

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDRE LARMAR HUNTER,

Defendant-Appellant.

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UNPUBLISHED

August 30, 2012

No. 297542

Wayne Circuit Court

LC No. 09-022865-FC

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

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life in prison for the murder conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. We now affirm.

**I. BACKGROUND**

The victim, David Hall, was fatally shot outside of the Tippin Inn in Detroit during the early morning hours of January 25, 2009. Hall's girlfriend, Patrice Walker, was an eyewitness to the shooting and she identified defendant as the shooter. Defendant's first trial was declared a mistrial because the jury was unable to reach a verdict. A second trial was held a week later. During jury deliberations, the jury in the second trial reported three times that it was deadlocked, but the trial court instructed it to continue deliberating. The jury eventually found defendant guilty of first-degree murder and felony-firearm. Following his convictions, defendant filed a motion for a new trial, arguing that the jury's verdict was against the great weight of the evidence and he was denied the effective assistance of counsel. After holding a *Ginther*<sup>1</sup> hearing, the trial court denied defendant's motion.

**II. ANALYSIS**

**A. RIGHT TO A PUBLIC TRIAL**

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<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defendant argues that the trial court violated his constitutional right to a public trial by excluding the public from the courtroom first during jury voir dire and again when the jury, during deliberations, asked to review a DVD video exhibit of footage from surveillance cameras at the Tippin Inn, which had previously been played at trial. This issue implicates defendant's constitutional right to a public trial. US Const, Am VI; *Waller v Georgia*, 467 US 39, 48-49; 104 S Ct 2210; 81 L Ed 2d 31 (1984).

The Michigan Supreme Court recently ruled on this issue in *People v Vaughn*, \_\_ Mich \_\_; \_\_ NW2d \_\_ (Docket No. 142627, decided July 9, 2012), slip op, p 1. In *Vaughn*, the trial court closed the courtroom at the beginning of jury voir dire. The trial court failed to provide a reason for this closure, and the defendant failed to object to the closure. *Id.* at 3. This Court held that the defendant waived his right to a public trial by failing to object when the trial court closed the courtroom, *People v Vaughn*, 291 Mich App 183, 195-196; 804 NW2d 764 (2010), but the Supreme Court overruled this Court and held that the defendant's failure to object implicated the forfeiture rule and applied the plain error doctrine. *Vaughn*, \_\_ Mich at \_\_ (slip op at 1-2).

Because defendant in this case failed to object on the basis that he had a right to a public trial when the trial court closed the courtroom, he forfeited his claim of constitutional error. *Vaughn*, \_\_ Mich at \_\_ (slip op at 21). Accordingly, to receive relief, defendant must "establish (1) that the error occurred, (2) that the error was 'plain,' (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.*, citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999) (footnote omitted).

The United States and Michigan constitutions enumerate the right to a public trial. *Vaughn*, \_\_ Mich at \_\_ (slip op at 6), citing US Const, Am VI; Const 1963, art 1, § 20. This right includes the right to keep the courtroom open to the public during jury voir dire. *Id.* However, a defendant's right to a public trial is limited and a courtroom may be closed under certain circumstances:

[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure. [*Vaughn*, \_\_ Mich at \_\_ (slip op at 9) (quotations, citation and footnote omitted).]

As in *Vaughn*, when the trial court closed the courtroom at the beginning of jury voir dire, defendant failed to object and the trial court failed to provide support for the closure on the record. However, unlike *Vaughn*, here the trial court held a *Ginther* hearing and at that time acknowledged that it closed the courtroom in order to accommodate the large pool of potential jurors. Nevertheless, because the trial court failed to place its reasoning on the record at the time of the courtroom closure, we conclude that an error occurred. Likewise, this error is plain because the record clearly supports that the courtroom was closed during voir dire. *Vaughn*, \_\_ Mich at \_\_ (slip op at 22). Moreover, as concluded by the *Vaughn* Court, the denial of the right to a public trial is structural error that affects a defendant's substantial rights. *Id.* at 23. But, like the *Vaughn* Court, in exercising our discretion we cannot conclude that the limited closure of the

courtroom in this case “seriously affected the fairness, integrity, or public reputation of judicial proceedings[,]” because the closure was brief and for a specific purpose. *Vaughn*, \_\_ Mich at \_\_ (slip op at 25-26) (citation and footnote omitted). Thus, defendant is not entitled to a new trial.

