

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER CURTIS MCCRAY,

Defendant-Appellant.

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UNPUBLISHED

September 25, 2007

No. 271510

Oakland Circuit Court

LC No. 2005-204586-FC

Before: Schuette, P.J., and Hoekstra and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, two counts of assault with intent to commit murder, MCL 750.83, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a third habitual offender, MCL 769.11, to concurrent prison terms of 40 to 60 years for the second-degree murder conviction and 30 to 50 years for each assault conviction, to be served consecutive to two years' imprisonment for the felony-firearm convictions. He appeals as of right. We affirm.

Defendant's convictions arise out of a shooting that occurred near the Lancaster Apartments in Pontiac. Donte Robertson and Julius Standifer drove to the apartment complex in a van to pick up Kentrell Louris. Louris got into the van, and Robertson attempted to park the vehicle at another location within the complex. While Robertson was doing so, defendant and his codefendant, Brandon Arnold, began firing shots at the van. Standifer, who was in the backseat, laid on the floor of the van until the gunshots ceased. He was not harmed. Robertson, however, was struck twice in the knee and fatally struck in the head, and Louris suffered gunshot wounds to the right thigh and neck, rendering him a quadriplegic. Defendant's theory of defense at trial was misidentification, and he presented witnesses who testified that the shooters wore masks.

Defendant first argues that there was insufficient evidence of premeditation, deliberation, and identity to submit the charge of first-degree murder to the jury, and thus his conviction of second-degree murder constituted an improper compromise verdict. Defendant preserved this issue by seeking a directed verdict on these grounds below. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). We review de novo a trial court's decision on a motion for a directed verdict to determine whether the prosecutor's evidence, viewed in a light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of an offense

were proven beyond a reasonable doubt. *Id.* “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, 763, 757; 597 NW2d 130 (1999), quoting *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

First-degree premeditated murder requires a “wilful, deliberate, and premeditated killing.” MCL 750.316(1)(a); see also *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). A prosecutor must establish that the killing was intentional and that “the act of killing was premeditated and deliberate.” *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2002). Premeditation and deliberation may be inferred from the circumstances surrounding the killing, but the inference must have support in the record and cannot be based on mere speculation. *People v Plummer*, 229 Mich App 293, 301; 581 NW2d 753 (1998). The following factors may be considered in determining whether premeditation has been established:

- (1) the previous relationship between the defendant and the victim;
- (2) the defendant’s actions before and after the crime;
- (3) the circumstances of the killing itself, including the weapon used and the location of the wounds inflicted. [*Id.* at 300.]

Premeditated murder also requires an opportunity for “cool and orderly reflection.” *Id.* at 302. “The critical inquiry is not only whether the defendant had the time to premeditate, but also whether he had the *capacity* to do so.” *Id.* at 301 (emphasis in original).

Further, aiding and abetting requires that

- (1) the underlying crime was committed by either the defendant or some other person,
- (2) the defendant performed acts or gave encouragement that aided and assisted the commission of the crime, and
- (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time of giving aid and encouragement. [*People v Smielewski*, 235 Mich App 196, 207; 596 NW2d 636 (1999).]

A defendant’s mere presence, even with knowledge that an offense is about to be committed, is insufficient to establish that he aided and abetted the commission of the crime. *People v Norris*, 236 Mich App 411, 419-420; 600 NW2d 658 (1999).

Here, the evidence was sufficient to submit the first-degree murder charge to the jury. The evidence tended to show that defendant and codefendant Arnold together planned and carried out the shooting, which involved 16 shots fired from two AK-47 firearms and one shot from a 9 millimeter handgun. Eight shots were fired from each AK-47. The shots were fired from the rear passenger side of the van toward the front of the van, where Robertson and Louis were seated, and some exited out the driver’s side of the van or through the windshield. The evidence also showed that a few days before the shooting, an individual known as “B.A.” and later identified as Arnold, approached Nana Acquaaah’s van and pulled a handgun out of his pocket. Acquaaah’s van was very similar to Robertson’s van. When Arnold saw Acquaaah, he asked, “Who are you?,” and no shooting occurred at that time. After the shooting at issue, Arnold asked Nacita Gilder to be his alibi witness and tell the police that she was with him during the shooting. Further, Louis repeatedly identified both defendant and Arnold as the

shooters, and defendant made incriminating remarks during a telephone conversation with his cousin, Willie Ratcliff, involving washing gunpowder off of his hands, changing his clothes, and the types of weapons used. Moreover, Roger Stokes saw defendant and Arnold together shortly after the shooting.

