

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TONI RENEE BUNTON,

Defendant-Appellant.

UNPUBLISHED

July 1, 2003

No. 236335

Wayne Circuit Court

LC No. 91-007001

Before: Griffin, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Defendant appeals pursuant to grant of an application to take a delayed appeal from the trial court's order and opinion denying her motion for relief of judgment. Defendant was convicted, following a jury trial, of two counts of second-degree murder, assault with intent to murder, and two counts of armed robbery.¹ Defendant was sentenced to twenty-five to fifty years' imprisonment for each conviction, with the sentences to run concurrently.² We affirm.

Ayman and Omar Kaji³ approached "Jason"⁴ and were directed to defendant with regard to purchasing ten pounds of marijuana, and met with defendant a couple of times arranging a sale for \$15,000. Days later, defendant drove Marvin Allen, Jose Burgos, and Manuel Sanchez to the

¹ Defendant was only sentenced on one count of second-degree felony-murder, and the other second-degree murder conviction was vacated.

² Defendant appealed her conviction to this Court as a matter of right. This Court affirmed defendant's convictions and sentences in an unpublished opinion. *People v Bunton*, unpublished per curiam opinion of the Court of Appeals, issued February 23, 1995 (Docket No. 153719). This Court denied a motion for rehearing. Following defendant's appeal in this Court, leave to appeal was denied by the Michigan Supreme Court (Docket No. 103535), and a Writ for Habeas Corpus was denied by federal district court.

³ Throughout their dealings with defendant, the Kajis referred to themselves as "Mark" and "Johnny."

⁴ It is unclear as to who exactly Jason is, but it is evident he was a contact person between defendant and the Kajis.

prearranged site for the transaction.⁵ The Kajis had planned to steal the marijuana, and brought only \$40 with a bundle of papers in between two \$20 bills. When the Kajis arrived at the scene where defendant was waiting, Burgos got out of defendant's car, and retrieved a black trash bag from the trunk of defendant's car. The plastic bag contained clothing and towels, not marijuana. Burgos entered into the back seat of the car in which the Kajis were sitting and shot them. Burgos took the money. Defendant, Burgos, Allen, and Sanchez all left the scene in defendant's car. Omar Kaji was found dead in the driver's seat of a car, and Ayman Kaji was laying shot outside passenger door.

Pursuant to an investigation into the shootings, Detroit Homicide Section Police Officers Lieutenant Fred Campbell and Darrel Martin, along with two Southgate Police Officers, Dale Tamsen and Charles Gaus,⁶ went to ask defendant questions at her workplace because there was information that a vehicle she owned was involved in a shooting. There is a question surrounding the events that followed as to whether defendant cooperated as witness and was taken to the station or was forced to go. While at the station, defendant gave a statement. Prior to trial, defendant filed a motion for a *Walker*⁷ hearing to determine the voluntariness of this statement arguing that it was a product of unkept promises, threats, and was not intelligently made. The trial court denied defendant's motion to suppress the statement.

Defendant's first issue on appeal is that she was denied her right to a trial by jury when the trial court failed to accurately respond to the jury's request and questions on the critical issue of defendant's intent and knowledge. Defendant has waived this issue on appeal.

When the trial court received the jury's questions, the court and both attorneys attempted to recall the testimony to determine which testimony, if any, could answer the jury's questions. Defense counsel offered input and took affirmative steps to craft the judicial response to the jury's questions and waived the issue. This was not a case where defense counsel simply failed to object to an action of the court. There was agreement between the trial court and both counsel on how the jury's questions were handled. The trial court handled the questions presented by jury, in manner in which the attorneys requested. Defense counsel's active participation constituted a waiver that "extinguishes any error." *People v Carter*, 462 Mich 206, 213-216; 612 NW2d 144 (2000). Counsel may not "expressly acquiesce" to the court's handling of a matter and then raise it as an error before this Court. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998). This waiver extinguishes any error and precludes defendant from raising the issue on appeal. *Carter, supra* at 208-209.⁸

⁵ Allen is also known as "Timbo," Burgos is also known as "Poodle," and Sanchez is also known as "Pookie."

