

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOUGLAS JAMES WRIGHT,

Defendant-Appellant.

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UNPUBLISHED

March 8, 2005

No. 249627

Genesee Circuit Court

LC No. 02-010836-FC

Before: Hoekstra, P.J., and Cavanagh and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced him to 25 to 50 years' imprisonment for the murder conviction and imposed a consecutive two-year sentence for the felony-firearm conviction. We affirm.

The instant case arose from allegations that defendant shot and killed his wife in May of 1993. The shooting occurred at the couple's home after the two spent the evening consuming alcohol and discussing their pending divorce. Defendant told investigators that he went out into the yard because their discussion was going nowhere, that he did not hear a gunshot, and that the decedent was dead when he returned a few minutes later. The forensic pathologist who conducted the decedent's autopsy concluded that she died from a single gunshot wound to the chest, but listed the manner of death as indeterminate. A second forensic pathologist reviewed the autopsy report in 1993 and again in 2002. On both occasions he concluded that the decedent's death was a homicide. In March of 2002, Detective David Dwyre of the Genesee County Sheriff's Department interviewed defendant several times and obtained a formal statement in which defendant admitted to being inside the house when the shot was fired. This statement resulted in defendant's arrest in August of 2002.

I. Prearrest Delay

On appeal, defendant first contends that he was prejudiced by the nine-year delay between the decedent's death and his arrest. But because defendant failed to raise it in the trial court by way of a motion to dismiss, the issue is unpreserved. See *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999). A challenge to a prearrest delay implicates constitutional due process rights and is generally subject to review de novo. *Id.* However, because defendant failed to preserve it this Court may only review the issue for plain error affecting his substantial

rights. *People v Carines*, 460 Mich 750, 764-765, 774; 597 NW2d 130 (1999); *People v Musser*, 259 Mich App 215, 219-220; 673 NW2d 800 (2003). “Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error ‘seriously affected the fairness, integrity or public reputation of judicial proceedings’ independent of the defendant’s innocence.” *Carines, supra* at 763, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

In order to demonstrate a violation of the right to due process on the basis of preindictment or prearrest delay, a defendant must show actual and substantial prejudice to his right to a fair trial. See *People v Adams*, 232 Mich App 128, 133-134; 591 NW2d 44 (1998). To be substantial, the prejudice must “meaningfully impair” the defendant’s ability to defend against the charges in such a manner that the outcome of the proceedings would likely be affected. *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000). Substantial prejudice requires more than just “generalized allegations” such as that the memories of witnesses have suffered. *Id.* Additionally, the defendant bears the burden of establishing that the prosecution intentionally delayed bringing the charges in order to gain a tactical advantage. *Id.*; *People v White*, 208 Mich App 126, 134; 527 NW2d 34 (1994), citing *United States v Marion*, 404 US 307, 324; 92 S Ct 455; 30 L Ed 2d 468 (1971).

Defendant asserts that actual and substantial prejudice resulted from the delay in prosecution of the instant case because it is now too late to exhume the decedent’s body and perform a second autopsy. Specifically, defendant contends that a second autopsy would have (1) eliminated the differences between the opinions of the forensic pathologists presented by the prosecution and the defense regarding whether the decedent’s wound constituted a contact wound; (2) allowed a gunpowder residue test to be performed on the decedent’s hands; and (3) definitively established whether the decedent suffered from chronic alcoholism.

We find defendant’s claims to be speculative and that he has thus failed to establish actual and substantial prejudice. Regarding the differing expert opinions concerning whether the decedent suffered a contact wound, defendant merely asserts that the difference “undoubtedly” arose because the experts were viewing photographs and that an examination of the decedent’s body would have resolved the issue. But the forensic pathologists formulated their conflicting opinions based upon the same photographs and autopsy report. Defendant does not assert that the photographs were inaccurate and makes no argument as to why viewing the actual body would have caused one of the experts to change his or her position. Defendant’s contention that a gunpowder residue test could have dispositively established his innocence also constitutes speculation. Defendant’s own expert, when asked if all firearms leave gunpowder residue, testified that “when hands are chemically tested more often than not, gunpowder is not detected.” Similarly, defendant’s claim that a second autopsy could have conclusively determined whether the decedent was a chronic alcoholic is based upon conjecture. The forensic pathologists formed their differing opinions on this matter after reviewing slides of tissue removed from the decedent’s liver during her autopsy. Neither expert testified that these slides were insufficient to form an opinion concerning the decedent’s history of alcohol abuse and defendant makes no argument with regard to how additional tissue samples or further examination of the body could have shed more light on the matter.

