

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

QUAMAIN CONAY LEAK, a/k/a QUAMAIN
CORNAY LEAK,

Defendant-Appellant.

UNPUBLISHED

August 2, 2012

No. 304713

Oakland Circuit Court

LC No. 2010-233891-FC

Before: MURRAY, P.J., and FORT HOOD and BORRELLO, JJ.

PER CURIAM.

Defendant, Quamain Conay Leak, appeals as of right his convictions of first-degree felony murder, MCL 750.316(1)(b); armed robbery, MCL 750.529; and conspiracy to commit armed robbery, MCL 750.529 and MCL 750.157a. Defendant was sentenced to life imprisonment without parole for first-degree felony murder, 20 to 60 years' imprisonment for armed robbery, and 20 to 60 years' imprisonment for conspiracy to commit armed robbery. For the reasons set forth in this opinion, we affirm the convictions of defendant and pursuant to the request of the prosecutor, we vacate the sentence of defendant and remand this matter to the trial court for resentencing in accordance with *Miller v Alabama*, ___ US ___; ___ S Ct ___; ___ LE2d ___ (2012).

This appeal arises from an alleged plot by defendant and codefendants James Haden and Michael Nevils to rob the victim. The robbery ultimately resulted in Haden shooting and killing the victim.

According to testimony provided by the victim's mother, the victim suffered a closed-head injury in 2004 resulting in mental issues, and following the injury, the victim began associating with members of defendant's family and engaged in the sale and distribution of marijuana.

Testimony provided by Haden and Nevils¹ revealed that defendant thought the victim could have had as much as \$5,000 as a result of his marijuana dealings. According to them, defendant approached them on November 3, 2009 with a plan to rob defendant. Haden had a .40 caliber Smith & Wesson semi-automatic handgun which defendant told Haden to bring. Defendant then told Haden and Nevils that he would telephone the victim and lure him out.

According to testimony provided at trial, Nevils then drove Haden and defendant to the apartment complex where the victim was thought to be residing. While in the vehicle, defendant called the victim, telling him he wanted to buy some marijuana. As they pulled into the apartment complex, defendant indicated to Nevils and Haden that he saw the victim outside riding a bicycle. The victim then approached Nevil's car on his bicycle and as he approached, defendant got out of the vehicle, grabbed the victim and tried to rob him. Haden got out of the vehicle to assist in the robbery of the victim. The victim resisted and began to run away when Haden fired one shot with the ".40 caliber handgun" in the direction of the victim, who after being struck, fell to the ground. The victim never regained consciousness and died on November 5, 2009 from a single gunshot wound to the neck.

Police responded to the scene within a minute of receiving the call that shots were fired and found the victim alone, unconscious and bleeding. Following his death, the Oakland County Medical Examiner determined the cause of death was a "gunshot wound to the neck," and the manner of death was determined to be a homicide.

At trial, defendant presented a different version of his role in the events of November 3, 2009. Carrie White, defendant's self-identified girlfriend,² testified that she picked defendant up at approximately 4:00 p.m. and dropped him off at a party store a few blocks from the apartment complex where the shooting occurred. Carrie testified that she believed defendant then went to a birthday party for one of his relatives at the apartment complex, she also acknowledged that she had multiple convictions involving theft or dishonesty.

Kenyada White testified that she left the birthday party with the victim to go to the store. According to her, just before they left, the victim received a cellular telephone call. Kenyada admitted that, as they left, the victim encountered defendant. She said that she decided to go back to the birthday party and after she turned around, she heard a shot fired. Kenyada testified that after the victim was shot, he took several steps. She also testified that she saw Haden and Nevils in a white car, but claimed, contrary to other testimony, that one left on foot and one left

¹ Haden and Nevils acknowledged at trial they were testifying against defendant in accordance with plea agreements relating to their participation in the robbery. Davaris Bass, who testified he overheard defendant indicate he was planning to rob the victim acknowledged that he was testifying, at least in part, in exchange for some consideration in a case involving an unrelated crime he committed.

² When defendant testified, he claimed she was just a friend and that he let Carrie believe she was his girlfriend.

in the car. Kenyada testified that after the victim was shot, defendant stayed with the victim and screamed for someone to call 911.

