

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PONCIETTA ADRIENNE EARLE,

Defendant-Appellant.

UNPUBLISHED

May 24, 2005

No. 244245

Wayne Circuit Court

LC No. 02-001674

AFTER REMAND

Before: Neff, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83, and carrying or possessing a firearm while committing or attempting to commit a felony (felony-firearm), MCL 750.227b. She was sentenced to 8 to 20 years' imprisonment for the assault conviction and to a two-year consecutive imprisonment term for the felony-firearm conviction with credit for time served. Defendant appealed as of right.

I. Facts and Procedural History

This case arose out of a shooting incident at an Embassy Suites hotel in Livonia. Defendant was an independent "escort" whom the victim hired for a period for time on December 13, 2001. When defendant was ready to leave she discovered that her "donation" was \$135 short. The victim stated that he did not believe he should have to pay for two full hours because she was leaving early, albeit at his request. Most of the events of the afternoon and evening that led up to the time of the shooting are not disputed. Defendant even acknowledged that she shot the victim. But defendant claimed it was in self-defense and that she did not intend to kill the victim. The prosecution maintained that a reasonable inference could be drawn from the circumstances that defendant did indeed intend to kill the victim. The jury agreed with the prosecution and convicted defendant. Defendant appealed her conviction as of right.

Among the many errors defendant alleged to have deprived her of a fair trial, was the allegation that the trial court erred when it failed to grant her a new trial for ineffective assistance of counsel. After reviewing the record and the trial court's opinion, we determined that we could not effectively review defendant's challenge to the trial court's decision not to grant a new trial without first remanding the case for the issuance of a new opinion addressing certain factual errors and the trial court's use of defendant's polygraph evidence. *People v Earle*, unpublished opinion per curiam of the Court of Appeals, issued September 23, 2004 (Docket No. 244245)

[hereinafter *Earle I*]. After remand, the trial court issued a new opinion on December 17, 2004, wherein it reversed its earlier position and granted defendant's motion for a new trial based on ineffective assistance of counsel. It also addressed the erroneous factual findings and the five *Barbara*¹ factors we asked it to address in our opinion of September 23, 2004. However, the trial court neglected to state whether the polygraph evidence was actually utilized, as well as the reasons for accepting or rejecting it, and did not make a factual finding as to whether defendant's trial counsel was in fact approached with an offer to accept a bribe. Instead, the trial court stated that the rights alleged to have been abridged were fundamental and that it could reverse even without considering whether defendant was prejudiced by her trial counsel's performance.

Plaintiff appealed the trial court's decision to grant a new trial, but we denied that appeal based on our retention of jurisdiction, and instead ordered that the application and answer in that appeal be docketed as supplemental briefs and placed in the current file. See *People v Earle*, unpublished order of the Court of Appeals, entered February 9, 2005 (Docket No. 260168). We then determined that the trial court abused its discretion when it granted a new trial without articulating a reason that provided a legally recognized basis for relief. Furthermore, because the trial court did not make the factual findings we requested, we were compelled to remand the case to the trial court for a second time. *People v Earle*, unpublished opinion per curiam of the Court of Appeals, issued February 22, 2005 (Docket No. 244245) [hereinafter *Earle II*]. After the second remand, the trial court made the necessary findings for our review of defendant's claims, and, finding those claims to be without merit, we affirm.

II. Sufficiency of the Evidence

Defendant first argues that the evidence presented at trial was insufficient to support her assault with intent to commit murder conviction because the evidence failed to establish her intent to kill. We disagree.

This Court reviews de novo a challenge to the sufficiency of the evidence. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). This Court views the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004).

