

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHAD GOOD,

Defendant-Appellant.

UNPUBLISHED

February 7, 2003

No. 229083

Saginaw Circuit Court

LC No. 98-016248-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL WESLEY SPERLING,

Defendant-Appellant.

No. 229136

Saginaw Circuit Court

LC No. 98-016262-FC

Before: Whitbeck, C.J., and Hood and Kelly, JJ.

PER CURIAM.

This appeal stems from crimes defendants Chad Good and Daniel Wesley Sperling perpetrated against Mike Hnevsa and others, whom defendants mistakenly thought had killed their friend, Corey Henderson. A jury convicted each defendant of assault with intent to do great bodily harm,¹ conspiracy² to commit assault with intent to do great bodily harm,³ possession of a firearm during the commission of a felony,⁴ and carrying a weapon with unlawful intent.⁵ The

¹ MCL 750.84.

² Each defendant's judgment of sentence incorrectly lists the conspiracy convictions as being under MCL 750.84, the assault with intent to do great bodily harm statute, rather than under the conspiracy statute, MCL 750.157a.

³ MCL 750.157a.

⁴ MCL 750.227b.

⁵ MCL 750.226.

trial court sentenced Good to concurrent prison terms of 48 to 120 months for the assault, 48 to 120 months for the conspiracy, and 24 to 60 months for carrying a weapon with unlawful intent. The trial court ordered him to serve these sentences consecutively to a twenty-four month term for felony-firearm, with fifty days' credit for time served on the felony-firearm sentence only. The trial court sentenced Sperling to concurrent prison terms of 42 to 120 months for the assault, 42 to 120 months for the conspiracy, and 12 to 60 months for the carrying a weapon with unlawful intent. The trial court ordered him to serve these sentences consecutively to a twenty-four month term for felony-firearm, with fifty days' credit for time served on the felony-firearm sentence only. We affirm.

I. Basic Facts And Procedural History

At trial in this case, Deputy Miguel Gomez said that between 4:00 a.m. and 4:30 a.m. on August 1, 1998, he saw Corey Henderson with a stab wound to the right side of his chest. Billy Ketner was attempting to perform cardiopulmonary resuscitation on Henderson. When Sperling arrived on the scene and talked to Ketner, Deputy Gomez heard Ketner tell Sperling that "they jumped us and Corey [Henderson] got stabbed and I think he's dying." When Sperling asked who committed the stabbing, Ketner replied "it was Mark and Mike and them," presumably referring to Mark Lytle and Mike Hnevsa. Ketner also told Sperling that people responsible for the stabbing were in Hnevsa's car. After that, Sperling said, "Okay, I'll take care of it" and walked away from Ketner. This was, however, incorrect information because it was undisputed that Lytle, not Hnevsa, stabbed Henderson, and Lytle was actually convicted of this offense.

As Michael Burtch explained it, for two months in the summer of 1998, three men, including Lytle and Hnevsa, rented the basement of his house. Burtch, who was friends with Good and Sperling, was home during the early morning hours of August 1, 1998. Hnevsa, Lytle, and Viles were in the basement. When Good and Sperling came to his house, Burtch, Viles, and Huntoon saw that Good had a shotgun. Good and Sperling appeared angry and said that they wanted Hnevsa and Lytle because they were going to fight with them. Viles said that Good and Sperling claimed to have had "50 guys coming over this way and that they were – was [sic] going to shoot us." Good and Sperling reportedly told Viles to leave because they did not want him to get hurt. Burtch eventually convinced Good and Sperling to leave, and then went to the basement to tell the other men that they had to leave. Huntoon said that Burtch indicated that "they," evidently meaning Good and Sperling told Burtch that "they were going to shoot one of us, shoot us."

