

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
August 8, 2013

v

EDWARD DEON FOSTER,

Defendant-Appellant.

No. 301361
Van Buren Circuit Court
LC No. 10-017033-FC

Before: MURPHY, C.J., and SAAD and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of felony murder, MCL 750.316(1)(b). Defendant was sentenced to life in prison without the possibility of parole as a result of the conviction. We affirm.

On April 26, 1998, Deborah Boothby and a friend went to the Blue Star Lounge, a bar located on the Blue Star Highway near South Haven, Michigan. By most accounts, Boothby became intoxicated and disruptive, engaging in an argument with an ex-boyfriend and his girlfriend. The argument caused the bar owner to order everyone to leave the bar, early. As the patrons left the bar, several people observed a fight in the parking lot involving Boothby and several other individuals.

Police were dispatched to the Blue Star Lounge some time after 2:30 a.m. on April 26, 1998, in response to a 911 call reporting that a woman had been hit by a car. Responders found Boothby lying on the Blue Star Highway a short distance from the lounge, bleeding and severely injured. She died from multiple injuries after being transported to the hospital.

The case remained unsolved for several years, after which the police received information and tips that named defendant and the others that were involved in the fight that was described as a brutal beating of Boothby. Witnesses also described defendant helping another individual drag Boothby to a vehicle after the beating stopped, and later a vehicle driving over Boothby, several times, while she was lying in the road. Adrienne Burnette, the girlfriend of one of the beating participants, admitted to watching Boothby being placed in a vehicle driven by a co-defendant and occupied by defendant after Boothby was severely beaten by defendant and others. Burnette followed the car containing Boothby to another location where defendant and others beat her again. Burnette also described watching as defendant and his co-defendants later placed Boothby in the road and drove over Boothby, two times. Burnette also admitted to

driving over Boothby with her vehicle. Defendant and three others were eventually charged in connection with Boothby's death. All four were tried jointly, but defendant had a jury separate from that of his three co-defendants. Defendant was found guilty of first degree felony murder.¹

On appeal, defendant first asserts that the trial court violated his Sixth Amendment right to a public trial by holding key portions of pretrial proceedings and voir dire in chambers with no access by the public. Defendant further argues that his trial counsel was ineffective for failing to object to the public's exclusion from these key portions of pretrial proceedings. We disagree.

Because defendant did not object to this error at the time it occurred, we review defendant's forfeited constitutional claim, for plain error that affected his substantial rights. *People v Vaughn*, 491 Mich 642, 664; 821 NW2d 288 (2012). To receive relief under this standard, defendant must establish (1) that the error occurred, (2) that the error was "plain," (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 664-665. Additionally, because defendant did not raise an ineffective assistance of counsel claim in the trial court, our review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

The Sixth Amendment of the United States Constitution expressly states that a criminal defendant "shall enjoy the right to a . . . public trial . . ." US Const. Am VI. The Sixth Amendment right to a public trial is applicable to the states by the Due Process Clause of the Fourteenth Amendment. "Additionally, article 1, § 20 of the 1963 Michigan Constitution guarantees that a criminal defendant 'shall have the right to a . . . public trial . . .'" *Vaughn*, 491 Mich at 650. "That the right to a public trial also encompasses the right to public voir dire proceedings is 'well settled.'" *Id.* at 650-652.

As a panel of this Court acknowledged in *People v Orlewicz*, 293 Mich App 96, 112-113; 809 NW2d 194 (2011), the United State Supreme Court has held that the Sixth Amendment right to a public trial extends to the voir dire of prospective jurors, subject to certain exceptions:

The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure. [quoting *Presley v Georgia*, 558 US 209, 214; 130 S Ct 721; 175 L Ed 2d 675 (2010)(internal citations omitted)]

¹ Defendant was charged with and found guilty of both first degree felony murder and second degree murder. At sentencing, the second degree murder conviction was properly vacated and defendant proceeded to sentencing on only the felony murder conviction.

However, where proceedings are only partially, rather than totally closed, only a substantial reason (as opposed to a compelling reason) must be given for the closure. *People v Russell*, 297 Mich App 707, 720; 825 NW2d 623 (2012).

Defendant dedicates a significant portion of his argument on this issue to whether his failure to object constitutes waiver of the right to a public trial, as was held in *People v Vaughn*, 291 Mich App 183 (2010). Defendant argued that *Vaughn* was wrongly decided and that he did not waive his right to a public trial. Our Supreme Court has since agreed, reversing the *Vaughn* decision and holding that a failure to object did not constitute a waiver of the right to a public trial that precluded review on appeal, but instead constituted a forfeiture of a constitutional right subject to plain error analysis on review. See *Vaughn*, 491 Mich 642.

