sorrels' credibility. The witness was apparently admitted to the hospital on the evening he was supposed to drive to Michigan, and defense counsel actively sought to obtain more information concerning his condition. Thus, it appears

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that defense counsel was diligent in seeking to produce the witness. We therefore conclude that defendant satisfied the requirements of the court rule. MCR 2.503(C)(1) and (2).

Concerning the requirement of good cause, defendant was asserting his constitutional due process right to present a defense, and he had a legitimate reason for asserting that right (because his witness had just been admitted to a Missouri hospital, suffering from chest pains). The witness was apparently admitted to the hospital on the evening he was supposed to drive to Michigan, so it appears that defendant was not negligent in securing his presence. Lastly, there is no indication that defendant had requested prior adjournments. Thus, we conclude that defendant also satisfied the good-cause requirement.

Because defendant showed good cause and satisfied the requirements of the court rule, we conclude that the trial court abused its discretion in denying defendant's request for an adjournment. Having found that the trial court abused its discretion in denying defendant's request for an adjournment, we next consider whether defendant was prejudiced by the trial court's denial of defendant's adjournment request. *Williams*, *supra*; *Lawton*, *supra*; *Sinistaj*, *supra*. Prejudice occurs when "the error affected the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999) (defining prejudice in the context of an unpreserved, nonconstitutional error), citing *United States v Olano*, 507 US 725, 734; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

At the outset, we note that whether defendant was prejudiced by the trial court's improper denial of his adjournment request is a close question. Examination of the proffered evidence indicates that Mings would have testified that Sorrels claimed that he (Sorrels) had put Little into a coma and that Sorrels' perception of reality was awry because he believed that Mings was at his home on the night of the assault. Dub Collins, who lived across the street from Sorrels, testified that Sorrels stated that after Sorrels and defendant had their altercation, Sorrels admitted to hitting Little with the baseball bat and knocking him out. Thus, the first part of the evidence offered by Mings would have been cumulative to Collins's testimony. Mings's additional testimony that Sorrels seemed mistakenly convinced that Mings was present during the assault, arguably has conflicting implications. Defendant argues that the statement proves that Sorrels had a warped perception of reality, and plaintiff argues that the evidence proves nothing further than what was already before the jury.

We concede the difficulty in trying to ascertain whether a single witness would have changed the outcome of a trial. In order to make such a finding, we must review all of the evidence and ascertain whether the testimony, if offered and presumably unrebutted, would have affected the outcome of the proceedings. Not all of the evidence used to convict defendant came from Sorrels. Defendant made statements to the police denying that he ever struck Little, although, after a tape recorded conversation defendant had with his mother where he admitted to kicking Little was played at trial, defendant was forced to recant his earlier statements denying that he struck Little. Additionally, taped conversations also revealed that the police had not seized the clothing worn by defendant on the night of the assault and in the taped conversations, defendant tried to convince his mother not to tell the police what he was really wearing on the night of the assault. All of the evidence presented at trial leads us to conclude that the exclusion of Eddie Mings's testimony did not affect the outcome of the proceedings. The evidence that Sorrels had admitted to being the assailant was already before the jury, and the issue of Sorrels'

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belief that Mings was present during the altercation, while probative, does not rise to the level of evidence that would have affected the outcome of the proceedings. We therefore conclude that defendant was not prejudiced by the trial court's denial of his request for adjournment.

Defendant next argues that the trial court erred by failing to instruct the jury on gross negligence. Because defendant did not request an instruction on gross negligence at trial, this issue is not preserved. Accordingly, our review is limited to plain error affecting defendant's substantial rights. *Carines*, *supra* at 763; *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001).

Manslaughter is murder committed without malice, i.e., a death caused by the defendant's act, without justification. *People v Mendoza*, 468 Mich 527, 534-535; 664 NW2d 685 (2003). There are two forms of manslaughter, voluntary and involuntary. *Id*. at 535. Voluntary manslaughter is an intentional killing committed in the heat of passion, caused by adequate provocation. *Id*. at 535-536. Involuntary manslaughter has traditionally been defined as "the unintentional killing of another, without malice, during the commission of an unlawful act not amounting to a felony and not naturally tending to cause great bodily harm; or during the commission of some lawful act, negligently performed; or in the negligent omission to perform a legal duty." *Id*. at 536.

Defendant argues that the first formulation of involuntary manslaughter is not appropriate in this case because, before the victim died, he was charged with assault with intent to do great bodily harm, which is a felony. After the victim died, the information was amended and defendant was charged with involuntary manslaughter.

In *People v Holtschlag*, 471 Mich 1, 4; 684 NW2d 730 (2004), our Supreme Court considered whether an involuntary manslaughter charge was precluded where the victim died when the defendant placed a drug in her drink, which is a felony. The Court explained that "[i]nvoluntary manslaughter has, first and foremost, always been considered the 'catch-all' homicide crime." *Id*. at 6-7. "Thus, . . . [e]very unintentional killing of a human being is involuntary manslaughter if it is neither murder nor voluntary manslaughter nor within the scope of some recognized justification or excuse." *Id*. at 7 (internal quotations and citations omitted).

At common law and during a large portion of the evolution of felony murder, the phrase "unlawful act not amounting to a felony" served the purpose of distinguishing involuntary manslaughter, first from common-law murder, and more recently, from felony murder, both of which encompassed involuntary killings committed during the commission of any felony. *Id*. at 5-9. Since 1980, however, a felony-murder conviction requires proof of malice, not just proof of the commission of a felony. *Id*. at 9. Therefore, by reason of its nature as the catch-all murder charge, the "unlawful act" formulation of involuntary manslaughter now encompasses any unintentional killing committed without malice, regardless of whether the killing occurred during the commission of a felony or a misdemeanor or some other unlawful act. *Id*. at 9-10. The *Holtschlag* Court stated:

> For this reason, defendants cannot opportunistically rely on [the] . . . description of the catch-all crime of involuntary manslaughter to argue that, because the homicide at issue occurred during the commission of a felony, they

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> cannot be guilty of manslaughter. That a "felony" has been committed is simply not dispositive in determining whether either "murder" or "manslaughter" has been committed and, thus, the "felony" language in [the traditional] . . . manslaughter description is essentially irrelevant. [*Id*. at 10.]

Thus, there is no merit to defendant's argument that the "unlawful act" formulation of involuntary manslaughter may not apply to this case because the beating that caused the victim's death amounted to a felony.

Defendant argues that under the second and third formulations of involuntary manslaughter, gross negligence is required. Therefore, defendant argues, the trial court erred in failing to sua sponte instruct the jury concerning the element of gross negligence.

Defendant's argument is based on the failed premise that the first formulation does not apply in this case (because the assault was a felony). As previously discussed, however, the Supreme Court has done away with the "not amounting to a felony" language. In this case, an unintentional killing resulted from an unlawful act (an assault), assertedly committed without malice. Thus, the first formulation of involuntary manslaughter applies. That formulation does not require proof of gross negligence (or any other mens rea), at least not if defendant acted with the intent to injure.[2] *Holtschlag*, *supra* at 17-21. In the present case, evidence that defendant kicked the victim in the head supports a reasonable inference that he acted with the intent to injure. Thus, there was no plain error in failing to give a gross negligence instruction.

The second and third formulations define involuntary manslaughter as an unintentional killing committed without malice "during the commission of some lawful act, negligently performed; or in the negligent omission to perform a legal duty." *Mendoza*, *supra* at 536. Thus, both of these formulations arguably require proof of gross negligence. See *Holtschlag*, *supra* at 16-17. In the present case, however, a rational view of the evidence does not support a conclusion that the killing resulted from a "*lawful act*, negligently performed," or from a "negligent *omission to perform a legal duty*." Thus, it would have been improper for the trial court to instruct the jury concerning those formulations of involuntary manslaughter. See *id*. at 15 n 8; see also *Mendoza*, *supra* at 533.

Defendant also argues that trial counsel was ineffective for failing to request a gross negligence instruction. As previously discussed, however, only the first formulation of involuntary manslaughter was supported by a rational view of the evidence. That formulation does not require proof of gross negligence where, as here, there is evidence of intent to injure. Thus, a request for a gross negligence instruction would have been futile. Defense counsel was not ineffective for failing to make a futile request. See *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002); see also *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

[2] The *Holtschlag* Court declined to decide whether proof of gross negligence is required where the defendant acts without an intent to injure. See *Holtschlag*, *supra* at 17-21.

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Lastly, defendant argues that the evidence was insufficient to support his convictions. The sufficiency of the evidence is evaluated by reviewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find every element of the crime proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985); see also *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). The resolution of credibility disputes is within the exclusive province of the trier of fact, *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990), which may also draw reasonable inferences from the evidence, *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991).

Concerning the involuntary manslaughter conviction, defendant argues that viewed in a light most favorable to the prosecution, the evidence failed to show that his actions were *the* proximate cause of the victim's death. Defendant does not challenge the remaining elements of the crime.

In *People v Tims*, 449 Mich 83, 96-97; 534 NW2d 675 (1995), our Supreme Court squarely rejected the argument that "a defendant is responsible for harm only when his act is the sole antecedent" cause of the harm. The proper test is whether the defendant's conduct was "a" cause, not "the cause," of the victim's death. *Id*. A victim's contributory negligence is a factor to consider in evaluating the defendant's actions, but it does not break the chain of causation and is not a defense. *Id*. at 97-99. The same is true of a third party's negligence. *Id*. at 99-101. Unless medical negligence was the cause of death, it is no defense to show that different medical treatment might have saved the victim's life and prevented the natural consequences of his wounds. *Id*. at 100. To hold a defendant liable in a criminal case, "the defendant's conduct must be the cause of the harm sine qua non,"[3] and "the harm must be a foreseeable risk of the defendant's conduct." *Id*. at 105.

In the present case, there was evidence that defendant inflicted a beating upon the victim. The victim was heavily intoxicated. The victim went to sleep afterward and his roommate did not seek medical care until the next day. The victim suffered a subdural hematoma and a brain contusion as a result of the beating, and later died of complications. Thus, the facts support a reasonable inference that defendant was a cause, sine qua non, of the victim's death, and that death was a foreseeable risk of defendant's actions. Viewed in a light most favorable to the prosecutor, the evidence was sufficient to enable a reasonable jury to find, beyond a reasonable doubt that defendant caused the victim's death.

Concerning the felonious assault conviction, defendant argues that Sorrels brought the bat outside, and that defendant threw a bottle at his head, if at all, only in self-defense. He claims that the prosecutor failed to disprove his claim of self-defense beyond a reasonable doubt.

"Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt." *People v Fortson*, 202 Mich App 13, 20; 507 NW2d

[3] Sine qua non is defined as a cause without which the harm would not have happened. *Random House Webster's College Dictionary* (2d ed), p 1205. Literally, it means "without which not." Black's Law Dictionary (8th ed., 2004), p 1418.