⁶ It is noted that throughout the record Officers Tamsen and Gaus are referred to as Southgate Police Officers. However, Officer Tamsen and Gaus' testimony reveals that they are Taylor Police Officers. It is unclear as to whether they may have been Southgate Police Officers at the time, but for purposes of this opinion the distinction is insignificant.

⁷ *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965).

⁸ An argument could be made that defense counsel's action may provide the basis for an
(continued...)

Defendant's second issue on appeal is that her statement to the police after her arrest without probable cause should have been excluded as a fruit of that arrest. We disagree.

MCR 6.508(D)(2) precludes relief from judgment where the motion "alleges grounds for relief which were decided against the defendant in a prior appeal." Defendant did challenge the admission of her statement in her prior appeal to this Court. However, that challenge was based on a contention that the statement was coerced and not voluntary. Defendant did not previously contend that her statement was the fruit of an illegal arrest. Therefore, the "ground for relief" asserted in this motion for relief from judgment is not the same as that asserted in her prior appeal. As a result, MCR 6.508(D)(2) does not preclude relief on this ground. Thus, this issue will be reviewed pursuant to MCR 6.508(D)(3) which provides, in relevant part:

(D) The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion

(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,

(i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;

* * *

(iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case.

If actual prejudice is not established, it is unnecessary to address the question of good cause. *People v Jackson*, 465 Mich 390, 405; 633 NW2d 825 (2001) mod 465 Mich 1209 (2001). In general, the trial court's decision to grant or deny a motion for relief from judgment is reviewed for an abuse of discretion. *People v Ulman*, 244 Mich App 500, 508; 625 NW2d 429 (2001); *People v Reed*, 198 Mich App 639, 645; 499 NW2d 441 (1993).

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ineffective assistance of counsel claim, but no such claim is asserted in the appeal. Thus, defendant waived this issue when she failed to raise it in her statement of questions presented. MCR 7.212(C)(5); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).

The ultimate question is whether a person is in custody, and thus, entitled to *Miranda*⁹ warnings before being interrogated by law enforcement officers, is a mixed question of law and fact which must be answered independently by the reviewing court after a de novo review of the record. *Thompson v Keohane*, 516 US 99, 111-112; 116 S Ct 457; 133 L Ed 2d 383, 394 (1995), on remand 145 F3d 1341 (CA 9, 1998); *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997). A lower court's factual findings when ruling on a motion to suppress are reviewed for clear error and will be affirmed unless we are left with a definite and firm conviction that a mistake has been made. *People v Faucett*, 442 Mich 153, 170; 499 NW2d 764 (1993); *Mendez, supra* at 382. The lower court's ultimate ruling with regard to the motion to suppress is reviewed de novo. *People v Garvin*, 235 Mich App 90, 96; 597 NW2d 194 (1999). A confession obtained during custodial interrogation following an illegal arrest should be suppressed, even if voluntary, if there was a causal nexus between the illegal arrest and the confession. *People v McKinney*, 251 Mich App 205, 212; 650 NW2d 353 (2002); *People v Spinks*, 206 Mich App 488, 496; 522 NW2d 875 (1994).

There is no ground for relief on this issue as defendant has failed to show any actual prejudice because the trial court's findings would also support a denial of a suppression motion based on a fruit of an illegal arrest argument. The findings of the trial court in response to the suppression motion and the *Ginther*¹⁰ hearing reveal that the trial court found that defendant was not in custody and knew she was free to leave.

Miranda warnings are not required unless the accused is subject to a custodial interrogation. *People v Hill*, 429 Mich 382, 384; 415 NW2d 193 (1987); *People v Kulpinski*, 243 Mich App 8, 25; 620 NW2d 537 (2000). A custodial interrogation is a questioning initiated by law enforcement officers after the accused has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). Whether an accused was in custody depends on the totality of the circumstances, and the key question is whether the accused could reasonably believe that she was not free to leave. *People v Marsack*, 231 Mich App 364, 374; 586 NW2d 234 (1998).

