

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ASKEW,

Defendant-Appellant.

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UNPUBLISHED

January 28, 2003

No. 225861

Wayne Circuit Court

LC No. 98-007542

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

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317, and sentenced to 20 to 40 years' imprisonment. He appeals as of right. We reverse and remand.

There is no dispute that defendant stabbed and killed Shane Venegar after Venegar followed him into his home. However, the manner in which Venegar followed defendant into the home was disputed at trial. The prosecutor argued that Venegar posed no threat and that defendant invited him into the house. Defendant maintained that Venegar chased him into the home, where defendant acted in self-defense after Venegar threatened to rob and kill him.

Each prosecution witness told a slightly different version of the events leading up to the stabbing. Adrigo Cowans testified that early on June 13, 1998, Venegar told him that he needed to "get his money" from defendant. Cowans and his girlfriend accompanied Venegar to defendant's house on Klinger Street, which was a couple blocks away. Cowans stated that defendant and Venegar talked outdoors, and eventually the talk turned into an argument with defendant saying he did not have Venegar's money. Cowans, who had been sitting in Venegar's car, left the vehicle and approached defendant and Venegar. Venegar told Cowans to get back in the car. Cowans testified that defendant pulled a gun, put it to his head, and threatened to kill him.<sup>1</sup> The police later found a .25 caliber pistol in defendant's upstairs bedroom. Cowans and Venegar returned to the car and went to Cowans' house.

They were joined at Cowans' house by Tyrod Williams and Diedra Greene. Williams and Greene were preparing to go to a wedding, and Venegar was going to drive them. While at

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<sup>1</sup> Cowans admitted at trial that he did not tell the police about this incident.

the house Venegar removed his shirt in order to get a haircut, and others could see that he had no weapon.

At about 3:00 p.m. or 3:30 p.m., all five got into Venegar's car to take Williams and Greene to the wedding. As they were driving, Venegar announced that he needed to make a "quick stop" at defendant's house. He stopped his car in front of defendant's house. Defendant was across the street talking to someone, but walked into the middle of the street. Venegar got out to talk with defendant while the others waited in the car. Williams testified that the car windows were down and that he was about five feet from defendant and Venegar; he did not hear any arguing or fighting. Greene heard voices rise, but she could not hear what they were saying.<sup>2</sup>

Defendant and Venegar talked for about eight to ten minutes. They walked to the other side of the car together and talked, not argued, for about five minutes. Williams testified that while the two were talking on the other side of the car, Cowans got out of the car with a baseball bat and approached the two men. Greene screamed when this happened, according to Williams. Venegar told Cowans to get back in the car, and Cowans complied without using the bat.<sup>3</sup>

Defendant then took his shirt off, threw it to the ground, and, according to Williams, "ran" into his house. Williams did not see a weapon on him. Greene said defendant "walked" into the house. According to Cowans, defendant told Venegar that they could talk further in the house. Cowans testified that Venegar went in with defendant.

The manner in which Venegar followed defendant into the house was characterized in different ways by the prosecution's witnesses. According to Williams, Venegar "walked" into the house about two minutes after defendant. On cross-examination, Williams testified that Venegar walked into the house one minute later. He also admitted that, at the preliminary examination, he testified that Venegar followed in about ten seconds. He also testified on cross-examination that Greene screamed when Cowans got out of the car and when Venegar "ran" after defendant. On redirect, he clarified that Venegar "walked" to the house and that it occurred one minute after defendant went into the house. Another portion of his preliminary examination testimony also characterized the delay as one minute. Greene testified that Venegar "walked" into the house after a "minute or two." When Venegar entered, the door was already open.

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<sup>2</sup> Greene testified that defendant and Venegar were "one or two inches" from the car. When she demonstrated how far "one or two inches" was in her mind, the court and the attorneys agreed that she identified a distance of approximately seven *feet*. She confirmed that, in her mind, this was "one or two inches." Later, after she described something as occurring in a few minutes, the attorneys tested her again and determined that, in her mind, a minute took about fourteen seconds. Greene also did not know that Seven Mile Road is north of Six Mile Road. Thus, a trier of fact could question her descriptions of measurement, time, and direction.