According to Clarissa, Kenyada White's daughter, after she heard the gunshot, she went outside and saw defendant with the victim, screaming for someone to call 911. Clarissa claimed, contrary to what police testified to, that defendant never left the scene and was there when police arrived.

Defendant testified at trial and stated that the victim was like a "cousin" to him. Defendant denied ever discussing a robbery with Haden and Nevils. Defendant admitted that he was in the white car used in the robbery at one point earlier in the day, but defendant testified that he was only in the backseat to smoke marijuana. Defendant claimed he just happened to be approaching the apartment complex when he saw the victim leaving. At this point, defendant claimed the white car with Haden and Nevils approached and that he saw the victim start running. Defendant saw Haden shoot at the victim and saw the victim fall, after which he ran to the victim and called out for someone to call 911. Defendant also claimed he was still at the scene when police arrived.

Defendant was convicted as stated above and this appeal ensued.

Defendant first argues his trial counsel was ineffective on a number of grounds. Because defendant failed to "move for a new trial or request a *Ginther*³ hearing below," this issue is unpreserved. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Because this issue was not preserved, "review is limited to errors apparent on the record." *People v Seals*, 285 Mich App 1, 19-20; 776 NW2d 314 (2009). To prove ineffective assistance of counsel, defendant must demonstrate: (1) his counsel's performance fell below an objective standard of reasonableness; and (2) it is reasonably probable that the result of the proceeding would have been different but for counsel's alleged error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). The burden is on defendant to establish "the factual predicate for his claim of ineffective assistance of counsel." *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant first argues his trial counsel was ineffective because he failed to use all of his available peremptory challenges during voir dire to strike a biased juror. On appeal, defendant fails to articulate which of the remaining jurors should have been excused. Defendant merely asserts that: "Counsel should have used one of his two remaining peremptory challenges. His failure to use his twelfth and last challenge could be excused on the theory that the juror excused through Counsel's last challenge might have been replaced by someone more biased. Counsel's failure to strike one more biased juror was a denial of Appellant's constitutional right to an impartial jury and cannot be considered strategic . . ." Defendant does not inform this Court which juror was prejudiced or even the basis of that prejudice. Rather he simply asserts that ". . . it is difficult to determine which jurors were excused due to the fact that jurors were not always identified by juror number, but by seat number. Appellant contends that at least one clearly biased juror remained." We do not know which juror, if any, was "clearly biased" because

³ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

defendant fails to produce any evidence of this claim. A party may not merely announce a position and leave it to this Court to rationalize that position. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). Accordingly, we find defendant has abandoned this claim of error. See *id.* Moreover, defendant has failed to demonstrate that any of the jurors on the panel were biased. Thus, he has not established a factual predicate for his claim. *Hoag*, 460 Mich at 6.

Defendant next argues his trial counsel was ineffective by failing to give a more elaborate opening statement. Only a partial version of defendant's trial counsel's opening statement is available because of an apparent failure to begin recording the proceedings immediately. Reviewing the portion of the opening statement that was available, defendant cannot demonstrate his trial counsel was ineffective. He fulfilled the purpose of an opening statement, which is to "tell the jury what the advocate proposes to show." *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976), *aff'd* *People v Tilley*, 405 Mich 38 (1979). And, we have previously recognized that even a complete failure to give an opening statement "can rarely, if ever, be the basis of a successful claim of ineffective assistance of counsel." *People v Pawelczak*, 125 Mich App 231, 242; 336 NW2d 453 (1983). Further, we find no merit in defendant's unsupported claims his trial counsel should have touched on the presumption of innocence, the burden of proof, and the requirement that the verdict be unanimous. These claims relate to instructional issues and go beyond the purpose of an opening statement. *Moss*, 70 Mich App at 32. Accordingly, we assign no error to this claim.

Defendant next argues his trial counsel was ineffective in making an inadequate closing argument. He notes that his trial counsel focused on attacking the credibility of Haden, Nevils, and Bass. Defendant implies his trial counsel should have focused more on the testimony of Kenyada White because she was an eyewitness to the shooting. The "decision concerning what evidence to highlight during closing argument" is presumed to be a matter of "trial strategy." *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). We generally do "not second-guess counsel on matters of trial strategy, nor" do we "assess counsel's competence with the benefit of hindsight." *Id.* Defendant's trial counsel properly focused his closing argument on discrediting the most important prosecution witnesses, Haden, Nevils, and Bass, all of whom had obvious motive to falsify testimony given their plea agreements. "Defendant has failed to overcome the strong presumption that [his trial] counsel engaged in sound trial strategy" in determining what to focus on during his closing argument. *Id.* Accordingly, we assign no error.