In any event, even had defendant established actual and substantial prejudice due to the delay, his claim would fail. Defendant has not shown or even alleged that the prosecution

intentionally delayed bringing the charges in order to gain a tactical advantage. Consequently, defendant cannot establish a violation of his right to due process. *Crear, supra* at 166-167; *White, supra*. Accordingly, because defendant has not established that prejudice resulted from the prearrest delay or that the prosecution intentionally caused delay to gain an advantage, no plain error occurred and we decline to further review the issue.

## II. Hearsay Evidence

Defendant next argues that by allowing the prosecution to present testimony regarding numerous hearsay statements made by the decedent, the trial court violated his right to confront witnesses and denied him a fair trial. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). But we review preliminary questions of law, such as whether a rule of evidence precludes admissibility, de novo. *Id.* A trial court abuses its discretion when it admits evidence that is inadmissible as a matter of law. *Id.* However, the only objection that defendant raised at trial regarding the admission of decedent's statements concerned their relevancy. Defendant did not argue that they violated the rule against hearsay or implicated his right to confront witnesses until the instant appeal. "An objection based on one ground is usually considered insufficient to preserve an appellate attack based on a different ground." *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Consequently, defendant failed to preserve the issue and we may only review it for plain error affecting his substantial rights. See *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003).

Defendant contends that twenty-one different statements made by the decedent constituted hearsay and were inadmissible under the only exception that could possibly apply, MRE 803(3).<sup>1</sup> MRE 801(c) defines hearsay as a declarant's out of court statement offered to prove the truth of the matter asserted. *People v Tanner*, 222 Mich App 626, 629; 564 NW2d 197

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<sup>1</sup> The decedent made the statements to several different witnesses, including her brother, Jeffery Thompson; her sister-in-law, Denise Thompson; her cousin, Beth Hallstrom; and two of her former co-workers, Elinor Sevick and Marsha Darnell. In addition to telling two of the witnesses that defendant was having an affair, decedent made the following statements: (1) defendant was a "control freak," (2) defendant did not want her to work, (3) defendant had physically abused her in front of their son, (4) she would come home to find defendant in their house after he had moved out, (5) she continued to give in to defendant sexually because she did not want to "face his wrath," (6) defendant shot her dog, (7) defendant was taping her phone conversations, (8) defendant was angry because he could not get at money she had inherited, (9) she planned to use information that defendant had stolen money from a charity in their custody battle over their son, (10) she similarly intended to use evidence that defendant submitted a fraudulent insurance claim, (11) she was nervous that defendant would kidnap their son and take him to Florida, (12) She was scared of defendant because he shot the dog and was often in the house, (13) she was frightened of defendant because he had been physically and psychologically abusive, (14) she had had a heated discussion with defendant concerning his shooting of the dog (15) defendant grabbed her bottom and wanted to have sex with her during the conversation about the dog, (16) defendant had been physically and mentally abusive, (17) defendant wanted her to sign the house over to him, (18) she had some information that she intended to use against defendant, and (19) she continued to have sex with defendant.

(1997). Hearsay is inadmissible as substantive evidence unless one of the exceptions in the rules of evidence applies. MRE 802; *People v Poole*, 444 Mich 151, 159; 506 NW2d 505 (1993). Under MRE 803(3), a statement of a declarant's "then existing state of mind, emotion, sensation, or physical condition" is not excluded by the hearsay rule." *Coy, supra* at 14. This includes statements of intent, plans, and mental feelings. *People v Fisher*, 449 Mich 441, 450; 537 NW2d 577 (1995). But the rule does not apply to statements of memory or belief used to prove the facts remembered or believed. *Coy, supra*.