In any event, applying a plain error analysis to the three proceedings defendant contends violated his Sixth Amendment right to a public trial clearly demonstrates that defendant is not entitled to relief. The first proceeding took place on the fourth day of jury selection, before a jury was impaneled. A potential juror requested a conference in chambers, which was thereafter held with all counsel, the trial judge, and a court reporter present. The potential juror advised that she recognized a couple of the co-defendants from high school as well as some of the people in the audience, though she was not friends with them. She stated that she did not feel it would make her uncomfortable to sit as a juror but felt she should bring the matter to the court's attention. This juror was ultimately excused from the jury for cause. Where the content of the closed-door conference did not affect defendant or any of his rights and the potential juror did not even serve on his jury, had an error in the closing of the potential juror's questioning occurred, it did not result in the conviction of an actually innocent defendant or affect the outcome of the proceedings in any manner. There was thus no plain error affecting defendant's substantial rights.

The second proceeding took place immediately after the above potential juror left the trial court's chambers. The trial judge's bailiff stated that a lady had approached him and told him that some of the potential jurors were talking about the defendants being in shackles and that they had apparently seen the defendants being transported. The bailiff indicated that when the defendants left the courtroom for bathroom breaks and the like, they were put in handcuffs. The court did not have the room to place the large number of potential jurors (around 80) comfortably in the court room during the breaks to avoid the defendants, so they were having the jurors go into the building next door until a certain time. Despite this precaution, some of the jurors would still come back to court early and there was no way to prevent the jurors from reentering the court building early to prevent them from seeing the defendants being transported in handcuffs.

The trial court acknowledged the practical problem presented by the layout of the courthouse facility and the difficulty of preventing observation of the defendants while traveling. The judge stated that if someone did see something on the defendants' legs, he would be willing to give some kind of instruction if counsel desired. The judge also indicated a willingness to question jurors about what they saw.

Defendant's counsel expressed grave concern over jurors seeing defendant in handcuffs and the potential prejudicial effect, but indicated that he did not think there was an instruction that could fix the impression that such a view gives a jury. He ultimately indicated that he would

prefer no instruction be given because it calls attention to the fact and because perhaps not all of the jurors had seen anything. He also did not want the jury questioned. The parties all then discussed various potential ways that the defendants could be transported without the risk of the jurors seeing them in handcuffs.

This proceeding, again, fails plain error analysis. Included within the right to a fair trial, absent extraordinary circumstances, is the right to be free of shackles or handcuffs in the courtroom. *People v Payne*, 285 Mich App 181, 186; 774 NW2d 714 (2009). The trial court, in consulting with all counsel and the deputy assigned to transporting defendant and his co-defendants to the courthouse, did its best to ensure that defendant's right was not compromised in any way and no error occurred where the logistics of transporting defendant without having the jury see him in handcuffs was discussed outside the public view. Had the discussion been conducted in open court, it would have been implied that defendant was in custody—an implication defendant was entitled to avoid and would likely want to avoid. Because the discussion involved a compelling right, a substantial reason for closing the proceeding existed. *Russell*, 297 Mich App at 720; 825 NW2d 623 (2012).

Had an error in the closing of this proceeding occurred, it did not result in the conviction of an actually innocent defendant or affect the outcome of the proceedings in any manner. How defendant was transported to the courtroom to avoid being seen by the potential jurors did not affect an ultimate issue of guilt and there is no allegation or evidence that any juror actually saw defendant being transported to or from the courtroom in handcuffs. Thus, there is no error requiring reversal. *Vaughn*, 491 Mich at 664.

The third proceeding also took place on the fourth day of jury selection. All counsel as well as a court reporter was present in the judge's chambers. All counsel waived the presence of their respective clients, including defendant's counsel. The trial judge's bailiff indicated that one of the security officers told him that the potential juror who they had spoken to that morning, needed to talk to him. The security officer brought her back to the bailiff's office, and she was shaking and crying. The potential juror advised that she was too upset to serve on the jury due to her knowing the people involved. Though she was not yet impaneled as a juror, no counsel objected to her being excused.

Defendant's counsel then asked at that point if they could have the person who told the bailiff that she had heard jurors discussing the defendants in shackles brought in and questioned. A juror was then brought in who related that she heard a lady ask "where do the defendants come from, are they from jail?" The juror stated that a man responded that he saw one come in shackles and he thought he was in jail now for something else. The juror said she knew who the woman was, and that the woman was on a jury panel, but did not know who the man was. The juror stated that hearing the conversation did not impact her in any way.

