STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 30, 2013
v THOMAS JAY MCCLOUD, JR., Defendant-Appellant.	No. 296256 Oakland Circuit Court LC No. 2009-224545-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v DONTEZ MARC TILLMAN, Defendant-Appellant.	No. 296267 Oakland Circuit Court LC No. 2009-224546-FC

Before: STEPHENS, P.J., and SAWYER and METER, JJ.

PER CURIAM.

Defendants Thomas McCloud and Dontez Tillman were tried jointly, before separate juries. Defendant McCloud was convicted of two counts of first-degree felony murder, MCL 750.316(1)(b), and defendant Tillman was convicted of one count of felony murder. Each defendant was sentenced to mandatory life imprisonment without parole. Both defendants appeal as of right. We affirm each defendant's convictions, but vacate their mandatory life sentences for first-degree felony murder and remand for resentencing.

Defendants' convictions arise from the beating deaths of two homeless men by a group of teenagers in downtown Pontiac in August 2008. The prosecutor's theory at trial was that, in the course of committing a larceny, defendants McCloud and Tillman participated in brutally beating 61-year-old Wilford "Frenchie" Hamilton and then leaving him in an alley behind a nightclub. Hamilton later died from blunt force head trauma and associated complications. The prosecutor further claimed that the day after Hamilton was found, defendant McCloud and his associates brutally beat 65-year-old Lee Hoffman and left him in a nearby park. Hoffman suffered a

serious brain injury and died approximately a month later from his injuries. The prosecution presented evidence that one day after the attack on Hoffman, a group of teenagers were involved in two other non-fatal assaults of men in the same downtown Pontiac area. Defendant McCloud was captured after fleeing from the scene of the last assault, and subsequently gave a statement to the police. Both defendants denied any intent to kill or take any property, and argued that their respective statements to the police were unreliable because they were confused about which attacks were being discussed. Defendant Tillman denied being present when Hoffman was attacked and he was not charged in Hoffman's homicide. Both defendants were juveniles at the time of the offenses, but were charged and convicted as adults.

I. DOCKET NO. 296256 (DEFENDANT THOMAS McCLOUD)

A. SUFFICIENCY OF THE EVIDENCE

Defendant McCloud argues that his convictions for first-degree felony murder must be vacated because the evidence failed to establish that he actively participated in the attacks of Hamilton and Hoffman, and also failed to establish the underlying felonies beyond a reasonable doubt. When ascertaining whether sufficient evidence was presented at trial to support a conviction, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

First-degree felony murder requires proof that the defendant killed the victim with malice, while committing, attempting to commit, or assisting in the commission of a felony specifically enumerated in MCL 750.316(1)(b). *People v Gayheart*, 285 Mich App 202, 210; 776 NW2d 330 (2009). "Malice is defined as 'the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.'" *People v Werner*, 254 Mich App 528, 531; 659 NW2d 688 (2002) (citation omitted).

At trial, the prosecutor advanced the theory that defendant McCloud may be guilty as an aider or abettor. A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense. MCL 767.39. "To support a finding that a defendant aided and abetted a crime, the prosecution must show 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 commission of the crime, and (3) the defendant [either] intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement[,]" *People v Izarraras-Placante*, 246 Mich App 490, 495-496; 633 NW2d 18 (2001) (citation omitted), "or, alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense," *People v Robinson*, 475 Mich 1, 15; 715 NW2d 44 (2006). "Aiding and abetting" describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); *People v Rockwell*, 188 Mich App 405, 411-412; 470 NW2d 673 (1991).

"The quantum of aid or advice is immaterial as long as it had the effect of inducing the crime." *People v Lawton*, 196 Mich App 341, 352; 492 NW2d 810 (1992).