Defendant next argues his trial counsel was ineffective in his questioning of Kenyada. Defendant claims his trial counsel should have sought to have Kenyada's prior consistent statements from the December 2, 2009 preliminary examination of Haden and Nevils admitted. While defendant attached an excerpt from this transcript on appeal, this transcript was not admitted as an exhibit during defendant's trial and, therefore, it is not properly part of the record on appeal and cannot be considered. *People v Shively*, 230 Mich App 626, 629 n 1; 584 NW2d 740 (1998); MCR 7.210(A)(1). Defendant has thus failed to establish "the factual predicate for his claim of ineffective assistance of counsel." *Hoag*, 460 Mich at 6. Further, even if we were to consider this argument, defendant fails to cite to any specific testimony from that attached transcript that defendant's trial counsel should have utilized. While defendant argues that the unidentified testimony was admissible as a prior consistent statement under MRE 801(d)(1)(B), we cannot find any grounds in his argument for the admission of her prior testimony. Generally, such testimony would be considered hearsay. Further, there is no evidence that had trial counsel

undertaken such actions it is reasonably probable that the result of the proceeding would have been different but for counsel's alleged error. *Frazier*, 478 Mich at 243. Accordingly, we assign no error.

Defendant next argues his trial counsel was ineffective in failing to ask Shawn Werner, who lifted the fingerprints from the car driven by Nevils during the commission of the crimes, or Robert Koteles, who matched defendant's fingerprint to one found on the car, whether they could determine when the fingerprint was left on the car. "Decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy." *Horn*, 279 Mich App at 39. "Defense counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases. There is therefore a strong presumption of effective counsel when it comes to issues of trial strategy." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Defendant admitted that he was in the vehicle on the day of the shooting. We find that defendant has failed to demonstrate how his trial counsel's decision to not focus on defendant's testimony that the fingerprint was left on the car earlier in the day was not sound trial strategy. Additionally, we cannot find that had the question been asked, and presumably answered in a manner favorable to the defendant, the outcome of the proceedings would have been different. *Frazier*, 478 Mich at 243.

Defendant's final ineffective assistance argument is that his trial counsel was ineffective in failing to call someone identified as "Detective Wittebort" as a defense witness. Defendant claims that Wittebort would have corroborated defendant's testimony that defendant was with Carrie, but nothing in the record supports this assertion. Defendant has failed to establish "the factual predicate for his claim of ineffective assistance of counsel," *Hoag*, 460 Mich at 6. Furthermore, it is difficult to ascertain what a witness would have testified to in the absence of an affidavit in support of their purported testimony. Additionally, even assuming that "Detective Wittebort" would have testified as to what defendant told him about his whereabouts at the time of the shooting, we cannot find that such evidence would have affected the result of the proceedings. Accordingly we cannot find that had trial counsel called this witness, and the witness testified as outlined by defendant, the result of the proceedings would have been different. *Frazier*, 478 Mich at 243.

Defendant next argues the trial court erred in making a number of evidentiary rulings. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). However, where the determination "involves a preliminary question of law" such as whether a court rule precludes the admission of the evidence, review of the trial court's application of the rule is de novo. *McDaniel*, 469 Mich at 412. Evidentiary issues are nonconstitutional. *People v Blackmon*, 280 Mich App 253, 260; 761 NW2d 172 (2008). In order to demonstrate that reversal based on a preserved nonconstitutional error is required, a defendant must show that "such an error is prejudicial" and "the appropriate inquiry focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence." *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999) (quotation omitted). "[A] defendant must persuade the reviewing court that it is more probable

than not that the error in question was outcome determinative.” *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000) (citation omitted; quotation omitted).

