

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CAROLYN JULETTE CURRY,

Defendant-Appellant.

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UNPUBLISHED

April 14, 2011

No. 292730

Saginaw Circuit Court

LC No. 01-019850-FC

Before: O'CONNELL, P.J., and K. F. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), conspiracy to commit first-degree premeditated murder, MCL 750.157a and MCL 750.316(1)(a), carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. She was sentenced as a second habitual offender, MCL 769.10, to life in prison for the murder and conspiracy convictions, to a term of four to seven years for the CCW conviction, and to a term of two years for the felony-firearm conviction. Defendant appeals by right consistent with the conditional grant of defendant's petition for habeas corpus in *Curry v Stovall*, unpublished opinion and order of the United States District Court for the Eastern District of Michigan, issued May 18, 2009 (Docket No. 07-CV-14695). We affirm.

**I. BASIC FACTS**

During a gathering at a motorcycle club on February 19, 2001, the decedent, Howard Reedy, cut defendant's son, Elmer Curry following an argument. Thereafter, various witnesses heard defendant threaten to kill Reedy. Moreover, witnesses testified that defendant was attempting to learn where Reedy lived and that she was carrying a firearm.

Shawn Carter, Eddie Ray Harry, and Adam Williams testified that they were having a four-way telephone conversation with Reedy later that evening. After Carter hung up, Reedy said that someone was at the door. Harry and Williams testified that they then heard Reedy telling "Redbone" to back up into the light. "Redbone" was defendant's nickname. Harry said he then heard two shots, and that Reedy came back and said defendant "shot me." According to Williams, Reedy simply said that he had been shot.

Reedy suffered a gunshot wound to his lower left abdomen. The bullet went from front to back, left to right, at a slightly downward angle. It was shot at very close range through a wooden door. Because the storm door had no damage, the shooter would have been between the storm door and the wooden door. A recovered casing indicated that the bullet came from a semiautomatic firearm.

There was evidence that on the evening in question, defendant was repeatedly seen with Dawn Parham. Originally, Parham and defendant were tried jointly. However, a mistrial was granted with respect to defendant. Thereafter, Parham entered a plea of no contest to a charge of voluntary manslaughter. Defendant was later convicted of all the charges against her. She now appeals.

## II. MISTRIAL

Defendant first argues that the prosecutor goaded her into moving for a mistrial and that her second trial was therefore barred by double jeopardy. We disagree. Defendant did not raise this issue below. “Unpreserved, constitutional errors are reviewed for plain error affecting substantial rights.” *People v Pipes*, 475 Mich 267, 270; 715 NW2d 290 (2006). “Reversal is appropriate only if the plain error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings.” *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005).

The Fifth Amendment of the United States Constitution prohibits a criminal defendant from:

“be[ing] subject for the same offence to be twice put in jeopardy of life or limb . . . .” [US Const, Am V]. A parallel provision of the Michigan Constitution provides a criminal defendant with similar protection. [Const 1963, art 1, § 15]. In adopting this parallel provision, “the people of this state intended that our double jeopardy provision would be construed consistently with Michigan precedent and the Fifth Amendment.” [*People v Nutt*, 469 Mich 565, 591; 677 NW2d 1 (2004)]. [*People v Szalma*, 487 Mich 708, 715-716; 790 NW2d 662 (2010)(footnotes omitted).]

Jeopardy attaches at the time the jury is selected and sworn. *People v Dawson*, 431 Mich 234, 251; 427 NW2d 886 (1988). If a mistrial is declared before a verdict, the Double Jeopardy Clause may bar a retrial. *Id.* However, when the defendant moves for or consents to a mistrial “and the mistrial was caused by innocent conduct of the prosecutor or judge, or by factors beyond their control, or by defense counsel himself, retrial is . . . generally allowed, on the premise that by making or consenting to the motion the defendant waives a double jeopardy claim.” *Id.* at 253. Nonetheless, “where prosecutorial conduct was intended to provoke the defendant into moving for a mistrial,” retrial is barred. *Id.* If a defendant has sought or consented to a mistrial and later invokes this exception to prevent a new trial, the defendant must establish the prosecutor’s intent from “the objective facts and circumstances of the particular case[.]” *Id.* at 257.