1. DEFENDANT McCLOUD'S PARTICIPATION IN THE KILLINGS

Defendant McCloud asserts that there was no credible evidence "tying" him to the killings of Hamilton and Hoffman. We disagree. Evidence was presented that defendant McCloud, along with codefendant Tillman and other teenagers, participated in a three-day crime spree involving four unprovoked attacks against men in a particular area of downtown Pontiac. Defendant McCloud was charged in only the two fatal attacks, although there was evidence connecting him to the two similar non-fatal attacks as well. Testimony was presented that on August 21, 2008, defendant McCloud and his associates approached Hamilton, a homeless senior citizen, who was in an alley. According to defendant McCloud's own statements to the police, the group "jumped" the unsuspecting Hamilton and severely beat him after he "acted like" he wanted to fight back. Defendant McCloud admitted his participation in the fatal beating by specifically stating that he hit Hamilton in the face "a few times" and kicked Hamilton while he was on the ground. Defendant McCloud also admitted delivering a "couple" of blows to Hamilton's head, as others were kicking the defenseless Hamilton. When Hamilton was found, he had been beaten to the point of being unrecognizable; his face was distorted, his head was swollen to the size of a basketball, his face and neck were swollen and bruised, and his eyes were swollen shut. Medical evidence indicated that Hamilton suffered a catastrophic brain injury, and died from blunt force head trauma and associated complications. Defendant McCloud admitted that he left the scene with his associates after beating Hamilton, and then subsequently returned to the area with the group of teenagers to attack another unsuspecting victim.

Evidence was presented that the group of teenagers accosted the second homeless man, Hoffman, who had been living and sleeping in a small park. Again, in his police statement, defendant McCloud admitted that he and his associates punched and kicked Hoffman, during which defendant McCloud hit Hoffman "about five times" and joined others in kicking Hoffman. When Hoffman was found, he was unconscious and unidentifiable. His face was swollen and bruised, his breathing was shallow, and he had lacerations on his forehead and abrasions on his chin, cheek, and jaw. Hoffman died from cranial cerebral trauma and resulting complications. On the next day, in the two similar, uncharged acts, defendant McCloud was with a group who attacked two other men, in the same area. Defendant McCloud was arrested after the last attack.

From this evidence, a jury could reasonably infer that defendant McCloud either delivered the fatal blows that caused the deaths of Hoffman and Hamilton, or aided and abetted in the killings. Further, an aider or abettor's state of mind may be inferred from all the facts and circumstances, including a close association between the defendant and the principal, and the defendant's participation in the planning or execution of the crime. *Carines*, 460 Mich at 757. As noted, after the initial beating of Hamilton, defendant McCloud left the scene with the other assailants, returned to the area the next night, and participated in the second deadly beating of Hoffman. The next day, defendant McCloud continued to participate with the group in attacking two other men. In one of the non-fatal attacks, defendant McCloud was specifically identified as the person who walked up to the victim and punched him. This evidence supports the jury's determination beyond a reasonable doubt that defendant McCloud was an active participant in the group's actions, and acted with malice to cause the deaths of Hamilton and Hoffman.

2. THE UNDERLYING OFFENSES OF LARCENY

Initially, defendant McCloud incorrectly asserts that the offense of unarmed robbery served as the predicate felony for the felony-murder charges. The predicate felony charged in the information for both offenses was larceny. At trial, consistent with the information, the trial court instructed the jury on felony murder, with larceny being the charged underlying felony. Larceny is specifically enumerated in MCL 750.316(1)(b).

The elements of larceny from a person are: "(1) the taking of someone else's property without consent, (2) movement of the property, (3) with the intent to steal or permanently deprive the owner of the property, and (4) the property was taken from the person or from the person's immediate area of control or immediate presence." *People v Perkins*, 262 Mich App 267, 271-272; 686 NW2d 237 (2004). For purposes of felony murder, an attempted larceny is sufficient, and, under the attempt statute, MCL 750.92, an attempt consists of "(1) an attempt to commit an offense prohibited by law, and (2) any act towards the commission of the intended offense." *People v Thousand*, 465 Mich 149, 164; 631 NW2d 694 (2001). Thus, the predicate offense for felony-murder may be established if property was stolen or if there was an attempt to steal property from the victim.