In order to be convicted of assault with intent to commit murder, the defendant must be found to have intended to kill the victim. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Intent may be inferred from all the facts and circumstances and minimal circumstantial evidence is sufficient. *Id.* Additionally, circumstantial evidence and the

¹ In *People v Barbara*, 400 Mich 352; 255 NW2d 171 (1977), our Supreme Court listed five factors that must be considered before polygraph test results may be considered in deciding a motion for a new trial.

reasonable inferences which arise from the evidence can constitute satisfactory proof of the elements of the crime. *Id.*

Here, defendant argues that the evidence was insufficient to prove this element because the shots fired were not directly aimed at the victim and, given her target practice experience, had defendant intended to kill the victim, she could have. However, there is a difference between shooting at a stationary object in the relative calm of a shooting range and firing at a live, moving person. In defendant's own testimony, she stated that she was an "average shot" and that she was scared at the time of the shooting incident because she had never been attacked by a client before. Therefore, the jury could logically infer that her aim was not true despite her intention to kill the victim.

Additionally, as most of the evidence was not in dispute, the matter was essentially a credibility contest between the victim, who testified that defendant was the aggressor, and defendant, who claimed she shot the victim in self-defense. Defendant testified that she fell to the ground with her purse on her shoulder when the victim grabbed her by the hair and pulled her down. She crawled on the floor to reach her gun, which was either still in her purse or had fallen out nearby, and fired a "warning shot" that went through the door separating the suite's living room area from the hallway leading to the bedroom. But the forensic evidence showed that the bullet which went through the door was fired at a slight downward angle, an improbable direction if defendant was on the ground as she claimed. And the victim's through and through wound to his arm was consistent with his arms being raised in a defensive position. Also, a bullet was recovered across the open atrium several floors below indicating that defendant shot at the victim as he was fleeing the room. Further, in the statement she gave to the interviewing police officer, defendant stated that she had her gun cocked, but concealed, before the alleged scuffle broke out.

Defendant also testified that she sustained an injury to the crown of her head that was caused by the victim banging her head against the door. Yet defendant never asked for medical attention and did not complain of any tenderness when being generally examined by a female police officer at the jail. Moreover, the evidence indicated that defendant told the victim to pay the money or "pay the consequences," became increasingly agitated as the evening wore on each time the victim was unable to obtain additional funds, and just prior to the shooting stated, "I'm going to have to kill you for this." This Court will not interfere with the jury's role in determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992); *Fletcher, supra* at 561. And questions of intent should be left to the trier of fact to resolve. *People Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). The jury was free to reject defendant's version of events, including her claim of self-defense. On the record presented, we do not find that defendant's assault with intent to commit murder conviction was supported with insufficient evidence.

III. Kidnapping Charge

Defendant also argues that by erroneously denying defendant's motion for a directed verdict on the charged offense of kidnapping, the trial court substantially increased the possibility that the jury's decision on the assault with intent to commit murder charge was a compromise verdict. In support of her position, defendant cites *People v Vail*, 393 Mich 460, 464; 227 NW2d 535 (1975), which held that it is error warranting reversal for a court to submit a

charge to the jury where the prosecution has failed to present evidence on all the required elements because “a defendant’s chances of acquittal on a valid charge is substantially decreased by the possibility of a compromise verdict.”

However, *Vail* is no longer good law on this point. The decision was overruled in *People v Graves*, 458 Mich 476, 483-486; 581 NW2d 229 (1981), and was replaced by a rule that took into consideration Michigan’s harmless-error jurisprudence. The *Graves* Court concluded that the *Vail* rule “overlooks the fact that the error is cured when the jury acquits the defendant of the unwarranted charge.” *Graves, supra* at 486. Thus, “a defendant has no room, to complain when he is acquitted of a charge that is improperly submitted to a jury, as long as the defendant is actually convicted of a charge that was properly submitted to the jury.” *Id.* at 486-487. In this case, defendant does not contend that the charge of assault with intent to commit murder was not properly submitted to the jury.²

But defendant does assert that “incomplete jury instructions as to how the jury should determine Defendant’s intent, and improper and incomplete responses to juror questions” made it highly probable that the submission of the kidnapping charge affected the jury’s verdict on the assault with intent to commit murder charge. The *Graves* Court did qualify its rule, stating that if “sufficiently persuasive indicia of jury compromise are present, reversal may be warranted in certain circumstances.” *Id.* at 487-488. An acquittal may not cure submission of an unwarranted charge

where the jury is presented an erroneous instruction, and: 1) logically irreconcilable verdicts are returned, or 2) there is clear record evidence of unresolved jury confusion, or 3) as the prosecution concedes in the alternative, where a defendant is convicted of the next-lesser offense after the improperly submitted greater offense. [*Id.* at 488.]