The judge then brought the woman identified as a participant in the conversation into chambers, Juror Schoenborn. Juror Schoenborn indicated that she had heard people discussing whether the defendants were in custody but that she had not seen anybody in custody. Juror Schoenborn also stated that she heard people ask if anyone knew if the defendants were in custody and she stated that to her knowledge no one knew the answer because no one answered the question. Juror Schoenborn told the judge that she had not seen the defendants coming or

going from the courthouse. Juror Schoenborn stated that whether the defendants were in custody or not would not have any effect of her view of them.

Defendant's counsel indicated again that he did not want a cautionary instruction because he was concerned that it would make the issue more serious and more of a concern. He did register an objection to the jury array, however. The juror who reported hearing the conversation did not serve on defendant's jury and Juror Schoenborn was excused from the jury. Notably, defendant does not argue that he wanted either of these jurors to serve on his jury.

While the trial court did not state why he was having the upset potential juror brought back to his chambers rather than addressing her in public, the fact that she was crying, shaking, and seriously distraught over having to consider the case may have adversely affected the other jurors. This was a substantial reason for closing the proceeding. *Russell*, 297 Mich App at 720. Similarly, the discussion with the two other jurors concerning a conversation they may or may not have had as to whether they had possibly seen defendant or his co-defendants in handcuffs or shackles, or were discussing the possibility of defendant being in handcuffs, was a substantial reason for closing the proceeding. *Russell*, 297 Mich App at 720. And, neither of the jurors questioned served on defendant's jury.

The court went to great lengths to ensure that defendant and his co-defendants were not seen in handcuffs. When it was brought to the trial court's attention that one or more jurors were discussing the fact that defendant or his co-defendants were or may have been handcuffed, the trial judge appropriately investigated the matter outside the presence of the other jurors. Had the questioning of these jurors taken place in open court, the handcuffing issue would have been brought to all of the juror's attention, placing defendant's right to a fair trial in serious jeopardy.

As pointed out by the *Vaughn* Court, the actions of the court in closing a proceeding to the public are to be examined in the context of the effect the action had on the protections afforded by the Sixth Amendment. 491 Mich at 667. "The goals sought by these protections include (1) ensuring a fair trial, (2) reminding the prosecution and court of their responsibility to the accused and the importance of their functions, (3) encouraging witnesses to come forward, and (4) discouraging perjury." *Id.* The trial court's closing of proceedings in all three of the above instances does not subvert any of these values.

Defendant also claims that his counsel's failure to object to the courtroom's closure during voir dire entitles him to a new trial on the basis of ineffective assistance of counsel. To establish ineffective assistance of counsel, defendant first must show that counsel's performance was below an objective standard of reasonableness. In doing so, defendant must overcome the strong presumption that counsel's assistance was sound trial strategy. Second, defendant must show that, but for counsel's deficient performance, it is reasonably probable that the result of the proceeding would have been different. *People v Armstrong*, 490 Mich 281, 289–290; 806 NW2d 676 (2011).

Concerning the first proceeding, because defense counsel had no reason to know what the potential juror would be disclosing during a private conference held at her request, counsel was not ineffective for failing to object to the conference being held privately. For all counsel (or defendant) knew, the juror could have been disclosing information detrimental to his client

and/or case, personal information about herself, personal information about defendant that he would prefer to not have made public, or any number of other matters. Defense counsel may reasonably have concluded that closing the proceeding to the public may have benefitted his client because whatever the potential juror had to say may have tainted the remaining jurors. And, again, the potential juror was ultimately excused from the jury. Counsel was thus not ineffective for failing to object when the juror requested a private conference with the trial court.

As to the second proceeding, defense counsel also could reasonably have concluded that closing the proceeding to the public would benefit his client. Discussing how to transport defendant to and from the courthouse and courtroom in handcuffs without having the jury view him was not a discussion that should have been held in public. Defendant was presumed to be innocent throughout his trial and having the public aware that he was being escorted to and from the courthouse in handcuffs would carry the implication that he was currently incarcerated and/or already guilty of the current or some other crime. That connotation could only work to defendant's detriment. Counsel was not ineffective for failing to object to having the second proceeding held publicly.