Viles, Hnevsa, and Huntoon then left Burtch's house in Hnevsa's car, but Sperling and Good followed them in another car. As they were driving, while the car in which Good and Sperling were traveling was still behind them, Huntoon warned his companions to "get down, they got a gun, get down." At that point, Hnevsa, who thought he heard only a single shot, said that the back window of his car was blown out. The shotgun blast hit Viles, who was sitting in the front passenger seat next to Hnevsa, in the back of the head. Unlike Hnevsa, Viles believed that two gunshots went through the back window of Hnevsa's car, although he was not positive that there were two shots. Huntoon, however, thought that he heard three gunshots. The first shot did not hit Hnevsa's car, the second shot shattered the car's rear window, and the third shot went through the window and hit Viles in the back of his head. Richard Tausch, an onlooker not connected to these two groups of men, said that, after the two cars involved in the chase passed his car, he heard one gunshot.

Viles said that, after he was hit, Good and Sperling “just disappeared,” and Huntoon explained that the vehicle Good was driving had turned around after the shooting. Eventually, Viles was taken to a hospital. He said that his injuries consisted of roughly thirty pellets in the back of his head. Anthony Bair, a paramedic, said that Viles had ten to fifteen small BB holes in the back and top of his head. Michael Farmer, D.O., an emergency room physician, saw Viles in the early morning hours of August 1, 1998, and determined that Viles had multiple pellets embedded in his skull. While investigating the shooting, Detective Wilbur Yancer, Jr., seized a shotgun that was located under “a chicken coop or small outbuilding” after Good showed him where the shotgun was located.

Both defendants said that they had a close relationship with Henderson, and provided a different explanation of what had happened on the night in question. According to Sperling, at about 3:00 or 4:00 a.m. on August 1, 1998, he received a call informing him that Henderson had been stabbed and was dying. Sperling went to the area where the stabbing occurred and, he said, “Bill,” evidently William Ketner, told him that Hnevsa had stabbed Henderson. Though Sperling said Deputy Gomez warned him “don’t go out there,” he headed for Good’s residence to tell him the news and to have him help find Hnevsa. Sperling said he wanted to find Hnevsa “[t]o fight and to find him out for the cops, I guess,” but he did not intend to kill him.

Sperling met with Good at his house. When the men left in search of Hnevsa, Good took a gun with him because, he said, “we knew that there was more people than us and I was scared, most of them were bigger than me, and I didn’t want to be the next one killed.” Sperling described himself as “pretty upset” at the time. They went to the house where Burtch and Hnevsa lived. Good testified that he thought Hnevsa had stabbed Henderson. Sperling said that Viles told him that Hnevsa was downstairs and that Burtch asked him and Good to leave, which they did. Sperling stressed that he did not say he was going to kill anybody and that he did not hear anyone say that. When asked if he ever told Burtch or anyone else that he was there to kill Hnevsa, Good denied telling anyone that he was going to kill anyone and denied saying anything like he was going to kill Hnevsa. Good told some people there that “they probably didn’t want to be there because there was some family and friends coming of [Henderson’s] and might not be a good situation that anybody wanted to be involved in.” Good was concerned that some of Henderson’s family and friends “were pretty rough characters and they didn’t take kindly to what happened there.”

Sperling and Good said that they then drove about a quarter of a mile to the home of one of Good’s friends. They intended to call the police, but no one was at home, so they could not make the call. They went back and blocked or partially blocked Burtch’s driveway to try to stop people from leaving. Sperling thought the police would be there at any time, but Hnevsa’s car eventually “came barreling out of the driveway.” Good said that Hnevsa’s car “about hit me and [Sperling] broadside,” so Sperling put his car in reverse, got out of Hnevsa’s way, and chased Hnevsa’s car. Sperling wanted Hnevsa to stop and explained that he was probably going to fight with him if he stopped. Sperling said that he heard a gunshot as he was pulling away from Hnevsa’s car and that, after this, he called Good a “stupid f***er” and turned off the road. Sperling said that he never intended to use a weapon against anyone in Hnevsa’s car and that he never intended to kill anyone in that car. Good similarly said that he had not intended to kill anyone before leaving his house.

Good, who conceded that he is a hunter, and whom Sperling described as a good hunter, said that he shot “at the passenger’s rear tire of [Hnevsa’s] car because he was increasingly pulling away from us headed towards the route out of state.” Good specifically said that he intended to hit “the rear passenger’s tire of the car.” Though it looked like he hit the top of the trunk and the “back corner” of the back window, he had not intended to hit that area. Good also thought that Hnevsa was the only person in Hnevsa’s car at the time of the incident.