Defendant first argues the trial court erred in allowing the prosecutor to question the victim’s mother about whether she knew defendant was aware the victim was a drug dealer, was carrying a large sum of money, and that the victim started selling marijuana after an association with defendant’s cousin. Contrary to defendant’s claim on appeal, the victim’s mother never testified defendant knew the victim would have a large sum of money; therefore we do not address this aspect of defendant’s argument. Defendant makes the preserved arguments that there was an improper foundation for the other challenged comments, that this information was irrelevant, and that even if relevant, it was substantially more prejudicial than probative. MRE 602 provides, in relevant part, “[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness’ own testimony.” The challenged testimony established the victim’s mother personally knew that defendant was aware the victim sold marijuana and that defendant’s cousin introduced the victim to selling marijuana. Because the victim’s mother had personal knowledge, the foundation for the challenged statements was proper. MRE 602.

The challenged evidence was also relevant. “Under MRE 402, relevant evidence is admissible unless excluded by the state or federal constitution or by a rule of evidence.” *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010). “MRE 401 defines relevant evidence as evidence having ‘any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.’” *Id.* at 236-237. Defendant’s knowledge that the victim sold marijuana was relevant to defendant’s motive to rob the victim. The prosecutor’s theory was that defendant decided to rob the victim because he believed, based on his knowledge that the victim was a drug dealer, the victim would have a large sum of money and marijuana to steal. “A motive is the inducement for doing some act; it gives birth to a purpose.” *People v Sabin (After Remand)*, 463 Mich 43, 68; 614 NW2d 888 (2000) (quotation omitted). Evidence that goes to a defendant’s motive “is always relevant.” *People v Flynn*, 93 Mich App 713, 722; 287 NW2d 329 (1979). For the same reason, the evidence that defendant’s cousin involved the victim in selling marijuana made it more likely that defendant knew the victim sold marijuana, which went to motive. Therefore, defendant’s relevancy argument fails. Further, defendant failed to demonstrate the probative value of the evidence was “substantially outweighed by the danger of unfair prejudice.” MRE 403.

Defendant next argues the trial court erred in allowing the victim’s mother to testify that she blamed defendant for what happened to the victim. Defendant has abandoned this argument by failing to articulate why this evidence should not have been admitted. A party may not announce a position and leave it to this Court to rationalize it. *Harris*, 261 Mich App at 50. Even if this Court addressed the argument made by defendant’s trial counsel as a preserved claim of error regarding this testimony, based on the objection raised before the trial court by defendant’s trial counsel, the argument fails. Generally, “a witness cannot express an opinion on the defendant’s guilt or innocence.” *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985). The victim’s mother’s testimony went to her opinion of defendant’s guilt because she blamed defendant for November 3rd, which was the date of the victim’s shooting. It was error

for the trial court to admit this testimony over defendant's objection. *Bragdon*, 142 Mich App at 199. However, defendant cannot demonstrate that, "it is more probable than not that the error in question was outcome determinative." *Elston*, 462 Mich at 766. Defendant was charged with first-degree murder under a felony murder theory because defendant participated in an attempt to commit a larceny. In *People v Smith*, 478 Mich 292, 318-319; 733 NW2d 351 (2007) (quotation omitted), our Supreme Court outlined the elements of first-degree felony murder:

The elements of first-degree felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316(1)(b).

One of the felonies specifically enumerated under MCL 750.316(1)(b) is larceny. "Larceny is the taking and carrying away of the property of another, done with felonious intent and without the owner's consent." *People v Malach*, 202 Mich App 266, 270; 507 NW2d 834 (1993), lv den 444 Mich 974 (1994). "[A]n 'attempt' consists of (1) an attempt to commit an offense prohibited by law, and (2) any act towards the commission of the intended offense." *People v Thousand*, 465 Mich 149, 164; 631 NW2d 694 (2001), reh den 465 Mich 1204 (2001), cert den *Thousand v Mich*, 534 US 1131; 122 S Ct 1071; 151 L Ed 2d 973 (2002). The prosecutor's theory was that defendant aided and abetted Haden in the commission of first-degree felony murder predicated on an attempted larceny. As explained in *Carines*, 460 Mich at 757-758 (quotation omitted):

Aiding and abetting describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime To support a finding that a defendant aided and abetted a crime, the prosecutor must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement.