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763 (1993). Here, defendant claimed that he fought with Sorrels in self-defense. However, Sorrels testified that he saw defendant kicking and stomping on Little, and that he attacked defendant in defense of Little. Defendant fought with Sorrels, hit him with a baseball bat, and threw a bottle at his head. Viewed in the light most favorable to the prosecution, the evidence was sufficient to enable a reasonable jury to find beyond a reasonable doubt that defendant did not act in self-defense when he struck Sorrels with a bat and threw a bottle at his head. Contrary to what defendant argues, this Court may not substitute its judgment for that of the jury on matters of factfinding and credibility.

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Stephen L. Borrello

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GHALIB MUNTAQIM-BEY,

Defendant-Appellant.

UNPUBLISHED
February 5, 2009

No. 280323
Wayne Circuit Court
LC No. 07-007792-01

Before: Saad, C.J., and Davis and Servitto, JJ.

PER CURIAM.

Defendant was found guilty by a jury of second-degree murder, MCL 750.317, and he was sentenced by the trial court as an habitual offender, fourth offense, MCL 769.12, to 336 to 500 months' imprisonment. Defendant appeals his conviction and his sentence. We affirm.

The victim in this matter was Richard Taylor III, who was beaten with a baseball bat late in the evening of August 20, 2006, in Inkster. Taylor died of his injuries in October 2006. Donnell Erquhart, an eyewitness to the beating and a friend of Taylor's, identified defendant as Taylor's assailant. A second eyewitness, Anthony Hasley, identified a photograph of defendant as looking like the person who beat Taylor, but Hasley testified that defendant was not the assailant. Defendant presented an alibi defense witness who testified that defendant and the witness had been at a party in Detroit when the beating occurred. In rebuttal, the prosecutor called defendant's wife, who testified that defendant was with her most of the day on the date of the offense, but then left the family home shortly before the offense and did not return until sometime the next morning.

Defendant argues that his wife's testimony was inadmissible for two reasons: first, it was in violation of the marital privilege; and second, the prosecutor failed to provide timely notice of her intent to testify as a rebuttal alibi witness. We disagree with both assertions.

The only privilege at issue is the criminal testimonial privilege: MCL 600.2162(2) provides that in a criminal prosecution, "a husband shall not be examined as a witness for or against his wife without his consent or a wife for or against her husband without her consent," except as otherwise provided in the statute. Thus, the privilege belongs to the witness, not the defendant. *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004). Here, defendant's wife approached the prosecutor and agreed to cooperate and testify against defendant; clearly, she did waive her privilege. Because she did not testify regarding any communication between

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herself and defendant, the communications privilege, MCL 600.2162(7), does not apply. Defendant contends that trial counsel was ineffective for failing to object, but any objection would have been futile, so trial counsel cannot be ineffective for failing to raise it. *People v Chambers*, 277 Mich App 1, 11; 742 NW2d 610 (2007).

A defendant is required to notify the prosecution of any witnesses and facts regarding an alibi defense. Pursuant to MCL 768.20(2) and (3), the prosecution must provide to the defense similar notice regarding rebuttal to any such alibi defense; the purpose of the rebuttal notice requirement is to prevent surprise at trial. *People v Bell*, 169 Mich App 306, 308; 425 NW2d 537 (1988). However, the trial court may, at its discretion, admit rebuttal testimony even after commencement of trial if it finds that, under the particular facts and circumstances of the case, the prosecution undertook all reasonable efforts to obtain the name of its rebuttal alibi witness. *People v Travis*, 443 Mich 668, 678-680; 505 NW2d 563 (1993). In making that assessment, the trial court must consider and weigh "(1) the amount of prejudice that resulted from the failure to disclose, (2) the reason for nondisclosure, (3) the extent to which the harm caused by nondisclosure was mitigated by subsequent events, (4) the weight of the properly admitted evidence supporting the defendant's guilt, and (5) other relevant factors arising out of the circumstances of the case." *Id*., 681-683.

The record discloses that the prosecutor did not learn that defendant's wife had information to rebut defendant's alibi testimony until the day she was called to testify. Defendant's wife testified that she approached the prosecutor on the morning that she testified. She gave a statement to the officer in charge while the prosecution was still presenting its case in chief.[1] Any earlier notice would have been a matter of hours, not days. The trial court also explained that it allowed defendant an opportunity to discover his wife's proposed testimony before she was called to testify. Defendant contends that had he known sooner that his wife would testify, he might not have presented an alibi defense. However, defense counsel had previously informed the jury in his opening statement that defendant would be presenting an alibi defense. This occurred well before the prosecutor learned of defendant's wife's testimony. Under these circumstances, the trial court did not abuse its discretion in allowing defendant's wife to testify in rebuttal.

Defendant next argues that the prosecutor committed misconduct by misrepresenting evidence during closing argument. We disagree.

The test for prosecutorial misconduct is whether defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Claims of prosecutorial misconduct are decided case by case and the challenged comments must be read in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). Although a prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, he is free to argue the evidence and any reasonable inferences that may arise from the evidence. *Bahoda, supra* at 282;

[1] The record does not support defendant's assertion that his wife gave her statement to the officer in charge the day before she was called to testify. The testimony established that she did not give her statement until after she came forward, which was on the same day she testified.

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People v Ackerman, 257 Mich App 434, 450; 669 NW2d 818 (2003). Because defendant did not preserve this issue with an appropriate objection at trial, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999); *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

Defendant specifically asserts that the following remarks from the prosecutor during oral argument were improper:

> Counsel is going to get up and say, ah, he [Erquhart] was smoking weed and he was drinking gin. Well let's see if he's accurate vis a vis other people.
>
> Time. Anytime you're five sheets to the wind one of the first things you lose track of, you been tipping it, time seems to slip away. What did Mr. Erquhart say? 11:45ish. Store closes at midnight he says. Sometimes they cheat on it a little bit. Some party store they might know. Not that that would happen. But the lady EMS tech told you what time a dispatch was. The officer in uniform this morning told you. So Erquhart is accurate. He's oriented, as the EMS tech would say, times four. Talked about, you know, his knowledge that Rick, Mr. Taylor, Richard Taylor, III, worked over at Harrison. And we know the relationship of the two locations. According to the Exhibit 4 half hours walk, short bike ride. *The corroboration we gained from the testimony of the tall, slender man.* When I saw him I commented to the detective he has a body like Jaylyn Rose. All arms and legs. I don't know if any of you are Michigan basketball fans, but unbelievable spans of humanity that was here. Mr. Hasley.
>
> Now understand what's going on with Mr. Hasley's head, cause you got to understand that. He comes in at a point in time when what? This be the pot, and his can's in the soup, or so he thinks. Don't want to get crude, but he's thinking he's in the soup when he comes and sees that man in November. November 6. Not in a whole lot of hurry to help out Unc, nephew ain't. Okay. *And he fills out a statement, and identifies from the lineup my man, the defendant.* The only thing he says that day from his testimony and from the detective's testimony is, you know the beard is a little different color. *That face, you got to age it some, and the beard is a little bit more like the color of my man in the third spot but the face is the same.* [Emphasis added.]

The testimony at trial revealed that, in the photographic lineup that Hasley viewed, the photograph of defendant was approximately six years old. Hasley identified defendant's photograph as resembling the person who assaulted Taylor. Hasley noted at the photographic lineup and at trial that the facial hair in the photograph was different and not as gray as the person Hasley saw beat Taylor, and as a consequence he was not certain of his identification, although the suspect "looked like" the photograph of defendant. We find that the prosecutor's argument that Hasley had identified defendant in the photographic lineup was based on the evidence and reasonable inferences therefrom. The prosecutor's argument was not improper, so it would have been futile for defense counsel to object. Again, trial counsel is not ineffective for failing to raise a futile objection. *Chambers*, *supra* at 11.

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Finally, defendant argues that the trial court improperly applied MCL 777.50 when scoring 50 points for prior record variable (PRV) 1 of the sentencing guidelines. We disagree. A trial court's application of the statutory sentencing guidelines is reviewed de novo. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001). If a statute is unambiguous, this Court will apply the language as written. *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007).

Under MCL 777.51, PRV 1 is to be scored at fifty points if the offender has two prior high severity felony convictions, which defendant does not dispute that he has. However, under MCL 777.50, any such conviction must be excluded if there has been "a period of 10 or more years between the discharge date from a conviction" and the "commission of the next offense resulting in a conviction." A "conviction" is explicitly defined as including "Assignment to youthful trainee status under sections 11 to 15 of chapter II [MCL 762.11 to MCL 762.15]" and "A conviction set aside under 1965 PA 213, MCL 780.621 to 780.624." MCL 777.50(4).

Defendant argues that the discharge date of his most-recent high-severity conviction was, in fact, more than ten years before the instant offense, and the trial court erroneously found no such gap on the basis of an intervening misdemeanor conviction. However, nothing in the statute contains any indication that the Legislature intended to differentiate between felonies and misdemeanors. To the contrary, the inclusion of assignment to youthful trainee status and expunged convictions of record indicates that MCL 777.50(4) was intended to broadly apply to all criminal convictions of record and, therefore, would encompass misdemeanor convictions for purposes of calculating the time between convictions under MCL 777.50.

Defendant asserts that his misdemeanor conviction was a traffic offense, which the Youthful Trainee Act (YTA), MCL 762.11 *et seq.*, excludes. MCL 762.11(2)(c) and (4)(b). However, the relevant consideration is whether defendant's conviction is subject to MCL 777.50, not whether it was subject to the YTA. Defendant also asserts that MCL 777.50 conflicts with MCL 777.55. However, MCL 777.50 specifically provides in subsection (1) that it applies to the scoring of PRV 1 through 5, whereas MCL 777.55 expressly applies only to PRV 5, which specifically scores misdemeanor convictions only. Thus, MCL 777.55 does not apply here and there is no basis for finding that this statute renders MCL 777.50 ambiguous. The trial court properly scored PRV 1.

Affirmed.

/s/ Henry William Saad
/s/ Alton T. Davis
/s/ Deborah A. Servitto

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v MICHAEL EUGENE CHILDS, Defendant-Appellant.	UNPUBLISHED October 13, 2011 No. 297692 Wayne Circuit Court LC No. 09-027558-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v NICO DEMETRIUS THOMAS, Defendant-Appellant.	 No. 297763 Wayne Circuit Court LC No. 09-027558-FC

Before: MURPHY, C.J., and TALBOT and MURRAY, JJ.

PER CURIAM.

Following a joint jury trial, defendant Michael Childs was convicted of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and defendant Nico Thomas was convicted of assault with intent to commit murder, MCL 750.83, and felony-firearm. Defendant Childs was sentenced to 25 to 50 years' imprisonment for the murder conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. Defendant Thomas was sentenced to 12 to 20 years' imprisonment for his assault conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. Defendant Childs now appeals as of right in Docket No. 297692, and defendant Thomas appeals as of right in Docket No. 297763. We affirm in both appeals.

