

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER JAMES,

Defendant-Appellant.

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UNPUBLISHED  
December 22, 2005

No. 257585  
Wayne Circuit Court  
LC No. 04-002643-02

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DESHAWN BROWN,

Defendant-Appellant.

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No. 257660  
Wayne Circuit Court  
LC No. 04-002643-01

Before: Murphy, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

In Docket No. 257585, defendant Christopher James appeals as of right from his conviction by a jury of first-degree premeditated murder, MCL 750.316(1)(a), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced James to life in prison for the murder conviction, to a suspended sentence for the felon in possession of a firearm conviction, and to a consecutive two-year prison term for the felony-firearm conviction. In Docket No. 257660, Defendant Deshawn Brown appeals as of right from his conviction by a jury<sup>1</sup> of second-degree murder, MCL 750.317, felon in possession of a firearm, and felony-firearm. The trial court sentenced Brown to forty to seventy-five years' imprisonment for the murder conviction, to a concurrent term of twenty-two months' to five years' imprisonment for the felon in possession

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<sup>1</sup> James and Brown were tried jointly but had separate juries.

of a firearm conviction, and to a consecutive two-year term for the felony-firearm conviction. We affirm in both cases.

The trial took place in July 2004 and was based on the fatal shooting of a man, Leroy Goss, in Detroit. Dacia Robinson, James's former girlfriend, testified as follows: She and James were together at their home on August 2, 2002, when Brown came to the door around 11:00 p.m. Brown arrived in a white, four-door car; a female was in the car and stayed there while Brown exited the vehicle. Brown told James to get a gun because Brown "had got into it with someone on the block." James got the gun, an "AK-47," and the two men headed down an alley. The alley led toward a vacant field, where Robinson could see five or six people gathered; Robinson heard screaming coming from the area. It sounded to Robinson like Brown and James were arguing with someone, and then Robinson heard one gunshot, followed by four more in quick succession.

Robinson stated that she did not see Brown or James fire a gun but that she saw a person fall to the ground and then saw Brown and James come back towards the house. According to Robinson, James said, "I shot the n--ga," and James and Brown left in the white car after James put the gun in the trunk. Robinson stated that James did not return home for about a month after the incident. She further stated that when she saw James again, she asked him why he had shot the person, and he "just said I shot him." Robinson admitted that she did not immediately tell the police about the shooting because she was scared that James would retaliate against her and her son.

Camesha Jones testified that she was in the white car with Brown on the evening of August 2, 2002. Jones stated that she and Brown saw about nine or ten people "jumping on" one person and beating him badly, that at some point Brown told the people to stop, and that Brown subsequently left to go to James's house. Jones testified that Brown and James came to the car several minutes later and that James spent a moment near the trunk of the car, which had been opened. Jones stated that she did not see James or Brown holding a gun. According to Jones, the three proceeded to a home on the east side of Detroit, Brown opened the trunk of the car, and James took something from the trunk.

Leroy Goss, the victim's teenaged nephew and namesake, testified as follows: He was playing a game with some friends and relatives on the night in question when a drunk man, Larry Hamilton, came by and said "f--k y'all" to them. Someone went to tell the victim,<sup>2</sup> who was also drunk, about Hamilton, and the victim appeared on the scene. The victim tried telling Hamilton to be more respectful, after which Hamilton stated to the victim, "f--k your kids." The victim then slapped Hamilton, and Goss and the others began beating Hamilton while they were all on the porch of a house near the vacant field. Brown saw the commotion, yelled for them to stop the beating, and stated that he was going to get an AK-47.

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<sup>2</sup> A later witness testified that Goss himself went to tell the victim about Hamilton, but Goss testified that he did not do so.

Goss testified that he and the people with him proceeded to the vacant field, leaving the beaten man behind, and that he then saw Brown, holding a gun, with another person next to him. According to Goss, Brown stated, “Yo, what’s up now, n---er?” to the victim. Goss stated that Brown fired the gun and that he remembered hearing four or five gunshots.

James’s attorney elicited that Goss’s testimony at the preliminary examination suggested that he had not in fact seen another person next to Brown that night. The attorney also elicited that Goss had earlier stated to the police that Hamilton had struck the victim and thereby “started the fight.” Goss admitted at trial that this statement was untrue. Brown’s attorney elicited that, in his pretrial statement to the police, Goss stated that he saw Brown with the AK-47 but did not actually see him shoot it.