The third proceeding also need not have been held publicly, as it could reasonably have been viewed as detrimental to defendant. The potential juror was shaking and crying. Having one of the jurors visibly shaken by the trial proceeding could potentially have a domino effect on the other jurors or make the case appear to be more devastating than the other jurors had initially thought. And, the discussion with two jurors about whether they had seen defendant or his co-defendants in handcuffs or had heard that any of them were handcuffed had the potential to affect defendant's right to a fair trial. Making anyone else aware that defendant may be handcuffed would only exacerbate the issue or bring to everyone's attention an issue that they may not have otherwise have known or wondered about. Counsel was not ineffective for failing to object to having this proceeding closed. Defendant was thus not denied his right to a public trial or his right to effective assistance of counsel where portions of pretrial proceedings and voir dire were conducted in chambers with no access by the public.

Defendant next claims that he is entitled to a new trial because his statutory and constitutional right to be present during a critical stage of his trial was violated due to his absence from the pretrial proceedings outlined above. We disagree.

There was no objection to holding these proceedings in defendant's absence. We thus review this unpreserved claim of constitutional error for plain error affecting substantial rights. See *Carines*, 460 Mich at 764.

An accused has a right to be present at his trial. This right is conferred by statute, MCL 768.3, guaranteed by the federal and state Confrontation Clauses, U.S. Const, Am VI; Const 1963, art 1, § 20, and also grounded in common law. *People v Mallory*, 421 Mich 229, 246 n 10; 365 NW2d 673 (1984). The right to be present at trial includes the right to be present during "the voir dire, selection of and subsequent challenges to the jury, presentation of evidence, summation of counsel, instructions to the jury, rendition of the verdict, imposition of sentence, and any other stage of trial where the defendant's substantial rights might be adversely affected." *Mallory*, 421 Mich at 247.

This Court has recognized that only “a defendant may waive both his statutory and constitutional right to be present during his trial.” *People v Montgomery*, 64 Mich App 101, 103; 235 NW2d 75 (1975). Waiver is defined as “the intentional relinquishment or abandonment of a known right.” *Carines*, 460 Mich at 762 n 7 (quotation marks and citation omitted). However, where a defendant does not waive his right to be present does not automatically entitle him to a new trial. “[T]he test for whether defendant's absence from a part of his trial requires reversal of his conviction is whether there was any reasonable possibility that defendant was prejudiced by his absence.” *People v Armstrong*, 212 Mich App 121, 129; 536 NW2d 789 (1995).

Here, defendant was absent for only a short period during the voir dire proceedings addressed above. During the first proceeding, the only issue discussed at that time was a potential juror’s recognition of co-defendants, and several members of their families. There was no trial strategy, right, or evidence at issue during the proceeding and defendant suggests nothing that he could have added to or advised counsel about concerning this discussion. And, the potential juror was ultimately excused from jury duty. There is no evidence in the record to support a finding that there was any “reasonable possibility” that defendant was prejudiced by his absence during this proceeding. *Armstrong*, 212 Mich App at 129. Even if his absence during the first proceeding was in error, reversal is not warranted because the evidence does not support that defendant is actually innocent or that the alleged error seriously affected the fairness, integrity, or public reputation of judicial proceedings. See *Carines*, 460 Mich at 763–764.

During the second proceeding, the logistics of being transported to and from the courthouse through certain doors while handcuffed without being seen by jurors while the jurors were on their breaks or loitering prior to or after the trial proceedings had begun or concluded for the day was discussed. Defendant would have had no input on which door he would have been permitted to enter through or how to otherwise traverse the courtroom building while under the requirement of handcuffs while at the same time be shielded from view of the jury to protect his constitutional rights. There is no evidence in the record to support a finding that there was any “reasonable possibility” that defendant was prejudiced by his absence during this proceeding. *Armstrong*, 212 Mich App at 129.

During the third proceeding, counsel specifically waived his client’s presence. Whether the waiver was appropriate or not, there is no evidence in the record to support a finding that there was any “reasonable possibility” that defendant was prejudiced by his absence during this proceeding. *Armstrong*, 212 Mich App at 129. A potential juror was excused from the jury due to her emotional admission that seeing people she knew in the audience (including co-defendants’ family and friends) bothered her and that she did not think she could serve as a juror. Defendant identified nothing that he could have taken from or added to this part of the proceeding. Two other jurors were then questioned concerning what they may have heard or seen with respect to defendant or his co-defendants being handcuffed. Defendant’s counsel was vigorously engaged in voir dire of these two jurors, who ultimately did not serve on defendant’s jury. Because the closure of the courtroom was limited to a vigorous voir dire process that ultimately yielded a jury that satisfied both parties (and did not include either of the questioned potential jurors), the closure did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. Defendant is not entitled to a new trial on the basis of his forfeited claim of error.