Defendants' convictions arise from a neighborhood altercation that took place in the late afternoon of August 31, 2009, on East Euclid Street in Detroit. Defendant Childs's convictions relate to the shooting death of Clinton Lewis, and defendant Thomas's convictions relate to the

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nonfatal shooting of Tavaras Montgomery. There were numerous witnesses to both shooting incidents.

I. DOCKET NO. 297692

A. AUTOPSY REPORT

Childs first contends that the introduction of autopsy report results through a medical examiner who did not perform the autopsy violated his constitutional right of confrontation and the rules of evidence. These assertions of error are unpreserved because Childs did not object on any basis during the testimony of forensic examiner Dr. Cheryl Loewe. Therefore, we review these matters only to determine whether there was plain error that affected Childs's substantial rights and, if indeed plain error affecting substantial rights is shown, whether the error resulted in the conviction of an actually innocent Childs or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of Childs's innocence. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Lewis (On Remand)*, 287 Mich App 356, 359; 788 NW2d 461 (2010).

In *Lewis*, *id.* at 359-360, this Court explained:

> The Confrontation Clause provides: "(i)n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." US Const, Am VI. Our state constitution also guarantees the same right. Const 1963, art 1, § 20. To preserve this right, testimonial hearsay is inadmissible against a criminal defendant unless the declarant was unavailable at trial and there was a prior opportunity for cross-examination of the declarant.

In *Crawford v Washington*, 541 US 36, 51-52; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the United States Supreme Court offered the following guidance for discerning whether a statement qualifies as being "testimonial:"

> Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," Brief for Petitioner 23; "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," *White v Illinois*, 502 US 346, 365[; 112 S Ct 736; 116 L Ed 2d 848] (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment); "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae 3.

See also *People v Fackelman*, 489 Mich 515; ___ NW2d ___ (2011).

In *Lewis*, this Court examined a defendant's right of confrontation in the context of a trial court's admission of an "autopsy report prepared by two nontestifying medical examiners

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through the testimony of a third medical examiner from the same laboratory, Dr. Carl Schmidt." *Lewis*, 287 Mich App at 359. In a prior opinion, this Court concluded that the autopsy report was nontestimonial because it was not prepared in anticipation of litigation against the defendant, but rather pursuant to a duty imposed by law, and thus was admissible under MRE 803(8). *Id.* at 360. The panel previously "noted that a medical examiner is required by statute to investigate the cause and manner of death of an individual under certain circumstances, including death by violence, MCL 52.202(1)(a), and thus further concluded that the admission of the autopsy report through Dr. Schmidt's testimony did not violate defendant's Sixth Amendment rights[.]" *Id.*

However, the Michigan Supreme Court remanded the case to this Court to reconsider the defendant's Confrontation Clause argument in light of" *Melendez-Diaz v Massachusetts*, ___ US ___; 129 S Ct 2527; 174 L Ed 2d 314 (2009), a case that Childs maintains mandates reversal of his convictions in this case. *Lewis*, 287 Mich App at 358, 361. As summarized by this Court in *Lewis* on remand:

> That case [*Melendez-Diaz*] involved the use of affidavits by forensic analysts to support the defendant's convictions of distributing and trafficking in cocaine. ___ US at ___; 129 S Ct at 2530-2531; 174 L Ed 2d at 319-321. At trial, over the defendant's objection, the court admitted three notarized "certificates of analysis" from nontestifying laboratory analysts who, at the request of the police, tested the substance in bags seized by the police. *Id.* The certificates stated that chemical testing identified the substance in bags as cocaine. *Id.* . . .
>
> On appeal, the defendant in *Melendez-Diaz*, ___ US at ___; 129 S Ct at 2531; 174 L Ed 2d at 320, challenged the admission of the certificates and claimed that the analysts were required to testify in person. The United States Supreme Court reversed the defendant's convictions, holding that the admission of the documents violated the Confrontation Clause. . . .
>
> * * *
>
> The Supreme Court concluded in *Melendez-Diaz* that the "certificates of analysis" were affidavits, and that they were statements offered against the defendant to prove a contested fact. ___ US at ___; 129 S Ct at 2532; 174 L Ed 2d at 321. As such, the certificates were testimonial in nature and subject to the Confrontation Clause. *Id.* The fact that the "sole purpose" of the certificates was to serve as prima facie evidence at trial further supported the Court's conclusion that they were testimonial. *Id.* [*Lewis*, 287 Mich App at 361-362.]

This Court distinguished the characteristics of the forensic analysis certificates introduced in *Melendez-Diaz* from the autopsy report that formed the basis for Dr. Schmidt's testimony at defendant Lewis's trial, explaining:

> Unlike the certificates, which were prepared for the "sole purpose" of providing "prima facie evidence" against the defendant at trial, *Melendez-Diaz*, ___ US at ___; 129 S Ct at 2532; 174 L Ed 2d at 321, the autopsy report was

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prepared pursuant to a duty imposed by statute. *Lewis*, unpub op at 4-5; MRE 803(8); MCL 52.202(1)(a). As we stated in our previous opinion:

> "(W)hile it was conceivable that the autopsy report would become part of (a) criminal prosecution, investigations by medical examiners are required by Michigan statute under certain circumstances regardless of whether criminal prosecution is contemplated." (*Lewis*, unpub op at 4).
>
> Furthermore, unlike the way the certificates in *Melendez-Diaz* were used, Dr. Schmidt formed independent opinions based on objective information in the autopsy report and his opinions were subject to cross-examination. Because the autopsy report was not prepared primarily for use in a later criminal prosecution and defendant cross-examined Dr. Schmidt regarding his independent opinions based on the autopsy report, the report is not testimonial evidence and defendant was not denied the right to be confronted by the two nontestifying medical examiners who prepared it. [*Lewis*, 287 Mich App at 362-363 (some citations omitted).]

In this case, Dr. Loewe, a deputy chief Wayne County medical examiner, testified to the cause of death of Clinton Lewis on the basis of an autopsy report prepared by Chief Medical Examiner Dr. Carl Schmidt. In brief testimony, Dr. Loewe characterized Lewis's death as a homicide caused by "[a] single gun shot wound to the chest." Dr. Loewe related that the lone gunshot had entered Lewis "near the arm pit on the right side of the body," damaged Lewis's right lung, his aorta, "[t]he right atrium of the heart," and "the upper lobe of the left lung," before exiting Lewis's body in the area of his "left upper chest." Dr. Loewe's testimony reveals that, as in *Lewis*, 287 Mich App at 363, she utilized Dr. Schmidt's autopsy report to "form[] independent opinions," which Childs's counsel subjected to cross-examination. Similar to this Court's reasoning in *Lewis*, 287 Mich App at 363,

> [b]ecause the autopsy report was not prepared primarily for use in a later criminal prosecution and [Childs's counsel] cross-examined Dr. [Loewe] regarding h[er] independent opinions based on the autopsy report, the report is not testimonial evidence and [Childs] was not denied the right to be confronted by the . . . nontestifying medical examiner[] who prepared it.

Moreover, the *Lewis* Court's emphasis of the harmless nature of the autopsy report's admission in that case applies equally here. As in *Lewis*, "the admission of the report through the testimony of Dr. Schmidt was not outcome determinative: There is no dispute that a crime was committed, and the autopsy did not aid in establishing the identity of the perpetrator, which was the central issue in this case." *Lewis*, 287 Mich App at 363 (internal quotation and citation omitted).

Concerning Childs's suggestion that the report of Lewis's autopsy consisted of inadmissible hearsay, we find that the report qualifies as an exception to the hearsay rule under MRE 803(8), which provides that the following statements are not excluded by the hearsay rule, even though the declarant is available as a witness:

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> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel . . . .

MCL 52.202(1)(a) directs that "[a] county medical examiner or deputy county medical examiner shall investigate the cause and manner of death of an individual under each of the following circumstances: . . . The individual dies by violence." In light of the undisputed nature of Lewis's violent death, the medical examiner had a statutory responsibility to investigate the death, and MRE 803(8) authorized the admission of the medical examiner's autopsy report.

Thus, we conclude that, consistent with *Lewis*, the trial court properly admitted the autopsy report.[1] Furthermore, given application of the plain-error test, we find that any assumed plain error was not prejudicial or outcome determinative as mentioned above, nor can we conclude that Childs was actually innocent considering the strong evidence of guilt or that the assumed error seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

B. PROSECUTOR'S CONDUCT

Childs also asserts that the prosecutor repeatedly and improperly sought to bolster the credibility of Neal Covington, the uncle of Clinton Lewis, during her closing and rebuttal arguments, and improperly denigrated defense counsel in the course of her rebuttal argument. Childs's counsel did not object during the prosecutor's closing and rebuttal arguments on the grounds he now raises on appeal, leaving this issue unpreserved.

As explained in *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated on other grounds in *Crawford*, 541 US at 64,

> Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. 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.

[1] Childs offers a related suggestion that defense counsel was ineffective for failing to object to the admissibility of the autopsy report. Because the autopsy report was properly admitted, however, an objection was not necessary. *Lewis*, 287 Mich App at 364; *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

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"We review claims of prosecutorial misconduct case by case . . . to determine whether the defendant received a fair and impartial trial." *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). We consider unpreserved claims of prosecutorial misconduct only to ascertain whether any plain error affected the defendant's substantial rights. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

1. VOUCHING FOR CREDIBILITY

Childs insists that on several instances during closing and rebuttal arguments the prosecutor improperly vouched for Covington's credibility. "A prosecutor may not vouch for the credibility of his witnesses by suggesting that he has some special knowledge of the witnesses' truthfulness. However, the prosecutor may argue from the facts that a witness should be believed." *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009) (internal quotation and citation omitted). "[A] prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004).

Our review of the challenged closing and rebuttal arguments reveals that at no point did the prosecutor ever suggest that she had some special knowledge of Covington's truthfulness. Instead, the prosecutor accurately characterized the content of Covington's testimony and how it was consistent with the accounts given by many of the other trial witnesses. Furthermore, the prosecutor repeatedly and correctly advised the jury that it had the prerogative to ascertain the truthfulness of Covington and the other witnesses, in part by considering their accounts in the context of all the evidence introduced at trial. See CJI2d 3.1 and 3.6. In sum, the prosecutor did nothing inappropriate in commenting on Covington's testimony.

