

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 20, 2015

v

MARK ANTHONY JONES,

Defendant-Appellant.

No. 321986
Genesee Circuit Court
LC No. 11-28887-FC

Before: HOOD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right following his jury trial convictions for first-degree felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, carjacking, MCL 750.529a, entering without breaking, MCL 750.111, carrying a concealed weapon, MCL 750.227, and felon-firearm, MCL 750.227b.¹ Defendant was sentenced to 40 to 60 years' imprisonment for the murder conviction, 285 to 460 months' imprisonment for the armed robbery conviction, 285 to 460 months' imprisonment for the carjacking conviction, 24 to 60 months' imprisonment for the entering without breaking conviction, 24 to 60 months' imprisonment for the carrying a concealed weapon conviction, and two years' imprisonment for the felony firearm conviction. The murder, armed robbery and carjacking sentences were to run consecutively to the felony-firearm sentence. The murder, armed robbery, carjacking, and entering without breaking sentences were to run concurrently to one another, with the concealed weapon sentence running concurrently to all counts. Finding no errors warranting reversal, we affirm.

I. BASIC FACTS

On November 17, 2010, 73-year-old Merlyne Wray's son-in-law came to visit her during his lunch break and found her asleep in her chair. Upon further examination, however, he realized that Merlyne was dead. He immediately called 911 and his wife. They noted that Merlyne's white Chevy Malibu was missing and that her home had been somewhat ransacked. Merlyne kept a clean and tidy home, but the drawer next to the chair she was sitting in had been

¹ The jury found defendant not guilty of first-degree premeditated murder, MCL 750.316(1)(a).

taken out and papers were strewn about. Both bedrooms had also been disturbed. In fact, Merlyne had been shot.

Tips from neighbors led police to 2718 Raskob where police recovered Merlyne's Malibu. The house itself was abandoned, but additional tips led police to 2702 Raskob where several individuals who were seen around the car were located. Officers watched individuals coming and going from the house. One of the individuals whom officers hoped to question ran into a home at 2712 Sloan. The occupants on Sloan gave consent to search the home and officers found defendant lying in a bed. Defendant and several others were arrested and interviewed.² Defendant had several cell phones in his possession – one for 275-8517. Officers were given permission to search the home at 2702 Raskob where they found the victim's wallet and two cell phones.

Defendant ultimately confessed to the shooting. At the time of his confession, defendant was 14 years old and in seventh grade, having been held back twice. Although he acknowledged sharing a marijuana "blunt" three hours prior to the interview, defendant denied being under the influence of drugs or alcohol. Defendant initially denied any involvement and, after over an hour of questioning, Officer Shawn Ellis requested Officer Harlan Green transport defendant to the detention center. However, instead of immediately transporting defendant, Green had a conversation with defendant that was not recorded.

Green asked for an opportunity to speak with defendant. Green had been involved in a case dealing with defendant's father, Mark Anthony, Sr., who spent time in federal prison on drug charges. Green told defendant that defendant may have been one of the babies he saw on the night his father was arrested. Green testified that he spoke to defendant as a father would to his son and denied threatening defendant or defendant's family in any way. He wanted defendant to consider the fact that defendant's father was absent for most of his life and that defendant may want to have a family one day and be there for them in a way that his own father was not.

After this conversation, defendant's demeanor changed and he began to cry. Green told Ellis that defendant would like to speak with him again. During this second interview, defendant confessed to murdering Merlyne. Defendant used to see Merlyne when he walked to the bus stop. He knew she lived there by herself. Defendant was alone on the day of the murder, having walked to Merlyne's home. He knocked on the front door. Merlyne opened the door. Defendant told her he had an emergency and asked to use the phone. Merlyne was ready to help, but defendant shot her once, using a .357 revolver that he had stolen a week before when he walked into an unlocked home on Herrick Street and took it. Defendant did not know why he shot her. After shooting the victim, defendant checked the house for money and keys. Defendant took the keys to the Malibu, which were by the door. Defendant found \$60 in the dresser in the living room. He also took a wallet and a cell phone. Defendant told his cousin,

² The other individuals included Antonio Allen, Donche Thomas, and D'Courion Jamerson ("Booger"). Adrian Brown and Demario Blunt (Antonio's brother) were also fingerprinted.

Antonio Allen, what happened. Defendant gave Antonio the gun and asked him to hide it. He also gave Antonio the car keys.³

Ellis and his partner then interviewed Antonio a second time and Antonio provided additional details. Based on the information provided, Ellis returned to 2702 Raskob and located the keys to the Malibu in a “fake” fireplace in the basement. Officers also proceeded to 3128 Raskob and found two weapons.