Defendant also contends that counsel was ineffective for failing to object to defendant's lack of presence at these proceedings. Again, to establish ineffective assistance of counsel, defendant first must show that counsel's performance was below an objective standard of reasonableness and that but for counsel's deficient performance, it is reasonably probable that the result of the proceeding would have been different. *Armstrong*, 490 Mich 289–290. Where the proceedings involved jurors that did not ultimately serve on defendant's jury, defendant has offered no reasonable argument that his lack of the presence at the proceedings affected the outcome of his trial. He has not suggested how his presence would have impacted the voir dire proceedings or, indeed, argued that he wanted these jurors on his panel. Counsel was not ineffective for failing to object to defendant's absence. Defendant is not entitled to a new trial because his constitutional and statutory right to presence during a critical stage of his trial was not violated and defense counsel did not render ineffective assistance of counsel by failing to object to the proceedings being held without defendant's attendance.

Defendant next argues that his Due Process right to a fair trial was violated where there was evidence that he was seen by the jury in handcuffs and appeared before the jury obviously wearing leg restraints. We disagree.

The Constitution forbids the use of visible shackles during trial, unless that use is justified by an essential state interest specific to the defendant on trial. *Deck v Missouri*, 544 US 622; 125 S Ct 2007; 161 L Ed 2d 953 (2005). Included within the right to a fair trial, absent extraordinary circumstances, is the right to be free of shackles or handcuffs in the courtroom. *Payne*, 285 Mich App at 186. A defendant may be shackled only on a finding supported by record evidence that this is necessary to prevent escape, injury to persons in the courtroom or to maintain order. *Id.* However, even if a trial court abuses its discretion in requiring a defendant to wear restraints, the defendant must show that he suffered prejudice as a result of the restraints to be entitled to relief. *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008). “[A] defendant is not prejudiced if the jury was unable to see the shackles on the defendant.” *Id.*

In the instant matter, it is unclear why defendant was made to wear a knee locking device under his pants while in the courtroom. There was no finding made on the record (or record evidence to support) that the same was necessary to prevent defendant's escape, that he posed a risk of injury to persons in the courtroom, that the restraints were necessary to maintain order in the courtroom, or that defendant was somehow unruly. Thus, the trial court abused its discretion in requiring defendant to wear the knee-locking device during trial and in the jury's presence. As indicated above, however, defendant must nonetheless show prejudice as a result of the restraints to be entitled to recovery and no prejudice is found where the jury is unable to see the shackles or, in this case, the knee-locking device. *Horn*, 279 Mich App at 36; See also, *People v Johnson*, 160 Mich App 490, 493; 408 NW2d 485 (1987).

Defendant does not argue that the jury *saw* the knee-locking device, as it was concealed by his pants, but argues that the jury was *aware* of the knee-locking device by virtue of the fact that it made him “shuffle” while walking. However, defendant has provided no evidence of the same. Defendant has come forward with no statement by a juror or any other indication that anyone noticed that defendant “shuffled” when he walked or that if they did take notice of his manner of walking, that they were aware that the same was caused by the use of a knee-locking device.

The only evidence that defendant presents with respect to any jury seeing defendant in shackles was the statement made by a juror (who did not serve on his jury) telling the trial court in one of the closed proceedings discussed above that she had overheard a female potential juror asking a man “where do the Defendants come from, are they from jail?” When questioned by the trial judge, the female, identified as potential juror Schoenborn, specifically stated that no one made an affirmative statement to her about the defendants in the case being in handcuffs or shackles. Schoenborn further stated that she had not seen the defendants coming or going from the courthouse.

Based upon the above, there is no record evidence upon which to conclude that any juror was aware that defendant was, in fact, in shackles during, before, or after trial. Thus, while the trial court abused its discretion in requiring defendant to wear shackles during trial, the defendant has not shown that any member of the jury saw the shackles or that he suffered prejudice as a result of wearing the shackles. *Horn*, 279 Mich App at 36.