Piceese Frazier, Goss’s teenaged cousin, testified that she witnessed the victim beating Hamilton on the night in question, that she and others joined in the beating, and that Brown swore at them and asked them why they were beating the man. Frazier testified that she saw Brown approach the porch where James was located and say “[h]and me my AK” to James. Brown’s attorney elicited on cross-examination that parts of Frazier’s pretrial statement to the police were inconsistent with her trial testimony.

Samantha Staton testified that she heard Hamilton making negative comments on the night in question and that someone told the victim about the comments. Staton indicated that Hamilton called the victim a “b---h,” that the victim hit Hamilton, and that a number of teenagers then began beating Hamilton. Staton testified that Brown witnessed the beating and told them to stop and that Brown at some point asked James for a gun. According to Staton, Brown ran up to her group when they were in the vacant field and shot an AK-47 “at least eight times.” Staton stated that James was behind Brown at the time of the shooting and that Brown and James both entered the white car after the shooting. On cross-examination, James’s attorney elicited that Staton had denied beating Hamilton in a pretrial statement to the police and had also denied seeing the specific action of Brown shooting the victim (as opposed to just seeing Brown shooting in general).

Daniel Legette, the victim’s teenaged son, testified that he went to get his father on the night in question because Hamilton had been harassing him and the people with him. Legette testified that the victim hit Hamilton and that the group then began beating Hamilton. Legette stated that Brown asked them to stop and that, when Legette and the others were in the vacant field, he saw Brown shooting the victim. Legette testified that he saw James on a porch with Brown before the shooting occurred but that he did not see another person with Brown at the time of the shooting. Brown’s attorney elicited that Legette did not identify Brown at a pretrial lineup.

Eugene Fitzhugh, a Detroit police officer, testified that he found numerous shell casings along a street and in the alley near the vacant field and that he also found a knife near a dumpster that is located in the area. Fitzhugh indicated that the casings were from a pistol and not from an AK-47. Susan Smith, a Detroit police officer, testified that she examined seven shell casings from near the area of the shooting and determined that all seven had been fired from the same weapon, which could not have been an AK-47. She stated that she had no way to know when

that weapon had been fired. Smith further testified that a bullet fragment found by Fitzhugh was from a .30 caliber rifle and that an AK-47 was a .30 caliber rifle.

Cheryl Loewe, a medical examiner, testified that, according to an autopsy report completed by a colleague, the victim had sustained three gunshot wounds in his abdomen. She also testified that the victim had been intoxicated at the time of his death.

Christopher Vintevoghel, a Detroit police officer, testified that, on February 3, 2004, he met with James. According to Vintevoghel, James indicated the following: On the night in question, Brown came to the house where James was sleeping to tell him that a man was being beaten and that he needed a gun. Brown was “hyped.” James went to the garage and showed Brown the gun. James thought Brown wanted only to scare the people committing the beating. Brown ran down an alley, and James heard several shots, after which Brown came back and said, “I got that n--ga.” James put the gun in a white car and he, Brown, and Brown’s girlfriend left the scene. Brown later told James that he had disposed of the gun.

Brown’s statement to police made on February 10, 2004, was read into the record in front of Brown’s jury only. In the statement, Brown indicated that he observed the beating on the night in question and asked the beaters to stop. He denied getting a gun or participating in a shooting that night.

Defendants presented no witnesses. James’s jury convicted him of first-degree premeditated murder, felon in possession of a firearm, and felony-firearm. Brown’s jury convicted him of second-degree murder, felon in possession of a firearm, and felony-firearm.

On appeal, James argues that the prosecutor presented insufficient evidence to sustain his murder conviction. He argues that the evidence failed to prove that he aided Brown in the shooting at all or that he aided Brown with the intent to kill or with the knowledge that Brown had the intent to kill.

In determining whether the prosecutor presented sufficient evidence to sustain a conviction, we must examine the evidence in the light most favorable to the prosecutor to determine whether a rational jury could have found the defendant guilty beyond a reasonable doubt. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Moreover, as noted in *People v Norris*, 236 Mich App 411, 419; 600 NW2d 658 (1999):

To establish that a defendant aided and abetted a crime, the prosecutor must prove that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the principal in committing the crime, and (3) the defendant intended the commission of the crime or knew the principal intended its commission at the time he gave aid or encouragement.

Also, “[t]o be convicted, the defendant must either himself possess the required intent or participate while knowing that the principal possessed the required intent.” *People v Youngblood*, 165 Mich App 381, 386; 418 NW2d 472 (1988). The elements of first-degree premeditated murder are “that the defendant intentionally killed the victim and that the act of

killing was premeditated and deliberate.” *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Circumstantial evidence may be sufficient to prove the elements of a crime. *People v Plummer*, 229 Mich App 293, 299; 581 NW2f 753 (1998).