Here, even if we were to presume that the jury was presented with erroneous instructions there is not “clear evidence” that there was unresolved jury confusion. The jury did submit several questions to the court during deliberations, which were addressed by the court.³ If questions remained, the jury was aware of its ability to communicate with the court for further clarification. Also, because kidnapping and assault with intent to commit murder are separate offenses with distinct elements, kidnapping is not a greater offense of assault with intent to commit murder⁴ and the verdicts are not irreconcilable.

² Defendant’s argument that there was insufficient evidence of an intent to kill to support the assault with intent to commit murder conviction is irrelevant in terms of whether the charge was properly submitted to the jury. As we noted above, questions of intent are properly decided by the factfinder, where, as in this case, the prosecution presented evidence from which a reasonable inference of intent could be made. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004).

³ We address the propriety of the court’s responses to the jury’s questions in section V of this opinion. We do not find defendant’s alleged instructional errors to be meritorious.

⁴ See *People v Bearrs*, 463 Mich 623, 627; 625 NW2d 10 (2001).

Moreover, the jurors were instructed not to give up their honest opinion for the sake of reaching a verdict. And the jurors were polled as to their verdicts.

There is simply no more reason for assuming that jurors have compromised on a verdict when there is an erroneous charge than there is to believe they have simply reached a middle ground when several instructions are correctly given. . . . [A]ny other conclusion is based on judicial speculation that jurors who have acquitted the defendant have compromised their views despite an express direction from the trial court to the contrary. [*Graves, supra* at 486, quoting *People v Johnson*, 427 Mich 98, 116 n 15; 398 NW2d 219 (1986) (citations omitted in original).]

We conclude that even if it was error for the court to submit the kidnapping charge to the jury, a question which we need not address, the error was cured by the jury's acquittal on the kidnapping charge.

IV. Admissibility of Evidence

Next, defendant challenges the court's admission of two pieces of evidence, ostensibly under MRE 404(b). A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000), or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

Specifically, defendant asserts that the trial court improperly admitted defendant's website and evidence of the large amounts of cash found in defendant's home and safety deposit box. We note that neither piece of evidence was admitted pursuant to MRE 404(b), and, therefore, decline to engage in such an analysis. Turning first to the court's admission of defendant's website, we determine that the trial court did not abuse its discretion.

At trial, defendant objected to the admission of a copy of her website because 1) it was not relevant to any of the elements of the charged offenses and 2) it was more prejudicial than probative. Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). But to be material, evidence need not relate to an element of the charged crime or an applicable defense. *People v Brooks*, 453 Mich 511, 518; 557 NW2d 106 (1996). The credibility of witnesses is a material issue and evidence which shows bias or prejudice of a witness is always relevant. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909, mod, rem'd on other grounds 450 Mich 1212 (1995). This is because "[i]f a witness is offering relevant testimony, whether that witness is truthfully and accurately testifying is itself relevant because it affects the probability of the existence of a consequential fact." *Id.*

In this case, the prosecution sought to introduce defendant's website to impeach defendant's credibility. Throughout the trial, defendant maintained that she did not engage in

prostitution, i.e., she did not exchange sex for money, and that there was nothing illegal about the services she provided. When pressed, defendant stated that she provided “adult entertainment,” which she described as whatever two consenting adults want to do. Although the website material did not tend to prove whether defendant acted in self-defense, it bore a direct relation to her credibility in terms of her truthfulness. The jury was able to view the web pages and determine for themselves what type of services defendant purported to offer, and, in turn, assess her credibility as to the veracity of her remaining testimony. Accordingly, we find that the evidence was relevant.

