

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

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
December 27, 2012

v

COREY LAMONT FENDERSON,  
  
Defendant-Appellant.

No. 306057  
Oakland Circuit Court  
LC No. 2011-236030-FC

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Before: STEPHENS, P.J., and OWENS and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of delivery of a controlled substance causing death, MCL 750.317a. Following this conviction, he was sentenced to 15 to 30 years' imprisonment. We affirm defendant's conviction, vacate his sentence and remand for resentencing.

**I. FACTUAL BACKGROUND**

The victim died after ingesting heroin she bought from David Ruttan and Alice Chase. In turn, Ruttan and Chase purchased the heroin from defendant before delivering it to the victim.<sup>1</sup>

**II. ANALYSIS**

**A. INSTRUCTIONAL ERROR**

Defendant argues that the trial court erred by refusing to instruct the jury on the necessarily lesser included offense of delivery of a controlled substance, an argument which we review de novo. *People v Kowalski*, 489 Mich 488, 501; 803 NW2d 200 (2011). Jury instructions are reviewed in their entirety and "must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). "Even if somewhat

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<sup>1</sup> Ruttan and Chase both pleaded guilty to delivery of a controlled substance causing death and conspiracy to deliver a controlled substance causing death.

imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights." *Id.*

"[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002); see also *People v Reese*, 466 Mich 440, 446-448; 647 NW2d 498 (2002). Instruction on a necessarily included lesser offense requires some evidence that would support a conviction on the lesser offense and "proof on the element or elements differentiating the two crimes must be *sufficiently* in dispute so that the jury may consistently find the defendant innocent of the greater and guilty of the lesser included offense." *Cornell*, 466 Mich at 352 (quotation marks and citations omitted). (Emphasis added.)

The elements that distinguish delivery of a controlled substance causing death from delivery of a controlled substance are that under the former it is required that a person consume the delivered drugs, which in turn causes the person's death. Compare MCL 750.317a<sup>2</sup> with MCL 333.7401.<sup>3</sup> At trial, defendant's primary argument was that there was no credible evidence that he was the person who sold heroin to Ruttan on February 27, 2010. The delivery element is a shared element of these two crimes, and thus defendant's primary argument did not require an instruction on delivery of a controlled substance because he failed to establish that there was a disputed factual element within the charged crime that was not part of the lesser included offense. *Cornell*, 466 Mich at 357; *Reese*, 466 Mich at 446-448.

Moreover, although during closing argument defendant asserted that the victim may not have died from heroin and/or could have had other sources for drugs, there was no evidence presented that indicated the possibility that the victim died from anything other than a fatal dose of heroin and defendant has not identified any evidence that the victim had other sources for heroin that she ingested on February 27 or February 28, 2010. Furthermore, defendant did not contest the causation of the victim's death when he requested the instruction on delivery of a controlled substance. Therefore, a rational view of the undisputed evidence requires a conclusion that the trial court did not err by refusing to give an instruction on delivery of a controlled substance. *Cornell*, 466 Mich at 352-357; *Reese*, 466 Mich at 446-448.

## B. PROSECUTORIAL MISCONDUCT

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<sup>2</sup> MCL 750.317a provides, "[a] person who delivers a schedule 1 or 2 controlled substance, other than marijuana, to another person in violation of . . . MCL 333.7401, that is consumed by that person or any other person and that causes the death of that person or other person is guilty of a felony punishable by imprisonment for life or any term of years."

<sup>3</sup> MCL 333.7401(1) provides, in the relevant part, "[e]xcept as authorized by this article, a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance, a prescription form, or a counterfeit prescription form."

Defendant argues that the prosecution committed misconduct by indirectly asserting that defendant gave defense counsel the names of other people who sold drugs from the Doyle house – the same house where Ruttan and Chase testified that they purchased the heroin that killed the victim. This Court reviews unpreserved claims of prosecutorial misconduct for plain error that affected the defendant’s substantial rights. *People v Fyda*, 288 Mich App 446, 460-461; 793 NW2d 712 (2010).

“Given that a prosecutor’s role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial.” *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). While a prosecutor cannot argue facts that are not in evidence or mischaracterize evidence, *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001), a prosecutor is free to argue all reasonable inferences arising from the evidence, *Dobek*, 274 Mich App at 66.