In the instant case, the decedent's statements regarding her fear of defendant made to her brother and her cousin were statements of her then existing emotional state and properly admissible under MRE 803(3). Similarly, the decedent's statement that she was nervous because she thought defendant might kidnap their son, fell within this exception. Those statements regarding the decedent's plans to use information, such as that defendant may have stolen funds or attempted insurance fraud, also constituted admissible statements of her intent. See, e.g., *Fisher, supra*. Although defendant argues that the decedent's intentions were unknown to him, the statements were not offered to show their effect on him as a listener. In any event, MRE 803(3) does not require a statement of then existing intent to be known to the person it is being offered against to be admissible.

The remaining fifteen statements relate to events that the decedent remembered having occurred rather than her state of mind. Consequently, defendant is correct in asserting that MRE 803(3) does not provide a basis for their admission. *Coy, supra*. Nevertheless, the prosecution argues that in *People v Ortiz*, 249 Mich App 297, 307-310; 642 NW2d 417 (2001), this Court admitted similar evidence regarding a victim's statements concerning the actions of the defendant, who was the victim's former husband.

In *Ortiz*, this Court quoted extensively from *Fisher, supra* at 448-450, for the proposition that state of mind evidence is admissible as an exception to the general exclusion of hearsay statements. *Id.* at 308-310. The Court then concluded, with no further analysis, that the trial court had not abused its discretion in admitting the statements. *Id.* at 310. In *People v Moorner*, 262 Mich App 64, 69; 683 NW2d 736 (2004), this Court found "the perfunctory analysis of MRE 803(3) in *Ortiz*" unhelpful in determining whether similar statements were properly admitted. The Court then held that the trial court erred in admitting the victim's statements to others regarding the defendant's threats and actions because these were statements of memory or belief. *Id.* at 73-74. However, the Court found that the error did not require reversal because the defendant had failed to preserve the issue and the trial court's actions did not amount to plain error affecting the defendant's substantial rights. *Id.* at 74-75.

The trial court in the instant case similarly erred in admitting the remaining statements made by the decedent under MRE 803(3). But as in *Moorner*, this does not amount to plain error affecting defendant's substantial rights. A trial court's misidentification of the grounds for admission of evidence does not necessarily require overturning its decision to allow it. *People v Vandelinder*, 192 Mich App 447, 454; 481 NW2d 787 (1992).

In the instant case, the decedent's statement to Denise that defendant shot her dog was properly admissible as an excited utterance. Under MRE 803(2), a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is not excluded by the hearsay rule. *People v Smith*, 456 Mich 543,

550; 581 NW2d 654 (1998). Here, Denise testified that the decedent was hysterical during their conversation because she had just discovered the body of her dog.

Similarly, the other fourteen statements challenged by defendant could have been admitted as non-hearsay. A statement presented to prove something other than the truth of the matter asserted does not constitute hearsay and is not excluded under MRE 802. See *People v Jones (On Rehearing After Remand)*, 228 Mich App 191, 206-207; 579 NW2d 82 (1998), modified 458 Mich 862 (1998). The literal truth of the statements challenged, such as that defendant was having an affair, that he was a “control freak,” that he did not want the decedent to work, and that they had an argument over the death of her dog, was not at issue at trial. Each of the remaining statements could have been admitted to show a breakdown in the decedent’s marriage with defendant rather than to establish the truth of the matter asserted. As the trial court noted, such statements were relevant to show that the decedent accused defendant of numerous wrongful acts, regardless of the truth of the accusations.

Even if the admission of the statements had constituted plain error, defendant cannot establish any resulting prejudice. The instant case is unique in that only two possibilities exist regarding what occurred. Other than their eight-year-old son, who was asleep upstairs at the time, defendant and the decedent were the only ones present in the home on the night of the shooting. Either the shooting was a homicide and defendant murdered his wife as argued by the prosecution, or the decedent committed suicide as argued by defendant. The decedent’s statements regarding marital strife and alleging improper conduct on the part of defendant support a finding that he had a motive to kill her. But the statements provide equal or greater support for the defense theory that the decedent took her own life because of these same factors. Consequently, defendant cannot show that their admission actually resulted in his conviction or seriously affected the fairness, integrity or public reputation of the proceedings. *Carines, supra* at 763. Defendant has failed to establish that the admission of the decedent’s out of court statements constituted plain error affecting his substantial rights and we decline to further review the issue.