The above evidence was sufficient to allow a rational trier of fact to find that defendant participated in the shooting and that he, along with Arnold, premeditated and deliberated Robertson's murder. *Aldrich, supra* at 122. At a minimum, the evidence was sufficient for a fact finder to conclude that defendant aided and abetted Arnold, knowing that Arnold intended the commission of the crime and premeditated and deliberated Robertson's murder. *Smielewski, supra* at 207. Accordingly, the submission of the first-degree murder charge to the jury was not erroneous and did not result in an improper compromise verdict as defendant contends.

Defendant next argues that he was denied his state and federal due process rights when the prosecutor presented perjured testimony. We disagree. Because defendant did not preserve this issue for appellate review, our review is limited to plain error affecting defendant's substantial rights. *Carines, supra* at 763; *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). Reversal is warranted only if the error resulted in conviction despite defendant's actual innocence or if it seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of his innocence. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

A prosecutor may not knowingly use false testimony to obtain a conviction and is obligated to correct false evidence when it appears. *People v Lester*, 232 Mich App 262, 277; 591 NW2d 267 (1998) ("*Lester I*"). "Prosecutors therefore have a constitutional obligation to report to the defendant and to the trial court whenever government witnesses lie under oath." *Id.* at 276. The fact that a witness's trial testimony conflicts with earlier statements, however, does not necessarily establish that the prosecutor knowingly presented perjured testimony. *People v Parker*, 230 Mich App 677, 690; 584 NW2d 753 (1998).

Defendant maintains that Louris's trial testimony that he saw defendant and Arnold with guns at the time of the shooting was false, as was his testimony that he saw only two shooters. Defendant relies on Louris's preliminary examination testimony and previous statements to the police that he did not see defendant or Arnold with weapons and that he saw only two shooters, and Detective Maurice Martin's trial testimony that Louris did not tell him that he saw Arnold with a gun. The mere fact that Louris's previous statements conflicted with his trial testimony, however, does not establish that the prosecutor presented perjured testimony. *Parker, supra* at 690. In fact, when confronted with his previous statements during cross-examination at trial, Louris denied telling the police officers that defendant and Arnold did not have weapons and denied testifying as such at the preliminary examination. Rather, Louris testified that he told the officers that defendant and Arnold had guns, but that he did not know what kind of guns they were. He also testified that he saw defendant and Arnold along with another unidentified person shooting. Louris maintained that the court reporter at the preliminary examination must have erroneously transcribed his testimony regarding these matters. Thus, Louris was impeached with his prior statement to the police and preliminary examination testimony at trial, and it was for the jury to determine which version was truthful. *People v Morrow*, 214 Mich App 158, 165; 542 NW2d 324 (1995). Moreover, knowledge of the falsity of testimony was not imputed to the prosecutor merely because Detective Martin's trial testimony conflicted with that of Louris.

*Lester I, supra* at 279. Accordingly, defendant has failed to establish plain error. *Carines, supra* at 763; *Knapp, supra* at 375.

Defendant also argues that his counsel's failure to object to the prosecutor's use of Louris's perjured testimony denied him the effective assistance of counsel. We disagree. Because defendant failed to raise this issue in a motion for a new trial or evidentiary hearing in the trial court, our review is limited to errors apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *Matuszak, supra* at 48, quoting *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Moorner*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004). With respect to the prejudice requirement, a defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *Moorner, supra*. A defendant must also overcome the strong presumption that counsel's actions constituted sound trial strategy. *Toma, supra* at 302.

As previously discussed, the prosecutor did not knowingly rely on perjured testimony. Thus, defense counsel was not ineffective for failing to object to the testimony. "[C]ounsel does not render ineffective assistance by failing to raise futile objections." *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Moreover, defendant has not overcome the presumption that counsel's failure to object to the prosecutor's use of the alleged perjured testimony constituted sound trial strategy. Counsel cross-examined Louris and impeached him with his contrary preliminary examination testimony and prior statements to the police. During closing argument, counsel relied on Louris's previous inconsistent statements and argued that his testimony as a whole was not worthy of belief. Because counsel utilized Louris's previous statements to defendant's advantage at trial, defendant has not overcome the presumption that counsel's actions constituted sound trial strategy. *Toma, supra* at 302.