Defendant also contends that he was visible to potential jurors during jury selection while being transported to and from the courtroom in handcuffs. Notably, there has been no argument made that he was ever handcuffed while in the courtroom or while in the presence of the jury. As conceded by defendant, the prohibition against shackling does not extend to safety precautions taken by officers while transporting a defendant to and from the courtroom. *People v Panko*, 34 Mich App 297, 300; 191 NW2d 75 (1971). *Horn*, 279 Mich App 31, 37. And, there has been no definitive evidence that any juror did, in fact, see defendant in handcuffs. At best, a man, who may or may not have ultimately served on either jury, may have said to a woman, who did not serve on either jury, that he saw one defendant (of which there were four) being brought over to the court in shackles. This does not equate with a juror having seen *defendant* in handcuffs.

Finally, even where jurors inadvertently see a defendant in restraints, there still must be some showing that the defendant was prejudiced. *Horn*, 279 Mich App 31, 37. Defendant argues that he was prejudiced by this possible view because the visible restraints likely tipped the scales against defendant in what he deemed a close case. However, defendant ignores that two “jailhouse snitches” testified to statements defendant made to them while they shared jail cells with defendant. Thus, the jurors were made well aware that defendant was incarcerated very recently. And, defendant’s portrayal of his case as “close” is questionable. Even aside from the testimony of Adrienne Burnette, whom defendant argues is untrustworthy, several witnesses still testified to seeing defendant kick and stomp Boothby in the parking lot of the lounge; one testified he kicked her hard in the head. Witnesses further testified that Boothby appeared dead or unconscious in the parking lot after the assault. Several other witnesses testified to seeing defendant help a co-defendant carry/drag Boothby to a car and place her in the back of the car, then get in the same car and drive off. Defendant’s participation in at least the beating of Boothby was clearly established. And, given the medical examiner’s testimony that Boothby died from a constellation of injuries inflicted by more than simply being run over by a car, it is unclear exactly what injury caused Boothby’s death, or even the moment of her death. Defendant could reasonably be held culpable for Boothby’s death simply due to his participation in stomping and kicking her in the head. Defendant’s due process right to fair trial was not violated and he is not entitled to relief on this issue.

Defendant also argues that his due process right to a fair trial was violated due to the introduction of false and perjured testimony from Keith Nickerson. We disagree.

It is well settled that a conviction obtained through the knowing use of perjured testimony offends a defendant's due process protections guaranteed under the Fourteenth Amendment. *Mooney v Holohan*, 294 US 103, 112; 55 S Ct 340; 79 L Ed 791 (1935); *Pyle v Kansas*, 317 US 213, 216; 63 S Ct 177; 87 L Ed 214 (1942); *Napue v Illinois*, 360 US 264, 269; 79 S Ct 1173; 3 L Ed 2d 1217 (1959). Accordingly, a prosecutor has an obligation to correct perjured testimony that relates to the facts of the case or a witness's credibility. *People v Lester*, 232 Mich App 262, 277; 591 NW2d 267 (1998). When a conviction is obtained through the knowing use of perjured testimony, a new trial is required "only if the tainted evidence is material to the defendant's guilt or punishment." *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009). So whether a new trial is warranted depends on the effect the misconduct had on the trial. *Id.* at 390. "The entire focus of [the] analysis must be on the fairness of the trial, not on the prosecutor's or the court's culpability." *Id.*

The prosecutor called Keith Nickerson, a "jailhouse snitch" as one of its witnesses. Nickerson testified that in March 2010, he was awaiting federal sentencing on a bank robbery charge. Nickerson testified that in April 2010, he was sentenced on the federal bank robbery charge to ten years and eight months and that he is currently serving that sentence. Nickerson testified that the prosecutor in the instant case did not indicate that he would do anything for him with regard to the cases he had pending and that the prosecutor has not done anything on his behalf. When asked again by the prosecutor, "Have I offered to do anything on your behalf in regard to your testifying?" Nickerson responded, "No." The following exchange then took place:

Q: Is there any benefit that you know of that you could receive for testifying today?

A: No.

Q: Now, at the time that you were sentenced in April of 2010, sir, did you happen to mention to the Judge your involvement in this case?

A: No.

Q: Now, I believe you had written a letter to your attorney, Craig. Do you know if your attorney, Craig, mentioned to the Judge what was going on here?

A: No, I mean, well, he kind of mentioned it. He is attorney. He knows everything that I do. So, he chose to say something about it, but I didn't personally.

On cross-examination, defense counsel elicited from Nickerson that he also testified at defendant's preliminary examination and at that time, he had not yet been sentenced in his federal bank robbery case. Defense counsel then asked:

Q: And you have indicated a number of times that nobody has done anything for you to give you a benefit for your testimony; is that right?

A: Correct.

Q: Meaning that as far as you knew, as least at that time, nobody had called and said, hey give this guy a break, he's helping out in a murder case or nothing like that?

