

**Court of Appeals, State of Michigan**

**ORDER**

People of the State of Michigan v Claude Edward Morris

Docket No. 277148

LC No. 06-008211-01

William C. Whitbeck  
Presiding Judge

Peter D. O'Connell

Kirsten Frank Kelly  
Judges

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The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued July 3, 2008 is hereby VACATED. A new opinion is attached to this order.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

SEP 04 2008

Date

*Sandra Schultz Mengel*  
Chief Clerk

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLAUDE EDWARD MORRIS,

Defendant-Appellant.

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UNPUBLISHED  
September 4, 2008

No. 277148  
Wayne Circuit Court  
LC No. 06-008211-01

ON RECONSIDERATION

Before: Whitbeck, P.J., and O’Connell and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of second-degree murder, MCL 750.317, assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to 15 to 30 years’ imprisonment for the murder and assault convictions, and two years’ imprisonment for the felony-firearm conviction. We affirm.

I. Basic Facts

Defendant was seen walking in a residential area of Detroit several times one day. He spoke with the victims twice during this time and left the area. In the evening, defendant returned carrying a gun. He shot one victim, who was sitting in the driver’s seat of his truck, twice in the head at close range, killing him. Defendant then shot the other victim, who was sitting on the back bumper of another truck, twice in the chest, and this victim survived. At trial, defendant asserted that he had never spoken to either of the victims. Defendant explained that he was walking home from a gas station when some men approached him and one man pushed him. Defendant claimed that the men attempted to rob him, and he shot them.

II. Waiver of Right To Jury Trial

Defendant argues that his jury trial waiver was coerced because he was never informed of the nature of the right he was relinquishing and was simply handed a waiver form and instructed to sign it. We disagree. We review for clear error a trial court’s determination regarding the validity of a defendant’s waiver of his right to a jury trial. *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (1997); see also *People v Williams*, 275 Mich App 194, 196-197; 737 NW2d 797 (2007).

At the outset, we note that defendant relies on an ex parte affidavit attached to his appellate brief. However, this document is not part of the lower court record and constitutes an improper expansion of the record on appeal. MCR 7.210(A)(1); *People v Eccles*, 260 Mich App 379, 384 n 4; 677 NW2d 76 (2004). Therefore, we will not consider this affidavit in resolving the issues raised in this appeal.

A criminal defendant is guaranteed the right to a jury trial. US Const, Ams VI, XIV; Const 1963, art 1, § 20. A criminal defendant may, with the prosecutor's consent and the trial court's approval, waive this right and "be tried before the court without a jury." MCR 6.401. MCR 6.402(B), which governs the waiver of a jury trial, provides as follows:

Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by addressing the defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceeding.

There is a presumption that the waiver was knowing, voluntary, and intelligent if the record shows that the trial court complied with the court rule. *People v Mosly*, 259 Mich App 90, 96; 672 NW2d 897 (2003).

Before the trial in the instant case began, defense counsel indicated that he had an opportunity to speak with defendant and defendant understood that he had an absolute right to a jury trial. Defense counsel further asserted that defendant understood that the effect of waiving that right meant that the trial court, instead of a jury of 12 people from the community, would decide his guilt or innocence. Defense counsel stated that defendant had executed the waiver form. When questioned by the trial court, defendant indicated that he wished to waive his right to a jury trial and it was his signature that appeared on the waiver form. Defendant denied that he had been threatened or given promises to get him to surrender his rights. Because the trial court advised defendant of his right to a jury trial and ascertained that he understood that right and voluntarily relinquished it, the trial court complied with the court rule, and defendant has failed to overcome the presumption that his waiver was knowing, voluntary, and intelligent. See *Mosly, supra* at 96. The trial court did not commit clear error in accepting defendant's waiver of his right to a jury trial.