Information from Merlyne’s credit union indicated that her debit/credit card was used after her death. In addition, a person called the credit union on several occasions for information about the account and how to change the account’s PIN. The caller was a young male and quite obviously not the victim. The number called from was 275-8517, which was defendant’s cell phone number. Items purchased after Merlyne’s death included an on-line purchase from Finish Line for two pairs of Nike tennis shoes. The items were billed to Merlyne’s name, with a billing address of 828 Leland Street, although the shipping address was 2618 Gibson Street – defendant’s address. The card was also used for at least two transactions with Page Plus to add minutes to a phone. The incoming phone number to the call center for the transactions was 618-4420, another of defendant’s cell phone numbers. After listening to the customer service recordings, Officer Ellis identified defendant as the caller. Merlyne’s card was also used at the 7-11 store at Flushing and Ballenger.

However, in terms of physical evidence connecting defendant to the crime, only defendant’s partial palm print match was lifted from the front passenger panel of the Malibu. Other items were either not tested or inconclusive. It was defendant’s theory of the case that his cousin Antonio and others were responsible for Merlyne’s death.

As will be discussed in Issue III, Antonio’s April 12, 2011 preliminary examination transcript was then read into the record. At the time of the preliminary hearing, Antonio was 16 years old and was placed at the Lakeside Academy for Children by the Juvenile Court. On November 16 or 17, defendant called Antonio and told him to meet him at the corner because defendant was not at Antonio’s “baby mama house.” Defendant was in a white Malibu. Antonio asked defendant where he got the car. Defendant told Antonio what happened as they drove: “He said he shot her. I said, ‘You shot who?’ He said he shot her. I said, ‘What’d you do that for?’ And then he didn’t tell me.”

The following day, defendant picked up Antonio again and they went to their aunt’s house on Raskob. Defendant went to the store and Antonio was in the basement when his aunt

³ Defendant’s confession was the subject of a prior appeal in *People v Jones*, unpublished per curiam opinion of the Court of Appeals, issued October 11, 2012 (Docket No. 308482), lv den 494 Mich 852 (2013). In a split decision, this Court concluded that defendant’s statement was voluntarily given in spite of defendant’s young age and the fact that he did not have a parent present during the interview.

called him upstairs because the police were there. Antonio was arrested and taken to the police department for interviewing. He told them the truth – that defendant told Antonio he had taken the Malibu from the lady’s house. Defendant had also shown Antonio the wallet he took from Merlyne’s house. It still had her ID in it. Defendant allowed Antonio to use Merlyne’s card to reactivate his phone. The card numbers had been written on a piece of paper. Antonio also saw a .357 in the car, which the police ultimately recovered.

During cross-examination, Antonio testified that his parents were not present when police interviewed him. He sat in the police cruiser for two hours and then in a cell for an additional three hours before being questioned. Antonio found out the next day that he had been charged with open murder. Antonio was released from juvenile detention after a month. The prosecutor told Antonio that if he would “commit and take the Accessory after the Fact of the murder charge, that I can leave. And they was going to drop the Felony Firearm.” Antonio anticipated spending six to nine months in juvenile detention in exchange for his testimony; he had been threatened with seven years’ imprisonment if he failed to testify.

The jury found defendant guilty of first-degree felony murder, armed robbery, carjacking, entering with intent without breaking, carrying a concealed weapon, and felon-firearm. He was sentenced as outlined above. Defendant now appeals as of right.

II. OTHER ACTS EVIDENCE

On appeal, defendant first argues that the trial court abused its discretion when it permitted the prosecutor to introduce evidence of defendant’s other bad acts. We disagree.

This Court reviews for an abuse of discretion a trial court’s decision to admit so-called bad acts evidence. *People v McGhee*, 268 Mich App 600, 636; 709 NW2d 595(2005). A trial court does not abuse its discretion when it chooses an outcome within the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Generally, character evidence cannot be used to show that a defendant acted in conformity therewith because there is a danger that a defendant will be convicted solely upon his history of misconduct rather than on his conduct in a particular case. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998). MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Generally, to be admissible under MRE 404(b), bad acts evidence (1) must be offered for a proper purpose, (2) must be relevant, and (3) must not have a probative value substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

The prosecutor sought to admit two other offenses involving defendant allegedly targeting elderly individuals. The first happened approximately three weeks prior to the incident giving rise to defendant's convictions. It involved defendant entering the apartment of an 80-year-old man and taking his cell phone. Defendant was apprehended as he attempted to leave the apartment building. The second incident occurred eight months prior to that, when defendant approached a 79-year-old woman who had just arrived home. He snatched her purse and was apprehended a short time later. The prosecutor argued that all three incidents were "related" – "the Defendant targeting the elderly individuals using a common scheme, plan or system of doing . . ."

Defense counsel pointed to the dissimilarities. In the first alleged incident, the police report indicated that defendant entered the dwelling without permission, but he did not steal the cell phone. The second incident was a purse snatching and did not involve entering a dwelling. Neither incident involved the use of a gun. Therefore, neither incident was relevant to the current charge, which involved entry into the home and the death of an individual. Defense counsel argued that the prosecution wanted to use the evidence to simply prove that defendant was a thief and acted in conformity therewith. The trial court disagreed and concluded that the other acts were properly admissible.