When Hamilton was found unconscious in the alley, his wallet was missing. According to defendant McCloud, after the group beat Hamilton, two people in their group went through his pockets, but did not find any money. However, Hamilton's wallet, which contained his driver's license and no money, was later found on a nearby balcony. The taking of Hamilton's wallet may alone constitute a larceny, regardless of whether the wallet contained any money. Defendant McCloud also admitted that after the group attacked Hoffman, two members of the group went through Hoffman's pockets, stole $80, and McCloud received a portion of the proceeds. From this evidence, a jury could reasonably infer that when Hamilton and Hoffman were beaten to death, defendant McCloud intended to commit, or assisted his associates in committing, a larceny. In addition, there was evidence that, in a similar, uncharged, non-fatal attack on Anthony Pace, as the group repeatedly hit and kicked him, the attackers demanded his wallet and stole $180. Defendant McCloud admitted that $20 in his possession when he was arrested was given to him by one of the teenagers involved in the attack against Pace. This evidence further supports a reasonable inference that the attacks on the victims were motivated in part to take their money without their consent. Consequently, viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant McCloud caused the deaths of Hamilton and Hoffman while committing, or attempting to commit, the enumerated offense of larceny.

B. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant McCloud argues that trial counsel was ineffective for failing to exclude his "misinformed" mother from participating in the plea negotiations. The prosecution offered defendant McCloud the opportunity to plead guilty to the lesser offenses of second-degree murder in exchange for his testimony against his associates. Defendant McCloud declined to accept that plea offer on the record before and during trial. Contrary to what defendant McCloud now argues, he did not raise this specific ineffective assistance of counsel claim in the trial court. Because the trial court did not conduct a hearing and make findings of fact concerning this claim,

our review is limited to mistakes apparent from the record. *People v Gioglio (On Remand)*, 296 Mich App 12, 20; 815 NW2d 589 (2012), vacated in part on other grounds 493 Mich 864 (2012).

A claim of ineffective assistance of counsel presents a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Questions of law are reviewed de novo, and a trial court's findings of fact, if any, are reviewed for clear error. *Id.* To establish ineffective assistance of counsel, a defendant first must show that counsel's performance was below an objective standard of reasonableness. Second, the defendant must show that, but for counsel's deficient performance, it is reasonably probable that the result of the proceeding would have been different. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). "Reviewing courts are not only required to give counsel the benefit of the doubt with this presumption, they are required to 'affirmatively entertain the range of possible' reasons that counsel may have had for proceeding as he or she did." *Gioglio (On Remand)*, 296 Mich App at 22 (citation omitted). "[A] reviewing court must conclude that the act or omission of the defendant's trial counsel fell within the range of reasonable professional conduct if, after affirmatively entertaining the range of possible reasons for the act or omission under the facts known to the reviewing court, there might have been a legitimate strategic reason for the act or omission." *Id.* at 22-23. Defendant has the burden of establishing the factual predicate of his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

A defendant's Sixth Amendment right to counsel extends to the plea-bargaining process. *Lafler v Cooper*, 566 US___; 132 S Ct 1376, 1384; 182 L Ed 2d 398 (2012). However, defendant McCloud has not overcome the strong presumption that trial counsel's performance with respect to the plea offer fell within the range of reasonable professional conduct. Considering that defendant McCloud was a 14-year-old juvenile charged with the serious offense of first-degree felony murder, it was not objectively unreasonable for counsel to permit defendant McCloud's mother to be involved in the proceedings. Defendant McCloud has not presented any record evidence that he did not consent to his mother's involvement, or that he was precluded from having any private discussions with his attorney. He has also failed to explain how his mother was "misinformed," or how any alleged misinformation should have caused counsel to prohibit her presence. Nor is there any evidence that counsel was aware, or should have been aware, that defendant McCloud's mother was supposedly exerting undue influence on him to reject the plea against his will.