Lieutenant Campbell testified that he went to defendant's workplace at approximately 6:00 p.m., on June 11, 1991. According to Lieutenant Campbell, defendant was cooperative and willing to go downtown to answer questions. Lieutenant Campbell testified that over the course of the next several hours, defendant gave him information, and he attempted to verify it. Based on the information defendant supplied, particularly the names of persons allegedly involved in the crime, more information was obtained, and Lieutenant Campbell realized that defendant was at the scene of the crime. As a result, at 11:45 p.m., defendant was formally arrested, read her rights, and gave a statement. According to Lieutenant Campbell, defendant was free to leave at

⁹ *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

¹⁰ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). The *Ginther* hearing was held pursuant to a remand from this Court. Following the *Ginther* hearing, the trial court issued a detailed opinion and an order denying defendant's motion for a new trial.

any time prior to her formal arrest. Officer Martin's testimony was very similar to that of Lieutenant Campbell, and was supported by Officers Packard, Gaus, and Tamsen.

Defendant testified that she did not go freely with Lieutenant Campbell, and was, in fact, handcuffed at her workplace and forced to go downtown. Defendant stated that she was taken to the Southgate Police Department, where she was interrogated, then driven around Detroit for hours while being questioned by Lieutenant Campbell and Officer Martin. Defendant claims that she was then taken to Detroit police headquarters, where she was further interrogated, and eventually placed under arrest.

According to the Lieutenant Campbell and Officer Martin there was no probable cause to arrest defendant until sometime between 11:30 p.m. and 11:45 p.m. Thus, the key question is whether defendant was in fact under arrest prior to this period. According to the police, defendant was not placed under arrest until somewhere around 11:30 or 11:45 and gave her statement at 11:45 p.m.

During the suppression hearing, the trial court found that defendant was brought in as a witness and developed into a suspect as the investigation progressed. The trial court further found that defendant's statement was freely and intelligently made, was voluntary, and that no promises or threats were made in order to obtain her statement. Following a *Ginther* hearing allowing other witnesses to testify, on whether defendant was in custody and the voluntariness of the statement, the court issued a detailed opinion finding that the prosecution witnesses were more credible than defendant and defense witnesses on this issue of defendant's statement to the police. In this opinion, the trial court reiterated that following the *Walker* hearing it was convinced that defendant initially cooperated with the police and went to the station voluntarily, and found the prosecution witnesses to be credible. The trial court made its new findings while including the new evidence, Carol Gau affidavit and David Meyers' testimony, stating that it disbelieved the testimony of defense witnesses, which were convincingly inconsistent with defendant's testimony. The trial court noted that it observed Meyers demeanor and did not find him to be particularly credible. The trial court specifically found credible the testimony from prosecution witnesses that defendant was not handcuffed and voluntarily went to the station for questioning as a potential witness, and would have made the same findings at the *Walker* hearing even with the new evidence.

The trial court already addressed every reason presented by defendant as a reason that her statement should be suppressed as the fruit of an illegal arrest. Although the trial court did not specifically find that the statement was not the fruit of an illegal arrest, the record sufficiently demonstrates that the trial court found that defendant was not in custody and voluntarily went to the station with the officers. See *People v Wells*, 238 Mich App 383, 388; 605 NW2d 374 (1999). The trial court's findings reveal that it would have found that the defendant was not arrested and her statements were not inadmissible as the fruit of an illegal arrest. As the trial court, specifically, found that defendant voluntarily went to the station as a witness without handcuffs. The trial court further made specific findings that the evidence, which defendant now asserts supports that there was an illegal arrest, was not credible. The evidentiary record supports the trial court's finding based on credibility of witnesses that defendant was detained as a voluntary witness, and therefore, it was not clearly erroneous for the trial court to suppress defendant's statements as voluntary or as the fruit of an illegal arrest.