### III. Other Acts Evidence

Defendant asserts that the trial court erred in admitting evidence that he committed certain bad acts. We review a trial court’s decision to admit evidence under MRE 404(b) for abuse of discretion. See *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

MRE 404(b) 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.

In *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994), our Supreme Court stated that before a trial court may admit evidence of other bad acts, it must determine:

First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury.

In the instant case the prosecution filed a Notice of Intent to Introduce Other Acts Evidence that included (a) all acts of prior domestic violence and threats on the part of defendant toward the decedent, (b) defendant's shooting of the decedent's dog, (c) all matters and issues relating to the parties' divorce, (d) defendant's relationship with Vicki Page/Cook, (e) defendant's commission of fraud and other crimes known by the decedent as they relate to defendant's motive to silence her. The prosecution argued that it wished to introduce the statements to show the decedent's state of mind and to establish intent, motive, and premeditation on the part of defendant. Defendant does not contend that this constitutes an improper purpose under MRE 404(b). Rather, defendant argues that the evidence regarding the shooting of the dog, his relationship with another woman, and his commission of fraud and other crimes were not relevant to any issue at trial and were therefore more prejudicial than probative.

Under MRE 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the actions more probable or less probable than it would be without the evidence." *People v Mills*, 450 Mich 61, 66; 537 NW2d 909, mod 450 Mich 1212 (1995). In cases where the proofs are circumstantial, evidence of motive is highly relevant. *Fisher, supra* at 453. And "[e]vidence of marital discord is relevant to motive just as evidence of marital harmony would be relevant to show lack of motive." *Id.* Whether the strife in a particular relationship is of a type that would provide a motive for murder constitutes an issue of weight rather than admissibility. *Id.*

The evidence challenged by defendant, like that in *Fisher, supra*, was relevant to the issue of marital discord and thus, defendant's motive for killing the decedent. Evidence that defendant was having or that the decedent believed he was having an extramarital affair clearly tends to establish a breakdown in their relationship. Similarly, the evidence that defendant shot the decedent's dog was relevant to the issue of marital discord. Testimony at trial established that the decedent was angry with defendant because of the incident and that the two had an argument over why he shot the dog rather than having it put to sleep. Further, the prosecution did not present any evidence that defendant actually stole money or committed insurance fraud. Rather, it presented statements from the decedent alleging that he committed these wrongs. The trial court found that these statements were relevant to the parties' relationship regardless of whether they were true. It held that the mere fact that the decedent made such accusations against defendant tended to establish the breakdown of their marriage. Contrary to defendant's claims, the challenged evidence was relevant to an issue at trial and the trial court did not abuse its discretion by admitting it.

#### IV. Prosecutorial Misconduct

Defendant next contends that the prosecution's rebuttal argument deprived him of a fair trial in that it improperly shifted the burden of proof from the prosecution to the defense. A claim of prosecutorial misconduct is a constitutional issue subject to review de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). When conducting such a review, we examine the pertinent portion of the lower court record and evaluate the alleged misconduct in context to determine "whether the defendant was denied a fair and impartial trial." *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003).

Prosecutors are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). And under the doctrine of fair response, "a party is entitled to fairly respond to issues raised by the other party." *People v Jones*, 468 Mich 345, 352 n 6; 662 NW2d 376 (2003). In *People v Fields*, 450 Mich 94, 116; 538 NW2d 356 (1995), our Supreme Court explained:

The nature and type of comment allowed is dictated by the defense asserted, and the defendant's decision regarding whether to testify. When a defense makes an issue legally relevant, the prosecutor is not prohibited from commenting on the improbability of the defendant's theory or evidence.