Good later hid the shotgun in a chicken coop. However, he eventually contacted the police, told “everything” he could remember to Detective Yancer, and showed him where he put the shotgun. Good testified that he was upset because he had no intention of shooting into the car, or shooting at anyone, but only meant to hit the back tire to stop the car. Good, who admitted that he been convicted of larceny in a building on April 27, 1992, when he was seventeen years old, emphasized that he merely wanted to stop and hold Hnevsa for the police because he thought Hnevsa had stabbed Henderson, but that he might have had to fight him “if they come swinging at us.”

II. Hearsay

A. Standard Of Review

Good argues that the trial court erred when it admitted at trial Burtch’s earlier testimony that Good and Sperling had threatened to kill Hnevsa because the testimony did not fit the state-of-mind exception to the rule against hearsay. Good also claims that Burtch’s previous testimony, as a recorded recollection, could not be used as substantive evidence. Good failed to preserve this issue for appeal by objecting on these bases at trial.⁶ Accordingly, he must demonstrate plain error affecting his substantial rights.⁷

B. Analysis

At trial, Burtch testified that he remembered Good and Sperling “saying that they wanted Mr. Hnevsa and Mr. Lytle.” After this, the prosecutor asked Burtch if they said “they were going to kill them,” to which Burtch replied, “I don’t recall that any – at this time anymore.” The prosecutor then effectively read into evidence a portion of Burtch’s testimony at Lytle’s trial for killing Henderson, in which Burtch said:

I told them [Good and Sperling] that I didn’t want any acts of violence going on around my home. They were yelling. They wanted Mark [Lytle] and Mike [Hnevsa] and all them. They wanted to go down there. They were going to kill him and stuff like that.

Good argues that this testimony did not reveal his state of mind at the time of the crime, because Burtch’s testimony purportedly described his statements *before* the crime. Good claims that Burtch’s testimony also failed to describe his state of mind because it mixed descriptions of him

⁶ *People v Cain*, 238 Mich App 95, 115; 605 NW2d 28 (1999).

⁷ *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

and Sperling. Therefore, Good claims, this testimony did not fulfill the requirements of the state-of-mind exception to the rule against hearsay in MRE 803(3). Also characterizing this past testimony as a recorded recollection,⁸ Good adds that, even without a request, the trial court should have instructed the jury that this testimony could not be used as substantive evidence.

Good's argument fails because he inaccurately characterizes the nature and use of Burtch's past testimony in his trial. As a basic premise, Michigan's rules of evidence permit evidence that would be excluded for one purpose to be admissible when proffered for another, proper reason.⁹ We can assume for the sake of analysis that Burtch's testimony from Lytle's trial was inadmissible under the state-of-mind exception to the rule against hearsay in MRE 803(3). Nevertheless, substantively, Good's and Sperling's statements to Burtch did not constitute hearsay because MRE 801(d)(2) excludes statements by party-opponents from the definition of hearsay.¹⁰

Nor is it problematic that there was an additional layer of repetition in the statement because the prosecutor read testimony that repeated not only the substance of Good's and Sterling's statements, but also repeated what Burtch had said previously. Contrary to Good's argument that Burtch's previous testimony was introduced as a recorded recollection under MRE 803(5), Burtch's testimony from Lytle's trial was admissible pursuant to MRE 801(d)(1)(A) because he met that evidentiary rule's three requirements. MRE 801(d)(1)(A) states:

A statement is not hearsay if—

(1) *Prior statement of witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.

First, there is no question that Burtch testified at Good and Sperling's trial, where he was "subject to cross-examination" concerning his previous testimony. Good suggests that this testimony did not fit MRE 801(d)(1)(A) because he did not have an opportunity to cross-examine Burtch at Lytle's trial. However, the evidentiary rules does not require that the defendant (or his attorney) have an opportunity to cross-examine the declarant at the earlier proceeding. The rule only requires that the declarant be "subject to cross-examination." Second, Burtch's previous testimony was also given "under oath subject to the penalty of perjury at a trial." And third, the testimony Burtch gave at Good and Sperling's trial was inconsistent with the testimony he gave at Lytle's trial in that in the first trial he claimed to recall what Good and Sperling said, while in the second trial he asserted that he did not recall what they said.¹¹ Furthermore, even assuming that Burtch's testimony and the way it was used at Good and Sperling's trial could be stretched

⁸ See MRE 803(5).