The trial court's reasoning for denying defendant's motion to suppress her statement was not clearly erroneous. *Faucett, supra* at 170. The trial court would have suppressed defendant's statements whether defendant challenged them as not voluntary or as the fruit of an illegal arrest. For this reason, defendant cannot establish actual prejudice, as necessary to warrant relief from judgment. MCR 6.508(D)(3)(b); Jackson, *supra* at 405. Thus, there was no "actual prejudice" as the trial court would not have suppressed the statement as the fruit of an illegal arrest and there was no irregularity with regard to this issue that was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand. MCR 6.508(D)(3)(b). Therefore, the lower court did not abuse its discretion by denying defendant's motion for relief from judgment with regard to this issue. *Ulman, supra* at 508.

Defendant's third issue on appeal is that she was denied a fair trial when the prosecutor misled the jury on the law, misled the jury on the facts, and vouched for the credibility of his witnesses. We disagree. This issue will be reviewed pursuant to MCR 6.508(D)(3). "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

Defendant argues that the prosecution misled the jury on the law with regard to aiding and abetting. This Court reviews claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). During closing argument, in regard to being an aider and abettor, the prosecutor stated, "a person may commit the crime themselves or is guilty of a crime if they help another commit the crime." Defendant argues that this was a misstatement of law because the prosecutor failed to convey that, not only did defendant have to help commit the crime, she must have possessed the same intent as the principal. A prosecutor's clear misstatement of the law, if uncorrected, can deprive a defendant of a fair trial. *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). "However, if the jury is correctly instructed on the law, an erroneous legal argument made by the prosecutor can potentially be cured." *Grayer, supra* at 357.

While defendant's argument correctly notes the requisite intent possessed by an aider and abettor, see *People v Barrera*, 451 Mich 261, 294; 547 NW2d 280 (1996), there is no "actual prejudice" to defendant from the prosecutor's remark. First of all, the prosecutor specifically stated that "[i]f I misstate the law, you go by what Judge Jobes tells you what the law is." The prosecutor indicated that he was attempting to "make it as simple as I can." Later in his argument, the prosecutor stated that he had to "show that there is a certain intent; that she had the intent to kill." The trial court instructed the jury that, in order to be guilty of aiding and abetting, defendant must have intended to assist in committing the crime and must have assisted in committing the crime. The trial court properly instructed the jury that intent and assistance is required, thus, curing any error. *Grayer, supra* at 357. Further, the trial court and prosecutor instructed the jury on numerous occasions that the attorneys' statements were not to be considered evidence. In light of the fact that the prosecutor specifically informed the jury that it was to follow the trial court's proper instructions and not any statements he made to the contrary, and the prosecutor did go on to state that he had to show that defendant intended to kill, the remark did not deny defendant of a fair trial or result in "actual prejudice," as there was no reasonable likelihood of acquittal based on this alleged error or irregularity that was so offensive

to the maintenance of a sound judicial process that the conviction should not be allowed to stand. MCR 6.508(D)(3).

Defendant also contends that the following statements made during closing argument by the prosecution were improper arguing of facts not in evidence:

Ayman Kaji said his brother had a gun. It was under his lap. Sergeant finds it on top of his lap. It is important that you remember his testimony. The gun was never fired. The safety is on. The clip is not fully engaged, and you know it is not fired because Officer Laurencelle is the one person who came and put the gun in evidence. He said the gun had a bullet in the chamber. It had a bullet in the chamber. We know it could not be fired with the clip not in it. It could not be reloaded. There was no way to reload it because the clip was not engaged. Omar never had a chance to protect himself with that gun.

Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Schutte, supra* at 721. A prosecutor may not make a statement of fact to the jury which is unsupported by the evidence, *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994); *Schutte, supra* at 721, but he is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case, *Bahoda, supra* at 282; *Schutte, supra*.

Defendant contends that the evidence did not support the "fact" that the gun could not fire. Defendant relies on the fact that there was one round in the chamber for her proposition that the gun could fire. However, one officer testified that, generally speaking, handguns such as the one at issue, would not fire without a fully seated magazine. Also, if the safety was on the gun could not fire regardless of whether the magazine was properly loaded. Officer Fischer testified that the safety was on. Thus, the prosecutor's argument was proper based on the evidence and the reasonable inferences arising there from. *Bahoda, supra* at 282. Therefore, there was no error, and thus, no "actual prejudice."