Although defendants have no burden to produce evidence, once a defendant advances a theory of the case, "argument on the inferences created does not shift the burden of proof." *Id.* at 115.

In *Fields*, *supra* at 97, the defendant admitted at the time of his arrest that he shot and wounded his wife. But at trial, he testified that a third person, his former lover, was the shooter. *Id.* at 97-98. The prosecution argued that this woman did not exist and cross-examined the defendant regarding whether he had made any effort to locate the woman and have her testify. *Id.* at 99-101 n 5. On appeal, the Court found that the prosecution's comments constituted a "fair response" to the defendant's arguments. *Id.* at 111. In holding that no burden shifting occurred, the Court noted that there was "no suggestion that the jury was required to find the elements of the offense from the defendant's failure to advance evidence, nor did the state allocate any burden to the defendant to disprove an element of the offense." *Id.* at 113.

The closing arguments made by defendant in the instant case stated that the prosecution had attempted to build its case on a series of "half-truths." Regarding whether fingerprints were found on the weapon used to shoot the decedent, defense counsel made the following statement:

Whose fingerprints did they find on the gun? They didn't present the fingerprint expert. Does that mean [the victim's] fingerprints were found on the gun? Is this another half-truth? Are you supposed to guess? He's on trial for his life. Are you supposed to guess?

[The evidence technician] said she turned 'em over to the fingerprint guy. She had to process it first. Whose fingerprints were on the gun? Oh, go ahead and guess. It's only murder. It's not like we tried to rush through this trial. You've been through what, eleven, twelve, days? Whose fingerprints? You don't know. And I submit to you, if they were [defendant's] fingerprints, do you think you would have heard the fingerprint expert in this case? Do you think, just maybe?

Nah. You didn't hear anything about fingerprints. And don't – we all know that they were tested. [The evidence technician] told us after she [processed] them, she was giving them to the print man. And the firearms expert.

In response to defendant's argument, the prosecution made the following statement during rebuttal.

Defense attorney talked about half-truths. He wanted to talk about fingerprints. And he actually suggested to you, 'well maybe, just maybe, her fingerprints were on the gun.' Because he didn't hear anything about fingerprints. Talk about half-truths, ladies and gentlemen. Talk about half-truths. He's trying to give you the impression that [the victim's] fingerprints were on that gun. But ladies and gentlemen, they had all the materials. Did you see how he stood up when – when he didn't – wondered if he had something in a report? Every time something happened, he had that in his materials. Now, he doesn't have the burden of proof, but he certainly has all the materials. And if [the victim's] fingerprints were on it, he was absolutely able to put that into evidence. But he didn't do it.

As in *Fields, supra*, the prosecution's comments constituted a fair response to an issue raised by the defense. Defense counsel's closing argument suggested that the prosecution intentionally withheld exculpatory fingerprint evidence. Rather than attempting to shift the burden of proof, the prosecution merely argued that all of the evidence it possessed had been given to the defense. Like the line of questioning employed in *Fields, supra*, the prosecution's statement that defendant could have presented the fingerprint evidence if it existed did not suggest that the jury was required to find the elements of the offense from defendant's failure to advance evidence or attempt to force defendant to disprove an element of the offense. After examining the prosecution's comments in context, we find that they did not deny defendant a fair and impartial trial.

## V. Jury Instructions

Defendant argues that because the prosecution presented insufficient evidence to support the charge, the trial court erred by instructing the jury on first-degree murder. Defendant contends that this erroneous instruction likely caused the jury to reach a compromise verdict and improperly convict him of second-degree murder. However, at trial, defendant waived any objection to the jury instructions.

In *People v Carter*, 462 Mich 206, 213; 612 NW2d 144 (2000), the trial court gave a jury instruction that violated a court rule. But rather than merely forfeiting the issue by failing to object, the defendant's attorney expressly approved the instruction given. *Id.* at 214, 216. Our Supreme Court found that, because of defense counsel's actions, the defendant had waived the issue on appeal. *Id.* at 215. The Court defined waiver as "the intentional relinquishment or abandonment of a known right" and held that waiver "*extinguishes any error*" and precludes appellate review. See *id.* at 215-216.