At the first trial, Troy Howard, Parham's boyfriend, testified about Parham's statement indicating that she was present at the time of the shooting and knew what kind of gun was used. Defendant's counsel objected on the basis that this line of questioning would ultimately result in the admission of an improper hearsay statement against defendant. In the discussion that followed, Parham's counsel noted that if Parham were being tried in a separate trial, which had been requested by defendant but was denied, he would have been able to cross-examine Howard regarding Parham's involvement, and would have elicited Parham's statement that defendant shot the decedent. The prosecutor argued that Parham's statement to Howard that she was present at the shooting was admissible against both Parham and defendant as a statement against Parham's interest under MRE 804(b)(3) based on *People v Poole*, 444 Mich 151, 162; 506 NW2d 505 (1993) (holding that a statement against interest could be used against a codefendant if there was sufficient indicia of reliability), overruled in part on other grounds *People v Taylor*, 482 Mich 368, 374; 759 NW2d 361 (2008) (stating that under controlling US Supreme Court case law, hearsay statements that are not testimonial "do not implicate the Confrontation Clause"). However, the court concluded that there would be substantial prejudice to defendant that could not be rectified, and therefore, granted defendant's motion for mistrial so that defendant could be tried separately.

Defendant has failed to show that the prosecutor intended to provoke a mistrial. The prosecutor argued in good faith his position based on *Poole*. In *Poole*, 444 Mich at 161, the Court stated:

We conclude, however, that where, as here, the declarant's inculcation of an accomplice is made in the context of a narrative of events, at the declarant's initiative without any prompting or inquiry, that as a whole is clearly against the declarant's penal interest and as such is reliable, the whole statement—including portions that inculcate another—is admissible as substantive evidence at trial pursuant to MRE 804(b)(3). . . .

The trial court appropriately determined that the statement was not admissible with regard to defendant and the potential testimony was so substantially prejudicial to defendant that a separate trial was warranted. The prosecutor's argument was not baseless; it was premised on a decision that gave rise to a bona fide argument for admission of the evidence against defendant. "[A] prosecutor's good faith effort to admit evidence does not constitute misconduct." *People v Dobek*, 274 Mich App 58, 72; 732 NW2d 546 (2007). Although the prosecutor's argument did not ultimately have merit, defendant has not demonstrated that the prosecutor goaded him into moving for a mistrial.

Defendant argues that, even if the intent was not to provoke a mistrial, this Court should adopt a more liberal standard for barring retrial based on prosecutorial conduct. Specifically, it urges the Court to adopt the test espoused in *Pool v Superior Court*, 139 Ariz 98, 108-109; 677 P2d 261 (1984), which would bar retrial if there is "intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal." We need not decide whether such a test should be adopted because, again, the prosecutor's argument for admission of the evidence was defensible based on *Poole* and defendant has not shown that the prosecutor acted in a way he knew was improper.

### III. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that there was insufficient evidence that she intended that the victim be killed in order to convict her of first-degree murder. We disagree. To the extent that defendant is arguing that there was insufficient evidence of premeditation and deliberation, we also disagree. When analyzing a claim based on insufficient evidence, we review the record de novo. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). “[W]e review the evidence in a light most favorable to the prosecutor to determine whether a rational trier of fact could have found that the essential elements of the offense were proven beyond a reasonable doubt.” *People v Couzens*, 480 Mich 240, 244; 747 NW2d 849 (2008). However, this Court should not “interfere with the trier of fact’s role of determining the weight of the evidence or the credibility of witnesses.” *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007). Moreover, [i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences.” *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

To convict a defendant of first-degree, premeditated murder, the prosecution must prove that the defendant intentionally killed the victim and that the act was premeditated and deliberate. *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2001). Defendant suggests that the angle of the bullet established that she did not have the intent to kill since she did not aim toward the upper half of Reedy’s body. However, circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). The use of a lethal weapon is sufficient to “support an inference of an intent to kill.” *People v Ray*, 56 Mich App 610, 615; 224 NW2d 735 (1974). As a result, there was sufficient evidence based solely on the use of the gun that defendant had the intent to kill the victim.