<sup>3</sup> Greene, however, did not remember screaming at any time for any reason, and she did not remember Cowans getting out of the car with any object, and she did not see Cowans or Venegar make any threatening moves toward defendant. Cowans testified that he got out of the car "for no reason" during the initial eight-to-ten-minute conversation and walked toward Venegar and defendant. He said he got back into the car when Venegar told him to do so. Cowans testified that he did not get out with a baseball bat until after the stabbing.

Greene then got out of the car and walked or ran down the street. She testified she did so “because I actually didn’t know what the man was running in the house for.” She did not clarify which man was running; she had said defendant “went” into the house, and that Venegar “walked.” Cowans, however, testified that Greene got out of the car about ten minutes after Venegar entered the house because she felt she was already late for the wedding.

None of the witnesses saw what happened in defendant’s house. As Cowans (now driving) was backing up to get Greene back into the car, Venegar emerged from the house holding his stomach. Venegar had been stabbed once in the chest and died from massive blood loss. Venegar also had a wound on his right hand, which the doctor characterized as consistent with a defensive wound. There were no scars from recent fighting, but there were old healed scars. A low level of cocaine was found in Venegar’s system, but it was not connected with his death.

Venegar’s mother testified that he was of small stature, had asthma which caused him to carry an inhaler at all times, and had a rod in his leg which prevented him from standing on the leg for extended periods of time and caused him to hobble. He could run “occasionally,” though.

While the police were in the defendant’s home, defendant entered the house and excitedly asked why the police were there. He was arrested. When defendant was placed in the police car, he started speaking on his own. He told Officer Manix Kroma, “I did it. I ain’t afraid of him. He came in there and said ‘James, where’s the – give me the money,’ and I told him I don’t have no money.” Defendant also claimed that Venegar had his hand in his pocket and swung at defendant, whereupon defendant took a knife from his right rear pocket and stabbed Venegar once. Defendant also told Officer Kroma, “I’m not going to let him take my mother’s house from me.” He also told the officer that someone ran after him with an AK-47 on the upper floor,<sup>4</sup> and that Venegar said he was going to “blow up his (defendant’s) head.”

Defendant gave a formal statement to homicide investigator Barbara Simon at police headquarters later that day. In it, he described two confrontations. Early in the day, he rode with Venegar and another man, and Venegar started talking about money. As defendant got out of the car, Venegar and the driver also got out, so defendant pulled his .25 caliber pistol out of his pocket and pointed it at the two men. According to defendant, they said, “Shoot me! Shoot me!” and defendant ran into his home. Defendant hid the gun at home, then went across the street. He sent a friend to get some liquor, and defendant stayed at the friend’s house, drinking. An hour and a half after the incident with Venegar, defendant returned home to get some ice and, while there, Venegar simply walked into the house asking where his money was. Defendant continued:

I grabbed him, and he slapped me, and he said, “the house is ours.”

It looked like he was reaching for something. That’s when I pulled my knife out of my right back pocket and stabbed Shane in the stomach. Shane grabbed his stomach and he said, “You’re dead.” And he turned around and ran out the door.

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<sup>4</sup> At trial, defendant denied making this statement to the police.

. . . I ran down the street, and I yelled for someone to call 9-1-1.

Defendant's statement reflected that he never saw a weapon on Venegar.

Defendant testified in his own behalf at trial. He testified that, in the days before the stabbing, a woman named Tracy Jackson came to him "out of distress" because she "had been beaten pretty severely." Venegar's friends came to defendant's house, looking for Jackson, and eventually Venegar came. Defendant confronted Venegar on June 12, 1998; Venegar said Jackson owed him some money and that "someone was going to pay him his money."