"The requisite intent for conviction of a crime as an aider and abettor is that necessary to be convicted of the crime as a principal." *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001) (quotation omitted). For purposes of felony murder, "[a] jury may infer that the defendant aided and abetted the killing by participating in the underlying offense." *People v Bulls*, 262 Mich App 618, 625; 687 NW2d 159 (2004). The untainted evidence, in the form of testimony by Haden, Nevils, and Bass, strongly supports that defendant aided and abetted Haden in the commission of felony murder. Haden, Nevils, and Bass all testified that defendant formulated the plan to rob the victim and participated in the robbery. Haden acknowledged he went with defendant and Nevils with the intent to steal money and marijuana from the victim. The evidence demonstrated Haden and defendant attempted to commit a larceny by trying to take money and marijuana from the victim and also that defendant knew Haden had a gun and specifically asked Haden to bring the gun with them to confront the victim. The victim was killed as a result of this attempted larceny. Haden testified he fired a gun at the victim, demonstrating malice. "Malice may [] be inferred from the use of a deadly weapon." *Carines*,

460 Mich at 759. Further, defendant demonstrated malice by knowingly participating in a robbery involving a dangerous weapon. See *id.* at 760; see also *Bulls*, 262 Mich App at 625-626. A gun is a dangerous weapon. See *People v Parker*, 417 Mich 556, 565; 339 NW2d 455 (1983). Additionally, defendant cannot demonstrate this error was outcome determinative with respect to his convictions for armed robbery and conspiracy to commit armed robbery. In order to prove armed robbery, the prosecutor must show:

(1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon. [*People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007) (footnote omitted).]

The phrase, “in the course of committing a larceny” includes “acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property.” *Id.* at 7 n 5, quoting MCL 750.530(2). As discussed above, the untainted evidence demonstrated defendant aided and abetted Haden in an attempt to commit a larceny involving the use of force. Further, Haden possessed a gun, a dangerous weapon, during the course of committing the larceny.

The untainted evidence also demonstrated that defendant participated in a conspiracy to commit armed robbery. “Establishing a conspiracy requires evidence of specific intent to combine with others to accomplish an illegal objective.” *People v Blume*, 443 Mich 476, 481; 505 NW2d 843 (1993). “The individuals must specifically intend to combine to pursue the criminal objective, and the offense is complete upon the formation of the agreement. The intent, including knowledge of the intent, must be shared by the individuals.” *Jackson*, 292 Mich App at 588. Haden and Nevils both indicated defendant planned the robbery with them and Haden testified defendant told him to bring his gun with him. The untainted evidence strongly supported defendant’s conviction for conspiracy to commit armed robbery.

Given the untainted evidence against defendant that he aided and abetted in the commission of felony murder and armed robbery and participated in a conspiracy to commit armed robbery, he cannot demonstrate that the victim’s mother’s isolated statement that she believed defendant was responsible for the victim’s death was an outcome determinative error. See *Elston*, 462 Mich at 766.

Defendant next argues that the trial court erred in admitting the following testimony of the victim’s father because it was hearsay:

THE PROSECUTOR: Mr. Stanley, when you were at the hospital in November when your son was in critical condition, did you come to learn that someone was blaming Quamain Leak for your son Deshaun’s death?

TRAVIS: Yes.

THE PROSECUTOR: And who was blaming Quamain? Which individual said you're [sic] responsible for this?

TRAVIS: Carlos --

DEFENDANT'S TRIAL COUNSEL: Objection --

TRAVIS: Leak.

DEFENDANT'S TRIAL COUNSEL: your honor. Now that would be hearsay.

This argument was preserved because it was raised before the trial court. See *Grant*, 445 Mich at 546. The transcript does not reflect any ruling by the trial court directly on this objection, but it appears the trial court allowed the answer to stand.⁴ “‘Hearsay’ is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” MRE 801(c); see also *People v Stamper*, 480 Mich 1, 3; 742 NW2d 607 (2007). Hearsay is generally not admissible, except as otherwise provided by the rules of evidence. MRE 802; see also *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). In the present case, it appears the prosecutor was attempting to use the testimony for the truth of the matter asserted, that defendant was responsible for the victim's death and there does not appear to be any applicable exception to remove the testimony from the general rule regarding hearsay, therefore, this testimony was improper and the trial court abused its discretion in admitting it. However, for the same reasons discussed above, given the untainted evidence against defendant, defendant cannot demonstrate that the victim's father's isolated statement was outcome determinative error. See *Elston*, 462 Mich at 766. Moreover, given the testimony of Haden, Nevils, and Bass, the erroneous admission of this brief statement was rendered harmless. “An erroneous admission of hearsay evidence can be rendered harmless error where corroborated by other competent testimony.” *People v Hill*, 257 Mich App 126, 140; 667 NW2d 78 (2003).