“To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or a problem.” *People v Furman*, 158 Mich App 302, 308; 404 NW2d 246 (1987). “While the minimum length of time needed to exercise this process is incapable of exact determination, a sufficient interval between the initial thought and the ultimate action should be long enough to afford a reasonable man an opportunity to take a ‘second look’ at his contemplated actions.” *People v Gonzalez*, 178 Mich App 526, 532-533; 444 NW2d 228 (1989). Moreover, premeditation and deliberation can be inferred from circumstances surrounding a killing, and “[m]inimal circumstantial evidence is sufficient to prove an actor’s state of mind.” *Ortiz*, 249 Mich App at 301. “The fact-finder is not prevented from making more than one inference in reaching its decision. That is, if each inference is independently supported by established fact, any number of inferences may be combined to decide the ultimate question.” *Hardiman*, 466 Mich at 428.

In this case, there was sufficient evidence of premeditation and deliberation. There was evidence that defendant repeatedly threatened to kill Reedy, including at a time that may have been just 15 minutes before the murder. Not only was defendant actively searching for Reedy, there was evidence that she armed herself, as witnesses observed a gun on her person. The approximate 15 minutes that lapsed between defendant’s last threats and the shooting was a sufficient interval to afford defendant an opportunity to take a “second look” at her contemplated actions.

#### IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that she was denied the effective assistance of counsel. We disagree. Whether a defendant has been denied the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). Findings of fact are reviewed for clear error, but the rulings on questions of law are reviewed de novo. *Id.*

To establish ineffective assistance of counsel, a defendant must show that “(1) counsel’s performance fell below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, but for counsel’s errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable.” *Id.* “Effective assistance is presumed, and the defendant bears a heavy burden of proving otherwise.” *Id.*, quoting *People v Solmanson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Defense counsel has wide discretion as to matters of trial strategy, *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007), and this Court will not substitute its judgment for that of counsel regarding such matters, *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Indeed, counsel’s trial performance in whole will be measured without the benefit of hindsight. *Id.* “An attorney’s decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy. . . . In general, the failure to call a witness can constitute ineffective assistance of counsel only when it ‘deprives the defendant of a substantial defense.’” *Id.* (citation omitted), quoting *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). A determination regarding what evidence to present is also a matter of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

Defendant argues that counsel should have introduced the caller ID record for Reedy’s phone because it did not log the four-way call involving Harry, Williams, and Carter and called into question whether the phone call even occurred. Counsel noted, however, that the report indicated the caller ID was not working properly. The record indicated that the caller ID erroneously stated that the date was February 16 and that the time was 6:39 p.m. Defendant claims that the date and time were consistently misstated by 83 hours and six minutes, but that the caller ID was capturing all of the incoming calls. According to defendant, the fact that the caller ID did not capture the four-way call demonstrates that the call did not occur. However, defendant presented no evidence that all of the calls were captured or that the time and date on the caller ID were consistently wrong. Given the erroneous dates and time, defendant has not overcome the presumption that the decision not to introduce this evidence was a sound trial strategy.

Defendant next contends that counsel should have called alibi witnesses to establish that she was at the hospital at the time of the murder. Counsel noted, however, that none of the witnesses could testify that defendant was at the hospital during all relevant times. Moreover, defendant told a police officer that she was with Parham in a car at some point that night for 45 minutes. In addition, defendant implicated herself in an interview with a detective, which likely would have come in by way of rebuttal if defendant had tried to present an alibi. Counsel was also concerned that Parham might testify as a rebuttal witness or that Parham’s statement to

Howard implicating defendant would come in as rebuttal. Counsel concluded that these concerns outweighed the benefit of presenting the alibi defense. This was a sound trial strategy.