At trial, Mary Mulhurin testified recounted an incident that occurred on January 14, 2010 when she was 79 years old. Mary had been running errands that day. She pulled right up to her home's porch and placed her lunch and purse on the porch. As she opened the back door to check for a water leak, she glanced up and saw a black face in her side mirror. The individual's arm reached from behind Mary and grabbed her purse. The individual ran across the street. Mary pressed the emergency alert button on her home's alarm system and also flagged down a couple who was driving past. The man in the car tracked the footprints in the snow and helped officers retrieve Mary's purse. Defendant was found hiding in a van that contained a number of items from Mary's purse.

James Drouse testified that he was 83 years old. On October 21, 2010, he lived alone in a seventh-floor apartment off of Center Road. He was reading a book when he heard a noise at the door – "And then all of a sudden my door opened and here's a young man that just walks right into the apartment." James did not recognize the individual. The individual told James that a lady down the hall said he could use James's bathroom. James told the individual that he did not let strangers into his apartment and that if the individual needed to use the bathroom, he could go to the first floor public restroom. The individual then picked up a cellphone that was on the dining table and said he really needed to make a call. James told the individual that he did not allow strangers to use his phone and demanded that he return it, which the individual did. James suggested that the individual leave the apartment or he would call the police. James guided him out of the apartment. James waited for five minutes and then went down to the office. The worker called the police. James was talking to the manager when they saw the individual come down the stairs. When the manager reached for the individual, the individual hit her and ran out the door. Police arrived and arrested the individual, who was identified as defendant.

We agree with the trial court that the other acts evidence was proffered for a proper purpose to show a system in doing an act. The trial court ruled:

If you notice, in the case that's before us, as well as the other two instances for which the prosecution is seeking to have presented before the jury, they involve elderly individuals, people who are – are less in ability – least in ability to protect themselves. It involves, at least in one report, the Defendant using a ruse to gain access to the elderly person's home. I think, in the case that's before us, it was the request to use a telephone. In the case – at least one of the cases involved in the police report involves the request to use the bathroom. So I do think that the prosecution has shown, in each case, a system, a plan in carrying out an act that would indicate that the first prong has been met.

A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v Johnigan*, 265 Mich App 463, 465; 696 NW2d 725 (2005). During closing arguments, the prosecutor argued that defendant “targeted elderly people in their homes and took their items.” The evidence was not offered to show that defendant was a bad person. Instead, the evidence was offered to show that defendant targeted elderly individuals who lived alone.

The evidence was also relevant because, as the trial court noted, “it would have a tendency to make a fact that's at issue, whether or not the Defendant conducted this crime in the manner in which the prosecution is alleging that he did, it makes that more believable . . . than it would be . . . without the evidence.” “Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence.” *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). Under this broad definition, evidence that is useful in shedding light on any material point is admissible. *Id.* at 114. To be material, evidence does not need to relate to an element of the charged crime or an applicable defense. *People v Brooks*, 453 Mich 511, 518; 557 NW2d 106 (1996). Rather, the evidence's relationship to the elements of the charge, the theories of admissibility, and the defenses asserted govern. *People v Yost*, 278 Mich App 341, 403; 749 NW2d 753 (2008). Defendant points out that the instances were dissimilar because the two prior two acts did not involve any force or violence. We do not find the dissimilarities to be dispositive where the acts were used to show, not the perpetrator's identity, but defendant's modus operandi. The other acts were highly relevant to the prosecution's theory that defendant, who knew that the victim lived alone because he walked past her home on his way to the bus, targeted the victim due to her age and vulnerability.

However, even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001). On this point, the trial court noted “I think the evidence is prejudicial; however, I don't think that it substantially outweighs the probative value. I think the probative value is significant with respect to this scheme, plan or method of carrying out an act.” In light of the fact of this case, the probative value significantly outweighed the potential for unfair prejudice.

Finally, the trial court gave a cautionary instruction as to the limited nature of the bad acts evidence. *People v Sabin*, 463 Mich 43, 56; 614 NW2d 888 (2000). Juries are presumed to follow their instructions. *People v Breidenbach*, 489 Mich 1, 13; 798 NW2d 738 (2011).

III. DUE DILIGENCE

Defendant next argues that the trial court erred in allowing Antonio's preliminary examination testimony to be read into the record where the prosecutor failed to exercise due diligence in securing Antonio's presence at trial. We disagree.

This Court reviews for an abuse of discretion a trial court's determination that the prosecutor has exercised due diligence. *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 lv den 471 Mich 867 (2004).