Defendant next contends the trial court erred in allowing the prosecutor to question defense witness Clarissa regarding: (1) an unrelated contempt of court proceeding she was involved in and (2) whether she was aware other people accused defendant of the crime. Defendant does not articulate any claim of error on appeal with respect to these arguments, but instead merely states this evidence was admitted over defense objection. Defendant also fails to cite to any legal authority and instead argues, “[t]he allowance of the questions cannot be supported by any evidentiary rule or exception.” A party may not merely announce a position and leave it to this Court to rationalize that position. *Harris*, 261 Mich App at 50. When a party fails to properly support an asserted issue, the issue may be considered abandoned. *Id.*

⁴ On appeal, plaintiff contends that the prosecutor withdrew the question and rephrased it. However, our review of the record does not reflect that this occurred.

However, having looked to the record and analyzed the objections made by defendant's trial counsel as preserved errors, based on the objections made by defendant's trial counsel, defendant's argument still fails. With respect to the contempt testimony, the trial court allowed the prosecutor to question Clarissa about the existence of an unrelated contempt proceeding against her in a case that involved one of her children. Defendant's trial counsel objected and contended that the evidence was not relevant. The trial court overruled that objection. No specific information was provided regarding why Clarissa was being charged with contempt. It appears the prosecutor may have been attempting to use this testimony to show bias and that Clarissa was willing to testify favorably for family members. "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." MRE 611(c). Further, MRE 608(b) allows a witness to be impeached with questions relating to specific instances of conduct if the conduct is "probative of truthfulness or untruthfulness." While it is true that, "evidence of bias is almost always relevant," *People v Layher*, 464 Mich 756, 764; 631 NW2d 281 (2001), the unexplained contempt proceeding was not relevant and did not show bias, credibility, or truthfulness. See also *People v Lester*, 232 Mich App 262, 273; 591 NW2d 267 (1998), lv den 461 Mich 861 (1999) (noting that, in the context of MRE 608(b), evidence that would show bias would be relevant, but the proponent must demonstrate how the evidence is relevant to bias). The trial court abused its discretion in admitting the testimony, over defendant's trial counsel's relevancy objection, regarding the unrelated and unexplained contempt proceeding. However, for the same reasons discussed above, given the untainted evidence against defendant, defendant cannot demonstrate that this brief statement that Clarissa had an unrelated contempt charge was outcome determinative error. See *Elston*, 462 Mich at 766. This is especially true given that Clarissa's testimony, even if believed, does not conflict with the accounts of Haden and Nevils. Clarissa only testified that defendant remained at the scene after the shooting, contrary to what police officers who were the first ones at the scene testified to.

The trial court also allowed the prosecutor to question Clarissa regarding whether she had "heard" there were other people accusing defendant of being "involved in this case." Defendant's trial counsel objected on hearsay grounds and the prosecutor's response was, "I'm not asking for a quote I'm just asking if she heard that." The trial court overruled the objection and allowed the question. Clarissa then indicated she was aware Haden and Nevils were accusing defendant. As noted above, "'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c); see also *Stamper*, 480 Mich at 3. The fact that Clarissa heard, from unidentified sources, that Haden and Nevils were accusing defendant appears to have been elicited for the truth of whether others were accusing defendant, not merely for its effect on the listener. No hearsay exception appears to apply. However, for the same reasons discussed above, given the untainted evidence against defendant, he cannot demonstrate that this brief statement that Clarissa heard from others that Haden and Nevils accused defendant was outcome determinative error. See *Elston*, 462 Mich at 766. Moreover, because Haden and Nevils testified at trial and accused defendant, this evidence was rendered harmless. "An erroneous admission of hearsay evidence can be rendered harmless error where corroborated by other competent testimony." *Hill*, 257 Mich App at 140.