During his closing argument, the prosecutor implied that defendant must have provided defense counsel with the names of other people who sold drugs out of the Doyle house. This argument was not improper – indeed, it was a logical and reasonable inference to be made from the evidence presented during trial. Furthermore, whether defendant provided the names of other people who sold drugs from the Doyle house to defense counsel was irrelevant to the prosecution’s burden to prove that defendant sold the heroin to Ruttan on February 27, 2010. Thus, defendant’s argument is without merit.<sup>4</sup>

### C. SCORING ERRORS

Defendant argues that the trial court erred in scoring OV 1, OV 2, OV 9, and OV 14. “This Court reviews a sentencing court’s scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score.” *People v Phelps*, 288 Mich App 123, 135; 791 NW2d 732 (2010) (quotation marks and citation omitted). “The interpretation and application of the legislative sentencing guidelines, MCL 777.1 *et seq.*, involve legal questions that this Court reviews *de novo*.” *People v Bonilla-Machado*, 489 Mich 412, 419; 803 NW2d 217 (2011). This Court will affirm a trial court’s decision regarding sentencing scoring where there is evidence existing to support the score. *Phelps*, 288 Mich App at 135. “A sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial.” *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993).

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<sup>4</sup> Additionally, even if the prosecution’s comments exceeded permissible bounds, any prejudice was cured by the trial court’s instruction that the attorneys’ arguments were not evidence. See *People v Meissner*, 294 Mich App 438, 457; 812 NW2d 37 (2011) (the jury is presumed to follow their instructions). Moreover, because there was no error, defense counsel was not ineffective for failing to raise a futile objection. *People v Horn*, 279 Mich App 31, 39-40; 755 NW2d 212 (2008).

1. OV 1

MCL 777.31(1)(b) instructs a score of 20 points for OV 1 as follows:

(1) Offense variable 1 is aggravated use of a weapon. Score offense variable 1 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

\* \* \*

(b) The victim was subjected or exposed to a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, harmful radioactive device, incendiary device, or explosive device[.]

A “harmful chemical substance” is defined as “a solid, liquid, or gas that through its chemical or physical properties, alone or in combination with 1 or more other chemical substances, can be used to cause death, injury, or disease in humans, animals, or plants.” MCL 750.200h(i).

This Court recently held that heroin is a harmful chemical substance because it is capable of causing death. *People v Ball*, 297 Mich App 121; \_\_\_ NW2d \_\_\_ (Docket No. 303727, issued June 19, 2012), slip op, p 3. However, “heroin, merely because it is illegal per se, is [not] always used as a weapon.” *Id.* In *Ball*, because there was no evidence that the defendant forced the victim to ingest the heroin (instead it was ingested voluntarily) this Court held that the heroin was not used as a weapon, and therefore, it was inappropriate to score OV 1 at 20 points. *Id.* *Ball* is controlling, and because there is no evidence that defendant forcibly injected the victim with heroin, defendant did not use the heroin as a weapon. Thus, it was error for the trial court to score OV 1 at 20 points. *Id.*

2. OV 2

MCL 777.32(1)(a) provides a score of 15 points for OV 2 as follows:

(1) Offense variable 2 is lethal potential of the weapon possessed or used. Score offense variable 2 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) The offender possessed or used a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, or harmful radioactive device[.]

At oral argument before this Court, the prosecution conceded error as the heroin was not a weapon under *Ball*, 297 Mich App at \_\_\_ (slip op at 3). Therefore, the trial court erred by scoring OV 2 at 15 points.

3. OV 9

“Offense variable 9 is number of victims.” MCL 777.39(1). Ten points are to be scored for OV 9 when “[t]here were 2 to 9 victims who were placed in danger of physical injury or death . . . .” MCL 777.39(1)(c). “Offense variables are properly scored by reference only to the sentencing offense except when the language of a particular offense variable statute specifically provides otherwise. The language of the statute for OV 9 does not so provide.” *People v McGraw*, 484 Mich 120, 135; 771 NW2d 655 (2009). “For purposes of scoring this variable, a court is to count each person who was placed in danger of physical injury or loss of life or property during the transaction giving rise to the particular offense as a victim.” *People v Harverson*, 291 Mich App 171, 181; 804 NW2d 757 (2010), citing MCL 777.39(2)(a).