2. DENIGRATION OF DEFENSE COUNSEL

Childs argues that improper characterizations of the defense appear in the following paragraphs of the prosecutor's rebuttal argument:

> The only issue became—'cause at the beginning, you know, you get into a case, you try to think okay, what's the defense. And they don't have to do anything, but they're going to have a theory as to what the defense is. And you can tell at the beginning their theory was going to be that it was the stepdad that did it. That was going to be their theory. And then as the witnesses kept coming and kept coming . . . and it became clear that all of the witnesses, including Nicole Thomas, said that Mr. Phelps was back here when he fired, he was back here in the middle of the street shooting up in the air, no way could have caused the kind of injury sustained by Clinton Lewis, which is from right to left and upward. Consistent with the testimony of the witnesses in this case, particularly Aunjrey Lewis. Consistent with the witnesses saying that he's facing this way, he's at the back of the car, he's facing, he looks up, ah shit and turns and . . . takes a bullet right here. Consistent with both Michael's testimony, consistent with both Aunjrey's testimony about how the shooting happened.

RECEIVED by Michigan Court of Appeals 12/2/2011 3:41:15 PM

> *And you've got a bunch of red herrings out here*. You've got questions being spat at witnesses at a fast pace. Well, didn't he say, you know, he was facing you. Yeah, when? At some point he was facing this way and then he turned. The situation was so fluid, people were moving and it takes seconds for people to change positions, to get from one position to the next. *The human eye isn't that quick to capture it as best as the defense would like you to believe*. [Emphasis added.]

"A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury." *Watson*, 245 Mich App at 592. To the extent that Childs asserts that denigration appears in the first quoted paragraph of the prosecutor's rebuttal, we detect none. Instead, this paragraph reflects that the prosecutor simply and accurately referenced the trial testimony. Although Michigan courts do not look with favor on a prosecutor's description that the defense has offered "red herrings," the second paragraph quoted above comprises an appropriate reply to the closing arguments of Childs's and Thomas's trial counsel, which emphasized the varying accounts and discrepancies among the trial testimony of the witnesses, and urged that the discrepancies rendered the testimony of the prosecution witnesses unreliable. See *People v Dobek*, 274 Mich App 58, 67; 732 NW2d 546 (2007) (observing that although the prosecutor's "red herring" "comments might have suggested that defense counsel was trying to distract the jury from the truth, the comments were, in general, properly made in response to defense counsel's suggestion that the prosecutor failed to recognize evidence that was allegedly problematic to the prosecution's theory"); *Watson*, 245 Mich App at 593 (explaining that the prosecutor's rebuttal argument reference to "red herrings" did not rise to error requiring reversal because they occurred in the course of a prosecution response "to defense counsel's closing argument, in which defense counsel emphasized discrepancies between the various accounts of the events"). Additionally, even assuming some impropriety, any prejudicial effect was minimized or eliminated by the trial court's jury instruction that the attorneys' arguments did not constitute evidence and that the jury "should only accept things the lawyers say that are supported by the evidence or by your own common sense or general knowledge." *Unger*, 278 Mich at 237 (observing that "relatively brief" inappropriate comments by the prosecutor did not warrant reversal, especially in light of the trial court's instruction that counsels' arguments did not qualify as evidence).

In summary, no prosecutorial misconduct occurred.

C. LATE ENDORSEMENT OF A WITNESS

Childs next challenges the trial court's decision granting the prosecutor's motion to endorse Covington as a trial witness on the fourth day of trial. We review for an abuse of discretion a trial court's decision whether "to permit or deny the late endorsement of a witness." *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008); see also *People v Herndon*, 246 Mich App 371, 402; 633 NW2d 376 (2001). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *Yost*, 278 Mich App at 379.

"MCL 767.40a(4) permits a prosecutor to endorse a witness 'at any time upon leave of the court and for good cause shown or by stipulation of the parties.'" *Herndon*, 246 Mich App at

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403, quoting MCL 767.40a(4). This Court has recognized that a purpose underlying MCL 767.40a is to afford "notice to the accused of potential witnesses[.]" *People v Callon*, 256 Mich App 312, 327; 662 NW2d 501 (2003). "[T]o establish that the trial court abused its discretion [in granting a late endorsement motion], [the] defendant must demonstrate that the court's ruling resulted in prejudice." *Id*. at 328.

The following colloquy took place on the fourth day of trial:

> *The Prosecutor*: There's been a lot of discussion during the course of this trial of a witness by the name of Neal Covington, the uncle. And Mr. Covington had not been interviewed and I did ask the officer-in-charge—yesterday Mr. Harper [Childs's defense counsel] said is Mr. Covington coming and I said he's not on the list. So, I had the officer go interview him. He did take a four page statement. And my understanding is he will be here today and I'm moving to endorse him.
>
> *The Court*: Okay.
>
> *Mr. Harper [Childs's counsel]*: It is late. We had no prior knowledge of his appearance or any statement that he might make, but I have been provided with one this morning.
>
> * * *
>
> *The Court*: Of course, whether late endorsement is allowed is a discretion [sic] of the Court, and you weigh out the circumstances, whether it's [a] surprise, is counsel being denied the proper notice. But I think it is quite clear from this record from the very beginning that person's name has been mentioned, he's included in the reports. I think we have a general idea of who and what he is and how he was involved with this. I don't think it is a big surprise. I am going to allow that.

The trial court did not select an outcome falling beyond the range of reasonable and principled outcomes when it granted the prosecutor's motion to permit Covington's testimony. The prosecutor endorsed as potential trial witnesses 12 of the multiple eyewitnesses to at least portions of the melee on Euclid Street that culminated in the shooting of Clinton Lewis. The prosecutor did not list Covington because he had not given a statement to the police. But many of the individuals involved in the altercation who testified during the first three days of trial referenced Covington's participation in the events. Childs's counsel did not dispute that he had inquired whether the prosecutor intended to call Covington to testify. The trial record demonstrating Covington's significant participation in the events and the importance of his testimony to giving the jury a fuller window into the circumstances surrounding the shooting amounted to good cause supporting the trial court's decision to grant the motion.

Concerning the purpose of MCL 767.40a to give the accused notice of potential witnesses, Childs does not dispute that multiple witness statements taken shortly after the August 31, 2009, shooting reference Covington. The record reflects that when the fourth day of trial began, the prosecutor provided Childs's counsel with a copy of the four-page statement that

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Covington supplied to the police the evening before his testimony, that Childs's counsel had the opportunity to review Covington's statement during the testimony of two witnesses who were called before Covington testified, and that Childs's counsel never voiced a concern or need for more time to review or investigate Covington's statement. Furthermore, the record substantiates no unfair prejudice to Childs stemming from the trial court's allowance of Covington's testimony. *Callon*, 256 Mich App at 328. Covington's account of the altercations and shooting of Clinton Lewis added some details not present in the accounts of the previous trial witnesses, including that he saw Childs in possession of Covington's silver handgun. But unlike several of the prosecution witnesses who had already testified, Covington did not assert that he saw Childs shoot Clinton Lewis. We discern no lack of notice regarding Covington's potential testimony at trial and no suggestion of unfair prejudice stemming from his late endorsement as a trial witness.

In summary, the trial court did not abuse its discretion in granting the prosecutor's motion to endorse Covington as a witness.

D. ADMISSIBILITY OF 911 RECORDINGS

Childs lastly disputes the propriety of the trial court's admission into evidence of 911 audio recordings, which Childs alleges supplied no probative value and injected unfair prejudice. The decision whether to admit evidence rests within the trial court's sound discretion and "will be reversed only where there is an abuse of discretion." *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). An abuse of discretion exists when the trial court selects an outcome falling outside the range of reasonable and principled outcomes. *People v Farquharson*, 274 Mich App 268, 271; 731 NW2d 797 (2007).

Childs's counsel and the trial court placed on the record their positions concerning the admissibility of the 911 audio recordings:

> *Mr. Harper [Childs's counsel]*: The 911 tapes are unidentified as to who the speakers are in most of them. They are not confirmed by anyone who testified in the case as being the person who made the phone call. The prosecutor is arguing and has alleged that the sounds heard on the 911 tape are gunshots that are involved in this case and there's no way of substantiating that or confirming that as the speaker and location of the speaker is not known and what the sounds are could be anything.
>
> * * *
>
> *The Court*: Understood. But I think that when you listen to that, just for this record, each time that . . . a call comes into the 911 operator, there is a recorded voice that says the date and the time. And all of that information that is done, I suppose is done just electronically when they get the call so they know when it comes in, because their system is in the same time period and so forth as the time of the case here and the events of the case.
>
> Additionally, I recognize that they're not identified. But I think that neither of them identified anybody, just simply giving circumstances that were occurring at the time.

RECEIVED by Michigan Court of Appeals 12/2/2011 3:41:15 PM

> I don't know whether they could be excited utterance, but I think their relevancy has to do with indicating the events and what was going on that could certainly corroborate the testimony of persons as testified here.
>
> Moreover, I don't think that there was anything that was done or said in any of those that causes any harm to either Defendant in any kind of way where there was something that was said that would identify them or anything of that nature. . . .

The content of the 911 audio recordings was not transcribed, neither a copy of the recordings nor a transcription of the calls appears in the record, and Childs has not furnished a copy of the recordings or a transcription of the calls with his brief on appeal. Accordingly, we accept the trial court's observations about the times and dates of the calls placing them around the time of the Euclid Street shootings, as well as the prosecutor's characterization that "the circumstances tied the call to this offense." Childs has not satisfied his appellate burden to "furnish[] the reviewing court with a record to verify the factual basis of any argument upon which reversal was predicated." *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). Accepting that the calls recorded reports of events or sounds, including gunshots, that had a relationship to the Euclid Street shootings, the recordings possessed some tendency to make more likely the fact that the Euclid Street shootings did occur on the afternoon of August 31, 2009, a fact of consequence in this case. MRE 401. Because the recordings qualified as relevant evidence, they were admissible pursuant to MRE 402.

Childs complains that the recordings unfairly prejudiced him, given that they revealed "highly inflammatory" comments designed "to elicit an emotional response from the Jury." But Childs's offers no concrete or specific examples of purportedly inflammatory statements. In light of the trial court's findings that the recordings identified neither Childs nor Thomas and did not otherwise inject harm to Childs or Thomas prohibited under MRE 403, we conclude that the trial court selected an outcome within the range of reasonable and principled outcomes when it admitted the 911 recordings.

II. DOCKET NO. 297763

A. SUFFICIENCY OF THE EVIDENCE

Thomas initially challenges the sufficiency of the evidence supporting his conviction for assault with intent to commit murder. He contends that there was insufficient evidence of the intent to kill. We review de novo a challenge to the sufficiency of the evidence. *People v Solmonson*, 261 Mich App 657, 661; 683 NW2d 761 (2004).

> When determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. The scope of review is the same whether the evidence is direct or circumstantial.

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> Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. [*People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000) (internal quotations omitted).]

"It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

A conviction of assault with intent to commit murder, MCL 750.83, requires proof that the defendant committed "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010) (internal quotation omitted).