Additionally, although defendant failed to object to the exclusion of the public during the jury’s viewing of the DVD video exhibit after the jury began deliberations, relief is not warranted because defendant does not have the right to have the public present during jury deliberations. See *People v Hoffman*, 142 Mich 531, 582; 105 NW 838 (1905), quoting *People v Knapp*, 42 Mich 267, 269-270; 3 NW 927 (1879) (“When the jury retire from the presence of the court, it is in order that they may have opportunity for private and confidential discussion, and the necessity for this is assumed in every case . . . . The presence of a single other person in the room is an intrusion upon this privacy and confidence, and tends to defeat the purpose for which they are sent out.”). The court did not exclude the public when it originally played the video during trial and the second viewing occurred in the context of the jury’s deliberations, in response to a jury request to review the video. It appears that the courtroom was merely a more convenient location for showing the video. Defendant has failed to show plain error.

## B. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant raises several claims of ineffective assistance of counsel. As previously noted, a *Ginther* hearing was held by the lower court after which it determined that defendant was not denied the effective assistance of counsel.

To establish that he received ineffective assistance of counsel, a petitioner must show, first, that counsel’s performance was deficient and, second, that counsel’s deficient performance prejudiced the petitioner. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). A petitioner may show that counsel’s performance was deficient by establishing that counsel’s performance was outside the wide range of professionally competent assistance. *Id.* at 689. This requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. *Id.* at 687. To satisfy the prejudice prong, a petitioner must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 694. A court’s review of counsel’s performance must be highly deferential. *Id.* at 689.

In reviewing this issue, defense counsel is afforded wide latitude on matters of trial strategy. *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008). This Court will not substitute its judgment for that of defense counsel on matters of strategy. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). “A particular strategy does not constitute ineffective assistance of counsel simply because it does not work.” *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004).

### 1. FAILURE TO OBTAIN THE TRANSCRIPTS OF THE FIRST TRIAL

Defendant first argues that his trial counsel was ineffective for failing to properly prepare for the second trial by not obtaining the transcript from defendant’s first trial. A defendant

claiming that defense counsel failed to adequately prepare for trial must demonstrate prejudice resulting from an alleged lack of preparation. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990).

After defendant's first trial ended in a mistrial, defense counsel agreed to schedule a second trial less than a week later. At the *Ginther* hearing, counsel testified that he had no recollection of whether he made a request for a copy of the transcript of the first trial before the start of the second trial, even after he reviewed the Registrar of Actions, which indicated that on February 23, 2010, he made a motion to stay proceedings to obtain transcripts from the first trial that was denied.<sup>2</sup> However, counsel also stated that he knew that the transcript of the first trial would not be available for use at the second trial, and that he did not believe the transcripts would be necessary for an effective defense at the second trial.

Defendant argues that counsel's failure to obtain the transcripts was objectively unreasonable, and it prevented counsel from effectively impeaching witness testimony at the second trial. However, counsel's decision to proceed promptly with a second trial, knowing that the transcript from the first trial would not be ready, was a matter of strategy. This Court will not substitute its judgment for that of defense counsel on matters of strategy. *Avant*, 235 Mich App at 508. Defendant relies on *Britt v North Carolina*, 404 US 226; 92 S Ct 431; 30 L Ed 2d 400 (1971), in arguing that there is significant value in reviewing a transcript of prior proceedings as a tool for preparation and for the impeachment of prosecution witnesses. In *Britt*, the United States Supreme Court held that an indigent defendant is entitled to a copy of transcripts of a prior court proceeding when the transcripts are needed for effective defense or appeal. *Id.* at 227. However, *Britt* does not require defense counsel to obtain the transcripts nor does it conclude that failing to do so is objectively unreasonable. *Id.* *Britt*, therefore, offers no support for this issue.

In addition, defendant has not demonstrated what value would have been added by the transcript from the first trial, or how the failure to obtain the transcript prevented counsel from effectively impeaching witness testimony at the second trial. Defendant did compile a list of nine instances in which he argues counsel could have used testimony from the first trial to impeach Patrice Walker at the second trial, but a review of the testimony reveals that these alleged missed opportunities of impeachment were insignificant, failed to highlight an inconsistency, or they were not the subject of testimony at the second trial.