Here, Ruttan and Chase were placed in danger of physical injury or death when defendant sold the heroin to Ruttan at the Doyle house before Chase gave the heroin to the victim. The *Ball* Court, in interpreting OV 1, acknowledged that heroin is a harmful chemical substance capable of causing death, but, concluded that the mere possession of heroin did not constitute its use as a weapon. *Ball*, 297 Mich App at \_\_\_ (slip op at 3). We agree with the *Ball* Court that heroin is a harmful chemical substance capable of causing death, and consequently, we find that the mere possession of heroin does place one in danger of physical injury or death. While it is true that a person must ingest heroin to be harmed, defendant’s action of selling the heroin to Ruttan provided Ruttan and Chase (as well as the victim) the opportunity and ability to ingest heroin, and therefore, they were placed in danger of physical injury or death during the transaction. The trial court did not err by scoring OV 9 at ten points.

#### 4. OV 14

“Offense variable 14 is the offender’s role.” MCL 777.44(1). Ten points are to be scored for OV 14 if “[t]he offender was a leader in a multiple offender situation[.]” MCL 777.44(1)(a). This Court considers the entire criminal transaction when determining if an offender was a leader in a multiple offender situation. MCL 777.44(2)(a); *People v Apgar*, 264 Mich App 321, 330; 690 NW2d 312 (2004). When a statute leaves a word undefined, this Court may consult a dictionary to assist it in determining the ordinary and generally accepted meaning. *People v Haynes*, 281 Mich App 27, 29; 760 NW2d 283 (2008). *Random House Webster’s College Dictionary* (2001) defines “leader” as “1. a person or thing that leads. 2. a guiding or directing head, as of an army or political group.”

The record does not support a finding that defendant guided or directed this criminal transaction. Although, in this case, defendant was the top distributor of the heroin and Ruttan’s and Chase’s ongoing supplier of heroin, the evidence shows that Ruttan purchased drugs from defendant for his own use and on the request of the victim. There is no evidence suggesting that Ruttan or Chase were being directed by defendant in their decision to purchase heroin. Rather, Ruttan and Chase made contact with defendant when they wished to purchase heroin. Therefore, the record does not support a finding that defendant was a leader in this situation. Accordingly, the trial court erred by scoring 10 points for OV 14.

Defendant’s OV score should have been scored at 50 points rather than 95 points. Therefore, defendant’s minimum sentence range for his delivery of a controlled substance causing death conviction should have been calculated at 108 months to 180 months (9 to 15 years). See MCL 777.62. Because the change in the total OV points alters defendant’s

recommended minimum sentence range, defendant's sentence is vacated and remanded for resentencing. *People v Francisco*, 474 Mich 82, 92; 711 NW2d 44 (2006).

#### D. DEFENDANT'S STANDARD 4 BRIEF

##### 1. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues in a Standard 4 Brief that he was fully deprived of counsel for 17 days during a critical stage of the proceedings. This Court reviews unpreserved constitutional issues for plain error that affected the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The Sixth Amendment guarantees a right to counsel in all criminal prosecutions. US Const, Am VI; Const 1963, art 1, § 20. "[W]hen a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic." *Holloway v Arkansas*, 435 US 475, 489; 98 S Ct 1173; 55 L Ed 2d 426 (1978); *People v Willing*, 267 Mich App 208, 224; 704 NW2d 472 (2005). A critical stage has been identified as "a step of a criminal proceeding, such as arraignment, that held significant consequences for the accused." *Bell v Cone*, 535 US 685, 696; 122 S Ct 1843; 152 L Ed 2d 914 (2002) (footnote omitted). In *United States v Cronin*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984), the Supreme Court identified three situations that implicated a defendant's right to counsel in which a defendant is entitled to relief absent a showing of prejudice. One situation is where the defendant is completely denied counsel, i.e., counsel is absent or otherwise prevented from assisting the defendant. *Id.* at 659 n 25.