In the instant case, the trial court instructed the jury regarding the elements of both first- and second-degree murder and explained that the jury could return a verdict of not guilty, guilty of first-degree murder, or guilty of second-degree murder. The court then called a bench

conference and asked the parties whether they had any objection to the instructions given. Defense counsel responded that he did not. Like the defendant's attorney in *Carter, supra*, defendant's counsel expressly approved the trial court's instruction regarding first-degree murder. Consequently, defendant has waived the issue and appellate review is precluded.<sup>2</sup>

## VI. Juror Misconduct

Defendant next asserts that the trial court erred in denying his motion for a mistrial based on juror misconduct. Twenty-one days after the close of trial, defendant filed a motion for a mistrial asserting that during the presentation of his defense, one of the jurors stated, "We have heard enough," and that there was no need to continue with the trial. On appeal, defendant argues that the trial court abused its discretion in failing to grant him a new trial. In essence, defendant argues that we should review the trial court's decision regarding his motion for a mistrial as though it had denied a timely motion for a new trial on the basis of juror misconduct.

Generally, we review a trial court's decision to grant or deny a mistrial for abuse of discretion. *People v Nash*, 244 Mich App 93, 96; 625 NW2d 87 (2000). But where a defendant fails to request a mistrial during the course of trial, the issue is forfeited and the defendant bears the burden of establishing the existence of plain error affecting his substantial rights. *Id.* at 96-97. If we were to consider defendant's motion as though he had moved for a new trial, we would review the trial court's decision for an abuse of discretion and its related factual findings for clear error. *Crear, supra* at 167. In order to obtain a new trial on the basis of juror misconduct, a defendant bears the burden of establishing that "the misconduct affirmatively prejudiced the defendant's right to a trial before a fair and impartial jury." *People v Fox (After Remand)*, 232 Mich App 541, 558; 591 NW2d 384 (1998).

Regardless of the standard applied, defendant bears the burden of establishing that prejudice resulted from the alleged juror misconduct. *Nash, supra* at 96-97; *Fox, supra*. The parties agree that an unidentified juror stated that he had "heard enough" during the presentation of defendant's case. But the prosecution argued and the trial court found that this constituted an expression of frustration with the length of the trial rather than an indication that the jury had commenced deliberating before the close of proofs or had made a premature determination of defendant's guilt. Rather than showing the existence of actual prejudice, defendant merely notes that the incident occurred and argues that the trial court should have held a hearing to determine whether prejudice resulted. Consequently, defendant has failed to meet the burden of establishing that the juror's statement denied him a fair trial.

## VII. Issues Raised in Defendant's Standard 11 Brief

### A. Transcripts

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<sup>2</sup> We note that even had defendant not waived the issue, his claim must fail. Viewing the evidence presented in the light most favorable to the prosecution, sufficient evidence existed for a rational jury to have found defendant guilty of first-degree murder beyond a reasonable doubt. See *People v Marsack*, 231 Mich App 364, 370; 586 NW2d 234 (1998). Thus, instruction on this offense was proper.

Defendant contends that key portions of the trial were not included in the trial transcripts. Several of defendant's claims in this regard are factually inaccurate. The transcripts do contain the trial court's jury instructions, its reasons for dismissing the two alternate jurors, and a record of the admission of the actual handgun used in the shooting. Defendant's remaining claims regarding comments made by the prosecution and jurors cannot overcome the presumption that transcripts prepared by certified court reporters are accurate. *People v Abdella*, 200 Mich App 473, 475-476; 505 NW2d 18 (1993).

Here, defendant makes no argument as to how, if the transcripts contained the comments he asserts are missing, his ability to seek post conviction relief would be enhanced. *Id.* at 476. Consequently, defendant is not entitled to relief based on the trial transcripts. Further, because a decision regarding which claims to pursue on appeal is presumed to constitute sound appellate strategy, counsel's failure to raise this issue on appeal does not constitute ineffective assistance of appellate counsel. *People v Reed*, 198 Mich App 639, 646-647; 499 NW2d 441 (1993).