The record discloses that trial counsel, as well as the trial court, thoroughly explained the plea offer to defendant McCloud, as well as the ramifications of rejecting it, and specifically garnered his personal understanding of the offer and his decision. It is clear that trial counsel consulted with defendant McCloud, both alone and with his mother, and explained the matter to him to the extent reasonably necessary to permit him to make an informed decision. Defendant McCloud, speaking on his own behalf, twice rejected the offer on the record (both before and during trial) and gave no indication that he was being coerced by his mother, or anyone else. Consequently, the record does not support this ineffective assistance of counsel claim.

C. DEFENDANT McCLOUD'S MANDATORY LIFE SENTENCES

Lastly, defendant McCloud seeks relief from his mandatory life sentences for the first-degree murder convictions. Defendant McCloud was a juvenile at the time he committed the felony-murder offenses. Under *Miller v Alabama*, 567 US ___; 132 S Ct 2455; 183 L Ed 2d 407 (2012), and *People v Carp*, ___ Mich App ___; ___NW2d ___ (Docket No. 307758, issued November 15, 2012), lv pending, defendant McCloud's sentences of mandatory life imprisonment without parole violate the Eighth Amendment ban on cruel and unusual punishment. US Const, Am VIII. Accordingly, we vacate defendant McCloud's mandatory life sentences and remand for resentencing consistent with *Miller* and *Carp*.[1] See *Carp*, slip op at 24, 40.

II. DOCKET NO. 296267 (DEFENDANT DONTEZ TILLMAN)

A. SUFFICIENCY OF THE EVIDENCE

Defendant Tillman argues that his conviction for first-degree felony murder must be vacated because the evidence failed to establish the necessary element of malice beyond a reasonable doubt, and also failed to establish the predicate felony of larceny. We disagree.

1. MALICIOUS INTENT

Malice may be inferred from facts in evidence. *People v Bulls*, 262 Mich App 618, 627; 687 NW2d 159 (2004). "[M]inimal circumstantial evidence will suffice to establish the defendant's state of mind[.]" *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008).

Evidence was presented that defendant Tillman and his associates approached Hamilton, a homeless senior citizen who was in an alley. Defendant Tillman claimed that the group's vicious actions were motivated, in part, by Hamilton's refusal to supply a cigarette. By defendant Tillman's own account to the police, he participated in the group's beating of Hamilton. Defendant Tillman specifically admitted that he pushed Hamilton, hit him three or four times, and kicked him twice, as his associates were also hitting and kicking Hamilton. Medical evidence revealed that except for one shoulder bruise, Hamilton's injuries were all to his head. He suffered a fractured nasal bone and injuries to several areas of the brain. From this evidence, a jury could reasonably infer that Tillman kicked Hamilton in the head. When Hamilton was found, he had been beaten and disfigured to the point of being unrecognizable.

[1] In *People v Eliason*, ___ Mich App___; ___ NW2d ___ (Docket No. 302353, issued April 4, 2013), slip op at 9, this Court held that in deciding whether to impose a life sentence with or without the possibility of parole, the trial court is to be guided by the non-exclusive list of factors, previously provided in dicta in *Carp*, slip op at 37. The trial court shall reconsider defendants' sentences for first-degree felony murder under those guidelines, rather than wait for any remedial legislative action.

The evidence that the older and defenseless Hamilton, without provocation, was attacked by a group of teenagers, pushed to the ground where he was hit and kicked in the head repeatedly, brutally beaten to the point of being unidentifiable, and thereafter left to die in an alley, viewed in a light most favorable to the prosecution, was sufficient to permit a rational trier of fact to infer beyond a reasonable doubt that defendant Tillman possessed the requisite malicious intent for felony murder.