The evidence presented at trial was sufficient to sustain James’s conviction. First, the testimony concerning Brown’s shooting of the victim was sufficient to establish Brown’s premeditated intent to kill. As noted in *Plummer, id.* at 300:

Though not exclusive, factors that may be considered to establish premeditation include the following: (1) the previous relationship between the defendant and the victim; (2) the defendant’s actions before and after the crime; and (3) the circumstances of the killing itself, including the weapon used and the location of the wounds inflicted.

The testimony concerning Brown’s actions before and after the crime, as well as the testimony concerning the manner in which he shot the victim and the type of weapon used, were sufficient to establish Brown’s premeditated intent to kill the victim. Moreover, the testimony that James provided the AK-47 to Brown established that James assisted Brown in the murder.

Additionally, the evidence concerning the circumstances under which James provided Brown the gun, as well as other circumstantial evidence, sufficiently established that James intended to kill the victim or aided Brown while knowing that Brown intended to kill the victim. Indeed, Robinson testified that Brown asked James for a gun because Brown “had got into it with someone on the block.” James, in his statement to the police, admitted that Brown was “hyped” at the time he requested the gun. Moreover, the type of gun requested by Brown was an assault weapon. There was also testimony from Goss that James encouraged Brown to shoot the victim. Under these circumstances, the prosecutor sufficiently established that James possessed the requisite state of mind. Reversal is unwarranted.

James next argues that the trial court erred in denying James’s motion for a new trial based on the great weight of the evidence. We review the trial court’s denial of this motion for an abuse of discretion. *People v Abraham*, 256 Mich App 265, 269; 662 NW2d 836 (2003). As noted in *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998):

[A] trial court may grant a motion for a new trial based on the great weight of the evidence only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand. However, neither the former nor the current understanding of the law with respect to such motions provides that this Court may make a credibility determination on appeal. To the contrary, it is well settled that this Court may not attempt to resolve credibility questions anew. [Citation omitted.]

James argues that the murder verdict was against the great weight of the evidence because the testimony of Robinson was “inherently unreliable” and “contradicted the testimony of every remaining prosecution eyewitness.” This argument is without merit. Indeed, even *disregarding* Robinson’s testimony, there was ample evidence of James’s guilt. James admitted in his own statement that he provided the gun to Brown, who was “hyped,” after Brown told him

that a man was being beaten. Staton and Frazier both testified that Brown asked James for the gun used in the shooting, and additional witnesses testified regarding the circumstances of the shooting. There was also testimony from Goss that James encouraged Brown to shoot the victim. The evidence did not “preponderate[] heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand.” *Id.* We find no abuse of discretion.

James next argues that the trial court erred in failing to conduct a hearing regarding whether the police and prosecutor used due diligence in attempting to secure the presence at trial of two potential witnesses, Larry Hamilton and Kevin Jackson (who was involved in the beating of Hamilton). We review the trial court’s actions in this regard for an abuse of discretion. *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004).

Under MCL 767.40a, a prosecutor must disclose the names of res gestae witnesses as they become known and must provide the defendant with a list of witnesses that the prosecutor intends to call at trial. The prosecutor must assist the defendant in producing res gestae witnesses upon the defendant’s request. *People v Perez*, 469 Mich 415, 419-420; 670 NW2d 655 (2003); MCL 767.40a(5). Here, there is simply no evidence in the existing record on appeal that Larry Hamilton was listed as a witness that the prosecutor intended to call at trial. Moreover, there is no evidence in the record that James filed a written request for assistance in locating Hamilton, as required by MCL 767.40a(5). Accordingly, we find no basis for reversal with respect to Hamilton’s absence from trial.

With regard to Jackson, the record reveals that after the prosecutor explained that Jackson had been served with a subpoena and had failed to appear and that due diligence had been shown, James’s attorney stated, “I accept what [the prosecutor] is saying.” Accordingly, we conclude that James waived any error with regard to the prosecutor’s due diligence in producing Jackson. See, generally, *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000).

James additionally argues that, because a proper due diligence hearing did not take place, the court should have given an instruction to the jury that the testimony of Hamilton and Jackson would have been favorable to the defense. This argument is without merit. Indeed, defense counsel expressed satisfaction with the jury instructions given and thereby waived any claims of instructional error. *Id.*

James next argues that the prosecutor committed misconduct requiring reversal in several respects. A reviewing court must consider claims of prosecutorial misconduct on a case-by-case basis by examining the record and evaluating the remarks in context. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated in part on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). “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 argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

James contends that the prosecutor erred in stating that defense counsel had made a “blatant mischaracterization of the law,” had made a “contemptible” argument, and had used a “red herring” and “smoking mirrors [sic]” to focus on gaining sympathy for Hamilton. These

comments did not amount to error requiring reversal. Indeed, “[a]n otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument.” *People v Watson*, 245 Mich App 572, 593; 629 NW2d 411(2001) (internal citation and quotation marks omitted.)

