

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ALLEN YANNA,

Defendant-Appellant.

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UNPUBLISHED

March 28, 2006

No. 258633

Saginaw Circuit Court

LC No. 04-024253-FC

Before: Borrello, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of first-degree felony murder, MCL 750.316(1)(b), first-degree home invasion, MCL 750.110a(2), armed robbery, MCL 750.529, carjacking, MCL 750.529a, and possession of burglar's tools, MCL 750.116. The trial court sentenced him as a fourth habitual offender, MCL 769.12, to imprisonment for life for each conviction and ordered the life sentence for the carjacking conviction to run consecutively to the remaining life sentences. We affirm, but remand for the trial court to vacate the conviction and sentence for either armed robbery or first-degree home invasion.

Defendant first argues that the trial court abused its discretion in admitting evidence of defendant's prior convictions arising from defendant's offenses committed at McDonald's restaurants in the summer of 2001. After holding a hearing on the prosecutor's motion to admit other acts evidence under MRE 404(b), the trial court ruled that the evidence was admissible. We agree.

This Court reviews the admission of other acts evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). "If an error is found, defendant has the burden of establishing that, more probably than not, a miscarriage of justice occurred because of the error." *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). "No reversal is required for a preserved, nonconstitutional error 'unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative.'" *Id.*, quoting *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999).

MRE 404(b) prohibits the introduction of evidence of other crimes, wrongs, or acts of an individual to prove a propensity to commit such acts. However, such evidence may be admissible for other purposes under MRE 404(b)(1), which 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.

MRE 404(b) is a rule of inclusion, not a rule of exclusion, *People v Katt*, 248 Mich App 282, 303; 639 NW2d 815 (2001), aff'd 468 Mich 272 (2003), and evidence of other crimes, wrongs, or acts is admissible under MRE 404(b) if such evidence is: (1) offered for a proper purpose and not to prove the defendant's character or propensity to commit the crime, (2) relevant under MRE 402 to a fact of consequence at trial, and (3) the danger of unfair prejudice does not substantially outweigh the probative value of the evidence under MRE 403. *People v VanderVliet*, 444 Mich 52, 55, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Finally, the trial court, upon request, may provide a limiting instruction under MRE 105. *Id.* at 75.

In this case, the trial court properly admitted the other acts evidence under MRE 404(b). First, the prosecutor did not offer the evidence for the improper purpose of showing that defendant's bad character showed that he had the propensity to commit crimes. Rather, the prosecutor offered the evidence for the proper purpose of showing defendant's motive, knowledge, intent, preparation, scheme, plan or system in doing an act. Second, evidence that defendant had previously used a hammer to break into a safe and previously disposed of his clothing and shoes after breaking into McDonald's restaurants was relevant to defendant's preparation, scheme, or plan or system in doing an act because in the instant case, the police recovered a hammer from defendant's residence that had blue paint on it that was consistent in color, chemical composition, and elemental composition with the blue paint on the boards that had been ripped from the window of the victim's home. Furthermore, in this case, there was also evidence that defendant had abandoned his clothes to avoid detection. Third, while the other acts evidence was prejudicial, it was not unfairly prejudicial. Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the trier of fact. *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002). Evidence regarding defendant's McDonald's convictions is not so inflammatory that the jury would give it preemptive or undue weight; therefore, the evidence cannot be characterized as unfairly prejudicial. See *People v Starr*, 457 Mich 490, 500; 577 NW2d 673 (1998). Moreover, the probative value of the evidence regarding defendant's motive, knowledge, intent, preparation, scheme, plan or system in doing an act was substantial, given that when defendant committed crimes in the past, he used a hammer and disposed of his clothing. The determination whether the probative value of evidence is substantially outweighed by its prejudicial effect is best left to a contemporaneous assessment of the presentation, credibility and effect of the testimony. *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002). Therefore, we defer to the trial court's determination in this regard because the trial court, not this Court, had the opportunity to conduct a contemporaneous assessment of the presentation, credibility and effect of the testimony. Finally, the trial court issued a limiting instruction, instructing the jury that it could only consider the other acts evidence for certain purposes and that it could not use this evidence to decide that defendant is a bad person and convict him on the basis of his other bad conduct. A jury is

presumed to follow the trial court's limited use instruction. *People v Frazier (After Remand)*, 446 Mich 539, 542; 521 NW2d 291 (1994).