⁹ See *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000).

¹⁰ See *People v Herndon*, 246 Mich App 371, 408; 633 NW2d 376 (2001).

¹¹ See *People v Chavies*, 234 Mich App 274, 282-283; 593 NW2d 655 (1999)

to fit the definition of a recorded recollection, Good fails to provide any authority holding that the trial court had to issue any related instruction at all. Accordingly, Good has failed to establish that the trial court plainly erred when it admitted this evidence.

III. Sleeping Juror

A. Standard Of Review

Good argues that the trial court erred when it denied his motion to excuse a juror before deliberations after he alleged that the juror had slept through parts of the trial. Good failed to bring this issue to the trial court's attention at any time when he believed the juror to be asleep. Because Good's tardiness deprived the trial court of an opportunity to take corrective action, he failed to preserve this issue for appeal. Accordingly, he must demonstrate plain error affecting his substantive rights in order for us to consider reversing his conviction.¹²

B. Analysis

At the beginning of the sixth day of the instant trial, which was after the parties had rested their proofs, but before closing arguments began, the following exchange occurred outside the presence of the jury:

[*Good's counsel*]: The other thing at this point, Your Honor, we would move to strike a juror It's my observation during this trial that a good part of it she has either been asleep or certainly projected the perception that she's asleep. I can't say that she is unconscious or she is simply sitting with her head slouched down with her eyes closed paying close attention. I would be led to believe she was not conscious and, therefore, not able to fully absorb what's going on in front of her.

I would note that she is a lady that has a problem with diabetes. I'm sure she has been very conscientious about trying to stay awake and perhaps we bored her to sleep. But the point becomes on a number of occasions I have observed her posture that certainly leads me to believe that she was sleeping. I would ask to strike her.

[*Sperling's counsel*]: I would join in that motion. My observation of her is that she has also been asleep.

[*The prosecutor*]: On behalf of the People, defense counsel raised this a couple days ago during the trial itself. I have kept – looked over on occasion and so has my investigating officer. Neither one of us has noticed she has been sleeping, so we don't think it's appropriate at this time.

[*The Court*]: I'll deny the request, however, your objection is noted. I'll deny it.

¹² See *Carines, supra* at 763-764.

While the prosecutor's remark indicates that the possibility that juror Robinson was sleeping during the proceedings was raised earlier during the trial, Good has not identified any place in the record indicating that he actually raised this issue earlier in the proceedings. At most, the record indicates that the juror yawned once during voir dire.

More importantly, in *United States v Curry*,¹³ the trial court denied a motion for a mistrial based on a claim that a juror slept during witness testimony on the ground that "counsel should have informed the court of the juror's inattentiveness when he first noticed it, not at the conclusion of the witness' testimony." In affirming this decision, the federal Fifth Circuit Court of Appeals reasoned that a defendant's trial attorney "had a duty to call a juror's inattentiveness to the court's attention when first noticed. Counsel may not permit juror misconduct or inattentiveness to go unnoticed, thereby sewing a defect into the trial, and later claim its benefit."¹⁴ *Curry's* reasoning is persuasive because it is consonant with this Court's philosophy that "[t]he purpose of the appellate preservation of error requirements is to induce litigants to do what they can in the trial court to prevent error and eliminate its prejudice, or to create a record of the error and its prejudice."¹⁵ Thus, clearly, Good failed to preserve this issue for appeal by waiting until after the proofs closed to bring this issue to the trial court's attention, rather than when the juror was allegedly asleep.

Good's failure to preserve this issue for appeal has very real consequences for him. The standard we apply requires that, before we may reverse his conviction, Good must demonstrate a plain error.¹⁶ However, Good's late objection made it impossible for the record to reflect whether, and when, the juror was asleep. Even Good's attorney could not state definitely whether the juror was asleep, or merely in deep contemplation of the evidence. The prosecutor claimed that neither he nor the assisting officer had seen the juror sleeping. Though the trial court noted Good's objection, in which Sperling joined, it did not make a factual finding that the juror had been asleep at any time. Thus, Good has only speculated regarding the juror's consciousness, and has not demonstrated plain error in allowing the juror to participate in the deliberations.