### B. Trial Court Bias

Defendant contends that during his presentation of testimony from an expert witness, the trial court interjected a joke that indirectly had the effect of chastising the witness. Defendant further asserts that on numerous other occasions, the trial court interrupted or criticized defense counsel and thus showed an obvious bias in favor of the prosecution.

A criminal defendant has the right to have his case heard by a "neutral and detached magistrate." *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996), quoting *People v Moore*, 161 Mich App 615, 619; 411 NW2d 797 (1987). Although a trial court has wide discretion and power in the matter of trial conduct, it "pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial." *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). But the record must be reviewed as a whole and "[p]ortions of the record should not be taken out of context in order to show trial court bias against defendant." *Id.*

In the instant case, during the presentation of testimony from a forensic pathologist, defense counsel misplaced an exhibit and took several minutes to locate it. During this time, the trial court told the jury a humorous story about Abraham Lincoln's law practice. Based on their context, there is no indication that the trial court's comments were intended to or had the effect of disparaging defense counsel or demeaning the expert's testimony. Rather, it appears that the trial court was merely attempting to give defense counsel time to find his missing exhibits without calling a recess or delaying the trial more than necessary. The comments did not "pierce the veil of judicial impartiality" or deprive defendant of a fair and impartial trial.

Although defendant claims that the trial court exhibited bias on numerous other occasions, he cites to no specific instances of such conduct. A party "may not leave it to this Court to search for the factual basis to sustain or reject his position." *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001), quoting *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). Consequently, defendant has abandoned these claims.

### C. Discovery Violations

Defendant next contends that the introduction of certain evidence, despite discovery violations by the prosecution, violated his right to due process and entitles him to a new trial. Specifically, he challenges the admission, use, or attempted admission at trial of the curriculum vitae of one of the forensic pathologists, the tape of his 9-1-1 telephone call on the night of the shooting, and the transcript of an interview conducted by Detective Dwyre in March 2002.

MCR 6.201 governs matters related to criminal discovery. *People v Gilmore*, 222 Mich App 442, 448; 564 NW2d 158 (1997). Under MCR 6.201(B), the prosecution must, upon request, provide a criminal defendant with certain information, including any police reports concerning the case and any written or recorded statements by the defendant. *Id.* If the prosecution fails to comply, the trial court, in its discretion, may order that testimony or evidence be excluded, or may order another remedy. MCR 6.201(J). “When determining the appropriate remedy for discovery violations, the trial court must balance the interests of the courts, the public, and the parties in light of all the relevant circumstances, including the reasons for noncompliance.” *People v Banks*, 249 Mich App 247, 252; 642 NW2d 351 (2002). We review such determinations for abuse of discretion. *Id.*

Further, criminal defendants do not have a general constitutional right to discovery. *People v Elston*, 462 Mich 751, 765; 614 NW2d 595 (2000). Where the evidence in question is not favorable to the accused, any error involved in a trial court’s failure to remedy a discovery violation is nonconstitutional in nature. *Id.* at 765-766 n 6. Our Supreme Court explained the standard for reviewing such errors as follows:

In order to overcome the presumption that a preserved nonconstitutional error is harmless, a defendant must persuade the reviewing court that it is more probable than not that the error in question was outcome determinative. An error is deemed to have been “outcome determinative” if it undermined the reliability of the verdict. In making this determination, the reviewing court should focus on the nature of the error in light of the weight and strength of the untainted evidence. [*Id.* at 766 (citations omitted).]

Defendant’s first two claims on appeal were remedied at trial pursuant to MCR 6.201(J). The trial court held that the prosecution violated MCR 6.201(B) with regard to the pathologist’s curriculum vitae and excluded this evidence. Further, although defendant had not been given a copy of the 9-1-1 tape, the trial court found that the prosecution had only just received the edited version and allowed defendant an opportunity to review it before admitting the recording. In light of the relevant circumstances, these actions constituted appropriate remedies for the prosecution’s discovery violations and we find no abuse of discretion.