However, even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *People v Houston*, 261 Mich App 463, 467; 683 NW2d 192 (2004), lv gtd 471 Mich 913 (2004). The prejudicial effect of evidence is best determined by the trial court’s contemporaneous assessment of the presentation, credibility and effect of the testimony. *People v Bahoda*, 448 Mich 261, 291; 531 NW2d 659 (1995). Here, the prosecution let the website speak for itself allowing the jury to draw inferences from it as to defendant’s believability. Defendant’s veracity was a particularly important factor in this case because of defendant’s claim of self-defense, combined with her inconsistent statements regarding the events contemporaneous to the shooting. We do not find that the trial court abused its discretion in concluding that the website’s probative value outweighed its prejudicial effect.

Defendant also claims it was error for the court to allow the prosecution to present evidence regarding the large cash amounts found in defendant’s home and safety deposit box, which totaled over \$100,000. Again, the court admitted this evidence to impeach defendant’s credibility. Defendant stated that she made a “modest” living from her escort services, no more than \$50,000 annually, and admitted that only some of the more than \$20,000 discovered in her home were profits from her business. While we agree that this evidence’s value was minimally probative, it did relate to the prosecution’s theory of the case—that defendant’s motive for killing the victim was to prevent an interruption in her business. A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000). And we do not find one here. Moreover, even if we were to find error, such error was harmless in light of the other evidence presented. An evidentiary error only requires reversal if it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

V. Jury Instructions

Defendant next contends that the trial court erred when it did not completely instruct the jury on the difference between murder and manslaughter. Plaintiff asserts that defendant has waived review of this issue because she affirmatively expressed satisfaction with the jury instructions. Defendant counters that she did not waive the issue because she did not know that the trial court was going to give CJI2d 17.4, which pertains to mitigating circumstances. We agree with plaintiff.

When instructing the jury, the court read sections (1) and (5) of CJI2d 17.4, which stated that a defendant can only be convicted of assault with intent to commit murder if the defendant

would have been guilty of murder, not manslaughter, had the victim died. The trial court did not read sections (2)-(4) which differentiate murder from manslaughter.

In order to preserve for appellate review an issue regarding the substance of a jury instruction, a party must timely object. MCR 2.516(C). When a party fails to object, that party forfeits the right to appellate review of that issue. *People v Gonzalez*, 468 Mich 636, 643; 664 NW2d 159 (2003). While a forfeited right may still be reviewed for plain error, the intentional relinquishment of a known right constitutes a waiver that extinguishes the error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Where a party expresses satisfaction with the jury instructions, that party waives review of any issue pertaining to those instructions. *Id.* at 214-215.

Here, there is no dispute that neither party requested CJI2d 17.4, and the court did not specifically mention this instruction when reviewing the proposed instructions with the parties. However, after the instructions were given and the jury was removed from the courtroom, the court gave the parties an opportunity to speak on the record. The prosecutor objected to CJI2d 17.4 being given as an instruction because there was no testimony to support it. The court then asked defendant if she had anything to say. Defendant stated that other than her earlier objections to the proposed jury instructions, she was “completely satisfied.” The court responded to the prosecutor’s objection, stating that it was required to give CJI2d 17.4 because defendant was charged with assault with intent to commit murder, and noted the objection for the record. Defendant was then asked again by the court if she had anything else to place on the record, to which defendant responded, “No, your Honor.”

We find that defendant’s comments clearly constituted a waiver. Before jury deliberations began, the court asked both parties, “Are you satisfied, with the exception of your objections that has [sic] been placed on the record, are you satisfied with the instructions as given?” Both parties responded, “Yes, your Honor.” Had defendant simply failed to object, we would review for plain error the forfeited issue. *Carter, supra* at 216. But because defendant expressly stated her satisfaction with the instructions, any error was extinguished by this waiver. *Id.* Therefore, review is not warranted.