Defendant testified that on June 13, 1998, Venegar and another man confronted defendant in a vacant lot; Venegar had a tire iron, and the other man had a baseball bat. Defendant pulled a gun from his pocket, pointed it at the men, successfully demanded that they drop their weapons, and then ran home to safety. Defendant stated that the men said, "Shoot me, shoot me," and said they would "get with me about that and get their money." Defendant said he was not going to shoot them, but just wanted to get away. He hid the gun at home.

Feeling the situation had gotten volatile, defendant packed a suitcase and went across the street to a neighbor's house to call his brother. After two or three hours of waiting at the neighbor's house, defendant was getting ready to return home to get ice cubes. Venegar pulled up and called over to defendant, who walked from the neighbor's porch and met up with Venegar in the street. Defendant claimed that Venegar immediately went "crazy," demanding money and saying he was going to take defendant's mother's house if he did not get paid. Venegar said he would kill defendant and firebomb his house. During this argument, defendant heard a woman scream "he's got a bat"; he turned to see Cowans approaching with a bat.

Defendant took off his shirt and wrapped it around his hands to help stop the bat if it was swung. He then ran into his house and up to the second floor, where he hid in a closet. He did not remember whether he shut the front door behind him. Defendant heard talking outside and a car starting, so – thinking Venegar had left – he came out of the closet and down the stairs. When he reached the bottom of the stairs, Venegar jumped out, defendant tripped and fell, and Venegar started hitting defendant with his fists.

Defendant continued:

A. All this time, he's telling me he's going to kill me. "I want my m\_\_\_\_ f\_\_\_\_" – excuse me. "I want my m\_\_\_\_ f\_\_\_\_ money." He's going to kill me. Then from somewhere, he comes up with a pointed object, and he stabs me in my left hand, second index finger.

Q. Okay. And after he stabs you, what do you do at that point?

A. I'm able to – I'm scared at this point. I'm very terrified. I'm able to retrieve a pocket knife that I had in my back pocket that I carry three hundred sixty five days of the year.

Q. And what do you do with it?

A. I was able to open it, and I'm swinging in a motion like this, asking him to please step back and please get out of my house.

Q. And does he respond to your asking him to step back?

A. He says – Excuse me again. “I'm not scared of you, m\_\_\_\_ f\_\_\_\_. I'm going to kill you. I want my money.”

Q. Did you believe him at that point?

A. Yes, I did.

\* \* \*

Q. Do you strike him at any time while –

A. Yes, I do. I think I caught him in his hand area because that's when he – That's when he said – Well, I can't think of what he said, but it was curse words, and that's when I heard the words, “I'm going to blow your head off, m\_\_\_\_ f\_\_\_\_.”

Defendant testified that he was backing up the stairway, swinging the knife, asking Venegar to “[p]lease, get out of my house.” The knife slashed Venegar's hand, and Venegar threatened to “blow [defendant's] head off.”

A. . . . He goes with – I believe it was his right hand. I'm not sure. I believe it was his right hand as if he's retrieving a weapon.

Q. And what did you do at that point?

A. At that point, I take action that I did. I just thrust forward with the knife.

Q. Okay. And after your thrust forward with the knife, what happens, at that time?

A. He immediately – Whatever he was trying to retrieve, he – It must have caught him because he takes his hand up like this, and he says, “You're dead, m\_\_\_\_ f\_\_\_\_,” and he runs out of the house.

Defendant stated that he asked neighbors to call the police, and fashioned a white towel into a compress to help Venegar. When Venegar's friends returned, defendant ran back into his house. He heard a window being knocked out.

As the police arrived and ordered some people outside to lie down, defendant was still at his house. He ran across the street to make another phone call because EMS had not yet arrived. Defendant returned to his house to explain what happened. The police kept asking defendant where the gun was, under the mistaken belief there had been a shooting.

Defendant maintained that he had a severe vision problem.<sup>5</sup> On cross-examination, the prosecutor impeached defendant's testimony about his vision by ascertaining that he was able to write letters, saw cars on the street, saw Venegar approaching his house on the date of the stabbing, and saw Cowans approaching with a bat.