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<sup>2</sup> During the *Ginther* hearing defense trial counsel exhibited a degree of unprofessionalism not reflective of our profession. Although normally the tenor of an examination is difficult to discern from a cold record, and though we realize the trial court found defense trial counsel to be credible, the answers given by defense trial counsel during the examination by defense appellate counsel were quite remarkable. Defense trial counsel showed a blatant disrespect towards appellant counsel and repeatedly refused to answer simple, clear questions during cross-examination. It would behoove defense trial counsel to remember that "[a]s officers of the court, lawyers have special duties to avoid conduct that undermines the integrity of the adjudicative process." Comment to MRPC 3.3.

Moreover, defendant has not shown that he was prejudiced by the absence of the transcript at the second trial. Although the transcript from the first trial could have provided additional opportunities for impeachment, considering the ample evidence already available and counsel's rigorous and thorough examination of Walker at the second trial, defendant has not demonstrated that the outcome of the proceedings would have been different. Even without the transcripts, defense counsel scrutinized details of her testimony, challenged her reliability, and relentlessly questioned her regarding inconsistencies in her testimony from the first trial. Defendant was not denied the effective assistance of counsel on this ground.

## 2. FAILURE TO INVESTIGATE AND PRESENT WITNESSES

Defendant next argues that counsel was ineffective for failing to call as a witness or interview Michael Turner and Germeka Whitaker as exculpatory and alibi witnesses, respectively. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Defendant argues that since counsel testified at the *Ginther* hearing that he had no recollection of the names Michael Turner or Germeka Whitaker that there can be no strategy for failure to investigate or present him. However, defense counsel testified at the *Ginther* hearing that defendant had admitted to him that he shot and killed Hall in retaliation for Hall's prior theft of drugs or money. Counsel further explained that in light of this confession he declined to advance these witnesses' testimony because he could not knowingly present perjured testimony. An attorney's refusal to knowingly facilitate or assist in the presentation of perjured testimony is consistent with his ethical obligations and, therefore, does not constitute ineffective assistance of counsel. See *Nix v Whiteside*, 475 US 157, 174-175; 106 S Ct 988; 89 L Ed 2d 123 (1986); *People v Toma*, 462 Mich 281, 303 n 16; 613 NW2d 694 (2000).

Defendant argues that counsel's testimony regarding defendant's alleged confession should not be accepted because it is inherently incredible and contrary to common sense, unsupported by other witnesses, and internally inconsistent. However, the trial court expressly found that defense counsel was credible, and we defer to the trial court's superior opportunity to determine the credibility of the witnesses who appear before it.<sup>3</sup> *People v Dagwan*, 269 Mich App 338, 342; 711 NW2d 386 (2005). Accordingly, since defendant has not demonstrated that counsel's actions were objectively unreasonable, this claim of ineffective assistance of counsel fails.

## 3. FAILURE TO INFORM THE COURT AND JURY THAT COUNSEL ADVISED DEFENDANT NOT TO ATTEND THE LINEUP WITHOUT COUNSEL PRESENT

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<sup>3</sup> Furthermore, this Court cannot consider evidence that was not considered by the trial court in deciding the motion, see *Lakeview Commons, LP v Empower Yourself, LLC*, 290 Mich App 503, 506; 802 NW2d 712 (2010), including the transcripts proffered by defendant suggesting that counsel has provided the same explanation at other *Ginther* hearings regarding why he did not conduct further investigation.

We next address whether counsel was ineffective for wrongfully advising him not to participate in a corporal lineup unless counsel was present, and failing to inform the court and jury of this direction. In particular, defense counsel unsuccessfully attempted to elicit testimony from Detroit Police Homicide Sergeant Kevin Hanus that defendant refused to participate in the lineup because his attorney was not present. Defendant argues, however, that counsel should have advised the jury that he advised defendant to refuse to participate unless defense counsel was present.

While defendant could have testified at trial and explained his reasons for not participating in the lineup, the decision whether to call defendant for that purpose was a matter of trial strategy. *Rockey*, 237 Mich App at 76. For example, calling defendant to testify on this point would have subjected him to examination regarding other matters. Accordingly, defendant has not overcome the presumption that defense counsel's decision not to call defendant for that purpose constituted sound trial strategy.