Defendant next contends that he is entitled to resentencing because his sentence was increased based on facts that were not found by a jury beyond a reasonable doubt contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Although defendant did not raise this issue below or in a motion to remand, he argues that he is entitled to relief under the plain error standard because this error resulted in his sentence being outside the appropriate guidelines sentence range. See *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

In *People v Drohan*, 475 Mich 140, 159-164; 715 NW2d 778 (2006), our Supreme Court held that judicial fact-finding to determine only the minimum sentence of an indeterminate sentence does not violate *Blakely*, which pertains only to sentences imposed beyond the statutory maximum. *Id.* at 159-164. Here, defendant challenges as violative of *Blakely* the trial court's scoring of points under offense variables (OVs) 1, 2, 3, 4, and 13. Because the assessment of

points under these variables affected only the minimum term of defendant's indeterminate sentence, however, the court's scoring of the sentencing variables did not violate *Blakely*.<sup>1</sup>

Further, defendant's reliance on *People v McCuller*, 475 Mich 176; 715 NW2d 798 (2006), is misplaced. Although the United States Supreme Court vacated our Supreme Court's decision in *McCuller* and remanded the case to our Supreme Court for further consideration, *McCuller v Michigan*, \_\_\_ US \_\_\_; 127 S Ct 1247; 167 L Ed 2d 62 (2007), that case involves a defendant who was entitled to an intermediate sanction, as opposed to a prison sentence, absent the trial court's scoring of certain offense variables. *McCuller, supra* at 179. Because this case presents no such situation, the proper resolution of *McCuller* is irrelevant to this case. In any event, our Supreme Court recently reaffirmed its original decision that a court does not violate *Blakely* by engaging in judicial fact finding to score offense variables to determine a defendant's minimum sentence range under the sentencing guidelines. *People v McCuller*, \_\_\_ Mich \_\_\_, \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 128161, decided July 26, 2007). Accordingly, defendant is not entitled to resentencing.

Defendant next argues in his Standard 4 brief that the trial court's failure to remove references to his unrelated criminal activity from a recorded telephone conversation played before the jury violated his right to a fair trial. We disagree. Defendant has not identified which portions of the recorded conversation reference unrelated criminal activity and therefore should have been redacted. A defendant "may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims . . ." *Matuszak, supra* at 59 (citation and internal quotations omitted). Moreover, our review of the record failed to reveal such reference to unrelated criminal activity. Therefore, defendant has failed to establish plain error in this regard. *Carines, supra* at 763, 774; *Knapp, supra* at 375.

Defendant further argues in his Standard 4 brief that the trial court violated his right to a fair trial by allowing the jury to review a transcript of the recorded conversation without verifying its accuracy. We disagree. We review for an abuse of discretion a trial court's decision whether to admit evidence. *People v Johnson*, 474 Mich 96, 99; 712 NW2d 703 (2006). The abuse of discretion standard acknowledges that there may be more than one reasonable and principled outcome. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006); *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Maldonado, supra*; *Babcock, supra*. "A decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *Aldrich, supra* at 113.

The trial court did not abuse its discretion by admitting a transcript of the recorded conversation for the jurors to review while listening to the recording. The trial court listened to a portion of the recording during a break in the proceedings and determined that the language used

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<sup>1</sup> Although defendant argues that the United States Supreme Court will likely overrule our Supreme Court's decision in *Drohan*, we note that the United States Supreme Court has already denied certiorari in that case. See *Drohan v Michigan*, \_\_\_ US \_\_\_; 127 S Ct 592; 166 L Ed 2d 440 (2006).

in the recording, or “street talk” as the trial court described it, was difficult to understand. Therefore, the trial court admitted a transcript of the recording, prepared by the prosecutor, to assist the jurors in interpreting the language used in the recording. The court instructed the jurors that the transcript reflected the prosecutor’s interpretation of the recording and that defendant disputed the accuracy of the transcript because it was not a certified court record. The court further instructed the jurors to accord whatever weight they desired to the transcript. Thus, considering the circumstances of this case, in particular the difficulty of interpreting the language used in the recording, the trial court’s admission of the transcript was not outside the range of reasonable and principled outcomes. *Maldonado, supra* at 388; *Babcock, supra* at 269.

Defendant’s reliance on *People v Lester*, 172 Mich App 769, 776; 432 NW2d 433 (1988) (“*Lester II*”), is unavailing. There, this Court stated that, in the absence of a stipulation regarding the accuracy of a transcript, “the transcriber should verify that he or she has listened to the tape and accurately transcribed its content. The court should also make an independent determination of accuracy by reading the transcript against the tape.” *Id.* at 776 (citation and internal quotations omitted). Here, the record shows that Detective Martin assisted the prosecutor’s office in interpreting the language used in the recordings and he testified at trial that the transcript fairly and accurately represented the recording. Moreover, the district court at defendant’s preliminary examination specifically determined that the transcript was a fair and accurate representation of the recording. Therefore, the transcript had previously been judicially determined to be accurate. Further, unlike the situation in *Lester II*, defendant in the instant case has not identified any portion of the tape that he contends was erroneously transcribed. Rather, he merely asserts that the trial court should have verified the accuracy of the transcript. Accordingly, he has failed to show that the trial court’s decision to allow the jurors to review the transcript constituted an abuse of discretion.

Affirmed.

/s/ Bill Schuette  
/s/ Joel P. Hoekstra  
/s/ Patrick M. Meter