Defendant argues that the other acts evidence is not sufficiently similar to the charged offenses and therefore was improperly admitted. Evidence of misconduct committed by a defendant and similar to the charged conduct is only logically relevant to show that the charged act occurred when the other act and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system. *People v Ackerman*, 257 Mich App 434, 440; 669 NW2d 818 (2003). In this case, the similarities were that defendant used a hammer and disposed of his clothing to avoid detection in both the McDonald's cases and in the instant case. The similarities need not be unusual or distinctive; they need only support the inference that the defendant employed a plan in committing the charged offense. *Id.* at 440-441. Although the similarities between the McDonald's cases and the instant case were not particularly unusual or distinctive, we conclude that they were sufficiently similar to support the inference that defendant employed a plan in committing the charged offenses. The trial court did not abuse its discretion in admitting evidence of defendant's McDonald's convictions under MRE 404(b).

Defendant next argues that the prosecutor improperly elicited testimony from witnesses that referred to defendant being in jail. We disagree.

Issues of prosecutorial misconduct are decided on a case-by-case basis. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). A claim of prosecutorial misconduct is a constitutional issue that is generally reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). The reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *Noble, supra* at 660. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated in part on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). The test of prosecutorial misconduct is whether the defendant was denied a fair trial. *Noble, supra* at 660.

Defendant failed to preserve this issue for review because he did not object to the prosecutor's allegedly improper remarks or to the testimony that he alleges that the prosecutor improperly elicited. Appellate review of alleged prosecutorial misconduct is precluded if the defendant fails to timely and specifically object unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998). Absent a timely and specific objection, this Court reviews for plain error a defendant's claim of prosecutorial misconduct. *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999); *Schutte, supra* at 720. To avoid forfeiture under the plain error rule, three requirements must be met: (1) error must have occurred, (2) the error was plain, and (3) the plain error affected substantial rights. *Carines, supra* at 763. Under the third requirement, a showing of prejudice is necessary; a defendant has been prejudiced if "the error affected the outcome of the lower court proceedings." *Id.*

Defendant is correct that references to a defendant's prior incarceration are generally inadmissible because the jury might focus on these references as evidence of the defendant's

general bad character. See, e.g., *People v Fleish*, 321 Mich 443, 461; 32 NW2d 700 (1948); *People v Spencer*, 130 Mich App 527, 537; 343 NW2d 607 (1983); see also MRE 404(b)(1). However, in this case, the trial court had already ruled that evidence of defendant's previous convictions arising from his offenses at McDonald's restaurants was admissible. Therefore, evidence of defendant's prior criminal activity was already properly before the jury, and the jury presumably was already aware that defendant had been in jail for those other convictions. Furthermore, because evidence of defendant's prior criminal convictions was properly before the jury, there is no basis for concluding that the prosecutor referred to or improperly elicited from witnesses improper references to defendant's previous time in jail as part of a deliberate and calculated strategy to inappropriately prejudice defendant. Moreover, defendant himself testified on direct examination in response to questions from defense counsel that he had a criminal history and that he had been in jail. Specifically, defendant testified that he had pleaded guilty to twelve felonies as a result of his breaking and entering or entering without breaking into McDonald's restaurants on three occasions and that he had been in prison as a result of those convictions. Defendant also testified that two weekends prior to giving his testimony, he had been in a fight in jail. Error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence. *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003). Defendant's testimony regarding his prior convictions and jail time waives any claim of impropriety related to the evidence. *Id.* Finally, the trial court gave a limiting instruction under MRE 105 regarding the MRE 404(b) evidence and specifically instructed the jury that it could not convict defendant of the charged offenses based on his other bad conduct. For these reasons, we conclude that defendant's substantial rights were not affected by the references to his being in jail. *Carines, supra* at 763, 774.