A: True.

Q: Today you indicated you didn't say anything about that at your sentencing, but your attorney did, isn't that correct?

A: Correct.

Q: Is it true that the United State Attorney's Office filed a specific motion called a 5K motion to give you a departure below your originally scored guidelines?

A: Yes.

Q: And as a result of this 5K Motion filed by the Federal Government, you received a reduction . . . is that right?

A: That is not why I got a reduction.

Q: You didn't get a reduction because of the 5k Motion?

A: No.

Q: Were you sitting in the courtroom when the federal judge sentenced you to your 128 months?

A: Yes, I was.

Q: Did you hear the federal judge mention a number of times that based upon your substantial assistance in a state murder case, along with some dispute about a definition of career criminal, that he was going to give you a three-level departure below [what] your original guidelines were?

A: The departure was because of the close proximity of my previous offenses.

Q: The judge did say at your sentencing that as a result also of your cooperation he was going to give you this benefit. In fact, he went so far as to say it was only as a result of the benefit that you gave up to that date and had nothing to do with any future benefit. Do you remember that?

A: No, I don't remember specifically what you are saying. I got credit for this, but I didn't get credit for this. That is not what happened.

Defense counsel thereafter elicited from Nickerson that his defense counsel at the federal sentencing may have told the federal judge that Nickerson helped in a murder investigation and should get some credit for that and that the judge may have said that he should be given a break because of his cooperation in a murder case. Nickerson acknowledged that the federal judge stated that Nickerson had done so at great personal risk, and that the departure did not bar Nickerson from getting a modification from his sentence later on, but still asserted that "I didn't receive a reduction [for] my assistance in this case."

Based upon documentation provided by defendant as a result of this Court's February 2, 2012 order allowing defendant to supplement the record on appeal, it is clear that Nickerson received a benefit from the 5K motion, which was based upon his cooperation in the instant matter. In the motion, the U.S. Attorney specifically stated that Nickerson's testimony concerning the instant matter "proved to be instrumental in murder charges subsequently brought against five individuals by the Michigan Attorney General" and that "[u]ndersigned counsel has spoken to Assistant Attorney General Dennis Pheny about the defendant's assistance and was advised that the defendant testified at a preliminary examination and was an important witness in the case." The motion concluded, "The United States has concluded that the activity described above constitutes 'substantial assistance' . . . [a]ccordingly, the government requests that the Court grant a downward departure on this basis."

At Nickerson's April 19, 2010, sentencing, Nickerson's defense counsel offered several arguments in support for a sentence lower than the 188 to 235 guidelines range, including the US Attorney's 5K motion. In imposing sentence, the federal judge stated:

I ordinarily, without the 5K consideration, would have sentenced Mr. Nickerson , in light of his prior record, at least in the middle of the attendant guideline range, which was—which would have been approximately 212 months, but the—and a three level departure from the low end of the 188 guideline range would have been 140 months. I believe a sentence of a level that gives credit to Mr. Nickerson's cooperation, as well as the fact that at the margin his career offender guideline does over score him. Accordingly, I intend to depart downward in a manner consistent with his 5K cooperation, as well as giving him a modest decrease for the fact that the career guideline overstates the seriousness of his particular situation. Accordingly, it's the judgment of the Court that the

defendant be committed to the custody of the Bureau of prisons for a period of 128 months.

It is abundantly clear from Nickerson's federal sentencing transcript that as a result of his cooperation and preliminary examination testimony in the instant case, he received a three level downward departure in his federal bank robbery sentencing. However, while the U.S. Attorney did state in its 5K motion that it spoke to the prosecutor in this case, it does not state that the prosecutor in this case promised Nickerson anything for his testimony or did anything other than provide information to the U.S. Attorney. It is not clear who initiated the contact between the two or that the prosecutor was advised that a 5K motion would be filed. And, there is no indication that the *state prosecutor* promised Nickerson any benefit for his cooperation or testimony.

It is also abundantly clear from the trial transcript in this case that Nickerson testified contrary to what was placed on the record at his federal sentencing. He did, indeed, receive a benefit from the 5K motion (which was based on his cooperation in the instant matter) in the form of a reduced sentence and yet unequivocally testified that he did not receive a reduction in his sentence because of his assistance in the instant matter. Nickerson's testimony was thus contrary to the actual facts.