Defendant's final argument is that the prosecutor's question to Carrie regarding her knowledge of defendant's tattoo was not relevant and should have been excluded. The exchange

that ultimately led to the admission of Carrie's testimony regarding defendant's tattoo began when the prosecutor, somewhat inexplicably, asked Carrie if she had "heard of the Leak Boy Mafia." Carrie responded that she had not heard of the Leak Boy Mafia. Before this point in the trial, nothing had been mentioned of the "Leak Boy Mafia" and it was not tied in any way to the charged crimes. When asked how it was relevant, the prosecutor was unable to articulate any theory for the relevance of the initial question regarding Carrie's knowledge of the Leak Boy Mafia. Instead, the prosecutor only argued that, based on Carrie's denial, he would impeach her with the fact she knew defendant had a tattoo on his arm that read "LBM," which stood for "Leak Boy Mafia." The trial court nevertheless allowed the question, which led to the prosecutor asking Carrie about a tattoo on defendant's arm that read "LBM." Carrie testified she was aware this stood for "Leak Boy Mafia," but stated she misunderstood the prosecutor's earlier question and thought he was asking if she knew anything about the "Leak Boy Mafia," not what LBM meant.

"MRE 401 defines relevant evidence as evidence having 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Schaw*, 288 Mich App at 236-237. Evidence relating to the "Leak Boy Mafia" was not mentioned anywhere else at trial, nor was the relevancy of this evidence as substantive evidence explained by the prosecutor. Therefore, the trial court abused its discretion in allowing any evidence of the Leak Boy Mafia to be admitted. Further, with respect to the prosecutor's argument that the evidence was proper to impeach Carrie based on her initial denial of knowledge about the "Leak Boy Mafia," "the prosecutor may not elicit a denial during the cross-examination of a defense witness and then use that denial to inject a new issue into the case." *People v Sutherland*, 149 Mich App 161, 164; 385 NW2d 637 (1985). Here, the prosecutor improperly used Carrie's denial of knowledge on an irrelevant issue, the "Leak Boy Mafia," to inject a new issue into the case, that defendant's tattoo that stood for the "Leak Boy Mafia." However, for the same reasons discussed above, given the untainted evidence against defendant, he cannot demonstrate that this irrelevant evidence relating to defendant's tattoo was outcome determinative. See *Elston*, 462 Mich at 766.

Defendant also argues that the trial court's erroneous evidentiary rulings, discussed above, demonstrated judicial bias. Defendant failed to properly present this issue. First, this issue was not raised before the trial court. See *People v Jackson*, 292 Mich App 583, 597; 808 NW2d 541 (2011), lv den 490 Mich 882 (2011). Additionally, this argument was not properly raised in defendant's statement of questions presented. Thus, this Court could decline to address it. MCR 7.212(C)(5); *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009). Nevertheless, even addressing this unpreserved issue, it has no merit. "Absent actual personal bias or prejudice against either a party or the party's attorney, a judge will not be disqualified. MCR 2.003(B)(1)." *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999), lv den 462 Mich 870 (2000). "A party that challenges a judge for bias must overcome a heavy presumption of judicial impartiality." *Id.*; see also *People v Wade*, 283 Mich App 462, 470; 771 NW2d 447 (2009), lv den 486 Mich 909 (2010). "The mere fact that a judge ruled against a litigant, even if the rulings are later determined to be erroneous, is not sufficient to require disqualification or reassignment." *In re Contempt of Henry*, 282 Mich App 656, 680; 765 NW2d 44 (2009); see also *People v Fox (After Remand)*, 232 Mich App 541, 558; 591 NW2d 384 (1998) ("[R]epeated rulings against a litigant do not require disqualification of a judge."). Because defendant relies solely on allegations of erroneous evidentiary rulings that do not demonstrate bias, "defendant

has failed to overcome the presumption of impartiality.” *Wade*, 283 Mich App at 471; see also *Jackson*, 292 Mich App at 598 (“[D]efendant’s reliance on various evidentiary rulings does not establish support for his claim of judicial bias.”)

At oral arguments, the prosecution noted that defendant was seventeen years old at the time he committed the offenses and that he received a mandatory life sentence without parole for the first-degree felony murder conviction. Under the circumstances, the prosecutor acknowledged, and we agree, that defendant is entitled to resentencing under the principles articulated in *Miller v Alabama*, ___ US ___; ___ S Ct ___; ___ L Ed 2d ___ (2012). Defendant’s sentence for the murder conviction is therefore vacated and the matter is remanded for resentencing.

Defendant’s convictions are affirmed, his sentence is vacated under *Miller v Alabama* and the matter is remanded to the trial court for resentencing in accordance with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Karen M. Fort Hood

/s/ Stephen L. Borrello