Defendant also argues that the trial court committed reversible error when responding to three notes submitted to the court during deliberations. In its first note, the jury asked for the criteria for the three offenses. The note read, “Criteria for ~~assault with intent to murder~~ 3 offenses.” In response, the court re-read the elements of the three charged offenses, as well as the elements of the lesser-included offenses of assault with intent to commit murder. Because defendant did not object at trial to the court’s response, our review is for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant argues that the court misinterpreted the jury’s question. Given the timing of the note, shortly after deliberations had begun, defendant asserts that the jury was requesting a complete reading of all of the jury instructions, particularly the instruction on self-defense. We find that this interpretation is purely speculative. The jury specifically asked for the criteria of *the offenses*, not the defense. We find nothing ambiguous in this language and conclude that the court did not commit plain error.

The jury's other two notes requested the first and second written statements of defendant and the victim to the police.⁵ The jury's request for defendant's statements was granted without objection, and, on appeal, defendant does not allege that this decision was error. Rather defendant takes issue with the trial court's refusal to submit to the jury the police officer's notes regarding his interviews with the victim. A trial court's refusal to grant a jury's request for an exhibit is reviewed for an abuse of discretion. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998).

The court initially told the jury that they would receive the requested exhibits. Out of the presence of the jury, defendant brought to the attention of the court that there existed no written statements by the victim. The court responded that, therefore, because there were no written notes by the victim, there was no exhibit representing the jury's request. Defendant objected, contending that the jury was referring to the police officer's notes pertaining to the interviews he conducted with the victim that had been admitted as substantive evidence. The court stated that it would not give the jury an exhibit that was not specifically requested and declined defendant's request to explain to the jury why they would not be receiving any statements by the victim.

We agree that defendant's interpretation of the jury's request was logical given the evidence that was admitted during the trial. But the officer's notes were admitted over the prosecution's hearsay objection. There is no question that the notes were in fact inadmissible hearsay and the trial court plainly erred in allowing their admission. Therefore, we find the court's refusal to submit the officer's notes to the jury to be harmless error. Also, while the court should have explained its ruling to the jury, given that it had previously been told that it would receive all the requested exhibits, the jury was aware of its ability to communicate with the court and could have done so if it believed it was missing pertinent requested material; we find no plain error.

VI. Ineffective Assistance of Counsel

Defendant filed a motion for a new trial based on ineffectiveness of counsel. Defendant claimed that during trial a juror, through a middle-contact person, offered to ensure a hung jury for \$10,000. Defendant alleged that her trial counsel had been contacted by a middleman with the offer and encouraged defendant to pay the money. Defendant further alleged that she asked defense counsel about informing the court of the bribe offer, but her counsel stated he did not want to antagonize any member of the jury and he would not "pimp out" the attorney, who acted as the middleman. Defendant asserted that her trial counsel was ineffective for failing to inform the court of the juror's offer to accept a bribe, and thus, was entitled to a new trial.

Pursuant to defendant's motion, a *Ginther*⁶ hearing was held. Defendant's trial counsel, William Bufalino II, testified and denied that any conversations took place regarding a juror's offer to be bribed. He stated that he did speak with defendant about a large sum of money, \$5,000, but that was in reference to hiring an investigator to interview the jurors to assist in

⁵ The exact wording of the note read, "1st & 2nd written statement of defendant/Plaintiff."

⁶ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

defendant's appeal efforts. Defendant presented several witnesses who testified that they were aware of the juror's offer on the day Bufalino approached defendant with the offer. Witnesses also testified that, in post-conviction discussions with Bufalino, he verified that the offer had been made. Defendant also presented polygraph results which averred that these witnesses were being truthful.

On September 26, 2003, the trial court issued its opinion on defendant's motion for a new trial. In determining that defendant was not entitled to a new trial, the trial court stated, the "Court is not convinced that the conversations occurred, nor is the Court convinced that the defendant was prejudiced by, if in fact it [sic] did occur, that it [sic] denied her a fair trial." Hence, the trial court appeared to find that the conversations between defendant's trial counsel and defendant and her family and friends regarding a possible juror bribe did not occur, and, even if they did occur, they did not affect the fairness of defendant's trial.