Defendant next argues that the prosecutor vouched for the credibility of Lieutenant Campbell. A prosecutor may not vouch for a witness' credibility or suggest that the government has special knowledge that a witness testified truthfully. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). However, where the jury is faced with a credibility question, the prosecutor is free to argue witness' credibility from the evidence. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). The critical inquiry is whether the prosecutor urged the jury to suspend its own judgment powers out of deference to those of the prosecutor or police. *People v Whitfield*, 214 Mich App 348, 352-353; 543 NW2d 347 (1995).

Defendant takes issue with the prosecutor's statement that, "the only reasonable person to believe is Campbell." There is no impropriety in that remark. The entire comment was:

Well, ladies and gentlemen, you decide who you believe. You can disbelieve everything that Lieutenant Campbell said, and all of the evidence, and there is still

evidence that says that she did it, but I submit that the only reasonable person to believe is Campbell; that she is simply unbelievable. You can't believe her when she says, I didn't know what was going to happen.

The prosecutor was not so much vouching for Lieutenant Campbell as he was arguing that the evidence suggested defendant was not worthy of belief. Such an argument is proper. See *Launsbury, supra* at 361. Secondly, the comment was made on rebuttal. Even assuming the prosecutor's comment was improper, otherwise improper remarks might not require reversal if they address issues raised by defense counsel. *People v Duncan*, 401 Mich 1, 16; 257 NW2d 86 (1977). In closing argument, defense counsel contended that this case was essentially a credibility contest between Lieutenant Campbell and defendant. The prosecutor's remark was made in response to that contention. There was no error, and thus, no "actual prejudice" required for relief from judgment.

Since any errors or irregularities during the trial were not of consequence, there was no cumulative error or irregularities that denied defendant a fair trial or resulted in "actual prejudice." Accordingly, the trial court did not abuse its discretion in denying defendant's motion for relief from judgment with regard to prosecutorial misconduct.

Defendant's fourth issue on appeal is that she was denied her right to confrontation and due process when the trial court curtailed cross-examination surrounding the circumstances of her statement to the police. We disagree. This issue will be reviewed pursuant to MCR 6.508(D)(3). The constitutional right for a defendant to confront his accuser is reviewed de novo. See generally *Lilly v Virginia*, 527 US 116, 118; 119 S Ct 1887; 144 L Ed 2d 117 (1999); *People v Smith*, 243 Mich App 657, 681; 625 NW2d 46 (2000).

Defendant claims that the trial court denied her right to confrontation when it limited defense counsel's inquiries into the circumstances surrounding defendant's statement to police. "The scope of cross-examination is within the discretion of the trial court." *People v Cantor*, 197 Mich App 550, 564; 496 NW2d 336 (1992). "Neither the Sixth Amendment Confrontation Clause, nor due process, confers on a defendant an unlimited right to cross-examine on any subject." *Cantor, supra* at 564. Cross-examination may be denied with respect to collateral matters bearing only on general credibility, as well as on irrelevant issues. *Id.*

The following exchange took place during defense counsel's cross-examination of Lieutenant Campbell:

Q: She indicated that she wanted to come downtown and help?

A: She didn't reject the idea of going, but she is in the car with two police officers and –

THE COURT: I think we can move on.

Q: She is in the police car?

A: We didn't have a police car.

Q: She is in a car?

A: She is in a car.

Q: You identified yourself as a police officer?

THE COURT: [Defense counsel], can we move on?

While the trial court is entitled to control the proceedings in its courtroom, it is not entitled to do so at the expense of a defendant's constitutional rights. *People v Arquette*, 202 Mich App 227, 232; 507 NW2d 824 (1993). In this case, defendant contends that the trial court infringed on defendant's right to confront the witnesses against her. However, "[t]he Sixth Amendment right of confrontation is subject to a balancing test involving other legitimate state interests in the criminal trial process, including avoiding, among other things, harassment, prejudice, confusion of the issues, safety of the witness, or interrogation that is repetitive or only marginally relevant." *People v Byrne*, 199 Mich App 674, 679; 502 NW2d 386 (1993).