However, as illustrated above, defense counsel cross-examined Nickerson extensively on this issue and elicited the pertinent information from Nickerson. Counsel pointed out the fact that a 5K motion was filed on his behalf; that Nickerson's guidelines were originally 188 months but that he was sentenced to 128 months; that his attorney may have asked for credit due to his cooperation in a murder investigation; and, that the judge had stated that Nickerson had cooperated at great personal risk to himself. Defense counsel also specifically asked Nickerson, "The federal government filed a specific motion saying that as a result of the information that they received from Mr. Pheny indicating that you had testified, that they would agree to the reduction; isn't that right?" Nickerson simply responded that he didn't receive a reduction for his assistance in this case and defense counsel asked if that was his understanding, to which Nickerson responded that it was. Counsel thus established that Nickerson's subjective belief was at odds with what actually occurred. Because defense counsel adequately placed before the jury the fact that Nickerson's testimony conflicted with the motion actually filed by the federal government and the federal judge's statements at sentencing, his credibility as to whether he received any benefit for testifying was placed in issue. And, the jury heard what defendant ultimately sought to have them hear—that Nickerson received a benefit for his cooperation and testimony and thus had a motive to testify as he did against defendant. Defense counsel's cross-examination called Nickerson's credibility even more into question. It cannot therefore be concluded that defendant's conviction was thus obtained through perjured testimony.

Had Nickerson's testimony been the only evidence against defendant, the situation may be different. However, as previously discussed, there was significant other evidence concerning defendant's participation in at least the beating of Boothby. Thus, Defendant's due process right to a fair trial was not violated by the introduction of false and perjured testimony from Nickerson.

Finally, defendant contends that the trial court abused its discretion in refusing to allow the jury to view the scene(s) of the crime. We disagree.

MCL 768.28 provides that “[t]he court may order a view by any jury empanelled to try a criminal case, whenever such court shall deem such view necessary.” Granting a motion for a jury view is proper when it is believed that a personal view of the scene would enable the jurors to comprehend more clearly the evidence already received. *People v Connor*, 295 Mich 1, 6; 294 NW 74 (1940); *People v Curry*, 49 Mich App 64, 67; 211 NW2d 254 (1973). Thus, the trial court must generally conduct a jury view *after* the relevant evidence has been admitted at trial. *People v Unger*, 278 Mich App 210, 256-257; 749 NW2d 272 (2008). “Where . . . a judge finds that photographs in conjunction with a diagram accurately depict the scene of a crime, that there is no factual dispute concerning the accuracy of the photographs, and that a view would not help decide the facts in this case, an abuse of discretion cannot be said to have occurred.” *People v Anderson*, 112 Mich App 640, 648; 317 NW2d 205 (1981). And, where the judge gave cogent reasons for denying the request, an abuse of discretion cannot be said to have occurred. *People v Crown*, 75 Mich App 206, 212; 254 NW2d 843 (1977), rev'd on other grounds 417 Mich 908 (1983).

Defendant requested that the court allow the jury to visit the scene, specifically the Blue Star Lounge, after dark, to allow the jury to see the difficulty that any witness would have had seeing due to the limited lighting, the layout of the bar, and the fence that was present. Defendant also requested the opportunity to travel to the second scene where the victim was allegedly assaulted, if possible. Defendant argued that given the vast number of different stories, and the age of the memories, it would be beneficial to the jury to view the scene.

The trial court denied the motion, indicating that it did not recall any witness testifying that they could not see what was going on because it was dark. Various witnesses testified that they could not see because of all of the people surrounding the victim or because they were standing at a particular angle or a particular location. The trial judge stated that no witness testified that he or she was inside the bar and could not see out at what was occurring, so a view of the scene would not assist with that issue. He also indicated that something that could not be recreated for the jury was the witnesses' alcohol and drug use, which may have impacted some of the witnesses' testimony and credibility, and that a view of the scene would not assist with that issue.

The trial court's reasoning was sound. Numerous photographs of the crime scene, including close-ups and aerial photographs of the lounge parking lot, the lounge itself, and the general location were entered as exhibits and blown up for the jury, as were diagrams of both the interior and exterior of the lounge. And, the witnesses provided clear testimony as to how close they were to certain locations and testified as to what they saw. As indicated by the trial court, all witnesses were thoroughly examined by the attorneys as to what they saw and what may have affected their view. No particular witness gave any relevant testimony that would be assisted by a view of the scene. Defendant does not, in fact, point to any particular testimony that would be aided by a jury view. The trial court thus did not abuse its discretion in denying defendant's motion for jury view.

Affirmed.

/s/ William B. Murphy
/s/ Henry William Saad
/s/ Deborah A. Servitto