On appeal, defendant argued that several findings of fact made by the trial court were clearly erroneous and that the court erred when it declined to consider polygraph evidence of three witnesses defendant contended were aware of the offer to fix the verdict. Based on these errors, defendant asserted that the court's ultimate conclusion, that defendant's trial counsel was not ineffective, must also be erroneous. We agreed that the trial court made several misstatements regarding the facts and that the trial court may not have properly considered the polygraph evidence presented by defendant. Because of these misstatements and the trial court's ambiguous treatment of the polygraph evidence, we could not properly evaluate defendant's ineffective assistance of counsel claim. Therefore, we remanded this case to the trial court for the reissue of its opinion, in light of those concerns.⁷

On December 17, 2003, the trial court issued its new opinion. In that opinion, the trial court stated that "the evidence in this case was overwhelming against defendant and clearly supports the jury's verdict." Nevertheless, the trial court determined that "it would be fundamentally unfair to allow defendant's conviction to stand in light of the rights allegedly abridged and would amount to a miscarriage of justice." The court reasoned that, "the appearance of any impropriety . . . is sufficient." The trial court did not address the factual findings that we requested in our first remand. The prosecution then appealed and we reversed and vacated the trial court's decision to grant a new trial and asked the trial court to reissue its opinion with the necessary findings of fact.⁸ On March 25, 2005, the trial court issued its third and final opinion on defendant's motion for a new trial, which resolved those concerns and now enables this Court to evaluate defendant's claim of error.

A. Standards of Review

We review for an abuse of discretion a trial court's decision on a motion for new trial. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). The trial court's factual findings are reviewed for clear error, *id.*, with due regard given for the trial court's opportunity to evaluate

⁷ See *Earle I*, *supra*.

⁸ See *Earle II*, *supra*. See also Section I, *supra*.

credibility, *People v Cress*, 250 Mich App 110, 138; 645 NW2d 669, rev'd on other grounds *Cress*, *supra* at 468 Mich 678.

Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *Bell v Cone*, 535 US 685; 122 S Ct 1843, 1850; 152 L Ed 2d 914 (2002); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). That is, defendant must show that counsel's error were so serious that the defendant was deprived of a fair trial, i.e., the result was unreliable. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *Id.* at 579. The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

B. The Trial Court's Findings of Fact

In defendant's motion for new trial, the key issue before the trial court was whether the alleged conversations regarding a juror's offer to accept a bribe actually transpired between defendant and her defense counsel. If the trial court found that the conversations never occurred, then trial counsel could not have been ineffective for failing to disclose a non-existent offer by a juror to accept a bribe or for attempting to solicit funds on that pretext. If the trial court found that the conversations occurred, then the trial court needed to determine whether defendant's trial counsel was ineffective for failing to bring the juror's request to the attention of the trial court or for attempting to obtain money on that pretext.

In its opinion of March 25, 2005, the trial court clarified that, at the *Ginther* hearing, defendant's trial counsel denied that any conversations regarding a juror's offer to be bribed ever occurred and that the only sums discussed were \$5,000 and \$1,000 respectively, to be used on post-trial matters.⁹ In addition, the trial court accepted that it could utilize the polygraph evidence presented by defendant and found that testimony to be credible.¹⁰ However, the trial

⁹ Under issue VIII of her brief, defendant argued the trial court's finding that her trial counsel was not ineffective was clearly erroneous because the trial court's underlying findings were erroneous. Defendant argued that the trial court erred when it found 1) defendant testified that she had a gun in her jacket's pocket, 2) defendant and complainant went to a bank, 3) that defendant's trial counsel testified that the \$10,000 was for post-trial matters, and 4) that defendant's aunt and cousin testified that they did not learn of the alleged juror bribe until after defendant was convicted. In our first opinion, we noted that the first two misstatements were harmless, *Earle I, supra*. The two remaining claims of factual error were addressed by the trial court's opinion of March 25, 2005.