Here, defendant's counsel, John Hocking, was effectively withdrawn as counsel on April 5, 2011. This matter was addressed at defendant's arraignment, and defendant agreed to this withdrawal. The trial court appointed substitute counsel, Douglas Oliver, at a pretrial hearing on April 22, 2011. The record does not indicate, and defendant does not identify, a critical stage in the proceedings where he was without counsel.<sup>5</sup> Defendant's claim is without merit.

We next turn to defendant's argument that he was deprived of the assistance of counsel by defense counsel's failure to investigate or interview the prosecution's witnesses. In the absence of an evidentiary hearing, this Court reviews a defendant's claim of ineffective assistance of counsel based on the existing record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003). "For purposes of distinguishing between the rule of *Strickland [v Washington]*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984) and that of *Cronin*, [the] difference is not of degree but of kind." *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007) (quotation marks and citation omitted). In *Cronin*, the Supreme Court identified three situations that implicated a defendant's right to counsel in which a defendant is entitled to relief absent a showing of prejudice. One situation is where counsel was provided but "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing," i.e., counsel did

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<sup>5</sup> Defendant's reliance on *Morse v Trippett*, 102 F Supp 2d 392 (ED Mich, 2000), is misplaced since that decision was vacated on appeal. *Morse v Trippett*, 37 Fed Appx 96 (CA 6, 2002).

nothing at trial. *Cronic*, 466 US at 659. Here, defense counsel gave an opening statement and closing argument, he cross-examined witnesses, and argued as a defense theory that there was reasonable doubt regarding whether defendant was the individual who sold heroin to Ruttan on February 27, 2010 because Ruttan and Chase were not credible witnesses. Therefore, trial counsel did not entirely fail to subject the case to meaningful adversarial testing, and thus defendant's claims are not properly analyzed under *Cronic*.

Under *Strickland*, to demonstrate ineffective assistance of counsel, a defendant must show that his attorney's performance fell below an objective standard of reasonableness and this performance prejudiced him. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). To demonstrate prejudice, the defendant must show the probability that, but for counsel's errors, the result of the proceedings would have been different. *Id.* Counsel is presumed to be effective and engaged in trial strategy, and the defendant has the heavy burden to prove otherwise. *Id.* Decisions regarding whether to call and question witnesses and what evidence to present are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant asserts that defense counsel failed to investigate or interview all of the prosecution's witnesses, and presents defense counsel's itemized statement from his request for extraordinary fees as evidence. Defense counsel's request for extraordinary fees is not record evidence, and thus, it may not be considered. See *Riley*, 468 Mich at 139. Moreover, the fee request alone would not have been probative of whether defense counsel investigated the prosecution's witnesses. Furthermore, counsel is presumed to be engaged in effective trial strategy, and decisions regarding what evidence to pursue and present are considered matters of trial strategy. *Armstrong*, 490 Mich at 290; *Rockey*, 237 Mich App at 76. Because defendant has failed to produce any evidence regarding his claim, he has failed to show that defense counsel was not engaged in effective trial strategy, and thus his claims are without merit.

## 2. JUDICIAL BIAS

Defendant next argues that the trial court pierced the veil of judicial impartiality when it read two special instructions<sup>6</sup> requested by the prosecution during jury instructions. This Court reviews unpreserved issues regarding judicial bias for plain error affecting a defendant's substantial rights. *People v Jackson*, 292 Mich App 583, 597; 808 NW2d 541 (2011). This Court reviews claims of instructional error de novo. *Kowalski*, 489 Mich at 501. This Court reviews the instructions as a whole to determine whether the trial court committed error requiring reversal. *Id.*

"A defendant claiming judicial bias must overcome a heavy presumption of judicial impartiality." *Jackson*, 292 Mich App at 598 (quotation marks and citation omitted). Generally,

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<sup>6</sup> One instruction informed the jury that whether the victim intentionally or unintentionally ingested too much heroin or mixed the heroin with other drugs was not a defense to the charged crime. The other instruction informed the jury that the heroin needed to be a contributing cause that was a substantial factor in the victim's death.

the following analysis is used to determine whether the trial court's comments deprived the defendant of a fair trial:

Michigan case law provides that a trial judge has wide discretion and power in matters of trial conduct. This power, however, is not unlimited. If the trial court's conduct pierces the veil of judicial impartiality, a defendant's conviction must be reversed. The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial. [*Id.* (quotation marks and citations omitted).]