Defendant posits that Byron Coates and Cynthia Diaz should have been called because they would have established that she was not with Parham at all pertinent times on the night in question. However, Diaz said she was not sure if defendant was with Parham. While Coates said he saw Parham without defendant within approximately a half-hour of the murder, presenting this testimony would have resulted in the same risk that Parham might testify as a rebuttal witness. Thus, counsel would have had a legitimate reason for not calling Coates.

It is not clear why defense counsel failed to call Ann Miller and Monique McQueen. They might have raised questions about the time of the murder and whether Carter was present. However, the testimony may have been undermined because Miller estimated the arrival of police officers approximately 15 minutes before their actual arrival and McQueen estimated the shot as having occurred at a time when the police officers had already arrived. Counsel is presumed to have provided effective assistance. Even if error, it is highly unlikely that the result of the proceedings would have been different given the significant evidence presented against defendant. Numerous witnesses testified that defendant threatened to kill Reedy after he cut her son and defendant was armed and looking for Reedy that night. Moreover, three witnesses testified to the four-way call, and two witnesses testified that Reedy identified defendant at the time of the shooting.

Defendant also argues that counsel should have presented a map and introduced evidence as to the distances between the various locations mentioned during the trial. However, counsel was aware that all pertinent locations were within 15 minutes of each other. It appears that counsel did not want to draw attention to this fact. Defendant further posits that the time of the 911 call should have been introduced. However, given that there was evidence of the responders' arrival time, which was within one to two minutes of the 911 call, it is not evident that this evidence would have been helpful.

Finally, defendant argues in her standard four brief that she had a constitutional right to be present when answers were given to the jurors' questions during deliberations and she was deprived of the effective assistance of counsel when counsel failed to object to her absence. We disagree. A defendant has a constitutional right to be present at trial. *People v Mallory*, 421 Mich 229, 246 n 10; 365 NW2d 673 (1984). However,

when considering what is the "trial" for purposes of this question we can exclude formal and preliminary matters or matters occurring after the hearing on the merits or rendition of the verdict, as well as other matters. . . . *This Court has held that the accused need not be present when the jury, after having departed to deliberate, returns and requests a reiteration of . . . testimony given during the trial . . . .* [*People v Medcoff*, 344 Mich 108, 116; 73 NW2d 537 (1955), overruled on other grounds *People v Morgan*, 400 Mich 527, 534-535; 255 NW2d 603 (1977) (emphasis added and citations omitted).]

Defendant relies on MCL 768.3, which provides criminal defendants the right to be present at trial. In *People v Alcorta*, 147 Mich App 326, 329-330; 383 NW2d 182 (1985), quoting *Mallory*, 421 Mich at 247, this Court held that the Supreme Court had interpreted the statute to mean:

A defendant has a right to be present during the voir dire, selection of and subsequent challenges to the jury, presentation of evidence, summation of counsel, instruction to the jury, rendition of the verdict, imposition of sentence, and any other stage of trial where the defendant's substantial rights might be adversely affected.

Applying the reasoning of *Medcoff*, reiteration of evidence does not constitute a stage at which substantial rights will be adversely affected. As a result, counsel was not ineffective for failing to object to defendant's absence when the trial court reconvened proceedings to answer jury questions during its deliberations because the objection would have been futile. See *People v Unger*, 278 Mich App 210, 256; 749 NW2d 272 (2008) (stating that a lawyer is not ineffective for failing to assert a futile objection).

Affirmed.

/s/ Peter D. O'Connell  
/s/ Kirsten Frank Kelly  
/s/ Amy Ronayne Krause