¹⁰ Under issue VII of her original brief, defendant claimed the trial court abused its discretion by failing to properly consider the polygraph evidence presented in support of her ineffective assistance of counsel claim. Because it was unclear whether the trial court properly considered this evidence, we asked the trial court to address this issue in its reissued opinion. See *Earle I*, (continued...)

court stated that, although Mary and Anthony Davis testified that they learned of the alleged crooked juror during the trial, they did not hear of this juror from defendant's trial counsel, but rather from defendant. The trial court further noted that all of the alleged conversations between defendant's trial counsel and those witnesses occurred after the trial had concluded. After making these clarifications, the trial court found that 1) "There was no approach made by defense attorney to the defendant for payment of \$10,000 to guarantee a hung jury; 2) there was no evidence [of] a pretext quest for monies during trial but post-conviction costs, [and] 3) there was no approach by a third party representing an alleged juror." The trial court further stated, "[d]efense counsel[s] representation and performance was effective, thorough and professional." Based on these findings, the trial court determined that defendant was not entitled to a new trial for ineffective assistance of counsel.

On the record now before us, we cannot say that these findings were clearly erroneous. The issue essentially amounted to a credibility contest between defendant's trial counsel and defendant and her witnesses. While the trial court acknowledged that the polygraph evidence seemed credible, it simply chose to believe defendant's trial counsel rather than defendant and her witnesses. We decline to second guess those credibility assessments. *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997) ("An appellate court will defer to the trial court's resolution of factual issues, especially where it involves the credibility of witnesses."). Given that the trial court found that defendant's trial counsel never told her about a juror bribe or even attempted to solicit money from her on that pretext and that there was no approach by a juror through a third-party, defendant cannot show that her trial counsel's performance fell below an objective standard of reasonableness, let alone that she was prejudiced by his conduct. Therefore, defendant's trial counsel cannot be said to have been constitutionally ineffective.

VII. Sentencing Issues

Defendant next argues that the trial court erroneously scored offense variable ("OV") 3 and 9 and, therefore, is entitled to resentencing. We disagree.

Because defendant committed the offense after January 1, 1999, the legislative sentencing guidelines apply. MCL 769.34(2); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision "for which there is any evidence in support will be upheld." *Id.*, quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). When the trial court's sentence is within the appropriate guidelines range, "the Court of Appeals must affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining the defendant's sentence." *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003).

Under MCL 777.33(1)(c), OV 3 should be scored at 25 points if a victim sustained a life threatening injury or suffered a "permanent incapacitating injury." In this case, the victim suffered two gunshot wounds, one of which penetrated the victim's liver and colon. At trial, Dr.

(...continued)

supra. We note that the trial court properly weighed this evidence in its final opinion.

Wahl testified that the injury to the victim's liver and colon would probably have resulted in death had it not been treated. Hence, this injury was life threatening, and the trial court properly scored OV 3 at 25.

Under MCL 777.39(1)(c) the trial court should score OV 9 at 10 points if there were from 2 to 9 victims. The court shall count "each person who was placed in danger of injury or loss of life as a victim." MCL 777.39(2)(a). At trial, evidence was presented that defendant fired multiple shots at her intended victim and that one bullet traveled through the door of the hotel room, through an atrium, and into a room three floors down. The fact that this shot did not hit anyone walking outside the victim's door or in another common area, and eventually came to rest in an unoccupied room, does not alter the fact that the shots could have injured or killed any number of the hotel's other patrons. Consequently, the evidence supported the trial court's finding that at least one other person within the hotel was placed in danger of injury or loss of life as a victim.

VIII. Cumulative Error

Finally, defendant argues that, if no one error was sufficient to warrant reversal on its own, the cumulative effect of the errors warrants reversal. We disagree.

This Court has held that the "cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not warrant reversal." *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001). However, the relevant inquiry is whether the irregularities denied defendant a fair trial. *Id.* On the record before us, we cannot say that the minor errors noted, even if aggregated, deprived defendant of a fair trial.

Affirmed.

/s/ Janet T. Neff
/s/ Michael R. Smolenski
/s/ Brian K. Zahra