The prosecutor, in stating that defense counsel had mischaracterized the law and had made a contemptible argument, was responding to counsel’s statement that the jury should convict James only of felon in possession of a firearm and should acquit him of the other charged crimes. The prosecutor indicated that this was an improper statement, because, if defendant were guilty of felon in possession of a firearm, he would also be guilty of felony-firearm. Under the circumstances, no error occurred, because the prosecutor was responding to defense counsel’s untenable argument. *Id.*; see also *People v Dillard*, 246 Mich App 163, 170-171; 631 NW2d 755 (2001) (conviction of both felon in possession of a firearm and felony-firearm, based on the same weapon, does not violate double jeopardy rights). We note that a prosecutor may use emotional language during closing arguments. *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003). Additionally, in referring to a “red herring” and “smoking mirrors,” the prosecutor was merely responding, properly, to defense counsel’s statement about the “vicious attack by a bunch of young kids led by an elder on this man Larry Hamilton.”

Because the prosecutor’s above-mentioned remarks were proper, we reject James’s argument that his attorney rendered ineffective assistance in failing to object to them. Indeed, counsel need not raise a meritless objection. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

James additionally argues that the prosecutor committed error requiring reversal by evoking sympathy for Hamilton and stating, “Mr. Hamilton deserved a lot of sympathy in this case. He did not deserve what happened to him . . . .” James argues that these comments deprived him of a fair trial. This argument is patently without merit. Indeed, we cannot fathom how invoking sympathy for *Hamilton*, as opposed to the murder victim, deprived defendant of a fair trial.

James further argues that the above instances of alleged prosecutorial misconduct, viewed as a whole, require reversal. We disagree. No prosecutorial misconduct occurred, and James was not deprived of a fair trial. See *Watson*, *supra* at 594.

Brown argues that the prosecutor committed misconduct requiring reversal by failing to produce Larry Hamilton as a witness at trial. As noted above, however, there is simply no evidence in the existing record that Larry Hamilton was listed as a witness that the prosecutor intended to call at trial. Moreover, there is no evidence in the record that Brown filed a written request for assistance in locating Hamilton, as required by MCL 767.40a(5).<sup>3</sup> Accordingly, we

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<sup>3</sup> There is a document in the record that was filed by Brown’s attorney and that requested that the prosecutor “endorse, and call, Larry Hamilton,” but we do not consider this document to be a “request [for] reasonable assistance, including investigative assistance, as may be necessary to locate and serve process upon a witness” as contemplated by MCL 767.40a(5).

find no basis for reversal. Brown additionally argues that the trial court erred in failing to give an instruction that Hamilton would have testified favorably for the defense. However, given that Brown has not met his appellate burden of showing that the prosecutor erred in failing to produce Hamilton, Brown has similarly failed to show that the “missing witness” instruction was appropriate. Reversal is unwarranted.

Brown next argues that the trial court erred in failing to allow into trial evidence of the victim’s history of violent crimes. We review for an abuse of discretion a trial court’s decision to exclude evidence from trial. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

Before trial, the prosecutor moved to suppress evidence of the victim’s history of violent crimes. Brown’s attorney argued that the evidence was admissible because Brown would be arguing a self-defense or a “defense of others” theory, and the evidence of the victim’s prior violent crimes was relevant to prove that the victim was the first aggressor in this case.<sup>4</sup> The court stated that there appeared to be little evidence of a self-defense or “defense of others” situation and stated, “my preliminary ruling is I’m not going to allow it. I’m going to see how the prosecution case goes.” Ultimately, the evidence was not admitted at trial. On appeal, Brown argues that the evidence was admissible as part of the “defense of others” theory because it tended to prove that the victim was the first aggressor.

We find no error requiring reversal. Indeed, as specifically noted in *People v Harris*, 458 Mich 310, 319; 583 NW2d 680 (1998), the Michigan Rules of Evidence do not allow a defendant to introduce evidence of a victim’s specific acts of violence in order to prove that the victim was the first aggressor in a situation. Brown contends, however, that under *Harris*, the evidence of specific acts was admissible to show a “reasonable apprehension of harm” on the part Brown. See *id.* However, the specific acts would tend to show a “reasonable apprehension of harm” on the part of Brown only if Brown *knew* about those specific acts, and there is no evidence in the record that Brown did know about them. Accordingly, Brown’s argument on appeal is without merit.