MCL 767.40a(3) provides: "Not less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial." "It is the fact of endorsement, regardless of whether or not such endorsement is required, that puts the obligation of production on the prosecutor." *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988). Applying the statute, this Court has stated:

A prosecutor who endorses a witness under MCL 767.40a(3) is obliged to exercise due diligence to produce that witness at trial. A prosecutor who fails to produce an endorsed witness may show that the witness could not be produced despite the exercise of due diligence. If the trial court finds a lack of due diligence, the jury should be instructed that it may infer that the missing witness's testimony would have been unfavorable to the prosecution's case. [*Eccles*, 260 Mich App at 388.]

"Due diligence is the attempt to do everything reasonable, not everything possible, to obtain the presence of res gestae witness . . ." *Cummings*, 171 Mich App at 585, quoting *People v George*, 130 Mich App 174, 178; 342 NW2d 908 (1983).

During opening statements, the prosecutor told the jury that they would hear from Antonio, who had been charged as an accessory after the fact. Antonio would testify that defendant confessed to killing Merlyne and asked Antonio to hide the murder weapon. Defense counsel warned in his opening statement: "So we'll see if Mr. [Antonio] Allen comes in and testifies and if so – because he's given four different versions of what happened, none of them that match up with each other whatsoever in any way, shape or form."

Antonio could not be subpoenaed and a due diligence hearing was held. Flint police Officer Somers testified that on October 22, 2013 Sergeant Brett Small asked him to check three addresses for Antonio. Small gave Somers neither a photograph nor a description of Antonio. The first address was 6814 Cecil Drive. Somers went at approximately 6:00 p.m. and found that it was vacant. The next address was 1195 Russell where the mother of Antonio's child, Serita Thompson, lived. Serita told Somers that she had not seen Antonio. Somers did not follow up with her when she said that she had not seen Antonio for a while. He did not ask her if she had his contact information. The next address was 2501 Mallory, a suspected drug house. The

occupants also reported that they had no knowledge of where Antonio would be.⁴ Somers had a difficult time getting information about Antonio from the individuals who were there. Somers made contact with at least two individuals, neither of whom provided identification. Somers returned to the addresses on October 24, 2013. Once again, the Cecil Drive address was vacant. He made no contact with anyone at the Russell or Mallory addresses.

Sergeant Small testified that he was the officer in charge of the case and was involved in locating the witnesses. Upon receiving subpoenas for the case, Small began to look for Antonio. Small had “inherited” the case and it dated back to 2010, so there were a number of addresses. The Cecil and Mallory addresses were each listed as Antonio’s prior addresses and the Russell address was where Antonio’s child’s mother lived. There was an address on Comanche belonging to Antonio’s cousin, Demario Blunt. When Small made contact at the Comanche address, a woman told him she had recently moved in and that other people had come around inquiring about Antonio, but she did not know him. He checked the other addresses approximately once every four days. Small ran Antonio’s name through the Law Enforcement Information Network for a recent address and noted that Antonio had outstanding warrants. Small then contacted the Genesee County Jail daily to make sure Antonio was not incarcerated. Small also left a message for Antonio’s attorney of record, Jeff Skinner. Small was unable to locate telephone numbers for either Antonio or his mother, Stephanie Tyler.

During cross-examination, Small acknowledged that he did not check Antonio’s mother’s address on Tebo. Small went to Antonio’s aunt’s house (the one where he was arrested) and the home was vacant. Although Antonio was placed on juvenile probation for this particular case, Small did not contact Antonio’s probation agent to see if he or she had an address or phone number for him. Small did not investigate whether Antonio was receiving state assistance or if he had an outstanding Friend of the Court case.

The prosecution requested that Antonio’s preliminary examination testimony be read into the record because Antonio was unavailable. Defense counsel objected, arguing that the prosecution failed to show due diligence in securing Antonio as a witness.

Under MRE 804(b)(1) “former testimony” is excluded from the hearsay rule if the witness’s testimony was “given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.” Where, as here, a missing witness’s prior testimony is sought to be read into the record at trial under MRE 804(b)(1), “the prosecution must have made a diligent good-faith effort in its attempt to locate a witness for trial. The test is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it.” *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998).

⁴ Defendant’s father testified that he believed defendant’s mother’s aunt lived on Mallory.

The trial court noted that, given the outstanding warrants for Antonio's arrest, it was likely that Antonio was avoiding the system and granted the prosecutor's motion. We can find no fault with the trial court's conclusion that the prosecutor exercised due diligence in securing Antonio's presence:

It appears that Sergeant Small did not wait until the day of trial to procure his attendance, that he made efforts from the time that he had obtained the subpoena for [Antonio]. There was also additional efforts made by Officer Somers during the trial of this matter, starting as early as this past Tuesday and where he had gone to several different locations that he had been instructed to by Officer – Detective Small, again, with no results in locating [Antonio].