As for a weapon, defendant testified that he felt – but did not see – a weapon on Venegar:

Q. Did you ever see Mr. Venegar with anything in his hand?

A. No, I didn't.

Q. So, you didn't see him come up with a pointy object?

A. I felt the pointed object.

Q. You could cut your own self, couldn't you? You had the pointy object, right?

A. No, sir. I couldn't of [*sic*] cut myself.

Q. You never saw Mr. Venegar with a weapon, right?

A. It appeared to me that when he hit me – I mean when he struck me in the hand, it might have been a pointed object in his hand.

Defendant explained that he did not cut himself, inasmuch as he pulled his own knife out *after* he was struck or poked by Venegar.

Following deliberations, defendant was convicted of second-degree murder, and sentenced to 20 to 40 years' imprisonment.

#### I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that the evidence was insufficient to support a conviction for second-degree murder because no prosecution witnesses knew what really happened inside the house. The question is whether, when the evidence is viewed in the light most favorable to the prosecutor, a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 148 (2002).

Defendant argued that Venegar's act of following him was a threatening gesture, which led him to believe that he was in danger. However, this theory is contradicted by Cowans, who was able to hear the conversation out in the street. According to Cowans, defendant told Venegar that they could talk further in the house. Cowans testified that Venegar went in with

<sup>5</sup> An optometrist testified that defendant had poor eyesight when examined a month before trial, but was impeached when he testified that letters written by defendant could not have been written if defendant's vision were as poor as thought, absent use of a vision aid.

defendant. Others said Venegar followed as quickly as ten seconds afterwards and as late as two minutes afterwards, which could be explained by Venegar's medical condition.

Defendant rests his argument on speculation about what "may" have happened in the house. That speculation is not enough to overcome Cowans' testimony that Venegar was invited into the house, from which a rationale trier of fact could reasonably infer that Venegar was not an unwelcome intruder. The lack of a weapon in Venegar's possession also supports the prosecution's theory that defendant was not in danger. An argument that the witnesses were credible or not credible affects the weight of evidence, not the sufficiency, and will not be resolved on appeal. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 478, amended 441 Mich 1201 (1992). It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *Hardiman*, *supra* at 428.

## II. "STATE OF MIND" EVIDENCE

Defendant next argues that the trial court denied him an opportunity to present a defense when it excluded his testimony that he believed Venegar had beaten Tracy Jackson, which defendant argues supported his theory that he had an honest belief that Venegar was dangerous. The trial court excluded the testimony as hearsay. On appeal, defendant argues that the testimony was offered for a non-hearsay purpose, consistent with MRE 404(a)(2), which provides:

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

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(2) *Character of alleged victim of homicide.* When self-defense is an issue in a charge of homicide, evidence of a trait of character for aggression of the alleged victim of the crime offered by an accused, or evidence offered by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution to rebut evidence that the alleged victim was the first aggressor[.]

We agree that the evidence was offered for a non-hearsay purpose, offered to show defendant's state of mind, i.e., that defendant had a basis for fearing Venegar, and not offered to prove the truth of the matter asserted, i.e., that Venegar actually beat Jackson. See MRE 801(c) (definition of hearsay). However, we disagree with defendant's argument that this error deprived him of a defense and, therefore, violated his right to a fair trial.

We do not find that this case fits within the parameters of those cases holding that a defendant was denied the right to present a defense. See *Rock v Arkansas*, 483 US 43, 55-56, 58; 107 S Ct 2704; 97 L Ed 2d 37 (1987); *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973); *Washington v Texas*, 388 US 14, 22-23; 87 S Ct 1920; 18 L Ed 2d 1019 (1967). These cases, which found the error to be of constitutional magnitude, dealt with a court

or state rule that required the exclusion of evidence which could not be introduced in another manner. There was no such restriction in the present case.