Defendant also argues that his wife and parents could have testified that defense counsel advised defendant not to participate. However, these potential witnesses were not present when counsel advised defendant. Instead, they learned the information second-hand from defendant or counsel. Therefore, their testimony would have been inadmissible hearsay. MRE 801; 802. Since defendant has not shown that defense counsel acted unreasonably, this claim of ineffective assistance of counsel cannot succeed.

#### 4. FAILURE TO MEET WITH DEFENDANT AND PROPERLY PREPARE A DEFENSE

Counsel was also not ineffective for not providing defendant with any discovery materials and ignoring information about his witnesses and his defense. The trial court also rejected this argument, finding instead that defense counsel credibly testified that he met with defendant, but that defendant's admission that he committed the charged crime limited defense counsel's options for defending the charges. Again, this Court defers to the trial court's determination that defense counsel's testimony was credible. *Dagwan*, 269 Mich App at 342. Accordingly, given the trial court's findings of fact, defendant has not demonstrated that counsel's actions were objectively unreasonable, and this claim of ineffective assistance of counsel cannot succeed.

#### 5. FAILURE TO OBJECT TO THE PROSECUTION'S CLOSING ARGUMENT

Defendant next argues that counsel was ineffective for failing to object during the prosecution's closing argument – thus leaving it un rebutted – that defendant refused to participate in the corporal lineup because he was guilty. This argument was particularly influential on the jury, according to defendant, because the other evidence in the case was neither compelling nor overwhelming, and so there is a reasonable probability that there would have been a different outcome without this closing argument.

However, “declining to raise objections, especially during closing arguments, can often be consistent with sound trial strategy.” *Unger*, 278 Mich App at 242. Counsel could have declined to object to the prosecution's argument because of the absence of testimony as to why

defendant refused to attend the lineup. Thus, defendant has not overcome the presumption that defense counsel's decision constituted sound trial strategy.

#### 6. FAILURE TO OBJECT TO THE CLOSING OF THE COURTROOM

Defendant argues that defense counsel was ineffective for failing to object to the closure of the courtroom during jury voir dire and when the video exhibit was shown to the jury. The *Vaughn* Court noted that counsel could have had several reasons for failing to object to the closure of the courtroom during jury voir dire, including a belief that the procedure would remove extraneous influences and expedite the proceedings. *Vaughn*, \_\_ Mich at \_\_ (slip op at 27). Also, defendant did not have a right to have the public present when the video exhibit was shown to the jury during deliberations. Defendant has not overcome the presumption that defense counsel's actions constituted sound trial strategy, and this claim of ineffective assistance of counsel cannot succeed.

#### 7. THE CUMULATIVE EFFECT OF THE ERRORS COMBINED TO DEPRIVE DEFENDANT OF A FAIR TRIAL

Finally, defendant argues that the cumulative effect of the alleged errors by defense counsel deprived him of a fair trial. "The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not." *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003). Because defendant has failed to show the merit of any alleged error, his cumulative error argument is also without merit.

For these reasons, defendant has not established that he was denied the effective assistance of counsel at trial.

#### C. GREAT WEIGHT OF THE EVIDENCE

The trial court did not abuse its discretion in denying his motion for a new trial on the ground that the jury's verdict was against the great weight of the evidence. *Unger*, 278 Mich App at 232. To grant a new trial because the jury's verdict is against the great weight of the evidence, the evidence must preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the jury's verdict to stand. *People v Lemmon*, 456 Mich 625, 627, 635; 576 NW2d 129 (1998); *Unger*, 278 Mich App at 232.

The elements of first-degree premeditated murder are that the defendant killed the victim and that the killing was "willful, deliberate, and premeditated . . ." MCL 750.316(1)(a); *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). Identity is an essential element of every offense. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008), citing *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). Identity may be proven by either direct or circumstantial evidence. *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967).

Defendant argues that the outcome of the trial hinged entirely on Walker's credibility, and that Walker was not credible. Defendant also asserts that there was no apparent motive for him to shoot Hall, whereas the evidence established a clear motive for another suspect, Douglas Samuels, who had just found out that Hall had fathered a child with Samuels's wife.

“Conflicting testimony and questions of witness credibility are generally insufficient grounds for granting a new trial.” *Unger*, 278 Mich App at 232. “Absent exceptional circumstances, issues of witness credibility are for the trier of fact.” *Id.* A difference of opinion over witness credibility cannot support the grant of a motion for new trial unless the witness testimony “contradicts indisputable physical facts or laws,” “is patently incredibly or defies physical realities,” “is so inherently implausible that it could not be believed[,]” or is so impeached as to riddle the trial with “uncertainties and discrepancies.” *Lemmon*, 456 Mich at 643-644 (quotations and citations omitted). The hurdle that a judge must clear to overrule a jury and grant a new trial “is unquestionably among the highest in our law.” *Unger*, 278 Mich App at 232 (quotations and citation omitted).