2. UNDERLYING OFFENSE OF LARCENY

According to defendant Tillman, the group approached Hamilton, seeking to "to roll[] his pockets." The group thereafter brutally beat Hamilton because he did not supply a requested cigarette. When Hamilton was found, his wallet was missing. The wallet, containing his driver's license, a debit card, and no money, was later found on a nearby balcony. From this evidence, a jury could reasonably infer that Hamilton's attackers took his wallet. As previously noted, the taking of Hamilton's wallet alone may establish a larceny, regardless of whether any money was obtained. The evidence, viewed in a light most favorable to the prosecution, was sufficient to establish beyond a reasonable doubt that defendant Tillman participated in the beating death of Hamilton, while committing, or attempting to commit, a larceny. *Perkins*, 262 Mich App at 271-272. Thus, the evidence was sufficient to support defendant Tillman's conviction of first-degree felony murder.

B. RIGHT OF CONFRONTATION

Defendant Tillman argues that the trial court violated his constitutional right of confrontation by permitting testimony from Detective Steven Wittebort, which defendant Tillman contends allowed the jury to extrapolate that codefendant McCloud had identified Tillman as his accomplice in Hamilton's attack. Defendant Tillman contends that without the inference from the challenged testimony, his identification would not have been established. Although defendant Tillman made an unspecified objection at trial to Detective Wittebort's testimony about what McCloud stated during his police interview, Tillman did not argue that the testimony violated his constitutional right of confrontation, so the constitutional claim is not preserved for review. An objection on one ground is insufficient to preserve an appellate challenge based on a different ground. *People v Bulmer*, 256 Mich App 33, 35; 662 NW2d 117 (2003).

To the extent that this issue is preserved, this Court reviews the issue for an abuse of discretion. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). "A trial court abuses its discretion when its decision falls 'outside the range of principled outcomes.'" *Id.* (citation omitted). Tillman's unpreserved constitutional claim is reviewed for plain error affecting his substantial rights. *Carines*, 460 Mich at 752-753, 763-764.

During direct examination, when testifying about the course of the police investigation, Detective Wittebort testified that the first interview he conducted was with codefendant McCloud, after which he interviewed defendant Tillman. During cross-examination, defense counsel sought to elicit that the facts of Hamilton's assault were supplied to Tillman by the detective. The following exchange occurred:

Q. And you've already now testified in front of this jury that it was you who suggested the location of Tiki Bob's initially. Correct?

A. Yes.

Q. And you did at that [preliminary] exam as well.

A. Yes.

Q. And isn't it true that it's also you that provided the names of the boys that he was with?

A. I don't know.

Q. Do you remember testifying—

A. I got the information from McCloud as to who they were with. And I interviewed McCloud first.

Q. And do you remember that it was you who provided the information to Dontez about who he was with?

A. Yeah.

Q. You do remember that you did that.

A. Yes.

* * *

Q. And you admitted at that preliminary hearing that when you did the initial conversation with Dontez you just opened up with so tell me what happened, correct?

A. Yes.

Q. Okay. There was again no specification of what day that you two were talking about.

A. Well we didn't·know what had been discovered. As I said I was brought in to say—to interview these guys and the interview was going on when we had Mr. McCloud and as we're interviewing Mr. McCloud the names are being brought forth to us—.

Q. I would object to anything—

A. in that—.

Q. —that was said in the interview of Mr. McCloud. Object to anything that was said in the interview with Mr. McCloud.

The prosecutor: I don't think he's—

The court: No.

The prosecutor: —said anything.

The court: Yes, he did. But that was in response to a question you asked. Overruled. Let's move on.

Q. All right. So you provided the names to Dontez. And isn't it true that when you started talking to him you just said let's talk about—what happened bro, that's how you opened up, what happened bro?

A. Yeah.

Hearsay, which is a statement other than one made by the declarant while testifying at the trial or hearing and is offered to prove the truth of the matter asserted, is inadmissible at trial unless there is a specific exception allowing its introduction. See MRE 801, MRE 802, and *People v Ivers*, 459 Mich 320, 331; 587 NW2d 10 (1998). "The Confrontation Clause prohibits the admission of all out-of-court testimonial statements unless the declarant was unavailable at trial and the defendant had a prior opportunity for cross-examination." *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007), citing *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). "Statements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard." *Crawford*, 541 US at 52. "However, the Confrontation Clause does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted." *Chambers*, 277 Mich App at 10-11; see also *Crawford*, 541 US at 59. "Specifically, a statement offered to show why police officers acted as they did is not hearsay." *Chambers*, 277 Mich App at 11.