Defendant next argues that the trial court abused its discretion in admitting evidence that the police discovered three crack pipes while executing a search of defendant's home and evidence that defendant failed to submit to drug testing. We disagree.

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Drohan*, 264 Mich App 77, 84; 689 NW2d 750 (2004). To preserve the issue of the improper admission of evidence for appeal, a party generally must object at the time of admission. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). In this case, defense counsel did not object to the allegedly improper evidence. We review this unpreserved issue for plain error affecting defendant's substantial rights. *Carines, supra* at 763. Reversal is only warranted when the plain, unpreserved error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence. *Id.*

Defendant argues that evidence of the crack pipes and defendant's failure to show up for drug tests should have been excluded under MRE 404(b). Assuming, as defendant contends, that evidence of the crack pipes and evidence that defendant failed to submit to drug testing constitutes bad acts evidence under MRE 404(b), it would have been offered for the proper purpose of establishing defendant's motive in committing the charged offenses. Evidence of a defendant's drug use is relevant to show motive in robbing the victim to obtain money to buy drugs. See *People v Rice (On Remand)*, 235 Mich App 429, 440; 597 NW2d 843 (1999); see also MRE 404(b)(1). Furthermore, the probative value of the crack pipes is not substantially outweighed by the danger of unfair prejudice under MRE 403. At trial, defendant admitted to

smoking marijuana in the past, but denied ever smoking crack. Nevertheless, the prosecutor's motive theory at trial was that defendant stole the victim's truck to sell it to obtain money to purchase drugs. Prejudice occurs when marginally probative evidence would be given undue or preemptive weight by the jury. *Rice, supra* at 441. Although defendant denied smoking crack, the trial court was in the best position to evaluate defendant's credibility. *Magyar, supra* at 416. Given that defendant admitted to some drug use, it is possible that he also used other drugs. Notwithstanding defendant's assertion that he had never smoked crack, evidence of the crack pipes was more than marginally probative of defendant's motive. Finally, any prejudice resulting from evidence of the crack pipes would have been eliminated by the trial court's MRE 404(b) limiting instruction to the jury that it could not convict defendant of the crimes charged based on his prior bad acts.

Given defendant's cursory treatment of his argument that the prosecutor did not provide proper notice of its intent to introduce bad acts evidence and his lack of citation to authority, we decline to address this issue. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). We note, however, that even when the notice requirement of MRE 404(b) is not satisfied, reversal is not required where the evidence was relevant and admissible under MRE 404(b) and the defendant had actual notice of the evidence sufficient to prepare a defense. *People v Hawkins*, 245 Mich App 439, 455-456; 628 NW2d 105 (2001). In this case, the evidence was admissible under MRE 404(b), defendant does not claim that he did not have actual notice or that he was surprised by the evidence of the crack pipes, and defendant has not suggested how he would have reacted differently had the prosecutor given notice. Therefore, there is no way to conclude that the lack of notice had any effect whatsoever. *Id.* at 455.

Defendant next argues that the trial court abused its discretion in admitting the prior consistent statement of witness Justin Nelson. Defendant expressly stipulated to the admission of the transcript in which the allegedly prior consistent statement occurred. Therefore, he cannot now complain of error. Error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence. *Gonzalez, supra* at 224. Defendant's agreement to the introduction of the transcript containing Nelson's prior statement waives any claim of impropriety related to the evidence. *Id.*

Defendant next argues that he is entitled to be resentenced based on the United States Supreme Court's decision in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Because our Supreme Court has determined that *Blakely* does not apply to Michigan's indeterminate sentencing scheme, we disagree.