In *People v Drayton*, 168 Mich App 174, 176-177; 423 NW2d 606 (1988), this Court, quoting *Roberts v People*, 19 Mich 401, 415 (1870), observed:

> "By saying however, that the specific intent to murder or . . . the intent to kill must be proved, we do not intend to say it must be proved by direct, positive, or independent evidence; but as very properly remarked by my brother Campbell in *People v Scott*, 6 Mich [287 (1859)], the jury 'may draw the inference, as they draw all other inferences, from any facts in evidence which to their minds fairly prove its existence.' And in considering the question they may, and should take into consideration the nature of the defendant's acts constituting the assault; the temper or disposition of mind with which they were apparently performed, whether the instrument and means used were naturally adapted to produce death, his conduct and declarations prior to, at the time, and after the assault, and all other circumstances calculated to throw light upon the intention with which the assault was made."

The evidence showed that Thomas behaved insultingly toward Calvin Phelps, his next-door neighbor and Clinton Lewis's stepfather, on the afternoon of August 31, 2009, that Clinton Lewis became involved in a fight with Thomas during which Lewis knocked out one of Thomas's teeth, and that minutes later Thomas accompanied his brother, who had an AK-47 assault rifle, onto the porch of 638 East Euclid, where they repeatedly threatened Lewis with death. A short while later that afternoon, Lewis and his father attempted to drive away from the neighborhood, but Thomas attacked their car with a baseball bat and again fought Lewis until codefendant Childs, an acquaintance of Thomas, shot and killed Lewis. Thomas, Childs, and others returned to the Thomas residence at 644 East Euclid, followed moments later by upset neighbor Tavaras Montgomery, Michael Bracey, one of Lewis's brothers, and Covington, who broke a front window while on the porch of 644 East Euclid. As Bracey and Montgomery walked away from 644 East Euclid, Thomas took aim with a shotgun from an upstairs window of that house and fired once in the direction of Bracey and Montgomery, striking Montgomery in the upper chest and left leg. Viewed in the light most favorable to the prosecution, Thomas's continued exhibitions of violent behavior on the afternoon of August 31, 2009, his death threats, and his ultimate discharge of a shotgun at Bracey and Montgomery as they walked away from Thomas's house, which struck Montgomery's upper chest and leg, amply supported a reasonable jury's conclusion beyond a reasonable doubt that Thomas assaulted Montgomery while

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specifically intending to kill him. *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992) ("[t]he intentional discharge of a firearm at someone within range is an assault"); *Drayton*, 168 Mich App at 176-177.

B. EFFECTIVE ASSISTANCE OF COUNSEL

Thomas next raises four purported examples of his trial counsel's ineffective assistance. Thomas did not move for a new trial or an evidentiary hearing to address his ineffective assistance of counsel claims. Therefore, this Court limits its review to mistakes apparent on the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Whether a defendant has received the effective assistance of counsel comprises a mixed question of fact and constitutional law, which we review, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court held that a convicted defendant's claim of ineffective assistance of counsel includes two components: "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." To establish the first component, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *Solmonson*, 261 Mich App at 663. With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate a reasonable probability that but for counsel's errors, the result of the proceedings would have differed. *Id*. at 663-664. A defense counsel possesses "wide discretion in matters of trial strategy." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). The defendant must overcome the strong presumptions that his "counsel's conduct falls within the wide range of professional assistance" and that his counsel's actions represented sound trial strategy. *Strickland*, 466 US at 689. This Court may not "substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (internal quotation omitted).

1. SEVERANCE

Thomas initially argues that his trial counsel's failure to move to sever the charges against him and Childs amounted to ineffective assistance of counsel. The Michigan Court Rules envision that "[a]n information or indictment . . . . may charge two or more defendants with two or more offenses when . . . the offenses are related as defined in MCR 6.120(B)." MCR 6.121(A)(2). The referenced subrule, MCR 6.120(B)(1), sets forth the following:

> Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on
>
> (a) the same conduct or transaction, or
>
> (b) a series of connected acts, or
>
> (c) a series of acts constituting parts of a single scheme or plan.

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According to MCR 6.121(C), "On a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant." MCR 6.121(D) provides that on a party's motion, "the court may sever the trial of defendants on the ground that severance is appropriate to promote fairness to the parties and a fair determination of the guilt or innocence of one or more of the defendants."

The record demonstrates that the charges against Childs and Thomas arose from "a series of connected acts." MCR 6.120(B)(1)(b). Thomas had a firm connection to both shootings, which occurred in close physical and temporal proximity—a discrete area of Euclid Street within a couple of minutes of one another. Thomas set in motion the series of events leading to the shooting of Clinton Lewis, and shortly thereafter, the shooting of Montgomery. Thomas started the disagreement with Lewis, leading to the one-on-one fight. Thomas then escalated the dispute by alighting onto the front porch of 638 East Euclid with his brother, who possessed an AK-47. Thomas and his family and friends solicited reinforcements, as did Lewis's family. When Lewis and his father tried to leave Euclid Street, Thomas, who carried a baseball bat, and several of his group prevented them from leaving and initiated a large fight in the street. Childs, an acquaintance of Thomas, who was recruited to the scene to assist Thomas and his group, walked into the street and shot Lewis. Scant minutes later, Thomas, Childs, and others sought refuge inside 644 East Euclid, Lewis's brother, uncle, and Montgomery broke windows at 644 East Euclid, and as Lewis's brother and Montgomery walked away from 644 East Euclid, Thomas shot Montgomery.

In light of the interrelationship between the two shootings, to justify severance Thomas had to make "a showing that severance is necessary to avoid prejudice to substantial rights of the defendant." MCR 6.121(C). "There is a strong policy favoring joint trials in the interest of justice, judicial economy, and administration, and a defendant does not have an absolute right to a separate trial." *People v Etheridge*, 196 Mich App 43, 52-53; 492 NW2d 490 (1992). "Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994).

> Inconsistency of defenses is not enough to mandate severance; rather, the defenses must be "mutually exclusive" or "irreconcilable." Moreover, incidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice. The tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other. [*Id*. at 349 (internal quotations and citations omitted).]

After reviewing the record, we have located nothing giving rise to any likelihood that the joint proceedings adversely impacted Thomas's substantial rights. Childs and Thomas did not pursue mutually exclusive, irreconcilable, or even inconsistent defenses. Neither Childs's counsel nor Thomas's counsel pointed to the other codefendant as the party responsible for the shootings. Rather the defense of each codefendant endeavored to highlight inconsistencies in the accounts of the many witnesses and argue that the prosecutor had not satisfied her burden of

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proving guilt beyond a reasonable doubt. Furthermore, although Thomas notes on appeal several facets of the joint trial that allegedly prejudiced him, he fails to illustrate prejudice to his substantial rights. Thomas mentions a statement of Childs that was read into the record at trial, but Childs's statement contained no reference to Thomas. Thomas also notes the admission of "hearsay 911 tapes . . . [that] did not pertain to Montgomery's assault," but as we have already concluded, the probative recordings did not inject any danger of unfair prejudice. Thomas maintains that the prosecutor had the luxury of portraying him as "a violent and bad man" by introducing evidence of the "two earlier fights . . . [that] had no probative value as to . . . [Thomas's] action when his home was under siege," but this position ignores the connected nature of the charged crimes. Thomas also offers multiple conclusory and unsubstantiated averments of prejudice, without any citation to the record.

In conclusion, the charges against Childs and Thomas arose from a series of connected acts, and Thomas has not shown that the joint proceedings prejudiced his substantial rights. Therefore, Thomas's counsel was not ineffective for failing to file a motion to sever the charges against Childs and Thomas. *Ericksen*, 288 Mich App at 201.

2. FAILURE TO RAISE SELF-DEFENSE

Thomas castigates his trial counsel for not pursuing a self-defense theory at trial. Under both the common law and Michigan's Self-Defense Act, MCL 780.971 *et seq*., a defendant may legally claim self-defense if he had an honest and reasonable belief of an imminent danger of death or serious bodily harm. MCL 780.972(1)(a); *People v Heflin*, 434 Mich 482, 502-503; 456 NW2d 10 (1990); *People v Conyer*, 281 Mich App 526, 529-530; 762 NW2d 198 (2008); *People v George*, 213 Mich App 632, 634-635; 540 NW2d 487 (1995); *People v Green*, 113 Mich App 699, 703-704; 318 NW2d 547 (1982). The testimony surrounding Thomas's shooting of Montgomery reflected that Montgomery and Michael Bracey had abandoned their violent misbehavior on the porch of 644 East Euclid and were returning to 638 East Euclid when Thomas fired at them, and there was no evidence of an ongoing assault of or threat to Thomas or his family when Thomas shot Montgomery from a second story window. Consequently, Thomas's trial counsel was not ineffective for neglecting to pursue a self-defense theory. *Ericksen*, 288 Mich App at 201.

3. FAILURE TO OBJECT TO THE PROSECUTOR'S CONDUCT

Thomas further contends that his counsel inexcusably failed to object to several instances of prosecutorial misconduct. As discussed in further detail in part II(C), *infra*, the prosecutor made no improper argument. Accordingly, Thomas's counsel need not have lodged groundless objections to the prosecutorial arguments. *Ericksen*, 288 Mich App at 201.

4. TRANSFERRED INTENT INSTRUCTION

Thomas suggests that an "erroneous instruction on transferred intent diminished the Prosecutor's burden of proof for the assault with intent to murder charge. Anybody will do, it seems the act of discharging a weapon alone establishes the elements of the crime." The thrust of Thomas's instructional argument is not clear, and he offers no authority regarding transferred intent in support of his assertion. Moreover, the record reflects that the trial court instructed the

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jury on the elements of assault with intent to commit murder in accordance with CJI2d 17.3, and twice advised the jury in a manner consistent with CJI2d 17.17 that if Thomas "intended to assault one person but by mistake or accident assaulted another person, the crime is the same as if the first person had actually been assaulted." The trial court's instructions adequately explained the concept of transferred intent. See *People v Plummer*, 229 Mich App 293, 304 n 2, 305-306; 581 NW2d 753 (1998). Because the trial court correctly instructed the jury, Thomas's counsel was not ineffective for neglecting to raise a meritless objection to the transferred intent instruction. *Ericksen*, 288 Mich App at 201.

C. PROSECUTOR'S CONDUCT

Thomas avers that during closing and rebuttal arguments, the prosecutor improperly vouched for the credibility of Covington and Aunjrey Lewis, denigrated defense counsel, and demonized Thomas. There were no objections to the prosecutor's closing and rebuttal arguments. Therefore, we review these unpreserved assertions of prosecutorial misconduct for plain error that affected Thomas's substantial rights. *Unger*, 278 Mich App at 235.