Brown makes the additional argument that his trial attorney was ineffective for failing to find a legally sound strategy to introduce the victim’s prior record. Brown makes no attempt, however, to identify what this strategy might have been. As noted in *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000), “[a] party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim.” Reversal is unwarranted.

Brown next argues that the trial court erred in denying Brown’s request to call a police officer to impeach Piceese Frazier’s testimony. Frazier testified at trial that she saw Brown and his girlfriend in a white car before the shooting incident. In a statement given to the police,

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<sup>4</sup> Brown’s attorney initially insinuated that Brown may have been defending *himself* against harm at the time of the shooting. However, the jury instructions, as well as the closing argument by Brown’s attorney, focused on the possibility that Brown had been defending *Hamilton* at the time of the shooting.

however, it was recorded that Frazier saw a white car but could not identify the passengers in it. Frazier testified that the police officer who recorded her statement must have made a mistake in recording it because she told the officer that she could in fact identify the passengers in the car. Defense counsel requested to call as an impeachment witness the officer who recorded Frazier's statement, but the trial court denied the request, concluding that the signed statement itself served to impeach Frazier's testimony.

We conclude that no error requiring reversal occurred. See, generally, *People v Minor*, 213 Mich App 682; 541 NW2d 576 (1995) (stating that "not every limitation upon cross-examination is error requiring reversal"); see also *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999) (indicating that an error in the admission of evidence does not require reversal unless it is outcome-determinative). Indeed, the jury was informed that Frazier had signed a document containing a statement differing from her testimony at trial. This in itself served to impeach Frazier's testimony to a certain extent. Moreover, it is highly unlikely that the police officer, had he been called to testify at the July 2004 trial, would have remembered the exact words that Frazier said to him in 2002, when he recorded Frazier's statement. We cannot conclude that the failure to allow the officer's testimony was outcome-determinative. Under the circumstances, reversal is unwarranted.

Brown next argues that the trial court erred in reopening the proofs to allow the prosecutor to introduce Brown's police statement. We review this issue for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 419; 633 NW2d 376 (2001).

After the prosecutor rested, the trial court decided to allow Brown to argue a "defense of others" theory and decided that it would instruct the jury with regard to that theory. The prosecutor then argued that Brown's police statement should be admitted, because in that statement, Brown denied shooting the gun and thereby contradicted the theory that he shot the victim to defend Hamilton. The trial court agreed. We find no error requiring reversal with respect to this decision. Indeed, Brown's statement simply was not pertinent for the prosecutor's case until after the court decided to allow the "defense of others" theory into the trial. After the court ruled to allow the theory, the statement became pertinent, and the court properly allowed it to be admitted. Reversal is unwarranted.

Brown next argues that the trial court, during sentencing, erred in refusing to change Brown's score for Offense Variable (OV) 5 to zero. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

OV 5 addresses the psychological injury to a member of the victim's family. MCL 777.35. The court is to assess fifteen points for OV 5 if "[s]erious psychological injury requiring professional treatment occurred to a victim's family . . . ." MCL 777.35(1)(a). MCL 777.35(2) states:

Score 15 points if the serious psychological injury to the victim's family may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive.

The victim's son testified at the sentencing hearing that losing his father "destroyed [him] completely." The victim's mother stated that "[w]e're still receiving counsel from my pastor." Under these circumstances, the court properly assessed fifteen points for OV 5, notwithstanding the prosecutor's statement that he had no objection to scoring OV 5 at zero.

Brown additionally argues that the trial court erred in the scoring of OV 14. A defendant is to be assessed ten points under OV 14 if he "was a leader in a multiple offender situation . . . ." MCL 777.44(1)(a). Even assuming that Brown had properly objected at the sentencing hearing to the scoring of this variable, there is no basis for appellate relief. Evidence at trial indicated that Brown observed the beating of Hamilton, retrieved the gun from James, and then committed the shooting. There was clear evidence of Brown's having been the leader in a multiple-offender situation.

Brown lastly argues that his sentence is invalid under the reasoning of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L.Ed.2d 403 (2004). However, under the current state of the law, *Blakely* does not apply to Michigan's sentencing scheme. See *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), lv gtd 472 Mich 881 (2005).

Both cases are affirmed.

/s/ William B. Murphy

/s/ David H. Sawyer

/s/ Patrick M. Meter