Defendant Tillman has not established a plain error affecting his substantial rights. First, the challenged statements regarding the detective's contact with codefendant McCloud during the investigation were responsive to defense counsel's questions, and they were not offered to prove the truth of the matter asserted, i.e., to prove who was with codefendant McCloud. Rather, the testimony was offered in response to trial counsel's line of inquiry about the detective's method of questioning defendant Tillman, and was intended to explain why the detective asked defendant Tillman an open-ended question ("What happened?"), and whether the detective fed Tillman the facts of Hamilton's assault. By way of background, the detective had explained that the investigation was just getting underway and facts were just coming in, including the fact that the police were still in the process of learning who may have been involved. Because the statements were responsive and presented for the limited purpose of providing background information, they did not constitute hearsay, or statements of an absent declarant such that defendant Tillman's confrontation rights were violated.

Moreover, to the extent that the challenged testimony went beyond simply responding to defense counsel's question, defendant Tillman has not shown that any error was outcome

determinative. Constitutional error involving the Confrontation Clause need not be reversed if it was harmless beyond a reasonable doubt. *People v McPherson*, 263 Mich App 124, 131; 687 NW2d 370 (2004). Under this standard, courts "conduct a thorough examination of the record in order to evaluate whether it is clear, beyond a reasonable doubt, that the jury verdict would have been the same absent the error." *People v Shepherd*, 472 Mich 343, 348; 697 NW2d 144 (2005) (quotation marks and citation omitted). Contrary to what defendant Tillman argues, it is clear beyond a reasonable doubt that the challenged testimony did not cause his conviction. In his statement to the police, defendant Tillman admitted that he was part of a group, which included codefendant McCloud, who participated in beating a man in an alley. Hamilton was the person who was found beaten in an alley. Tillman admitted that he shoved, hit, and kicked the man. Defendant Tillman denied any knowledge about the other attack in the park, which involved the attack of Hoffman, claiming that he refused to go back out with the others. Defendant Tillman was not charged with an assault on Hoffman. Given defendant Tillman's own statements, it is clear beyond a reasonable doubt that any possible inference drawn from Detective Wittebort's testimony did not cause the jury's verdict.

C. OPINION TESTIMONY REGARDING DEFENDANT TILLMAN'S CREDIBILITY

Defendant Tillman also argues that he is entitled to a new trial because Detective Wittebort impermissibly gave an opinion regarding his credibility. Because defendant Tillman did not object to the challenged testimony, we review this unpreserved claim for plain error affecting his substantial rights. *Carines*, 460 Mich at 763.

During trial counsel's cross-examination of Detective Wittebort, the following exchange occurred:

> *Q.* Okay. So you provided the location and the names?
>
> *A. Because your client was lying.*
>
> * * *
>
> *Q.* Okay. And very early on in the interview Dontez told you that he didn't know what happened and you told him that if he said he didn't know that would get him in trouble, correct?
>
> *A.* Yes. *Everybody tells me they don't know what I'm talking about when we first start talking. Very few tell me the truth initially*. [Emphasized added.]

Subsequently, on redirect examination, Detective Wittebort described his "investigative tactic" of using fabrication to trigger a response:

> A lot of times when we're dealing with individuals especially the individuals I deal with such as homicide, armed robberies and what not, they almost every time, almost every time, deny any involvement even with the case last week, deny any involvement. We'll employ different techniques and it's fabricated you know there's eyewitness there, you know we have video of it. Just like he said to me you know we have video, yes.

> And it's just something to trigger and, and the reality is if you had nothing to do with it he'd say okay, so you have video. Still not going to show me. You use it just to trigger man do they—do they really have video of me. Are they going to see me there. Huh—oh I better start saying something right now. I better tell my involvement.
>
> And so it's just one of the many techniques that we utilize to try to get to the truth whether you have involvement or whether you don't have involvement. This is one of the techniques that we use.