In *People v Claypool*, 470 Mich 715, 730-731 n 14; 684 NW2d 278 (2004), our Supreme Court determined that *Blakely* is inapplicable to Michigan's indeterminate sentencing scheme. Defendant argues that *Claypool* is merely dicta and not binding upon this Court. However, in *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), this Court specifically rejected the argument that *Claypool* is merely dicta and not binding on this Court. Although our Supreme Court recently granted leave in *Drohan* to consider the sole issue whether *Blakely* and *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), apply to Michigan's

sentencing scheme, *People v Drohan*, 472 Mich 881 (2005),<sup>1</sup> *Drohan* is still binding precedent under MCR 7.215(C)(2), which provides that “a Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals.” See *Straman v Lewis*, 220 Mich App 448, 451; 559 NW2d 405 (1996). Therefore, pending a decision by our Supreme Court in *Drohan*, we are bound by this Court’s published opinion in *Drohan* that *Claypool*’s holding that *Blakely* is inapplicable to Michigan’s indeterminate sentencing scheme is not merely dicta and is binding on this Court.

Defendant also raises numerous issues in a supplemental brief in propria persona. First, defendant contends that the evidence was insufficient to establish his identity as the perpetrator of the charged offenses. We disagree.

We review de novo a claim regarding the sufficiency of the evidence. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). The test for determining whether sufficient evidence has been presented to sustain a conviction is whether, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). “The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict.” *Id.* at 400. “Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.” *Id.*, quoting *Carines*, *supra* at 757.

Identity is always an essential element of a criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). The prosecution must prove the identity of the defendant as the perpetrator of the charged offense beyond a reasonable doubt. *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967). Circumstantial evidence and reasonable inferences arising from the evidence may be sufficient to prove the elements of the crime, including the identity of the perpetrator. *Id.* at 409-410; *People v Nelson*, 234 Mich App 454, 459; 594 NW2d 114 (1999). In this case, defendant’s left index fingerprint was found on a bottle of Dr. Scholl’s foot powder that was found three feet from the victim’s body. Fingerprint evidence alone is sufficient to establish identity if the fingerprints are found at the scene of the crime under such circumstances that they could only have been made at the time of the commission of the crime. See *People v Ware*, 12 Mich App 512, 515; 163 NW2d 250 (1968); see also *People v Willis*, 60 Mich App 154, 158-159; 230 NW2d 353 (1975). Defendant asserted that he had been in the victim’s home on one occasion in August or September 2003. However, he stated that he had only stood in the doorway of the victim’s home, and he further stated that he did not recall touching the bottle of Dr. Scholl’s foot powder at that time. Defendant’s fingerprint on the bottle of Dr. Scholl’s foot powder alone was sufficient to establish defendant’s identity as the perpetrator because given defendant’s testimony that he had only been inside the victim’s home on one other occasion, that he had only stood in the doorway, and that he had not touched a bottle of Dr. Scholl’s foot powder, the circumstances were such that defendant’s fingerprint on the Dr. Scholl’s foot powder could only have been made at the time of the commission of the

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<sup>1</sup> The Supreme Court heard oral argument in *Drohan* in November 2005.

crime. Even though the fingerprint evidence alone was sufficient to establish defendant's identity as the perpetrator, we also observe that the fact that the blue paint found on a hammer that was seized from defendant's residence was consistent with the blue paint that was on the boards that had been removed from the victim's home to gain access to the home also provides further circumstantial evidence of defendant's identity as the perpetrator. Viewing the evidence in a light most favorable to the prosecution, the evidence was sufficient to establish defendant's identity as the perpetrator beyond a reasonable doubt.

Defendant next argues that numerous instances of prosecutorial misconduct deprived him of a fair trial. Because defendant did not object to any of the alleged prosecutorial misconduct at trial, our review is for plain error affecting defendant's substantial rights. *Carines, supra* at 763, 774. After reviewing defendant's numerous claims of prosecutorial misconduct, we conclude that plain error did not occur because there was no prosecutorial misconduct. Defendant's ineffective assistance of counsel claim must also fail because any objection to the prosecutor's questions or comments would have been meritless given that there was no prosecutorial misconduct. Defense counsel does not render ineffective assistance of counsel by failing to make a meritless objection. *Hawkins, supra* at 457.

Defendant next argues that defense counsel was ineffective in failing to investigate, interview, and call his sister as a witness and in failing to obtain his mother's phone records. We disagree.