### III. Ineffective Assistance of Counsel

Defendant raises several allegations of ineffective assistance of counsel. We are not persuaded that counsel was ineffective.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004), quoting *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because no *Ginther*<sup>1</sup>

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<sup>1</sup> *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973).

hearing has been conducted, our review is limited to mistakes apparent on the record. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

To establish that counsel was ineffective, defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness and counsel's representation so prejudiced defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Moorner*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004). Regarding the prejudice requirement, defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *Moorner, supra* at 75-76. "[T]he defendant must overcome the presumption that the challenged action might be considered sound trial strategy." *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

Originally, defendant was scheduled to be tried before a jury, and his initial lead counsel began conducting jury selection. Co-counsel, who was more experienced with capital murder cases and jury trials, initially assisted by "sitting second chair". The trial court observed that lead counsel was not quite comfortable with voir dire and struggled with her questions to the veniremembers. The trial court learned that it was lead counsel's first capital murder trial and indicated that it was willing to adjourn the trial to afford her additional time to prepare. Because co-counsel had been absent for a portion of voir dire, he was not prepared to assume the role as lead counsel with the panel that had been selected at that point and requested an adjournment. Co-counsel became defendant's lead counsel, and defendant's original lead counsel agreed to continue representing defendant in a secondary capacity. Defendant indicated that he wanted her to continue to assist with his defense and he had no objection to co-counsel assuming the lead counsel role. Several months later, defendant waived his right to a jury trial, and the trial court conducted a bench trial, during which defendant's former lead counsel questioned some of the witnesses.

Defendant first claims that defense counsel was ineffective in coercing defendant to waive his right to a jury trial and that making this decision at the last minute was not a reasonable strategy. Given our determination, *supra*, that the trial court properly determined that defendant's waiver was knowing, voluntary, and intelligent, defendant has failed to show that the waiver was coerced or counsel was ineffective in advising defendant to waive his right to a jury trial.

Defendant also argues that, because his original lead counsel was allowed to question witnesses after relinquishing her role as lead counsel, his right to a fair trial was prejudiced. Defendant asserts that the trial court recognized that his initial lead counsel was not able to adequately represent defendant. Defendant mischaracterizes the trial court's comments. The trial court never stated that defendant's initial lead counsel was "in way over her head" or unable to adequately represent defendant. Rather, the trial court merely observed her lack of experience and, given the seriousness of the charges against defendant, offered her the opportunity to have additional time to prepare for trial.

Further, defendant has failed to illustrate how counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. See *Pickens, supra* at 302-303; *Moorner, supra* at 75-76. Although defendant insists that allowing his original counsel to question some witnesses was prejudicial, defendant fails to identify any error that

demonstrates prejudice. An appellant may not simply announce a position or assert an error and leave it to this Court to “discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.” *People v Kevorkian*, 248 Mich App 373, 388-389; 639 NW2d 291 (2001), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Therefore, defendant has failed to overcome the presumption that counsel was effective in questioning witnesses. See *LeBlanc, supra* at 578.

Defendant asserts that there is a “strong likelihood that [he] was sentenced on incorrect information” and his sentence could theoretically be too harsh because counsel failed to review his presentence investigation report (PSIR) before sentencing and defendant was not given a chance to verify the information contained therein. A defendant is entitled to be sentenced on the basis of accurate information, *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006), and be given an opportunity to review his PSIR before sentencing, *Morales v Parole Bd*, 260 Mich App. 29, 46; 676 NW2d 221 (2003); see also MCL 777.14(5). Counsel indicated on the record at sentencing that she and defendant had reviewed the PSIR and the information contained therein was accurate. Further, defendant has failed to identify any errors in the PSIR or articulate how any errors would have a determinative effect on his sentence. See *People v McAllister*, 241 Mich App 466, 474-475; 616 NW2d 203 (2000) (stating that, if inaccuracies in the PSIR would have no determinative effect on the defendant’s sentence, any error in the trial court’s failure to respond to allegations of inaccuracies is harmless). An appellant may not simply announce a position or assert an error and leave it to this Court to “discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.” *Kevorkian, supra* at 388-389, quoting *Mitcham, supra* at 203. Therefore, defendant has failed to overcome the presumption that counsel was effective. See *LeBlanc, supra* at 578. Further, we are not persuaded that it is necessary to remand for a *Ginther* hearing on any of defendant’s ineffective assistance of counsel challenges.

Affirmed.

/s/ William C. Whitbeck

/s/ Peter D. O’Connell

/s/ Kirsten Frank Kelly