As defendant Tillman notes, it is improper for a witness to provide an opinion regarding the credibility of another witness during trial because credibility is a determination for the trier of fact. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). Here, however, Detective Wittebort was not commenting on the credibility of a witness at trial, but rather the credibility of defendant Tillman during the police interview. The detective's testimony explained his remarks during the interview and how those remarks were based on a police technique used during interrogations. Regardless, to the extent that Detective Wittebort's testimony violated the rule in *Buckey*, defendant Tillman's substantial rights were not affected. Defendant Tillman bears the burden of showing actual prejudice. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006). The challenged testimony was intended to explain why Detective Wittebort continued to question defendant Tillman during the police interview, and what police tactics he used during the questioning. Further, during the interview, defendant Tillman initially denied any awareness of or participation in the attack. Ultimately, defendant Tillman admitted that he had repeatedly hit and kicked the victim, despite having previously told the police that he only shoved the victim, then later that he hit the victim but did not kick him. Thus, defendant Tillman's own statements, which were admitted at trial, showed that Detective Wittebort had a reason to disbelieve defendant Tillman's initial police statements. Consequently, defendant Tillman has not established that the challenged testimony affected his substantial rights. *Carines*, 460 Mich at 752-753, 763-764.

D. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant Tillman argues that trial counsel was ineffective for (1) failing to request redaction of prejudicial information from his police interview, and (2) failing to exclude evidence that Hoffman ultimately died. We disagree.

1. FAILURE TO REDACT INFORMATION FROM TILLMAN'S INTERVIEW

Defendant Tillman asserts that defense counsel should have redacted from his police interview the exchange where Detective Wittebort asked questions about codefendant McCloud's alleged statement that defendant Tillman was with him on a particular night. The following exchange occurred:

> *Detective Wittebort*: So, TJ [McCloud]'s lying?
>
> *Tillman*: TJ, um, down here?
>
> *Detective Wittebort*: Yea.

Tillman: We did not go down there no—no Wednesday.

Detective Wittebort: So TJ's lying?

Tillman: I think he is 'cause on Thursday we went 'cause it was yesterday—

Detective Wittebort: So, why is TJ going to lie and say that he—that he even jumped the dude?

Defendant Tillman has not established that trial counsel was ineffective in this regard. The exchange regarding what codefendant McCloud supposedly said, followed by an inquiry of whether he was lying, revealed an investigative tactic, and did not raise issues of confrontation in this context. As previously indicated, the detective explained that he uses fabrication as a customary police technique during interrogations. At a post-trial evidentiary hearing, trial counsel acknowledged her awareness that police officers use lying as an interview tactic, and believed that the brief exchange was neither improper nor harmful in this instance. Further, in response to the detective's baiting, defendant Tillman responded that he was with defendant McCloud on Wednesday, not Thursday, and that codefendant McCloud was lying. As noted by both the trial court and plaintiff, there was no evidence that defendant Tillman was charged with any crime that occurred on Wednesday, only with the attack against Hamilton, and the trial court made it clear to the jury that defendant Tillman was only charged with the attack against Hamilton. Accordingly, it was not objectively unreasonable for trial counsel to forego redaction, believing that the exchange was not objectionable. *Gioglio (On Remand)*, 296 Mich App at 22-23. Moreover, the evidence in this case was compelling, and defendant Tillman has failed to demonstrate that there is a reasonable probability that, but for counsel's failure to redact the exchange, the result of the proceeding would have been different. *Armstrong*, 490 Mich at 289-290.

Defendant Tillman also argues that trial counsel should have removed Detective Wittebort's remarks in which he informed Tillman that he was suspected in a gas station robbery. The detective made the following comments:

Detective Wittebort: So are you dumb enough to rob a gas station?

Tillman's mother: You're going to be right with them being stupid.