IV. Instructions

A. Standard Of Review

Good argues that the trial court's instruction concerning the evidence of his flight was erroneous. Good arguably objected to the instructions on related grounds in the trial court, which means we apply review de novo to this issue.¹⁷

¹³ *United States v Curry*, 471 F2d 419, 421-422 (CA 5, 1973).

¹⁴ *Id.* at 422 (citation omitted).

¹⁵ *People v Schmitz*, 231 Mich App 521, 527-528; 586 NW2d 766 (1998).

¹⁶ See *Carines*, *supra* at 763.

¹⁷ See *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998).

During its jury instructions, the trial court informed the jury:

There has been some evidence that the defendants ran away after the alleged crime they are accused of. This evidence does not prove guilt. A person may run or hide for innocent reasons such as panic, mistake or fear. However, a person may run or hide because of a consciousness of guilt.

You must decide whether the evidence is true and, if true, whether it shows the defendant had a guilty state of mind.

In *People v Riddle*,¹⁸ the Michigan Supreme Court explained the fundamental principles that govern jury instructions in criminal trials:

A criminal defendant is entitled to have a properly instructed jury consider the evidence against him. When a defendant requests a jury instruction on a theory or defense that is supported by the evidence, the trial court must give the instruction. However, if an applicable instruction was not given, the defendant bears the burden of establishing that the trial court's failure to give the requested instruction resulted in a miscarriage of justice. The defendant's conviction will not be reversed unless, after examining the nature of the error in light of the weight and strength of the untainted evidence, it affirmatively appears that it is more probable than not that the error was outcome determinative.

Good, though devoting exactly two sentences to his argument, contends that the trial court's instruction to the jury violated these standards in two distinct ways. First, he argues that the prosecutor presented no evidence of flight, and therefore the trial court should not have issued the flight instruction. Second, he claims that the trial court erred when it failed to instruct the jury that flight may be consistent with innocence, which was applicable in this case.

Neither part of Good's argument has merit. Good makes a purely conclusory statement that there were no facts at trial "consistent with the prosecutor's theory of flight." Good evidently equates the prosecutor's theory with evidence that he was conscious of his guilt. In fact, however, there was evidence that tended to show he was conscious of his guilt after the shooting. As Good acknowledged, he initially hid the shotgun used in the incident in a chicken coop. Concealment is one manifestation of a consciousness of guilt.¹⁹ Furthermore, contrary to Good's argument, in giving this instruction, the trial court did not "refuse" to instruct the jury that a defendant's flight may have resulted from reasons consistent with innocence. On the contrary, the trial court expressly stated that a person might run or hide "for innocent reasons such as panic, mistake or fear." We see no error in this instruction as a whole.

¹⁸ *People v Riddle*, 467 Mich 116, 124-125; 649 NW2d 30 (2002) (citations omitted).

¹⁹ See *People v Haxer*, 144 Mich 575, 577; 108 NW 90 (1906).

V. Private Right To Arrest

A. Standard Of Review

Good contends that he was exercising his right as a private individual to arrest the individuals he thought had committed a crime – killing Henderson – when he shot at the car in which Hnevsa, Viles, and Huntoon were riding. Accordingly, he claims that he cannot be convicted of the crimes in this case as a matter of law, and that his trial counsel was ineffective both for failing to move to quash the charges against him and for failing to request a related jury instruction. He failed to raise any of these issues in the trial court. Accordingly, the plain error standard again applies.²⁰

B. Analysis

In making his arguments, Good relies on MCL 764.16, which provides in pertinent part:

A private person may make an arrest—in the following situations:

- (a) For a felony committed in the private person’s presence.
- (b) If the person to be arrested has committed a felony although not in the private person’s presence.
- (c) If the private person is summoned by a peace officer to assist the officer in making an arrest.