So when the Court looks at the total circumstances of this situation, given the fact that Sergeant Small had made efforts to locate [Antonio] at various residences that [Antonio] had had in the past, where one of his friends or associates lives at, where his baby's mama lived at. He had searched the jail to determine whether or not he was located in the jail because of the warrants that were pending.

This Court would find that there certainly were reasonable efforts to obtain his attendance at Court. And I would also find that there were diligent efforts to locate him, both before trial and during trial, to have him here.

There is testimony by [Antonio] that is in the preliminary examination transcript – or the preliminary examination hearing where both sides were given equal opportunity to solicit testimony on behalf of their respective clients. And so for that reason I will find that the Prosecution has met his burden to establish reasonable efforts to locate [Antonio] as well as diligent efforts to obtain him within the requirements of the law. And I will allow his preliminary examination testimony to be read into evidence.

The trial court's decision was not an abuse of discretion where the proper inquiry was whether the prosecutor made diligent good-faith efforts, not whether the prosecutor could have made more stringent efforts. *Bean*, 457 Mich at 684.

IV. SENTENCING

Finally, defendant argues that he is entitled to resentencing where his sentence violated the requirements of proportionality. While the trial court did not impose a sentence of life without parole, it imposed the maximum sentence under MCL 769.25(9). In so doing, defendant argues, the trial court misapplied *Miller v Alabama*, ___ US ___; 132 S Ct 2455; 183 L Ed 2d 407 (2012) because, although the trial court considered the factors set forth in *Miller*, the ultimate sentence was not proportional to the offender.

In *Miller*, the United States Supreme Court held that mandatory life imprisonment without the possibility of parole for those under the age of 18 when they committed a crime violated the Eighth Amendment's, US Const VIII, prohibition against cruel and unusual

punishment. *Miller*, 132 S Ct 2455. The Court concluding that juveniles were different from adults:

Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors . . . or his incapacity to assist his own attorneys. . . . And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it. [*Id.* at 2468.]

However, the Court fell short of categorically barring life without parole for juvenile offenders; instead, it held that a sentencing court must “take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” *Id.* at 2469.

Our Courts have since struggled with what, exactly, *Miller* requires. See *People v Eliason*, 300 Mich App 293; 833 NW2d 357 (2013); *People v Carp*, 298 Mich App 472; 828 NW2d 685 (2012). This Court noted that “the only discretion afforded to the trial court in light of our first-degree murder statutes and *Miller* is whether to impose a penalty of life imprisonment without the possibility of parole or life imprisonment with the possibility of parole” guided by “the following nonexclusive list of factors”:

(a) the character and record of the individual offender [and] the circumstances of the offense, (b) the chronological age of the minor, (c) the background and mental and emotional development of a youthful defendant, (d) the family and home environment, (e) the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressure may have affected [the juvenile], (f) whether the juvenile might have been charged [with] and convicted of a lesser offense if not for incompetencies associated with youth, and (g) the potential for rehabilitation. [*Carp*, 298 Mich App at 532, citing *Miller*, 132 S Ct at 2467–2468 (quotation marks and citations omitted).]

However, the Legislature enacted MCL 769.25 and MCL 769.25a effective on March 4, 2014, and applying to a criminal defendant who is less than 18 at the time he committed an offense either after the effective date of the amendatory act added the statutes or was less than 18 prior to that effective date and (1) either the case was still pending in the trial court or the applicable time periods for direct appellate review had not yet expired or (2) on June 25, 2012, (the day before *Miller* was decided) the case was pending in the trial court or the applicable time period for direct appellate review had not yet expired. MCL 769.25(1)(a)(i) and (ii). Pursuant to MCL 769.25, juveniles are no longer sentenced under the same fixed sentences as adults who

commit the same offenses may be sentenced and, absent a motion by the prosecutor seeking a sentence of life without parole, “the court shall sentence the individual to a term of imprisonment for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years.” MCL 769.25(4) and (9). If the prosecutor files a motion seeking life imprisonment without the possibility of parole for the allowed enumerated offenses, the trial court must hold a hearing, at which it must consider the factors listed in *Miller* and shall specify on the record any reasons supporting the sentence imposed. MCL 769.25(6) and (7).

When considering *Eliason* and *Carp*, our Supreme Court determined that a sentencing court was not afforded with only the discretion to impose a penalty of life imprisonment without the possibility of parole or life imprisonment with the possibility of parole; a defendant whose case was on direct review at the time *Miller* was decided was entitled to resentencing pursuant to MCL 769.25(1)(b)(ii):

Under MCL 769.25(9), the default sentence for a juvenile convicted of first-degree murder is a *sentence of a term of years* within specific limits rather than life without parole. A juvenile defendant will only face a life-without-parole sentence if the prosecutor files a motion seeking that sentence and the trial court concludes following an individualized sentencing hearing in accordance with *Miller* that such a sentence is appropriate. [*People v Carp*, 496 Mich 440, 528; 852 NW2d 801 (2014).]