Defendant's challenge focuses on her limited ability to cross-examine Lieutenant Campbell. There was no constitutional violation in the instant case. The questions, interrupted by the trial court, had been previously asked by defense counsel and answered by Lieutenant Campbell. Defense counsel had previously asked Lieutenant Campbell if he had identified himself as a police officer, and Lieutenant Campbell answered that he identified himself and was in the presence of uniformed officers. Also, defense counsel had previously asked the following questions: "[d]o you ask her at any time would you please come down to the homicide section at your convenience and talk to us," "[h]ow did you get her to come with you," "[a]nd she indicated that she wanted to go with you downtown and give you this information." In light of the fact that defense counsel had previously asked the questions which prompted the trial court to prod defense counsel to "move along," the trial court did not deny defendant her right to confrontation, and the trial court's action did not result in "actual prejudice" to defendant. There was no "actual prejudice" because there was not a reasonable likelihood of acquittal but for this alleged irregularity and this alleged irregularity was not so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand. MCR 6.508(D)(3). Therefore, the lower court did not abuse its discretion by denying defendant's motion for relief from judgment with regard to this issue.

Defendant's fifth issue on appeal is that she was denied her constitutional right to effective assistance of counsel where her attorney failed to seek suppression of her statement on the grounds of unlawful arrest and when counsel conducted an examination of a witness in a manner that prejudiced her case. We disagree.

This issue will be reviewed pursuant to MCR 6.508(D)(3). When reviewing a claim of ineffective assistance of counsel, this Court's review is limited to the facts contained on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002); *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). Defendant must overcome the presumption that the challenged action is sound trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and

constitutional law.” *LeBlanc, supra* at 579. The court must first find the facts and then decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel. *Id.* The trial court’s factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) that the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 694-696; 122 S Ct 1843; 152 L Ed 2d 914, 927 (2002); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

As discussed, *supra*, regardless of whether defense counsel should have sought suppression based on the statement being the fruit of an illegal arrest, the result of the proceedings would not have been different. *Toma, supra* at 302. The trial court’s findings indicate that it would have denied a motion to suppress based on the statement being the fruit of an illegal arrest, and the trial court’s findings were not clearly erroneous. Consequently, the result of the proceedings would not have been different, and therefore, defendant has not established ineffective assistance of counsel on this claim. *Bell, supra* at 694-696. Thus, with regard to this issue, there is no “actual prejudice,” because there was no irregularity that without the irregularity there was a reasonable likelihood of acquittal and there was no irregularity so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand. MCR 6.508(D)(3)(b).

Defendant also claims that defense counsel was ineffective in his examination of Jose Colon. In particular, defendant takes issue with the following exchange:

Q: Did [Campbell] ever mention Toni Bunton’s involvement to you in the case?

A: Yeah. He said that she was involved and might be going to jail if I don’t give them what they want to hear.

Defendant argues that Colon’s testimony as to what Campbell told him [Colon] was hearsay and that “the introduction of Lt. Campbell’s opinion that she was involved in the murder so prejudiced her case.” Decisions as to what evidence to present is a matter of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). That a strategy does not work does not render its use ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Defendant is not entitled to relief on this issue. While, as defendant argues, Colon’s testimony regarding Campbell’s statement does appear to fall within the definition of hearsay, there is no likelihood this prejudiced defendant. MRE 801. Colon never indicated that Lieutenant Campbell told him defendant was involved “in the murder.” The statement was that defendant was “involved.” Whether defendant was “involved” in what occurred was not at issue, and defendant testified at trial that she did participate in a drug transaction. It was the extent of defendant’s involvement, and her knowledge during that involvement, which was at issue, and

Colon's testimony was of no real consequence to those issues. Thus, had defense counsel not elicited Colon's testimony in this regard, there is not a reasonable probability that the result of the proceedings would have been different and this does not amount to an irregularity that is so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand. Accordingly, there was no "actual prejudice." Therefore, the lower court did not abuse its discretion by denying defendant's motion for relief from judgment with respect to this issue.