Although defendant was not able to present evidence of the attack on Tracy Jackson through his own testimony, he could have called her to testify directly. Defendant was able to testify about the specific threats leveled against him, and violence perpetrated against him, by Venegar. Also, the jury heard evidence regarding healed scars Venegar had on his body. While specific additional testimony about attacks on Tracy Jackson would have made defendant's theory stronger, the exclusion of the evidence *through defendant's testimony* did not deny him a defense. Defendant's testimony was not the only way to establish the theory of self-defense. Therefore, we conclude that the court's ruling that the proposed evidence was hearsay did not deprive defendant of the right to present the defense of self-defense.

Nevertheless, we do find that the trial court abused its discretion in excluding defendant's testimony, given that it was clearly admissible under MRE 404(a)(2). *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). Although the error was not sufficient to constitute a constitutional violation, we conclude that the error was not harmless and requires reversal because there was little other evidence presented regarding Venegar's propensity for violence from which the jury could have inferred that defendant's fear of the victim was reasonable. *People v Fortson*, 202 Mich App 13, 19; 507 NW2d 763 (1993).

### III. PROSECUTORIAL MISCONDUCT

Defendant asserts error in portions of the prosecutor's rebuttal argument. Claims of prosecutorial misconduct are reviewed on a case-by-case basis, examining the remarks in context, to determine if the defendant was denied a fair and impartial trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). However, defendant did not object to the challenged remarks at trial, so the issue is not preserved and is reviewed only for plain error. *People v Carines*, 460 Mich 750, 752-753; 597 NW2d 130 (1999).

An unpreserved claim of error may lead to reversal only if three requirements are met:

1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. [*Id.* at 763; citation omitted.]

After a defendant establishes these three requirements, this Court must exercise discretion whether to reverse the conviction:

Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error “‘seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings’ independent of the defendant’s innocence.” [*Id.*; citation omitted.]

First, we do not consider the prosecutor's reference to “magic” to be strong language denigrating defense counsel. In any event, a prosecutor need not use the blandest possible terms in closing argument. *Aldrich, supra* at 112. Second, the prosecutor did not argue that defense

counsel thought Venegar deserved to die, rather she argued that the jury should not conclude that Venegar deserved to die even if it believed him to be a bad person. Third, the prosecutor did not commit error when she noted that defendant failed to present witnesses on his behalf because references to the lack of corroborating evidence were permissible and did not shift the burden of proof. *People v Fields*, 450 Mich 94, 106; 538 NW2d 356 (1995). Thus, because the prosecutor's remarks were not improper, defendant has failed to show plain error effecting his substantial rights.

#### IV. JUDICIAL MISCONDUCT

Defendant argues that he was denied a fair trial by the trial court's comments and interruptions. Because defendant did not object at trial, the issue is unpreserved and reviewed for plain error affecting defendant's substantial rights. *Carines, supra* at 763-764. The test is whether the court's comments pierced the veil of judicial impartiality and unduly influenced the jury. *People v Paquette*, 214 Mich App 336, 341; 543 NW2d 342 (1995).

First, we disagree that the court implied that it had to protect the jury from defendant when it admonished defendant for speaking during the introduction of the parties. While the court may have been disrespectful to defendant, particularly when it instructed him to "shut your mouth," we are not persuaded that the court's comments unduly influenced the jury.

Second, although defendant argues that the trial court berated defense counsel and continued to "harangue" her, he cites only one example in which the court admonished defense counsel for asking questions regarding a subject that defense counsel had earlier objected to. We do not find that this comment amounted to "berating" defense counsel or indicated partiality.

Third, while we are concerned that the court took over voir dire of a defense expert, we disagree with defendant that the court denigrated the witness' qualifications. The court simply clarified the difference between ophthalmologists and optometrists, and that, contrary to the prosecutor's insinuation, optometrists were entitled to be referred to as "doctor." We conclude that the court's questions were not improper because the purpose was to clarify testimony and did not indicate partiality. *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996).

Finally, we find that the court's comment regarding the prosecutor's use of a letter in the court's file was proper. The court correctly stated that the file is a public file to which *both* sides had equal access. MCR 8.119(E)(1). We do not construe this explanation as implying that the prosecution had the backing of the court, as defendant contends. Accordingly, defendant has failed to show plain error.