Detective Wittebort: 'Cause rumor has it, and I'm going to tell you, when you're associated with bad people. I can't say that's why I'm going to ask you on this one. Rumor has it, Tez and Junior, JR, tried to rob a gas station. So you never heard me ask you did you do it. I'm telling you when you hang around dirty people, you're going to be labeled as dirty. You're going to get a lot of stuff thrown on you that is deserving and not deserving. So you should watch who you run with 'cause you can get associated with some stupid sh*t. Stupid sh*t gets you locked down.

Here, while there might have been a basis to redact the statements because they were not relevant, MRE 401, this omission does not support a claim of ineffective assistance of counsel.

At the evidentiary hearing, trial counsel explained that, in her opinion, the detective was not stating that defendant Tillman was involved in a robbery or that such a robbery had actually taken place. During the interview, defendant Tillman stated that the reason he kicked the man in the alley was because others were doing it. Immediately thereafter, Detective Wittebort inquired whether defendant Tillman was dumb enough to do anything his friends did, indicating that the group was rumored to have tried to rob a gas station. Viewed in context, the remarks did not indicate that Detective Wittebort believed that defendant Tillman robbed a gas station, but only warned that he was hanging out with a "dirty crowd" and would be labeled accordingly. At the evidentiary hearing, trial counsel further reasoned that redacting the videotaped interview would have been more harmful because edits would be apparent to the jury, risking that it might speculate about what it was not allowed to hear. Defendant Tillman has not shown that trial counsel's decision not to seek redaction was objectively unreasonable, *Gioglio (On Remand)*, 296 Mich App at 22-23, and we will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

2. FAILURE TO EXCLUDE EVIDENCE OF HOFFMAN'S DEATH

Defendant Tillman does not dispute that evidence of Hoffman's beating was admissible under MRE 404(b), as part of the common scheme of the group to assault homeless people in downtown Pontiac. He argues, however, that the evidence of Hoffman's death one month after he was assaulted should have been excluded under MRE 403.

Defendant Tillman has not overcome the strong presumption that counsel chose not to exclude the evidence as a matter of defense strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). At the evidentiary hearing, trial counsel explained that she deliberately used evidence of Hoffman's death to support a defense strategy of emphasizing possible confusion between the two different homicides during the interview and in the minds of the jury, hoping that the confusion would preclude a finding beyond a reasonable doubt that defendant Tillman was guilty of Hamilton's death. The record supports trial counsel's testimony that she used the evidence of Hoffman's death to support a defense of confusion, and vigorously presented that defense. Under the circumstances, trial counsel's decision not to exclude the evidence as part of her defense strategy was within the purview of trial strategy, *Rockey*, 237 Mich App at 76, and did not fall below an objective standard of reasonableness, *Armstrong*, 490 Mich at 289-290. "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

E. DEFENDANT TILLMAN'S MANDATORY LIFE SENTENCE

Defendant Tillman, a juvenile at the time he committed the offense, seeks relief from his mandatory life sentence for his first-degree murder conviction. Our analysis of codefendant McCloud's claim in section I(C), *supra*, is equally applicable here. For those same reasons, we vacate defendant Tillman's mandatory life sentence for first-degree murder and remand for resentencing.

III. DEFENDANT TILLMAN'S SUPPLEMENTAL BRIEFS

Defendant Tillman has filed supplemental briefs in which he argues that, on remand for resentencing, he must be sentenced to a term of years because a sentence of life imprisonment with or without the possibility of parole is unconstitutional. We disagree.

This Court recently addressed and considered this precise question in *People v Eliason*, ___ Mich App___; ___ NW2d ___ (Docket No. 302353, issued April 4, 2013), slip op at 9-14, and held that "the only discretion afforded to the trial court in light of our first-degree murder statutes and *Miller* is whether to impose a penalty of life imprisonment without the possibility of parole or life imprisonment with the possibility of parole." *Id.*, slip op at 9 (citations omitted). On the authority of *Eliason*, we reject defendant Tillman's claim.

Affirmed in part, vacated in part, and remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Patrick M. Meter