Hnevsa did not commit a felony in Good’s presence, nor did a peace officer summon Good to assist in arresting Hnevsa. As a result, only MCL 764.16(b) could possibly apply to Good. However, a private person may arrest a person for a felony only if that person actually *committed* the felony.²¹ There is no “probable cause qualification” that authorizes a private person to make an arrest under MCL 764.16(b) if the person has not actually committed the felony.²² In other words, there is no “safe harbor” to validate an arrest if the private person conducting the arrest suspected that the other person had committed a felony. In the present case, there was complete agreement that Hnevsa did not stab Henderson. Contrary to the implication of Good’s argument, any reasonable cause that he may have had to suspect Hnevsa of that crime did not authorize Good to arrest Hnevsa.²³ Accordingly, this statute, as a matter of law, did not bar Good’s conviction.

²⁰ See *Carines*, *supra* at 763-764.

²¹ *Bright v Littlefield*, 465 Mich 770, 773; 641 NW2d 587 (2002).

²² *Id.* at 774.

²³ Obviously, MCL 764.16(a) did not authorize Good to arrest Hnevsa for the stabbing of Henderson because the stabbing did not occur in Good’s presence. Likewise, MCL 764.16(c) is inapplicable because a peace officer did not summon Good to assist in making an arrest.

Good, in effect, argues that there were other crimes beside the stabbing for which he could have arrested Hnevsa. However, Good also states in his brief that the testimony at trial indicated that his pursuit of Hnevsa was “solely to arrest his [sic] as a suspect to the stabbing of Corey Henderson.” This constitutes an acknowledgment by Good that he was not actually attempting to arrest Hnevsa for any crime other than the stabbing.

Nor is there any merit to Good’s ineffective assistance of counsel arguments. As this Court explained in *People v Knapp*,²⁴

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel’s performance fell below an objective standard of reasonableness and that, but for defense counsel’s errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel’s performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

Critically, attorneys are not required to undertake meritless activities on behalf of their clients.²⁵ Because the evidence did not support Good’s private arrest defense, his trial attorney had no reason to move to quash the information because the motion would have been denied properly. For the same reason, his trial attorney did not render ineffective assistance by failing to request a jury instruction related to this theory.

Moreover, contrary to Good’s argument, this case is distinguishable from *People v Whitty*.²⁶ In *Whitty*, the defendant was convicted of first-degree murder for shooting a man who had earlier robbed a party store the defendant managed.²⁷ This Court held that the trial court’s jury instructions were erroneous because they “ignore[d] the possibility of the use of deadly force where necessary to stop a felon from fleeing.”²⁸ At issue in *Whitty* was whether the deliberate use of deadly force was justified to stop a felon from fleeing. In contrast, in the present case, Good denied shooting any person intentionally, saying instead that he was merely trying to shoot out a tire in Hnevsa’s car. Moreover, Good’s version of events essentially disclaimed an intent to use deadly force against anyone. Thus, Good has not established that trial counsel was ineffective in failing to seek a jury instruction on arrest by a private person.

²⁴ *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001).

²⁵ See *People v Knapp*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

²⁶ *People v Whitty*, 96 Mich App 403; 292 NW2d 214 (1980).

²⁷ *Id.* at 407-410.

²⁸ *Id.* at 412.

VI. Interview Tape

A. Standard Of Review

Good contends that he was denied due process of law because the police lost a tape recording of his interview. While Good's counsel referred to the tape recording as having been lost in connection with a motion in limine asking the trial court to preclude the prosecution from making a certain type of argument, Good's counsel did not argue that the prosecution or police lost the tape recording intentionally or otherwise were guilty of bad faith in connection with this matter. Accordingly, he has failed to preserve this issue for appeal, which again requires us to apply the plain error standard.²⁹