In the case before us, the parties began the sentencing hearing with the belief that the trial court could sentence defendant to life without the possibility of parole or life with the possibility of parole. It was only later that the parties acknowledged that defendant could be sentenced to a term of years under MCL 769.25(9).

Two recently decided cases have added a further wrinkle to sentencing juvenile offenders. In *People v Lockridge*, ___ Mich ___; ___ NW2d ___ (Docket No. 149073, decided July 29, 2015), our Supreme Court concluded that “the rule from *Apprendi v New Jersey*, 530 US 466, 120 S Ct 2348, 147 L Ed 2d 435 (2000), as extended by *Alleyne v United States*, 570 US —, 133 S Ct 2151, 186 L Ed 2d 314 (2013), applies to Michigan’s sentencing guidelines and renders them constitutionally deficient. That deficiency is the extent to which the guidelines *require* judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that *mandatorily* increase the floor of the guidelines minimum sentence range, i.e. the “mandatory minimum” sentence under *Alleyne*.” *Lockridge*, slip op, p 1-2. In order to remedy the constitutional deficiency, the Supreme Court severed “MCL 769.34(2) to the extent that it makes the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory. We also strike down the requirement in MCL 769.34(3) that a sentencing court that departs from the applicable guidelines range must articulate a substantial and compelling reason for that departure.” *Id.* Going forward, the Supreme Court held that “a guidelines minimum sentence range calculated in violation of *Apprendi* and *Alleyne* is advisory only and that sentences that depart from that threshold are to be reviewed by appellate courts for reasonableness.” *Id.*

This Court recently applied *Lockridge* to juvenile sentencing in *People v Skinner*, ___ Mich App ___; ___ NW2d ___ (Docket No. 317892, issued August 20, 2015), and held that a jury must decide whether a juvenile is to be sentenced to life imprisonment without the possibility of parole because such a sentence increases the maximum penalty in violation of the Sixth Amendment. In finding that portions of MCL 769.25 violate the Sixth Amendment, this Court explained:

MCL 769.25 contains provisions that establish a default term-of-years prison sentence for a juvenile convicted of first-degree murder. Specifically, the statute provides in pertinent part that “[t]he prosecuting attorney may file a motion under this section to sentence a[] [juvenile defendant] to imprisonment for life without the possibility of parole if the individual is or was convicted of [] [first-degree murder.]” MCL 769.25(2). Absent this motion, “the court *shall sentence the defendant to a term of years*“ MCL 769.25(4) (emphasis added). The effect of this sentencing scheme clearly establishes a “default” term-of-years sentence for juvenile defendants convicted of first-degree murder. See *Carp*, 496 Mich. at 458 (explaining that “MCL 769.25 now establishes a *default sentencing range* for individuals who commit first-degree murder before turning 18 years of age” (emphasis added); MCL 769.25(4) (providing that, absent the prosecution's motion to impose a life without parole sentence, “*the court shall sentence the defendant to a term of years* as provided in subsection (9)” (emphasis added)). [*Skinner*, slip op, p 8 (footnotes omitted).]

Here, defendant was sentenced to a term of years instead of life without the possibility of parole; as such, the holding in *Skinner* is inapplicable. Quite simply, by sentencing defendant to the statutory maximum, the trial court did not increase the default penalty.

Therefore, in accordance with *Lockridge*, we will review defendant’s sentence to determine whether it is reasonable. In so doing, we note that *Lockridge* did not overrule *People v Hardy*, 494 Mich 430, 438; 835 NW 2d 340 (2013), which provides that a trial court’s “factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence.”

The trial court in this case conducted an extensive sentencing hearing and also reviewed numerous documents. Defendant had an extensive disciplinary history in the Flint school district, dating back to the third grade for things such as loitering, skipping class, fighting and aggressive behavior towards students and staff. He was often suspended. In addition to his behavior, defendant also had poor attendance, missing more than 50 percent of school. Defendant was never evaluated for special education. Defendant was referred to the Youth Service Bureau, but his mother declined services and said she would take defendant to a counselor.

Defendant's criminal history included a December 2009 no contest plea to charges of criminal trespass and breaking and entering a vehicle.⁵ He successfully completed consent calendar probation in March 2010, but a new petition alleging first-degree home invasion was filed in October 2010. He was adjudicated a temporary ward and placed on formal probation. Defendant was on probation when the instant offense occurred. Defendant attempted to escape from juvenile detention in June 2012. There were also uncharged criminal offenses. An officer from U of M-Flint testified that there was a purse taken from a shelf in an employee's office on campus on November 16, 2010, along with a cell phone and multiple credit cards. There were two unauthorized attempts to use the employee's credit card at a Target store and other stores within a plaza in Flint. Surveillance footage captured defendant's image. Defendant was not arrested because the officer learned that he was already in custody for a homicide. The cell phone was recovered from defendant when he was arrested for the murder. Another cell phone recovered from defendant belonged to a second U of M-Flint employee.