1. VOUCHING FOR CREDIBILITY

Thomas's appellate contention that the prosecutor improperly bolstered the credibility of Covington rests almost entirely on the passages of the prosecutor's closing and rebuttal arguments challenged by Childs and addressed in part I(B)(1), *supra*, of this opinion. As we earlier explained, a review of the challenged closing and rebuttal argument excerpts reveals that at no point did the prosecutor ever suggest that she had "some special knowledge of . . . [Covington's] truthfulness." *Seals*, 285 Mich App at 22. Instead, the prosecutor accurately characterized the content of Covington's testimony and how it was consistent with the accounts of many other trial witnesses. Furthermore, the prosecutor repeatedly and correctly advised the jury that it had the prerogative to ascertain the truthfulness of Covington and the other witnesses, in part by considering their accounts in the context of all the evidence introduced at trial. See CJI2d 3.1 and 3.6. To the extent that Thomas also criticizes the prosecutor's representation that "her star witness could not have been the shooter since Morris Larry had him in a head lock," this argument accurately describes the testimony of Morris Larry and Andrew Larry, who entered the fight on behalf of Thomas, and Covington concerning his position at the time of the shooting. *Schutte*, 240 Mich App at 721.

Similarly, the prosecutor's summary of Aunjrey Lewis's trial testimony, including the purportedly improper comment, "I submit to you that little . . . Aunjrey, was probably the one that had the best vantage point about what was going on, how his brother died," accurately described Lewis's testimony. Lewis recalled that he had stood in a position close to Clinton Lewis's father's car during the fight and shooting of Clinton Lewis and did not participate in the altercation, but merely watched the events.

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2. DENIGRATION OF DEFENSE COUNSEL

Thomas criticizes as improper denigration the following emphasized portion of the prosecutor's rebuttal argument:

> Now, [Thomas], you think listening to the defense of Nico Thomas in here that . . . Montgomery was never shot, that there was no shotgun fired, that that birdshot in his leg just magically appeared. Well, you didn't hear a shot after that, did you? Did you hear a shot? Were they all close together? Did you hear a shot? You would think it didn't happen. That we're just making it up that he was shot. That the officers there at the scene said, yep, he was wounded, I saw blood on his leg and chest area, that he was transported to the hospital in an ambulance, they're just making that up because we want to put a charge on Nico, I guess.
>
> *That's all I heard in this case as far as a defense of Nico Thomas is I didn't prove this case beyond all doubt. Remember when Mr. Brown [Thomas's counsel] stood over me, yeah, yeah, I don't mean it—reasonable doubt. He's dancing, bopping like Muhammad Ali, just kind of jabbing and doing whatever he can to maybe have one of you bite at whatever red herrings he's throwing out. That's what he's doing. Does he think you don't have common sense? Does he think that this injury just magically appeared?* [Emphasis added.]

As we observed in our discussion in part I(B)(2), *supra*, although Michigan courts do not look with favor on a prosecutor's description that the defense has offered "red herrings," the second paragraph quoted above comprises an appropriate reply to the closing arguments of Thomas's trial counsel, which emphasized the varying accounts and discrepancies among the trial testimony of the witnesses and urged that the discrepancies rendered the testimony of the prosecution witnesses unreliable. *Dobek*, 274 Mich App at 67; *Watson*, 245 Mich App at 593. Additionally, even assuming some impropriety, any prejudicial effect was eliminated or minimized by the trial court's jury instruction that the attorneys' arguments did not constitute evidence, and that the jury "should only accept things the lawyers say that are supported by the evidence or by your own common sense or general knowledge." *Unger*, 278 Mich App at 237.

3. DENIGRATION OF DEFENDANT THOMAS

With respect to Thomas's complaints about the prosecutor's demonization of him, we find that the prosecutor's closing argument amounted to proper commentary on the basis of ample evidence admitted at trial establishing Thomas's integral role in his and his brother's attack on 638 East Euclid before the shootings and the fights leading up to the two charged shootings. *Schutte*, 240 Mich App at 721. While Thomas does not complain that the prosecutor appealed to jury sympathy, the isolated references to family members' anguish does not equate to a forbidden invocation of jury sympathy for the victims. See *Watson*, 245 Mich App at 591; see also *People v Hoffman*, 205 Mich App 1, 21; 518 NW2d 817 (1994).

D. CUMULATIVE ERROR

Thomas lastly insists that the cumulative effect of the errors in the proceedings deprived him of his due process right to a fair trial. US Const, Ams V and XIV; Const 1963, art 1, § 17.

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Because Thomas has not demonstrated the existence of any actual errors, he cannot show that the cumulative effect of any errors adversely impacted his right to a fair trial. *LeBlanc*, 465 Mich at 591-592 n 12.

Affirmed.

/s/ William B. Murphy
/s/ Michael J. Talbot
/s/ Christopher M. Murray

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALEXIS LYNN WARREN,

Defendant-Appellant.

UNPUBLISHED
June 16, 2009

No. 285029
Wayne Circuit Court
LC No. 07-020344-FH

Before: O'Connell, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right her bench trial convictions of two counts of aiding and abetting felonious assault, MCL 750.82. Because defendant received the effective assistance of counsel at trial and because the prosecutor presented sufficient evidence to convict defendant, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions stem from the words and actions in which she engaged during Dominique Lambert's felonious assault of two of defendant's neighbors, Shaleena Powell and Powell's mother, Sharon Eldridge, with a steel baseball bat. Defendant argues she could not possibly have aided or abetted the specific crime of felonious assault because she did not know assault was Lambert's intention. The trial court disagreed, and the facts support the trial court's decision. Defendant also contends on appeal, but did not raise in the trial court, that her joint representation with Lambert deprived her of the constitutional right to the effective assistance of counsel.

Claims of insufficient evidence are reviewed by this Court de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When reviewing a challenge to the sufficiency of the evidence, the Court views the evidence in a light most favorable to the prosecution and determines whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

Aiding and abetting is any type of assistance given the perpetrator of a crime by word or deed intended to encourage, support, or incite commission of that crime, and the one aiding or abetting may be convicted and punished as if she directly committed the offense. MCL 767.39; *People v Plunkett*, 281 Mich App 721, 730; 760 NW2d 850 (2008). To establish guilt under an

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aiding and abetting theory, a prosecutor must show that the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time she gave aid and encouragement. *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006). An aider and abettor's state of mind may be inferred from the facts and circumstances, and factors that may be considered include a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. *People v Turner*, 213 Mich App 558, 568-569; 540 NW2d 728 (1995), overruled in part on other grounds *People v Mass*, 464 Mich 615; 628 NW2d 540 (2001).

Felonious assault is defined in MCL 750.82 as assault of another person "with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon without intending to commit murder or to inflict great bodily harm less than murder . . . ." The evidence showed defendant's participation in the incident consisted of jumping up and identifying Powell to Lambert, who was in possession of a bat, clapping her hands and stating, "Yeah. This is how Detroit do it," or "I'm gonna show you how Detroit do it," ratifying Lambert's act by sheltering Lambert in her home and blocking a police officer when he attempted to question Lambert, and stating to Powell sometime after the incident "[O]h, ya'll bitches thought it was over." In addition to these facts, the surrounding circumstances showed there was bad blood between defendant and Powell: (1) Officer Benjamin Johnson knew the parties from prior contact; (2) something had happened earlier in the day on September 27, 2008, prompting defendant to consider filing a police report for which Lambert was going to pick her up and drive her to the police station; (3) defendant and Lambert were closely related; (4) Lambert did not know Powell until defendant identified her, and Lambert indicated by asking "[I]s that one of them bitches" or "[W]here them bitches at" that she and defendant had discussed Powell earlier; (5) Lambert did not raise as a defense that she was planning to play baseball; and (6) Lambert indicated she acted against Powell on defendant's behalf when she confronted Eldridge with "who the f--k f--k with my cousin" and "[Y]ou better get those bitches under control. [Y]ou don't know me. I'll kill them bitches."

The evidence, viewed in a light most favorable to the prosecution, clearly supported the trial court's finding that a factor underlying Lambert's assault was defendant's poor relationship with Powell, that Lambert would not have known whom to assault had defendant not identified Powell, and that defendant intended, incited, and encouraged Lambert to chase and threaten Powell and Eldridge with great bodily harm with the steel bat. Sufficient evidence was presented to convict defendant of aiding and abetting felonious assault, MCL 750.82.

Defendant next argues that defense counsel's joint representation of both she and Lambert created a conflict of interest that adversely impacted counsel's performance and constituted ineffective assistance of counsel. Defendant did not preserve this issue by raising it in the trial court. However, a claim of ineffective assistance of counsel may be raised for the first time on appeal if the details relating to the alleged ineffective assistance of counsel are sufficiently contained in the record to permit this Court to decide the issue. *People v Cicotte*, 133 Mich App 630, 636; 349 NW2d 167 (1984). Since defendant did not request an evidentiary hearing in the trial court, this Court's review is limited to the existing record. *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992).

To demonstrate ineffective assistance of counsel, it must be shown that an attorney's performance fell below an objective standard of reasonableness and that the deficient

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representation so prejudiced the defendant that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). See also *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The Sixth Amendment right to counsel encompasses the right to have an attorney that is not "burdened by an actual conflict of interest." *Id.* at 692. When a claim of ineffective assistance of counsel involves an assertion of the existence of a conflict of interest, a defendant must demonstrate that an actual, not a presumed or implied, conflict of interest negatively impacted his attorney's performance. *People v Smith*, 456 Mich 543, 556-557; 581 NW2d 654 (1998). To demonstrate an actual conflict of interest, a defendant must prove "that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Id*. at 557, quoting *Cuyler v Sullivan*, 446 US 335, 348-350; 110 S Ct 1708; 64 L Ed 2d 333 (1980). Prejudice is presumed if an actual conflict of interest adversely impacts the sufficiency of an attorney's performance. *Smith, supra* at 556-557.

Defendant asserts that defense counsel failed to set forth defendant's best defense, which was that Lambert acted completely alone in committing felonious assault and defendant could not have known what Lambert intended. Instead, counsel pursued the less credible argument that Lambert did not commit the underlying offenses. However, the record showed that at the preliminary examination, in a motion to quash the information, and at trial, defense counsel advanced, albeit unsuccessfully, the very argument that defendant in her appellate brief argues should have been advanced, i.e., that Lambert acted alone and defendant could not have known what Lambert intended. Defendant's defense would have been the same regardless of whether counsel argued that Lambert did or did not commit the offenses. Defendant's defense would also have been the same whether she was separately or jointly represented. Defendant did not show that counsel's handling of any particular aspects of the trial or her defense were likely affected or prejudiced because of the joint representation. Counsel's representation was not adversely impacted and not rendered ineffective. Defendant received the effective assistance of counsel.

Affirmed.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JULIE ANN GOBLE,

Defendant-Appellant.