Although defendant asserts that Walker’s testimony was “riddle[d] . . . with uncertainties and discrepancies” regarding the shooter’s clothing, whether she saw a gun, and her inability to see more than half of the shooter’s face, her testimony was not contrary to physical facts or laws, nor was it so inherently implausible that it could not be believed. Walker stated that she saw one side of the shooter’s face as the shooter approached Hall and shot him before getting into a passing car. She testified that the shooter wore a yellow hoodie, and that she saw a patron in the bar wearing a yellow hoodie. The jury heard this testimony and viewed a video of footage from surveillance cameras at the Tippin Inn, and apparently found Walker’s testimony credible. Defense counsel extensively attempted to impeach Walker’s testimony, eliciting discrepancies between her testimony and her statements to the police and her testimony at the preliminary examination and the first trial. However, Walker did not deviate from her essential testimony that she saw enough of the shooter’s face to identify defendant as the shooter. Further, although defendant argues that the evidence established a motive for Samuels to kill Hall, testimony indicated that Samuels walked with a limp and dragged one leg, and that the shooter did not have such a disability, thereby enabling the jury to conclude that Samuels was not the shooter. Accordingly, the trial court did not abuse its discretion in denying defendant’s motion for a new trial.

#### D. COERCED VERDICT

Defendant’s final argument is that the trial court improperly coerced a verdict by instructing the jury to continue deliberations despite receiving a fourth note from the jury expressing that it was “a hung jury.” A trial court’s decision to continue jury deliberations instead of declaring a mistrial because of jury deadlock is reviewed for an abuse of discretion. *Arizona v Washington*, 434 US 497, 509-510; 98 S Ct 824; 54 L Ed 2d 717 (1978); *People v Harvey*, 121 Mich App 681, 689; 329 NW2d 456 (1982). “An abuse of discretion occurs when the trial court chooses an outcome that falls outside the permissible range of principled outcomes.” *People v Brown*, 294 Mich App 377, 385; 811 NW2d 531 (2011).

“Claims of coerced verdicts are reviewed on a case-by-case basis, and all of the facts and circumstances, as well as the particular language used by the trial judge, must be considered.” *People v Malone*, 180 Mich App 347, 352; 447 NW2d 157 (1989). In this case, defendant does

not contend that any specific comments by the trial court were inherently coercive,<sup>4</sup> but rather argues that it was coercive for the court to instruct the jury to continuing deliberating after the jury sent a fourth note indicating that it was deadlocked.

The trial court did not abuse its discretion in ordering the jury to continue in its deliberations. Before the trial court was able to respond to the fourth jury note expressing that the jury was hung, the jury sent another note asking for the opportunity to review the video exhibit. The trial court reasonably viewed that note as an indication that jurors were willing to take another look at the evidence to determine whether it would help resolve the deadlock. The jury's request indicated that it had not abandoned efforts to reach a unanimous verdict. It was reasonable for the court to accommodate the jury's request to review the requested evidence before declaring a mistrial. Although the trial court informed that parties that a mistrial would likely be necessary if the jury was unable to reach a verdict by the end of the day, the court did not communicate that view to the jury, or otherwise impose any time constraints on the jury for either reaching a verdict or continuing with deliberations. See *Malone*, 180 Mich App at 351-352. Under the circumstances, the trial court's decision to instruct the jury to continue deliberations was neither coercive nor outside the permissible range of principled outcomes.

Affirmed.

/s/ Christopher M. Murray  
/s/ Karen M. Fort Hood  
/s/ Stephen L. Borrello

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<sup>4</sup> Defendant's brief references a statement by the trial court when responding to defense counsel's objection to allowing the jury to view the DVD video. The trial court expressed its belief that reasonable efforts should be made to accommodate the jury's request and then remarked, outside the presence of the jury, "in light of the fact that we already had one mistrial in regard to this matter, we don't want to have a second one." Because the statement was not made in the presence of the jury, it could not have had any coercive effect on the jury's verdict.