B. Analysis

Notably, although Good never argued in the trial court that the tape was lost intentionally or in bad faith, the trial court stated that it did not find any deliberate misconduct regarding this matter. Later, during questioning by Good's counsel, Detective Yancer testified that he tried to locate the tape of his interview with Good and was unable to do so. "Failure to preserve evidentiary material that may have exonerated the defendant will not constitute a denial of due process unless bad faith on the part of the police is shown."³⁰ Contrary to Good's contention, the record does not reflect that the police intentionally or in bad faith failed to preserve the tape at issue. Rather, the record provides no explanation for the tape's disappearance. All Detective Yancer indicated was that he looked for the tape, but could not find it. The trial court's statement that it found no deliberate misconduct is accurate in light of Good's mere conjecture that the police, prosecutor, or someone must have tampered with the tape to suppress the alleged exculpatory evidence it contained. Though Good attached an affidavit to his pro se brief related to the statement that he gave to Detective Yancer, this is not part of the lower court record, and will not be considered.³¹ In sum, Good has not established that he is entitled to relief based on this unpreserved issue.

VII. Separate Trials

Sperling argues that he was denied his right to a fair trial when he was tried with Good. At the hearing on Sperling's motion for severed trials, Sperling's counsel indicated that, if the prosecution would not use a statement by Good that possibly suggested that Sperling operated his vehicle in a way that allowed Good to shoot a firearm from the window of the vehicle, "then we really don't have a basis for our motion." Eventually, the trial court stated, "[w]e'll delete the statement and we'll go on." The prosecutor then conducted a joint trial of Good and Sperling, without the statement to which Sperling's attorney objected at the motion hearing.

²⁹ See *Carines*, *supra* at 763-764.

³⁰ *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993).

³¹ See *People v Watkins*, 247 Mich App 14, 31; 634 NW2d 370 (2001).

In *People v Carter*,³² the Michigan Supreme Court held that a defense attorney's affirmative approval of a trial court's conduct as constituting "a waiver that *extinguishes* any error." The statements Sperling's attorney made at the motion hearing clearly constituted affirmative approval of holding a joint trial, albeit conditional approval. Accordingly, the prosecutor honored the condition Sperling's attorney placed on the joint trial, and this agreement waived any claim Sperling can make challenging his trial because it was joined with Good's trial.

VIII. Prosecutorial Misconduct

A. Standard Of Review

Sperling contends that the prosecutor committed misconduct in his opening statement and closing argument to the jury. As Sperling acknowledges, he failed to preserve this issue for appeal by objecting to the arguments in a timely manner. Accordingly, we apply the plain error standard.³³

B. Analysis

In his opening statement, the prosecutor informed the jury that the

testimony is going to show they went looking for blood and, according to one witness, they were looking to kill for something they were not involved in, and the testimony is going to show, ladies and gentlemen, that Good and Sperling went out hunting for the wrong person, ended up shooting another person.

In his closing argument, the prosecutor said:

They learned mistakenly that Mike Hnevsa did the stabbing and they went out looking for revenge, retaliation. They went out looking for blood. They went out looking to kill. They are acting like vigilantes. Old west. Let's go over after those horse thieves and string them out [sic] without the law, without the police, without the court system. They were taking the law into their own hands and they went after the wrong person and when they shot at them they hit the wrong person.

Sperling apparently argues that these comments were improperly inflammatory and not supported by evidence presented at trial.

In *People v Schultz*,³⁴ this Court explained that

[i]n reviewing alleged prosecutorial misconduct, we review the pertinent portion of the record and evaluate the prosecutor's remarks in context. Prosecutors cannot

³² *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000) (emphasis in the original).

³³ See *Carines*, *supra* at 763-764.

³⁴ *People v Schultz*, 246 Mich App 695, 710; 635 NW2d 491 (2001).

make statements of fact unsupported by the evidence, but remain free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. The prosecutor's comments must be considered as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial.

The prosecutor's remarks suggest that Good and Sperling intended to kill Hnevska. Even though the jury convicted Good and Sperling of the lesser crime of assault with intent to do great bodily harm, the prosecutor charged them with assault with intent to murder. Burch's testimony from Lytle's trial, which was properly admitted, indicated that Good and Sperling expressed an intent to kill Hnevska, just as the prosecutor argued to the jury. That Good and Sperling pursued Hnevska at high speeds, and that Good shot at the other men's car, also demonstrated what could be interpreted as an intent to kill Hnevska. Accordingly, the evidence supports the prosecutor's argument, which was not improperly inflammatory, but stressed the gravity of defendants' conduct. Thus, Sperling is not entitled to relief based on this issue.