UNPUBLISHED
June 11, 2009

No. 283889
Monroe Circuit Court
LC No. 07-036385-FH

Before: Wilder, P.J., and Meter and Servitto, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of receiving or concealing a stolen motor vehicle, MCL 750.535(7), and sentenced to 23 to 60 months' imprisonment. She appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's conviction results from her possession or concealment of a stolen pickup truck in Monroe County during the early morning hours of September 22, 2007. Earlier, on the evening of September 21, the owner of the truck made contact with defendant outside a restaurant in Washtenaw County. The owner testified that he stopped because defendant appeared to be in distress. The owner agreed to drive defendant to a mobile home park. After arriving at the mobile home park and exiting the truck, the owner was attacked by two men, one of whom hit him with a baseball bat. Defendant then took the keys from the owner, said "come on, let's go" to the two men, and left with them in the truck. After the owner made a police report regarding the theft, state police troopers found the truck at a Travel American Truck Stop in Monroe County. Before verifying that the truck was stolen, one of the troopers saw Jose Vigil walking around it and observed what appeared to be fresh damage to the truck. Defendant was observed shutting the tailgate of the truck. Defendant and Vigil were arrested after entering the truck stop. The keys belonging to the truck were not located.

After the prosecution rested, defendant testified that the truck owner picked her up for prostitution and that she then accompanied him to the mobile home park for drugs. She claimed that a drug dealer known as Johnny drove her and Vigil to the truck stop after the owner loaned his truck to Johnny in exchange for drugs, and that Johnny ran off when the police arrived.

Relying on *People v Wolak*, 110 Mich App 628; 313 NW2d 174 (1981), defendant argues on appeal that the trial court erred in denying her motion for a directed verdict, which was based

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on the theory that conviction is not permitted under MCL 750.535(7) if she stole the truck. The proper meaning of a statute constitutes a question of law that we review de novo. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). Our review of a trial court's denial of a motion for a directed verdict is also de novo. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). The evidence is viewed in a light most favorable to the prosecution to determine if a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Gillis*, *supra* at 113.

At the time this Court decided *Wolak, supra*, MCL 750.535(1) provided, in pertinent part, that "[a] person who buys, receives, *possesses, conceals*, or aids in the concealment of stolen, embezzled, or converted money, goods, or property knowing the money, goods, or property to be stolen, embezzled, or converted, if the property purchased, received, possessed, or concealed exceeds the value of $100.00, is guilty of a felony . . . " (emphasis added). The prior version of the statute contained similar language, but did not include the terms "possesses" or "conceals."

In *Wolak, supra* at 633, this Court, relying on our Supreme Court's construction of the statute in *People v Kyllonen*, 402 Mich 135; 262 NW2d 2 (1978), held that an actual thief of property may not be convicted under the statute. At the time *Kyllonen* was decided, the statute did not contain the terms "possesses" or "conceals," which were added by 1979 PA 11. Giving strict construction, and upon considering the early history of the statute (which indicated an intent to proscribe conduct by persons who help thieves dispose of stolen property), the *Kyllonen* Court concluded that "[u]nder the Michigan statutory scheme, thieves are to be punished for larceny. Persons who help thieves or others conceal stolen property are to be punished for aiding in the concealment of stolen property." *Kyllonen*, *supra* at 148.

In *People v Hastings*, 422 Mich 267, 271; 373 NW2d 533 (1985), our Supreme Court held that the 1979 amendment "removes the basis on which *People v Kyllonen* concluded that the thief could not be prosecuted under the statute." At the time defendant committed the charged offense in this case, the statute contained the same language that the *Hastings* Court concluded allowed a thief to be prosecuted under the statute. As amended by 2006 PA 374, the statute provides:

> A person shall not buy, receive, possess, conceal, or aid in the concealment of a stolen motor vehicle knowing, or having reason to know or reason to believe, that the motor vehicle is stolen, embezzled, or converted. A person who violates this subsection is guilty of a felony . . . A person who is charged with, convicted of, or punished for a violation of this subsection shall not be convicted of or punished for a violation of another provision of this section arising from the purchase, receipt, possession, concealment, or aiding in the concealment of the same motor vehicle. This subsection does not prohibit the person from being charged, convicted, or punished under any other applicable law. [MCL 750.535(7).]

Based on *Hastings, supra*, the evidence that defendant participated in the theft of the truck did not preclude a conviction under MCL 750.535(7). Therefore, the trial court did not err in denying defendant's motion for a directed verdict on this ground.

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Defendant next argues that the trial court erred by denying her request for a jury instruction, based on *Wolak, supra,* that she could not be convicted of the receiving or concealing charge if the jury believed that she was involved in the theft of the truck. We review de novo questions of law involving jury instructions. *Gillis, supra* at 113. Having concluded that a thief may be convicted under MCL 750.535(7), we find no error in the trial court's refusal to give the requested instruction. A trial court's duty is to instruct the jury on the applicable law. MCL 768.29; *People v Dobek,* 274 Mich App 58, 82; 732 NW2d 546 (2007).

Finally, defendant argues that the trial court's denial of her request to have Vigil brought from the county jail to testify as a defense witness deprived her of her constitutional rights to present a defense and to compulsory process. Defendant claims that she preserved this issue by requesting that Vigil be brought from jail to the trial. We disagree.

The record indicates that defense counsel requested that Vigil be brought from jail to testify at trial, over the prosecutor's objection that Vigil was not disclosed as a possible witness, contrary to the trial court's scheduling order and the prosecutor's demand for discovery, but did not argue that the failure to allow Vigil to testify would affect defendant's constitutional rights. Defense counsel asserted that he could not call Vigil as a witness until Vigil pleaded guilty to his involvement in this case. The trial court rejected this argument, finding that Vigil could not be called as a witness only if it was known that he would assert his Fifth Amendment privilege against self-incrimination and, after confirming that Vigil was not listed as a defense witness and hearing the prosecutor's claim of prejudice, denied the request to allow Vigil to testify.

Having failed to present her constitutional claims to the trial court, defendant failed to preserve those issues for appeal. Therefore, our review is limited to plain error affecting defendant's substantial rights. *People v Carines,* 460 Mich 750, 763; 597 NW2d 130 (1999).

The right to present a defense is not absolute. As explained in *People v Unger,* 278 Mich App 210, 249-250; 749 NW2d 272 (2008):

> Few rights are more fundamental than that of an accused to present evidence in his or her own defense. *Chambers v Mississippi,* 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Holmes v South Carolina,* 547 US 319, 324; 126 S Ct 1727; 164 L Ed 2d 503 (2006) (internal quotation marks and citations omitted). This Court has similarly recognized that "[a] criminal defendant has a state and federal constitutional right to present a defense." *Kurr, supra* at 326 [*People v Kurr,* 253 Mich App 317, 326; 654 NW2d 651 (2002)].
>
> However, an accused's right to present evidence in his defense is not absolute. *United States v Scheffer,* 523 US 303, 308; 118 S Ct 1261; 140 L Ed 2d 413 (1998); *Crane v Kentucky,* 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636 (1986). "A defendant's interest in presenting . . . evidence may thus ' "bow to accommodate other legitimate interests in the criminal trial process." ' " *Scheffer, supra* at 308 (citations omitted). States have been traditionally afforded the

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> power under the constitution to establish and implement their own criminal trial rules and procedures. *Chambers, supra* at 302-303.
>
> Like other states, Michigan has a legitimate interest in promulgating and implementing its own rules concerning the conduct of trials. Our state has "broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' " *Scheffer, supra* at 308, quoting *Rock v Arkansas,* 483 US 44, 56; 107 S Ct 2704; 97 L Ed 2d 37 (1987).

Discovery in a criminal case is governed by MCR 6.201. *People v Phillips,* 468 Mich 583, 586-587; 663 NW2d 463 (2003). Pursuant to MCR 6.201(A)(1), a party, upon request, must provide the other party with "the names and addresses of all lay and expert witnesses whom the party may call at trial; in the alternative, a party may provide the name of the witness and make the witness available to the other party for interview; the witness list may be amended without leave of the court no later than 28 days before trial." The record in the case indicates that the prosecutor requested discovery of all witnesses whom defendant may call at trial. In addition, the trial court entered a scheduling order that required the parties to file and exchange witness lists before trial.

Because defendant failed to comply with discovery, the trial court had the discretion to deny defendant's request to permit Vigil to testify at trial. MCR 6.201(J). In deciding whether to exclude evidence because of a discovery violation, "the trial court must balance the interests of the courts, the public, and the parties, in light of all the relevant circumstances, including the reasons for noncompliance." *People v Banks,* 249 Mich App 247, 252; 642 NW2d 351 (2002). In addition, the complaining party must demonstrate prejudice. *People v Greenfield (On Reconsideration),* 271 Mich App 442, 456 n 10; 722 NW2d 254 (2006).

Here, defendant has not demonstrated any abuse of discretion by the trial court in denying the untimely request to permit Vigil to testify. Indeed, defendant does not even address the trial court's discretionary authority to remedy a discovery violation. Furthermore, under MRE 103(a)(2), error may not be predicated on a ruling that excludes evidence unless "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." Here, the substance of Vigil's proposed testimony is not apparent from the record and defendant did not make an offer of proof with regard to his testimony.

Considering that a defendant's right to present a defense does not excuse compliance with established rules and procedures, *Unger, supra* at 250, defendant's failure to demonstrate any abuse of discretion in the manner in which the trial court resolved the discovery violation, and defendant's ability to present a defense through her own testimony at trial, we conclude that

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reversal is not warranted. Defendant has failed to show a plain constitutional error affecting her substantial rights. *Carines, supra* at 763.[1]

Affirmed.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Deborah A. Servitto

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[1] We also note that, absent a valid waiver, the Fifth Amendment privilege against self-incrimination exists until after sentence is imposed and the judgment of conviction becomes final. *United States v Rivas-Macias*, 537 F3d 1271, 1277 (CA 10, 2008), cert den ___ US ___; 129 S Ct 1371; ___ L Ed 2d ___ (February 23, 2009); see also *People v St Onge*, 63 Mich App 16, 18; 233 NW2d 874 (1975) (right still applies when appeal is pending after a conviction on the charge to which incriminating testimony would relate). Defense counsel may not knowingly call a witness who would assert the privilege. *People v Giacalone*, 399 Mich 642, 645; 250 NW2d 492 (1977). The record indicates that Vigil was not sentenced until after defendant's trial concluded. Thus, although not dispositive of our resolution of the constitutional issue raised by defendant, it appears that the concern expressed by defense counsel at trial when attempting to justify his failure to timely list Vigil as a possible witness still existed, because Vigil had not yet been sentenced. Defense counsel did not indicate, nor does the record disclose, that Vigil was willing to waive his Fifth Amendment privilege against self-incrimination in order to testify.

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EMMANUEL JAMARR ATKINS,

Defendant-Appellant.

UNPUBLISHED
June 9, 2009

No. 282697
Kalamazoo Circuit Court
LC No. 07-000624-FC

Before: Beckering, P.J., and Wilder and Davis, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree, premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as an habitual offender, second offense, MCL 769.11, to life imprisonment for the murder conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

I

On March 29, 2007, at approximately 10:00 p.m., a Chevrolet Suburban with approximately 11 young men inside, including defendant, drove by a house located near the corner of Mills and Washington in Kalamazoo, Michigan. According to witness testimony, defendant, who was seated closest to the passenger-side window of the vehicle's second row, fired one shot out of a gun toward a group of people gathered on the porch. The shot struck 14-year-old William Berry in the eye, killing him. Witness testimony supported that the shooting was the culmination of an earlier altercation between rival street gangs.