However, the record is unclear as to whether the prosecution violated the discovery rule with regard to the interview transcripts. Despite objections by defense counsel, the trial court allowed the prosecution to cross-examine defendant with the transcripts and admitted a recording of the interview without comment. But even if the admission of this evidence constituted a violation of the discovery rule, we find that any such error was harmless. Although defendant stated that he had not seen the transcripts of the interview before trial, he testified that he had read the transcripts and listened to the tape of the formal statement he gave immediately following the interview. In both the formal statement and the interview, defendant deviated from his earlier story and admitted that he heard a gunshot when at the top of the basement stairs.

Because the contents of the two statements are substantially similar, defendant cannot show that it is more probable than not that the prosecution's use of the transcripts from the interview resulted in his conviction. Consequently, defendant is not entitled to a new trial.

#### D. Use of Leg Restraints

Defendant asserts that the trial court committed reversible error by ordering him to wear a leg restraint during trial. "Freedom from shackling is an important component of a fair trial" and their use is permitted only under extraordinary circumstances. *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). Restraints may be used "only to prevent the escape of the defendant, to prevent the defendant from injuring others in the courtroom, or to maintain an orderly trial." *Id.* But to "justify reversal based on the presence of shackles or restraints during trial, the defendant must show that prejudice resulted." *People v Robinson*, 172 Mich App 650, 654; 432 NW2d 390 (1988). An error may be rendered harmless if the jury was unable to see the defendant's restraints. *People v Johnson*, 160 Mich App 490, 493; 408 NW2d 485 (1987).

On appeal, defendant concedes that rather than highly visible handcuffs or shackles, the restraint consisted of a leg brace worn beneath his civilian clothing. Although defendant contends that the brace caused him to walk in a stiff-legged manner and that the edge of the brace was visible beneath the leg of his trousers, there is no indication that the jury actually noticed the restraint or that use of the unobtrusive device altered the outcome of the trial. Because defendant has failed to establish prejudice, we refuse to reverse his convictions.

#### E. Ineffective Assistance of Counsel

Finally, defendant alleges that he received ineffective assistance of trial counsel. Because defendant failed to move the trial court for an evidentiary hearing or a new trial, our review is limited to mistakes apparent on the record. *People v McMillan*, 213 Mich App 134, 141; 539 NW2d 553 (1995).

Effective assistance of counsel is presumed and the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001). In order to establish ineffective assistance of counsel, the attorney's performance must have been "objectively unreasonable in light of prevailing professional norms." *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). Further, it must be shown that, "but for the attorney's error or errors, a different outcome reasonably would have resulted." *Id.*

First, defendant contends that he received ineffective assistance because the defense was forced to share a table with the prosecution at trial. Defendant asserts that this arrangement prevented him from openly communicating with his attorney or participating in his defense. Although the record does not provide any direct information concerning the seating arrangements at trial, it may be inferred that the parties were in close proximity. At one point, defense counsel took several minutes to locate a photographic exhibit because one of the prosecution's files had been placed on top of it. Nevertheless, there is no indication that the close quarters actually impeded defendant's ability to communicate with his trial counsel or that, but for the seating arrangement, the outcome of defendant's trial would have been different.

Next, defendant asserts that trial counsel was ineffective for failing to immediately move for a mistrial when he discovered that one of the jurors had stated he had “heard enough.” Defense counsel did move for a mistrial because of this alleged juror misconduct after the close of defendant’s trial. The trial court fully considered the issue and found that the juror’s statement constituted an expression of frustration with the length of the trial rather than an indication of juror bias. Defendant fails to establish that, but for his attorney’s failure to raise the issue earlier, a different outcome would have resulted.

Finally, defendant asserts that his attorney failed to adequately prepare him for the prosecution’s cross-examination in that counsel failed to inform of the existence of an interview report prepared by Detective Dwyre. The record is silent as to the matters defendant and trial counsel actually discussed before his testimony. Consequently, defendant cannot overcome the presumption that the degree to which counsel prepared him for his testimony constituted sound trial strategy.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Mark J. Cavanagh

/s/ Stephen L. Borrello