IX. Double Jeopardy

A. Standard Of Review

Sperling argues that his dual convictions of carrying a dangerous weapon with unlawful intent and felony-firearm violate his constitutional rights to be free from multiple punishments for the same offense.³⁵ According to *People v Dillard*,³⁶ this Court applies review de novo to double jeopardy issues.

B. Analysis

The jury convicted Sperling of carrying a dangerous weapon with unlawful intent contrary to MCL 750.226 and felony-firearm in violation of MCL 750.227b. The felony-firearm statute provides in pertinent part:

A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony, except a violation of [MCL 750.223, MCL 750.227, MCL 750.227a, or MCL 750.230], is guilty of a felony, and shall be imprisoned for 2 years.^[37]

Carrying a dangerous weapon with unlawful intent, MCL 750.226, is not one of the four crimes the statute excludes as the predicate felony for felony-firearm.

In *People v Mitchell*,³⁸ the Michigan Supreme Court indicated that, as concerns multiple punishments, the federal and state constitutional protections against double jeopardy are

³⁵ See US Const, Am V; Const 1963, art 1, § 15.

³⁶ See *People v Dillard*, 246 Mich App 163, 165; 631 NW2d 755 (2001).

³⁷ MCL 750.227b(1).

³⁸ *People v Mitchell*, 456 Mich 693, 695; 575 NW2d 283 (1998).

“designed to ensure that courts confine their sentences to the limits established by the Legislature.” Accordingly, double jeopardy analysis examines “whether there is a clear indication of legislative intent to impose multiple punishment for the same offense. If so, there is no double jeopardy violation.”³⁹ The *Mitchell* Court interpreted the Legislature’s intent in enacting the felony-firearm statute as an intent “to provide for an additional felony charge and sentence *whenever* a person possessing a firearm committed a felony other than those four explicitly enumerated in the felony-firearm statute.”⁴⁰ In *Dillard*,⁴¹ this Court relied on this holding in *Mitchell* to conclude that charging the defendant with felon in possession of a firearm⁴² and felony-firearm did not violate double jeopardy because felon in possession of a firearm is not one of the enumerated felonies in the felony-firearm statute. Thus, because carrying a dangerous weapon with unlawful intent is not one of the four felonies excluded as predicate felonies in the felony-firearm statute, Sperling’s dual convictions do not violate the constitutional protection against double jeopardy. While Sperling argues that *Mitchell* was wrongly decided, we are obligated to follow *Mitchell* because it is a majority opinion of the Michigan Supreme Court.⁴³

In his reply brief, Sperling attempts to distinguish *Mitchell* on the ground that his convictions of both carrying a dangerous weapon with unlawful intent and felony-firearm were obtained on an aiding and abetting theory. However, nothing *Mitchell* indicates that whether a defendant is convicted of felony-firearm as a principal or aider and abettor is at all relevant to a double jeopardy analysis. Further, the Legislature abolished the distinction between principals and aiders and abettors in MCL 767.39, which provides that a person who “procures, counsels, aids, or abets” the commission of an offense “on conviction shall be punished as if he had directly committed such offense.” Accordingly, “one convicted as an aider and abettor is punished the same as the principal of the offense.”⁴⁴ Thus, that the jury convicted Sperling as an aider and abettor is immaterial to our conclusion that double jeopardy does not bar his dual convictions of carrying a dangerous weapon with unlawful intent and felony-firearm. The fact that carrying a dangerous weapon with unlawful intent is not one of the four enumerated felonies in the felony-firearm statute is dispositive.

Affirmed.

/s/ William C. Whitbeck
/s/ Harold Hood
/s/ Kirsten Frank Kelly

³⁹ *Id.* at 695-696.

⁴⁰ *Id.* at 698 (emphasis added).

⁴¹ *Dillard, supra* at 167-168.

⁴² MCL 750.224f.

⁴³ See *People v Beasley*, 239 Mich App 548, 559; 609 NW2d 581 (2000).

⁴⁴ *People v Coomer*, 245 Mich App 206, 223; 627 NW2d 612 (2001).