At the start of trial, over defendant's objection, the prosecutor sought to have the courtroom closed because several prosecution witnesses had been harassed and threatened, and several threatening messages were posted to some of the witnesses' Internet pages. In addition, the prosecution indicated that a person with a baseball bat had chased one of the witnesses after that witness testified at the preliminary examination. Another witness moved from the area, and still another witness dropped out of school because of intimidation. The prosecutor noted that two-thirds of the prosecution's witnesses were minors who after the trial would come into contact with many of the spectators in the courtroom at school and in the community. The trial court declined to close the courtroom at that time, but indicated that it would monitor the situation, including the conduct of the spectators in the courtroom.

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After approximately 11 witnesses testified, including two who were in the Suburban at the time of the shooting, the prosecutor renewed his request for a closed courtroom, particularly during the testimony of four witnesses who were in the vehicle with defendant. The court noted that several spectators who had been sitting in the courtroom throughout the trial became quite interested whenever gang references were made; that four spectators were removed from the courtroom for making comments about the deputies' guns; that spectators were removed despite the presence of additional security at the trial; that the jurors had become somewhat concerned and requested assistance to their vehicles; that witnesses had been threatened in the past and there were ongoing concerns about the safety of witnesses and intimidation regarding potential consequences for their testimony; and that the case involved a neighborhood crime, including several young witnesses and spectators who attended the same high school, which could also lead to threats, intimidation, and concern for the integrity of the proceedings. The trial court concluded that under the presenting circumstances there was a substantial reason to allow for a partial closure of the courtroom in order to protect the integrity of the judicial system and ensure that witnesses were comfortable and testifying truthfully. The court kept the courtroom open to the parents of the witnesses, defendant, and the victim, as well as the media.

Defendant declined the court's offer to open the courtroom for the testimony of police officers because he believed it would be prejudicial to open the courtroom for some witnesses and close it for others. After taking the testimony of several witnesses, the trial court stated that the courtroom would remain partially closed for the remainder of the trial and restated its previous reasoning. The trial court also noted as additional concerns a report by a juror regarding an episode where individuals standing by the elevator appeared to be taking a "head count" of the jurors as they returned from lunch, as well as a report of ongoing Internet threats to witnesses. The court indicated that the family members (not just the parents) of defendant, the witnesses, and the victim were welcome to sit in the trial, as was the media. The courtroom remained partially closed for the remainder of the trial, which included the testimony of nine witnesses (including defendant) who were in the Suburban at the time of the shooting and six other witnesses. Several witnesses testified to various threats and repercussions of their potential testimony, including one witness who dropped out of school due to the fighting, harassment, and threats, one who moved out of the area, and one who was chased by an individual with a baseball bat following his testimony at the preliminary examination.

II

On appeal, defendant contends that the trial court denied him his constitutional right to a public trial when it partially closed the courtroom. Whether a trial court denied a criminal defendant the right to a public trial involves a question of constitutional law which this Court reviews de novo. *People v Dunbar*, 463 Mich 606, 615; 625 NW2d 1 (2001). The denial of a criminal defendant's Sixth Amendment right to a public trial constitutes a structural error warranting automatic reversal. *People v Anderson (After Remand)*, 446 Mich 392, 405; 521 NW2d 538 (1994), citing *Waller v Georgia*, 467 US 39, 49 n 9; 104 S Ct 2210; 81 L Ed 2d 31 (1984).

A defendant in a criminal proceeding has both a state and federal constitutional right to a public trial. US Const Am VI; Const 1963, art 1, § 20; *People v Kline*, 197 Mich App 165, 169; 494 NW2d 756 (1992). "Although the right to an open trial is not absolute, that right will only

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rarely give way to other interests." *Id*. The United States Supreme Court in *Waller*, *supra* at 48, set forth the requirements for the total closure of a trial:

> [T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

However, this Court in *Kline*, *supra* at 169-170, explained the difference between a partial closure and a total closure as follows:

> *Waller* addressed total closure of a suppression hearing, and does not necessarily govern partial closures. Because the impact of a partial closure does not reach the level of total closure, only a substantial, rather than a compelling, reason for the closure is necessary. [Citations and footnote omitted.]

"A partial closure occurs where the public is only partially excluded, such as when family members or the press are allowed to remain . . . ." *Id*. at 170 n 2 (citations omitted).

In this case, the trial court only partially closed the courtroom because it allowed defendant's relatives, relatives of the victim and the testifying witnesses, and members of the media to remain in the courtroom. *Id*. Thus, a substantial interest, as opposed to a compelling interest, was necessary to implement the partial closure. *Id*. at 170.

The record indicates that the nature of this offense involved two neighborhood street gangs, and there was a high likelihood of influence and intimidation from spectators. The shooting was the culmination of a clash between geographically based neighborhood street gangs, and the trial court and prosecutor noted that there were many young people in the courtroom, many of whom appeared to be from the same high school as the witnesses. In addition, threats were posted on the Internet, and, according to the prosecutor, some of the witnesses indicated they were afraid to testify in court. The threats posted online warned some witnesses that there would be retaliation depending on who testified and who "snitched." One witness testified that his parents forced him to leave the city, another admitted during testimony that a person chased him with a baseball bat after he testified at the preliminary examination, and another testified that he dropped out of school after being harassed. Furthermore, the prosecutor indicated that witnesses were being threatened as they left the courtroom. The trial court also noted that four individuals were removed from the courtroom for inappropriate comments about weapons carried by deputies, that jurors were being escorted out of the courthouse as a safety precaution, and that a juror complained about a remark directed at the jury during a break. Under these circumstances, we find there was a substantial interest in partially closing the courtroom to ensure that witnesses were testifying without threats or intimidation and to protect the integrity of the judicial system.

Additionally, the closure was narrowly tailored, the trial court properly articulated findings on the record, and it considered alternatives to a total closure. *Waller*, *supra* at 48; *Kline*, *supra* at 169. Here, the trial court narrowly tailored the closure to allow relatives of defendant, the victim, and the testifying witnesses, as well as members of the media to remain in the courtroom. The trial court properly articulated findings on the record; specifically, the trial

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court discussed that threats were being made against several witnesses, that the crime was a "neighborhood crime," that rival gangs and many high school-aged individuals were involved, that threatening messages were posted online, that a comment was directed at a juror, and that several individuals were removed from the courtroom for inappropriate remarks about weapons. This record is sufficient to allow this Court to determine that the closure was proper. *Waller*, *supra* at 45 (citations omitted). Furthermore, the trial court properly considered alternatives to totally closing the courtroom. The court left the courtroom open for the first 11 witnesses, it offered to open the courtroom during the testimony of police officers, and it allowed relatives and media members to remain.

III

Defendant also contends that there was insufficient evidence to show that he acted with premeditation and deliberation when he fired a gunshot out of the window of the Suburban at the porch. We review a challenge to the sufficiency of the evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In determining whether the prosecution presented sufficient evidence to sustain a conviction, this Court must construe the evidence in a light most favorable to the prosecution and consider whether there was sufficient evidence to justify a rational trier of fact in finding that all of the elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999).

In order to prove first-degree, premeditated murder, MCL 750.316(1)(a), the prosecution must prove beyond a reasonable doubt that "the defendant killed the victim and that the killing was . . . 'willful, deliberate, and premeditated . . . .'" *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002), quoting MCL 750.316(1)(a). Under the doctrine of transferred intent, if evidence shows that a defendant intended to kill *someone*, yet accidentally killed someone else, the evidence is sufficient to establish the intent element of first-degree murder. *People v Youngblood*, 165 Mich App 381, 388; 418 NW2d 472 (1988). To show premeditation and deliberation, there must be some time span between the initial homicidal intent and the ultimate action. *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003) (citations omitted). "The interval between the initial thought and ultimate action should be long enough to afford a reasonable person time to take a 'second look.'" *Id.* (citations omitted). The facts and circumstances surrounding the killing, including evidence of motive as a result of a previous relationship between the parties, can establish premeditation and deliberation. *Youngblood*, *supra* at 387. Moreover, "[c]ircumstantial evidence and reasonable inferences drawn from the evidence may constitute satisfactory proof of premeditation and deliberation." *People v Unger*, 278 Mich App 210, 229; 749 NW2d 272 (2008). And, "[b]ecause of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

In this case, the evidence viewed in a light most favorable to the prosecution showed that defendant had a motive to commit the murder. Several witnesses testified at trial that the group inside the Suburban was involved in an altercation with a rival street gang earlier in the day. Following the altercation, certain members of the group wanted to return to the area to fight the rival gang. Defendant was informed of the earlier altercation and joined the others in the Suburban. Defendant himself acknowledged during his testimony that certain members of the group informed him they wanted to return to fight the other group, and asked him if he had a gun.

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Additionally, the evidence viewed in a light most favorable to the prosecution showed that defendant planned to shoot someone that night and that he had adequate time for a "second look." Defendant brought a gun with him in the Suburban after he was informed that the group wanted to fight. Defendant had time during the ride from his residence to the scene of the shooting to contemplate and reflect upon his actions. According to witnesses' testimony, the Suburban drove past Mills, where the group inside the vehicle observed a crowd of people gathered on a porch, some of whom were involved in the earlier altercation. The Suburban then turned around in a driveway and circled back, turning onto Mills. During this time, defendant had an opportunity for a "second look" and time to contemplate his actions. According to the testimony of the witness who was seated next to defendant in the Suburban, as the vehicle approached the house, defendant's window rolled down, and defendant pointed a gun out of the window and fired a shot at the porch where the kids were gathered. As defendant's window rolled down and he pointed the gun, he had yet another opportunity for a "second look" and to reflect on his actions before he fired the weapon into the crowd of people on the porch.

In reaching our conclusion that the evidence was sufficient to establish the elements of first-degree, premeditated murder, we will not interfere with the factfinder's role of determining the weight of the evidence or credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). "It is the function of the jury alone to listen to testimony, weigh the evidence and decide the questions of fact. . . . Juries, not appellate courts, see and hear witnesses and are in a much better position to decide the weight and credibility to be given to their testimony." *Id.*, quoting *People v Palmer*, 392 Mich 370, 375-376; 220 NW2d 393 (1974). Reviewing the evidence in a light most favorable to the prosecution, and considering that only minimal circumstantial evidence is needed to prove a defendant's state of mind, we find there was sufficient evidence to allow a rational trier of fact to conclude beyond a reasonable doubt that defendant was guilty of first-degree, premeditated murder.

Affirmed.

/s/ Jane M. Beckering
/s/ Kurtis T. Wilder
/s/ Alton T. Davis

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