Defendant's sixth issue on appeal is that her sentence violated the principles of proportionality because it is neither proportionate to the offense or the offender. We disagree.

This issue will be reviewed pursuant to MCR 6.508(D)(3) which provides, in relevant part:

(D) The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that

(iv) in the case of a challenge to the sentence, the sentence is invalid.

Determination of the proportionality of a sentence already imposed is an exclusively appellate function, and a trial court may not resentence a defendant based upon its own determination that the initial sentence was disproportionate. *People v Wybrecht*, 222 Mich App 160, 168; 564 NW2d 903 (1997). Thus, the trial court did not err in denying defendant's motion for relief from judgment with regard to the proportionality of the sentence already imposed by the trial court.

Defendant was convicted of two counts of second-degree (one of which was vacated), assault with intent to murder, and two counts of armed robbery; and was sentenced to twenty-five to fifty years' imprisonment for each conviction, with the sentences to run concurrently. Offenses committed before January 1, 1999, are subject to the judicial sentencing guidelines, *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000), and to review under standards primarily developed by the judiciary. Sentences that fall within the guidelines range are presumed to be neither excessively severe nor unfairly disparate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Bennett*, 241 Mich App 511, 515-516; 616 NW2d 703 (2000). Nevertheless, a sentence within a guidelines range can conceivably violate proportionality in unusual circumstances. *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990).

In the case of a challenge to a sentence, "actual prejudice" under MCR 6.508(D)(3)(b)(iv) means that the sentence is invalid. A sentence, which violates the principle of proportionality, is invalid. See *People v Williams (After Second Remand)*, 208 Mich App 60, 64; 526 NW2d 614 (1994). In this case, the applicable guidelines range was eight to twenty-five years. Defendant was sentenced to twenty-five to fifty years' imprisonment. As a result, because defendant's sentence was within the guidelines range, it is presumed not to violate the principle of proportionality. However, a sentence within the guidelines range can conceivably violate the principle of proportionality in "unusual circumstances." *Milbourn, supra* at 661. This Court has

defined “unusual circumstances,” in the sentencing context, as “[u]ncommon, not usual, rare.” *People v Sharp*, 192 Mich App 501, 505; 481 NW2d 773 (1992) (quoting Black’s Law Dictionary).

Defendant cites her lack of a prior criminal record, the fact that she was employed, her remorse, and her limited role in the crime, as “unusual circumstances.” None of the circumstances submitted by defendant are “unusual,” and certainly not to the extent that the presumption of proportionality should be overcome. Defendant’s prior record and role in the crime are specifically taken into consideration in scoring the guidelines, and are, therefore, not “unusual.” Further, this Court has previously held that “employment, lack of criminal history, and minimum culpability, are not unusual circumstances that would overcome” the presumption of proportionality. *Daniel, supra* at 54. In addition, the sentencing court noted that defendant had failed to show any remorse until the sentencing hearing. Defendant has not overcome the presumption that her sentence within the guidelines range is proportionate. Further, defendant’s sentence is not invalid, and thus, there was no “actual prejudice.” Additionally, the trial court did not err in denying the motion for relief from judgment because the determination that an imposed sentence is disproportionate is exclusively an appellate function. *Wybrecht, supra* at 168.

Finally, defendant contends on appeal that she has established an entitlement to relief from the judgment of her conviction and sentence by demonstrating good cause for the failure to raise her present claims on direct appeal or in a prior motion and actual prejudice from the alleged irregularities in this criminal process. We disagree.

All of the alleged errors raised by defendant are either without consequence or merit. If actual prejudice is not established, it is unnecessary to address the question of good cause. *Jackson, supra* at 405. There is no irregularity alleged that would likely have resulted in an acquittal, there was no alleged irregularity that was so offensive to the maintenance of the judicial system that the conviction should not be allowed to stand, and the sentence imposed was not invalid. Thus, defendant has failed to establish that she has suffered “actual prejudice,” and relief from judgment is not warranted.

Affirmed.

/s/ Richard Allen Griffin
/s/ William B. Murphy
/s/ Kathleen Jansen