#### V. MIRANDA RIGHTS

Defendant argues that he was entitled to have his *Miranda*<sup>6</sup> rights read to him, rather than presented in written form, because of his vision disorder. This issue was preserved by a *Walker*<sup>7</sup>

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<sup>6</sup> *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

<sup>7</sup> *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2 87 (1965).

hearing. Defendant challenged the legality of a formal written statement made at police headquarters and oral statements made to arresting officers. Oral recitation of rights may be necessary when written advice would be ineffective. *People v Nantelle*, 130 Mich App 51, 53; 342 NW2d 627 (1983).

We examine the entire record and make an independent determination about the voluntariness of confessions. *People v Sexton*, 458 Mich 43, 68; 580 NW2d 404 (1998). This Court will not reverse unless left with a definite and firm conviction that a mistake was made – in other words, the “clearly erroneous” standard applies. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000).

When determining whether a waiver of the right to silence was knowing and intelligent, an objective standard must be applied through an inspection of the totality of the circumstances involved. *People v Daoud*, 462 Mich 621, 633-634; 614 NW2d 152 (2000). An officer testified that he informed defendant of his rights at the scene when he was arrested, before he made certain voluntarily statements in the police car. Defendant testified that he did not “recall” being advised of his rights, but it was possible that he was so advised. Defendant’s testimony about his vision disorder was contradicted by his conduct, including writing lengthy letters to the court with great clarity, and his conduct during the interrogation. Defendant read the rights back to the investigator and initialed them neatly; he also signed his statement. Defendant explained that he could not see the statement and only signed it to “appease” the police. Deference is given to the trial court’s assessment of the weight of the evidence and credibility of the witnesses. *Sexton (After Remand)*, *supra* at 752. After reviewing the facts, we find that the court did not clearly err in finding that defendant was informed of his rights at the scene and that he was able to read the written rights presented to him at police headquarters, concluding that defendant voluntarily waived his *Miranda* rights.

## VI. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was denied the effective assistance of counsel. We agree. This issue was preserved by a hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel’s performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different; *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052, 2065; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994), and (3) that the resultant proceedings were fundamentally unfair or unreliable, *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant asserts that his trial counsel was ineffective for failing to call Fred Hamilton as a witness. Hamilton, who lived across the street from defendant, testified at the *Ginther* hearing that he was sitting on his porch during the altercation and heard defendant telling Venegar “quite a few times” in an excited, mad voice to leave his house.

A defendant must overcome the presumption that a trial counsel’s decision not to call a witness was sound trial strategy by showing that his counsel’s decision deprived him of a

substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). A substantial defense is a defense that would have affected the outcome of the proceeding. *Id.*

Defense counsel testified at the *Ginther* hearing that defendant had requested that she call Hamilton as a witness, but claimed she was unable to locate him. She called Hamilton by telephone twice “or maybe more” (she documented two times in her notes) and spoke with someone who answered the phone, but “probably” did not leave messages for him. Defense counsel also stated that she went to the neighborhood, but did not have an address for Hamilton; defendant had told her Hamilton “usually sat on somebody’s porch to have a drink and I didn’t see anybody . . . hanging out over there.” She went to defendant’s house and “kind of looked in” but did not recall knocking on the door. She did not visit other houses because she was alone.

Defense counsel testified that she did not recall requesting or receiving any information from prior counsel, and she did not recognize the 1998 investigator’s report prepared for prior counsel, which summarized Hamilton’s proposed testimony and contained his address. The attorneys at the *Ginther* hearing stipulated that defense counsel did not request the prior attorney’s file; the prior attorney would have provided it if asked; and the file contained the original investigator’s report with Hamilton’s proposed testimony.