Because defendant did not move for a new trial or an evidentiary hearing, our review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004). To establish ineffective assistance of counsel, the defendant must prove that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the proceedings would have had a different result. *Id.* Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy which this Court will not review with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). To overcome the presumption of sound trial strategy, a defendant must show that the failure to call the witness deprived him of a substantial defense which would have affected the outcome of the proceeding. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). The fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Contrary to defendant's contention, it appears from the record that defense counsel attempted to obtain defendant's mother's cell phone records. Because defendant did not move for an evidentiary hearing, it is unclear whether defense counsel was unable to obtain the records or whether defense counsel, upon obtaining the records, decided that they did not support defendant's claims. In any event, the fact that defense counsel did not call defendant's sister as a witness did not constitute ineffective assistance of counsel because decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy which this Court will not review with the benefit of hindsight. *Rockey, supra* at 76-77.

Based on the limited record before this Court, defendant has not overcome the strong presumption that defense counsel's performance was sound trial strategy.

Defendant next argues that the cumulative effect of multiple instances of prosecutorial misconduct, defense counsel's failure to object to the prosecutor's misconduct, and defense counsel's failure to call defendant's sister as a witness deprived him of a fair trial. There were no single instances of prosecutorial misconduct. Because the prosecutor's comments and conduct were not improper, an objection by defense counsel would have been meritless. Defense counsel is not ineffective in failing to make a meritless objection. *Hawkins, supra* at 457. Furthermore, defense counsel was not ineffective in failing to call defendant's sister as a witness because the decision whether to call a witness is a matter of trial strategy, which this Court will not review with the benefit of hindsight. *Rockey, supra* at 76-77. It is true that the cumulative effect of several minor errors may warrant reversal where the individual errors would not. *Ackerman, supra* at 454. However, in this case there is no single error on any issue; therefore, there can be no cumulative effect of multiple errors. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). Defendant's contention that the cumulative effect of multiple errors deprived him of a fair trial is without merit.

Defendant finally argues that his convictions for first-degree felony murder, first-degree home invasion, armed robbery, and carjacking violate his constitutional right not to be subject to double jeopardy and that his convictions and sentences for those offenses must be vacated. Defendant is correct that his conviction and sentence for either armed robbery or first-degree home invasion must be vacated. However, the remaining convictions and sentences stand.

A double jeopardy issue involves a question of law, which this Court reviews de novo. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). Because defendant did not preserve this constitutional issue for appeal, this Court's review is for plain error affecting defendant's substantial rights. *Carines, supra* at 763.

Under both the United States and Michigan Constitutions, the state may not place a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15. A conviction of and sentence for both felony murder and the underlying felony constitutes multiple punishments for the underlying offense and violates the right not to be subject to double jeopardy. *People v Coomer*, 245 Mich App 206, 224; 627 NW2d 612 (2001); *People v Minor*, 213 Mich App 682, 690; 541 NW2d 576 (1995). The proper remedy is to vacate the conviction and sentence for the underlying felony. *Coomer, supra* at 224. In this case, the information listed the underlying offenses for the first-degree felony murder charge as robbery or first-degree home invasion. The trial court instructed the jury on both underlying offenses, and the jury found defendant guilty of both underlying offenses. However, neither the verdict form nor the judgment of sentence indicates whether armed robbery or first-degree home invasion was the predicate offense for the first-degree felony murder conviction. We hold that the conviction and sentence for either armed robbery or first-degree home invasion must be vacated. Because it is impossible to determine whether the felony murder conviction was predicated on the armed robbery conviction or the first-degree home invasion conviction, we remand to the trial court with instructions that the trial court vacate the predicate offense for the first-degree felony murder conviction.

Affirmed, but remanded for the trial court to vacate defendant's conviction and sentence for either the armed robbery or first-degree home invasion conviction. We do not retain jurisdiction.

/s/ Stephen L. Borrello  
/s/ David H. Sawyer  
/s/ E. Thomas Fitzgerald