Evidence was presented regarding defendant's behavior while in juvenile detention. Defendant was quiet at first, but was then drawn into negative behaviors before demonstrating some leadership and "upping" his level. He did not stay up a level though. Defendant did not keep up with his schoolwork but was not involved in any violent behavior. At most, he would "square off" with other inmates, either in self-defense or as the aggressor. He was "consistently inconsistent." He participated in group meetings. He eventually went absent without leave. Defendant was off campus for an appointment when he asked to go to the bathroom and never returned.

Defendant's father, Mark Anthony Jones, Sr., testified that he was currently incarcerated on a child support matter. Jones and defendant's mother were in a relationship for several years before defendant was born. Jones became incarcerated in federal prison on July 27, 1995 and defendant was born on April 19, 1996. Jones was in prison for 13 years. Jones went to live with defendant on his release in 2008. Jones and defendant would go to the library, play basketball and play video games. Jones would sometimes check on defendant at school. He did not realize how low defendant's grades were. Defendant would get in trouble at school, but was not involved in violent behavior. Jones did not discipline defendant because "he was just too far gone; and me disciplining him wouldn't have helped too much."

Defendant's mother, Tiniya Tyler, testified that she had defendant when she was 26 years old. She worked until 2007 as a tutor and lunch aide at an elementary school and also worked in retail. Tyler stopped working because of medical and mental health problems and was receiving disability benefits. Tyler had ADHD, bipolar disorder, and post-traumatic stress disorder. Tyler's highest level of education was seventh grade because she was pregnant. She never received her GED.

Tyler testified that defendant began getting into trouble very early on at school. She helped him with homework, but sometimes he would not turn it in and he continued to do poorly. Teachers told Tyler that defendant was not focused and was not trying hard enough. Tyler

⁵ They were separate instances on separate occasions, but heard on the same date.

forced defendant to switch schools frequently. Tyler and Jones were frequently called to the schools for defendant's behavior. He would run around the school, skip class and hide. Tyler testified that she requested that defendant be tested for special education but that he was never tested. There was a brief period when defendant's performance improved because of a tutor. Tyler took defendant to a doctor when he was ten and he was diagnosed with ADHD and bipolar disorder and was placed on medication. She also took him to counseling twice when he was 12. He attended monthly counseling at New Passages.

Tyler came from a large family, but did not get along with her sister, Stephanie. Defendant did not have any friends and spent most of his time hanging out with Stephanie's children, Antonio and Demario. Tyler believed that Stephanie and her children were "smoking weed and taking pills" and admonished defendant not to go there, but he would sneak off anyway. On November 16, 2010, Tyler got a call from her sister to come pick up defendant because he had taken same pills and was not acting like himself. After arriving at the hospital, Tyler began to have a panic attack and left defendant in order to get some ice. He was gone when she returned. Defendant returned home at 11:00 p.m. that night and seemed tired. She did not think he needed to go back to the hospital. He was arrested the next day. Tyler did not believe defendant committed the murder.

Psychologist Karen Noelle Clark testified that she met with defendant at defense counsel's request in January 2014. Clark was supposed to meet with defendant's parents, but neither appeared for their scheduled appointments. Clark had a telephone interview with defendant's mother. Defendant's father was incarcerated. Defendant's IQ was 77, which was "borderline" and comparable to the bottom six percent of the population for his age. Defendant read at the sixth grade level and his math skills were at the fourth grade level. Defendant was "impulsive, unpredictable and often explosive." Clark found defendant to be a "very troubled young man" whose behavior had been out of control since he was eight years old. He had ADHD and Clark noted that there was some depression and reference to bipolar disorder. While those characteristics would not make a person more violent, they "would make a person more impulsive, having more risk taking, having fewer controls over themselves and have more difficulty engaging appropriately in society with people and values and character."

Clark believed defendant's behavior was learned behavior from his environment, which was "loose, disorganized, dysfunctional and unkind." Defendant was "left pretty much to his own devices." Clark noted that defendant's family was very poor and mobile, "which meant that they really didn't have stakes; that mom had learning problems. Dad's absent. He didn't fit. He didn't fit any place . . . They didn't have the sustained services that might have redirected him." She noted:

I would say that the circumstances that this young man grew up in would be hard for anybody. That he – he doesn't have a sense of resiliency, he doesn't have a sense of self-correcting, he doesn't – he doesn't have a sense of personal value. I mean, he doesn't have a sense of the discipline that says you don't do that because it will hurt your mother, or you don't do that because it will hurt somebody else. His value is he can get away with it or he doesn't care, you know, that it's so impulsive, it's so shortsighted, that it's more immediate gratification, you know, I want this with really having no long range vision to what that means even for him.