Hamilton stated that he had lived at the same address for twenty-three or twenty-four years as of the date of the *Ginther* hearing, and had the same telephone number as shown in trial counsel’s notes. He denied avoiding defense counsel or the police. A “paralegal investigator” with the State Appellate Defender’s Office (SADO), who had seventeen years’ experience, was given defendant’s address and asked to find Hamilton. She went to the neighborhood and found Hamilton on her second attempt (her first attempt failed because she had been given a bad address). She found Hamilton to be very cooperative.

After careful consideration, we believe that trial counsel did not take reasonable steps to locate Hamilton. Applying an objective standard of reasonableness, she should have obtained prior counsel’s file, which would have revealed the substance of Hamilton’s proposed testimony, as well as his address. If counsel was afraid to canvass the neighborhood, she could have sought the court’s assistance through retention of an investigator (in fact, such a request would probably be met with a response that an investigator had previously worked on the file, leading a reasonable attorney to seek the prior work product). Finally, when she reached Hamilton’s house by phone she should have left some type of message.

The prosecutor argues that the ease with which an investigator found Hamilton in 2001 is not relevant to the ease with which he could have been found by defense counsel in 1999. We disagree. The ease with which the SADO “paralegal investigator” found Hamilton two years later – in the same house in the same neighborhood – is certainly relevant to an inquiry into defense counsel’s efforts in 1999, especially because defense counsel would have had access to an investigator’s report dated October 16, 1998, identifying Hamilton’s address and proposed testimony. It usually becomes harder to find someone after the passage of time. If they can be found with ease years later, a court can infer that – all things being equal – the person could have been found at the time of trial. Hamilton testified that he lived in the same house, had the same phone number, and did not avoid defense counsel. All things were equal except the effort.

The prosecutor also argues that Hamilton had a serious credibility issue because he varied his description of the width of the street separating his house from defendant's. We do not believe Hamilton's proposed testimony should be disregarded because of a minor discrepancy, especially when we consider that a principal prosecution witness exhibited even greater difficulty with physical measurements.

Only one prosecution witness testified that defendant invited Venegar into the house, making it look like an ambush or at least an amicable meeting. Hamilton's testimony would have directly contradicted that scenario by showing that defendant did not want Venegar in his house, which is especially important in a self-defense case where a defendant has already retreated into his home. See *People v Riddle*, 467 Mich 116, 126-130; 649 NW2d 30 (2002). Hamilton's testimony would have corroborated defendant's testimony that he told defendant several times to leave before the fatal stabbing occurred.

Further, we note that defense counsel failed to call Tracy Jackson as a witness after the court refused to allow defendant to testify about the details of Jackson's attack, allegedly committed by Venegar; again, a decision which we cannot consider trial strategy. Her testimony could have further corroborated defendant's version of events. We believe that defense counsel's failure to call these witnesses cannot be considered sound trial strategy and deprived defendant of a substantial defense. *Daniel, supra* at 58. Therefore, we conclude that defense counsel's deficient performance was so prejudicial to defendant that it resulted in an unreliable outcome. Accordingly, we hold that defendant was denied ineffective assistance of counsel and is entitled to a new trial.

We do not believe that defense counsel was ineffective for failing to raise objections to other matters asserted in this appeal. Objections would not have been successful for the reasons stated in this opinion. Trial counsel is not required to make a futile objection. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

## VII. REMAINING ISSUES

Because we are remanding this case for a new trial, it is unnecessary for us to address defendant's sentencing issues. Also, defendant's argument that the court erred by admitting into evidence an edited version of defendant's statement is abandoned. Although raised in the statement of questions in his *in propria persona* brief, it is not argued in the body of the brief. *Knoke v East Jackson Public School Dist*, 201 Mich App 480, 485; 506 NW2d 878 (1993). Lastly, we also reject defendant's argument that reversal is independently required due to the cumulative effect of multiple errors. *People v Knapp*, 244 Mich App 361, 387-388; 624 NW2d 227 (2001).

Reversed and remanded. We do not retain jurisdiction.

/s/ Henry William Saad  
/s/ Michael R. Smolenski  
/s/ Donald S. Owens