Judicial rulings are not valid grounds for asserting bias "unless there is a deep-seated favoritism or antagonism such that the exercise of fair judgment is impossible." *Jackson*, 292 Mich App at 598 (quotation marks and citation omitted).

First, defendant argues that the trial court's approval of the prosecution's recommended jury instructions demonstrated its bias for the prosecution. Defendant has failed to show that this ruling indicated the trial court's deep-seated favoritism for the prosecution, and therefore, it is not a valid ground for asserting bias. *Jackson*, 292 Mich App at 598.

Second, defendant argues that the trial court's reference to the victim as a "victim" within the jury instructions demonstrated its bias and unduly influenced the jury. Contrary to defendant's argument, the trial court's use of the word "victim" did not implicate whether defendant committed this crime. Regardless, the jurors were instructed that the trial court's instructions were not evidence, and the jurors are presumed to have followed the instructions. *People v Meissner*, 294 Mich App 438, 457; 812 NW2d 37 (2011). Defendant's argument fails.

Lastly, defendant asserts that the trial court erred when it stated to the jury, as a matter of fact, that defendant delivered a controlled substance during the jury instructions. In reading the entire jury instructions, it is clear that the trial court was reading each element of the charged crime and that the trial court stated to the jury that it would first have to determine whether defendant delivered a controlled substance before it could determine if the controlled substance caused the victim's death. Thus, the trial court did not indicate as an undisputed fact that defendant delivered a controlled substance. Defendant's claim is without merit.

### 3. ADMISSION OF HEARSAY EVIDENCE & RIGHT TO CONFRONTATION

Defendant's final argument is that the trial court erred by admitting testimonial hearsay, which violated his right to confrontation. Unpreserved issues regarding whether the admission of evidence violated a defendant's Sixth Amendment right of confrontation are reviewed for plain error affecting the defendant's substantial rights. *People v Benton*, 294 Mich App 191, 202; 817 NW2d 599 (2011). This Court reviews unpreserved issues regarding the admission of evidence for plain error that affected the defendant's substantial rights. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

"'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).

Hearsay evidence is generally not admissible. MRE 802. The Confrontation Clause provides that, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .” US Const, Am VI. Testimonial statements of witnesses that are not present at trial are therefore admissible only when the original declarant is unavailable and the defendant has had a prior opportunity to cross-examine that declarant. *Crawford v Washington*, 541 US 36, 54, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Generally, statements are testimonial in nature if they constitute a declaration or affirmation made for the purpose of proving some fact. *Id.* at 51.

Defendant argues that because Royal Oak police officer Frank Bonnette stated on cross-examination that another person informed him that defendant refused to participate in a corporeal lineup, Bonnette did not have personal knowledge of that fact and his direct examination testimony was inadmissible hearsay. Defendant’s argument is misplaced. It appears that this evidence was used to show why a photographic lineup was conducted instead of a corporeal lineup,<sup>7</sup> rather than to prove the truth of the matter asserted – that defendant refused to participate in a corporeal lineup. Furthermore, Bonnette clearly had personal knowledge that defendant did not participate in a corporeal lineup because he was the person who attempted to conduct it. Therefore, this evidence was not hearsay. Furthermore, because the trial court did not commit an error in admitting the evidence, defendant’s unreserved Confrontation Clause issue is without merit. See *People v Coy*, 258 Mich App 1, 16; 669 NW2d 831 (2003).<sup>8</sup>

We affirm defendant’s conviction, vacate his sentence, and remand for resentencing. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens  
/s/ Donald S. Owens  
/s/ Christopher M. Murray

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<sup>7</sup> If the defendant is in custody, a corporeal lineup, rather than a photographic lineup, must be used. *People v Kurylczyk*, 443 Mich 289, 298; 505 NW2d 528 (1993). But, there are several exceptions to this rule, including when an accused refuses to participate the corporeal lineup and by his actions would seek to destroy the value of the identification. See *People v Anderson*, 389 Mich 155, 186-187 n 22; 205 NW2d 461 (1973) rev’d on other grounds *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004).

<sup>8</sup> Additionally, because defendant’s claims are without merit, defense counsel was not ineffective for failing to raise a futile objection. *Horn*, 279 Mich App at 39-40.