But Clark believed defendant was capable of rehabilitation in a controlled environment. She noted that while defendant “is capable of turning his life around. I think that turning his life around is swimming upstream; and I don’t know if he’s willing to do it or if he’s able to do it.” She opined:

The experiences of Mark Jones’ early life cannot be altered. These formative years will have an indelible impression on the rest of his life. His behavior, heretofore, has been driven by rebelliousness, defiance and emotional detachment, with no regard for the consequences of his behavior. He has sought immediate gratification, irrespective of the cost to others, victims or their loved ones. He has lived with reckless abandon, seeing violence and predatory behavior as an acceptable way of life. His behavior going forward would have to depend on his own internal motivation to change. With time and a strong commitment from Mark Jones, it is anticipated that he could learn to use his long years of incarceration to his benefit; to learn discipline, structure, academic and work skills, and to learn values and build character.

Rehabilitation would be a long and arduous process. The seriousness of the offense, notwithstanding, because of Mark Jones’ youthfulness and immaturity, it is my professional opinion, based on all of the information available to me at this time, that if he is willing to put forth the necessary and unyielding effort to reform his ways in the controlled environment of prison, that he has the emotional and intellectual attributes that suggest the capacity to be rehabilitated. The onus would be on him.

By the time defendant was sentenced on May 9, 2014, he had obtained his GED. The law had also undergone a change. The trial court indicated that “life with the possibility of parole” was no longer available and that it could now either sentence defendant to life without parole or a term of years. The trial court then undertook an exhaustive look at the statutory factors to consider when sentencing defendant.

The trial court considered “the character and record of the individual offender and the circumstances of the offense,” by enumerating over fifty factors, including that defendant: was shaped by the world around him; was a very troubled youth; had horrible school attendance; had numerous police contacts; was shuffled from one school to another; did not have a stable home life; was not held accountable for his actions at home; showed some leadership qualities while in juvenile detention; did not have previous violent behavior; had a proclivity for theft; was using drugs; had previously been charged with first-degree home invasion; was on probation when the instant offense was committed; had escaped from the juvenile detention center, stealing a van to do so; previously stole cell phones and a purse at U of M-Flint, using those credit cards; used the murder victim’s credit cards the day after the killing, which showed a lack of remorse; Dr. Clark found defendant to be immature, defiant, aggressive, hostile and academically deficient; brought a replica of a gun to school in the second grade; was suspended from school on multiple occasions for disruptive behaviors; was chronically truant; had failed seventh grade twice; admitted that he never listened to his mother; was verbally assaultive and threatening toward police officers; was supposedly diagnosed with ADHD and bipolar disorder; had low average intelligence; was involved in attempting to extort someone with his mother – “So this is highly

disturbing that a mother might be involved in criminal activity in my opinion with her young son. I just think this boy had no chance out here. Just no chance.”

The trial court then considered defendant’s “chronological age.” While acknowledging that defendant was a mere 14 years old when he committed the offenses, the trial court concluded that defendant’s actions “were calculated and deliberate” and, therefore, his age was not a mitigating factor.

The trial court considered defendant’s “background and mental and emotional development,” concluding that defendant’s mental and emotional stability was stunted “due to his lack of family stability and complete lack of discipline.” Defendant’s father was non-existent and defendant attended no fewer than 11 schools. Defendant was disruptive at school and received poor grades, but had the capacity to learn, as demonstrated by the fact that he completed his GED while in jail.

The trial court considered defendant’s “family and home environment,” concluding that there was no stability and no family support to speak of. His father was absent. Life with his mother was transient and she had mental health issues. Defendant’s cousins were a negative influence.

The trial court considered the “circumstances of the homicide offense,” including the extent to which defendant was influenced by family and peers. Defendant was using drugs with his cousins, which necessitated a trip to the hospital. Instead of being treated, defendant left, retrieved a gun he had previously stolen, and attacked the victim.

In looking to “whether defendant might have been charged and convicted of a lesser offense if not for his incompetency,” the trial court noted that defendant’s statement was voluntary and had been upheld by the appellate courts. In any event, the trial court found that the evidence was damning even without the confession.

Finally, the trial court considered defendant’s potential for rehabilitation. It focused on the fact that defendant had the potential for rehabilitation in a structured environment. It pointed to defendant’s successful completion of calendar probation. The trial court again found that defendant’s behavior was due in large part to his upbringing. Nevertheless, the trial court concluded that defendant “ought to be sentenced at the high end of the minimum sentence.”

We can find no fault in defendant’s sentence. The trial court appropriately declined to sentence defendant to life without parole, recognizing that defendant was the product of his upbringing but that he had the potential for rehabilitation in a controlled environment. However, the trial court also noted the deliberate and calculated way defendant acted and concluded that defendant must serve the statutory maximum for killing Merlyne. Defendant’s sentence was reasonable under the circumstances.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly