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2016001751 ND

Information - Circuit Court
Original Complaint - Court
Warrant - Court

Bind over/Transfer - Circuit/Juvenile Court
Complaint copy - Prosecutor
Complaint copy - Defendant/Attorney

STATE OF MICHIGAN **67th JUDICIAL DISTRICT** **7th JUDICIAL CIRCUIT**	**COMPLAINT** **FELONY**	**CASE NO.: 2016001751** **DISTRICT: 16TC-1024** **CIRCUIT:**

District Court ORI: MI- **MI250095J**
630 S. SAGINAW ST. FLINT, MI 48502 810-257-3165

Circuit Court ORI: MI- **MI250015J**
900 S. Saginaw St. Flint, MI, 48502

THE PEOPLE OF THE STATE OF MICHIGAN	Defendant's name and address V **DONALD WAYNE DAVIS B/M** **5611 BALSM LN** **FLINT, MI, 48507**	Victim or complainant **DET CHAD BALDWIN** Complaining Witness STACEY **DET ~~CHAD BALDWIN~~** Moore
Co-defendant(s) **SPENCER HOLIDAY, JAMES MARTIN ELBERT III**		Date: On or about **04/27/2016**

City/Twp./Village	County in Michigan	Defendant TCN	Defendant CTN	Defendant SID	Defendant DOB
CITY OF FLINT	**Genesee**		**25-16001751-01**	**3037718T**	**10/02/1994**

Police agency report no.	Charge	DLN Type:	Vehicle Type	Defendant DLN
25FPD 3161-16	**See below**			

Witnesses

D/TPR STACEY MOORE
OFC ESTER CAMPBELL
BRIAN HUNTER MD
JAMES MARTIN ELBERT III
DET DON DIXON
KEEPER OF VIDEO FATHER DUKETTE
QUIN JACKSON
DET ALFINO DONASTORG
DET CHAD BALDWIN
SPENCER HOLIDAY

STATE OF MICHIGAN, COUNTY OF GENESEE
The complaining witness says that on or about 04/27/2016 in Genesee County, Michigan the defendant contrary to law:

COUNT 1: HOMICIDE - OPEN MURDER - STATUTORY SHORT FORM
did murder Davonte Hanson; contrary to MCL 750.316. [750.316-C]
FELONY: Life; DNA to be taken upon arrest.

COUNT 2: WEAPONS - AMMUNITION - POSSESSION BY FELON
did possess ammunition when ineligible to do so because he had been convicted of Unarmed Robbery and/or Carry Concealed Weapon, a specified felony, and the requirements for regaining eligibility had not been met; contrary to MCL 750.224f(6). [750.224F6]
FELONY: 5 Years and/or $5,000.00; Mandatory forfeiture of weapon or device [See MCL 750.239]

COUNT 3: WEAPONS - FIREARMS - POSSESSION BY FELON
did possess a firearm when ineligible to do so because he had been convicted of Unarmed Robbery and/or Carry Concealed Weapon, a specified felony, and the requirements for regaining eligibility had not been met; contrary to MCL 750.224f. [750.224F]
FELONY: 5 Years and/or $5,000.00; Mandatory forfeiture of weapon or device [See MCL 750.239]

4-29-16

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COUNT 4: WEAPONS - FELONY FIREARM

did carry or have in his possession a firearm, to-wit: a handgun, at the time he committed or attempted to commit a felony, to-wit: Count 1 - 3; contrary to MCL 750.227b. [750.227B-A]

FELONY: 2 Years consecutively with and preceding any term of imprisonment imposed for the felony or attempted felony conviction; Mandatory forfeiture of weapon or device [See MCL 750.239]

Upon conviction of a felony or an attempted felony court shall order law enforcement to collect DNA identification profiling samples.

The complaining witness asks that the defendant be apprehended and dealt with according to law.

Warrant authorized on 04/29/2016 by:
Date

David Guinn, P56984

☐ Security for costs posted

Complaining Witness Signature

Subscribed and sworn to before me on 4-29-16
Date

Judge/Magistrate/Clerk P43434
Bar no.

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STATE OF MICHIGAN

IN THE DISTRICT COURT FOR THE 67TH JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF MICHIGAN,

v D.C.#16-TA1024-FY
C.C.# N/A

JAMES MARTIN ELBERT, III, Defendant. JUDGE NEITHERCUT
_____/

THE PEOPLE OF THE STATE OF MICHIGAN

v D.C.#16-TB1024-FY
C.C.#16-040022-FC

SPENCER HOLIDAY, Defendant. JUDGE NEITHERCUT
_____/

THE PEOPLE OF THE STATE OF MICHIGAN

v D.C.#16-TC1024-FY
C.C.#16-040020-FC

DONALD WAYNE DAVIS, Defendant. JUDGE NEITHERCUT
_____/

FILED
2016 SEP -9 A 10:23
GENESEE COUNTY CLERK
CERTIFIED CLERK

PRELIMINARY EXAMINATION - VOLUME II OF II

BEFORE THE HONORABLE NATHANIEL C. PERRY, III, DISTRICT JUDGE

Flint, Michigan - August 16, 2016

APPEARANCES:

For the People: CHRIS LAROBARDIERE (P60954)
Assistant Prosecuting Attorney
900 South Saginaw Street
Flint, Michigan 48502
(810) 257-3210

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MR. LAROBARDIERE: Okay.

THE COURT: So I said it's irrelevant for me to watch it because she's already, I'm basing, I would base my decision on her testimony anyway.

MR. LAROBARDIERE: All right.

THE COURT: Anything else?

MR. LAROBARDIERE: Ah, well with that, ah, as it relates to Mr. Theodoroff, we, ah, have alleged Felon, Felon in Possession, Felony Firearm, or Felon In Possession, Ammunition and Firearm and I'm in possession, ah, Mr. Theodoroff, of, ah, proof of Unarmed Robbery conviction and Carrying a Concealed Weapon conviction, ah, unless there's objection to that, I think he's been shown that.

THE COURT: That's to the charge of Felon in Possession of the Weapon?

MR. LAROBARDIERE: Yes.

THE COURT: Any objection Mr. Theodoroff?

MR. THEODOROFF: None, I have copies of that.

THE COURT: All right.

MR. LAROBARDIERE: With that, Judge, ah, People would rest.

THE COURT: Any witnesses or testimony Mr. Theodoroff?

MR. THEODOROFF: None, thank you.

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THE COURT: Ms. Taft?

MS. TAFT: No, Judge.

THE COURT: And, Ms. Lang?

MS. LANG: None for me.

THE COURT: And your motion to, is to bind over all as charged?

MR. LAROBARDIERE: Yes, Judge, I would move, ah, that and, ah, obviously the issues that have raised relative to ID and some factual, ah, disputes should be left to the trier of fact at this point.

THE COURT: Objection for the record, Mr. Theodoroff?

MR. THEODOROFF: Your Honor, just my primary objection is going to be that, um, the primary Witness this afternoon could not identify what happened in the vehicle, um, the videos didn't, do not show that so I don't think they've met their burden of proof as it relates to the case so, I'll just object.

THE COURT: Ms. Taft, an objection for the record?

MS. TAFT: No, Judge, a little more than that. Ah, while, ah, there's testimony that my client leaves the apartment that the other two gentlemen left and then exits the building, he goes and picks up his brother, ah, there is nothing in the evidence that suggests that he

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knew anything about what had maybe occurred or not in the parking lot; none at all. Um, his charge is Accessory After the Fact but it's essential that he knew that there was something inappropriate that happened prior to his picking these two gentlemen up in order to make that case and for that reason I, ah, ask that the Court not bind this over.

THE COURT: Ms. Lang?

MS. LANG: Judge, I would request that the Court not bind it over in terms of the charges as to my client, um, it's pretty clear that he was, there was no intent for my client to rob or to commit any kind of felony so that would do away with the Felony Firearm charge. He does admit that he, that he discharged his firearm but that's it, there's no, um, intent to harm or murder anybody, ah, and I don't think that the Prosecution has met their burden of probable cause in, with respect to that so I request that it not be bound over.

THE COURT: And Mr. Larobardiere, your response to first, um--

MR. LAROBARDIERE: Mr. Elbert?

THE COURT: --Mr. Elbert.

MR. LAROBARDIERE: Well, ah, I think with the, ah, telephone call close in time to when the homicide

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occurs and with the foot traffic of the, ah, the suspects leaving the High Rise Apartment into the town home and, ah, coinciding with Mr. Elbert, ah, quickly leaving the apartment to go pick them up, I think the Court can infer that he's got a little bit more knowledge than he's letting on, ah, the circumstances seem to lend themselves to, ah, more but, once again, I think that factual dispute is gonna be up to a jury.

MS. TAFT: Judge, may I respond to that, I mean, that, that, you can also infer that his brother called and said I want a ride and he knew nothing at all about it. There is nothing that suggests that my client knew that there had been any sort of a crime committed or that he was helping to, ah, further that enterprise by going to pick his brother up.

THE COURT: I think the evidence is real thin as to Mr. Elbert based on those facts and circumstances and based on the testimony.

As it relates to Ms. Lang's client?

MR. LAROBARDIERE: Judge, ah, I think, ah, the charge of Open Murder obviously encompasses, ah, multiple, ah, versions of murder and, ah, I think Felony Murder to be one of 'em could be encompassed in there. Ah, as to his intent, ah, that's gonna be for a jury to decide.

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THE COURT: As it relates to Mr. Holiday it appears that, ah, something happened in the course of that vehicle and based on his statement it's clear that he, at least, fired one of the rounds so he will be sent to Circuit Court, that's a Judge Neithercut case, as along with Mr. Davis who would be sent to Circuit Court with Mister, ah, Holiday.

However the evidence being as thin as it is against Mr. Elbert, I gotta dismiss that.

MS. TAFT: Thank you, your Honor.

MR. LAROBARDIERE: Thank you, Judge.

MR. THEODOROFF: Thank you, Judge.

MS. LANG: Thank you, Judge.

THE COURT: Bonds continued.

(At 4:09 p.m., proceedings concluded)

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2016001751 JR
08/30/2016

Information - Circuit Court
Original Complaint - Court
Warrant - Court

Bind over/Transfer - Circuit/Juvenile Court
Complaint copy - Prosecutor
Complaint copy - Defendant/Attorney

STATE OF MICHIGAN **67th JUDICIAL DISTRICT** **7th JUDICIAL CIRCUIT**	**INFORMATION** **FELONY**	**JUDGE:GEOFFREY NEITHERCUT** **DISTRICT: 16TC-1024FY** **CIRCUIT: 16-040020-FC**
District Court ORI: MI- **MI250095J** **630 S. SAGINAW ST. FLINT, MI 48502 810-257-3165**		Circuit Court ORI: MI- **MI250015J** **900 S. Saginaw St. Flint, MI, 48502**

THE PEOPLE OF THE STATE OF MICHIGAN V	Defendant's name and address **DONALD WAYNE DAVIS JR B/M** **5611 BALSM LN** **FLINT, MI, 48507**	Victim or complainant **DET CHAD BALDWIN** Complaining Witness **DET CHAD BALDWIN**
Co-defendant(s) **SPENCER HOLIDAY, JAMES MARTIN ELBERT III**		Date: On or about **04/27/2016**

City/Twp./Village	County in Michigan	Defendant TCN	Defendant CTN	Defendant SID	Defendant DOB
CITY OF FLINT	**Genesee**	**BI16207205P**	**25-16001751-01**	**3037718T**	**10/02/1994**

Police agency report no. **3161-16**	Charge **See below**	DLN Type:	Vehicle Type	Defendant DLN

[ ] A sample for chemical testing for DNA identification profiling is on file with the Michigan State Police from a previous case.

Witnesses
***SEE ATTACHED**

STATE OF MICHIGAN, COUNTY OF GENESEE

IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN: The prosecuting attorney for this county appears before the court and informs the court that on the date and at the location described above, the defendant:

COUNT 1: HOMICIDE - OPEN MURDER - STATUTORY SHORT FORM
did murder Davonte Hanson; contrary to MCL 750.316. [750.316-C]
FELONY: Life; DNA to be taken upon arrest.

COUNT 2: WEAPONS - AMMUNITION - POSSESSION BY FELON
did possess ammunition when ineligible to do so because he had been convicted of Unarmed Robbery and/or Carry Concealed Weapon, a specified felony, and the requirements for regaining eligibility had not been met; contrary to MCL 750.224f(6). [750.224F6]
FELONY: 5 Years and/or $5,000.00; Mandatory forfeiture of weapon or device [See MCL 750.239]

COUNT 3: WEAPONS - FIREARMS - POSSESSION BY FELON
did possess a firearm when ineligible to do so because he had been convicted of Unarmed Robbery and/or Carry Concealed Weapon, a specified felony, and the requirements for regaining eligibility had not been met; contrary to MCL 750.224f. [750.224F]
FELONY: 5 Years and/or $5,000.00; Mandatory forfeiture of weapon or device [See MCL 750.239]

COUNT 4: WEAPONS - FELONY FIREARM
did carry or have in his possession a firearm, to-wit: a handgun, at the time he committed or attempted to commit a felony, to-wit: Count 1 - 3; contrary to MCL 750.227b. [750.227B-A]
FELONY: 2 Years consecutively with and preceding any term of imprisonment imposed for the felony or attempted felony conviction; Mandatory forfeiture of weapon or device [See MCL 750.239]

Upon conviction of a felony or an attempted felony court shall order law enforcement to collect DNA identification profiling samples.

(* Witnesses the People intend to produce at trial; MCL 767.40a(3)

and against the peace and dignity of the State of Michigan.

8/30/16
Date

Prosecuting Attorney (FOR DAVID S. LEYTON)

By: CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on 8-30 20 16

By: ☐ U.S. Mail ☐ FAX
☐ Hand Delivered ☐ Overnight Courier
☐ Certified Mail ☒ Email:

Signature

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WITNESS LIST
Defendant Name: DONALD WAYNE DAVIS JR

* D/TPR STACEY MOORE
* DET DON DIXON
* DET ALFINO DONASTORG
OFC ESTER CAMPBELL
KEEPER OF VIDEO FATHER DUKETTE
* DET CHAD BALDWIN
* BRIAN HUNTER MD [EX]
QUIN JACKSON
SPENCER HOLIDAY
JAMES MARTIN ELBERT III
* JOHNATHAN HANSON
* MONIQUE GIVENS
DEP RYAN HEIL
OFC BRIDGETTE BALASKO
* SARA BESSON
* TPR VERGISON
BRYAN WOOTEN
MARTHA SHIELDS
SGT TOMASSI
TPR TROY BONADURER [EX]
DESHWANDA TAYLOR
MARCUS TURNER JR
TAJANIQUE GAYLOR
SECURITY OFC MACCAULEY
* TPR DAVID FIEBERNITZ
* TPR JASON WALTERS
KONITIQUEIA SHIELDS
OFC ROBERT GOLIDY
OFC JEFF WHITE
OFC JAEQWAN JACKSON
MARQUAVIUS SYKES
KEITH WOOTEN
KEARRA CHALET WALES
DAUNDRIA SUGAR-CHANTE FRYE
* SHERRI ESTEP
SGT KEITH URQUHART
SGT JOE HALL
OFC KRIS JONES
OFC FELIX TREVINO
OFC WORDIE JOHNSON
OFC DANE SELTZER
DR ROEBUCK
DET TYRONE BOOTH
LT JASON CATE
LT PATRICK YOUNG
SGT BILL JENNINGS
MATTHEW LULLOVE
SPARKLES LAKRESHA ROGERS

* 911 RECORDS KEEPER
* KONTIGVEIA SHIELDS
* SECURITY OFC JACKSON
* DET TYRONE BOOTH

Date: 08/30/2016

By: _____
ASHLEY JENKINS
Prosecuting Attorney

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STATE OF MICHIGAN
COUNTY OF GENESEE – 7th JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF MICHIGAN

VS

Spencer Holiday
Defendant

Case # 16-40022-FC

JUDGE: Neithercut

PLEA AGREEMENT

David S. Leyton P-35086
Prosecuting Attorney

L. Lans
Defense Attorney

The Defendant having been charged as follows: 1) Open Murder 2) Felony Firearm

The following constitutes the full and complete plea negotiation agreed upon by the parties, and the defendant agrees that he/she will seek no further considerations. The terms and conditions of any and all written proffer agreements are incorporated into this plea agreement.

The People will amend/add: Ct 1 to Manslaughter 750.321-A 15yrs+/or $7,500.00

The People will dismiss: Nothing

Defendant will plead guilty/no contest to: Amended Ct 1 and Original Ct 2

Sentence ☐Agreement ☒Recommendation: 90-150 months MDOC on amended Ct 1

If the Judge does not follow a prosecutor's sentence recommendation, the defendant is NOT entitled to withdraw the defendant's plea. If the defendant commits misconduct after the plea is accepted but before sentencing, the defendant is NOT entitled to withdraw the plea unless allowed by the court for good cause. MCR 6.302; MCR 6.310.

Sentence Enhancement: ☒ None ☐ HO2 ☐ HO3 ☐ HO4 ☐ Drug

Consecutive Sentencing: ☐ None ☒ Mandatory (Felony Firearm) ☐ Discretionary _____

HYTA or 7411: ☒ No ☐ Defendant to request, People reserve right to object

Restitution to be determined by the court as to: ☐ All counts originally charged or ☐ $ _____

☒ Defendant shall provide truthful testimony as required by prosecutor consistent with interview by Detective Watson

Other: None

*** If the defendant was not born in the United States there may be immigration consequences to entering this plea.***

Date: 6/12/17
Assistant Prosecuting Attorney

Date: 6/12/17
Attorney for Defendant

Date: 6/12/17
Spencer Holiday
Defendant

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STATE OF MICHIGAN

IN THE 67TH DISTRICT COURT FOR CITY OF FLINT

THE PEOPLE OF THE STATE OF MICHIGAN

CASE NO. DC: 16TC-1024-FY
CC: 16-040020-FC

v.

FILED

JUDGE GEOFFREY NEITHERCUT

DONALD WAYNE DAVIS,

NOV 27 2017

Defendant GENESEE COUNTY CLERK
BY DEPUTY CLERK

PRELIMINARY EXAMINATION
VOLUME II OF II

BEFORE THE HONORABLE NATHANIEL C. PERRY, III, DISTRICT JUDGE

Flint, Michigan - Tuesday, November 7, 2017

APPEARANCES:

For the People:	MR. JOSEPH SAWKA (P-74197) Assistant Prosecuting Attorney 900 South Saginaw Street Flint, Michigan 48502 (810) 424-4480
For the Defendant:	MR. MAJOR J. C. WHITE (P-58800) 503 South Saginaw Street, Ste. 519 Flint, Michigan 48502 (810) 235-7996
RECORDED BY:	Brandy Graham (CER #8782) Certified Electronic Recorder (810) 766-8987
TRANSCRIBED BY:	Arlene A. Hildensperger (CER #4384) Certified Electronic Recorder (810) 766-8987

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THE COURT: To what?

MR. SAWKA: We believe Count 1 will be Homicide-Felony Murder; Count 2, Felony Firearm; Count 3, 1st Degree-Premeditated Murder; Count 4, Felony Firearm; Count 5, Assault with Intent to Rob while Armed; Count 6, Felony Firearm; Count 7, what is already bound over as to Felon in Possession of a Firearm, and Felony Firearm, Count 8. And Count 9 was already bound over, Weapons of Ammunition-Possession by a Felon, and a Felony Firearm, Count 10.

So we are only seeking to do further clarification of the testimony with regards to Count 1, 2, 3, 4, 5, and 6 at this time. And it is the co-defendant who has already pled up in circuit court has agreed to provide testimony to the People so that we may amend these charges.

THE COURT: I guess my question is why, why wasn't this done in circuit? Was it a, ah; was it something that the defense objected to?

MR. WHITE: As far as objecting to it at Circuit, no, your Honor. Mr. Sawka had made that his position known with what was going on. Mr. Holiday has given multiple statements (inaudible) multiple different versions of the story and this would be the first time to get him under oath to be able to give his version of what he's going to be testifying to at trial.

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MR. SAWKA: And as this Court may recall, Mr. Theodoroff was originally appointed to represent Mr. Davis. Mr. White has come in and we think after consulting with our Appellate Division and in the interest of justice and to avoid any potential issues, it is appropriate to have Mr. Holiday now testify with regards to this case at the preliminary exam level instead of having to go to trial in the circuit court and then amending the charges during the trial, which would provide unfair notice to Mr. White we believe.

THE COURT: So you propose to add Counts 5, 6, 7, and 8?

MR. SAWKA: It will be Counts 1 through 6, your Honor. I do have a copy of a complaint for you to follow.

THE COURT: No, no, no. Listen to what I'm saying. You've already got 1 through 4 that --

MR. SAWKA: Oh, I see what you're saying.

THE COURT: -- that he was bound over on, so you intend to add Counts 5, 6, 7, and 8 which would be 1st Degree-Premediated Murder, Felony Firearm, Assault with Intent to Rob While Armed, Felony Firearm, if I'm correct.

MR. SAWKA: Count 1 was originally Open Murder, so we would be moving to amend that count because that will then become Homicide-Felony Murder. Count 2 will be a Felony Firearm attached to it. Count 3 will be 1st

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Degree-Premeditated Murder. Count 4 will be a Felony Firearm attached to that, and then Count 5 would be added, which would be Assault with Intent to Rob while Armed. Count 6 would be Felony Firearm attached to that, and then as you stated, the Felon in Possession of a Firearm and the Felon in Possession of Ammunition would remain the same, but they would be --

THE COURT: Procedurally I don't think you can do it that way. I think you have to dismiss Count 1, add Count, ah; dismiss Count 1, the Open Murder, add Count -- add a count of 1st Degree-Premeditated Murder, and then because you have counts that will stay the same, Count 2 will still be Possession of Ammunition; Count 3 will be Possession by a Felon; Count 4 will be Felony Firearm, and you add everything else which would be Counts --

MR. SAWKA: Whatever they may be.

THE COURT: Whatever would be left.

MR. SAWKA: That's fine, your Honor, if that's the way you feel that's appropriate I am perfectly fine with that.

THE COURT: Well, I think that's how, I think that's how you have to do it procedurally. And, I think we may have to take a brief recess since the supervisor is here to deal with the computer.

(At 2:51 p.m., off the record)

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(At 2:53 p.m., back on the record)

THE COURT: Gentlemen?

MR. SAWKA: All right, thank you.

THE COURT: We're back on the record.

MR. WHITE: Just procedurally for the record, your Honor, I'd ask for sequestration at this point in time.

MR. SAWKA: I have no objection to that, Judge. I do know that the victim's mother and his girlfriend are present in the courtroom. I don't expect them to be testifying witnesses at any point in this case.

THE COURT: All right.

MR. SAWKA: I'd ask that they stay unless Mr. White has an objection.

MR. WHITE: Someone at some point in time someone's gonna have to say they identified the body and who the individual was, your Honor.

THE COURT: Oh, I see.

MR. WHITE: And then also considering the nature of the facts that are in the case, what Mr. Hanson's -- what he was doing at the time this alleged event took place as well, they may be asking about that, also his proclivity to carry a gun and any other nature like that I hate to say, but it's a possibility it could come out.

THE COURT: Okay, ladies, you have to step out.

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Call your first witness.

MR. SAWKA: Thank you. People call Spencer Holiday.

THE COURT: Is Mr. Holloway -- Holiday here?

MR. SAWKA: He is in the courtroom, Judge.

THE COURT: I want you to stand up and raise your right hand as best you can. Do you swear or affirm the information and testimony that you're about to give this Court today will be the truth so help you God?

MR. HOLIDAY: So help me God, yes.

THE COURT: Give us your name.

THE WITNESS: Spencer Holiday.

THE COURT: You want to spell your first and last name for us?

THE WITNESS: S-p-e-n-c-e-r, H-o-l-i-d-a-y.

THE COURT: All right, thank you. You can have a seat.

MR. SAWKA: May I proceed, Judge?

THE COURT: Go right ahead.

MR. SAWKA: Thank you.

SPENCER HOLIDAY

(At 2:55 p.m., called by Mr. Sawka and sworn by the Court, testified as follows)

DIRECT EXAMINATION

BY MR. SAWKA:

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Q. Mr. Holiday, are you currently incarcerated in the Genesee County Jail?
A. Yes, sir.
Q. And do you know a person named Donald Davis?
A. Yes, sir.
Q. How do you know Donald Davis?
A. My brother introduced me to him.
Q. How long have you known Donald Davis as --
A. Two days -- two days.
Q. I'm sorry? How long?
A. Two days.
Q. Two days? I'm talking about as of today how long have you known him?
A. Ah, 18 months.
Q. And when was the first time you met the person you know as Donald Davis if you remember?
A. I met him the day before the incident.
Q. And the incident being April 27th of 2016?
A. Yes, sir.
Q. So you knew him beginning April 26th of 2016?
A. Yes, sir.
Q. Do you see the person you know as Donald Davis in this courtroom today?
A. Yes, sir.
Q. Okay. What I'd like you to do -- I know that your hands

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are restrained --

THE COURT: Any objection Mr. White?

MR. WHITE: No, your Honor, thank you.

THE COURT: The record can indicate the witness has identified the defendant.

MR. SAWKA: All right, thank you, Judge.

BY MR. SAWKA:

Q. You were originally charged as a co-defendant with Defendant Davis in this case, correct?

A. Yes.

Q. And you were originally charged with one count of Open Murder, one count of Possession of a Firearm during the Commission of Open Murder, is that true?

A. Yes, sir.

Q. In relation to this case, did you accept a plea agreement in exchange for your truthful testimony against Defendant Davis?

A. Yes, sir.

Q. As part of that plea agreement the Prosecution agreed to amend the charge of Open Murder to Manslaughter, am I true? Is that correct?

A. Yes, yes, sir.

Q. And as part of the plea agreement, you agreed to serve a minimum of 64 ½ months on a charge of Manslaughter, correct?

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A. Yes, sir.
Q. And you pled guilty to that amended charge?
A. Yes, sir.
Q. And you also pled guilty as charged to the Felon in Possession of a Firearm without any agreement, correct?
A. Yes, sir.
Q. Okay. Is there any other agreement or consideration that I have not mentioned that was part of your plea?
A. No, sir.
Q. And is it your understanding if you fail to testify truthfully that that plea agreement will be revoked?
A. Yes, sir.
Q. I'm gonna direct your attention to April 27th of 2016 -- and I know it was a year ago, so do your best to think about that date -- were you with Defendant Davis that day?
A. Yes, sir.
Q. What time did you meet Defendant Davis, approximately?
A. Um, probably like 1 o'clock, 12 o'clock.
Q. P.M., or A.M.?
A. A.M.
Q. And where did you meet Defendant Davis?
A. In Father Dukette Apartments.
Q. And that's in Flint, Michigan?
A. Yes, sir.
Q. Were you with; well, what was your purpose for meeting the

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defendant?
A. He was with my brother. He was with my brother friend (sic).
Q. And who's your brother's friend?
A. James Elbert.
Q. Is James Elbert your brother or your brother's friend?
A. My brother.
Q. Your brother, okay. Are you aware if Mr. Elbert, your brother, knew Defendant?
A. Yeah (sic).
Q. Do you know how long he had known Defendant?
A. No, sir.
Q. Was there a girlfriend there of somebody's when you met the defendant?
A. My girlfriend was there.
Q. And what was her name?
A. Teajanique Gaylor (sic).
Q. Could you spell her last name?
A. G-a-l -- I mean G-a-y-l-o-r.
Q. And the first name please?
A. T-e-a-j-a-n-i-q-u-e.
Q. Do you recall what Defendant Davis was wearing on April 27th?
A. He was wearin' a black hoodie that say "Reckless" on it.
Q. Do you recall what you were wearing that day?

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A. I was wearin' a white and orange shirt that said "Philly" on it.
Q. Did you go into the department -- into the apartment with the defendant?
A. Yes.
Q. Did you overhear your defendant (sic) and your brother, Mr. Elbert, talking?
A. Yes.
Q. Do you remember what the defendant was saying to your brother?
A. That he was hurtin' for money and he needed to find somebody to rob.
Q. During the conversation, did you hear the defendant say anything about a particular person?
A. No, sir.
Q. Did there come a point in time on April 27th when you decided to leave the apartment?
A. Yes, I went to go get my girl some cigarettes and some weed.
Q. Approximately what time was that?
A. I'm not sure, sir.
Q. Okay. What -- was it light out or dark out?
A. It was light.
Q. Do you remember if it was morning, afternoon, or evening?
A. Evenin'.

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Q. When you left the apartment that evening, was there anybody else in the apartment?
A. My father and a friend of mine with my girlfriend was in our apartment; my stepfather.
Q. What about the defendant?
A. Was he in our apartment?
Q. Yes.
A. No, he left out the apartment with me.
Q. He left with you?
A. Yeah (sic).
Q. Okay. When he and you left the apartment, did you take the stairs or the elevator?
A. The elevator.
Q. And what floor were you on?
A. The 11th floor.
Q. While walking with the defendant downstairs, did he say anything about what he wanted to do?
A. Yeah. He asked me, ah, what I know where any licks at (sic).
Q. And what does that mean to you?
A. The word do I know, do I know somebody he can find somebody he can rob (sic).
Q. And what did you respond?
A. I said, "No, I don't know nobody."
Q. Did you plan to rob anyone that day?

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A. No, sir.
Q. When you exit out the building, where did you go?
A. I was walkin' on my way to the store; I was on my way to the store.
Q. What store would that be?
A. Ah, Dan's store.
Q. What is it?
A. Dan's.
Q. Dannon's?
A. Dan's.
Q. Dan's; D-a-n-s?
A. Yeah, yeah.
Q. And what type of store is that?
A. A party store where you get cigarettes and junk food at.
Q. And where was the defendant when you were starting to walk to Dan's store?
A. He was on the side of me walkin' with me.
Q. Was the defendant on a phone or talking to anybody at that point?
A. No, sir.
Q. Was he on a phone -- did he have a phone with him if you know?
A. Yes, sir.
Q. Did you see him using the phone?
A. Ah, when we came out the apartment he was usin' his phone.

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Q. Do you know why he was using the phone?
A. No, sir.
Q. As you left the apartment, were you armed with a weapon that day?
A. Yes, sir.
Q. And what were you armed with?
A. A .38.
Q. And that's a handgun?
A. Yes, sir.
Q. Okay, why did you have the handgun?
A. For safety.
Q. Where did you have it on you?
A. On my hip.
Q. Did at any point you show it to the defendant?
A. No, sir.
Q. When you were with the defendant, were you aware if he had a gun or did not have a gun?
A. I was aware.
Q. How did you know the defendant had a gun?
A. Because he showed it in the apartment before we left.
Q. Do you know why he showed it to you? Did he explain?
A. He was showin' my brother (inaudible) when I seen it.
Q. And your brother being Mr. Elbert?
A. Yep (sic).
Q. Can you describe what type of gun it was?

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A. I think it was a .40.
Q. As you left the apartment and were heading to Dan's store, was it ever your intent to purchase marijuana?
A. Yes, sir.
Q. Is that where you were going to purchase the marijuana?
A. Yeah, I was goin' to purchase the marijuana from the dude that be at the store (sic).
Q. And did you ever tell the defendant that you were trying to buy marijuana?
A. Yes.
Q. What did the defendant say to you in response to you telling him that?
A. He said he got somebody that's gonna pull up with some weed.
Q. And at any point while you were walking toward the store, did a car pull up that the defendant directed your attention to?
A. Yes, sir.
Q. Okay. What type of car was it?
A. A Bonneville, white Bonneville.
Q. When the car pulled up, did the defendant say anything to you?
A. No, sir.
Q. What did you do when the car pulled up?
A. Ah, when he pulled up, he jumped out the car and he went

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to the trunk and he got some weed out the trunk and we all got in the car. He didn't say nothin' because he already knew what he was comin' over there for.

Q. Did you know the name of this person?

A. No, sir, not at the time.

Q. Do you know the name now?

A. Yes, sir.

Q. What is the name that you understood to be of the person who pulled up in the white car?

A. Devante.

Q. D-e-v-a-n-t-e?

A. Yeah.

Q. Did you know the last name?

A. No.

Q. Do you remember what he was wearing?

A. A white T-shirt. I remember a white T-shirt.

Q. Had you ever seen Devante before?

A. No, sir.

Q. So after Devante appears at the -- where were you when the car appeared?

A. Um, I was in like on the side of it, or behind it, if I remember.

Q. And that was a bad question; let me clarify. In what location were you? Were you at the store? Were you at the apartment complex still?

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A. I was at the apartment complex in the parking lot.
Q. When Devante gets out of the car, what do you do?
A. I wait for him to go to his trunk.
Q. And then what did you do?
A. And then I got in the car with him. He told us get in the car.
Q. And what was your purpose for getting into the car?
A. To buy some weed from him.
Q. And what did Defendant do at that point as well?
A. He jumped in the back seat of the, ah, driver's seat.
Q. Okay.
A. In the back seat.
Q. Did Devante enter the driver seat?
A. Yes, sir.
Q. And what seat did you enter?
A. The passenger seat.
Q. The front passenger or back?
A. Yep; the front passenger.
Q. And you stated that the defendant entered the back seat?
A. Yep (sic).
Q. Behind the driver --
A. Yep.
Q. -- or you?
A. Behind the driver.
Q. Did you see anybody else around you at the time you

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entered the car?
A. No, sir.
Q. At the time all three of you were in the car, what happened with respect to the purchase of marijuana?
A. I ain't, I ain't like the first batch of marijuana he was showin' me, so I told 'em I didn't want to buy it and he told me he had some different marijuana in the trunk, so he went back to the trunk again and got some different marijuana out the trunk and got back in the car.
Q. Did you have any money on you?
A. Yes.
Q. How much did you plan to buy?
A. I was just buyin' a sack of weed.
Q. And how much would that have cost?
A. Five dollars.
Q. As Devante gets out the car, did the defendant say anything to you at that point while you and him were in the car?
A. He said, "I'm about to get this nigga."
Q. What did that mean to you?
A. That he was tryin' to rob 'em.
Q. Did you say anything back to the defendant?
A. I said, "There's cameras all around here and plus I stay out here you trippin'?"
Q. So what was your intent at that point?

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A. Just to buy the weed and get out the car.
Q. At the time that you told the defendant that, what was Devante doing?
A. Gettin' back in -- he was gettin' back in the car.
Q. And what side did he get back in on?
A. In the driver seat.
Q. After Devante got back in on the driver's seat, did he shut the door?
A. Yes.
Q. At that time, what did Devante do?
A. He had showed me the second weed and then I gave him a $20 bill and he gave me the weed and then my co-defendant pulled his gun out.
Q. Okay. So let's stop for just a second. Devante pulls out the weed that he was going to sell you?
A. Yes, sir.
Q. And what did you do in response?
A. I pulled my money out.
Q. And what did you see Defendant Davis do at that point?
A. Pulled his gun. He pulled his gun out.
Q. Okay. Did you see where he pulled the gun from?
A. His hip.
Q. And what did he do with the gun?
A. He pointed it at him and told him, "Run it."
Q. He pointed at him and told him what?

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A. "Run, run that shit."
Q. Okay, and what does that mean to you?
A. Ah, gimme what you got.
Q. Where was the gun pointed at Devante?
A. At the back his head (sic).
Q. And what did Devante do at that point?
A. Turned around and jumped for the gun and try to grab it.
Q. And when he tried to grab the gun, can you describe how? One hand, two hands?
A. Two hands.
Q. And when he grabbed the gun, --
A. (Inaudible)
Q. -- what did Defendant Davis do?
A. He shot the gun.
Q. Did Defendant say anything else at the time when he was trying to rob Devante?
A. Did he say anything else?
Q. Yes.
A. No, sir.
Q. Did he say, "What up, nigga," or anything like that?
A. He said, "What's up with that shit nigga," when he was tryin' to rob 'em.
Q. Okay. At that point as Devante had a hold of the gun, what occurred?
A. The gun went off.

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Q. How many times?
A. Once.
Q. How did you feel at that point?
A. Scared.
Q. What did you see Devante do?
A. Ah, he got -- when he got shot, he start holdin' his chest.
Q. Can you indicate where on your body you saw him hold his chest?
A. Right here.
Q. So you're holding your middle of your sternum --
A. Yeah (sic).
Q. -- if the record could reflect that? After the defendant shot Devante in the chest, did Defendant say anything?
A. He, ah, he pointed the gun at me.
Q. When he pointed the gun at you, did he say anything?
A. He told me to shoot him before he shoot me.
Q. Where was Devante within the car at that point?
A. In the driver seat.
Q. Was he moving?
A. Yes. He was still holdin' hisself (sic). He was movin' slow.
Q. Was he saying anything?
A. No.
Q. Had you shown the defendant your gun at any point earlier

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in the day?
A. No, sir.
Q. How did he know you have (sic) a gun to your knowledge?
A. I don't know.
Q. When the defendant told you to shoot the -- Devante, what went through your mind?
A. I didn't wanna get shot, so I did what he told me to do.
Q. How did you do it?
A. I closed my eyes and it shot towards the victim direction (sic).
Q. How many times did you shoot?
A. Once.
Q. Did you see if Devante was hit?
A. Um, yes.
Q. Okay. Can you describe where he was hit?
A. In his heart.
Q. Ride side or left side?
A. Left side.
Q. Did you at any point see a bullet hole in the back of a car -- of that car?
A. No, sir.
Q. Were you aiming in that direction in -- somewhere in that direction toward the back of the car --
A. I was aimin' --
Q. -- when you shot him?

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A. I was aimin' towards him. I aimed towards him. I aimed towards him.
Q. Where was he positioned in the car when you aimed towards him?
A. He was -- he was slouched over the seat like --
Q. Was his --
A. -- turnt, turnt around, like turnt (sic) around.
Q. Was he facing the back?
A. He was facin' the back.
Q. Okay. And was his side towards you or his front?
A. His side.
Q. What happened to Devante after you shot him?
A. Well, I got out the car. He told me to get out the car; I got out the car.
Q. Did Devante continue to move at that point?
A. Yes, sir.
Q. Was he saying anything or how was he acting?
A. He just holdin' hisself (sic).
Q. After you shot the -- after you shot Devante after Defendant told you to do that, what did you see the defendant do?
A. Get out the car.
Q. And at that point, is that when you're saying you got out as well?
A. Yes.

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Q. How did the defendant get out of the car? What side?
A. He got out the passenger side on the -- he got out on the other side of the door.
Q. On your side?
A. Yep (sic).
Q. How did he get from the driver's passenger to the -- your side?
A. After he shot him, he jumped behind me and had the gun on me behind me. Remember I told you?
Q. When you both exited the car, did the defendant take anything from the car?
A. No, sir.
Q. When you exited the car, what did you and the defendant do next?
A. He told me to go to his sister house.
Q. Where -- did you know where his sister house was?
A. He directed me to his sister house.
Q. And where was that?
A. In the back of the Father Dukette.
Q. So in the same location that you were at?
A. Yep (sic).
Q. Did you at any point return to the apartment complex that you were in?
A. No, sir.
Q. Okay. When you went to -- did you actually go to the

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defendant's sister's house?
A. Yes, sir.
Q. When you arrived there, who was there?
A. Some ladies was there and his sister was there.
Q. Did you at any point tell any of them what had occurred?
A. No, sir.
Q. Why not?
A. I don't know. I'm not sure why I didn't tell 'em.
Q. When you were at the defendant's sister's house, did the defendant request something from you?
A. My gun.
Q. And what happened when he requested your gun?
A. He requested my gun. I gave him my gun and he wrapped it up in a shirt.
Q. What shirt was that?
A. A white T-shirt.
Q. Did you see what he did after wrapping your gun up in the white T-shirt?
A. No, sir.
Q. Did he request -- did he have his gun pointed on you at any point?
A. Yeah, he pulled a gun on me and told me gimme, gimme my gun.
Q. Do you remember in which part of the house you were in?
A. In the basement.

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Q. At that point you gave him your gun?
A. Yes, sir.
Q. What did you do next?
A. He told me to call my brother.
Q. Do you know why?
A. Ah, pick us up.
Q. What did you do?
A. I called my brother and told 'em pick us up.
Q. When you called your brother that was Mr. Elbert, did you tell him what had happened?
A. No, sir.
Q. Did your brother arrive?
A. Yes, sir.
Q. When your brother arrived, did you exit the house or did he come in the house?
A. He came in there.
Q. And what happened when he came in the house?
A. He, ah, he came in there and told us, told us come on.
Q. And what did you do?
A. We came outside.
Q. Okay. Behind you --

MR. SAWKA: If I may approach the witness, Judge or the computer briefly? There is a video. I'm gonna have you observe this and tell us if you -- if this is a fair and accurate recording of the events that occurred on

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April 27th of 2016, okay? What I will do is direct you to starting at 3 minutes and 7 seconds...

(At 3:14 p.m., proposed Exhibit #3, a CD containing a video is played off a laptop computer and shown to the witness on the television screen in the courtroom. The exhibit was not previously marked)

(At 3:20 p.m., video concludes)

MR. SAWKA: Stopping it at 8 minutes and 22 seconds.

BY MR. SAWKA:

Q. Is that -- did you recognize the events from 3 minutes and 7 seconds to 8 minutes and 22 seconds?

A. Did I recognize 'em?

Q. Did you recognize what had just occurred in that time period that we played?

A. Yes, sir.

Q. Was that a full, fair, accurate recording of the events as you witnessed them on April 27th of 2016?

A. Yes, sir.

MR. SAWKA: Okay. Judge, People move for admission of People's proposed Exhibit #3 which is a CD for the minutes of 3 minutes and 7 seconds to 8 minutes and 22 seconds.

MR. WHITE: No objection for exam purposes, your

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Honor. Thank you.

(No response from the Court as to its admission)

BY MR. SAWKA:

Q. And Mr. Holiday, my last questions are did you recognize the people in the video?

A. Yes.

Q. Okay. Who did you recognize?

A. I recognized my co-defendant.

Q. Mr. Davis?

A. Yes.

Q. And was he the person in the back seat?

A. Yes, sir.

Q. And what about yourself?

A. I recognized myself in the white and orange.

Q. And what about the third person that was in the video?

A. Devante with the white shirt on.

MR. SAWKA: I have nothing further, Judge. Thank you.

THE COURT: Cross-examination.

MR. WHITE: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. WHITE:

Q. Mr. Holiday, how many times have you talked to a police officer about this case?

A. Two or three times.

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Q. Two or three times? So you talked to these two individuals sitting over here at counsel table, correct?
A. Yes, sir.
Q. Detective Baldwin and Detective Moore, correct?
A. Yes, sir.
Q. And do you recall any other of the names of any other police detectives or officers that you spoke with?
A. No, sir.
Q. Do you recall a Detective Watson?
A. Detective Watson?
Q. Yes.
A. No, sir.
Q. Okay. Mr. Sawka had asked you some questions about a plea agreement that you entered into; do you recall that?
A. I think so.
Q. Okay. Do you recall signing a plea agreement?
A. Yes, sir.
Q. Do you recall going over that plea agreement with your defense attorney?
A. Yes, sir.
Q. Your defense attorney is Lisa Lang, correct?
A. Yes.
Q. And do you recall the portion of the plea agreement that spoke about providing truthful testimony as required by the Prosecutor?

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A. Yes.
Q. Do you recall that?
A. Yes.
Q. Do you recall what was handwritten next to that?
A. No, sir.
Q. If I showed you a copy of your plea agreement, would that happen to refresh your memory?
A. Yes, sir.

MR. WHITE: Your Honor, may I approach?

THE COURT: Yes, sir.

BY MR. WHITE:

Q. I want you to read over there and after you're done reading it, just lay it down, okay?

(At 3:22 p.m., the witness reads over his plea agreement)

Q. (Inaudible) read it?
A. Yeah.
Q. And what did that say that was handwritten next to that area that said, "Defendant shall provide truthful testimony as required by the Prosecutor"?
A. What did it say?
Q. Yes.
A. I ain't pay attention to that.
Q. So I just asked you to read it and you didn't pay attention to it? Well, answer me this; do you recall if

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it said, "Defendant shall provide truthful testimony as required by Prosecutor," and then handwritten next to that was "consistent with the interview by Detective Watson"?

A. Yes.

Q. Is that what you read?

A. (Inaudible)

Q. Okay. Do you recall being interviewed by a Detective Watson?

A. I don't recall it.

Q. All right. Are you aware of what the term consistent means?

A. Consistent?

Q. Yeah, do you know what it means?

A. No, sir.

Q. Okay. There also came a point in time when you were interviewed by the two detectives here at the table. You were interviewed one time at the county jail, correct?

A. Yes, sir.

Q. Was that on July 19th?

A. Yes, sir.

Q. There was another time when you were interviewed on July the 28th; do you recall that?

A. Yes, sir.

Q. And the officer that interviewed you on July 28th, could that have been Detective Watson?

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A. No, I don't recall a Detective Watson.
Q. Okay. Could it be an Officer Watson?
A. Probably so.
Q. It could be? So just a couple questions about what you had testified today. If I heard you correctly, you testified today in front of this judge that Mr. Davis was unaware that you had a gun, correct?
A. Yes, sir.
Q. That you never talked to him about a gun or showed him a gun that day, correct?
A. Yes.
Q. All right. Do you recall talking to the officers here sitting at the table and letting them know that as far as the gun that you were actually showing it off in the apartment upstairs before you went down that day? Do you recall that?
A. No, sir.
Q. Okay. Let me digress; let me go back for just a moment. When you spoke to these two officers when they interviewed you back on July 19th, were you being truthful?
A. Yes, sir.
Q. They actually asked you to be truthful, correct?
A. Yes, sir.
Q. And that was actually during your proffer statement, correct?

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A. Yes, sir.
Q. And you signed a form before you did that, correct?
A. Yes, sir.
Q. And your attorney went over that with you, correct?
A. Yes, sir.
Q. But as you testified today under oath, you don't recall showing your gun to anyone that day, correct?
A. No, sir.
Q. You didn't show it to Mr. Davis?
A. No.
Q. You had also testified today about that there was a conversation that Mr. Davis had with your brother in the apartment regarding Mr. Davis needing to hit some licks, or get some money, something along those lines, correct?
A. Yes, sir.
Q. Did you ever tell any officer that statement before?
A. Did I tell 'em that?
Q. Yes.
A. Yes, sir.
Q. You did tell them that? Okay. Then also as far as going downstairs that day with Mr. Davis -- jumping ahead a little bit -- the two of you never had a conversation about robbing anyone?
A. He asked me do I know where the licks at on the elevator (sic).

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Q. He asked you if there were any licks or anything like that?
A. Yeah.
Q. Did he ever mention anything about trying to rob the individual who was coming to sell you marijuana?
A. No, sir.
Q. Do you recall talking to Officer Watson -- Trooper Watsman (sic) -- Watson, telling her that you denied any knowledge of a robbery being planned before the homicide? Do you recall that?
A. No, sir.
Q. Do you recall telling her later that you knew that there was a robbery going to take place?
A. No, sir.
Q. Do you recall telling Officer or Trooper Watson that the reason that you fired your gun was because you heard a gunshot and fired in that direction to protect yourself or protect someone?
A. No, sir.
Q. And going on to when you guys were in the car, if I hear you correctly, Mr. Hanson is in the front, the driver's seat, and Mr. Davis is in the seat behind him, correct?
A. Yes, sir.
Q. And you're sitting in the passenger seat, correct?
A. Yes, sir.

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Q. This is the white Bonneville that's up there, correct?
A. Yes, sir.
Q. As far as the front seat, are they bucket seats or is it a con -- I mean is there a bench seat?
A. Is there a what?
Q. Are there bucket seats? Individual seats with a console in between, or is it a bench seat where there's just one seat that goes all the way across?
A. I'm not sure.
Q. You don't recall?
A. No.
Q. Well, when you were, um; okay, as you're sitting there, do you recall if there were headrests in the vehicle? Do you know what a headrest is?
A. What is a headrest?
Q. Behind your head.
A. Yes.
Q. The cushion behind your head as your sitting.
A. Yes.
Q. Did, ah, are you aware if there was a headrest behind Mr. Hanson?
A. Yes, sir.
Q. Okay. And so then I believe you testified that Mr. Davis when he attempted to rob or started to rob Mr. Hanson, he pulled out his gun and pointed it at the back of his head,

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is that correct?
A. Back of the seat.
Q. The back of the seat?
A. Yeah.
Q. All right. Did he tell Mr. Hanson that he had a gun?
A. No.
Q. Are you aware if Mr. Hanson could see the gun in any way?
A. No, sir.
Q. So when Mr. Davis is pointing the gun at Mr. Hanson, describe to me how Mr. Hanson is sitting in the front seat.
A. He's sittin' like this. He just sittin' there.
Q. So he's just sitting as if he was normally going to drive the vehicle?
A. Yeah, he sittin' there he paused.
Q. I'm sorry?
A. He paused.
Q. He paused?
A. Yeah. When he heard what he said he paused and then turnt (sic) around.
Q. Then he turned around at that point?
A. Yeah.
Q. And then I believe you indicated that at some point in time he tried to grab the gun from Mr. Davis?
A. Yes, sir.

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Q. So when Mr. Davis had the gun at that point in time, had he lifted it above the seat to point it at Mr. Hanson?
A. No, he had it on a -- he had it on the seat. He had it at the headrest.
Q. He had it at the headrest?
A. Yes.
Q. So at that point Mr. Hanson then, what, turned completely around in his seat?
A. Yes.
Q. Mr. Davis, did he fire his weapon at that time?
A. When he grabbed the gun he fired it.
Q. Well, I mean when he's turning around, is he -- did he fire the weapon at that time?
A. He turned. He fired the weapon when he grabbed the gun.
Q. Well, again, Mr. Hanson is turning around. Before he grabs the gun, Mr. Davis doesn't fire at that point, correct?
A. No.
Q. He turns around and then is he completely facing Mr. Davis in the back seat?
A. Yes.
Q. And then is Mr. Davis is still holding the gun at that point in time which would be pointed at the headrest which would be pointed at I guess the front of Mr. Hanson's body at that time, correct?

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A. Yes, sir.
Q. And then Mr. Hanson reaches around the seat and tries to grab the gun with both hands, correct?
A. Yes, sir.
Q. Then at that point in time they begin struggling over the gun?
A. You say what?
Q. At that point in time, they begin struggling over the gun.
A. Yes, sir.
Q. Then at that point is when the gun went off, correct?
A. Yes, sir.
Q. And then Mr. Hanson got shot in his sternum or the left side of his chest at that point --
A. Yes, sir.
Q. -- correct, as he's turned around facing Mr. Davis in the back seat?
A. Yes, sir.
Q. When he gets shot, when he gets hit at that point in time, does he slump back against the steering wheel?
A. No, he, ah; he slumped over the seat.
Q. He slumped over the seat?
A. Yeah.
Q. And when you say slumped over the seat, would his face --
A. His, his left side was, ah, directed towards me. His left side of his body was directed towards me like he was still

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turnt (sic) around.
Q. He was -- so his face would still have been facing Mr. Davis, correct?
A. Yes, sir.
Q. And at that point in time, what does Mr. Davis do?
A. After he shot 'em?
Q. Does he shoot again?
A. No.
Q. He then tells you to shoot him?
A. Yes, sir.
Q. And again, according to what you're testifying to today, Mr. Davis had no idea you had a gun, correct?
A. No.
Q. Does he hand you his gun?
A. No. I had a gun on me. I pulled my gun out.
Q. So, he's telling you to shoot him even though he has no idea that you have a gun as far as you know?
A. Yes.
Q. And then you pull out the gun and then you shoot him, shoot Mr. Hanson in the left side, correct?
A. Yes, sir.
Q. And then after you shoot Mr. Hanson, who at this point in time I'm assuming is still facing Mr. Davis, correct?
A. Yes, sir.
Q. Still slumped over the seat?

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A. Yes, sir.
Q. After you shoot him, what happens to Mr. Hanson?
A. He turns his body a different way. Ah, the impact of the bullet made him turn.
Q. The impact of the bullet, and you shot him on the left side, correct?
A. Yep (sic).
Q. And then what did Mr. Davis do after that?
A. We got out the car.
Q. He didn't tell you to shoot again or anything of that nature?
A. No, sir.
Q. Didn't check to see if he was alive or anything?
A. No, sir.
Q. Didn't run his pockets?
A. No, sir.
Q. Didn't take the marijuana?
A. No, sir.
Q. And going back for just a moment; allegedly this whole thing was to start it out there was gonna be a marijuana buy, correct?
A. Yeah (sic).
Q. And if I'm -- if I heard you testify correctly, Mr. Hanson had marijuana in the trunk, correct?
A. Yes, sir.

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Q. Had at least two bags back there because he brought one bag that you didn't like, correct?
A. Yes, sir.
Q. Did you happen to see how much marijuana was in the trunk?
A. No, sir.
Q. Okay. So after this was all said and done, nobody goes back to the trunk to get the marijuana, correct?
A. No, sir.
Q. So Mr. Davis who is hard up for money according to what you testified to do -- today -- what you heard him say, who is looking for a lick to hit, according to what you testified today, correct?
A. Yes, sir.
Q. Shot someone but didn't take their money, correct?
A. Yes.
Q. Didn't take the marijuana that was inside the vehicle, correct?
A. No, sir.
Q. Didn't go to the back of the trunk and take the marijuana that was in the back of the vehicle?
A. No, sir.
Q. Correct? Or actually, even when that's goin' on, didn't take the time to actually push the body over to the other side of the car and drive the vehicle away, correct?
A. No, sir.

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Q. Okay.

MR. WHITE: One moment, Judge.

BY MR. WHITE:

Q. Was there ever a point in time where Mr. Hanson was actually in the back seat of the vehicle? (Inaudible)

A. When he was strugglin', he was halfway in the back seat. He wasn't all the way back there.

Q. He was in the back seat at that point in time? He was halfway in between the two seats in the back seat?

A. Yeah. Yes, sir.

Q. At any point in time did you or Mr. Davis ever have to push him back into the front seat?

A. Mr. Davis pushed him back into the front seat.

Q. Mr. Davis pushed him back into the front seat?

A. Yeah.

MR. WHITE: And then one moment, your Honor.

BY MR. WHITE:

Q. I think you had also mentioned that after Mr. Davis shot he then slid over behind you, correct?

A. Yes, sir.

Q. And that's when he pointed his gun at you?

A. Yes, sir.

Q. Okay. Do you know an individual by the name of Jalen Pritchett?

A. Do I know an individual by the name of who?

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Q. I believe it's Jalen Pritchett.
A. Yes, sir.
Q. And who is Jalen Pritchett?
A. A cell mate of mine I had.
Q. A cell mate in the Genesee County Jail?
A. Yes, sir.
Q. Are you still in the same cell with him?
A. No, sir.
Q. How long were you in a cell with him?
A. Ah, I'm not sure.
Q. Okay. At any point in time did you ever sit down with Mr. Pritchett and compose some rap lyrics about what happened during this robbery?
A. Some rap lyrics?
Q. Correct.
A. Naw, (sic), not that I know of.
Q. Not that you know of?

MR. WHITE: Your Honor, no further questions. Thank you.

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MR. SAWKA:

Q. Mr. Holiday, what's the highest level of education that you have?
A. Tenth grade.

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Q. Is the testimony that you gave here today truthful to the best of your memory --
A. The best --
Q. -- about the events that occurred April 27th of 2016?
A. Yes, the best of my memory.
Q. And the last thing is, do you remember any of the detectives by name?
A. I remember Detective Baldwin and Detective Moore.
Q. If you saw Detective Watson, do you think you would remember who that person was and if you gave them a statement or not?
A. Yes, sir.

MR. SAWKA: I don't have anything further, Judge, thank you.

THE COURT: Thank you. You can take him back.

(At 3:34 p.m., witness excused)

THE COURT: Any other witnesses or testimony?

MR. SAWKA: The People rest, Judge.

THE COURT: Mr. White, any witnesses or testimony?

MR. WHITE: No, your Honor, thank you.

THE COURT: Your motion?

MR. SAWKA: Judge, we move as we had originally stated to the Court to amend the complaint down here. We'd ask the Court bind the matter over on one count of

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Felony Murder with the predicate felony being Assault with the Intent to Rob while Armed. The testimony was that Mr. Davis was in the car. He did have the intent to rob Mr. Hanson. Whether or not an actual robbery occurred does not require -- is not an element of an assault with intent to rob; it's only that a person be assaulted, which he was with a gun, and the defendant have the intent to rob while being armed with a dangerous weapon. So we'd ask the Court bind over on Homicide-Felony Murder.

With respect to the other testimony the Court had already heard prior to this testimony, Count 2 a Weapons-Felony Firearm attached to the Felony Murder; 1st Degree-Premeditated Murder as the premeditated with the intent to kill because he told the co-defendant to kill Mr. Holiday, or excuse me, to kill Mr. Hanson, thus aiding and abetting in that manner, and also being a principal of 1st Degree Murder. Count 4, or an additional count of Felony Firearm attached to that; a count of Assault with Intent to Rob while Armed; a count of Felony Firearm attached to that.

And then the remaining charges would have already been bound over remain, which are Felon in Possession of a Firearm, Felon in Possession of Ammunition, and Felony Firearm attached to each of those. Thank you.

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THE COURT: Objection for the record Mr. White?

MR. WHITE: Absolutely, your Honor.

THE COURT: There is sufficient probable cause to believe that a felony murder took place and the assault with the intent to rob while armed; prior testimony indicates that there was a convicted felon here in possession of ammunition and a firearm, and that because Mr. Hanson was a victim of a homicide, the question becomes can a jury find him guilty of both 1st degree and felony murder? I assume it's an alternative count at this point, so the 1st Degree Felony Murder would also go over.

And then he would have one, two, looks like three counts of Felony Firearm which makes it eight counts, and he'll be held without bond. He's been identified and that will be all for today.

MR. WHITE: Thank you, your Honor.

MR. SAWKA: Judge, there's just one, ah, the Assault with the Intent to Rob while Armed count.

THE COURT: I thought I said that, but...

MR. SAWKA: Okay. Thank you. I appreciate your time.

(At 3:38 p.m., proceedings concluded)

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2016001751 JR
11/21/2017

Information - Circuit Court
Original Complaint - Court
Warrant - Court

Bind over/Transfer - Circuit/Juvenile Court
Complaint copy - Prosecutor
Complaint copy - Defendant/Attorney

STATE OF MICHIGAN **67th JUDICIAL DISTRICT** **7th JUDICIAL CIRCUIT**	**AMENDED INFORMATION FELONY**	**JUDGE:GEOFFREY NEITHERCUT** **DISTRICT: 16TC-1024FY** **CIRCUIT: 16-040020-FC**

District Court ORI: MI- **MI250095J**
630 S. SAGINAW ST. FLINT, MI 48502 810-257-3165

Circuit Court ORI: MI- **MI250015J**
900 S. Saginaw St. Flint, MI, 48502

THE PEOPLE OF THE STATE OF MICHIGAN V

Defendant's name and address
DONALD WAYNE DAVIS JR B/M
5611 BALSM LN
FLINT, MI, 48507

Victim or complainant
DET CHAD BALDWIN

Complaining Witness
DET CHAD BALDWIN

Co-defendant(s) **SPENCER HOLIDAY, JAMES MARTIN ELBERT III**

Date: On or about **04/27/2016**

City/Twp./Village	County in Michigan	Defendant TCN	Defendant CTN	Defendant SID	Defendant DOB
CITY OF FLINT	**Genesee**	**BI16207205P**	**25-16001751-01**	**3037718T**	**10/02/1994**

Police agency report no.	Charge	DLN Type:	Vehicle Type	Defendant DLN
3161-16	**See below**			

[ ] A sample for chemical testing for DNA identification profiling is on file with the Michigan State Police from a previous case.

Witnesses
***SEE ATTACHED**

STATE OF MICHIGAN, COUNTY OF GENESEE
IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN: The prosecuting attorney for this county appears before the court and informs the court that on the date and at the location described above, the defendant:

COUNT 1: HOMICIDE - FELONY MURDER
did while in the perpetration or attempted perpetration of a robbery, murder one Devante Hanson; contrary to MCL 750.316(1)(b). [750.316-B]
FELONY: Life without parole; DNA to be taken upon arrest.

COUNT 2: WEAPONS - FELONY FIREARM
did carry or have in his possession a firearm, to-wit: a handgun, at the time he committed or attempted to commit a felony, to-wit: Homicide - Felony Murder; contrary to MCL 750.227b. [750.227B-A]
FELONY: 2 Years consecutively with and preceding any term of imprisonment imposed for the felony or attempted felony conviction; Mandatory forfeiture of weapon or device [See MCL 750.239]

COUNT 3: HOMICIDE - MURDER FIRST DEGREE - PREMEDITATED
did deliberately, with the intent to kill, and with premeditation, kill and murder one Devante Hanson; contrary to MCL 750.316. [750.316-A]
FELONY: Life without parole; DNA to be taken upon arrest.

COUNT 4: WEAPONS - FELONY FIREARM
did carry or have in his possession a firearm, to-wit: a handgun, at the time he committed or attempted to commit a felony, to-wit: Homicie - Murder 1st Degree - Premeditated; contrary to MCL 750.227b. [750.227B-A]
FELONY: 2 Years consecutively with and preceding any term of imprisonment imposed for the felony or attempted felony conviction; Mandatory forfeiture of weapon or device [See MCL 750.239]

COUNT 5: ASSAULT WITH INTENT TO ROB WHILE ARMED
did make an assault upon Devante Hanson with intent to rob and steal while being armed with a dangerous weapon, or an article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon, to-wit: a handgun; contrary to MCL 750.89. [750.89].
FELONY: Life or any term of years; DNA to be taken upon arrest.

COUNT 6: WEAPONS - FELONY FIREARM
did carry or have in his possession a firearm, to-wit: a handgun, at the time he committed or attempted to commit a felony, to-wit: Assault with Intent to Rob While Armed; contrary to MCL 750.227b. [750.227B-A]

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COUNT 7: WEAPONS - FIREARMS - POSSESSION BY FELON
did possess a firearm when ineligible to do so because he had been convicted of Unarmed Robbery and/or Carry Concealed Weapon, a specified felony, and the requirements for regaining eligibility had not been met; contrary to MCL 750.224f. [750.224F]

COUNT 8: WEAPONS - FELONY FIREARM
did carry or have in his possession a firearm, to-wit: a handgun, at the time he committed or attempted to commit a felony, to-wit: Felon in Possession of Firearms; contrary to MCL 750.227b. [750.227B-A]

COUNT 9: WEAPONS - AMMUNITION - POSSESSION BY FELON
did possess ammunition when ineligible to do so because he had been convicted of Unarmed Robbery and/or Carry Concealed Weapon, a specified felony, and the requirements for regaining eligibility had not been met; contrary to MCL 750.224f(6). [750.224F6]
FELONY: 5 Years and/or $5,000.00; Mandatory forfeiture of weapon or device [See MCL 750.239]

COUNT 10: WEAPONS - FELONY FIREARM
did carry or have in his possession a firearm, to-wit: a handgun, at the time he committed or attempted to commit a felony, to-wit: Felon in Possession of Ammunition; contrary to MCL 750.227b. [750.227B-A]
FELONY: 2 Years consecutively with and preceding any term of imprisonment imposed for the felony or attempted felony conviction; Mandatory forfeiture of weapon or device [See MCL 750.239]

Upon conviction of a felony or an attempted felony court shall order law enforcement to collect DNA identification profiling samples.

(* Witnesses the People intend to produce at trial; MCL 767.40a(3)

and against the peace and dignity of the State of Michigan.

11-21-17
Date

Prosecuting Attorney (FOR DAVID S. LEYTON)
By: _____ P74197

CERTIFICATE OF SERVICE
The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on 11-21 20 17

- ☐ U.S. Mail
- ☐ Hand Delivered
- ☐ Certified Mail
- ☐ FAX
- ☐ Overnight Courier
- ☒ Email

Signature _____

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WITNESS LIST
Defendant Name: DONALD WAYNE DAVIS JR

* D/TPR STACEY MOORE
DET DON DIXON
* DET ALFINO DONASTORG
OFC ESTER CAMPBELL
KEEPER OF VIDEO FATHER DUKETTE
* DET CHAD BALDWIN
* BRIAN HUNTER MD [EX]
QUIN JACKSON
* SPENCER HOLIDAY
JAMES MARTIN ELBERT III
JOHNATHAN HANSON
OFC BRIDGETTE BALASKO
TPR VERGISON
BRYAN WOOTEN
MARTHA SHIELDS
SGT BOB TOMASSI [EX]
TPR TROY BONADURER [EX]
DESHWANDA TAYLOR
MARCUS TURNER JR
TAJANIQUE GAYLOR
SECURITY OFC MACCAULEY
OFC ROBERT GOLIDY
OFC JEFF WHITE
MARQUAVIUS SYKES
KEITH WOOTEN
KEARRA CHALET WALES
DAUNDRIA SUGAR-CHANTE FRYE
SHERRI ESTEP
SGT KEITH URQUHART
SGT JOE HALL
OFC KRIS JONES
OFC FELIX TREVINO
OFC WORDIE JOHNSON
OFC DANE SELTZER
DR ROEBUCK
DET TYRONE BOOTH
LT JASON CATE
LT PATRICK YOUNG
SGT BILL JENNINGS
MATTHEW LULLOVE
SPARKLES LAKRESHA ROGERS
911 RECORDS KEEPER
KONTIQUEIA SHIELDS
SHANE HILL [EX]
MICHELLE SCHMITT [EX]
TPR NEASE
MARK SHANGO
KEITH JAMES

* SGT TIFFANY WATSON
* MEI M MIZE
* RON CRICHTON [EX]
* SECURITY OFC JACQWAE JACKSON
* TPR JASON WALTERS
* TPR DAVID FIEBERNITZ
* MONIQUE GIVENS
* DEP RYAN HEIL
* SARA BESSON
Mike Mize
Todd
Thomas
Tpr. Sedlak
Zerbe

Date: 11/21/2017

By: _____
JOSEPH SAWKA
Prosecuting Attorney

4/2021 2:35:10 PM

From : DAVIS, DONALD WAYNE Sent Date: 1/8/2018 1:05:33 PM Review Status: System Approved
To : macieharris18@gmail.com
Subject: DJ
Message: AND WHO IS DAT??

From : DAVIS, DONALD WAYNE Sent Date: 1/8/2018 1:36:47 PM Review Status: System Approved
To : williamskeme@gmail.com
Subject: DJ
Message: DIS DJ TELL YARNELL I SAID WATUP THO

From : DAVIS, DONALD WAYNE Sent Date: 1/8/2018 1:52:06 PM Review Status: System Approved
To : cbaldwin@cityofflint.com
Subject: MR.DAVIS
Message: THIS DONALD DAVIS YOU GUYS TOLD MAJOR WHITE I HAD INFO ABOUT ANOTHER CASE THAT CAN HELP ME WITH MY CASE WHAT KIND DEAL I CAN GET COME SEE ME

From : DAVIS, DONALD WAYNE Sent Date: 1/8/2018 1:59:16 PM Review Status: System Approved
To : jalynbrown45@yahoo.com
Subject: DJ
Message: DIS DJ SINO BROTHER I WAS TRYN TO SEE IS TIM OUT

From : ijabreea@gmail.com Sent Date: 1/8/2018 3:01:49 PM Review Status: System Approved
To : DAVIS, DONALD WAYNE
Subject: DJ
Message: Hell nawl NO KIDS lol and I work at McDonald's and a company called RGIS

From : jalynbrown45@yahoo.com Sent Date: 1/8/2018 4:27:03 PM Review Status: System Approved
To : DAVIS, DONALD WAYNE
Subject: DJ
Message: Naw he not he got sent back to Tennessee and now he doing time up there

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

PEOPLE OF THE STATE OF MICHIGAN,

v

Circuit Court No.
16-040020-FC

DONALD WAYNE DAVIS,

DIGITALLY RECORDED

Defendant.

_____/

JURY TRIAL - VOLUME I

BEFORE THE HONORABLE GEOFFREY L. NEITHERCUT, CIRCUIT JUDGE

Flint, Michigan – Wednesday, February 21, 2018

APPEARANCES:

For the People:
Joseph F. Sawka, (P-74197)
Assistant Prosecuting Attorney
LeAnne M. Dao, (P-79247)
Assistant Prosecuting Attorney
900 South Saginaw Street
Flint, Michigan 48502
(810) 257-3232

For the Defendant:
Major J.C. White, (P-58800)
503 South Saginaw Street, Suite 519
Flint, Michigan 48502-1824
(810) 235-7996

Transcribed By:
Tamara Johns, CER 8749
2428 East Wilson Road
Clio, Michigan 48420
(810) 252-6985

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(indiscernible) this afternoon based on my conversation with Mr. Sawka as well.

THE COURT: I understand.

MR. WHITE: That's what I did as far as scheduling (indiscernible).

THE COURT: I understand.

MR. ELLIS: All rise for the jury.

(At 2:25 p.m., jury present)

THE COURT: Sit down please. You two ladies in the chairs, pull them out this way better so that you can see. There we go. Now, we've chosen you as jurors and the next thing that's going to happen is Mrs. Harger is going to ask you to give another promise, another oath, another affirmation. And basically, what she's going to ask you to do is to promise to be a true and a just juror. And she uses legal language. She will say, each of you do solemnly swear or affirm that in this action now before the court you will justly decide the questions submitted to you. That unless you are discharged by the Court from further deliberation, you will render a true verdict and that you will render your verdict only on the evidence introduced and in accordance with the instruction of the court so help you God. That's what she's going to ask and she wants your answer nice and loud please. Go ahead, Mrs. Harger.

MRS. HARGER: Would the jury please stand and raise

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your right hand? Do you solemnly swear or affirm that in this action now before the Court you will justly decide the questions submitted to you? That unless you are discharged by the Court from further deliberation, you will render a true verdict and that you will render your verdict only on the evidence introduced and in accordance with the instruction of the Court so help you God?

JURY PANEL: (answered in the affirmative)

MRS. HARGER: Thank you. You may be seated.

THE COURT: Thank you, Mrs. Harger. Now here's what the procedure is going to be. I'll finish talking to you today. I'll give you some legal principles and then I'll send you home and then we'll be back at 9:15 tomorrow. And at that time, Mr. Sawka will stand up and give you an opening statement where he'll tell you what he hopes to prove on the case. Mr. White can make an opening statement if he wants to also, but he's not required to do that and he may think it's not necessary since you presume his client to be innocent. What I want you to know about the opening statements though is that's not the evidence. All the opening statements are is the lawyer's telling you what they think is going to happen or where they have an interest.

The opening--the evidence comes next. That's when Mr. Sawka will present witnesses. I'll put them under oath and they'll come up here and testify. And every time a

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witness testifies for the prosecution, then Mr. White will have an opportunity to question and cross-examine those witnesses. And when Mr. Sawka is done, if Mr. White wishes to call witnesses he can or if he chooses not to, he can. That's his choice. He may think it's not necessary since you presume his client to be innocent. But if he does call witnesses to testify, we'll certainly give Mr. Sawka the right to question them and cross-examine them. And if the defense does put up some evidence, we'll give the prosecutor a second chance, it's a called a rebuttal. They're allowed to bring in witnesses who are designed to explain or contradict something that the defense may have raised.

And then when the testimony and the trial is all done the lawyers will come back to you and give you their closing remarks where they'll tell you what they think they've proved or what was not proved. And the closing remarks are just like the opening remarks. That part is not the evidence. That's important because it helps you understand the lawyer's theories and how they use the evidence, but in the end, you use the evidence that you choose to believe.

Now, there's as I told you, ten charges I believe it is. Yes. And the prosecutor has the burden of proving each one of them with evidence beyond a reasonable doubt. And there are certain things that he has to prove to you, we call them elements. So, what I'm going to do next is go through

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the elements in each charge and you'll find that I'm repeating myself a little bit, so bear with me on that. But for starters he--this defendant is charged with first degree felony murder. And to prove that charge, here's what the prosecutor has to prove. First, that the defendant caused the death of Devante Hanson. That is that Devante Hanson died as a result of gunshot wounds or wounds. Second, it must be proven that the defendant had one of these three states of mind. That he intended to kill, or he intended to do great bodily harm to Devante Hanson, or he knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of his actions. That's the second thing that has to be proven. Third, that when he did the act that caused the death of Devante Hanson, the defendant was committing or attempting to commit the crime of assault with intent to rob while armed.

Well what is assault with intent to rob while armed? Well there's elements for that also. To prove that, the prosecutor must prove these elements to you with evidence beyond a reasonable doubt. First, that the defendant assaulted Devante Hanson. Now there's two ways to commit an assault. Either the defendant must have attempted or threatened to do immediate injury to Devante Hanson and was able to do so, or the defendant must have committed an act that would cause a reasonable person to fear or apprehend an

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immediate injury. Second, that at the time of the assault the defendant was armed with a weapon designed to be dangerous and capable of causing death or serious injury. Third, that at the time of the assault, the defendant intended to commit robbery.

Well what's a robbery? Well, a robbery occurs when a person assaults someone else and takes money or property from him or in his presence intending to take it from the person permanently. It is not necessary that the crime be completed or that the defendant actually took money or property. However, there must be proof beyond a reasonable doubt that at the time of the assault the defendant intended to commit robbery.

Now to establish an attempt, because that's one of the ways that this can be proven, the prosecutor must prove beyond a reasonable doubt that the defendant intended to commit the crime of assault with intent to rob while armed and that he took some action towards committing that crime but failed to complete it. Now it's not enough to prove that the defendant made preparations for committing that crime. Things like planning the crime or arranging how it will be committed are just preparations. They do not qualify as an attempt. In order to qualify as an attempt, the action must go beyond mere preparation to the point where the crime would have been completed if it hadn't been interrupted by outside

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circumstances.

To qualify as an attempt, the act must clearly and directly be related to the crime of assault with intent to rob while armed and not some other objective. The defendant must have been either committing or helping someone else commit the crime of assault with intent to rob while armed. To help means to perform acts or give encouragement before or during the commission of the crime that aids or assists in its commission. At the time of giving aid or encouragement, the defendant must have intended the commission of the assault with intent to rob while armed.

Now that was a lot of information I just gave you. It's in writing and I'm going to give it to you at the end of the trial so you can go through those items, those elements one a time to help you as you analyze the case.

In addition, the prosecution has asserted that this defendant intentionally assisted someone else in committing felony murder. Now anyone who intentionally assists someone else in committing a crime is as guilty as the person who directly commits it and can be convicted of that crime as an aider and an abettor and that's what I'm talking about right now, aiding and abetting. To prove that the prosecutor must prove certain elements to you beyond a reasonable doubt. First, that the alleged crime was actually committed either by the defendant or someone else, and it doesn't matter whether

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anyone else has been convicted of that crime. Second, that before or during the crime, the defendant did something to assist in the commission of the crime. Third, at the time the defendant must have intended the commission of the crime alleged or must have known that the other person intended its commission or that the crime alleged was a natural and probable consequence of the commission of the crime intended.

Now, count two is a charge called felony firearm and it has to do with a gun, a firearm. And the prosecutor, what he's done is he has--the felony firearm charge always has to relate to a different felony and the prosecutor has actually alleged four or five different felonies and each time he did that he added a felony firearm charge relating to that individual one. So, as far as the charge of felony murder, he's related it. So, in order to prove felony firearm on any of these felonies, the prosecutor has to prove first, that the defendant committed a felony crime. And the first one we're talking about is felony murder and I've already defined that for you. I'm going to define to you the other felonies that he has to prove. It's not necessary, however, that the defendant be convicted of that crime. And then second, it has to be proven that at the time the defendant committed the felony crime, he knowingly carried or possessed a firearm. And we define a firearm as any weapon that will or is designed to or may readily be converted to expel a projectile by action

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of an explosive, and a pistol is a firearm.

Now count three is a different way to charge murder. It's called first degree premeditated murder, and the prosecutor has charged that so he has to prove these elements to you beyond a reasonable doubt. Some of them sound the same, some of them are a little different. First, he has to prove that the defendant caused the death of Devante Hanson. That is to say that Devante Hanson died as a result of a gunshot wound or wounds. Second, it has to be proven that the defendant intended to kill Devante Hanson. Third, it must be proven that this intent was premeditated, that is to say thought out beforehand. Fourth, it must be proven that the killing was deliberate, which means the defendant considered the pros and cons of the killing and thought about and chose his actions before he did it. There must have been real and substantial reflection for long enough to give a reasonable person a chance to think twice about the intent to kill. Now the law doesn't say how much time is needed for that because the law says you decide if enough time has passed under the circumstances of this case. And the killing cannot be the result of a sudden impulse without thought or reflection.

The prosecutor has added a count to this one too called aiding and abetting. I already told you what has to be proven for aiding and abetting on the felony murder. Same thing has to be proven for premeditated murder except the

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aiding and abetting has to relate to the premeditated murder. I'm not going to repeat those elements for you although you will see them in writing separately at the end of the trial.

Fourth is that charge of felony firearm, and I already told you what the elements are to that. He has a charge relating to felony murder, he has a separate felony firearm charge relating to premeditated murder, so I'm not gonna repeat those elements.

Fifth there's a charge called assault with intent to rob while armed. He's charged with that. The prosecutor has to prove it. First, the prosecutor has to prove that the defendant assaulted Devante Hanson. Now there's two ways to commit an assault. Either the defendant must've attempted or threatened to do immediate injury to Devante Hanson and was able to do so or the defendant must've committed an act that would cause a reasonable person to fear or apprehend an injury. Second, it must be proven that at the time of the assault the defendant was armed with a weapon designed to be dangerous and capable of causing death or serious injury. Third, it must be proven that at the time of the assault the defendant intended to commit robbery. Robbery occurs when someone assaults someone else and takes money or property from him or in his presence intending to take it from that person permanently. It is not necessary that the crime be completed or that the defendant have actually taken any money or

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property. However, there must be proof beyond a reasonable doubt that at the time of the assault, the defendant intended to commit robbery. There is a separate felony firearm charge for this one too. It's the same elements except it relates only to the charge of assault with intent to rob while armed.

Then there's a separate charge called felon in possession of a firearm. That's a little different way to deal with firearms. The prosecutor has accused the defendant of that charge and he has to prove two things to you. First, that the defendant possessed or used or carried a firearm in this state. Second, that the defendant was convicted of a specified felony before all that. And then count eight is felony firearm again. This felony firearm relates to being a felon who possessed a firearm. It has the same elements as I've told you about before except it only relates to being a felon who possessed a firearm.

Count nine is a little different. That's called felon in possession of ammunition. The defendant is charged with possession of ammunition after having been convicted of a specified felony. To prove that the prosecutor must prove each of the following elements to you beyond a reasonable doubt. First, that the defendant possessed or used or carried ammunition in this state. Second, that previously the defendant had been convicted of what we call a specified felony.

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And the next charge is called possession of a firearm at the time of commission or attempted commission of a felony which we shorten up and call felony firearm. That relates back only to the felon possessing ammunition. It has the same elements as I explained to you earlier.

Now, my job as the Judge in this trial is to see to it that this case is tried fairly and efficiently. I will rule upon questions of law that may arise during the course of this trial. And I'll tell you what the law is that you use and you must use the law as this Court gives it to you. But I want you to know that nothing I say is meant to reflect my opinion about the facts in this case. And if you think I have an opinion about the--what happened you ignore me because that's your job. Your responsibility as jurors is to decide what the facts of the case are. That's your job, that's no one else's job. That means you must think about all of the evidence and all of the testimony and then decide what each piece of evidence means and how important you think it is. And that includes how much you believe what a witness said. And frankly, what you say about any fact here is final because you are the judges of the facts. I judge the law, you judge the facts.

When you make your decision, you are only allowed to consider the evidence that was properly admitted into this courtroom. And you might ask yourself what's evidence? Well

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evidence consists of testimony of the witnesses. Evidence can also consist of exhibits which have been shown to you and sometimes the Court will tell you to consider something as evidence.

One of the things you're going to have to do when you're deciding what the facts of this case are is decide which witnesses you believe and how important you think their testimony is. Now you don't have to accept or reject everything a witness says. Actually, you can use all of the witness's testimony or none of it, or you can use the part of the testimony that you find believable and ignore the rest.

When you're trying to decide upon how to believe a witness use your common sense and use your experience in life. You know when we were going through that voir dire we were looking for some pretty sensible people and we picked you. And since we trust you, trust yourself, and use that good sense because you've been down the road, you've seen things, you've done things, you've got good sense. But set aside any bias or prejudice that you might have based upon somebody's race or religion or national origin or gender because those things don't help you in deciding how to believe witnesses.

Now we don't have a fixed set of rules to help you believe a witness. We don't have a perfect system on that. A lot of people talk about polygraphs but they're not reliable enough for courts. The polygraph in this courtroom is you.

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And the best I can do there is give you some questions to keep in mind as you're watching what happens. Ask yourself if the witness was able to see and hear clearly. Ask yourself if something else was going on that might've distracted the witness. Ask yourself how long that witness was looking or watching or listening. Ask yourself does the witness seem to have a good memory. Ask yourself how does that witness act while testifying. Is he or she trying to honestly answer the lawyer's questions or is the witness maybe dancing around the questions or trying to argue with the lawyers? Ask yourself if the witness's age or maturity would affect how you judge his or her credibility. Ask yourself does that witness have a bias or a prejudice or a personal interest in the outcome of this case. Does he or she want to make something happen. Ask yourself has there been a promise or a threat or a suggestion or influence that affects how a witness testifies. In general, ask yourself if the witness has a special reason to tell the truth or a special reason to tell a lie. And all in all, when you're looking at any one witness in this case, ask yourself how it compares and contrasts with all of the rest of the witnesses in this case. If you use that method that will help when you're trying to find the truth.

Understand this part, the questions that the lawyers ask are not the evidence. Only the answers are the evidence. And you must not think something is true just because the

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question suggests that. I always chuckle when my wife's watching that Law and Order show because they get the lawyer up at that lectern and there's the witness right here and the lawyer asks the question and it's powerful and articulate and it tells the whole 53 minute story. And do they let you hear the answer? Oh, no. They black out the screen, they do that ka-chung sound and they cut to the commercial. You never heard the evidence. So that's where I want you to focus. The lawyers' questions are useful because they take you to the evidence, but the evidence is right here.

I may ask the witnesses questions but I try not to. I don't like to do it because of two reasons; number one, if I ask a question people think that I know something. And number two, I don't want to interfere with the lawyer's strategy. Sometimes they'll leave something for later and I interfere with that if I ask a question. But if I do ask a question please understand I'm not sending you a message of what I think about the facts. It's not my job.

You may ask questions if you want to, but it's a really rigid system. We went for about 300 years without letting--without letting jurors ask questions, but about five years ago they changed the rules. But the rules go like this, you have to sit there quietly and watch the lawyers do all their questioning and when they're all done, I'll turn to you and I'll ask you if you have a question. You are not allowed

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to speak it out loud, you write it down. We'll give you some paper and pencils and you write your question down and you pass it up to me and I'll look at it. If I think it's appropriate, I'll ask the question for you. Sometimes I don't think it's appropriate and it doesn't get asked. That's the only way you can ask a question. If the lawyer really had everything covered there won't be that many questions by the jury.

These are a couple of well-trained lawyers, they're smart and from time to time they may be required to make an objection or a motion based upon the law and I will be required to rule upon that based upon the law. I try to do that outside of your hearing because I don't want you to get mixed up with the legal issues. That's not your job. But if you get to listen to that, I mean if they object to a question and I don't let the witness answer, you don't get to go back into the jury room and say, well I sure wish I knew what that answer was. Just use the evidence you have.

And also, I don't want you to think that my rulings are reflecting my opinion about the facts in this case. Now you heard me say that three times. I've been a Judge for 32 years and I've seen cases where I thought somebody should win but I constantly ruled against them because the law made me. It's not my feelings. So, don't you think that the way I rule is telling you what to do with the facts. You are the judges

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of the facts.

We do not want you to talk about this case. Not with each other, not until it's the right time, not with your family, not with your friends, not with anyone else. When we take a break between witnesses, you don't get to go back into that room and discuss the last witness's testimony, you just wait until it's time. We've learned that if you start talking about things early you prejudice yourself. You start thinking about things without having heard everything, so just don't talk about the case. Not until you are told to talk about the case. And then you only get to talk about the case when all of you are together.

Don't go on some research session, don't drive up to the location and look around, don't get on the internet and look around. We want you to make your decision based only on the evidence that you received in this courtroom in the presence of both sides, the Court, and your fellow jurors. That way we all know what you know and it's fair. And just to let you know how important this is, I had a case ten years ago where there was a fight in a night club and this one juror just couldn't believe such a thing could happen there. So she went home and called up her girlfriends that hang out there and asked what the night club was like. And then during their deliberations, she came back and reported to the jury what that night club was like. You don't want to know what

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happened to her. She used information that nobody knew about. That's not fair, so don't you do that either.

And don't you let people try to bring information to you. And just to tighten that rule up a little bit, I don't want you to talk to those people about anything. Not about whether your yard flooded this morning, not about how the Tigers are going to win the pennant this year. You don't talk to them about--you don't even say hello to them. Anybody who's a witness or a litigant or a lawyer, you don't have any words with at all. And if you're coming down the hallway and you see one of them turn and run it's not because you have bad breath it's because they know they're not supposed to talk to you.

If someone does talk to you I need to know about it and I'll give you an example. One time not too long ago I had a case where on the second or third day there was a juror that came in the morning and she got in the elevator to ride up to the room and there was a deputy on the elevator and one of the lawyers on the case was there. And the deputy knew the lawyer was on the case so the deputy started asking questions about the case, making comments. Well that juror was pretty smart because she said I'm one of the jurors, you two better--better stop talking. Well, they were mortified. She got off the elevator and reported it to me right away. They got off the elevator and beat it up here and tried to get to me first and

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then they got down on their knees and they begged forgiveness and explained what happened. It was not a problem because not enough was said. She handled it the right way. That's the way you should handle it if you overhear things or if anybody tries to approach you.

I don't think this is the kind of case that's going to catch the attention of the news media, but if it does I'm going to direct you not to look at that. No news, no TV, radio, MLive, stay off of all that because those media sources--I think in our town they try to be pretty accurate, but what they'll do is they'll watch the trial for an hour and give a whole day's story and you'll be in here for four more hours. You've got the story, so don't use their accounts, just rely upon the information that you saw.

And when you decide this case, you base your decision solely on the evidence that you've seen here in this courtroom. You don't get to consider information given to you or found by you from anywhere else. And you don't do research. They had a case down in Miami where some lady went on the internet to look up some things that were related to the case, she was a juror. When that Judge down there found out he gave her 90 days. That's not for you to do. If we need to research it, we'll give--we'll do the research for you. You don't go to the site. If we think you need to see where it is, we'll all go together and you'll all look at it

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side by side with your fellow jurors so you'll all know what the--you'll all see the same thing.

You will not share any information about this. You don't get to--well there was another case where this one juror, she went on her Facebook every night and she told everybody what she saw. Don't do that. You're prejudicing yourself.

You may take notes. Mr. Ellis will give you a note pad if you want and he'll give you a pen if you want. There's a rule about your notes though, you keep them to yourself. As a matter of fact, they stay in your chair. When you leave for a minute, they stay in your chair. At the end of the day, Mr. Ellis will collect them and then--and you don't show them to anybody, not even your fellow jurors until I tell you it's time to deliberate. And when I say it's time to talk about the case, you talk about the case, you show your notes to everybody else and use them to help you. But until that time, they stay in your chair.

And I don't want you to think about penalty. That's not a jury's job. Your job is to decide what the facts were. If there's a penalty, that's the job of the judge of the law to impose. It's not to be considered by you. You notice, it wasn't one of those elements I told you about so don't talk about that.

And then when you're deliberating, I want you to use

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everything that has been given to you, all the instructions as a whole. And I don't want you to pick out the instructions that were important to you and ignore the other ones because these lawyers spent a long time preparing this case and they looked at those instructions and designed their case around those instructions. So, if you ignore some of them that's not fair to one side or the other or maybe even both.

And I do want you to keep an open mind throughout this case. An open mind to me is this blank piece of paper. I don't want you to start deciding things right away because if you hear a witness and make a conclusion you prejudiced yourself. You've got maybe two or three more days of evidence to hear and that's not fair, so just gather the information, collect it, catalog it, but don't decide. Wait until you've heard everything to decide this case. Wait until you have the final instructions and the law to decide this case. Wait until you're all together and you're talking about it to decide this case. That's what it is when I say keep an open mind.

Now, I'm done giving you these principles, so now you get to go about your personal business. When you get home, you tell your family and friends you can't talk about the case. They'll ignore you. They'll say well what's it all about? And you'll say, well if I talk to you, Judge Neithercut says he's gonna lock you up until the case is over.

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And they'll say okay, I won't talk. Just let them know, they'll understand.

And be in that second floor room tomorrow morning at 9:15 and we'll get everything organized here and Mr. Ellis will bring you up and then you get to hear from Mr. Sawka again. Mr. Ellis, you ready?

MR. ELLIS: Yes.

MR. SAWKA: One request, Judge?

THE COURT: Okay. Pardon?

MR. SAWKA: The number of juror's instruction.

THE COURT: Okay. We actually have 14 of you and only twelve of you will decide the case. We picked extra jurors because if somebody falls ill or if there's a situation where they cannot attend we still have 12 people here. At the end of the trial if you're all still here and most times you are, we will eliminate two by lottery. And I don't know who the two are. It's not necessarily the two ladies at the end, it could be any of you, and then 12 of you proceed to deliberate.

Now, Mr. Ellis, you can take this jury.

MR. ELLIS: Yes, Your Honor. All rise for the jury.

(At 3:02 p.m., jury excused)

THE COURT: Okay, deputies.

MR. SAWKA: Judge, for the record, I have no objection to the instructions as you read them. I appreciate

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

PEOPLE OF THE STATE OF MICHIGAN,

v

Circuit Court No.
16-040020-FC

DONALD WAYNE DAVIS,

DIGITALLY RECORDED

Defendant.

_____/

JURY TRIAL - VOLUME II

BEFORE THE HONORABLE GEOFFREY L. NEITHERCUT, CIRCUIT JUDGE

Flint, Michigan – Thursday, February 22, 2018

APPEARANCES:

For the People:
Joseph F. Sawka, (P-74197)
Assistant Prosecuting Attorney
LeAnne M. Dao, (P-79247)
Assistant Prosecuting Attorney
900 South Saginaw Street
Flint, Michigan 48502
(810) 257-3232

For the Defendant:
Major J.C. White, (P-58800)
503 South Saginaw Street, Suite 519
Flint, Michigan 48502-1824
(810) 235-7996

Transcribed By:
Tamara Johns, CER 8749
2428 East Wilson Road
Clio, Michigan 48420
(810) 252-6985

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Flint, Michigan

Thursday, February 22, 2018 - 9:19 a.m.

THE CLERK: All rise please.

THE COURT: Thank you. Sit down. The jury should be on their way.

MR. SAWKA: We have one housekeeping matter, Judge, I'd like to place on the record, obviously. We have a mutual sequestration order. I would like to inform the Court, I know that I have the victim's family members and friends present none of whom will be a witness. The one witness who I do have will be his mother will be first to testify, that's Monique Wilson--or Monique Givens, excuse me. After she's done testifying I have no further plans to call her, so I'm going to ask that the Court allow her under the Crime Victim's Rights Act, MCL 780.761 to remain in the courtroom. The Act section 11 says:

> "The victim has the right to be present throughout the entire trial of the defendant unless the victim is going to be called as a witness. If the victim is going to be called as a witness, the Court may, for good cause shown, order the victim to be sequestered until the victim first testifies. The victim shall not be sequestered after he or she first testifies."

At this point, I--once she's testified, I ask the Court to

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allow her to sit in under the statute. Thank you.

MR. WHITE: No objection at this point in time, Your Honor. If it becomes an issue later on, if she creates a scene or causes a disturbance, I may raise an issue at that point, but right now I have no objection to it.

MR. SAWKA: And I'll state for the record, I have informed her of the court's rules about outbursts and if she needs to--if she thinks something's gonna happen, I asked her to excuse herself. So--

THE COURT: She may watch on the condition that she's done with her testimony and that she is calm and civil. Ready. Go ahead.

THE CLERK: All rise for the jury.

(At 9:26 a.m., jury present)

THE COURT: Everybody can sit down. Good morning.

JURY PANEL: Good morning.

THE COURT: Before we get started we want to get some legal pads for you so you can take notes if you want to. I suppose I could tell jokes or something, but--

(At 9:27 a.m., Judge tells the jury a joke)

THE COURT: Thank you, sir. Okay. Now, we will turn to Mr. Sawka and ask him to tell us what this case is all about.

MR. SAWKA: Thank you, Judge. One second. Forgive me for using notes, but this is a large murder case and it's

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not something that somebody just retains automatically. But on April 27th of 2016 around five p.m., Jaeqwantae Jackson was on his way to start his shift as a security guard for River Village Apartment Complex at 702 Father Dukette Boulevard, City of Flint, Genesee County, Michigan. You're gonna hear from Mr. Jackson that as he was walking through the parking lot of the apartment complex on his way to work he noticed a white car. This car was parked near the entrance, but it was parked in the exit area of the entrance and it was running. He thought that was unusual. It's late afternoon, it's bright, it's sunny out, so there's nothing unusual about that necessarily, but as Mr. Jackson got closer, he observed a black male in the driver's seat and that male was dead. He had gunshot wounds and was bloody. That male, we learned his name was Devante Hanson. Mr. Jackson immediately called 911 and I expect you'll hear the 911 call.

You're gonna hear from multiple police officers from various agencies including the Flint Police Department, the Michigan State Police, the sheriff's office, and medical investigators. One of those officers is gonna be Detective Donastorg who you'll hear from. He works with the Flint police. He went with Mr. Jackson on arrival to the security office of Father Dukette Apartments and he reviewed surveillance video footage with Mr. Jackson. And they have multiple cameras from multiple angles.

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Mr. Jackson was able to retrieve some of the surveillance videos and watch them with Detective Donastorg and was able to observe the white car arrive at the apartment complex. And Detective Donastorg and Mr. Jackson will tell you that they saw two black males exit the building, walk towards the car, get into the car. There were--the driver of that vehicle was Devante. You'll see the videos and I think you'll see on those videos that Devante exits the car, meets these two men. One male enters the front passenger seat, one male enters the back passenger seat behind the driver and Devante enters the driver's seat. At that point, you'll see the video approximately a minute or two. At one point Devante gets out of the car, goes to his trunk, comes back, gets in the car. One minute later the car shakes and right then, the male in the front seat who we learned was Spencer Holiday gets out of the vehicle. The male in the back seat who was behind the driver's seat now gets out of the passenger's side of the vehicle back seat. That male we learned was the defendant, Donald Davis.

The officers will explain to you, Detective Donastorg particularly, how they were able to review the cameras and saw both males run across a, more of an enjoining townhouse area and from the car. And they will tell you about how they tried to track them down, but they were not apprehended at that point. Other officers then transported

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the vehicle with Devante's body inside the vehicle to the garage at the Flint Police Department for further examination. And we expect Dr. Hunter, who is the forensic pathologist to testify he located two bullet entrance holes in Devante's body; one to the front chest and then one to the left side of the rib cage. And he'll testify the one to the front chest did an exit and the bullet was recovered. The one to the left chest exited through the right chest. That's unusual. He's gonna tell you we believe that Devante's cause of death was a gunshot wound or wounds and his manner of death was homicide.

You will hear that the police were able to locate the two men who exited the car being Spencer and Mr. Davis. You're also gonna hear as I mentioned in voir dire, Spencer we've made a deal with. You're gonna hear Spencer was originally charged with open murder and felony firearm meaning he committed a felony with a firearm and that felony being murder. And in an exchange for his truthful testimony in this case, my office agreed to allow Spencer to plead to the charge of manslaughter and felony firearm with a sentence agreement.

As to manslaughter, he was sentenced to 53 and a half months incarceration. As to the felony firearm, he was sentenced to two years in incarceration to run consecutive to the manslaughter charge. So in total, he is sentenced to 77 and a half months in prison, and if he does not provide truthful testimony, his plea is revoked and he will face his

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own trial.

Now, I know you're asking why did you do that as any rational person would. You will hear Spencer testify in this case about what happened prior to entering the vehicle, while inside the vehicle, and after exiting the vehicle. And there are only three people who truly know what happened in that vehicle; Devante who is dead, Spencer who told us what happened, and defendant Davis who is currently on trial for murder and other charges.

Spencer's testimony is the link to defendant Davis and defendant Davis was the architect of Devante's death. I expect Spencer's going to testify to the following information. That on that date and time at the Father Dukette apartments he was with defendant Davis in an apartment, and he told defendant Davis, I'm gonna go down the street and buy some marijuana. Well defendant says, you know what, I know a guy. Don't go down to the street. And sure enough, Spencer we expect to testify will tell you defendant called this other man who was Devante. Now he didn't know who he was calling at that point--Spencer didn't know who defendant was calling, but Devante shows up, they go outside.

We also expect Spencer to tell you he and defendant Davis were armed with firearms. Spencer knew defendant had a gun and Spencer might know or believe defendant thinks he knew Spencer had a gun or he might not. But they walk outside,

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Devante drives up, Spencer didn't know Devante. Spencer had no clue who this person was other than he was a friend or some acquaintance of the defendant.

We expect the testimony of Spencer to be that when Devante arrived, Spencer entered the front seat. Defendant Davis entered the back passenger seat behind Devante and Devante entered the front driver's seat. Now, when they're in the car, we expect Spencer to testify that Devante gave him some marijuana. Spencer gave Devante approximately five dollars but didn't like the marijuana which caused Devante to exit the vehicle and go to the trunk. We expect Spencer to testify then at that point, defendant Davis told him while those two were the only two in the car, I'm about to rob this guy and Spencer had no idea this was gonna happen.

Devante got back in the vehicle, Spencer pulled out his gun and aimed it at Devante's back and head from the back seat driver's passenger seat. Devante caught off guard turned around and began to wrestle to try to get the firearm out of defendant Davis' hands and defendant Davis then shot Devante. And we think there will be corroborating evidence in this case to show you that he was shot from the back seat, which would explain the bullet chest--or the bullet wound to the front chest. At that point, Spencer we expect to testify said Devante was breathing really heavy, but defendant Davis then said, hum. He scooted across the seat in the back passenger

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seat, pointed his gun at Spencer and said now you shoot him too or I'm gonna shoot you.

Spencer, you will see him and you can judge his credibility, he's not the most intelligent person we believe. He pulled out his gun, he's gonna testify we think, aimed it, closed his eyes and fired. Then they both got out of the same side of the vehicle. You're gonna watch the videos, you'll see Spencer, they both look back in the car, Spencer bolts. Defendant Davis walks away.

I expect Spencer to tell you that he went to defendant's family member's home where at that point, Donald Davis said give me the guns. He took Spencer's gun, he took his gun, he wrapped it in his shirt and we don't know what happened to it. Spencer does not know what happened to it either. There are no firearms in this case that I will be producing to you. But during the investigation, the officers, the police investigating agency recovered two bullet casings, one in the back seat of the vehicle and one in the trunk of the vehicle where there was a hole. We sent those casings to the Michigan State Police Crime Lab, and you're gonna hear from Ron Crichton, an expert in forensic firearms analysis. He's gonna tell you these bullet casings came from two different guns.

You're also gonna hear defendant Davis has been previously convicted of a specified felony making him

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ineligible to possess a firearm and ineligible to possess ammunition.

I finally expect and towards the end, our last witness is gonna be Sergeant Todd Lanning of the Genesee County Sheriff's office. He's assigned to the Genesee County Jail. He's gonna tell you about how residents of the jail are allowed to email people, how the jail keeps records of the emails through the system they use. And you're gonna hear and see evidence that on January 5th, January 8th of 2018, Detective Chad Baldwin, who's sitting here to my right behind me, one of the investigators in this case, received an email from the Genesee County Jail from defendant Donald Davis asking for a plea deal in exchange for information he knows about another case. We did not grant him anything. But that's gonna show consciousness of guilt we believe.

He also sent an email to someone he knows stating we were talking about trial on the 21st, which is yesterday, but he's trying to get a plea deal. Why is this important? When the evidence is in, it's gonna show his consciousness of guilt. Why ask for something if you are innocent?

All of the evidence I expect you to see and hear in this case, and maybe even touch in this case because we will have some physical evidence, will lead you only to the reasonable and logical conclusion about each charge that the defendant is guilty beyond a reasonable doubt of felony

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murder, premeditated murder, assault with intent to rob while armed, being a felon in possession of a firearm, and being a felon in possession of ammunition, and each of the accompanying felony firearm counts as the Judge explained to you at the beginning of this case. Thank you.

THE COURT: Mr. White, do you wish to make an opening statement?

MR. WHITE: Absolutely, Your Honor.

THE COURT: Go ahead.

MR. WHITE: Thank you. Good morning everyone.

JURY PANEL: Good morning.

MR. WHITE: This is one of the--one of only one of the times I'm gonna be able to speak to you directly, here and during closing statements as well. Just a reminder from when we talked yesterday when you're sitting here now, you're not a clean slate. You have some idea of what's gonna happen in the case, but remember the instructions the Judge gave you? As you sit here right now, Donald Davis is innocent until proven otherwise. He is innocent up until the moment that you walk back into that jury room and begin deliberations and decide what the verdict's gonna be at that point in time. But as you sit here and listen to everything, remember that's the prism through which you're viewing, you're listening, and you're hearing everything.

The Judge had mentioned during voir dire and we had

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testimony that I believe, and then who is looking at basically doing five years at this point in time. So, you'll determine after listening to that testimony whether those emails are either evidence of guilt or a young man who is sitting there saying hey, if I've got something that I can use, when I've seen someone else already take advantage of the system, what can it do for me.

Again, as I indicated this is not the opportunity to argue this to you. Please pay attention to the evidence. You have your notepads. Please take detailed notes, listen to what's being said up on the stand, and I anxiously look forward to being able to talk to you again at the end of the trial. Thank you, Your Honor.

THE COURT: Thank you, sir. Well, those are the lawyer's introductions, let's hear what the witnesses have to say now. Do you have somebody nearby, Mr. Sawka?

MR. SAWKA: Yes. The People are going to call Monique Givens. They have (inaudible) in here.

THE COURT: Go ahead. While we wait jury, stand up.

(At 9:55 a.m., jury stands)

THE COURT: All right, maybe you should sit down now.

MR. SAWKA: I'll be right back, Judge. Apparently, they didn't go where I thought they did.

THE COURT: Good morning, madam. Would you walk up

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to me please? I'd like you to stand for a minute and raise your right hand. Do you solemnly swear to tell the truth in this cause so help you God?

MS. GIVENS: Yes.

THE COURT: Now please step over to the left, there's a little door, you pull that open, go up there and be seated please.

MONIQUE GIVENS

(At 9:56 a.m., witness sworn in, testified as follows)

DIRECT EXAMINATION

BY MR. SAWKA:

Q When you're comfortable, Ms. Givens, please state and spell your first and last name for us.

A Monique Givens, M-O-N-I-Q-U-E, G-I-V-E-N-S.

Q Thank you. I don't normally ask this, but I'm going to for this case, obviously; may I ask how old you are?

A I'm 48.

Q Thank you. And do you know a person named Devante Hanson?

A Yes.

Q How is it that you know Devante Hanson?

A He is my son.

Q Is he your biological son?

A Yes.

Q And who is his father?

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A Jonathon Hanson.
Q In 2016, do you recall how old Devante was?
A He was 22.
Q Do you have any other children besides Devante?
A Yes.
Q And who are they and how old are they?
A Johnathon Givens, he's 25.
Q In 2016, did Devante live with you or was he living somewhere else?
A He was living somewhere else, excuse me.
Q Was he on his own or was he with someone do you know?
A As far as?
Q Living somewhere.
A His auntie.
Q And did--are you aware if Devante had any children?
A Yes.
Q How many children did he have?
A He had two so far.
Q What were their names and how old were they in 2016 if you know?
A Harmony Hanson, she just turned 6. Then Devante, Junior, and he's--I'm not good with their ages, there's so many of them, but uh, four, three.
Q Okay.
A One or the other.

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Q Was Devante married or engaged or seeing anybody at that time in 2016?
A No.
Q If you are aware, did Devante own a vehicle in April of 2016?
A Yes.
Q Do you know what type of vehicle that was?
A It was a white Grand Prix, something like that.
MR. SAWKA: And Your Honor, may I approach the witness?
THE COURT: Yes.
MR. SAWKA: Would you like us to ask each time or maybe just approach?
THE COURT: I trust you.
MR. SAWKA: Okay. Thank you.
BY MR. SAWKA:
Q I'm gonna show you what's marked as People's exhibits 3 and 4--
MR. WHITE: Your Honor, I apologize, but I haven't had an opportunity to see what's being shown to the witness before--
MR. SAWKA: Oh, I'm sorry. I didn't have all the exhibits.
(At 9:59 a.m., Prosecutor Sawka shows Attorney White the exhibits)
BY MR. SAWKA:

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Q I'm showing you what's marked as exhibits 3 and 4, you can just hold them to yourself here okay? Just--you don't show the jury yet, just because they aren't admitted yet. So, looking at People's exhibits 3 and 4, are you familiar with the object depicted in those exhibits which are two photographs?
A Yes.
Q Okay. How do you recognize the object depicted in those photographs?
A My son's car.
Q Okay. Thank you. I'll take those back for right now. Was Devante employed in April of 2016, if you know? If you need a moment, don't feel rushed by any means.
A What was the question?
Q Do you know if Devante was working in 2016, of April?
A Yes.
Q Okay. Where was he working, if you know?
A He had quite a few jobs, I was trying to think of the last one he was at. Mark's something. Uh--
Q Do you--can you just describe what type of work it was?
A Uh--
Q If you don't know, that's perfectly fine.
A I--I mean, it was--I don't know if it was a--it wasn't a--oh my goodness, it wasn't a shop.
Q Ms. Givens, it's perfectly fine. I'm gonna move on, is that

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okay?
A Yes.
Q It's not a problem. I just--maybe we'll try it this way. Did he work anywhere near Father Dukette Apartments in Flint, Michigan on April of 2016?
A Father Dukette?
Q Yes.
A No.
Q And I'm gonna direct your attention a little bit to a different topic now and please feel--if you need to, just take a moment. In April of 2016, did you become aware that your son had died?
A Yes.
Q How did you become aware of that? Was it by phone, email, did someone show up at your house?
A By phone.
Q Okay. Do you know who it was that informed you of his death?
A Um, actually I had quite a few missed calls, so it was their dad.
Q Okay.
A And their--his children's grandmother. His baby mama's mother.
Q Do you know where you were or recall where you were when you learned of Devante's death?
A Where I was?

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Q Yes.
A I was at home.
Q Do you recall approximately what time it was?
A It was in the daytime. I believe it was after 3:00 somewhere when I got the call. In the evening.
Q And this is just a yes or no question. When you learned Devante had died, were you informed how he had died?
A No. When I got the call?
Q Yes. And--
A No.
Q Okay. Prior to April of 2016, so before April of 2016, did you know a person named Spencer Holiday?
A No.
Q Were you aware if Devante had contact with or knew Spencer Holiday prior to April of 2016?
A No.
Q Were you aware if--well let me ask it this--sorry. Prior to April, 2016, did you know a person named Donald Davis?
A No.
Q Were you aware if Devante knew a person named Donald Davis? Prior to April of 2016.
A No.
Q Were you aware of Devante in April of 2016 or prior to selling any types of drugs or pills such as marijuana or prescription pills?

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A No.
Q After you learned of your son's death, did you have a chance to observe his body at some point for cremation or burial purposes?
A Can you repeat that?
Q Yes. After you learned of his death, did you have an opportunity to observe Devante's body for purposes of burying him or ceremonial proceedings?
A Yes.
Q And how did that come about?
A At the funeral home.
Q What I need to have you do, and I'm not--I'm showing you what's been marked as People's proposed exhibit number 1. I need you to identify the person in the photograph, okay? And I'm going to ask you this question first so it is easier. The question I'm going to ask is do you recognize the person in the photograph as Devante Hanson, your son, yes or no? Okay?
(At 10:04 a.m., witness cries)
A That's him.
Q That's him? I know it's hard.
A Can I see it?
Q Okay.
A Yes.
Q I'm sorry, you do have to--
A Yes.

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Q Thank you. We are recording and--

MR. SAWKA: And, Your Honor, I'm gonna reserve the right to admit these photos at a later date. Thank you. That's all I have for the witness.

MR. WHITE: Your Honor, no questions of Ms. Givens. Thank you.

THE COURT: Now jury, you can write down a question and submit it if you wish. And I don't think you wish, so madam, we are really sorry for your loss. You can step down and wait in the back of the courtroom.

THE WITNESS: Okay. Thank you.

(At 10:05 a.m., witness excused)

MR. SAWKA: Your Honor, our next witness will be Jaeqwantae Jackson and Detective Moore is retrieving him at the moment.

THE COURT: Good morning, Mr. Jackson. Would you walk up to me please?

MR. JACKSON: Yes, Your Honor.

THE COURT: All the way up here and then stand for a moment and raise your right hand. Do you solemnly swear to tell the truth in this cause so help you God?

MR. JACKSON: I do.

THE COURT: Now please go left, open that doorway and seat yourself.

JAEQWANTAE JACKSON

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(At 10:06 a.m., witness sworn in, testified as follows)

DIRECT EXAMINATION

BY MR. SAWKA:

Q When you're comfortable, Mr. Jackson, please state and spell your first and last name for us.

A Jaeqwante Jackson, J-A-E-Q-W-A-N-T-A-E. Jackson, J-A-C-K-S-O-N.

Q Thank you. I want to give you a little--just a little bit of a primary--we're recording through these microphones so we have to have yes or no answers. No head nods or anything like that because obviously that can't be recorded. And if you don't understand the question, you can just ask me to repeat it, does that make sense?

A Yes, sir.

Q Okay. Thank you. First of all, Mr. Jackson, I'd like to ask you how old you are.

A I'm 24.

Q And are you currently employed--

A Yes.

Q --with anybody? Where are you employed?

A I'm a cook and I also do security.

Q I'm sorry, what was the last one?

A Um, security.

Q A security being--

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A Guard.
Q --a security guard?
A Yes, sir.
Q I'm interested in this being a security guard. Do you work with a particular company?
A Yes, sir. Lagarda Security.
Q Do you have an official title with Lagarda Security?
A No, sir. Just an officer, security officer.
Q Now when you say security guard or officer, you're not talking like a police officer, you're talking as a private--security guard through a private company, is that true?
A Yes, sir.
Q How long have you been with Lagarda Security as a security guard?
A I would say, it's been a, maybe a little bit over two years.
Q Do you remember when it was you started?
A I started, I want to say August of 2015 maybe.
Q Are you still working as part of the security team as a security guard with Lagarda Security as you sit here today?
A Yes, sir.
Q I'm gonna direct your attention to April 27th of 2016. And what was your occupation on that date?
A Security Guard.
Q With Lagarda Security as well?
A Yeah. Yes, sir.

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Q Did you have a particular assignment with Lagarda Security or was it you went wherever they told you?
A Well at that particular time I was at--I was stationed at a property. I was probably there for about two years. Um--
Q Do you--
A --that's probably where I started off at.
Q Do you recall what property you were stationed at?
A Yep.
Q What property was that?
A It was the River--River Village Apartments.
Q Would that be located at 702 Father Dukette Boulevard, City of Flint, Genesee County, Michigan?
A That'll be that.
Q Thank you. So, we talked about how the security company sends you there. You don't work for the Father--the River Village Apartments, correct?
A Yes.
Q On April of 20--April 27th, 2016, how long had you been working at the River Village Apartment complex in the City of Flint?
A When--what was that date on that again you said?
Q April 27th of 2016.
A April 27th of 2016. I'd say about al--it was almost a year maybe. Maybe almost a year.
Q Are you still working there today as a security guard?
A No, I'm not.

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Q Okay. When did you--when was your last day there, if you recall?
A I want to say, was it before Christmas? I have to say it had to have been around Christmas time. I'm not sure of the exact time.
Q Of this past year--
A Yes.
Q --2017?
A Yep.
Q Can you describe for us what--the jury, what the general duties as a security guard with Lagarda Security means? What do you have to do to be a security guard?
A Well uh, of course, you have to apply--apply. They do do a background check as far as like you know, regular orientation. And then they send you out to the--
Q Okay.
A --local site that they have.
Q Do they provide you any training of any sorts?
A At that site, yes.
Q Okay. What type of training did you receive?
A Basically, like because we have camera systems, I had to know the camera systems. As far as like who the people were that stayed there, um, different like areas of the building, who stays where, the high crime area or the more foot traffic where that stuff is. Basically, my boss just, you know, he

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gave me the overall--
Q Okay.
A --training, yeah.
Q What were your duties on April 27th of 2016 as a Lagarda Security guard?
A My basic duties were access--watching access to the building, making sure that the guests of the resident that stays there, make sure they come sign in, make sure that they show their ID, and make sure that they go to the correct place that they say they're going.
Q So, on April 27th of 2016, did you work at the Father Dukette Apartments that day?
A Yes, I did.
Q Do you recall which shift you were working?
A It was more sort of evening shift. Like the shift ran from like eight to five, five to twelve, and then twelve to eight, so I was doing the five and twelve shift.
Q When you arrived at the apartment complex that day, did you arrive through bus, car, walking, bike, do you recall?
A My vehicle. I have my own car.
Q Okay. So, when you arrived at five p.m. on April 27th, 2016, was it light, dark, it--'cause it's kind of that--
A Uh-hum.
Q --you know, spring starts to appear, so--
A It was light. It was light.

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Q --more daylight, less daylight?
A It was light outside.
Q As you approached the apartment complex, was there anything that caught your attention when you arrived?
A In my--in my car? When I arrived in my car or?
Q Well at any point when you started to go to the apartment complex, when you arrived in the area.
A Um, yeah. When I uh--actually, when I pulled in I noticed that it was a car that wasn't in a parking space, I should say. It was actually pointing away where you would be leaving. Um--
Q Is that unusual to you?
A Yes, it is.
Q Why is it unusual?
A Because when you're going that way you're leaving. You're supposed to be leaving, you're not supposed to be coming in.
Q So are there--with your experience working at Father Dukette Apartments, is that a typical thing you see for way--the way that car was parked?
A No.
Q Do you recall if the vehicle was running or not?
A Yes, it was running.
Q How did you know it was running?
A Uh, noise from the engine.
Q Okay. So, you could hear it?

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A Yeah.
Q Do you--can you describe if you recall what type of vehicle it was based on your personal knowledge?
A I remember it was a white car. I'm not sure what make and model it was, but I know it was a--it was a white car.
Q Okay. And when we say I car I guess, it's important to distinguish was it a truck, a sedan, an SUV?
A More so like a--like a normal car. Like a--
Q Four door or two door?
A Four door.
Q Four door.
A Four door car. I'm not sure the style or make of it.
Q Just--how far away were you when it first caught your attention? Five feet, 15?
A I had just pulled in to the parking lot, so I had to be at least, maybe about 20 or 30 feet from when I first seen it.
Q Okay. When you first saw it, did you see anybody inside the vehicle? Initially, when you first saw it.
A No. At first, I thought somebody just parked there and got out on the other side.
Q Okay. Do you recall if the vehicle had any tinted windows or were they down or up or anything like that that caught your attention?
A All the windows were up. Didn't see a dark enough tint not to see the--who was inside.

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Q Okay. I'm gonna approach again with exhibits 3--People's proposed exhibits 3 and 4. I'm gonna ask for you to first identify for us if you recognize the--or the photographs, do you recognize these photographs?
A Yes, sir.
Q Okay. How do you recognize them?
A Um--
Q What they depict.
A Will you say the question again?
Q Yeah, how do you recognize them?
A That's the--that's how when I pulled in, that's the car I noticed that was parked the other way, you know.
Q Okay. Is this a fair and accurate--
A Oh, yeah.
Q --depiction of the vehicle on April 27th, 2016 that you observed at the Father Dukette apartments?
A Yes, sir.
Q Okay.

MR. SAWKA: People move for admission of People's exhibits 3 and 4.

MR. WHITE: No objection, Your Honor. Thank you.

THE COURT: Admitted.

(At 10:14 a.m., PX 3 and PX 4 admitted)

BY MR. SAWKA:
Q Right now displaying on the screen is People's exhibit number

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3 and I'm gonna ask Ms. Dao to hit number 4 as well. And that's just a different angle of it. So, at that point when you noticed the car, as the security guard, are you required to do anything or did you do anything personally?

A We're--you know, that's not a place you want people to park. So, we--of course, I went up to the vehicle. I was already talking like you can't move there or you can't park there. Already talking as I walked to the vehicle. I didn't get a response, so, that's it.

Q And Mr. Jackson, I have a laser pointer here I want to hand to you, just so you can explain to us exactly what we're looking at as you are in this position.

A Okay.

Q Just hit this red button, okay?

A Yeah.

Q So where is the entrance/exit to--in this picture?

A To the building or--

Q Yes.

A Let's see, that's the entrance there.

Q Okay. And what about the parking lot area? Where would the cars be exiting?

A Um, there is a--there is no entrance or exit in this photo here, but just right behind 'em is an entrance.

Q Okay. So, where the vehicle is--

A Uh-hum. So, you would have to turn there. Turn there from

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here to right here.
Q Okay. So, the way this car is facing if it came out--the cars normally exit out the opposite way, is that correct?
A Yes, sir.
Q Did you end up approaching the vehicle as it was running, like you were close to it?
A Yes, sir.
Q Did you look inside the vehicle?
A Yes, sir.
Q What did you observe inside the vehicle?
A I observed a--first I observed a shirt, a white shirt and the white shirt was red. So, and then I see a guy who is a--it was a black male, he was um--he was laying up against the door somewhat. And um--
Q Let me back you up there--
A Okay.
Q --just a little bit so we can make sure we understand everything. So you are approaching the vehicle?
A Yeah.
Q Just so we can have an idea, if this is the vehicle, approximately--am I standing in the position you were when you first observed a white shirt?
A Well, I didn't--what--what--
Q If you can indicate on--you can--let me stop you, sorry.
A Okay.

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Q If you want to, you could indicate for us on the photograph where you were when you observed the person.
A So when I pulled in, I pulled in right there, kind of right here. So, as I'm walking up, I am, you know, saying you can't park here, you can't park here. So, then I come to the driver's side door and I look in and then that's when I--
Q Okay.
A --noticed the individual.
Q So you first say you saw a white shirt?
A Yep. I seen the white shirt at first because of the tint.
Q And then you observed a person, a body?
A Yes. Yep.
Q Okay. When you observed the vehicle, you were clearly I'd say within a foot of the window fair to say?
A Yep.
Q Did you recall anything about the person in the vehicle that stood out to you?
A Yes.
Q Okay. What was that?
A The white shirt with the red on it. That--
Q Did you know what the red was?
A Uh, no. Well, it didn't hit me until I kind of, you know--
Q Processed--
A --yeah, processed everything, and then that's when I went okay, that's--this is not--

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Q Describe for us if you're--where you're sitting in the witness stand--
A Okay.
Q --how was the male that you saw in the vehicle positioned in the driver's seat?
A Okay. So, in the driver's seat, he was sitting like this with his head (witness leans to the left with his head tilted).
Q Okay. So, he's leaning towards more the door?
A Yeah.
Q Was his head up, down, back, if you recall?
A Kind of leaning back.
Q Did you see any movements in the vehicle?
A No, sir.
Q I'm gonna approach and show you what's marked as People's proposed exhibit number 5. I'm gonna ask for you to identify the photograph. Do you--does this--look familiar to you?
A Yes, sir.
Q Okay. How does it look familiar to you?
A Just the face.
Q Okay. Is this a fair, accurate representation of the male who you saw in the vehicle on April 27th, 2016?
A Yes, sir.
Q Okay.

MR. SAWKA: People move for exhibit--People's exhibit 5 to be admitted.

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MR. WHITE: No objection, Your Honor. Thank you.

THE COURT: It may be admitted.

(At 10:19 a.m., PX 5 admitted)

BY MR. SAWKA:

Q When you talked about processing it, what was going through your mind at that moment as you stood outside the vehicle?

A Um, was a, wow--

THE COURT: Take the photo down, Ms. Dao.

A --just wow. Wow, that's all I could really process was wow. I couldn't even--I couldn't even--it was--it was wow.

Q At that moment did you contact any--911?

A Yes.

Q Okay. Was it immediate or did you wait?

A It was um--it was immediate.

Q I'm gonna approach and show you what's marked as People's proposed exhibit 2. And this is a CD and you had an opportunity to listen to this CD in my office, is that correct?

A Yes, sir.

Q And I had you date and initial the back of it. And what date did you listen to this?

A On the 23rd of this year.

Q Was this a fair and accurate recording of your 911 call relating to the scene at Father Dukette Apartments?

A Yes, sir.

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MR. SAWKA: People move for admission of People's proposed exhibit number 2.

MR. WHITE: No objection, Your Honor. Thank you.

THE COURT: Admitted.

(At 10:21 a.m., PX 2 admitted)

MR. SAWKA: And Your Honor, I'm going to move to play the 911 call at this time. Our speakers unfortunately, sometimes are not the best, so the jury will be able to hear this I presume when they take it back with them as well.

THE COURT: Just so you know, jury, when you deliberate, you'll get to take this disc in with you, so you can play it over again ten times if you want to. And if you don't hear it or see it well enough now, you can play it again.

MR. SAWKA: Thank you, Your Honor.

(At 10:21 a.m., 911 call played)

(At 10:25 a.m., 911 call concluded)

BY MR. SAWKA:

Q After listening to the call, that was your full 911 call to the best of your knowledge?

A Yes, sir.

Q Okay. On the 911 call it sounded like you had said something about checking for bullet holes.

A Yep.

Q Okay. Was that on the outside of the car or were you looking

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somewhere else?
A On the outside of the vehicle.
Q Did--where did you look and what did you see if anything?
A I was just looking around the car just to see if I see any holes. Maybe somebody shooting from the outside in.
Q Did you observe anything?
A Um, observe any holes?
Q Bullet holes, yes.
A No, I did not see--
Q Or to what you believe might be a bullet hole.
A --I didn't see any holes from outside of the vehicle.
Q As you're on the phone with the 911, were you still standing at the vehicle or had you moved somewhere else at that point?
A I was standing--I was standing at the vehicle.
Q Did you ever open the door to the vehicle?
A No, sir.
Q While you were there prior to police arriving did you see anybody else approach the vehicle or leave the vehicle?
A No, sir.
Q Did you take anything or move anything from the vehicle?
A No, sir.
Q Did you see anybody else take or move anything from the vehicle prior to police arriving?
A No, sir.
Q Now on the 911 call, you said you could see a bullet wound, is

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that correct?
A I just--I don't remember saying a bullet wound. I remember saying um, I believe, a hole or blood coming from his chest or on his shirt. I don't quite recall, saying--
Q Okay.
A --a bullet hole.
Q To clarify, so did you observe any wounds to the person yourself or was that just what you had believed had occurred?
A That I believed had occurred. I didn't necessarily even know how it happened, like I say, he could've been stabbed or shot, I'm not sure because I didn't see any bullet holes on the outside of the vehicle. So, I'm not sure if he was stabbed or if he got shot.
Q Okay. So on the 911 call, you were just telling the officer what you--or the 911 technician, what you believed might've happened?
A Yes, sir.
Q Were you present when police officers arrived?
A Yes, sir.
Q From the time that you ended the 911 call, how long did it take for police to arrive approximately?
A Seconds.
Q Seconds?
A Seconds.
Q Did you speak to the police officers about what you had

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observed when you arrived at work?
A Um, eventually yes, but not right off the bat because of course they're trying to assess the situation that's at hand. But yeah, eventually, yes.
Q And you had mentioned something on the 911 call about cameras, is that correct?
A Yes, sir.
Q Does the apartment complex that you worked at, which is the Father--River Village, right?
A Yeah. River Village.
Q Does that have surveillance videos to your knowledge?
A Yes, sir.
Q Does the apartment complex have video surveillance inside the building?
A Yes, sir.
Q What about outside the building?
A Yep.
Q Do you know approximately how many security cameras the apartment complex has?
A Just around the whole property?
Q Yes.
A Around like--close to 300 cameras around the whole property, inside and out.
Q As a security guard, are you familiar with where they're placed throughout the property?

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A Yes, sir.
Q And are you familiar with how the surveillance system operates? Meaning, you're familiar with how it records, where it's stored and stuff like that?
A Yes, sir.
Q Do you know how to review surveillance video footage?
A Yep.
Q During the police officer's investigations in this case, did they request to review surveillance video from the apartment complex?
A They did.
Q Did you assist them with that?
A I did.
Q How do you go about reviewing surveillance video from the security apartment complex with these officers?
A Well, you know, for one I just go back to the camera that the car is at. Um, that is pointed down, and um, I kind of take it back before the car gets there and um, you know, pretty much that's how, you know, you operate it. That's how I operated it that day. I had to go back from before the--well, when the car is pulling in.
Q So the camera video surveillance footage stores information?
A Yes, it does.
Q And you were able to review that information about what happened prior to your arrival?

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A Yep.
Q Is it true that later that date--on a later date another officer came and collected the security video--
A Yes.
Q --surveillance?
A Yes.
Q Did you assist with them and helping them collect it and describe how to do it and what to do?
A Well, that particular time I was there, I think they came a little bit before my shift had started.
Q Okay.
A And um retrieved the data off the DVR, but I didn't--yeah, it was a little bit before my shift, so no, I didn't help them with that part.
Q But you did review all of the surveillance video footage with the police officers at the time that you had called 911?
A Yep. As far as the times and the--yep.
Q I want to approach again and show you what I have marked as People's exhibits--proposed exhibits 46, 47, and 49. And these are discs as well, so starting with 46, I had you review the contents of this video, is that correct? And then after you reviewed it, you signed and dated it?
A Yes, sir.
Q Were the contents of this video a fair and accurate recording of the surveillance video footage that you reviewed relating

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to this incident?
A Yes, sir.
Q And the same is true with People's exhibit 47, you signed and dated it as well after reviewing it on January 23rd of 2018?
A Yes, sir.
Q Is that a full, fair, accurate recording of the surveillance videos as they--as you reviewed them on--relating to this incident?
A Correct.
Q And as to People's proposed exhibit 49, you reviewed this on February 21st, 2018, and was this a full, fair, accurate recording of the surveillance video footage as it relates to this incident?
A Yes, sir.
Q Thank you.

MR. SAWKA: People move to admit People's proposed exhibits 46, 47, and 49 at this time.

MR. WHITE: No objection, Your Honor. Thank you.

THE COURT: Admitted.

(At 10:31 a.m., PX 46, PX 47, and PX 49 admitted)

MR. SAWKA: And Your Honor, what I'm going to ask to do at this time is also publish these to the jury, but while there is a fairly extensive amount of information on these videos, I do have particular points that I would like to move the camera to if it's okay with Mr. White to avoid some of the

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more repetitious issues.

MR. WHITE: No objection, Your Honor.

MR. SAWKA: Thank you.

BY MR. SAWKA:

Q And Mr. Jackson, before we play the video, I'd just like for you to identify, do you recognize what is currently depicted at the beginning of the video?

A Say that again.

Q Do you recognize this area of what's depicted in the video?

A Yes, sir.

Q And could you just tell us what this is briefly?

A This is one of the hallways in the apartment building at the high rise.

Q At Father Dukette?

A Yes, sir.

Q Thank you.

MR. SAWKA: For the record, I'm going to move the camera to three minutes and play starting from there and we're just gonna have you watch just for a minute and I'll ask you some questions in a moment. And--

(At 10:33 a.m., surveillance video played)

MR. SAWKA: For the record, we're gonna start this video, which is People's exhibit number 47, the second video, at three minutes and thirty seconds.

(At 10:34 a.m., surveillance video played)

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THE COURT: Are they standing outside of an elevator or something?

THE WITNESS: Yes, sir.

(At 10:36 a.m., surveillance video paused)

BY MR. SAWKA:

Q Mr. Jackson, the Judge beat me to my question. I was gonna ask you, can you describe for us from the first video which is a hallway to this area that we're looking at now, how--what is the relationship between those two?

A It looks like they're coming from--from an apartment down from the east wing down to the elevator.

Q And the elevator here that these gentlemen have entered, is that an elevator that goes up and down both ways?

A Yes.

Q And it--does it exit anywhere in the building? Where does it exit to?

A It can exit in the--as far as to outside or to another floor.

Q What's--I guess what's--does it go to a ground floor?

A Yes.

Q Is that like a lobby that Father Dukette apartments have?

A It--it has--we have a first floor and then we do have a basement that you can get out and go through the back.

Q Okay. What's on the first floor?

A The first--

Q Is that the exit to somewhere else or is that the ground level

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if you want to exit to the parking lot?

A Yes, sir. Yep, that--it'll be the ground level if you want to exit to the front parking lot.

Q Okay, thank you. And at this time--

MR. SAWKA: And Your Honor, for the record, we're still on the same exhibit 47. It's an elevator, we started it from the beginning.

(At 10:38 a.m., surveillance video resumed)

MR. SAWKA: And now we're going to move it forward to the 16 minute mark approximately.

(At 10:38 a.m., surveillance video played)

(At 10:40 a.m., surveillance video paused)

BY MR. SAWKA:

Q Mr. Jackson, I want to ask you, looking at what's currently being shown on the screen at the mark of approximately 17 minutes and 37 seconds with the elevator door open, do you recognize this area?

A Yes. That--yes, sir.

Q What area is this in the apartment complex?

A That looks to be like the main lobby.

MR. SAWKA: And at this time, I'm gonna ask we now show exhibit 40--excuse me, yes, exhibit 46, which is going to be number 60. And I'm gonna ask to play this from the approximate three minute mark until the approximate eight minute mark.

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(At 10:40 a.m., surveillance video played)

(At 10:46 a.m., surveillance video paused)

MR. SAWKA: And Judge, the last video is People's exhibit 49. And this will be starting at approximately the ten--approximately the ten minute mark.

(At 10:46 a.m., surveillance video played)

(At 10:47 a.m., surveillance video concluded)

BY MR. SAWKA:

Q And Mr. Jackson, just to reaffirm, these videos were the fair and accurate recordings of the surveillance videos, correct, that the Father Dukette Apartments, the surveillance video system records?

A Yes, sir.

Q Are you familiar with residents of the apartment complex at the Father Dukette Apartments?

A Yes, sir.

Q On April 27th of 2016, were you familiar with the residents in general? Maybe not every resident, but just residents?

A Yes, sir.

Q Do you routinely interact with residents of the apartment complex as a security guard?

A Yeah.

Q How often would you say you interact with them?

A Every day I will try to, you know, make sure everybody's doing okay.

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Q On April 27th of 2016, were you aware of a person named Spencer Holiday?
A Yep. Yes, sir.
Q How were you familiar with the person named Spencer Holiday?
A Well he was--his dad was a resident--his dad was a resident there and he uh--he was--he kind of--he kind of made hisself (sic) noticeable, you know. He caused a lot of attention to hisself (sic). Um just, you know, me being a security guard I watch for that stuff, you know? As far as movement, how he moves. He moves a lot and talks less.
Q How many times on--
MR. WHITE: I'm sorry, Your Honor, I didn't hear that answer. I apologize.
BY MR. SAWKA:
Q Could you repeat the answer please?
A Oh, I'm sorry. He moves a lot but talks less, so a person like that, you know, you just watches (sic) a lot. You know, I just observe him.
Q How many times prior to April 27th of 2016 would you say you've had contact with Spencer or observed him?
A Multiple.
Q Multiple?
A Multiple, yes.
Q Have you had personal interactions with him? Like if I were to walk up to a juror and just talk--start talking to them--

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A Uh-hum.
Q --have you had that interaction with Spencer?
A It'd be more so--no. No. It'd be more so like hi, how ya doin'? And most of the time I didn't even--I'd get a--if I did get a response it was kinda low. I didn't really kinda hear it, so I almost feel like he wouldn't even--like didn't acknowledge it.
Q Are you aware if Spencer lived at the Father Dukette apartment complex?
A Yep.
Q He did live there?
A Yep.
Q How long had he lived there to your knowledge?
A From the time I--from the time I had started working there to maybe 'til the incident happened is when I seen him so, I'm sure he was a resident. He was in and out. His dad stays there, so I'm sure he was a resident. He might've not--his address might not have been there as far as like, you know, when you go change your address over, but he was stayin' there.
Q Having watched the videos that we've shown and that have been admitted, did you recognize Spencer Holiday in either of the videos--in any of the videos?
A Uh, I did notice him when they were leaving the apartment and going to the elevator.

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Q And because there were multiple people in the videos, can you describe what the person you know as Spencer Holiday was wearing?
A He had on a--I'm not sure if the video showed, but he had on like a white shirt, white, I want to say yellow or a mustard shirt with Philly on it--with the word's Philly on it.
Q Did he have long hair or short hair if you recall?
A He had, I want to say medium--medium hair. Kinda like braids or short dreads or something. Cornrows maybe.
Q And did you know a person on April 27th, 2016 named Donald Wayne Davis, Junior, or any combination of that name, such as Donald Davis, or anything like that?
A No, sir.
Q Had you ever seen the male that was depicted in the videos with Spencer prior to April 27th, 2016?
A Not to my knowledge, no.

MR. SAWKA: I don't have anything further, Judge. Thank you.

THE COURT: Mr. White?

MR. WHITE: Yes, Your Honor, briefly.

CROSS-EXAMINATION

BY MR. WHITE:

Q Mr. Jackson, just for my own edification and curiosity, when you go in the front door of that apartment complex there you indicated that people had to sign in and out or show an ID, is

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that correct?
A Yes, sir.
Q So, if I go in there to visit someone, I walk in the front door what do I see and what do I do?
A When you--well--when you fall through the front door you have to get buzzed in by the resident. So, the resident usually has to know you're coming in order, you know, for you to get in. They would have to buzz you in.
Q So let me stop you right there. So basically, if I go in that front entranceway, there's gonna be--is there like a wall of buzzers with like apartment numbers on there?
A Oh, yeah. It's like a--like a--it's off to the side is like a phone dial. If you dial the apartment number and it goes straight to the apartment.
Q So, if I wanted to go say like to apartment 205, I would find that button on there and push--
A 205.
Q --and push it. And then it would buzz up into that apartment?
A Yes, sir.
Q And then someone would basically buzz down and let me in to the next portion or let me in to the lobby at that point?
A Yes, sir.
Q All right. And you indicated that someone had to--had to sign in. What do you mean by that?
A Um, usually, um--I think around that time, um, we didn't have

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security during the day, but um, because usually they--the office is open. Um, right now, they do have security 24 hours, but at that time they didn't. So that--at that time they probably didn't have to sign in.

Q All right. And so, when you say that, so the office--as you walk in the lobby, the office would've been located right there?

A Yes, sir. It's--

Q And so, if I'd walked in as a visitor, after I was buzzed in would I have to check in with someone in the office?

A No.

Q All right.

A Probably just--nine out of ten people just walk straight on up.

Q Just walk straight. So is there like--is there like a log book or something that's someone has to sign into?

A There is a log, yep. After five o'clock, during that time there is a log that you have to sign in with time--time--or where you're going, the time in, and then they do have a spot for the time out.

Q All right. And then you also indicated as far as showing ID, who would someone have to show ID to?

A Um, that particular site, we do have people that are banned that can't enter, so they do have to--all guests have to show their ID if they're over 18. You're under 18, you have to be

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with an adult.

Q And then also going finally to Mr. Holiday. Did I hear you correctly that there was someone that as a security guard caught your attention?

A Yes, sir.

Q And would that be because you believed he was suspicious in some manner?

A Well, it's just his overall demeanor. How he was carrying hisself (sic).

Q And what do you mean by that?

A He would--like I say, he would move a lot around the building, but he wouldn't say much. As far as he would come down off the elevator, he would go to the front door and just look, and then he would go--you know, it just--certain activities that he would do kind of just, you know, made me just observe him a little bit more than the others.

Q Okay.

MR. WHITE: Your Honor, I have no further questions. Thank you very much, Mr. Jackson.

MR. SAWKA: I have nothing further, Your Honor. Thank you.

THE COURT: Jury, do you have written questions you would like to ask? I have a question, Mr. Jackson.

THE WITNESS: Yes, sir.

THE COURT: The third video we saw two men running

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through what looked like different kinds of buildings. Not the high rise that we saw on the first two videos.

THE WITNESS: Right.

THE COURT: How close was that video scene to the high rise front door?

THE WITNESS: Um, well that video was kinda sorta in the back. It had to have been maybe a couple yards away. Um, it was between that--the video where they got out the car, in that video where you see them running back towards the, you know, where it's--it's some--it's some video that, you know, it's kinda--it's some space. It's some space between it, it's a couple yards, I wouldn't say a mile. A couple yards.

THE COURT: Okay.

MR. SAWKA: Your Honor, if I could have one second to ask (inaudible) with Mr. White real quick. Judge, I have a follow-up just for that too for clarification--

THE COURT: Go ahead.

MR. SAWKA: --because I know it's hard to explain it. I'm going to approach and show you what's marked as People's proposed exhibit 6. This isn't going to be admitted at this time, but I've shown Mr. White. It's going to be admitted later on. If Mr. White has no objection, I could admit it now just for purposes of clarification and lay the foundation later, or conditionally.

MR. WHITE: I have no objection, Your Honor.

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MR. SAWKA: Okay. Then I'll move for admission of People's proposed exhibit 6.

THE COURT: We'll admit it.

(At 10:55 a.m., PX 6 admitted)

REDIRECT EXAMINATION

BY MR. SAWKA:

Q Mr. Jackson, this was a scene drawing that we're gonna hear testimony about later, but this is the Father Dukette apartment complex. Just assume that for the time being, okay?

A Okay.

Q The--this--let me get my little pointer out here. Thank you. This rectangle right here that I'm pointing to--

A I can't quite see it.

THE COURT: Stand up if you need to.

BY MR. SAWKA:

Q Let's try it this way. I'll approach and just show you.

A Okay.

Q This is what's up on the board--

A Uh-hum.

Q --right here.

A Uh-hum.

Q So that part right--the one in between the two--

A Okay.

Q --with the numbers on it.

A Uh-hum.

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Q Assuming that that's the white car that we see in the video, could you show us using, if you can use the pointer and if the jury can't see it they can let us know and we can have you approach, in which direction are the townhouses that the Judge was referencing in the other video? Where would you have to go from the car in this picture to get to those townhouses?
A Okay. For one, where's the video--where's the building?
Q If the building were here--
A Okay.
Q --and this is the entrance/exit that we've talked about.
A Okay. Gotcha.
Q And that's the white vehicle and then that obviously would be the north. So, this is tilted just--
A Okay, gotcha-
Q --to give us a better picture.
A The um--you couldn't really necessarily see the--that townhomes from this area here. If this would be the entrance here, this is the building where--it'd have to been--you know, you'd have to go back--what shows is--that--it has to be behind the building.
Q Okay. So it's up--behind the building--
A It's on--
Q --and approximately how far away?
A I'd have to say--it's a couple yards.
Q Okay.

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A It's not--I want to say--it's not far. It's not far. I can't really give diameter--
Q I guess we could try to reference it as like streetwise; would I have to run across a street to get there--
A Yep.
Q --or is it adjoining like by a lawn?
A It's a--it's a somewhat of a street. It's somewhat of like a little crossing street and then this is the apartments. This was a--this is a better way I can explain it. You have--I don't know if the pointer's working. Okay. This is the building, say this is the building here--
Q Yes.
A --behind the building is the park--it's another parking lot back there that's gated. The gate--outside of the gate it's a street right there. Then across the street is the townhomes. As far as where they were, they kind of cut through the townhomes, went back by the pool, and went on the other side which is in Glenbrook is where you see 'em running out at.
Q If you could estimate in feet for us from the car to where they were positioned, those two males in the video when they were running, how--approximately how many feet is that?
A Maybe--I'd have to say maybe--I don't want--I don't want to--'cause I don't want to judge--it'd have to--
Q If you--you know what, if you can't answer it honestly without under--without guessing or something then just tell me that.

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That's fine.
A Yeah. I don't wanna--
Q Okay.
A --'cause I don't know.
Q I appreciate that. Thank you.
A But I know it's not far.
MR. SAWKA: Judge, that's all I had. I just wanted to try to clear it up.
THE COURT: All right.
MR. WHITE: Your Honor, may I maybe have some follow-up based on that?
THE COURT: Yes.

RECROSS-EXAMINATION

BY MR. WHITE:
Q Let's try it this way, Mr. Jackson. Maybe something that most of us understand and everything, is it more or less than a football field away?
A Yep.
Q So would you say it'd be more than a football field?
A It'd be about a football field.
Q About a football field?
A Yep.
Q So roughly about a hundred yards away at that point?
A Yep. About--
Q All right. Thank you.

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MR. WHITE: No further questions, Your Honor. Thank you.

THE COURT: That seems to be a measurement unit that we get a lot of in the courthouse.

MR. WHITE: Yeah. I'm sorry, Your Honor.

THE COURT: We seem to use that measurement unit a lot in the courthouse. Mr. Jackson, you can step down. Thank you for being here today.

THE WITNESS: Thank you, Judge.

(At 10:59 a.m., witness excused)

MR. SAWKA: May the witness be excused, Judge? I have no further need to call him I don't believe.

MR. WHITE: No objection, Your Honor. Thank you.

THE COURT: Yes, sir.

MR. SAWKA: Your Honor, at this time--the next witness is approximately a half an hour away. I don't know if the Court would just like to take a short recess and I'll give him a call and see if he can make it here. Maybe he's closer than we think.

THE COURT: I guess I don't have a choice, do I?

MR. SAWKA: I tried.

THE COURT: Okay, jury. I want you to go to your room please and leave your notes on your chair please. Remember you're not talking about the case. Talk about the Tigers and spring training.

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Usually, we would make a party prove that the exhibit really is what it purports to be and prove that it came from the site where they claim it came from. We call that foundation. We're not going to make them do that because they both looked at the exhibits and they both agree about what they are, so you can just accept them on their face.

MR. SAWKA: Thank you, Your Honor. At this time, the People are gonna call Deputy Ryan Heil.

THE COURT: Come on up here, sir. Stand for a minute. Do you solemnly swear to tell the truth in this cause so help you God?

MR. HEIL: Yes, sir.

THE COURT: Now be seated please.

RYAN HEIL

(At 11:28 a.m., witness sworn in, testified as follows)

DIRECT EXAMINATION

BY MR. SAWKA:

Q And when you're comfortable, Deputy, please state and spell your first and last name for us.

A Deputy Ryan Heil. R-Y-A-N, H-E-I-L.

Q Sorry for mispronouncing that.

A Oh, that's all right.

Q What's your present occupation, Deputy Heil?

A Deputy Paramedic for Genesee County Sheriff's Office.

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Q How long have you been a Deputy Paramedic?
A I started on 11/14/14.
Q Now, you say you're a deputy in--with a paramedic designation or is that something different?
A I'm in a Deputy Paramedic Division.
Q Okay. And how is that different from a just general sheriff's deputy?
A It's a dual role. We respond to medicals and also police work.
Q What are your general duties as a deputy paramedic?
A Well, it depends on the call we're given. If it's a medical, we respond as a paramedic. If it's a police call, we--we're a deputy.
Q How is it determined what your role is gonna be? I mean, you say it's based on a call, but what does that mean?
A For example, we get a call, domestic. I'm not worried about the paramedic aspect, I'm completely a deputy on that call. It's based on the information provided by dispatch.
Q So is it fair to say that your role is determined by the nature of the call that is--that you get to decide?
A Yes, sir.
Q Okay. So, it's not necessarily two different roles, it's one role that you are kind of putting on two different hats depending on the circumstance?
A Exactly.

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Q Okay. Do you have to have any special training or experience to become a deputy paramedic or is it just a general deputy?
A Well, you've gotta be a licensed paramedic.
Q And are you?
A Yes.
Q Okay. For how long have you been a licensed paramedic?
A It's been almost six years.
Q And as part of being a licensed paramedic, what role is that within the deputy's office, other training and experience other than just being a certified paramedic?
A Well you go to college to be a paramedic, you get your license as a paramedic. We also attend the police academy and do all the necessary police roles. Once you pass your state license exam, then you're qualified to practice as a paramedic.
Q I want to direct your attention to April 27th of 2016. Were you working in your official law enforcement capacity with the--is it Genesee County Sheriff's office?
A Yes, sir.
Q That day?
A Yes, sir.
Q And while working, do you recall being dispatched to 702 Father Dukette Boulevard, City of Flint, Genesee County, Michigan?
A Yes, sir.
Q Do you remember approximately what time you received the

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dispatch?
A It was approximately 1700 hours.
Q And being military time, that makes it approximately five p.m., is that correct?
A Yes, sir.
Q What was the nature of the dispatch that you recall?
A I recall being dispatched for an unresponsive male inside a motor vehicle in the parking lot of Father Dukette.
Q After you received the call, approximately how long did it take you to respond to the scene?
A A few minutes.
Q Do you recall was it light out, weather?
A It was sunny and dry.
Q When you arrived were there other people already on the scene or were you the first to arrive?
A There was bystanders and security was approximately 100 yards to the north of me, and then also the fire department was right behind me.
Q When you say security, what are you referring to?
A Father Dukette security.
Q Did you ever have contact with the security personnel?
A No, sir.
Q So you wouldn’t know their names?
A No, sir.
Q And you said fire was right behind you, would that be the fire

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department?
A Yes, sir.
Q When you say right behind you, what does that mean?
A Second on the scene.
Q Okay. So, they weren't behind you physically, they were behind you in time?
A Exactly.
Q Now you said bystanders. Approximately how many bystanders were there?
A I can't--I can't recall.
Q Would you say more than 1?
A Yes, sir.
Q More than 2?
A More than 10.
Q Okay. That's fine for an approximation, more than 10. When you arrived were you dressed in a full police uniform or were you dressed as you are now, in a suit and tie?
A No, a full uniform.
Q Did you have a deputy car or were you travelling in an unmarked patrol vehicle?
A It was a sheriff Tahoe, marked.
Q And when you arrived, where was it that you parked your car or where did you stop?
A I parked, I believe I parked right on Father Dukette. Right off of Saginaw.

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Q So you didn't actually enter the apartment complex with your vehicle?
A No, sir.
Q When you parked your vehicle, did you exit it and approach somewhere?
A Yes, sir.
Q Okay. Where did you go after you exited your vehicle?
A I exited the vehicle and secured my surroundings based right next to my vehicle and proceeded towards the parked car in the parking lot.
Q When you say secured your surroundings what does that mean to you?
A Make sure the scene was safe.
Q And what do you do to ensure that for yourself?
A Visualize, look for any suspects, any weapons, any danger, anybody not acting right.

MR. SAWKA: I'm gonna wait until the sirens pass, if that's okay, Judge?

THE COURT: Yes. I think it's a routine run every day between 10:30 and 11:30.

MR. SAWKA: It seems to be that way doesn't it?

BY MR. SAWKA:
Q All right. And continuing, you said you observed a vehicle, correct?
A Yes, sir.

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Q Okay. Where was that vehicle?
A In the--in the main parking lot on Father Dukette right in front.
Q The vehicle that you observed, what do you recall about it?
A It was white in color. The--it was facing towards Father Dukette.
Q The apartment complex?
A Yes, sir.
Q Was it running or not when you arrived?
A I do not recall.
Q When you arrived had--was there anybody around the vehicle itself on your arrival?
A No, sir.
Q Did you observe the vehicle to be open such as the trunk or the doors or anything like that?
A All doors were closed.
Q To your knowledge, prior to your arrival had any police officers or any other people opened the door--
A No, sir.
Q --to the vehicle? When you approached the car, what was it that you initially observed other than just the car itself?
A I observed the victim.
Q And when you say victim, can you describe what this person looked like?
A A black male, white shirt, dark hair.

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Q And where was it that you observed this person?
A In the driver's seat of the vehicle.
Q And I'm just gonna approach and show you what's been admitted as People's exhibit 5. The Court's--it's already been published to the jury, so I'm just gonna ask, is that the male that you saw in the vehicle?
A Yes, sir.
Q Okay. And just for the jury to say--for to see this photograph instead of posting it. I won't have to repost it. The male that you observed in the vehicle, can you describe how you observed him positioned in the vehicle?
A Kind of slumped over slightly, still sitting--still sitting upright.
Q At the time you observed this person in the vehicle did you open the car door at any point?
A Yes, sir.
Q Okay.
A Immediately.
Q And what did you do once you opened the car door?
A I checked to see if he was alive.
Q How did you go about doing that?
A I checked the carotid pulse (inaudible)--
Q And what is that--paramedic terms obviously are a little bit more technical than--
A It's your pulse right here, your main--one--

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Q So you're, for the record, your right hand is pointing to your right side of your neck by your chin area?
A Exactly.
Q Okay.
A You can check it on either side.
Q And when you checked the pulse of the person in the vehicle what was--did you discover a pulse?
A Absent. None.
Q After you opened the vehicle and you checked this person's pulse did you check for any other bodies or anything else in the vehicle itself?
A After--after I confirmed and checked his pulse then I searched the surroundings one more time. I didn't open up any doors of the vehicle just more secured the surroundings because at that point in time I realized it was a shooting.
Q What made you think it was a shooting based on your observations at that point?
A The blood on the shirt. I lifted up his shirt and seen a gunshot wound to the chest and also to the right lower abdomen area, approximately this area.
Q When you checked his pulse what does your paramedic training require you to do at that point if you discover there's an absence of a pulse?
A It depends. It's all different. In this situation it's considered a traumatic arrest. Based on the gunshot wounds

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and the unknown down time and when the incident occurred, you--if it's--if he's pronounced right there you leave him there to secure all evidence at that point.

Q You said traumatic arrest. What does that mean in your terminology?

A Gunshot wounds. Any fatal gunshot wounds, car accidents, falls, any type of traumatic injury.

Q So in this instance you stated that you lifted up his shirt correct?

A Yes, sir.

Q What caused you to lift up the shirt? Why did you think that was important?

A The blood.

Q On his shirt?

A Yes, sir.

Q And when you lifted up the shirt you stated you saw a, was it a gunshot wound you believed? Or was it--

A Yes, sir. It was a gunshot wound.

Q And on your body indicating for us where did you believe you saw it at?

A I see one in the chest and then in the right lower abdomen in--approximately in this area.

Q Now did you move the body at all to like conduct some sort of examination of the body?

A To see the--I moved him slightly towards me and then I

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noticed--that's when I noticed the one on the right lower abdomen area.

Q Once you noticed the one on the front chest and the one on the lower right area, did you check any other portions of his body--

A No, sir.

Q So you didn't look to his back or his left side or his legs or anything like that?

A No, sir.

Q As part of your training and experience, when you've discovered a body and you've determined that there was no pulse at that point what is it that you're required to do?

A I contact a local hospital. It could be any of the three in the county. I contacted Hurley at that time.

Q And what is it that you have to do when you contact Hurley other than just contacting Hurley?

A Give them the story based on what I see. Same things I told you and speak with a doctor to get a time of death.

Q At this time when you say get a time of death, how--what does that--how does that work? How can the doctor give you a time of death if you're on the scene and the doctor hasn't seen the body?

A Based on the information I give him.

Q Okay. So, in this case do you recall what it was that you--did you--well first let me back up. You called Hurley--

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A Yes, sir.
Q --do you remember approximately what time that was in there?
A Shortly after arrival.
Q Okay.
A I don't approximately, exactly.
Q Do you recall if you spoke with the doctor?
A No.
Q Okay.
A I do not recall.
Q Did--
A I have a doctor's name.
Q Wait, what?
A I gave the doctor's name in my report, but I do not remember if I spoke with him or not.
Q Oh, okay. And if you called Hurley, what would have been your purpose for calling Hurley?
A The--to get the time of death.
Q So, can--is it just a doctor that gives you time of death or is it anybody who--like a nurse?
A It could be their assistant, it could be a nurse, it's just given under the doctor's name, who's ever on--
Q Whosever on call?
A --on call that night or time.
Q And in this case, did you request a time of death determination?

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A Yes, sir.
Q So you did speak with somebody there?
A Yes, sir.
Q You just don't happen to remember the name of this person?
A No, sir.
Q When you spoke with them you told them I'm assuming everything that you've just testified to here today. Is there anything else that you told them that informed their decision?
A No, sir.
Q Do you recall what time of--what the time of death was if you know?
A No, sir. I do have it in my report if you would like for me to--
Q Oh, if you have it in your report and it would refresh your memory I can get that for you.

MR. SAWKA: Do you have any objections, Mr. White?

MR. WHITE: No.

BY MR. SAWKA:
Q I'm going to approach and hand you a three page document, I guess first I should ask you is this the report that you determined or is there another one?
A This is it, sir.
Q Okay. So, you can just take a minute to review that and just let me know when you're done reviewing it.
A I'm all set.

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Q Okay. My question to you was, let's back up first; do you recall the doctor you spoke to? Is that listed in there at all?
A Yes, sir. It's listed in here as Dr. Rockford.
Q And you requested a time of death, and what time of death was given to you if one was given?
A 17:15. 5:15 p.m.
Q P.m. Thank you. So, you've called for the time of death and at that point are you required to just leave the scene and say I'm done or is there something else that you have to do at the scene?
A No, sir. I help out. I ask the supervisor on the scene, in this case it would've been Flint City if they need any help or any assistance.
Q From the time that you made your call to the doctor to get the time of death, had additional police arrived on the scene?
A Yes, sir.
Q Approximately, I'm not asking for an exact number, do you recall how many? Two, five, approximately?
A I couldn't even guess.
Q Okay.
A It was a few.
Q Do you recall how many people you talked to about what you observed when you arrived and what you did?
A I talked to the immediate responding officer. I don't recall

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the name. And then the--I did talk with the supervisor for a brief moment based on what I had seen.

Q And they took your information about it and then they followed up--

A Yes, sir.

Q --to your knowledge. After you've talked to the supervisors and informed them of what you saw and required--did what you were required to do as a deputy paramedic, do you have any further involvement in the case at all?

A No, sir.

Q Okay. And since the--April 27th of 2016, did you have any further developments or investigation in this case outside of what you've already testified to?

A No, sir.

Q Thank you.

MR. SAWKA: I don't have anything further, Judge.

THE COURT: Mr. White?

MR. WHITE: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. WHITE:

Q Deputy, you used the expression that we get a call. When you say we get a call, what do you mean by that?

A Dispatched a call.

Q So when you say dispatch, 911 has received a phone call and then they dispatch it out to you correct?

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A Yes, sir.
Q And did that call come specifically to you or was it to any vehicles in the area?
A Based on that it's the closest.
Q The closest--
A Whoever's--
Q --and so you responded correct?
A Yes, sir.
Q And then also, while you were there and you're securing the scene, is part of your job at that point in time do you--did you note any sort of items of interest or anything that you wanted to make sure that you pointed out to the responding officers?
A No, sir.
Q All right. So, you're not looking around for any other physical evidence or anything of that nature?
A No, sir.
Q All right. And then finally, when it comes to time of death, we're not saying that in this instance we're not saying the time of death is exactly when Mr. Hanson's bodily function seized, that's just when a medical professional said I'm gonna note this as the time of death correct?
A Yes, sir.
Q Thank you.

MR. WHITE: Your Honor, I have no further questions.

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Thank you, Deputy.

MR. SAWKA: I don't have any redirect, Judge. Thank you. I ask the witness be excused unless the Court or jury has any.

THE COURT: Jury, do you have any written questions here? It looks like you may be excused--

THE WITNESS: Thank you, sir.

THE COURT: --deputy. Thank you.

(At 11:43 a.m., witness excused)

MR. SAWKA: Your Honor, due to--the next two witnesses who had prior appointments, we won't have them here until 1:30. I apologize for the gap, but I don't have control of their schedules.

THE COURT: Well, I hope you brought something to do. So, what we'll do is we'll stop here. Mr. Ellis will take you to lunch, I guess it'll be an early lunch, and then you can come back and watch TV or take a snooze or read a book or do something until that witness gets here. Leave your notes there, stand up and go into the jury room.

MR. ELLIS: All rise for the jury.

(At 11:44 a.m., jury excused)

THE COURT: You can all sit down and I ask everyone to stay in the courtroom until the jury gets off the floor please.

MR. WHITE: Your Honor, is the courtroom gonna be

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locked? Can we leave our materials in here?

THE COURT: Do you want to--

MR. WHITE: Do I want to leave my materials here? Yeah, I'd prefer, but--

THE COURT: I'm sorry?

MR. WHITE: Can I leave my materials in here? Is the courtroom gonna be locked during the break or--

THE COURT: I can lock it, but if somebody wants to work in here I'm gonna leave it unlocked.

MR. WHITE: Oh, okay. I'll take it--

MR. SAWKA: I don't have any reason--none of us need to stay do we?

THE COURT: We'll lock it up then.

MR. WHITE: Thank you, Judge.

MR. SAWKA: I have no objection.

MR. WHITE: Okay.

THE COURT: Go ahead deputies. Yeah, just stay there please.

MR. SAWKA: I just want to let the Court know for the record, there were--

MR. WHITE: Yeah, I want to make sure that's--

MR. SAWKA: --family members in the hallway, but there was no contact with the jury from what--as they passed by. I don't want there to be any issues.

THE COURT: That's why I wanted everybody to wait.

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MR. SAWKA: Oh, yeah. They were--

UNIDENTIFIED SPEAKER: They were outside the door.

MR. SAWKA: They were already outside, that was the problem, so sorry.

(At 11:46 a.m., court recessed)

(At 1:58 p.m., court reconvened)

MR. ELLIS: All rise.

THE COURT: Okay. Thank you. Are we ready, Mr. Sawka?

MR. SAWKA: Yes, Your Honor.

THE COURT: Then we'll bring the jury in and you all can sit down until the jury enters the room please. Well no, we're not ready. We are not ready. Who is in the gallery that works at Hurley Hospital? Nobody in the gallery. You maybe? Do you work there or not?

UNIDENTIFIED SPEAKER: Pardon me, sir?

MS. FRYE: I work there.

THE COURT: Sit down. I want you to come up and stand at that lectern right there please.

MS. FRYE: Right there?

THE COURT: Yes. I want you to come up here and stand where that microphone is.

MS. FRYE: Okay.

THE COURT: What is your name?

MS. FRYE: Daundria Frye.

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THE COURT: Say it again?

MS. FRYE: Daundria Frye.

THE COURT: Frye?

MS. FRYE: Uh-hum.

THE COURT: Spell it for me.

MS. FRYE: Um, D-A-U-N-D-R-I-A. Frye, F-R-Y-E.

THE COURT: Where do you work at Hurley Hospital?

MS. FRYE: Housekeeping. Environmental Services.

THE COURT: And you are here watching this trial why?

MS. FRYE: Why am I watching it?

THE COURT: Yes.

MS. FRYE: Because Devante Hanson was my kid's father.

THE COURT: So you know, counselors, the jury has complained that that woman has tried to talk to them.

MS. FRYE: No. I didn't try to talk, I just saw a lady and I asked--I'm like did you--do you work at Hurley's? I know I'm not supposed to talk to them.

THE COURT: I've got two choices. One is to find you in contempt of court and lock you up.

MS. FRYE: Is you serious?

THE COURT: I'm serious. The other is to order everyone in the gallery to leave the courthouse and not come back. What we're going to do is this; in order to lock you up

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I'd have to get you a lawyer first and that wastes time because we have things to do here. So instead, I'm going to bar everyone from this courthouse except for the mother of Devante Harris (sic). The rest of you leave. Don't you come back.

MS. FRYE: Okay.

THE COURT: Shame on you trying to subvert the justice system.

THE DEPUTY: Just have them hold until somebody (inaudible). Your Honor, we're gonna have a deputy escort them out.

THE COURT: That's a good idea.

THE DEPUTY: We're gonna get a deputy to escort you out.

UNIDENTIFIED SPEAKER: Judge, you did mean for the remainder of the trial correct?

THE COURT: For the remainder of the trial, all the way in to next week.

UNIDENTIFIED SPEAKER: All right.

THE COURT: The only person allowed to watch this trial is the mother of the young man who died. What foolishness.

MR. WHITE: Your Honor, may we approach?

THE COURT: Yes. Do you want this on the record or off the record?

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MR. SAWKA: It probably should be on because I think it's for both of our benefit here.

THE COURT: Okay.

MR. SAWKA: Do you want to have the jurors who have a complaint to come in to double check to make sure that there has been no comment that has been made that's gonna prejudice the--anything?

THE COURT: No.

MR. SAWKA: Okay. Fair enough.

THE COURT: No. It was a short comment. What she asked one juror was, do you work at Hurley Hospital.

MR. SAWKA: Okay. So, there's nothing about the case itself that was implicated?

THE COURT: Right.

MR. WHITE: Well it's still enough to sit there to cause some concerns, but I guess you worked it out. I understand why the concern (inaudible).

THE COURT: Sure.

MR. SAWKA: It's up to you. Do you want him--are you okay with it?

MR. WHITE: (inaudible) with the Judge's decision.

MR. SAWKA: I don't have a need for a hearing if that's all that was said.

THE COURT: I don't think it's necessary.

MR. SAWKA: Okay. Thank you.

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THE COURT: I don't want to make the jury nervous. Now we'll bring the jury out.

MR. ELLIS: All rise for the jury.

(At 2:04 p.m., jury present)

THE COURT: Everybody else can sit down. Sorry that we all had to wait so long, but we can get started now, so let's go ahead, Mr. Sawka.

MR. SAWKA: Thank you, Judge. The people will call Michael Mize.

THE COURT: Come on up to me please, sir. Good afternoon.

MR. MIZE: Good afternoon.

THE COURT: Do you solemnly swear to tell the truth in this cause so help you God?

MR. MIZE: I do.

THE COURT: Please be seated.

MICHAEL MIZE

(At 2:05 p.m., witness sworn in, testified as follows)

DIRECT EXAMINATION

BY MR. SAWKA:

Q When you're comfortable, please state and spell your first and last name.

A Michael Mize, M-I-C-H-A-E-L. My last name is M-I-Z-E.

Q Thank you. Mr. Mize, what is your present occupation?

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

PEOPLE OF THE STATE OF MICHIGAN,

v

Circuit Court No.
16-040020-FC

DONALD WAYNE DAVIS,

DIGITALLY RECORDED

Defendant.

_____/

JURY TRIAL - VOLUME III

BEFORE THE HONORABLE GEOFFREY L. NEITHERCUT, CIRCUIT JUDGE

Flint, Michigan – Tuesday, February 27, 2018

APPEARANCES:

For the People:
Joseph F. Sawka, (P-74197)
Assistant Prosecuting Attorney
LeAnne M. Dao, (P-79247)
Assistant Prosecuting Attorney
900 South Saginaw Street
Flint, Michigan 48502
(810) 257-3232

For the Defendant:
Major J.C. White, (P-58800)
503 South Saginaw Street, Suite 519
Flint, Michigan 48502-1824
(810) 235-7996

Transcribed By:
Tamara Johns, CER 8749
2428 East Wilson Road
Clio, Michigan 48420
(810) 252-6985

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MR. WHITE: One moment, Your Honor. Your Honor, no further questions. Ms. Besson, thank you very much.

THE COURT: Mr. Sawka?

MR. SAWKA: I don't have any redirect, Judge.

THE COURT: Jury, your written questions of this witness? There are none so you can step down, Miss. Thank you.

THE WITNESS: Thank you, sir.

(At 11:14 a.m., witness excused)

MR. SAWKA: People will call Detective Walters.

THE COURT: Stand up and stretch jury. Morning, Detective. Walk up to my bench please. Do you solemnly swear to tell the truth in this cause so help you God?

MR. WALTERS: I do, Your Honor.

THE COURT: Be seated there please.

DIRECT EXAMINATION

(At 11:14 a.m., witness sworn in, testified as follows)

JASON WALTERS

BY MR. SAWKA:

Q When you're comfortable, Detective Walters, please state and spell your first and last name for us.

A Jason Walters. J-A-S-O-N, W-A-L-T-E-R-S.

Q Thank you. What's your present occupation?

A I'm employed by the Michigan State Police. I'm currently

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assigned to the Flint major case unit.

Q How long have you been a police officer?

A I've been with the State Police for about ten years. I've been assigned to the major case unit for about four years now.

Q And we heard a little bit about a major case unit from Detective Donastorg. Can you just reiterate for us what that actually means within your line of work?

A When I first got out there I was assigned to non-critical shootings and like armed robberies. So as those cases came in to the PD, we would be assigned. That was a two man team. We'd go back and forth to who was the officer in charge for that case, but it's pretty much the same as a homicide. You're in charge of everything as far as the investigation is--witness the events, collection of evidence and stuff like that.

Q I direct your attention to April 27th, 2016, were you working in your official law enforcement capacity that day?

A Yes, I was.

Q What was your assignment that day?

A I was in the office just routine--

Q So you weren't on road patrol or out--

A No, I was--we're--I work out of an office. We just work our cases when we're not taking new ones.

Q And while working were you dispatched at some point to 702 Father Dukette Boulevard, Flint, Genesee County, Michigan?

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A Yes, I was.
Q Do you recall approximately what time it was, night, evening, or even a time?
A I believe I wrote in my report that it was at 17:50 hours, so 5:50 p.m.
Q And when you received that dispatch were you working with anybody or were you just working alone?
A I ended up responding to the scene with Detective Trooper Fiebernitz.
Q And were you dressed as you are here today or were you in full police uniform like we just saw Detective Besson in--or excuse me, Officer Besson?
A No. Without the coat it would be the same thing, dress pants, shirt and tie.
Q When you arrived what did you initially observe at the scene?
A The parking lot of 702 Father Dukette, which is like a high-rise apartment. The parking lot was taped off. Inside the taped area we observed--or I observed a white Pontiac towards--it was kind of parked in the driving area of the parking lot, it wasn't parked in a spot, and it was up towards the front of the apartment complex.
Q When you observed the vehicle was it running or not, if you recall?
A I don't believe it was.
Q Were you able to see inside of the vehicle?

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A Yes.
Q What did you observe?
A There was a black male sitting in the front seat.
Q Was he covered in anything at this point or was he still observable from head down to his toes or wherever it may be?
A Well it would be the head to the torso.
Q Okay. Did you eventually observe the license plate on the car?
A Yes.
Q Did you run it through what's called LEIN?
A I didn't personally run it, I did have it run on the scene though.
Q What is that? Please describe it for us.
A LEIN is the Law Enforcement Information Network. Basically, it compiles a whole bunch of information like your driver's license, your vehicle registration, if you have any warrants, those would be entered into LEIN. There's a whole bunch of other stuff that we can run through it. Like if I have one of your names and I need to know where you lived, I can run your name and figure out your address or if I knew your address and I wanted to know who lived there I could back and vice versa, figure out who comes back to that address, but--
Q When you ran the license plate through LEIN did you eventually learn that the registered owner of that vehicle was a person named Devante Hanson?

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A Yes.
Q While at the scene did you or another trooper take scene measurements?
A Myself and Detective Trooper Fiebernitz took the measurements.
Q Okay. So, when we hear about measurements we always think probably about like particular actual inches, meters, diameters, whatever it may be, is that how you did it or was there another way in which you went about taking measurements?
A I guess I'm not a hundred--I mean, yes. I mean you'll have your scene and so it's in the middle of the parking lot. We'll find two fixed points that won't move so if something happens and we need to come back at a later date we can measure off those known fixed points. So we will run either, we can use a laser, which we didn't have at that time or we have a long tape measure. We can run from that fixed point to an object and you take all those measurements, and you take the other fixed point and run to the object and that way where those intersect is the exact location of where the object was.
Q And it was actually Trooper Fiebernitz that created the scene drawing correct? You were just assisting him in the, I guess measurements and construction of the scene, is that fair?
A That's correct.
Q All right. I'm gonna show you what's been marked as People's exhibit 6. Is that--and admitted. That was the scene drawing that Detective Trooper Fiebernitz made to your knowledge and

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that you assisted with?
A Yes.
Q Okay. Now, I think we sometimes hear the words to scale. In this instance, do you recall, or I could have Trooper Fiebernitz who will testify next talk about that if you are unaware if this was to scale or not?
A That's not gonna be to scale, no.
Q Okay. Would you be in a better position to testify about that or would Detective Fiebernitz?
A I guess ultimately, Detective Fiebernitz because he's the one that--
Q I just want to make sure that--
A --created the drawing, but I mean, it's not gonna be to scale. We do not measure the length of the car--
Q Okay.
A --or the length of the parking lot and all that stuff.
Q So we'll move on. While conducting your investigation, did you obtain a search warrant for Devante Hanson's vehicle?
A Yes, I did.
Q And did you also obtain a search warrant for apartment 1111 at 702 Father Dukette?
A Yes, sir.
Q Did you obtain those search warrants around 10:45 p.m.? Was it in the evening, I believe--
A Yes, it was.

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Q Were you personally part of the team that executed each search warrant?
A Yes.
Q Were the other officers Fiebernitz, Dixon, Donastorg, and Officer Besson who was here?
A Yes.
Q Was anyone in the apartment 1111 at the time you executed the search warrant?
A I don't recall. I don't believe so, but I don't recall.
Q Do you recall anything that was discovered of importance in the apartment that you recall?
A No.
Q Did you also obtain a search warrant for 902 Glenbrook Unit B?
A Yes.
Q Around the same time, 10:45 p.m.?
A All--they all would've been included in the same search warrant I do believe. I don't believe we had--
Q Oh, okay. So, they weren't individual search warrants you're saying?
A I don't believe so. I believe they were all added into the same search warrant.
Q Again, the same people that executed the apartment complex with you, did they execute the unit with you?
A Yes, they did.
Q I want to talk about Mr. Hanson's car. We've heard that that

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was taken to the Flint Police Department garage. Were you part of the team that went to the garage to assist in the investigation of the car?

A Yes, I was.

Q To your knowledge, was Devante Hanson the driver of that vehicle in the vehicle, at that point did you know that was Devante Hanson or not?

A I believe we knew at that point that it was Devante Hanson, yes.

Q And did that result from the LEIN that you believed, or was there other information that you had?

A I had talked to the girlfriend at the scene. She had indicated to me that that was his car.

Q Okay. So--

A The plate came back to him. We had no--I don't remember if we had a, like an ID card. I'm pretty sure he was positively ID'd by that point in time though.

Q So when you conduct your search at the Flint Police Department garage, what is your role in that? What did you do?

A Kind of directed the evidence tech of what we needed as far pictures all around. We had her swab the doors.

Q And if anything, did you find anything of importance that you believed was relevant to this case inside of Devante Hanson's vehicle?

A Yes. When we were searching the vehicle, we found a spent

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bullet in the trunk and there was copper jacketing in the back seat.

Q I'm gonna show you what's been marked and admitted as People's 35. Does this photograph look familiar to you at all? And if not, that's fine.

A Just one (inaudible), I mean, I can't really tell what I'm looking at.

Q And maybe 36 might assist you.

A That is the trunk of the victim's vehicle.

Q And as it relates to People's exhibit number 59, do you recognize this photograph?

A That was the bullet that we found in the trunk.

Q Now is this one that you personally found and directed Ms. Besson to collect?

A Yes.

Q And as it relates to People's exhibit number 16, do you recognize what is depicted in this photograph?

A That was the copper jacket that was found in the back seat.

Q And that was also something else that you directed Ms. Besson to collect?

A That's correct.

Q Anything else--I guess the question should be, Mr. White has asked Ms. Besson if she searched underneath the seats. Did you guys conduct searches underneath the seats at any point or anything around the seats?

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A Yeah, we would've pulled the seats out the best we could.
Q Was there anything that you found underneath the seats or anywhere within, I guess, the compartment area of the vehicle outside of the bullet jacket that's depicted in People's exhibit 16 that was related to maybe a bullet or firearms or blood or anything like that?
A No. We would've collected it if we would've found it.
Q When you examined the vehicle--
MR. SAWKA: Would you put People's 15 up please?
BY MR. SAWKA:
Q --was this a fair, accurate depiction of how it looked when you were examining it with the blood or suspected blood, a hat in the vehicle at all if you remember?
A Yes, it was.
Q Okay. Did you at any point try to smear the blood or move the blood or do anything that you were aware of?
A No, we didn't touch the blood other than having Besson take swabs, but we didn't touch it.
Q Do you recall if there was any blood outside of the vehicle or on the sides of the vehicle?
A I believe there was blood on the passenger side.
MR. SAWKA: And if you could show People's exhibit number 12.
BY MR. SAWKA:
Q And the photograph depicted in 12, is that what you were

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referring to?
A Yes, and I also thought there was a little bit on the exterior of the door, but--
Q Okay. And outside of the vehicle, the blood that you observed, is there anything else outside like I guess on the hood or the back or anything like that?
A No, there was not.
Q Okay.

MR. SAWKA: I don't have anything further. Thank you.

CROSS-EXAMINATION

BY MR. WHITE:
Q And I'm sorry, is it Detective, Trooper, or Detective Trooper?
A Detective Trooper.
Q Detective Trooper. Hi Detective Trooper Walters. You said that you were dispatched to the scene. How were you dispatched to the scene?
A I was just given a call saying that they had a suspected homicide and they asked me to respond out there.
Q And who gave you that call, do you recall?
A I don't recall at this time.
Q All right. And when you say that there was a suspected homicide is it because you're part of--I believe you classified yourself on the major crimes bureau, is that why you were given a call to respond?

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A Yes, sir.
Q And so you went there with Detective Fiebernitz correct?
A Correct.
Q Did the two of you travel together out there?
A Yes, we did.
Q So, you arrive on scene, there are other officers on the scene already correct?
A That's correct.
Q Is Lieutenant Cate from the City of Flint Police Department on the scene? If you recall?
A I don't recall.
Q All right. Well when you arrive on scene as far as the major crimes bureau are you guys in charge when you arrive?
A Yes.
Q All right. So basically, as far as the chain of command goes, you and Detective Fiebernitz are directing people around correct?
A Yes.
Q I mean basically, the steps that are going forward at that point in time, it's your call as to what happens correct?
A Until--we weren't--it wasn't our week and we knew the responding team was in route, but yes, we are in charge of what's at that scene at that time.
Q So if I'm hearing you correctly, it's--let me stop you for a second, when you say it's not your week, what do you mean by

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that?

A There's a rotation up there. We're (sic) currently have three teams. So, every third week my team will be up for any calls that come in. So, when I say it's not my week, if a call comes in on an off week but we are at the PD they will request that we go out and assist.

Q And so then you respond and then you're just there until whoever's their week on call until their able to arrive on scene correct?

A Correct.

Q And so basically, once they arrive you hand it off to them?

A As far as the officer in charge capacity, I'm still there to assist.

Q You're still there to assist, but as far as making the call as to what's to be done or not done, do you hand that off to someone else?

A Well the officer in charge will take over, yes.

Q All right. So in this case, you arrive on scene and I believe you indicated you were the person that actually went and got the search warrants, is that correct?

A Correct.

Q And there were two locations that are--the vehicle and also two locations that you got search warrants for correct?

A Correct.

Q And did I hear you testify that--stop back for a second. So,

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you get a search warrant and you go to the scene of where the search warrant is, when you arrive with that warrant what are you doing?

A Of the search warrant?

Q Correct.

A Searching the specified location.

Q For what?

A Guns, I think we had some clothing that we were aware of at the time that we might've been looking for.

Q Okay. Well I thought that I heard you say you didn't find anything of importance at the scene when you did the search warrant, is that correct?

A I would have to look at the tabulations, but I don't recall any--finding anything of real significance at the residence.

Q Well at the house on--or excuse me, I shouldn't say the house, but the apartment on Father Dukette you collected multiple cell phones, is that correct?

A At that the 1111?

Q No, the--yeah, sorry, I apologize. Apartment 1111.

A That's quite possible, yes. That's pretty standard.

Q And the search warrant also indicates that you find a marijuana grinder, is that correct?

A I would have to--I'm taking your word for it.

Q If I showed you a copy of the property receipt from the search warrant that was at 702 Father Dukette apartment 1--I mean,

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1111. It looks like it was taken in by Officer, or excuse me, IB tech Besson, would that refresh your memory?

A Yes, sir.

MR. WHITE: Your Honor, may I approach?

THE COURT: You may.

BY MR. WHITE:

Q All right. So, looking through--after looking over that, collected multiple cell phones correct?

A Correct.

Q Also collected a marijuana grinder correct?

A Correct.

Q And then also collected a box of ammunition while you were there also as well correct?

A Yes.

Q And then you also after that went to another location which would've been the Glenbrook Circle address, do you recall that?

A Yes.

Q And then while you were there you also at that location collected multiple cell phones correct?

A Correct.

Q And then also collected a sweatshirt and some clothing you indicated correct?

A Yes.

Q While at that location did you find any firearms or ammunition

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at that location?
A No. Not that I'm aware of.
Q Then going back to the scene, were you the individual who directed IB tech Besson what to photograph?
A I--I don't recall.
Q You don't recall. Do you recall if you were the one that directed her to collect the evidence that she collected?
A In the vehicle?
Q Yes.
A It--yes, I did at that point.
Q And then also as far as the photographs that she took, are you the one that directed her what to photograph and what not to photograph? Let me rephrase that question. Were you the very individual who directed her what to photograph?
A Yes.
Q All right. Did you instruct her to do any sort of DNA swabs on anything in the vehicle?
A I believe we directed her to, before we even opened the vehicle (indiscernible) the vehicle we swabbed all the door handles and then I believe we took blood samples from inside the vehicle.
Q Did you direct her to fingerprint anything as far as it went to the vehicle?
A I believe we attempted, I don't believe she was able to lift any prints.

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Q And as far as the search of the interior of the vehicle, it was you and Detective Trooper Fiebernitz that did that correct?
A Correct.
Q And so when you're going through that you'd indicated I believe that you had moved the seats back and forward, is that correct?
A Yes.
Q Searching underneath the seats and there was nothing photographed with the seats moved forward correct?
A I don't know all the photographs she took. I--
Q Let me ask the question this way then. Did you observe anything underneath the seats once they were moved forward that caught your attention?
A No, we did not.
Q Did you happen to search the glove compartment?
A Yes, we would've.
Q What about the console?
A Yes.
Q And so as far as those two locations you found nothing that was of interest or importance to you correct?
A That's correct.
Q When you were searching the vehicle did you find any marijuana inside the vehicle?
A I--no, I do not believe so.

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Q So neither the interior--you didn't find any marijuana in the interior or the trunk of the vehicle correct?
A That's correct.
Q Did you find a digital scale inside the vehicle?
A I--not that I recall. I mean, well if we would've it would've been tabulated.
Q It would've been--you would have directed IB tech Besson to collect it correct?
A Correct.
Q As far as any sort of plastic baggies inside the interior or the trunk of the vehicle, do you recall finding any of those?
A I do not.
Q And as far as jackets or cartridges, anything of that nature, you only found the one in the back seat correct? There was only one bullet jacket found inside the car correct?
A That's correct.
Q And then finally, when you were searching inside the vehicle, did you notice any damage inside the vehicle where if anything had been broken in any way?
A Other than I believe there was a bullet hole through the driver's seat that went through the--and there was one that went through the back seat into the trunk.
Q And there was also a seatbelt that had been damaged also as well, correct?
A I believe so.

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MR. WHITE: Your Honor, I have no further questions. Detective, thank you very much.

REDIRECT EXAMINATION

BY MR. SAWKA:

Q Detective Walters, I'm gonna show what's marked as Defendant's exhibit 1 and 2. If you can just hold it like that so the jury can see what we're talking about. Thank you. I know that the Judge can't see, you might want to--if you want to show him. Does that look familiar to you regarding the inside of the vehicle?

A Yes, it does.

Q Okay. What is the portion that you talked about the damage being done to the vehicle?

A I was talk--

Q Or the seatbelt I should say, sorry.

A --he was talking about the seatbelt. But I mean, obviously, if you've got the seatbelt thing there, you've got part of the seatbelt--

Q Cap?

A --cap there on the ground.

Q Okay. And so that the jury can see, I don't have a blowup of this one. You guys will also have this back in the courtroom--or not the courtroom, excuse me, your jury room. And I'm gonna show you defense exhibit number 3. Does this look familiar to you at all?

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A I believe that's the back seat, correct? It looks like the back seat where the bullet went through and would go--lodge where we found it in the trunk after it passed through the back seat.

Q Okay. And then--

MR. SAWKA: --and I know that's very difficult to see everybody at the moment, but you'll have the photographs as well. Outside of that, I don't have anything further. Thank you.

THE COURT: Jury, questions? Step down Trooper. Thank you.

THE WITNESS: All right. Thank you, sir.

MR. SAWKA: Judge, our last witness for this morning is gonna be Detective Fiebernitz.

THE COURT: How long will he go?

MR. SAWKA: How long, I'm sorry, what?

THE COURT: How long will he go?

MR. SAWKA: Not that long I don't think. Probably the same as Detective Walters.

THE COURT: Okay. I'm just trying to schedule the jury.

MR. SAWKA: Yes. I can inform you, we--at two p.m., we have Dr. Hunter. He's scheduled, I'll assume him to be here at 2:00. And then our other witness is being brought.

THE COURT: Yes. Good. Detective, walk up to my

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bench please. Do you solemnly swear to tell the truth in this cause so help you God?

MR. FIEBERNITZ: I do.

THE COURT: Please be seated there.

DAVID FIEBERNITZ

(At 11:36 a.m., witness sworn in, testified as follows)

DIRECT EXAMINATION

BY MR. SAWKA:

Q And when you're comfortable, Detective Fiebernitz, spell state and spell your first and last name.

A It's David, D-A-V-I-D. Last name is Fiebernitz, F as in Frank, I-E, B as in boy, E-R-N-I-T-Z.

Q Thank you. It's probably repetitive to the jury, but what is your present occupation?

A I'm a Detective Trooper with the Michigan State Police.

Q How long have you been a trooper with the Michigan State Police?

A 31 years.

Q Any prior experience?

A No.

Q All right. And I understand you're actually up for retirement--actually, did you just retire?

A Tomorrow is my last day.

Q Congratulations, you get to testify. What a way to go out.

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A Right.
Q I'm gonna direct your attention to April 27th of 2016. Were you working in your official law enforcement capacity that day?
A Yes, I was.
Q And we've heard some testimony already and I'm gonna try to, without objection if there is any, move us through the beginning portions. Your assignment that day, what was it if you recall?
A I was actually working afternoons at the Flint Police Department's Major Crimes Unit. There was a homicide that had occurred. The way that we do it, my team wasn't up, it was a different team but because I was working I was asked to go out and assist them in any way that I could. So, I did that.
Q You say team, you guys work in pairs?
A They're four man teams. At this time there were four four man teams. Like I said, I wasn't on this particular team at that time, but because I was working I was asked to go up and assist them.
Q And were you directed to or dispatched to 702 Father Dukette, Flint, Genesee County, Michigan that day?
A Yes, I was.
Q Do you recall if that was evening around 5:00, 6:00, 7:00, 8:00 any in there--sometime in there?
A It was right around six p.m., yes.

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Q When you arrived, can you just describe the scene for us when you arrived?
A Father Dukette is on--is off of Saginaw where it runs true north and south. It's on the east side of the road. There's actually a drive right there. I remember when I went up there that the inter--parking lot area was taped off. So, when you come in on Father Dukette from Saginaw you run into the east and the parking lot runs off south of that, so that was taped off. There was a lot of people standing on the other side of the tape, it was actually on Father Dukette. There were some police vehicles within the taped off area, the parking lot area. I don't exactly recall where I parked at when I went there. But I proceeded--
Q Were you with Detective Walters at that point?
A I was.
Q Did you guys travel together or were you in separate cars?
A I don't recall if we went together or not.
Q At some point you arrived on the scene and you meet each other?
A Yes.
Q Okay. Did you eventually end up speaking with other officers at the scene learning the investigation, the process, what they had done before you began doing your own investigation?
A Just briefly, yes.
Q And did you observe a white vehicle?

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A Yes, I did.
Q Do you recall if that vehicle was on or off at that time?
A It was off if I recall correctly.
Q Did you approach the vehicle at any point?
A I did at some point in time, yes.
Q Did you observe anything in the vehicle?
A There was a deceased male in the driver's seat of the vehicle.
Q Was he covered at any point because we've seen a photograph that he was covered in blue later in the evening or was he not covered at that point so you could observe him?
A I don't recall if he was covered or not.
Q Okay. You eventually learned the vehicle was registered to a person named Devante Hanson, correct, through a LEIN check?
A That is correct.
Q You and Trooper Walters worked together to take some scene measurements and created a scene diagram correct?
A That is correct.
Q I'm gonna show you what's been marked and admitted as People's exhibit 6 I believe. Is this the scene diagram that you personally drew of the scene?
A Yes, it is.
Q Okay. There is a second page to this the jury has not seen just yet because we were waiting for you to testify. Thank you. So, I've got a--this is your handwriting and your actual drawing?

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A Yes.
Q Sketch. Okay. So, you've got a little--some--I'll call it letters and numbers up there just for the time being. And this is the actual exhibit that's been admitted. It's a two-page document, and the first thing I'm gonna ask you is can you tell us what the rectangle near the middle actually is from your scene drawing?
A That represents the white vehicle that was in the parking lot with the deceased male inside.
Q Now you've got some numbers down here. I see a number 1, number 2, and number 3, correct?
A That is correct.
Q What do those correspond to?
A Those are things that could be used as potential evidence that were located around the vehicle that we marked and we measured during our scene measurements.
Q And do you recall what number 1, number 2, and number 3 are from the second page? Did you document those?
A I did.
Q And what was number 1?
A Number 1 was a piece of paper.
Q Okay. And what was number 2?
A I just wrote down plastic.
Q And I'll show you again Defendant's exhibit number 1, if you can identify that. Is that the piece of plastic that you

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observed?
A Yes.
Q And there's a red cone or an orange cone in there in that picture with a little piece of yellow underneath it, correct?
A Correct.
Q Is that the piece of paper that's number 1?
A That is correct.
Q Okay. And I'll just go ahead and pass it around to the jury.

MR. SAWKA: Do you object, Mr. White?

MR. WHITE: Not at all.

MR. SAWKA: That's fine, so they can see.

BY MR. SAWKA:
Q Number 3, what was number 3?
A A cigarette butt.
Q And now, to the right of the vehicle, can you tell us what the circle is and there's some letters or numbers in the circle?
A That would be light pole number 2. That was used as one of our reference points when we took measurements.
Q Okay. And my guess is this little circle over here is light pole number 1?
A That is correct.
Q So describe how you go about taking measurements so that the jury can understand what this scene is supposed to depict?
A So depending on what type of scene we have will dictate what kind of measurements we do. So, what we used here was

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triangulation. Myself and Trooper Walters, we would have a piece of paper writing down light pole 1, light pole 2. We did the car, so using light pole 1 we measured the center of the tires of the vehicle on the left side. And then for light pole 2, we did the same thing on the right side. And then what we'd do with the evidence as best as we could going underneath the car is we would hold, we call it the dummy end at the light pole, and we'd measure it out to that piece of evidence. And then we would use on the other light pole the same evidence to triangulate where the location is at so that if we ever had to go back and recreate the scene you could take the measurements and take the measuring tape and put them back as we found them as best as possible at that time.

Q Now the jury has seen some photographs already of the vehicle during the daylight at the apartment complex. Is your drawing to scale of the apartment complex and the surrounding areas as it's depicted?

A It's as close as we can be to scale with measuring tapes. There are better methods out there that we didn't have access to at that time.

Q Okay. So, for example, do you know the exact I guess width where the car is located like feet wise? Are you able to actually tell us that? Like is that 50 feet, 100 feet, 2,500 feet?

A Well what I can tell you is that the left rear tire of that

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vehicle is 18.2 feet. So, the measuring tape that we were using at the time, sometimes we have measuring tapes that have inches, other times it's in metric, it's .2. So, the measuring tape we had at this time was in metric. So, if we go from light pole one to the left rear tire it's 18.2 inches.

Q Okay. Then my last question for you is down here there's this little I guess rectangle with a point, it looks kind of like a pencil down in the lower left corner, what is that?

A That's just the boulevard mark or divider to the entrance of Father Dukette.

Q Okay.

MR. SAWKA: That's all I have, Judge. Thank you.

CROSS-EXAMINATION

BY MR. WHITE:

Q Good morning, Detective Fiebernitz.

A Good morning.

Q So my understanding is that you responded that day with Detective Walters, is that correct?

A That's correct.

Q And if I heard correctly, you work for MSP and you're assigned here in the City of Flint, is that correct?

A That is correct.

Q And then you respond mainly to homicides and do you respond to anything other than homicides?

A During this time period I responded to homicides and any

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critical incidents, so a stabbing, critical shooting, or if there was (sic) youths involved, juveniles.

Q So as far as like in this situation here in this scene, when MSP or Major Crime Bureau responds and everything, how does that work with the City of Flint Police Department? I guess, who's in charge? Whose investigation is it?

A Every team is different.

Q Uh-hum.

A So at this time with the four teams there was two Flint police officers and two MSP officers. And we would rotate through and like I said each team would do it differently, but we would rotate through and keep track of who took the last homicide, who took the last critical shooting. So, at any given time, they know who's up, but whoever's up for the next one, when that call comes out it could be either state or Flint City and that's how it's determined by that time. And then if it's a state guy, then they're the OIC and follow it through. Same thing with Flint City.

Q And if I--Detective Walters had testified that basically you guys weren't on call this week, but you were just there to be able to take the first dispatch, is that correct?

A That is correct.

Q And then eventually when the next team was available you would hand it off to them correct?

A That is correct.

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Q But in the meantime while you're involved, your investigation is as if it's your case correct?
A That is correct.
Q Taking every step that you would normally do if you were gonna follow it from beginning to end, you're doing everything the exact same way correct?
A That is correct.
Q So then that way when the next team hopefully takes over it's a seamless transition as far as the investigation goes?
A That's right. And this communication goes on between the team that's there and us reporting officers to make sure that everything is done that needs to be done and nothing is missed in that instance.
Q As part of the major crimes bureau and also working for the Michigan State Police, you have access to the crime lab at Bridgeport, is that correct?
A That is correct.
Q And they also have a team that will respond to homicides or respond to critical scenes correct?
A That is correct.
Q And as far as making that call to that unit and having them respond, how is it determined whether a call is made or not?
A Typically, it's gonna be the officer in charge when they arrive on scene. We kind of look at the scene and see if it's something that we can manage ourselves, or if it's a really

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complex scene then we'll contact the lab. The lab doesn't always come out. There's been times when they've said no, but that is an option that we have.

Q And just so we're clear for the jury, when the lab or the team comes out and everything they come out in basically their CSI van and there are a couple of different people who have various specialties, correct?

A That is correct.

Q And then once they arrive on the scene do you turn it over to them or do you direct them to do something?

A It's turned over to them, but if there's specific things that we're looking for that they're not aware of just by arriving that we will notify them of that and have them process different pieces or look at different aspects of it.

Q And as far as this scene goes, once you arrived on scene you and Detective Walters determined that this was not a case where you would need to call the lab, is that correct?

A I don't remember who made the call, but it was just we were requested to do the scene sketch and the scene diagram.

Q Oh. So as far as that part of it goes, that wasn't part of whether you would've made the call to have them respond or not?

A That's correct. We would've waited for someone from the other team to see what they wanted.

Q So basically at that point in time, you would turn--it would

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have been turned over to someone else correct?
A That is correct.
Q And then as far as what you did, the scene diagram and then also you had responded or actually executed two search warrants, is that correct?
A That is correct.
Q At 1111 Father Dukette correct?
A That is correct.
Q And then also, Glenbrook Circle correct?
A What was the last part?
Q The Glenbrook Circle address also?
A Yes, sir.
Q And then as far as when you were at those two scenes, what you collected and also who were the individuals that were on scene that was information you would've turned over to the next team, is that correct?
A That is correct.

MR. WHITE: Your Honor, I have no further questions. Thank you very much and congratulations on your retirement.

THE WITNESS: Thank you.

MR. SAWKA: I have one redirect.

REDIRECT EXAMINATION

BY MR. SAWKA:
Q I guess talking about the MSP Crime Lab group that comes to scenes, is that in every case that they--your off--or as a

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police officer you say well we need all these people to come here to investigate a case?

A No. Like I said, we've contacted them in the past and there's been instances where they've said no, that they're not gonna respond.

Q But in this case, there just was no necessary need for them to your knowledge?

A That's correct.

MR. SAWKA: I don't have anything further.

THE COURT: Written questions, jury? None. Go forth and enjoy.

THE WITNESS: Thank you, sir.

(At 11:49 a.m., witness excused)

THE COURT: And you're done for the morning?

MR. SAWKA: Yes, Judge. Our next witness is not gonna be here until two o'clock.

THE COURT: One of the things I've learned is is that Mr. Sawka and Mr. White are really quick. They get to the point. Any delay we've had has been caused by witnesses that had their own schedules. But it looks like Mr. Ellis will take you to your lunch now and when we come back we'll hear the next witness when he's available.

MR. ELLIS: All rise for the jury.

(At 11:50 a.m., jury excused)

THE COURT: And of course, I want everybody to stay

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here until the jury gets off the floor, so just relax. And deputies, you can move Mr. Davis.

MR. WHITE: Your Honor, just as one moment, just as a housekeeping matter as well. I understand it's very emotional for Mr. Hanson's mother also as well, but I don't think it's appropriate once the jury is walking by for she and the victim advocate to be hugging on each other and patting each other on the back at that point in time. I--it's still going on, the trial's still going on at this point in time, I don't want to influence the jury. I understand it's very emotional for her, but I have to place an objection to that sort of behavior when the jury is walking by.

MR. SAWKA: Judge, I had my back--I didn't see anything, but I didn't see if the jury made any motions or nods, I'm unaware of anything, but I will ask--obviously, they're both present right now, my victim's advocate and Ms. Givens, who is the victim's mother. If the Court wants to give some sort of warning to them, I don't have an objection to that.

THE COURT: Ms. Givens, you have to be very neutral. See when you lean over and seek consolation, you're evoking a request for sympathy from the jury and we're not allowed to do that.

MS. GIVENS: Sorry, Your Honor.

THE COURT: So, just be very neutral.

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MS. GIVENS: Sorry, Your Honor. My apologies.

THE DEPUTY: Are we good to take him, Judge?

THE COURT: Yes.

(At 11:52 a.m., court recessed)

(At 2:09 p.m., court reconvened)

MR. ELLIS: All rise.

THE COURT: Thank you. Are we ready to go?

MR. SAWKA: Yes, Judge.

THE COURT: All right. Then we'll get the jury in here. Ms. Givens, this is not going to sound pretty. Are you up to it?

MS. GIVENS: Yes.

THE COURT: Okay.

MR. ELLIS: All rise for the jury.

(At 2:10 p.m., jury present)

THE COURT: Come on up here, Doctor. Yes, sir please. Everybody else can sit down. Do you solemnly swear to tell the truth in this cause so help you God?

MR. HUNTER: Yes.

THE COURT: Be seated please.

MR. SAWKA: For the record, People call Dr. Hunter.

BRIAN HUNTER

(At 2:11 p.m., witness sworn in, testified as follows)

DIRECT EXAMINATION

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

PEOPLE OF THE STATE OF MICHIGAN,

v

Circuit Court No.
16-040020-FC

DONALD WAYNE DAVIS,

DIGITALLY RECORDED

Defendant.

_____/

JURY TRIAL - VOLUME IV

BEFORE THE HONORABLE GEOFFREY L. NEITHERCUT, CIRCUIT JUDGE

Flint, Michigan – Wednesday, February 28, 2018

APPEARANCES:

For the People:
Joseph F. Sawka, (P-74197)
Assistant Prosecuting Attorney
LeAnne M. Dao, (P-79247)
Assistant Prosecuting Attorney
900 South Saginaw Street
Flint, Michigan 48502
(810) 257-3232

For the Defendant:
Major J.C. White, (P-58800)
503 South Saginaw Street, Suite 519
Flint, Michigan 48502-1824
(810) 235-7996

Transcribed By:
Tamara Johns, CER 8749
2428 East Wilson Road
Clio, Michigan 48420
(810) 252-6985

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MR. WHITE: Well, just to be clear for the record (indiscernible) I'm going to provisionally rest after that, Your Honor, and then we'll go through my--with my client--

MR. SAWKA: Oh.

MR. WHITE: --whether he's going to testify or not, just to--

MR. SAWKA: Yes, thank you.

MR. WHITE: --be clear for the record.

THE COURT: Yes. Thank you. Okay, Mr. Ellis, bring in the jury please.

MR. ELLIS: Yes, Your Honor. All rise for the jury.

(At 9:45 a.m., jury present)

THE COURT: Everybody sit down please. Good morning, jury.

JURY PANEL: Good morning.

THE COURT: Begin, Mr. Sawka.

MR. SAWKA: Thank you, Judge. The People are calling Spencer Holiday.

THE COURT: Mr. Holiday, would you please stand and face me and raise your right hand. Do you solemnly swear to tell the truth in this cause so help you God?

THE WITNESS: Yes, sir (inaudible).

THE COURT: Now sit down please.

SPENCER HOLIDAY

(At 9:46 a.m., witness sworn in, testified as

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follows)

DIRECT EXAMINATION

BY MR. SAWKA:

Q All right. A couple of things, Mr. Holiday. First, it's very difficult to hear sometimes in this courtroom--

A Yeah.

Q --so, I'm gonna ask you to keep your voice up, and if you don't understand a question that I ask, just ask me to rephrase it or just let me know you don't understand it, okay?

A Okay.

Q Thank you. First thing I'm going to have you do is state and spell your name for the record.

A Spencer Holiday. S-P-E-N-C-E-R, H-O-L-I-D-A-Y.

Q Okay. Thank you. As you sit here today how old are you?

A 22.

Q Did you complete high school?

A No, sir.

Q What was the highest grade that you finished?

A Tenth grade.

Q Did you attend school here in Genesee County?

A Yes.

Q In April of 2016, that would've made you 20 year's old?

A In 2016, yeah. 20.

Q Did you have a job in 2016?

A I worked with my dad on landscaping.

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Q Where were you living in April of 2016?
A In River Village.
Q River Village?
A Yes.
Q Is that an apartment complex?
A Yes, sir.
Q And is that also known as 702 Father Dukette?
A Yes, sir.
Q And you said you lived at the River Village, did you live in an apartment there or something else?
A In an apartment.
Q Did you rent the apartment?
A Yes, sir.
Q Did anybody else rent the apartment with you?
A My girlfriend.
Q And what was her name?
A Tajanique.
Q That's a unique name. Could you spell that for us?
A T-A-J-A-N-I-Q-U-E.
Q And what about your father, did he live there with you or rent--
A He stayed there with me.
Q Okay. And you say stayed, does that mean that he stayed a long time or just kind of intermittently meaning short periods?

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A Short periods.
Q And what's your father's name?
A James Albert.
Q What room number or apartment number did you have?
A 1111.
Q Now obviously, as you sit here today you're dressed in what we call the orange, right?
A (no audible response)
Q Your current incarceration is at what's known as the Carson City Correctional Facility correct?
A Yes, sir.
Q And that is obviously a place of imprisonment correct?
A Yes, sir.
Q And you are incarcerated because of a plea that you entered with my office in this courtroom involving a case which was a murder, right?
A Yes, sir.
Q And that related to why you are testifying here today, is that true?
A Yes, sir.
Q And we're gonna talk about that throughout this time, okay? Do you know a person named Donald Davis, Junior?
A Yes, sir.
Q How is it that you know Donald Davis, Junior, and I mean as a friend, a family member, something else?

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A An acquaintance.
Q Okay. And what does an acquaintance mean to you?
A An associate.
Q Is that different from a friend?
A Yes.
Q Do you recall the first time you met the person you know as Donald Davis, Junior?
A I met him the day--the day before the incident happened.
Q So would that be approximately April 26th of 2016?
A Yes, sir.
Q Do you see the person you know as Donald Davis, Junior in this courtroom today?
A Yes, sir.
Q Okay. What I'm gonna ask that you do is first tell us where that person is at and then identify a particular item of clothing that the person is wearing.
A He's over there sittin' next to his lawyer with a white shirt on.
Q Okay.

MR. SAWKA: Would the record reflect the identification of defendant Davis, Your Honor?

THE COURT: Yes.

MR. SAWKA: Thank you.

BY MR. SAWKA:
Q Is the defendant Davis known through any nicknames to you?

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A Uh, DJ.
Q DJ?
A Yeah.
Q The letters D and J?
A Yeah.
Q How is it that you first met the defendant?
A My brother introduced me to him.
Q And what's your brother's name?
A James Albert.
Q So your father's name is James Albert and your brother's name is James Albert?
A He a Junior.
Q James Albert, Junior?
A Yeah.

MR. WHITE: And Your Honor, I guess just for clarity, is James Albert, Junior the father or the brother?

BY MR. SAWKA:

Q Is your father's name Junior or is that your brother's name?
A My brother's named Junior.
Q And Spencer, you were originally charged as a co-defendant of defendant Davis in this case correct?
A Yes, sir.
Q Now you were originally charged, if you remember, with one count of open murder and one count of--

MR. WHITE: Your Honor, at this point in time I'm

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objecting to the leading nature of the questions at this point. If he'd just ask Mr. Davis--I mean, excuse me, ask Mr. Holiday if he recalls what he was charged with and have him answer the question as opposed to leading him.

THE COURT: It's a preliminary matter, it's judicial convenience so he can do it.

MR. SAWKA: Thank you.

BY MR. SAWKA:

Q You were originally charged with one count of what's called open murder and one count of possession of a firearm during the commission of open murder correct?

A Yes, sir.

Q Now in relation to your charges, did you accept a plea agreement in exchange for your truthful testimony in this case against the defendant Davis?

A Yes, sir.

Q And I'm actually going to approach and show you what's marked as People's exhibit number 60. I'm just gonna ask do you recognize this one-page document?

A Yes, I recognize it.

Q Okay. Could you just tell us briefly what it is?

A It's a plea agreement.

Q How do you recognize it?

A Because I see it say manslaughter and I see it say 15 years. I see where it say 64 months. I see--that's what I see.

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Q Okay. So, you recognize it as your plea agreement--a copy of your plea agreement?
A Yes, sir.
Q And you recognize your signature down at the bottom along with your attorney's?
A Yes, sir.
Q Okay. Is this the full, fair, accurate to your recollection the plea agreement?
A Yes, sir.
Q Okay.

MR. SAWKA: Your Honor, I'm gonna move for People's--admission of People's proposed exhibit number 60.

MR. WHITE: You know, I thought it'd already been admitted, but I have no objection to it.

MR. SAWKA: This is one that we had discussed after, so--

MR. WHITE: I have no objection, Your Honor.

THE COURT: It's admitted.

MR. SAWKA: Thank you.

(At 9:53 a.m., PX 60 admitted)

BY MR. SAWKA:
Q Okay. Now regarding your case that you have, do you remember if I was the actual prosecutor that entered the plea agreement with you?
A Was you the actual prosecutor?

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Q Right.
A I believe it was a different prosecutor.
Q Female or male?
A I think it was a female.
Q Now as part of the plea agreement, the prosecutor who was working on your case agreed to amend your charge from open murder to manslaughter correct?
A Yes, sir.
Q As you had just mentioned.
A Yes, sir.
Q And in the plea agreement it also states the prosecution would recommend you serve a minimum of 64 and a half months on the charge of manslaughter correct?
A That's what was the--but they dropped it down to 53 months.
Q And we're gonna get into that in a minute.
A Okay.
Q So, but the plea agreement does state 64 and a half months, right?
A She was supposed to go to the middle of my guidelines.
Q I know you're jumping ahead and we're gonna get there.
A Yeah.
Q I just need a yes or no if it was 64 and a half months, that's all.
A Yes, sir.
Q Okay. And you ended up pleading guilty to the amended charge

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of manslaughter on June 12th, 2017 correct?
A Yes, sir.
Q Okay. Now, you also had the charge of you mentioned felony firearm correct?
A Yes, sir.
Q And did we offer you a plea agreement on that charge?
A I don't believe so.
Q And you pled guilty to felony firearm as well correct?
A Yes, sir.
Q Now in this plea agreement, People's exhibit 60, it also said, the prosecutor wrote you were required to provide truthful testimony in this case which says:

"Defendant shall provide truthful testimony as required by prosecutor consistent with interview by Detective Watson."

And you remember that correct? Yes or no, we have to have answers.
A Yes, sir.
Q All right. Now when it says, "Shall provide truthful testimony as required by the prosecutor consistent with the interview by Detective Watson", what does that mean to you when you sign this? What did you understand the agreement to be?
A That I supposed to have gave--give testimony.
Q Okay. Now Detective Watson is somebody who conducted an

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interview with you correct?
A I believe so.
Q Okay. And do you recall if you gave maybe some inconsistent statements during the interview? If you recall.
A What does inconsistent mean?
Q Inconsistent would mean things maybe--like if I say I saw a red car versus I saw a blue car, I tell two different types of events, that's an inconsistency.
A Yes, sir.
Q Okay. Did you recall if you gave any inconsistencies with Detective Watson that's all?
A Yes, sir.
Q Okay. When you spoke with Detective Watson, and you understand that you're supposed to provide truthful testimony, is it your understanding that we want you just to testify for only what helps the prosecution's case, even if it's untruthful, or is it your understanding we just want the truthful testimony? Whatever's the truth that you were telling Detective Watson?
A Yes, sir.
Q Which one is it? I know it's a long question. Do you need me to rephrase it?
A Yeah, rephrase it for me.
Q Okay. You're required to provide truthful testimony--
A Yes, sir.

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Q --you understand that?
A Yeah.
Q Consistent with what this prosecutor says is consistent with the interview by Detective Watson correct?
A Yes, sir.
Q If you gave two maybe different types of maybe statements--
A Stories.
Q --yeah. Do you think we just want you to testify with whatever helps the prosecution's case or are we asking you to tell us just what the truth is even if you gave different stories?
A Just what the truth is.
Q Okay. And as you sit here today, are you--you heard the Judge give you an oath to tell the truth, right?
A Yes, sir.
Q And you're sworn to tell the truth and you understand that?
A Yes, sir.
Q And given your understanding of the plea agreement is--you will be telling us the truth regardless if you gave maybe different stories to Detective Watson, is that true?
A Yes, sir.
Q Okay. I just want to be clear with that before I move on. You were asked to testify in relation to this case in November of 2017 during what we call a preliminary examination, do you remember that?

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A Yes, sir.
Q Now after you testified in that case you came back up to this courtroom, do you recall that?
A Yes, sir.
Q And you were sentenced, right?
A Yes, sir.
Q Now do you recall at the sentencing that there was some discussion about what your actual sentence was supposed to be?
A Yes, sir.
Q And your understanding--what was your understanding about your actual sentence as to the manslaughter charge?
A Well, what the--what I understand what I supposed to have got?
Q Yes.
A 53 months.
Q Okay. 53 and a half, is that correct?
A Yeah, 53 and a half months.
Q Okay. Why was that your understanding because your plea agreement says 64 and a half months.
A My plea agreement said that, but--but the guidelines is messed on my guidelines, so they supposed to have went in the middle of my guidelines. My middle of my guidelines is 53 and a half months.

MR. SAWKA: And Your Honor, if I could just approach you for a minute? I think you have a book here.

THE COURT: Take it.

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MR. SAWKA: This, just so the jury is aware this is something in the law, if Mr. White has no objections, it's called a sentencing guidelines book.

THE COURT: Jury, what happens is when a Judge sentences somebody the Judge is not always allowed to just decide on his or her own what the sentence is going to be because the legislature wants judges to sentence consistently across the state. They learned a long time ago that somebody in Mackinaw sentences differently than somebody in Flint and it wasn't always fair. So, they put together these guidelines and it's a formula. They look at a lot of different things and they come up with points, and the points recommend to the sentencing judge what a minimum sentence should be. Not a maximum, but a minimum. And when they talk about guidelines, they're talking about this.

MR. SAWKA: Thank you, Judge. And if you would just reiterate to the jury because we've had to have this discussion about, they don't--they don't--shouldn't be worrying about the penalty obviously.

THE COURT: Yep, that's true. I mean, we're talking about the guidelines because we're trying to figure out what his understanding was, but it has nothing to do with this case here. And when you decide the case, you decide the case based upon what the facts prove and not what any possible penalty can be. That's not your business. The penalty is not your

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business.

MR. SAWKA: Thank you.

BY MR. SAWKA:

Q And Mr. Holiday, did anybody tell you that if you testified at the preliminary exam really well or did something great for us, and meaning the prosecution, that we were going to reduce your sentence?

A No, sir.

Q Were there any promises that were made to you outside of the plea agreement that you understood it at the time you entered the plea agreement?

A Promises?

Q Yes. Anything outside of it?

A No, sir.

Q Okay. I'm gonna move on now from the plea agreement. I'm gonna direct your attention to April 27th of 2016. Were you with defendant Davis that day if you recall?

A Yes, sir.

Q What time did you first meet defendant Davis on April 27th, if you remember?

A Um, on April 20 what, 7th?

Q Yes.

A I met him on April 26th.

Q Right. But were you with him the next day?

A Yeah, I was with him the next day.

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Q Okay. Talking about the next day. What time approximately did you meet him?
A Probably like 11:00 or 12:00.
Q Sometime--
A That following morning.
Q --afternoonish?
A Afternoonish, yeah.
Q Okay. Do you recall where it was that you met the defendant on April 27th?
A At my apartment.
Q And that's the River Village--
A Yes, sir.
Q --apartment 1111, right?
A Yes, sir.
Q What was your reason for meeting the defendant on that day at that time?
A I wasn't really meeting him, he was just with my brother. My brother came over with him.
Q So, was your brother already at your apartment or did he arrive separately from defendant Davis? If you recall.
A I'm not for sure.
Q Okay. How did you learn that defendant Davis was brought to your apartment with your brother? How did you get--how did you become aware of that? Did he appear and knock on your door, did somebody tell you?

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A He knocked on my door.
Q Okay. Was he alone or with anybody?
A My brother.
Q Are you aware of how your brother knew the defendant?
A No, sir.
Q Had you ever met the defendant prior to April 26th, the day before?
A No, sir.
Q So you told us that your girlfriend was at your apartment?
A Yes, sir.
Q And then it was your father was there--
A Yes, sir.
Q --your brother was there, the defendant was there?
A Yes, sir.
Q Was there anybody else that you recall?
A My--one of my friends.
Q One of your friends. And what was your friend's name?
A Marquavius.
Q Did they arrive prior to Mr. Davis arriving or after?
A He was there before there--before he was there.
Q Do you--when the defendant arrived at your apartment do you recall what he was wearing?
A A black hoodie that said reckless on it.
Q Do you recall if he was wearing anything on his head like a do-rag or a--

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A He had a hat on.
Q A hat. Okay. Do you remember anything about the hat, color--
A It was black and red.
Q And do you recall what you were wearing that day?
A I was wearing a white and orange shirt.
Q Anything about the white and orange shirt that you recall?
A It said Philly on it.
Q P-H-I-L-L-Y?
A Yes, sir.
Q Okay. So, while there--you're in your apartment with the defendant and I think you said James is in there at some point as well.
A Yes, sir.
Q Okay. What were you doing in the apartment while both your brother and the defendant were in the apartment?
A I was in the back room with my girl and they was in the living room.
Q Okay. So, you had separate rooms?
A Yes, sir.
Q At some point did you ever overhear your defendant--or excuse me, your brother talking to the defendant?
A Yes, sir.
Q Okay. How long after they arrived did you hear them talking?
A Probably like an hour later.
Q After he arrived and when you heard about the talk, did you

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hear anything that the defendant was saying to your brother?
A That he needed to find a lick.
Q That he needed to find a lick?
A Yeah.
Q Okay. What does that mean to you?
A He needed to find somebody he could rob.
Q Is that language that you've heard before just in your general experience?
A Yes, sir.
Q Did you overhear any particular person mentioned?
A No, sir.
Q We've heard testimony from an officer called Detective Donastorg that he conducted a search of your apartment, were you aware of that?
A No, I wasn't aware of that.
Q You--were you present when the search was conducted?
A No, sir.
Q Did you have marijuana or narcotic paraphernalia in your apartment?
A Not that I know of.
Q Okay. Did you have anything such as ammunition in your apartment that you were aware of?
A Not that I know of.
Q Did you see anybody--have you allowed people who use narcotics or bring narcotics to your apartment at any point?

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A Yes, sir.
Q Okay. Are you somebody who deals narcotics at all?
A Yes, sir.
Q Okay. What type?
A Cocaine and marijuana.
Q And do you use like scales or bags or anything?
A Scales.
Q Then while you're in your apartment did either the defendant--did defendant ask you for marijuana?
A Did he ask me for marijuana?
Q Yes.
A No, sir.
Q That you recall?
A No, sir.
Q No? Okay. Did--were you aware--had you ever told him, you know, I sell some marijuana and stuff, anything like that?
A No, sir.
Q While you're in your apartment on April 27th did you also own a gun or possess a gun?
A Yes, sir.
Q Now is this a gun that you legally possessed or not?
A No, it was illegal.
Q Do you remember what type of gun it was, and I'm gonna try to help you on this one because I don't know exactly how to phrase it; is--was it a long gun, like a rifle, or a short

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gun?
A A short gun.
Q And do you recall, if you could tell us, anything about it, a color, a name--
A Silver. Silver and black--
Q Okay.
A --and it's a .38.
Q A .38?
A Yes, sir.
Q What does that mean to you?
A A .38 revolver.
Q And why did you feel the need that you had to have a gun?
A Because I was dealing drugs.
Q And what to you makes--just because you're dealing drugs, why do you think you need a gun?
A Just in case somebody tried to rob me or something.
Q Have you ever had to use that gun outside of this case, which we'll get to in a minute?
A No, sir.
Q So you're in your apartment, where was your gun? Was it on you, was it somewhere else in the apartment?
A It was in the windowsill.
Q Windowsill. Okay. Was it visible to everybody in the apartment?
A Yes, sir.

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Q If you were--if you were--if I was to walk by in your apartment would I see it?
A Yes, sir.
Q Do you recall if your gun was loaded?
A Yes, it was loaded.
Q Did you actually show your gun to the defendant at any point?
A Yes, sir.
Q You did?
A Yes, sir.
Q Why did you show it to him?
A We was flashing our guns showing what type of guns we had.
Q Now you testified at an exam that we already mentioned now, do you recall testifying at the exam that you actually didn't see--or no, you know what, I'm gonna back up and I'm gonna withdraw that, Judge. I'm incorrect on that. And Spencer, you did testify at an exam--
A Yes, sir.
Q --and do you remember me asking you if you were aware if the defendant knew if you had a gun?
A I'm not for sure.
Q Okay. If I tell you that at the exam I did ask you that and you had actually said, no, I don't--he wasn't--I don't think he was aware that I had a gun, would that have been incorrect?
A Yes.
Q Okay. Why would you think you would've testified to that?

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A Why you think I would've testified to what?
Q Because--
A Saying no?
Q --right. I mean, you just said we were showing each other our guns--
A Yeah, we were showing each other guns.
Q But previously you had testified well--I--and let me get the exact wording, because I don't want to misstate myself here.

MR. SAWKA: And Mr. White if you see it before me please let me know.

MR. WHITE: It's 41, I believe. At least at one point.

MR. SAWKA: Okay.

BY MR. SAWKA:
Q I asked you on page 16 of the exam, do you know, oh, sorry.

MR. WHITE: It would be page 16, lines 14 and 15.

MR. SAWKA: Okay. Thank you.

BY MR. SAWKA:
Q I asked you:

"Did at any point you show it" meaning your gun, "to the defendant?"

And you said:

"No, sir."

Do you remember that at all?
A No, sir.

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Q Okay. Do you have any reason that you would have forgotten or let's just say lied about it? Any reason at all that you can think of?
A Probably my medication.
Q Okay. You're on medication?
A Yes, sir.
Q What type of medication do you take?
A Remerons and Lexotan.
Q What does that do to you?
A Help me sleep and hearing voices.
Q Okay. Are you in anyway effected today as you testify by those or are you okay?
A I'm okay.
Q So, are you taking your medications as you testify here today?
A No, I ain't--I ain't take it today.
Q When did--when is the last time you took it?
A Yesterday.
Q And how often are you supposed to take it?
A At twelve noon, and 7:30 at night.
Q I don't know if you recall down at the preliminary examination, were you on medications at that point?
A I don't believe I was. I don't believe, so. No, I don't believe.
Q Okay. So, you don't know why your testimony might've been a little different today than it is down at the exam in

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November?
A No, sir.
Q All right. So, you showed each other your guns, what about your brother, where was he?
A My brother was right there.
Q Did he see what was--your gun and the defendant's gun as well?
A Yes, sir.
Q Do you know what type of gun the defendant had?
A I think it was a .40 cal.
Q And is that a long gun or a short gun?
A A short gun.
Q What color was it, if you recall?
A Black.
Q Do you recall where it was that the defendant had his gun, was it--'cause yours was on a windowsill. Do you recall where the defendant had his?
A In his hand.
Q Do you see where he got it from?
A His hip.
Q Was it covered in some way?
A From his hoodie, his--the hoodie covered it.
Q Do you recall if it was his left side or his right side?
A I don't remember.
Q Do you recall the defendant saying anything to you when you were showing him your gun and he was showing you his gun?

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A No, sir.
Q Did you know at that time when you first saw the gun, that that gun that the defendant had was loaded?
A No, sir. I didn't know if it was loaded or not.
Q So, did there come a point when you actually decide to leave your apartment? Do you need me--I'm sorry, but I didn't hear a response. Did you decide to leave your apartment at some point?
A Yes, sir.
Q What time approximately do you think you left your apartment?
A Like one or two o'clock.
Q Was it still light out?
A Yes, sir.
Q Was anybody else still in your apartment?
A My girl, my daddy and my--and my brother.
Q What was your reason to leave your apartment in the afternoon?
A To go get some weed and cigarettes.
Q Where were you going to go do that at?
A The store.
Q Now how far away is the store that you're talking about?
A It's across the street from the apartments.
Q What's the name of it if you recall?
A Dan's.
Q Now when you say you're gonna go to the store, does that mean your--the store sells cigarettes and marijuana or is there

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somebody there you personally know that does that?
A Somebody personally know that I--that I know.
Q When you left your apartment did you tell anybody you were leaving?
A I told my brother I was leaving.
Q And what about defendant Davis? Did you tell him, hey, I'm leaving to go to the store and buy some marijuana or anything?
A No.
Q Did the defendant ask to come with you at some point?
A He came with me.
Q But did you invite him?
A No.
Q Do you recall in your apartment that you took--did you take the stairs or an elevator if you recall?
A Elevator.
Q Okay. I'm gonna show you what's marked and admitted as People's exhibit, it's going to be number 61, but it's People's exhibit 47, but 61 in our slides.

MR. SAWKA: And I'm going to ask Ms. Dao to put it at 3:45. Play this beginning at the 3:45 second spot approximately. That's fine.

(At 10:13 a.m., video played)

BY MR. SAWKA:
Q Do you recognize the interior of this hallway?
A Yes, sir.

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Q Okay.

MR. SAWKA: And can you pause it? Thank you.

(At 10:13 a.m., video paused)

BY MR. SAWKA:

Q Now do you recognize the two people that left the apartment area in the video?

A Yes, sir.

Q Okay. We're seeing right now on the screen a person who's--in the white shirt with orange and the word Philly on it, do you recognize that person?

A Yes, sir.

Q Who is that?

A That's me.

Q Okay.

MR. SAWKA: Now--if you can stop and back it up just a little bit?

BY MR. SAWKA:

Q The person that you--was accompanying you leaving the apartment complex, do you recognize who that person is?

A Yes, sir.

Q Okay. Who is that?

A Donald Davis.

Q The defendant?

A Yes, sir.

MR. SAWKA: And if you could move it forward a

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little bit, just play.

(At 10:14 a.m., video played)

MR. SAWKA: Great, I'm gonna stop you right there.

MS. DAO: Oh, my bad. Sorry.

MR. SAWKA: It's all right. Just leave it.

BY MR. SAWKA:

Q Spencer, I'm also gonna now approach and show you what I marked and admitted as People's exhibit 48. It's a still photograph from the video we just saw. What I'm gonna have you do--

MR. SAWKA: --where's my deputy at? He's gonna have to write please.

BY MR. SAWKA:

Q Are you left-handed or right-handed?

A Right-handed.

(At 10:15 a.m., deputy unlocks Mr. Holiday's arm restraints)

BY MR. SAWKA:

Q Okay. What I'd like you to do is first circle on your body where your gun is. And if you could initial right next to it.

A Initial to say what?

Q Just put your initials so we know that you circled it. And on the defendant's body, can you circle where, if you recall, he had a gun when you left the apartment.

A I don't--I don't recall where he--where he had his gun at.

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Q Okay. I'll take the pen back. Thank you. Let me ask you this way; was the defendant carrying a gun when he left the apartment to your knowledge?
A Yes, sir.
Q Did you see him ever put the gun in--you said it was under his hoodie initially right?
A Yes.
Q Did you see where he put it back after he was done showing it to you?
A On his hip.
Q Okay. But you don't remember which hip?
A No.
Q So that's why you can't circle it on People's exhibit 48?
A Yes, sir.
Q You don't want to be incorrect?
A Yes, sir.
Q When the defendant came with you did he say anything to you about what he wanted to do that day?
A He said he was looking for a lick. He told me he was looking for a lick.
Q So he tells you that at a second time, not just the first time, but as you're leaving--
A He was telling--he was telling my brother that the first time, remember? I was in the back room, I overheard him, then he told me on the elevator.

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Q Oh, okay. And on the elevator--

MR. SAWKA: --and I'm gonna just go ahead, Ms. Dao, put up number 63. And if you could put that at number 16:10.

BY MR. SAWKA:

Q Is that--do you recognize defendant Davis in that picture?

A Yes, sir.

Q Is he the one with the black hat on?

A Yes, sir.

Q Okay. And then you said you took the elevator down. Oh--is, do you recognize the two people in the elevator that's in People's exhibit--well, that were in the exhibit?

(At 10:17 a.m., video played)

MR. SAWKA: If you can pause it.

BY MR. SAWKA:

Q Do you recognize those two people?

A Yes, sir.

Q And who are in the elevator again?

A Me and Donald Davis.

Q Okay. Now when was it that the defendant told you he was still looking to hit a lick?

A When the doors closed.

Q Okay.

MR. SAWKA: Go ahead and play it.

(At 10:17 a.m., video played)

BY MR. SAWKA:

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Q Do you recall when he told you that?

MR. SAWKA: You can pause it.

BY MR. SAWKA:

Q Do you recognize this person that's getting in the elevator in the brown shirt at all?

A No, sir.

Q Okay. Do you remember when it was in the elevator, was it before this man entered or after the man entered that he--

A Before.

Q Before? What did you tell him in response to his question?

A I don't know where no licks at. I don't hit licks.

Q What does that mean, I don't hit that?

A I don't rob people, basically.

Q Did this question surprise you at all from the defendant about hitting a lick?

A Yes.

Q Okay. What went through your mind when you heard this question? Like do you know where I can hit a lick?

A I don't remember what went through my mind actually.

Q But you said you were surprised.

A I was surprised, yeah.

Q Did you think he was being serious or joking?

A I thought he was joking.

Q So you didn't tell anybody correct?

A No.

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Q So, once you exit into what we know is a lobby of this area, did you observe--were you still walking with defendant Davis?
A Yes, sir.
Q As you were walking with him, did you observe him do anything?
A No, not that I recall.
Q At some point a white vehicle appeared, right?
A Yes, sir.
Q Okay. Did he tell you anything about this white vehicle?
A He said that he had some weed for sale.
Q Okay. Do you know how that white vehicle appeared? Did anybody tell--oh, let me back up. Did you ever see a phone on defendant Davis?
A Yes, sir.
Q Okay. Did you ever see him use the phone?
A Yes, sir.
Q When did you see him use the phone?
A On our way out. I believe we was on our--walking down the hallway.
Q At that point when you were seeing him on the phone, could you overhear anything?
A No, sir.
Q Was this before or after you heard him--or he asked you to take a lick--or know where he could hit a lick?
A This was after he got off the phone he said that.
Q After he got off the phone?

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A Yeah.
Q Had you told defendant Davis already that you were heading to the store to buy weed?
A I told him when we got outside.
Q When you got outside, of the apartment complex?
A Yes, sir.
Q When you exited outside and you told him you were about to go to the store to buy some weed what happened next?
A He said my man's finna pull up with some weed so you might as well wait.
Q What did that mean to you? I mean, he says there's a man that's gonna sell some weed, right?
A That I could've got it from him, I could've saved the walk from the store and just bought the weed from him.
Q Okay. Where was this man at when you walked outside? Was he--this person there?
A No, he wasn't there yet. He had--the car pulled up and he directed me to the car.
Q How did the car arrive? I mean, did you happen to call somebody, did you see defendant Davis call somebody, was there anybody else?
A No, I didn't call nobody.
Q So, you don't know how--why the car arrived?
A No, sir.
Q Did he ever tell you the person's name that could sell you the

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weed?
A No, sir.
Q As you got outside and he told you hey, there's this person I have, I'm summarizing what you've testified about, what did you do? Did you continue to walk or did you just wait?
A I walked a little bit farther then I stopped.
Q Okay. Why did you stop?
A Because he told--that's when he's telling me I can get the weed from him, so I stopped and waited until the victim got out the car.
Q Okay.

MR. SAWKA: I'm gonna ask that Ms. Dao put up slide exhibit number 60, which is People's exhibit 46. And if you could move it to three minutes and seven seconds. It doesn't have to be perfect.

MS. DAO: Okay.

(At 10:21 a.m., video played)

MR. SAWKA: Okay, if you'd pause it please.

BY MR. SAWKA:
Q Do you recognize the--

MR. SAWKA: Ms. Dao's having some troubles today.

MS. DAO: Sorry. You mentioned seven seconds you said?

MR. SAWKA: Yep, that's fine. I need you to pause it please.

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(At 10:22 a.m., video paused)

BY MR. SAWKA:

Q Okay. Do you recognize the person who is in the video surveillance right now?

A Yes, sir.

Q Who is that?

A That's me.

Q Okay. When you were walking--you said you were walking away. Where were you walking to at this point?

A I was finna go to the store.

MR. SAWKA: And continue, press play please.

(At 10:22 a.m., video played)

BY MR. SAWKA:

Q And narrate and tell--or tell us what is going on in this video right now because you just walked outside of the screenshot.

A Um, I'm not sure what's going on.

Q Okay. Well tell us what's happening here. Is this the car that was gonna sell you the weed or not?

A Yes, sir.

Q Do you know? And what are you--and who's that other person who's at the trunk right now?

A Uh, Donald Davis.

Q And what about the person that just got out of the vehicle?

A The victim.

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Q Did you know his name at this point?
A No, sir.
Q So what are you guys discussing right there, you and defendant Davis?
A We didn't discuss nothin'. We--he told me to get in the car, that's about it.
Q Okay.

MR. SAWKA: Pause it please.

(At 10:23 a.m., video paused)

BY MR. SAWKA:
Q Now the video shows Mr. Davis getting in the back passenger seat correct?
A In the back driver's seat?
Q Back passenger driver, right.
A Yeah.
Q Yeah, behind the driver. What--and you get in the front passenger seat?
A Yes, sir.
Q Now as this is going on, when you get in the vehicle, what happens inside the vehicle initially to start, because we know that you stated Donald says well, I have this person, who can give you weed, what happens at this point?
A He was showing me the weed--
Q And who is he?
A --the victim.

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Q Okay. And as he's showing you the weed, do you know where he showed you it from? Was it on his person, in the glove compartment--

A He got it from the trunk. When we first--when we first pulled up he got it out of the trunk.

Q Oh, okay. So, when you guys were at the back of the trunk in the video, that's when you first saw the weed?

A Yeah.

Q Do you remember what it was like? Was it like a large barrel of weed, was it a small amount, a bag?

A A small amount.

Q Okay. Do you remember how it was packaged?

A No, sir.

Q Was it, I guess maybe I can clear that up. Was it just out, like hey, I've got a whole bunch of marijuana spread out in my car or was it in like some sort of container if you know?

A It was in a--I believe it was in a container.

Q Okay. Do you remember if it was a plastic bag, a piece of--

A A plastic bag.

Q Okay. A plastic bag. If you can give us an idea of what you saw. Was it a large amount or a small, like a handful? Like how would you describe it?

A It was a little over a handful.

Q So what happened after you saw the weed in the back of the car?

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A I got in the car to look at it.
Q You got in the car to look at it?
A Yeah, to look at the weed.
Q Did--what did the victim do? Did he take any of the weed with him or did he already have some on him when he got in the car, if you remember?
A He took the weed from the trunk and got in the car with the weed that he got from the trunk.
Q And in the vehicle, you said he showed it to you?
A Yes, sir.
Q What happened at that point?
A He was showing it to me and I didn't want it. I told him I didn't want to buy it so--
Q Did you exchange money with him?
A No, I didn't exchange money with him then.
Q I'm sorry, what?
A I didn't exchange money with him right then and there on that one because I didn't want it.
Q Oh, okay. So--
A So he--
Q --he showed it to you first?
A --yeah, he showed it to me first.
Q When he showed it to you, why did you say I don't want this?
A Because it wasn't the type of weed I was looking for.
Q Okay. So, to you there is different types of marijuana?

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A Yes, sir.
Q Why was the one that he had not to your liking?
A Because it wasn't strong enough.
Q At that point, was defendant Davis doing anything in the back seat?
A No, sir.
Q After you told the victim I don't want this type of weed, how did he respond?
A He said I have some more weed in the trunk.
Q So what did he do, if you recall?
A He got out of the car and opened the trunk to get some different weed.
Q Okay.

MR. SAWKA: Move it to 5:40 please. It doesn't have to be perfect.

(At 10:26 a.m., video played)

BY MR. SAWKA:
Q Is this at the point in which the victim, the driver, got out of the vehicle after you told him you didn't like the weed?
A Yes, sir.
Q Do you know what he was doing in the back of his trunk?
A I know he was going to get some different weed 'cause he said he was going to get some different weed when he was in the car.

MR. SAWKA: Pause it there please.

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(At 10:26 a.m., video paused)

BY MR. SAWKA:

Q So, once the driver was out of the vehicle, at that point who was in the vehicle?

A Me and Donald Davis.

Q Nobody else?

A No.

Q Did anybody else get out of the vehicle outside of the driver at that point?

A No, sir.

Q Did you ever have money on you and you gave it to the victim at some point?

A I gave it to him when he got back in the car the second time.

Q Okay. Prior to the driver getting back in the vehicle did you or Donald Davis, the defendant, say anything to each other?

A He said I'm about to get this nigga.

Q Okay. Who is he?

A The victim.

Q I think I'm--two different wavelengths, sorry. You and Donald Davis are the only two in the vehicle, right?

A Yes, sir.

Q Okay. What--does defendant speak to you?

A Yes, sir.

Q What does he say to you?

A I'm about to get this nigga.

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Q What does that mean to you when you heard it?
A I'm about to rob him.
Q What do you recall thinking at that point? Did you have any intent to do any of it?
A No, sir.
Q So, when you heard him say that did you think he was being serious or joking?
A I didn't think he was taking it serious 'cause he knows cameras around there.
Q How did--how would--did you tell him--well, let me back up. Do you know if there are cameras at your apartment complex?
A Yes.
Q Okay. Did you tell Mr. Davis that?
A You see cameras when you sign your name on the list downstairs.
Q You see cameras--
A You see cameras everywhere. The camera machine--the camera, the TV's and the cameras showing where--outside and different floors.
Q Did you ever tell him that as well?
A I told him uh--I told him that there's cameras out here and I said are you trippin'? That's what I said back to him.
Q So, when the defendant told you he was about to rob the driver you were interviewed by Detective Watson and do you recall ever being asked if you were aware Donald Davis was going to

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rob Devante--
A No, sir.
Q --who later became known as the driver?
A No, sir.
Q You don't remember it?
A No.
Q But you do remember that at that moment when it occurred, you over--you heard him say it?
A Yes, sir.
Q Okay. So, prior to getting in the vehicle with the defendant and him telling you that you had no idea he was going to rob the driver?
A No, sir.
Q So we saw that the victim, Devante, reentered the car, what happens at the point he gets back in the car?
A He's showing me his second batch of weed.
Q Okay. How--is that also packaged?
A Yes, sir.
Q When he showed you the second batch what did you do?
A I liked it, I was sniffing it and I liked it, so I gave him a twenty-dollar bill.
Q And when you gave him the twenty-dollar bill, was that the total amount or was it he--
A He gave me--he gave me fifteen dollars back.
Q So it was only five dollars that you were buying it for?

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A Yeah.
Q So, you're buying marijuana from the driver?
A Yes, sir.
Q But you sell marijuana as well?
A But I didn't have none.
Q Oh, so you're--
A I was buying the weed for my girl to smoke.
Q Oh, so you were buying it for Taja--how do you say her name?
A Tajanique.
Q Tajanique?
A Yes, sir.
Q But you didn't have any at your apartment at that time?
A No, sir.
Q So that's why you went to the store?
A Yes, sir.
Q Just trying to figure that part out. Thank you. You exchange money with the driver?
A Yes, sir.
Q At that point was your gun still on you?
A Yes, sir.
Q Had you ever shown the driver that you were--that you had a gun?
A No, sir.
Q Did Donald Davis when he first met the victim ever say, hey, I got a gun or show the victim the gun?

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A No, sir.
Q As you exchanged money with the driver, what happened next?
A Donald Davis pulled his gun out.
Q Okay. Do you recall the motion that he made when he pulled his gun out? How--where was it? Did you--were you watching?
A I wasn't watching, I was watching the driver--
Q How did you--
A --I just seen--I just seen him come out to the back of the seat.

(At 10:31 a.m., prosecutor arranges chairs)

BY MR. SAWKA:
Q Donald, what--or excuse me, Spencer, what I'm gonna have you do is to give us the best idea how this occurred is I'm going to need you to--

MR. SAWKA: --do the deputies need to be here? Do you need to stand by or anything?

BY MR. SAWKA:
Q What I'm going to ask you to do is to step out of the witness stand here and sit in the seat that you were sitting in.

MR. SAWKA: So, for the record, I have four chairs set up in basically a square to represent an inside of a car.

(At 10:31 a.m., witness sits in the chair depicted as front passenger seat in seats set up by prosecutor)

BY MR. SAWKA:

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Q Where was Donald Davis sitting?
A Behind me on this seat (points behind him and to his left).
Q Okay. And the driver was sitting here?
A Yes, sir.
Q And how were you positioned when you were exchanging the marijuana and money with the driver?
A Like this.
Q Okay. Were you looking at him like you're looking at the Court right now or were you turned more? It's up--how do you remember it?
A I was looking more this way. (points to his left)
Q Okay. And you said you weren't looking at Mr. Davis?
A No, sir.
Q When is it that you saw--
A When I--
Q --the gun?
A --when I heard him say what's up with that shit, I looked back--looked back to see what he's talking about and I seen.
Q When you say looked back to see what he's talking about, what were you--what was he talking about?
A He was talking about give him the money and uh, and some weed.
Q Okay. So, you look back and I have the classic pistol here. Is this similar of some sort to the gun that Mr. Davis had?
A Yes, sir.
Q Just for demonstrative, this is not the gun, obviously--

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A No, sir.
Q --this is plastic. Direct my hand to where the gun was positioned if this is the driver's seat.
A He was at--he was at the back, the--the headrest.
Q Okay. And what did you hear defendant Davis say at this point?
A He said what's up with that shit nigga?
Q What's up with that shit nigga?
A Yeah.
Q And what does that mean to you?
A He was tryin' to rob him.
Q Okay. What I'm gonna ask you to do at this point is switch to the driver's seat. From where you were sitting, what did you see the driver do as the gun was pointed?
A He turned around.
Q Okay. The driver turns around?
A Yes, sir.
Q What does the driver do based on your observations?
A He grabbed the gun.
Q As he grabbed the gun, what happened between the driver and defendant Davis?
A The gun went off.
Q Okay. I need you to demonstrate the body position of the driver when he turned around, and if--I know your hand is currently shackled to your side, but if you could do the best

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you can. If you need to get up and move that's perfectly fine.

A Yeah, he was over the seat, like this. (Witness stands up and leans over towards prosecutor)

Q So he's over the seat like this--

A Yes, sir.

Q --and then at this point did you hear him saying anything to Donald Davis?

A No, sir.

Q Did you hear Donald Davis saying anything like--

A No.

Q --get off, go away?

A No, sir.

Q At that point, what--did--what happened next?

A The gun went off.

Q Okay. You can move back to your seat please.

(At 10:33 a.m., witness returns to seat depicted as front passenger seat)

BY MR. SAWKA:

Q Now, I'm gonna have you watch the video and I know the jury is pushed to the front, but what I'm gonna have you look at is the passenger's side door in the front.

MS. DAO: Play it?

MR. SAWKA: Yes, please.

(At 10:34 a.m., video played)

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MR. SAWKA: Okay. Back it up a little bit please. Maybe 7:43, yeah. And at 7 minutes and 43 seconds, right here.

BY MR. SAWKA:

Q Mr. Davis--or Spencer if you'd watch please. Did you see your driver's side--or your passenger side door open? At--did you happen--did you see it at all in the video?

A No.

Q Okay. It might be too short, but let me ask you this; did you open your door at some point?

A I opened it afterwards.

Q Did you open it after Donald Davis shot the victim the first time?

A No, sir.

Q Okay. You--when did you open it?

A After I was told to shoot him I opened it.

Q Okay. So prior to that, do you remember ever telling a police officer that you opened the door because the gunshot was ringing in your ears?

A Not that I recall.

Q Okay. As the victim was shot, do you remember how his body was positioned in the vehicle?

A He was going like this over the seat.

(At 10:35 a.m., witness stands up and leans over the driver's seat towards prosecutor)

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Q Okay. What happened at that point? What did--what was going through your mind at first?
A I was stunned, I was shocked. I was stunned like paused.
Q Did you have your gun pulled out at all?
A No, sir.
Q So only the defendant, Mr. Davis, had his gun out?
A Yes, sir.
Q At that point what happens next?
A He pushed him back to the front and he pointed the gun towards me.
Q Okay. How did--direct my hand as to how the gun was pointed towards you.
A It was pointed like this.
(At 10:36 a.m., witness directs gun towards him)
Q Okay. And how were you positioned in your vehicle?
A Like this.
(At 10:36 a.m., witness leaning left and looking over left shoulder)
A Like this.
Q And at this point did defendant Davis say anything to you?
A He said shoot him or I'm gonna shoot you.
Q And why did--what did you do?
A I pulled my gun out.
Q And I'm gonna give you this plastic gun to demonstrate.
(At 10:36 a.m., witness pulls gun out of right side

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and points it)

A I pulled my gun out and I closed my eyes and I shot.

Q Do you recall how it was that--and I know you're kind of demonstrating for us here, but how if you--to the best of your memory did you shoot your gun at the driver?

A How did I shoot?

Q Yep. How did you do it, to the--

A I did it like this.

(At 10:36 a.m., witness extends hand towards driver's seat)

Q Okay. Your arm's extended and your hand is bent at ninety degree--or your wrist is bent at a ninety degree angle?

A Yes, sir.

Q Okay. Now your gun is pointing down obviously it's at the driver's seat here.

A Yeah. And I pointed to the ribs.

Q Now--to the victim's ribs?

A Yeah.

Q If I am the driver--

A You're still turned around though.

Q --am I still like this?

(At 10:37 a.m., prosecutor in driver's seat turns and leans over seat)

A Yeah.

Q Okay. How--approximately like this or more or less?

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A Just like that.
Q And show the jury how it is that you had your gun pointed at me.
A Like this.
(At 10:37 a.m., witness points gun towards prosecutor's side)
Q And what did you do?
A I shot--
MR. WHITE: Your Honor, I apologize, I may based on what happened yesterday with the dead spot being right there if we could just either you or Mr. Sawka explain how he's draped over the chair right there just so we get a full picture for the record?
MR. SAWKA: I'm trying to keep my voice up as well.
MR. WHITE: Well, okay. I understand it's--
MR. SAWKA: But if the record did not pick it up, I'm in the front--what would be the front driver seat bent over the front of the seat with my left rib cage exposed to the passenger's seat. And Mr. Holiday had his arm extended, if you could demonstrate it again, Mr. Holiday, with his wrist bent at a ninety-degree angle approximately, and the gun was pointing towards the left rib cage, correct?
THE WITNESS: Yes, sir.
MR. SAWKA: Any objections to that, Mr. White?
MR. WHITE: No, not at all. Thank you--

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MR. SAWKA: Okay. Thank you.

MR. WHITE: --Mr. Sawka.

THE COURT: It's not on a ninety-degree angle, but it's bent.

MR. SAWKA: A 45?

THE COURT: It doesn't matter.

MR. SAWKA: Okay.

BY MR. SAWKA:

Q At that point after the driver's shot, what happens?

A He told me to get out of the car.

Q Who's he?

A Donald Davis.

Q What did you do with your gun?

A Put it back on my hip.

Q Now where was Donald Davis at this point when he had his gun at you? Was he still where I'm sitting in the seat behind the driver?

A He is behind--he was in this seat.

(At 10:38 a.m., witness points to seat behind him)

Q When was it that defendant moved from the back driver's seat to the--behind the back passenger--front passenger seat? Prior to you shooting or after?

A Prior to me shooting.

Q Okay. So, if I have my gun at you right now--

A But you--he moved over first then he pointed the gun at me.

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Q So after he shot the victim Devante--
A Yes, sir.
Q --he didn't point it at you at that point--
A No, sir.
Q --he moved over first?
A Yes.
Q So, I move over behind you and I--as Donald Davis has his gun at you, this is when he tells you to shoot then?
A Yes, sir.
Q Did he tell you why you had to shoot him?
A No, sir.
Q What did he--if you recall his exact words, what were his exact words?
A Shoot him or I'm gonna shoot you.
Q Why didn't you shoot Donald Davis?
A Why didn't I shoot him? 'Cause he had the drop on me.
Q What does that mean?
A He had a gun at my head, so if I'd of tried to do anything wrong I was gonna get shot.
Q So at this point, you do shoot--
A The victim.
Q --the driver?
A Yes, sir.
Q Do you recall what happens after that?
A We uh--we both--well I put my gun down and he put his gun

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(inaudible) and we both get out the car.
Q I'm going to have you have another seat right here in the witness stand please, okay?
(At 10:39 a.m., witness returns to witness stand)
BY MR. SAWKA:
Q And then--oh, I'm sorry. We're gonna show part of this video again.
MR. SAWKA: If you could play it from where it was?
(At 10:40 a.m., video played)
BY MR. SAWKA:
Q And Spencer, if you could watch the video please.
MR. SAWKA: And you can pause it there please.
(At 10:40 a.m., video paused)
BY MR. SAWKA:
Q You saw yourself exit the passenger seat where you entered?
A Yes, sir.
Q Where did defendant Davis exit from?
A The back passenger seat.
Q Not the place he entered?
A No, sir.
Q We see you and defendant Davis look into the vehicle, did you see that?
A Yes, sir.
Q Okay. Why did you do that?
A To look at him.

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Q Look at who?
A The victim.
Q Okay. Why were you looking at him?
A We was just looking at him.
Q Did either--did you say anything to defendant Davis right there--
A No, sir.
Q --at that point? Did defendant Davis say anything to you?
A No, sir.
Q When the driver was shot in the back seat by defendant Davis, do you remember if he was still animated or was he, for a better word, passed out or dead if you know?
A You said when he shot him?
Q Yes. The first time. The first shot.
A He got--he was slouched over.
Q Okay. Was he still moving?
A A little bit. He wasn't moving like that, he was slouching in like slow motion.
Q After you had to shoot him when the gun was pointed at your head was he moving?
A Yes, sir.
Q Did either--how was it that the driver's body--after you had to shoot him--
A His body turned after I shot him.
Q Body turned, like this?

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(At 10:42 a.m., prosecutor moves his back onto the back of the chair)

A Yeah.

Q So he was in the driver's seat more towards the corner by the seatbelt facing forward?

A Yes, sir.

MR. SAWKA: Would you show People's exhibit number 5?

BY MR. SAWKA:

Q Is this the position that you recall leaving the driver in?

A Yes, sir.

Q Okay.

MR. SAWKA: You can take that down please. Actually, People's 56 please?

BY MR. SAWKA:

Q Does this photograph, People's exhibit 56 look familiar to you?

A Yes, sir.

Q Okay. How does it look familiar to you?

A That's the--it looks like the weed that he was trying to sell me.

Q That the driver had?

A Yeah.

Q Okay. When the first shot by defendant Davis occurred, did you see blood anywhere?

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A Yes, right here.
Q Okay. You're indicating your sternum. Did you see it go anywhere in the vehicle at that point?
A Did I see what, the bullet?
Q The blood.
A The blood? Uh, no, no, no, I believe some fell in the back seat, I believe.
Q Do you know how it got onto the back seat?
A 'Cause he was--remember I told you he turned around and he was wrestling for the gun and it went off and he was just half his body was in the back seat. Some of his body is in the back seat.
Q You're referring to the driver?
A Yes, sir.
Q Did you see blood on defendant Davis' hands at any point?
A No, sir.
Q And for the record, defendant Davis is an African American male that was dark-skinned, is that correct?
A Yes, sir.
Q Did you look at his hands at any point?
A No, sir.
Q After you exited the vehicle and we saw you run out of the screen in People's exhibit 46, where were you running to?
A He told--he told let's go to his sister (sic) house.
Q I'm sorry, where?

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A He said let's go to his sister (sic) house.
Q His sister's house?
A Yes.
Q Who's his?
A Donald Davis sister.
Q Do you--did you know her at all?
A No, sir.
Q When--how far away is his sister's house from the car?
A It's in the back of the--it's like behind the apartments that I stay in.
Q Okay. I'm gonna show you People's exhibit 49--
MR. SAWKA: --and if you could, Ms. Dao, move it to--oh, here it is.
MS. DAO: Oh, sorry. 64.
MR. SAWKA: Oh, thank you. Yes. Ten minutes. Yep.
(At 10:45 a.m., video played)
BY MR. SAWKA:
Q Does this scene look familiar to you?
A Yes, sir.
Q Okay. We see two people running across the screen. Do you identify those two people?
A It's me and Donald Davis.
Q I'm gonna give you a little laser pointer here because it might be out of the shot. You ran from right to left in the video, you're running to the left diagonally, where's his

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sister's house located from where you saw yourselves running? Would it be farther off the screen?

A I believe it's farther off the screen.

Q How far approximately? Did you have to run a mile, a little, 500 feet?

A A little.

Q Okay. How long did it take you to run from the car to his sister's house?

A About five minutes, six minutes, seven minutes, probably. It wasn't that long 'cause we was runnin'.

Q What was going through your mind at that moment as you ran from the vehicle?

A I was scared.

Q Why were you scared?

A 'Cause I didn't know what I just got myself into.

Q Did defendant Davis say anything to you as you were running with him to his sister's house?

A He was just tellin' me to come on.

Q I'm sorry, say what?

A He was tellin' me to come on.

Q Come on?

A Yeah.

Q Meaning what to you?

A Run faster, I believe.

Q Prior to exiting this vehicle, do you recall defendant Davis

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or yourself taking anything from the vehicle?
A No, sir.
Q So, although defendant Davis said he was going to rob him, the driver, nothing was actually taken to your knowledge?
A No, sir.
Q At--when you arrived at--do you recall actually ever telling Detective Watson that you thought that defendant Davis took the hat that was in the seat that was--belonged to the driver?
A No, sir.
Q Okay. As you exited the car and you ran to the house, when you arrived at this house, was anybody home?
A Yes, sir.
Q Who was home?
A Some women in the kitchen.
Q Okay. And did you ever met (sic) these women before?
A No, sir.
Q Do you know who they were?
A No, sir.
Q You had no names for them?
A No, sir.
Q Did you and defendant Davis each have your own guns still?
A Yes, sir.
Q When you entered this home what happens?
A We go to the basement.
Q Why did you go the basement?

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A I followed--I was just following him.
Q So, describe exactly how it was you went to the basement because you said you were following the defendant?
A Yes.
Q So, how did this work? Did he say come on, come to the basement or did he go down and you followed him?
A He went down and I followed him.
Q What occurs in the basement?
A He pulled his gun out on me and told me give me--give me--give my gun to him.
Q When he did that did you know why he was asking for your gun?
A No, sir.
Q Did you ask why do you need my gun?
A No, sir.
Q What did you do?
A I gave him my gun.
Q Why did you give him your gun?
A ‘Cause he had a gun on me.
Q So he still has a gun pointed at you?
A Yeah.
Q Did you see what happened with your gun after you gave it to defendant Davison (sic)?
A He wrapped it up in his shirt.
Q Do you recall what type of shirt this was?
A A white shirt.

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Q Do you recall what happened after he wrapped up your gun with a white shirt?
A I don't know where he put it at, I stopped paying attention.
Q Did you see what he did with his gun?
A He put it back on his hip.
Q So he took your gun, wrapped it in a white t-shirt, but you don't remember what he did with it after that?
A No, sir.
Q Did--were you watching him?
A No, sir.
Q Were you--
A I quit watching him.
Q --where do you--what were you doing after you gave--
A I went--
Q --him your--after you gave him your gun and he wrapped it in a white t-shirt?
A --I went over there and walked and sat on the couch.
Q In that house that you were in?
A Yes, sir.

THE COURT: You're still in the basement?

THE WITNESS: Yes, sir.

BY MR. SAWKA:
Q At some point, were you asked to call somebody by defendant Davis?
A My brother.

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Q Okay. Was your--where was your brother to your knowledge?
A In an apartment.
Q Your apartment, 1111?
A Yes, sir.
MR. SAWKA: If Ms. Dao would put up number 61 and move it to ten minutes and 50 seconds.
(At 10:49 a.m., video played)
BY MR. SAWKA:
Q Do you recognize the person exiting your apartment?
A Yes, sir.
Q Who is that?
A My brother.
Q Okay.
MR. SAWKA: You can continue to play it please.
MS. DAO: Oh, sorry.
(At 10:50 a.m. video played)
BY MR. SAWKA:
Q Did your brother, based on this video from what you see, did he appear to be on the phone?
A Did I see him on the phone?
Q Yes.
A I'm not for sure if I see him on the phone or not.
Q Okay. That's fine. But you ended up calling your brother eventually, correct?
A Yes, sir.

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Q How long after the defendant took your gun and wrapped it in a blanket did you call your brother?
A I called him right after--after he put it--wherever he put the gun I had called him right after that.
Q Okay. When you were on the phone with your brother, what did you tell him?
A I told him this--I told him to come get me.
Q Did you--you see him running in the video? Did you see that?
A Yes.
Q Okay. How did you say it, just, did you say just come get me?
A No, I said it in a dramatic way.
Q Okay. Did you tell him what had just occurred?
A No, sir.
Q Did he know at--when you were on the phone with him anyway--anything about what had just happened between--with you, the driver, and defendant Davis?
A No, sir.

MR. SAWKA: You can pause it. There's nothing further.

(At 10:51 a.m., video paused)

BY MR. SAWKA:
Q Now speaking of the driver, Mr. Hanson, when--at any point when he was out of the car, when you were in the car with him, or after you left the car did he have any firearms on him?
A Did he have a gun on him?

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Q Correct.
A I think there was a gun in the trunk.
Q Did you see the gun?
A I believe I seen a gun.
Q Did he have it on him when he was in the actual interior of the car with you and defendant Davis?
A No, sir.
Q So he was not armed?
A No, sir.
Q Did he have any type of weapon on him?
A No, sir.
Q When you called your brother, how long did it take for him to arrive?
A It took him about--about like five, ten minutes he came.
Q And what type of car does he drive?
A It was a--he had it was like a truck.
Q Like a truck?
A A black truck. Yeah, it was a truck.
Q Okay. Like SUV or a flatbed truck?
A Like a SUV.
Q When he arrived, what happened?
A We both got in the car.
Q Okay. Both means who?
A Me and Donald Davis.
Q Did your brother call you and say hey, I'm here or did he

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knock on the door, were you already outside--
A Yeah, I believe he--I believe he knocked on the door.
Q And at that point you and defendant Davis left his sister's house, defendant's sister's house?
A Yes, sir.
Q What at that point when you got in the vehicle occurred?
A What did I--what did I overhear?
Q Did defendant--did you hear defendant Davis say anything?
A No, sir.
Q What hap--where did you guys go in the vehicle?
A First we went to the Holiday Inn for my brother to pick up some money, then we went to the club, and then we went to my uncle (sic) house.
Q What was going through your mind at this point? I mean, you had just shot somebody.
A What was going through my mind?
Q Yeah.
A He sayin' not to say nothin'.
Q I'm sorry, what?
A Not to say nothin'.
Q Okay. Did defendant Davis say anything to you to not say anything or was it just your decision?
A Yeah. He told me not to say nothin' when I called him. When he told me to call him he told me not to say nothin'.
Q So defendant Davis told you to call your brother and not to

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say anything?
A Yeah.
Q After some point you guys, you were--how long were you with defendant Davis after your brother picked both of you up?
A After we--when we made it to my uncle (sic) house somebody else came and picked Donald Davis up.
Q At that point did you reveal to your brother what had happened?
A Yes, sir.
Q Have you had any further contact with defendant Davis after that night through whether it be email, voice mails, phone calls, in person contacts at all?
A No, sir.
Q Now at some point, approximately we'll say a week later, did you have contact with police officers?
A A week later?
Q Through the phone.
A Yes, sir.
Q Okay. Do you recall who it was that you spoke to?
A I believe it was Detective Moore, I believe.
Q Female or male?
A It was a female.
Q Did you call her or did she call you?
A I called her.
Q Why did you call her?

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A To explain what happened.
Q What made you want to call her?
A ‘Cause I felt bad.
Q When you called her did--was anybody with you?
A No, sir.
Q At--how long did this conversation last approximately, if you recall?
A Probably like five minutes. Five, ten minutes.
Q Were you calm when you called, excited, do you recall any of that?
A I was sad.
Q When you called Detective Moore after speaking with her what did you do?
A After I talked to her?
Q Yes.
A I went and talked to my people and told them bring me back down there for I could turn myself in.
Q Okay. Who’s your people?
A My granny.
Q And at that point did you end up turning yourself in to police officers?
A Yes, sir.

MR. SAWKA: May I have one moment, Your Honor, please? I don’t have anything further at this moment, Your Honor.

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THE COURT: Jury, stand up for a minute and stretch. Okay, Mr. White, when you are ready.

MR. WHITE: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. WHITE:

Q Good morning, Mr. Holiday.

A Good morning.

Q Going over something that you had just mentioned today for the first time, the medication that you're on, what are those medications again?

A You said what do they do?

Q What are they, the names?

A Remerons and Lexotan.

Q And what is Remeron for?

A Sleep.

Q And what's the other--the other drug?

A For hearing voices.

Q For hearing voices. Have you been diagnosed with a mental disorder?

A Schizophrenic and bipolar.

Q And how long have you been di--how long have you had those diagnoses?

A Since I was 14.

Q Since you were 14. Have you been taking medications since you were 14?

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A Yes, sir.
Q Have you been taking it regularly since you were 14?
A Have I been taking what?
Q Have you been taking your medication regularly since you were 14?
A I stopped taking it eventually.
Q When did you stop taking your medication?
A When I was about 18.
Q When you were about 18. At the time this event took place were you taking your medication?
A No, sir.
Q You had been off of it for a couple years at that point in time?
A Yes, sir.
Q And so and that point in time were you still suffering from the schizophrenia and hearing the voices?
A Yes, sir.
Q Okay. And then going forward with the medication, when did you start taking medication again?
A When I was 14.
Q No, no. You stopped, there came a point in time when you began taking your medication again correct?
A Yes, sir.
Q When did you start taking your medication was it while--
A When I got--

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Q --was it while you were in the Genesee County Jail?
A When I was in the Genesee County Jail.
Q All right. And I'm assuming you were seen by the psychiatrist over there correct?
A Yes, sir.
Q And then did he diagnosis you again as being schizophrenic?
A Yes, sir.
Q And then he prescribed those two medications for you?
A Yes, sir.
Q All right. When you spoke to the police officers for the first time back on--first time in custody back on May 4th were you on your medication at that time?
A No, sir.
Q What about when you spoke to them on July 9th of 2016, were you on your medication at that time?
A July 9th?
Q Of 2016.
A I believe so.
Q You believe you had started it at that point?
A Yes, sir.
Q So when you're on your medication over at the county jail were you on the third floor in the medical unit?
A Yes, sir.
Q While you were there taking your medication at the jail, were you taking it via tablet or via an injection?

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A A tablet. I--they was giving me an injection too.
Q And then they stopped and you were just taking it by tablet only?
A Yes, sir.
Q All right. So, since that period of time at least we now know, so July 9th, you know you were on your medication correct?
A Yes, sir.
Q So from July 9th up until today have you been taking your medication consistently?
A Yes, sir.
Q All right. While you were over at the Genesee County Jail, while this was going on were you ever on suicide watch there?
A Yes, sir.
Q All right. And when was that?
A Plenty of times.
Q Plenty of times?
A Yes, sir.
Q So on more than one occasion?
A Yes, sir.
Q Was that before you were on your medication?
A I was still on medication.
Q So you were taking your medication but you were still placed on suicide watch at the Genesee County Jail?
A Yes, sir.

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Q And was that because you had threatened to harm yourself?
A Yes, sir.
Q Had you threatened to harm others over there?
A Yes, sir.
Q All right. At any point in time did your attorney talk to you about sending you to the forensic center?
A No, sir. She never mentioned it to me.
Q Did you ever tell your attorney that you were hearing voices?
A Yes, sir.
Q Did you ever tell your attorney that you were on suicide watch?
A Yes, sir.
Q Did you ever tell your attorney that you had been diagnosed with this disorder since you--the age of 14?
A Yes, sir.
Q But at no point in time any suggestion was ever made to send you to the forensic center to determine whether you were competent or not?
A No, sir.
Q All right. Going back to the date that this happened, you'd indicated you'd only known Mr. Davis for--you'd met him the day before correct?
A Yes, sir.
Q And you'd indicated that you were living at Father Dukette in apartment 1111, is that correct?

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A Yes, sir.
Q And how long had you been living there?
A Probably a year.
Q A year?
A Yeah.
Q And your name was on the lease?
A My dad (sic) name was on the lease.
Q So your dad's name was on the lease?
A I was paying the bills though.
Q So the leaseholder of that apartment was your father?
A Yes, sir.
Q And you were giving him money for paying rent and utilities I'm assuming?
A Yes, sir.
Q So as far as the apartment complex knew your father was the individual whose name was on the lease correct?
A Yes, sir.
Q There had been a gentleman who had testified earlier by the name of Mr. Jaman--Jaman, Quantay Jackson. Do you know that individual?
A No, sir.
Q Did you know any of the security guards at Father Dukette?
A I knew a few of 'em, but not by name.
Q Not by name. You just knew them by face?
A Yeah.

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Q So going on to the date that we have here of the incident, you're at your apartment, your father is there correct?
A Yes, sir.
Q And is that James Albert, does he go by Senior, anything of that nature or is he just James Albert?
A I think it's Senior.
Q You think it's James Albert, Senior?
A Yeah.
Q And then your brother was there also, correct?
A Yes, sir. Junior.
Q James Albert, Junior?
A Yes, sir.
Q Does he also go by James Albert, the III?
A Yes, sir.
Q And in relation to you is James Albert the III or James Albert, Junior, is he older or younger than you are?
A You said is he older or younger?
Q Yes.
A He's older than me.
Q By how many years?
A Um--20--
Q If you know.
A --23, 24, 25, 26, 27, 28, 29, about seven years.
Q He's about seven years older than you are?
A Yep.

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Q Did your brother live at that apartment as well?
A Did he live there?
Q Yes.
A No, sir.
Q So, did he stay there at times?
A He stayed the night sometimes when he'd get into with his girlfriend.
Q Okay. So, he was there occasionally. And I guess going back for a second as far as your father, did your father live at that apartment?
A He comes there when he get into it with his girlfriend.
Q So your father, his name is on the lease but he doesn't spend every night there?
A No, he used to--he lived on Grand Traverse.
Q All right. And then as far as your girlfriend, does your girlfriend stay at that apartment with you?
A Yes, sir.
Q All right. So, she actually lived there?
A Yes, sir.
Q So, while you're living in that apartment I think you just indicated to Mr. Sawka and everything that you were selling drugs out of that apartment, is that correct?
A Yes, sir.
Q You have to wait, just let me finish and then before you answer even though you know what the answer is gonna be

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because it's being recorded, okay? So, you were selling drugs out of the apartment correct?

A Yes, sir.

Q And you had indicated you were selling marijuana?

A Yes, sir.

Q And cocaine as well?

A Yes, sir.

Q How long had you been selling drugs out of that apartment?

A About a year.

Q About a year?

A Yeah. Same time I moved in.

Q The same time that you moved in?

A Yes, sir.

Q So once you moved into that apartment that's where you began selling drugs out of it at that point?

A Yes, sir.

Q Did your father happen to know you were selling drugs out of there?

A Yes, sir.

Q What about your brother?

A Yes, sir.

Q Your girlfriend as well?

A Yes, sir.

Q So you're selling drugs out of that apartment and I believe you've been asked questions as well, did you have a grinder

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there?
A A grinder?
Q A marijuana grinder?
A A weed grinder?
Q A weed grinder.
A Yes, sir.
Q Did you happen to have a scale there?
A Yes, sir.
Q Why did you have a scale?
A To measure the weed, the bags of weed. Put the bags of weed into grams.
Q All right. So when you measure it--so you would measure it into grams?
A Grams, yep.
Q So is that how people would normally buy weed from you would be in grams?
A Yeah.
Q So, at this point in time let's say back when this event happened and everything, so a gram of weed, how much would it be going for--
A Ten dollars.
Q --what would--ten dollars a gram?
A Yes.
Q And just for an idea, as far as a gram of weed, about how big is that?

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A How big is it, about that big.

(At 11:03 a.m., witness shows size with fingers)

Q So you've got your finger and you're making it about the size of a quarter?

A Yeah, about--about a quarter.

Q About a quarter?

A About a little bigger than a quarter.

Q A little bit bigger than a quarter?

A Yeah.

Q All right. So, then as far as each gram goes it would be worth approximately ten dollars or so, correct?

A Yes, sir.

Q All right. So, going back to this day, there was an individual that came in that you referred to as DJ that we know as Donald Davis correct?

A Yes, sir.

Q And that's a friend of your brothers?

A Yes, sir.

Q You met him the day before when he came over?

A Yes, sir.

Q And then he came--this next day or the day of the event he was there also as well?

A Yes, sir.

Q Did you have any idea that he was coming over that day?

A No, sir.

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Q When you had met Mr. Davis the day before did you guys exchange phone numbers anything of that nature?
A No, sir.
Q So, he comes over that day, was your brother already present at your apartment when Mr. Davis showed up?
A I believe he was.
Q You believe that your brother was already there?
A I think so.
Q Do you recall if your brother said, hey, by the way, DJ's coming back over today?
A No.
Q So Mr. Davis shows up, when he shows up did you answer the door?
A I believe I answered the door, yeah.
Q So when you got there, Mr. Davis arrived, DJ was there and did he ask where James was at?
A Yes, sir.
Q Let me stop for a second. Your brother, James Albert the III or James Albert, Junior, does he have a nickname?
A Uh, JR.
Q JR? So, when he's there, does he ask if JR's there?
A Yes, is James there. He said James all the time.
Q Is James there?
A Yeah.
Q So, he--you allowed him into your apartment correct?

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A Yes, sir.
Q And then once he comes into your apartment does he start speaking with James?
A Yeah, he started talking to James.
Q And what do you do while that's going on?
A I go to my room.
Q You go to your room?
A With my girl.
Q With your girl?
A Yeah.
Q And then while you're back there with your girl, you're back there for awhile before you come back out, correct?
A Yes, sir.
Q And about how long was that?
A Probably like 15, 20 minutes.
Q 15 or 20 minutes?
A Yes, sir.
Q During this time period is that when your girlfriend is telling you that she would like some cigarettes?
A Yes, sir.
Q And is that also when she's telling you that she would like some weed?
A Yes, sir.
Q And I believe you had testified you did not have any weed at this point in time?

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A No, sir.
Q You were basically sold out?
A Yeah.
Q All right. As far as getting weed, you indicated you were going to go over to Dan's party store, is that correct?
A Yes, sir.
Q Is that someone that--who you normally bought weed from would be at that store?
A Yes, sir.
Q Are they always there or did you have to call them?
A They usually post it in front of the store.
Q They usually post it in front of the store and when you say post it, what do you mean by that?
A Stand in the front of the store or stand in the side of the store.
Q Just standing someone around the store--
A Yeah.
Q --just kind of hanging out?
A Yep.
Q And then if people need something or know them, they can buy marijuana from them correct?
A Yes, sir.
Q Is this someone that you had bought from frequently?
A Yes, sir.
Q So, you tell your girlfriend, I'm gonna go get some marijuana

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and go what, go get some weed and go get some cigarettes and so you start to leave, is that correct?

A Before that, I stayed in the living room a minute and talked to DJ and James though before I left out the door.

Q So you were out--you were out in the living room talking to DJ and James. Were you telling them that you had to go to the store to get some cigarettes and get some weed?

A I told my brother that.

Q Well, was Mr. Davis standing there while this conversation was going on?

A Yeah, I believe he was.

Q You believe he was standing there also as well?

A Yeah.

Q So he's standing there listening as well. You leave--or I'll ask the question this way. Who left out of the apartment first?

A Who left out the--

Q You or Mr. Davis?

A Mr. Davis.

Q So, Mr. Davis walks out. Did you tell Mr. Davis that hey, by the way I'm going to the store and he said--

A I told him that when I got outside.

Q When you got outside?

A Yes, sir.

Q So, you hadn't said anything to Mr. Davis about going to the

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store before he left out of the apartment?
A No, sir.
Q So he leaves out of the apartment and you file behind him correct?
A Yes, sir.
Q And this is when you guys have a conversation--allegedly have a conversation in the elevator correct?
A Yes, sir.
Q When you leave your apartment, going back for just a second, when you leave your apartment you have your gun on you correct?
A Yes, sir.
Q And what kind of gun was that again?
A A .38.
Q And was that a revolver?
A A revolver, yeah.
Q And do you remember how many rounds that you had in?
A Six.
Q You had six in there. Do you recall if they were copper or anything else?
A No, I don't recall.
Q Okay. You don't recall. So, you're leaving to walk to the store and you have your gun on you correct?
A Yes, sir.
Q I believe you testified earlier the reason that you owned a

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gun was because that you sold drugs correct?
A Yes, sir.
Q When you're walking out, why do you have the gun on you at that point?
A Why'd I have the gun on me at that point?
Q Correct.
A 'Cause I always have my gun on me when I leave to--when I leave the spot.
Q When you leave the spot?
A When I leave my apartment.
Q So when you leave your apartment. So, whenever you leave your apartment you always have your gun on you?
A Yes, sir.
Q Regardless of whether you're dealing drugs or not?
A Regardless.
Q So if you're just walking to the store you've got your gun on you?
A Yeah.
Q Going to church, you've got your gun on you?
A I don't go to church.
Q Okay. Going to school, you've got your gun on you?
A No, I don't go--I leave my gun with my girl when I go to school.
Q Okay. So, you leave your gun with your girl when you go to school. And let's digress and go back to that for a second.

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I believe you indicated that as far as school goes that you did not get your high school diploma, is that correct?
A Yes, sir.
Q Did you ever get your GED?
A I was going--I was attending the GED program at the time of the event.
Q When this was happening?
A Yes, sir.
Q That as far as school goes you had only made it through the tenth grade, is that correct?
A Yes, sir.
Q While you were in school, had you any sort of special services that were offered to you because of your mental illness or anything?
A I had counselors that I usually talked to frequently--
Q Okay.
A --about my problems.
Q But as far as school goes and everything, you were mainstreamed through school correct?
A Yes, sir.
Q You didn't have any special classes, anything of that nature?
A No, sir.
Q All right. Going back now to when you and Mr. Davis are leaving the apartment. So, when Mr. Davis is over at your apartment had you engaged any conver--had you had any

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conversation with him?
A In the apartment?
Q Yep.
A We were just showing each other our guns in our apartment--
Q All right.
A --that was about it.
Q So going back to that, so you're showing each other your guns. You had only met him the day before correct?
A Yes, sir.
Q And the day before when you had conversation with him or time that you had spent with him, how long was that?
A I'm not for sure.
Q I mean, well had you guys spent like several hours together?
A Yes, sir.
Q Been hangin' out?
A He was hangin' out with my brother, he wasn't hangin' out with me.
Q So while he's there hanging out with your brother, I mean, is he sitting there having any conversation with you?
A No, not the first day.
Q Not the first day?
A No.
Q So he's there hanging out with your brother. The second day he comes over then you're saying that he's showing you his gun?

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A Yes, sir.
Q He just pulls it out and says hey, by the way, this is--here's my 40.
A And then, what you packin'? And I showed him my gun.
Q So I mean that's what he did, I'm just asking you. So that's what he did. He just pulled out his 40 and said hey, this is what I'm carrying?
A Yeah. Basically.
Q Basically.
A Yes.
Q And so, then at that point in time he asked what you're carrying, is that correct?
A Yes, sir.
Q And what did you tell him?
A I told him this is what I got.
Q And where did you pull your gun from?
A My hip.
Q From your hip. So, when you spoke to Mr. Davis it was already on your hip at that point?
A I had grabbed it from the windowsill when I was talkin' to my girl and then I came in the living room, I put it on my hip when I came in the living room though.
Q And Mr. Sawka had asked you as well, as far as whether or not that um, he knew that you had a gun, you recall testifying down at district court correct?

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A Yes, sir.
Q In front of Judge Perry--
A Yes, sir.
Q --is that correct? And you recall being asked if you had shown Mr. Davis your gun or if he knew that you had a gun. Do you recall being asked that?
A I'm not for sure.
Q You don't recall?
A No.
Q Well if I showed you a copy of the transcript would that refresh your memory as to what you were asked and what your answer was down at district court?
A I know you just said it was no.
Q I'm sorry?
A I know you just told me I said no.
Q So you're gonna take his word that you told--you said no down at district court?
A Yeah, I'm gonna take his word.
Q So then also as well when we're talking about if when I asked you that same question, if you had um said that you didn't see anyone having a gun--you didn't show a gun that day, do you recall that?
A No, sir.
Q Going on to the gun also as well. You've given several different statements to police officers correct?

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A I believe so.
Q All right. So, we're gonna stop there with that. So, let's go back forward to when you're talking to Mr. Davis. You guys get on the--get in the elevator and then just out of the blue he tells you that he needs to hit a lick or something?
A Yes, sir.
Q You guys have had no other conversations before this of any importance, correct?
A No, sir.
Q When you guys are climbing into the elevator, do you know what Mr. Davis' real name is?
A No, sir.
Q You only know him as DJ?
A Yes, sir.
Q Do you know where he lives at?
A No, sir.
Q Do you know who his mother is?
A No, sir.
Q Do you know who his girlfriend is?
A No, sir.
Q Do you know if he has a job?
A No, sir.
Q Do you know where he went to school at?
A No, sir.
Q Know if you guys have any common friends together?

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A No, sir.
Q So the only way that you know Donald Davis--
A Is--
Q --is the few minutes or the period of time that you seen him interact with your brother, is that correct?
A Yes, sir.
Q And then supposedly in the elevator, he tells you, hey, I need to hit a lick correct?
A Yes, sir.
Q When you guys are getting into the elevator have you already told Mr. Davis that you need to go get some marijuana for your girlfriend?
A No, sir. I told him when we got outside.
Q So when you got outside. And so, when you get outside, just all of the sudden this white car pulls up, the Bonneville that has a gentleman inside it and he was able to sell some marijuana correct?
A I don't know what he pulled up for. I don't know if he called him or not. I don't know who he was on the phone with.
Q Well here's my question. You haven't told him--he's telling you that he needs to hit a lick or supposedly that's what you had testified to, that he needs to hit a lick, and I believe at one point in time you had told--said down in district court that he was hurting for money, correct?
A Yeah.

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Q Do you recall that?
A Yeah.
Q So you get in the elevator, supposedly he tells you that oh, well I need to hit a lick again correct? Or I need some money even though he's had no other conversation with you he tells you he needs to rob somebody. You get outside, when you get outside that's when you tell him that you need to buy some weed, is that correct?
A Yes, sir.
Q And then at that moment, looking at the video--
A I told him I was going to the store to get some weed and some cigarettes.
Q You were going to the store to get some weed and some cigarettes. And within a minute or so of you walking outside we have the white Bonneville pull up correct?
A Yes, sir.
Q And the person inside the white Bonneville shows up and they've got weed to sell, is that correct?
A Yes, sir.
Q Okay. But yet you had no idea that this person was going to pull up correct?
A No, sir.
Q Had no idea that this individual had any weed if there was gonna be anything to bought--to be able to be bought right then?

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A No, sir.
Q So he shows up, you've never seen this before correct?
A No, sir.
Q He gets out and as you're walking up and Mr. Davis walks up he goes to his trunk to open it up correct?
A Yes, sir.
Q Have you told the gentleman hey, I need to buy some weed?
A No, they was talkin' and they shook each other hand and he was like, my man's wanna buy some weed. He say--he told him that I wanted to buy some weed. I didn't say nothin' to him.
Q So when Mr.--the person we know as Mr. Hanson, when Mr. Hanson arrives Mr. Davis then says hey, by the way, my boy over here, Holiday needs to buy some weed correct?
A Yeah.
Q And so at that point in time that's when we see the trunk open up correct?
A Yes, sir.
Q So then Mr. Hanson goes in the trunk and then you guys eventually get inside the car--
A Yes, sir.
Q --is that correct? So, inside the car you try to buy weed from him. He has some weed that you don't like to begin with correct?
A Yes, sir.
Q And when he showed you that weed, how was it packaged?

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A I think it was in a sandwich bag.
Q In a sandwich bag?
A Yes, sir.
Q And you sell drugs. Any idea by looking at it how much weed was in that sandwich bag?
A Probably like a quarter.
Q About a quarter. And when you say a quarter, what do you mean by that?
A A quarter of weed.
Q Well a quarter of weed would be how many grams?
A Seven.
Q It would be seven grams?
A Yep.
Q So, seven grams and how much would seven grams of weed normally sell for?
A $70.00.
Q $70.00. Did you tell him that you wanted that much weed?
A No.
Q How much did you tell him that you wanted?
A I just wanted to buy a bag.
Q You wanted to buy a bag. So when you say a bag, while he's got it in a bag right there.
A I just wanted to buy a five in a bag.
Q You wanted to buy a $5.00 bag?
A Yeah.

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Q So did he pull a $5.00 bag out of his pocket?
A He pulled it out of the quarter.
Q He pulled it out of the quarter?
A Yeah, to put it on the scale.
Q Pulled it and put it on the scale?
A Yeah.
Q Let me stop you right there. So, there's a scale. Where was the scale located at?
A On the arm, I mean in the middle.
Q In the console?
A Yeah, in the console.
Q So he opened up the console and pulled out a scale?
A Yes, sir.
Q Was it a digital scale?
A Yes, sir.
Q And so then he places the marijuana on the digital scale?
A To show how many grams he's giving me.
Q And so then based on that he would pull off or put some back on to try to get the amount that you want?
A Yes, sir.
Q All right. Did he do that, but that's not with the first batch though correct? Because the first batch you looked at and you didn't like just from looking at it correct?
A He didn't do it with the first batch, he did it with the second batch.

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Q Okay. That's what I was gonna go through. So, the first batch you don't like. He gets out of the car and gets out and then supposedly, this is when Mr. Davis all of the sudden says, hey, I'm gonna hit this, right?
A Yeah.
Q And you had no idea what he was talkin' about?
A I knew what he was talking about, but I didn't know he was gonna really follow through with it.
Q So before this did you have any idea what he was talking about? Had you had any idea that this was going to happen?
A No, sir.
Q All right. So he gets inside--so he says this, does he have his gun out at this point in time?
A No, sir.
Q And then Mr. Hanson gets back into the vehicle correct?
A Yes, sir.
Q And you guys do your transaction?
A Yes, sir.
Q And so what you said is he pulls out the weed and puts it on the scale, is that correct?
A Yes, sir.
Q And then eventually he sells you what, a $5.00 bag?
A Yes, sir.
Q And so then does he give you the bag and you give him the money?

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A Yes, sir.
Q All right. And going back again for just a second and I just have a question about how the seats were located. If you could step down one more time out of the witness box.
(At 11:16 a.m., witness exits witness box)
Q And what I need for you to do first, we're gonna pretend this is the driver's seat of the white Bonneville, okay?
A Yep.
Q What I need for you to do is move this chair as to where your seat would've been in location to this one because originally when you were sitting here together they were side by side correct?
A Yes, sir.
Q Okay. So, you and Mr. Hanson would be touching elbows correct?
A Yes, sir.
Q But you guys weren't that close correct?
A No, sir.
Q Because there was a console in the middle?
A Yes, sir.
Q So move the chair if you don't mind approximately how far apart that would be as far as the console separating the two of you.
(At 11:16 a.m., defendant moves chair)
A About right here.

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Q Okay. So, we have it like right there so the other chairs are approximately six, eight inches apart at this point in time correct? So, if you'd have a seat where you were seated at. You were seated in the passenger seat correct?
A Yes, sir.
Q Please have a seat.
(At 11:16 a.m., defendant sits in front passenger chair)
Q So then when Mr. Hanson is I'm assuming using the console right there to measure out the weed, is that correct?
A Yes, sir.
Q Mr. Davis is sitting behind him correct?
A Yes, sir.
Q So as far as Mr. Davis' seat behind the driver's seat, I'm gonna move the chair back a little bit and tell me to stop where you think how far it was away from where Mr. Hanson was sitting okay?
A About right there.
Q About right there. So basically, the front edge of the chair to the back of the second chair to the back edge of the first chair is about 18 inches apart.
MR. WHITE: Does that seem about right?
MR. SAWKA: Oh, I have no objection.
BY MR. WHITE:
Q So that's where he's seated, he's seated directly behind Mr.

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Hanson, is that correct?
A Yes, sir.
Q Okay. The seat that's there that Mr. Hanson has has a headrest correct?
A Yes, sir.
Q Is the headrest up?
A I don't remember.
Q You don't remember. Do you remember if it had a headrest though?
A I believe it had a headrest.
Q So it had a headrest. So, while this is going on, I believe what you had testified to is supposedly Mr. Davis pulls out his gun and points it at the back of the headrest correct?
A Yes, sir.
Q So it would've been the back of Mr. Hanson's head?
A Yes, sir.
Q Could Mr. Hanson see the gun at that point in time?
A I don't believe so, no.
Q Because his back, the back of his head is--
A 'Cause he's turned--'cause he's turned. I don't believe he seen it.
Q So the back--
A He's turning his head.
Q Okay. But the back of his head would've towards Mr. Davis correct?

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A Yes, sir.
Q If you want to have a seat back up in the jury--I mean the witness box for just a minute.
(At 11:18 a.m., witness returns to witness stand)
Q So then when Mr. Hanson hears this, when Mr. Davis says allegedly what you say that he said, did you turn around and look at Mr. Davis?
A Yes.
Q And you see the gun out is what you testified to correct?
A Yes, sir.
Q And supposedly it's pointed at the back of Mr. Davis'--or excuse me, at Mr. Hanson's head correct?
A Yes, sir.
Q And then you indicated that Mr. Hanson as opposed to giving any money--or he didn't give up any money at that point, did he?
A No, sir.
Q He didn't give up any marijuana at that point, did he?
A No, sir.
Q He then turned around and grabbed at the gun that Mr. Davis had in his hand at that point?
A Yes, sir.
Q Did Mr. Hanson say anything?
A No, sir.
Q Okay. So, after Mr. Davis has said what you said he said,

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give me this or whatever's going to happen as he's pointing the gun at the back of him, Mr. Davis doesn't pull the trigger at that point correct?

A The gun went off--the gun went off (inaudible)--

Q Is Mr.--hold on, let me stop you for a second. As Mr. Hanson has his back to Mr. Davis and Mr. Davis is pointing the gun at the back of his head and tells him to run that shit or whatever he said--

A Yeah.

Q --Davis didn't pull the trigger at that point in time correct?

A No, sir.

Q Mr. Hanson then gets up and turns around in his seat correct?

A Yes, sir.

Q As he's turning around in his seat, Mr. Davis doesn't pull the trigger at that point in time, does he?

A No, the gun went off while they was tussling for it.

Q So Mr. Hanson turned around and grabbed the gun and started wrestling with him correct?

A Yes, sir.

Q And Mr. Hanson, when he is wrestling with Mr. Davis, he's basically facing towards the back seat at this point in time correct?

A Yes, sir.

Q His chest is resting up against the seat and the headrest correct?

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A Yes, sir.
Q He's not--he's not in the middle over by the console or anything, he's turned around--
A He turned around--half of his body was in the back seat.
Q So half his body was in the back seat?
A Yes, sir.
Q When we say half his body is in the back seat, do you mean over his driver's seat?
A His--yeah, over his driver's seat.
Q Over--
A His feet and legs were still in the driver's seat.
Q Okay. And he's turning around tussling over the gun at that point in time?
A Yes, sir.
Q And then at that moment, that's when you hear the gun go off correct?
A Yes, sir.
Q And then when you testified today that oh, well this is when you're shocked and you have no idea what's just happened correct?
A Yes, sir.
Q And at that point in time I believe you testified--you're testifying today that Mr. Davis then slid over behind you and pointed the gun at your head and told you to shoot correct?
A Yes, sir.

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Q When you shot, Mr. Davis--or excuse me, Mr. Hanson, was he still leaning over that front seat?
A Yes, sir.
Q Was he over toward the console in any way, shape or form?
A A little bit.
Q Just a little bit. And then at that point you just close your eyes, turned and shot correct?
A Yes, sir.
Q And then you get out of the vehicle--eventually get out of the vehicle and you guys run off and everything correct?
A Yes, sir.
Q All right. Going back to what happened inside the vehicle, do you recall talking to these two detectives over at the Genesee County Jail back on May the 4th?
A I talked to them more than once, so I believe--I believe I talked to 'em.
Q Okay. And you also talked to them back on July the 9th, do you recall that? There were two different times that you spoke to them.
A I believe so.
Q Do you recall that?
A Yeah, I believe so.
Q Do you recall telling them during that second interview that there was never any discussion about a robbery?
A There wasn't no discussion.

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Q No conversation. Then you never told them that Donald Davis had told you hey, I need to hit a lick or I need to rob someone?
A Did I tell them that?
Q Did you tell them that?
A I believe I told somebody that.
Q Well that's my question. Back at that first interview at the jail did you tell these two officers--excuse me, I apologize, the second interview at the jail, did you tell these two officers, hey, Donald Davis was telling me he needs to hit a lick or he needs to rob someone?
A I don't remember.
Q You don't recall that. Do you recall having an interview with Detective Watson?
A Who is Detective Watson?
Q Would've been somebody from the Michigan State Police. They might've taken you out of the jail for that interview.
A Uh--
Q It would've been a lady. Do you remember having an interview with a--with a police officer who would've been female and these two officers I don't believe would have been present during that interview, but do you recall that interview?
A I believe so.
Q Okay. Do you recall telling her that as far as everything that happened, do you recall telling her that you had no

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knowledge whatsoever that DJ was gonna rob the weed man?
A I didn't have no knowledge.
Q Well, I mean, you just testified that you heard him talking about rob--well, let me put it this way; had--did you tell her that DJ had made any mention of robbing anyone whatsoever?
A I don't--I don't remember.
Q Okay. Do you recall telling her that you had no knowledge of the robbery being--even happening at all before the shot happened?
A Did I tell her that?
Q Yes.
A I don't even remember talking to Detective Watson.
Q So you don't remember talking to her about anything. So, if she wrote a report that says that while you were inside the car that you heard a gunshot and then you just fired in the direction of the victim to protect him, you don't recall telling her that?
A I don't remember talking to her period.
Q Don't remember talking to her period. So as far as anything that she--any report that she made, any comments she may have to make about a statement that you made, you're saying that you have no knowledge of it whatsoever?
A Basically.
Q Okay. Is this--I should ask the question this way. Back on July 28th of 2016, were you on your meds at the time?

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A I was on my meds.
Q You were on your meds at the time?
A I believe so.
Q Okay. You also had a time when you testified in front of Judge Perry down at district court, do you recall that?
A Yeah, I recall it.
Q It was a couple months ago actually, correct?
A Yeah.
Q And prior to testifying down at district court you had actually entered into your plea agreement, is that correct?
A Yes, sir.
Q And your plea agreement, I believe Mr. Sawka he discussed it with you, but let's go over a couple things. You were represented by--or you're represented by an attorney by the name of Lisa Lang correct?
A Yes, sir.
Q And she's been your attorney throughout this entire case correct?
A Yes, sir.
Q She told you that originally you were charged with open murder, is that correct?
A Yes, sir.
Q Did she tell you what the penalty was for open murder?
MR. SAWKA: Judge, I need to object. I think we might be pushing into client attorney privilege. I try to

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avoid anything that Ms. Lang had told.

MR. WHITE: I will rephrase the question, Your Honor.

BY MR. WHITE:

Q As far as open murder, are you aware of what the penalty for open murder is?

A I believe it's life.

Q And when you say life, what do you mean by life?

A The rest of your life.

Q So basically that you would die in prison?

A Yeah.

Q You're also charged with felony firearm, is that correct?

A Yes, sir.

Q And felony firearm carries a two year penalty, correct?

A Yes, sir.

Q And you understand that that is actually consecutive which means you have to do that time first before you do any other penalty correct?

A Yes, sir.

Q You then entered into a plea agreement where that open murder charge was pled down to manslaughter?

A Yes, sir.

Q And then you were explained to that was--your understanding of manslaughter, what's the maximum penalty for manslaughter.

A Fifteen years.

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Q And pursuant to your plea agreement, there was a recommendation that you would get how long in prison?
A 53 months.
Q When you originally signed your plea agreement what was your understanding of what you were going to get on your minimum sentence?
A 64 months.
Q 64 months. That was when you signed it back on June the 12th correct?
A Yes, sir.
Q And as far as the 64 months, you testified that oh, well that later it became 53 months, is that correct?
A Yes, sir.
Q And that was because someone told you that you were supposed to be sentenced within the middle of the guidelines, is that correct?
A Yes, sir.
Q When it states on your plea agreement it doesn't say middle of the guidelines does it? And I can show it to you if you'd like to see it.
A My attorney--my attorney told me that uh--
Q We're talking about the--one second before we get into any of that. We're talking about the document that you signed that you identified earlier that Mr. Sawka showed you, your plea agreement, that was a document you signed correct?

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A Yes, sir.
Q It states under sentence recommendation, it says 64 months correct?
A Yes, sir.
Q Actually, 64.5 months correct?
A Yes, sir.
Q It does not say middle of the guidelines, does it?
A No, sir.
Q And then going also as well underneath the--provide truthful testimony as required by the prosecutor, it says consistent with the interview by Detective Watson, is that correct?
A Yes, sir.
Q So you signed this document correct?
A Yes, sir.
Q You understood what was going on with it when you signed it correct?
A I believe that I supposed to been testifying for the pleaded (sic).
Q You believe you're supposed to be testifying for a pleading?
A Yes, sir.
Q As far as this portion that said consistent with the statement given to Detective Watson, did you ask what that meant?
A No, sir.
Q Okay. And then going on when you entered your plea, you actually entered your plea in this courtroom correct?

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A I believe so.
Q In front of this Judge, correct?
A Yes, sir.
Q And he asked you did you understood (sic) what you were signing correct?
A Yes, sir.
Q And he also asked you whether any promises, threats or inducements that were not placed on the record, is that correct?
A I believe so.
Q You believe so? As far as promises, do you know what that means?
A Promise mean, I don't really know the definition but promise mean--
Q Well let me explain it to you--let me put it to you this way. When you were sitting there the Judge explained to you this was a contract correct?
A Yes, sir.
Q That everything was to be contained on this piece of paper correct?
A Yes, sir.
Q And as far as this piece of paper goes, it says your minimum sentence is 64 and a half months correct?
A Yes, sir.
Q And the Judge asked you was there anything else, any other

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promises, threats, inducements, anything else to make you plead guilty to this charge. Do you remember him asking that?

A I believe so.

Q But no one said, well yes, by the way, this is a mistake. It should be the middle of the guidelines correct?

A My lawyer told me.

Q I'm not saying that, I'm saying when you were talking to this Judge and when you were entering into all this on the record did anyone ever say middle of the guidelines?

A No, sir.

Q Okay. So, then you go down to district court and you testify in front of Judge Perry and you recall that correct?

A Yes, sir.

Q Were you down there--Mr. Sawka was there correct?

A Yes, sir.

Q And I was also there as well correct?

A Yes, sir.

Q And at that point in time during your testimony that's when you start telling--or you told that Judge that oh, well, Donald Davis was in that apartment and he was telling everybody that he was hurting for money correct? And is that a yes?

A Yeah, I believe--no, he was telling my brother that.

Q Well that's what I'm saying. He's at the apartment, he's telling people that he's hurting for money correct?

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A Yeah.
Q And he's also telling him that he needs to find somebody to rob correct?
A Yeah.
Q But you hadn't told anyone else this before though correct?
A You said what?
Q You hadn't told any police officers that before correct?
A I thought I did.
Q You thought you did. You also testified down there at that court, do you recall testifying that by the way you never showed anyone your gun?
A You just asked me that, didn't you?
Q I did. (indiscernible) through that statement from that day again. So again, as far as that goes, you don't recall saying that, is that correct?
A No.
Q Okay. Is that a yes? And then also, when we--when you were testifying at district court there came a point in time when you were questioned about what happened inside the car and do you recall saying that you tried to talk Davis out of robbing anyone?
A Did I recall trying to talk him out of it?
Q Yeah. Saying hey, by the way, there's cameras around here?
A Oh, yeah.
Q So you told us that down there correct?

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A Yeah.
Q And you're like what are you trying to do, there's cameras around here?
A Yeah.
Q So when I say dissuade, you were trying to basically talk him out of it at that point in time correct?
A Basically.
Q Had you ever told anyone that before?
A I believe I did.
Q You believe that you did. And then also, as far as inside the vehicle once you guys leave there's marijuana left in the car correct?
A Yes, sir.
Q As far as money in the car, you had paid Mr. Hanson correct?
A Yes, sir.
Q When he pulled out his--giving you change did you see any money at that point in time?
A Yes, sir.
Q Did you happen to see how much he had?
A No, sir.
Q But that money wasn't taken either correct?
A No.
Q As far as any marijuana in the trunk was that taken?
A No, sir.
Q Was--did you see Mr. Davis or did anyone happen to run Mr.

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Hanson's pockets at all?
A No, he didn't run his pockets.
Q Nobody did anything?
A No, sir.
Q The vehicle itself, were the keys still in the ignition?
A Yes, sir.
Q All right. But no one took the vehicle either correct?
A No, sir.
Q I'm sorry?
A No, sir.
Q And so, then you leave and you and Mr. Davis then go over to Mr. Davis' sister's house correct?
A Yes, sir.
Q And I believe you just testified today that once you got over there you went down into the basement correct?
A Yes, sir.
Q And then Mr. Davis made you give you--give him your gun correct?
A Yes, sir.
Q And he wrapped it up in something correct?
A Yes, sir.
Q What did he wrap it up in?
A A t-shirt.
Q A t-shirt. Do you recall what color the t-shirt was?
A White.

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Q It was a white t-shirt. But you didn't see what he did with your gun?
A No, sir.
Q Did you see if he put his gun in with that t-shirt?
A No, I didn't see.
Q All right. And so, you're sitting down in the basement correct?
A Yes, sir.
Q Did Mr. Davis ever leave the basement while you were down there?
A No, sir.
Q You call your brother correct?
A Yes, sir.
Q Your brother--when your brother arrives does he call and say hey, by the way I'm upstairs, come and see me.
A Did he call?
Q Yeah, did he call to let you know that he was there?
A No, I believe he knocked on the door and we came--
Q Knocked on the door.
A --we came upstairs.
Q And then you guys came upstairs?
A Yeah.
Q At that point in time you left with your brother correct?
A Yes, sir.
Q And as far as Mr. Davis goes, he never--once you guys were

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down in the basement and once you supposedly gave him your gun you never lost sight of him at that point in time correct? He was always down there with you?

A He was down there with me, but I was in a different part of the basement then.

Q Well describe the basement for me. How many rooms are down there?

A There's only one room. I was on the couch though.

Q Okay. Well I mean, was there anything like separating the room? Sort of like a wall?

A No.

Q Okay. So basically, it's one giant room like this room?

A Yes, sir.

Q And you're sitting there and then Mr. Davis is walking around correct?

A Yeah. I wasn't paying attention to him though.

Q Did you ever see him--I'm--well here's my question; did you ever see him leave that room?

A No, sir.

Q All right. And then as far as right now you're actually incarcerated that's correct?

A Yes, sir.

Q You're in Carson City correct?

A Yes, sir.

Q And then you were brought here last--or yesterday afternoon,

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is that correct?
A Yes, sir.
Q Yesterday afternoon did you have any conversations with either of these two detectives?
A Did I talk to 'em?
Q Yes.
A Yes, sir.
Q Did you talk to the prosecutor?
A No.
Q Okay. The two detectives, did you talk about what you were going to be testifying about today?
A Yes.
Q Did they ask you some questions?
A No, they didn't ask me any questions really.
Q Well let me--what was the substance of the conversation? What did you guys talk about?
A What'd we talk about?
Q Uh-hum. That's a yes.
A Basically, was I following through--was I following through with it.
Q Were you following through with it?
A Yeah.
Q And what does that mean to you?
A Was I going to testify.
Q Were you going to testify?

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A Yes, sir.
Q And what did you tell them?
A I told them I would.
Q So, if--what is your understanding if you came into court today and said Donald Davis had absolutely nothing to do with this, do you still think you'd get your plea agreement?
A No.
Q If you came in here and said Hanson pulled out a gun, we were defending ourselves in that car, that's what happened, do you think you'd get your plea agreement?
A No.
Q If you say anything other than Donald Davis robbed this gentleman and forced you to shoot do you believe you still get your plea agreement?
A No, sir.

MR. WHITE: I have nothing further, Your Honor. Thank you.

MR. SAWKA: I don't have much, Judge.

REDIRECT EXAMINATION

BY MR. SAWKA:

Q Mr. Holiday, let's just start off with this truthful testimony portion that was just touched on by Mr. White so eloquently. Is everything you testified today the truth?
A Yes, sir.
Q If you had lied, then yes, your plea agreement would have been

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revoked, that's your understanding?
A Yes, sir.
Q But even if you had said I was the shooter the entire way, Donald did nothing, this is how it all happened, if that's the truth we can't do anything about your plea agreement, can we?
A I don't believe ya'll can.
Q Because you have to tell--it's the truth, that's what we're interested in--
A Yes, sir.
Q --it's a search for truth, right? The officers talked to you because--have you--when's the last time you saw the officers?
A Yesterday.
Q And prior to yesterday when was the last time?
A I only seen them yesterday.
Q So it's been months?
A Yeah.
Q And briefly, there was talk about having a discussion about robbing Devante. Do you remember Mr. White asking you about that?
A Yeah, I believe, I remember it.
Q Did you have a discussion prior to learning about robbing Devante with defendant Davis?
A Did I have a what? A discussion?
Q Yes.
A About robbing him?

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Q Yes.
A No, sir.
Q You learned about it the first moment when he told you he was going to rob him, is that the correct statement?
A Yes, sir.
Q So when you were asked by Detective Watson about knowing if the--defendant Davis was going to rob Devante and you said no, is that because you had no prior knowledge other than when it was actually told to you--
A You said--
Q --or is there another reason?
A --you said what?
Q When you talked to Detective Watson and said no, I didn't know he was going to rob the driver, Devante, is that because you didn't have any prior knowledge--
A I didn't have no prior knowledge.
Q --so it's--you're saying no, I only knew at that moment?
A Yes, sir.
Q If she had asked you did you know he was going to rob Devante at that moment, what would your answer have been?
A Yes.

MR. SAWKA: I don't have anything further.

THE COURT: Jury, do you have questions? Okay. You have a short witness remaining?

MR. SAWKA: Yes, and we can remove Mr. Holiday if

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you'd like first (inaudible)--

THE COURT: Well I'm just trying to figure out what you're up to first.

MR. SAWKA: Yes, we have one short witness and then I do have one other witness here, it might be short as well and we could get through them.

THE COURT: Okay. Do you have--can you take him?

(At 11:36 a.m., witness excused)

MR. SAWKA: Your Honor at this time, after discussion with Mr. White and (inaudible) with the Court we have some scheduling things going on. The People are going to provisionally and conditionally rest at the moment with the Court's permission to reopen and we're going to allow Mr. White to call a witness who can only be here for a certain period of time in his case in chief, and then provisionally rest is my understanding and need--if need be call additional witnesses.

THE COURT: And what he's getting at is we like to do things in a certain order, but it's not working during this trial. So, we're going to bring in this witness and then we're going to go back to the prosecutor's case. Mr. Sawka, is Ms. Lang your witness or Mr. White's witness?

MR. SAWKA: She's gonna be my witness. Is she present in the--

THE COURT: She's been here.

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MR. SAWKA: Will she--if she's available in the afternoon that might be best instead of waiting.

THE COURT: Okay.

MR. SAWKA: Is she available, if you could ask her?

THE COURT: Well wait a minute, how long is this other one going to go?

MR. SAWKA: Not long. I just don't know how long--if she has to go somewhere else or not right now.

THE COURT: I think we'll do both.

MR. SAWKA: Okay.

THE COURT: Good morning, Detective. Walk up to me please.

MS. WATSON: Good morning. Right up to you, sir?

THE COURT: Yes, please.

MS. WATSON: Okay.

THE COURT: Do you solemnly swear to tell the truth in this cause so help you God?

MS. WATSON: I do.

THE COURT: Good. Please be seated right there.

TIFFANY ZFRANZOSI-WATSON

(At 11:38 a.m., witness sworn in, testified as follows)

DIRECT EXAMINATION

BY MR. WHITE:

Q Good afternoon, I mean, good morning, I should say.

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A Good morning.
Q Is it Detective, Detective Sergeant, Trooper, or--
A Detective Sergeant.
Q Detective Sergeant. Good morning Detective Sergeant Watson. Would you please state and spell your name for the record?
A Tiffany, T-I-F-F-A-N-Y. Last name is hyphenated, Zfranzosi, Z-F-R-A-N-Z-O-S-I-Watson, W-A-T-S-O-N.
Q I guess I should--
THE COURT: Wait, stop. F-R-A-N-Z?
THE WITNESS: O-S-I. Watson, W-A-T-S-O-N.
THE COURT: Thank you.
BY MR. WHITE:
Q I believe congratulations are in order since I've read this report. Where are you employed at?
A With the Michigan State Police.
Q How long have you been employed there?
A 20 years.
Q And what are your duties there at the Michigan State Police?
A I conduct interviews.
Q And as far as conducting interviews, have you had any training in conducting interviews?
A Yes, I have.
Q And what sort of training have you undergone?
A I have quite a bit of training in interview interrogation and developing relationships for interviews.

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Q All right. And I guess to say as far as hours doing that, approximately how many hours would you have had of training?
A Hundreds.
Q Hundreds.
A I would say, yes.
Q So approximately over the 20 years that you've been doing this approximately how many interviews have you conducted?
A Thousands.
Q Thousands? So probably innumerable at this point and time?
A Pardon?
Q Innumerable at this point and time?
A Yes.
Q Too many to count?
A Yes.
Q So let's go as far as this year from January of this year up until today's date, how many interviews have you conducted?
A Approximately 38, 37. Right in the mid-30's.
Q All right. So not quite one a day basically what you're going through as far as interviews that you're doing, or one every two days shall we say?
A Right.
Q Did there come a point in time--let me ask the question this way; are there points and times where you're asked to interview individuals by other police agencies?
A Yes.

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Q All right. Do you recall being--coming into contact with Detective Baldwin and Detective Moore regarding a case?
A Yes.
Q Did they ask you to interview someone?
A Yes.
Q Do you recall who that individual was?
A Yes.
Q And what was that individual's name?
A Spencer Holiday.
Q Do you recall when that interview took place?
A July of 2016.
Q If I say July 28th of 2016 does that sound about right?
A That sounds about correct.
Q On that date and time when you met with Mr. Holiday had you been provided any sort of background information before you began interviewing?
A Yes.
Q And what had you been provided?
A Just a preliminary conversation with the detectives about what their case involves.
Q And so, I'm assuming you were told that there was a shooting that took place inside a vehicle?
A Yes.
Q And that there were allegations that a robbery had taken place?

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A Yes.
Q And then based on that information with that, you began interviewing Mr. Holiday, is that correct?
A Yes.
Q And I should ask also as well, when those interviews take place, where do they take place at?
A They take place at the--I believe this one was in Flint so it'd be at the Michigan State Police Post.
Q The Michigan State Police Post?
A Yes.
Q And would that be just in a room?
A Yes.
Q Are there cameras inside the room?
A Yes, there are.
Q Was this interview recorded?
A At that time I don't believe we were recording yet.
Q Okay. So, it was not--so as far as you know at this point in time you don't believe there was a recording of that interview?
A Right. We didn't record for a while after that.
Q And then I guess just so we're clear, as far as while the interviews taking place you're taking down notes correct?
A Some notes. I usually don't take too many notes until the end.
Q Eventually at some point in time you write up a report though

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correct?
A Correct.
Q Did you write a report in this case?
A Yes, I did.
MR. WHITE: Your Honor, may I approach?
THE COURT: You may.
BY MR. WHITE:
Q I'm gonna ask you some questions, but before I do that I want to show you what's been marked as report number 1 and have you look at that and see if you recognize it.
A Okay. Yes.
Q And does that look like the report that you prepared in this matter?
A Yes.
Q All right. So, going back on to Mr. Holiday, when you began interviewing him what do you do? Walk us through one.
A Well the very first thing I do with anyone I speak with I make sure that they're comfortable, make sure they've eaten something, need something to drink, if they need to use the restroom. Then I go over what's something (sic) called a Miranda form, it's their rights while they're there. We go over that and I do read it from a sheet. I read it to them, I make sure they understand it. If they have questions we'll discuss it. And then if they agree to the rights and understand everything about it we'll both sign it and then

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we'll continue with an interview.

Q And in--once you begin the interview as you mentioned that you try to become familiar or develop some sort of rapport with the individual correct?

A Yeah. It's--I want to talk with the person a little bit, find out, you know, one what they are there for, what are we gonna be talking about and a little bit about what--who they are and what brings them into this type of a situation.

Q And so when you spoke to Mr. Holiday, there eventually came a point in time you started talking about the reason that he was there correct?

A Yes.

Q And did Mr. Holiday tell you what had happened?

A Yes.

Q Did he give you a--he gave you a version of events correct?

A Correct.

Q And do you recall what that version of events was?

MR. SAWKA: Judge, before we go any further, my understanding is Ms. Watson is here for impeachment, so I'd ask Mr. White to use--if there's certain statements--

MR. WHITE: Oh.

MR. SAWKA: --that are the impeachment, I don't have an objection to leading--

MR. WHITE: Sure.

MR. SAWKA: --versus a narrative.

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MR. WHITE: Oh. Absolutely, Your Honor. I can ask and I can go through it that way as well.

BY MR. WHITE:

Q Do you recall--digressing back for just a moment. Again, you were aware of what the basic facts of the case as far as these detectives had told you correct?

A Correct.

Q Do you recall asking--or Mr. Watson--or excuse me, Mr. Holiday telling you that he had no knowledge of a robbery being planned before any of this happened?

A During my first interview.

Q During your first interview. Did he also during that first interview did he admit that he shot the individual, the victim, Mr. Hanson?

A Yes.

Q Did he tell you that what happened was that he had heard a gunshot and then fired in the direction of the victim?

A Yes.

Q And did he state also that he fired in the direction of the victim to protect him?

A To protect himself.

Q To protect--that's how you took that to mean?

A To protect himself. To protect--Mr. Spencer said he shot to protect him, like himself.

Q Okay. So, if the report says that he fired in the direction

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to protect him, you're saying that it should be himself as opposed to--or the way that that means and everything is that Mr. Holiday supposedly fired to protect himself from getting shot?

A Right.

Q Okay.

A He was explaining he fired in protection of himself.

Q After he told you that did you begin questioning him further?

A Yes.

Q Did you confront him and say by the way, I don't think that--something doesn't sound right about this story?

A Yes.

Q Then at that point in time, then he gives you another version of events?

A Yes, during a second interview.

Q And I guess I should ask the second interview, in between the first interview--what was the length of time in between the first interview and the second interview?

A It was within maybe an hour. We take a break and then we'll start to talk again.

Q And I guess I should ask also though during that break, or while this interview was going on, were either detectives Moore or Baldwin there? During--

A With Mr. Holiday?

Q Yes, while this interview is going--

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A No.
Q Okay. So, you take a break, you go back and talk to him again the second time correct?
A Yes.
Q And during this interview he then tells you that he knew that they were going to rob the person he describes as the weed man, is that correct?
A Correct.
Q And then also indicates that the first time that they heard-- that supposedly he heard DJ and his brother talking about it in the apartment correct?
A Correct.
Q And then also indicates that while they were riding in the elevator down to meet the weed man that they discussed DJ robbing the weed man, is that correct?
A I would have to look at that. I thought it was he was listening to them discuss it.
MR. WHITE: Your Honor, may I--
BY MR. WHITE:
Q If I showed you a copy of your report would that refresh your memory?
A Yes.
MR. WHITE: Your Honor, may I approach?
THE COURT: Yes.
BY MR. WHITE:

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Q In the second paragraph.
A Pardon?
Q It's the second paragraph.
A Okay.
Q And so during he told you that while they were in the elevator that he and DJ discussed robbing the weed man supposedly correct?
A Yes.
Q Then also gives a description of the events when--how they got into the vehicle correct?
A Correct.
Q And then also indicated that when the driver got out of the vehicle that's supposedly when DJ said I'm about to get this N word shall we say?
A Yes.
Q He then stated--then he told you at that point in time when the weed man gets back in the car that he and--after this starts to take place that the weed man and DJ begin to fight, is that correct?
A Correct.
Q And then he tells you that's when he hears a pop, is that correct?
A Correct.
Q And that Holiday said that while he was in the front seat he just fired into the back seat at the weed man correct?

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A Correct.
Q Did--during this interview did Mr. Holiday ever tell you that Mr. Davis had pointed a gun at him?
A I'm sorry, I have to think about what you just said.
Q During this interview did Mr. Holiday ever tell you that Mr. Davis pointed a gun at him pointing as in Mr. Holiday?
A No.
Q Never mentioned anything about Mr. Davis threatening to shoot him correct?
A I don't recall that.
Q If I showed you the report, would that refresh your memory?
A If it's not in my report I did not hear that.
Q And then he also indicated to you that after this took place that they went to DJ's sister's house where Holiday called--where Mr. Holiday called his brother to come and pick him up, is that correct?
A Correct.
Q He didn't tell you anything--oh, he also indicated in there that DJ took both guns to get rid of them correct?
A Correct.
Q He didn't mention anything about DJ pointing a gun at him and basically taking the gun from him correct?
A I don't recall that.
Q Well let me put--rephrase it this way. Did he indicate to you in this interview that DJ had threatened him in anyway?

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A I don't recall that.
Q Okay. And when you say you don't recall that, if I--do you mean that that's not what he said or you don't recall because your memory keeps you from remembering it right now?
A I don't recall that he told me that. If it was--if it was said to me I normally document it in my report.
Q Well again, if I approach you with your report and you looked at it would you be able to say--
A Absolutely.

MR. WHITE: Your Honor, may I approach?

BY MR. WHITE:
Q And so after reviewing your report, there's no mention in that report of Mr. Holiday stating that DJ or Mr. Davis threatened him in any way at any time correct?
A Correct.

MR. WHITE: One moment, Your Honor. Your Honor, I have no further questions right now. Thank you very much, Detective.

CROSS-EXAMINATION

BY MR. SAWKA:
Q I don't have much, Detective Watson. Mr. White showed you two documents correct, that you--a report you created?
A Correct.
Q I'm gonna approach and show you an additional page that I believe you recognize. Do you recognize that?

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A Yes.
Q Is that part of your report somehow?
A It's attached as an external document.
Q What is it?
A It's a written statement.
Q By whom?
A By myself and Mr. Holiday.
Q That--reading this, actually go ahead and just review that for a moment.
A Okay.
(At 11:50 a.m., witness reviews document)
A Okay.
Q Okay. I'm not permitted to ask you certain answers that are given by Spencer Holiday pursuant to the law, so I just want you to be aware that these are just yes or no questions.
A Okay.
Q Were some of the questions--was this document something that you went through with Spencer--
A Yes.
Q --when you were interviewing him afterwards?
A Yes.
Q You asked him questions correct?
A Yes.
Q Were those questions also consistent or inconsistent with other questions you asked him? That might be confusing, I

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know--
A That's kind of a wide range--
Q --I'm trying to phrase it quite particularly because I have to. He gave you--Mr. White had asked you that--he's--one--in the report it said that you asked him did you plan to rob that man and his answer was no.
A Correct.
Q Was there other evidence after the fact that led you to a different conclusion about your question and my--let me be clear. Do you believe there's a difference between asking somebody did you plan to rob that man and did you know that that man was going to robbed? Is that--are those two different questions in your opinion?
A Yes.
Q Is it different questions in your opinion if I ask you did you discuss robbing a person versus when--did you hear a person discuss robbing a person?
A Those are two different questions, yes.
Q And when I say I discussed something, what does that mean to you?
A You spoke with somebody else about it.
Q Does that indicate a time period generally?
A In the past.
Q So if I wanted to know if I discussed something with someone at a very moment, like we're doing today. Right now, we're

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discussing something at this very moment.
A Uh-hum.
Q Would you ever phrase that as did you discuss your testimony with Detective Watkins prior to her testifying? If we're talking about right now. Have I discussed it with you?
A Have you discussed it with me.
Q Your testimony.
A If that's in the past. If you're looking at time frames if that's the question, that's talking about have we discussed it in the past, prior to this moment.
Q Right, okay.
A If I--
Q That's what my question's getting at.
A Okay.
Q The word means something past not present--
A Correct.
Q --at the moment.
A Correct.
Q Okay. If you wanted to know whether a person discussed robbery versus knew about a robbery would that change your questioning of somebody?
A If--well if you've discussed it you have knowledge of it. So, there is gonna be past knowledge of it.
Q And what about if I just know about it versus discussed it?
A You can know about, have knowledge of it and have never

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discussed it, yes.

MR. SAWKA: I don't have anything further. Thank you.

MR. WHITE: One question, Your Honor, if I may?

REDIRECT EXAMINATION

BY MR. WHITE:

Q Ms. Watson, or excuse me, I apologize, Detective Sergeant Watson, in your report there is a statement in there that you wrote that when he was alone with DJ and he referring to Spencer, when he was alone with DJ in the elevator riding down to meet the weed man they discussed that DJ would rob the weed man correct?

A Correct.

Q That statement is in your report correct?

A Correct.

MR. WHITE: Your Honor, I have no further questions. Thank you.

MR. SAWKA: Just one brief follow-up based on that.

RECROSS EXAMINATION

BY MR. SAWKA:

Q Do you quote word for word--

THE COURT: Stop.

MR. SAWKA: Oh, I'm sorry.

THE COURT: If it's new matter you can bring it up, but I don't allow recross.

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MR. SAWKA: A new matter? Well, it's just to that one question.

THE COURT: It doesn't sound like it's new so it's recross.

MR. SAWKA: Okay.

THE COURT: Jury, do you have questions? All right. Step down Sergeant Detective, thank you.

THE WITNESS: Thank you.

(At 11:55 a.m., witness excused)

THE COURT: Now we will go back to the prosecutor's case and you can get that other short witness in here.

MR. SAWKA: Judge, we're gonna call Sergeant Lanning.

THE COURT: Instead of Lisa Lang?

MR. SAWKA: I'm sorry, what?

THE COURT: You're not doing Lisa Lang?

MR. SAWKA: Well, we have two, yeah. This is the one I thought you were talking about first.

THE COURT: I was thinking about Lisa Lang, actually.

MR. SAWKA: Sergeant Lanning is currently in training as well, so he's also a time--this won't be long.

THE COURT: All right. Come on up here, Sergeant.

MR. SAWKA: And then Ms. Lang will be the next one.

THE COURT: Come on, please. Do you solemnly swear

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to tell the truth in this cause so help you God?

MR. LANNING: I do.

THE COURT: Seat yourself there please.

TODD LANNING

(At 11:55 a.m., witness sworn in, testified as follows)

DIRECT EXAMINATION

BY MR. SAWKA:

Q When you're comfortable, Sergeant Lanning, please state and spell your first and last name.

A Todd Lanning, T-O-D-D, L-A-N-N-I-N-G.

Q Thank you. What is your present occupation?

A I'm a Sergeant at the Genesee County Sheriff's office.

Q How long have you been a police officer or a Sergeant at the Genesee County Sheriff's office in total?

A Nine years.

Q And have you held prior law enforcement experience other than Genesee County Sheriff's office?

A No.

Q Where are you currently assigned right now as you testify here today? What's your area that you work with?

A Corrections division.

Q And is that currently something related to the Genesee County Jail?

A Yes.

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Q What are--as part of your duties are you familiar with the system in which residents of the jail are able to communicate with the outside world?
A Yes.
Q What are your duties as it relates to that? Like what do you have to know and what do you have to do?
A Any supervisor assigned to the GLS regularly review emails that are sent in and out of the jail between inmates and the public, as well as phone calls and video visitations.
Q And what forms of contact are available for residents of the jail to utilize?
A Phone calls, video visitations and emails, along with standard letters in the mail.
Q I want to talk about the ability of a resident to use the email system with the Genesee County Jail. First, when a person is booked to be housed in the Genesee County Jail, are they assigned a specific identifier or some way to identify them?
A Yes, they're given an inmate booking number.
Q Is that kept somewhere within the system so they continuously have that number?
A Yes.
Q Does that number ever change if a person stays in the jail for a period of time?
A No.

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Q Can one--more than one person ever be assigned the same number?
A No.
Q Ever assigned the same number at all or even at the same time?
A At all.
Q So the inmate number is specific to the inmate itself?
A Yes.
Q Since you stated that they have access to emails, describe how a--if I were to be a resident of the Genesee County Jail, how would I go about sending an email? Do I have just a computer in my cell?
A There's a kiosk located in the pod where the inmate is residing.
Q Okay. What's that mean, a pod?
A Housing unit.
Q Okay. Is this kiosk, is it about the size of this podium here or is it larger?
A No, it's smaller, it's right on the wall.
Q And--
A Attached to the wall.
Q --what is on this kiosk?
A Inmates have the ability to order commissary, look at their account balances and send emails.
Q So it's a computerized kiosk?
A Yeah, it's essentially a locked computer.

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Q If I was an inmate and I wanted to send an email how would I go about doing that?
A You would--when you first get on to the housing unit you would set up an account through the kiosk that was assigned to you. You have to provide your thumbprint. Thereafter, that thumbprint is how you access your account on that machine.
Q So the thumbprint when in the booking process, the thumbprint is taken as well?
A When your booked in you're given a four-digit pin. It's your responsibility when you get on to the housing unit to use that pin to build your account and provide your thumbprint.
Q So I want to send an email, I need to provide my thumbprint prior to using the system and then I enter in a pin as well?
A Just the first time.
Q The first time. And then after that what would I have to do?
A Just the thumbprint.
Q So every time after I send my first email or login I now only need to put my thumbprint on each time I need to send another email?
A Yes.
Q When an email is sent by a resident what identification will the email have to indicate who it's sent from and to? Does it look the same as a typical email?
A Yeah, generally it looks like a normal email. It will have their name, their account--their inmate ID number which is

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assigned to them, along with the email address they're sending it to, the date and time.

Q Now is there a general email address, like when we think about email in general we see like from and maybe our email address. Do you know what goes in the from portion? Is--

A The software we use generates an email address for them.

Q Okay. So it's not a personal email address?

A No.

Q Are you familiar with whether the email that the Genesee County system uses can be pulled from the server and like put into paper form?

A Yes.

Q How would you go about doing that?

A Supervisors have access to the software to go in, read the emails, review them, like put holds on them and cancel the emails.

Q And I'm just gonna approach and show you already (sic) what's been admitted as People's exhibit 51 and 52. I just want to ask you do those look familiar to you?

A Yes.

Q How do those look familiar to you?

A This is a general resident email report that we have access to.

Q And prior to testifying here today have you been asked to review emails of anybody for this case?

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A No.
Q Okay. So, these emails that have been entered in are just the--you can identify them through what--like how do you identify them knowing they came from Genesee County Jail.
A This is the--this is the same form we use every time from the software.
Q Okay. So, these are just normal records that are kept through the process of sending and receiving emails in the Genesee County Jail?
A Yes.
Q Now the emails that get sent, if I wanted to be the resident that types it do these get altered in any way prior to being sent--
A No.
Q --if I'm just typing it?
A No.
Q Are people able to send from my email without me allowing them access through my thumbprint?
A No.
Q So if somebody's gonna send something through my email I need to do what first to allow them?
A You would have to log into the kiosk.
Q So thumbprint and ID if it's my first time, but if it's not my first time, just my thumbprint?
A Yes.

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Q Okay. And that happens, right? Sometimes that we're aware of?

A Yes.

MR. SAWKA: I don't have anything further, Judge. Thank you. And I'm gonna ask just to publish 51 and 52 just to the jury instead of putting it up there.

THE COURT: You may.

CROSS-EXAMINATION

BY MR. WHITE:

Q Is it a normal practice to review inmate's emails?

A Yes.

Q So is that something that's done for every email--I mean, for every inmate I should say?

A No. The system has built-in perimeters that if it--if keywords are hit, like one of our officer's names or the word kill or suicide or anything like that it flags it and we check those emails first.

Q But as far as say like just Joe Smith, just somebody that's just over there like on a drunk driving or something else he's there for 30 days, do you guys like check their emails every day or does it have to be red-flagged?

A No, we don't have to check them.

Q Don't have to check them. So as far as this case goes with emails that are being published right now, how did those come to your attention?

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A We would have to go in and search for each inmate's individual emails.
Q So you would have to go search for it. Were they red-flagged in any way or did someone--
A They could be.
Q Okay. In this situation do you know?
A I did not review these specific emails.
Q So you have no idea whether or not that there was a keyword that came up or anything as far as Mr. Davis goes?
A I do not.
Q And so you're not aware if someone actually made a specific request to review someone--to review his emails?
A No.
Q Could that be done also as well?
A Yes.
Q So as an attorney--or let me rephrase that. Excuse me, if I was a detective or a prosecutor I could say hey, by the way, we have this individual over at the jail, can you pull his emails for the last 20 days?
A Yes.
Q All right.

MR. WHITE: I have no further questions, Your Honor. Thank you.

MR. SAWKA: I don't have any redirect, Judge.

THE COURT: Jury, any questions? Step down,

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Sergeant. Thank you.

THE WITNESS: Thank you.

(At 12:03 p.m., witness excused)

MR. SAWKA: Judge, our last witness for the morning/afternoon will be Lisa Lang.

THE COURT: Step right up to the bench, Ms. Lang. Do you solemnly swear to tell the truth in this cause so help you God?

MS. LANG: I do.

THE COURT: Please be seated there.

LISA LANG

(At 12:04 p.m., witness sworn in, testified as follows)

DIRECT EXAMINATION

BY MR. SAWKA:

Q Ms. Lang, when you're comfortable please state and spell your first and last name for us.

A Lisa Lang, L-I-S-A, L-A-N-G.

Q And before we begin I'm just gonna say this is weird for us, just we all know it, but you understand why you're here today correct?

A I do.

Q Okay. What is your present occupation?

A I'm an attorney in Genesee County. I practice mainly in Genesee County.

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Q Do you have a particular legal focus?
A Criminal law and family law.
Q And how many--
A Probably more emphasis on family law.
Q As it relates to criminal cases, how many have you handles approximately as of today?
A I'm on the court appointed list so I do about 20 or 30 cases a year, felony cases, so--and I've been doing it for 20 years. So, you're talking anywhere from 400 to 600 cases.
Q As part of the court appointed list you act as representative counsel for defendants who are charged with crimes correct?
A Yes.
Q As part of your practice in being a criminal defense attorney is it normal that you seek to make a reasonable resolution through plea negotiations sometimes?
A Absolutely.
Q In relation to the reason you're here today, did you represent a person named Spencer Holiday in relation to a murder that occurred on April 27th of 2016 in Flint, Michigan?
A I did.
Q Were you appointed or retained by him if you recall?
A I was retained.
Q Now retained means that somebody came to you and asked we'll pay you to represent him.
A Correct.

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Q I want to inform you we are not going to be asking any questions that impinge on the attorney client privilege because we can't and if you feel that an answer can't be given because it is something that is attorney client privilege please just tell me, okay?
A Okay.
Q Thank you. During your representation of Spencer Holiday you reviewed multiple police reports, documents, and evidence given to you by my office to prepare for the case, is that correct?
A Yes.
Q As part of your representation of Mr. Holiday, did you arrange a meeting with the assistant prosecutor at the time on his case which was Ashley Jenkins, and with the elected prosecutor, Mr. Leyton of this office?
A I did.
Q I was not involved in this in any way, correct?
A No.
Q Did that meeting to your knowledge occur on or about May 16th of 2017?
A Yes.
Q And during this meeting between you, Ms. Jenkins, and Mr. Leyton, I assume and correct me if I'm wrong, lengthy negotiations occurred?
A Yes.

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Q And it was related to a way to resolve Mr. Holiday's case?
A Correct.
Q And there was a resolution reached that we know about because we have a plea agreement which has been admitted as People's exhibit 60 correct?
A Yes.
Q Now in exchange for Mr. Holiday's testimony in this case, and Mr. Holiday's already testified for your information, he was required to provide truthful testimony against his co-defendant who is Mr. Davis. You were aware of that?
A Yes.
Q You were aware his charge was open murder and we amended that to manslaughter and he would be allowed to plead guilty to manslaughter and other--the other charge of felony firearm?
A Correct.
Q Now there's also something about a sentencing agreement, which is the focus why you're here today. In this plea agreement it says sentence, there was a recommendation by the prosecution to 64.5 months, MDOC on amended count one, which was the manslaughter charge. Can you tell us how, if you know, 64 and a half months was the sentence that we recommended, being my office?
A Yeah. What--the way we arrived at that is there's something that's called sentencing guidelines. I don't know if the jury knows what they are?

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Q Judge did a great job explaining that to them.
A Okay.
THE COURT: They got them.
THE WITNESS: Thank you. We went through the sentencing guidelines and we had estimated at the time that the sentencing guidelines were, I think 43 to 86 months. So, the idea was to come right down in the middle of that, an average, which would've been 64.5 months for the minimum.
BY MR. SAWKA:
Q And on June 12th, 2017, that was when Mr. Holiday executed his plea agreement that's been admitted as People's exhibit 60 to your knowledge?
A Yes.
Q And were you present with him when that was executed?
A Yes.
Q And it also has a place where it says attorney for defendant. Was that your signature?
A Yes.
Q So you were present with him at the time of the execution of the agreement and it had already been explained to him?
A Absolutely.
Q And that was before Judge Neithercut, correct?
A Correct.
Q Now prior to sentencing, Mr. Holiday did testify at what we know as a preliminary examination to your knowledge, is that

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true?
A I wasn't there, but I'm told that that's what happened, yes.
Q Okay. So you--you weren't present for the preliminary exam--
A No.
Q --but if I tell you he did testify you don't--that would not be disputed by you?
A Correct.
Q Okay. So, on December 8th of 2017, now approximately a month later he was sentenced before Judge Neithercut with you as representing him correct?
A Correct.
Q At that time I did stand in to--I was the prosecutor on the case at that point for Mr. Holiday, true?
A Yes.
Q During the sentencing process, one of the things that occurs is something we have called a presentence investigation report from the probation department correct?
A Correct.
Q Could you just tell us what that is, just a brief, short explanation?
A It's an investigation that the probation department does taking into account the defendant's background, the characteristics of the crime, his biographical information, children, marriage, mental health issues, drug issues, and specific characteristics of the crime are discussed in that

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presentence report.
Q And that's something that a Judge uses correct?
A Correct.
Q Now there's also something that's attached to that called sentencing guidelines, right?
A That's correct.
Q As it relates to Mr. Holiday's case only, on the date of sentencing there was a discrepancy with the sentencing guidelines, is that correct?
A That's correct.
Q Can you please tell us from--what was the discrepancy from your negotiations to the date of sentencing with the guidelines?
A When the probation department did their presentence report they recommended the sentencing guidelines that they came to was 36 to 71 months, which is lower than what we had contemplated when we made our deal with the--when I made my deal with the prosecutor. So, the average of 36 to 71 months is actually 53.5, and that's what I argued to the Judge that should be the true sentence because that reflected the agreement that we had reached between the prosecutor and myself.
Q So obviously in the plea agreement, I don't know if you need to see it, you might be aware of it already, it doesn't say anything about middle of the guidelines or what the

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negotiations were correct?
A No.
Q Is that something that we--that you would typically ever put in like--we've had these negotiations, this is how we calculated it--
A No.
Q --and all this other stuff? So, when the prosecutor who wrote this plea agreement, it wasn't in your handwriting correct?
A Correct.
Q Wrote this plea agreement of 64 and a half months it wasn't just that number only, it was based on the sentencing guidelines as you had calculated them?
A Correct. The 43 to 86 is what we had originally contemplated the guidelines to be.
Q But just through whatever reason, and we don't need to go into that because it would be complicated, but there was an error in calculations which happens.
A Correct.
Q So they were lower?
A Correct.
Q And as representing your counsel (sic) you can't sit there and say well he gets a higher sentence because of whatever reason even though that's not we intended is that true?
A That's correct.
Q Now there's also one last portion in here. It says:

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"Defendant shall provide truthful testimony as required by prosecutor consistent with interview by Detective Watson."

Do you remember anything about this?

A I remember that he was to testify truthfully, period.

Q You clearly--well let me rephrase that. Did you have conversations with Mr. Holiday prior to him executing the plea agreement? And you don't have to say what those conversations are.

A I was gonna say, yeah. Yes, I did. Of course.

Q Okay. And you explained to him what occurred, what it meant and everything, what you intended it to mean?

A Yes.

Q When you receive this language consistent with interview by Detective Watson, what--that was part of the--we've heard Detective Watson testify. She interviewed Mr. Holiday and we've heard that there have been some inconsistent statements. Did this to you, this language about on the plea agreement consistent with the interview mean he had to tell us exactly what he told Detective Watson that was beneficial to us regardless of whether or not it was truthful?

A No.

Q Okay. What--you've got a kind of weird face on. Why is that?

A My job is to get the best deal I can for my client, and when--in the part of the plea agreement that said to testify

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truthfully, that's the way I interpreted it. I didn't look into the part about Detective Watson or anything like that. I looked at the fact that he was to testify truthfully, period.

Q If there was ever a discussion between your--you or a thought by you that it just says consistent with Detective Watson, therefore, even if you lie it's still fine because it's still consistent, would you approve such an interpretation of this agreement in your opinion?

A No.

Q And why not?

A That would be unethical.

Q So, it was your understanding that when he entered into this plea agreement it wasn't with the prosecution just saying you gotta tell us everything that's positive for our case even if it's a lie?

A No, we never had that kind of discussion at all.

Q So your discussion--what were your discussions generally revolving around when it came to the truthful testimony?

A Basically, that he--to provide truthful testimony at trial when it came time for Mr. Davis to be tried.

Q Regardless of positive or negative for the prosecution?

A Correct.

Q As long as it's truthful?

A Correct.

MR. SAWKA: I don't have anything further, Judge.

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CROSS-EXAMINATION

BY MR. WHITE:

Q Good morning, Ms. Lang.

A Good morning.

Q So going on with a few things. You've been practicing--I find it hard to believe you've been practicing that long, but you said you had approximately 600 or so criminal cases, a fair estimate correct?

A I would say 400 to 600.

Q 400 to 600?

A Depending on how many I do in a year. Not including misdemeanors and drunk drivings.

Q And on those are also cases where you mentioned where you're court appointed but also on numerous cases where you're retained as well correct?

A Correct.

Q All right. So, over the course of your career doing these, how many plea agreements do you think that you've seen?

A Probably 400 to 600.

Q 400 to 600. And as far as actual pleas entered pursuant to those plea agreements, probably still about 400 to 600 correct? Fair to say?

A Correct. Yes.

Q Okay. So, going on with this case, when it goes on with what's going on with the case, your client's interviewed by

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Detective Watson and then approximately I think six months or a year later you actually enter into this plea agreement correct?

A Correct.

Q You were aware your client was interviewed by Detective Watson correct?

A Yes.

Q Were you present for that interview?

A No.

Q Did you happen to get a report--did you happen to get a copy of her report after that interview?

A I did.

Q All right. So, after you get that report you're engaged in negotiations with Ms. Jenkins, the prosecutor on the case, as well as Mr. Leyton the prosecutor, correct?

A Correct.

Q You come up and you put together this plea agreement correct?

A Correct.

Q Where your client originally was charged with open murder and felony firearm correct?

A Correct.

Q And I'm assuming pursuant--I know you well enough to know that you explained to him what the possible penalties were for those charges correct?

A Correct.

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Q And then you were able to knock it down to reach an agreement where it was a significantly, much less harsh sentence correct?
A If you want to characterize it that way, yes.
Q Well--
A It was a lesser sentence than what he was originally facing, absolutely.
Q --correct. He was facing mandatory life in prison correct?
A Correct.
Q Where he would look at dying in prison correct?
A Yes.
Q Mandatory life, he dies, correct?
A Correct.
Q And then what you were able to do with him is you were able to get him a 15 year max penalty correct?
A Correct.
Q And we say 15 year max, what that means is he can circle a date on the calendar and knows that he cannot be kept a day past that day correct?
A That’s correct.
Q And then not only that is you were advocating for your client and negotiating, you were actually able to get them to agree to what a minimum sentence would be on this case correct?
A The average of the minimum.
Q Okay. Well when I say a minimum sentence where you’re able to

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get a sentence, you were able to get an agreement as to what the minimal amount of time he would have to do before he's eligible for parole?

A Yes.

Q Is that correct?

A Yes.

Q The number that you came up with and you and Ms. Jenkins came up would be 64.5 correct?

A Correct.

Q So it states on here as far as a recommendation goes as opposed to--that was the number you came up with, but you also very easily could've used the language middle of the guidelines correct?

A Yeah, but we don't usually do that.

Q You haven't had it happen in the past? Let me put it this way; how many times have you run guidelines where they've come up incorrect or different from what the probation department does?

A I would say maybe a small percentage of cases. I don't challenge very many guidelines because they're usually quite accurate.

Q Okay. So, you and Ms. Jenkins come up with 64.5 as far as the recommendation goes correct?

A The average between the 43 and the 86 months, yes.

Q And I understand how you get that number and that's what you

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tell your client correct?
A Correct.
Q You tell your client pursuant to this plea agreement this is what you're looking at correct?
A Correct.
Q All right. As far as the expression with being an attorney, as far as things being on the record, what does that mean to you?
A That means that everything that went behind the placing the deal went on the record.
Q And basically, that means that would be in open court in front of the Judge correct?
A Correct.
Q Recorded for future people to see correct?
A Yes.
Q In case there's any questions as to what happened, that's the reason you go on the record correct?
A Correct.
Q As far as Mr. Holiday's case goes, as far as this average middle of the guidelines, none of that was ever placed on the record correct?
A I don't believe so.
Q I can show you a copy of the sentencing--or the plea transcript if you would like to see it.
A No.

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Q That was not placed on the record correct?
A Not that I'm aware of, no.
Q So that was not there. All we have is this document that says 64.5 correct?
A Correct.
Q This is as Judge Neithercut often describes it the contract between the prosecutor, the defendant, and defense attorney correct?
A Correct.
Q So as far as the 64.5, you were aware that that's how you came to that number correct?
A Based on the sentencing range, yes.
Q Okay. So, God forbid anything had happened to you whatsoever, someone else steps into that case they're not aware of that because that's not placed on the record for everyone to know correct?
A No, but they would've known that that number was arrived to somehow.
Q Again, it could be a number that--as again somehow, but it could be a number where negotiation with the prosecutor you could've just picked a number. But again, this was not placed on the record for anyone to know correct?
A Correct.
Q All right. And then also as well when you say the average middle, it says 64.5, it came out to be 53 or whatever it was

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because it came back lower.
A Correct.
Q So what if the guidelines had come back higher? What if that average minimum would've been 75.5?
A Well that would've be up for the prosecutor to argue that the sentence should've been higher.
Q Okay. But you have a document here that says it's 64.5, but you would've argued then at that point in time, hey, this is the agreement we reached was 64.5 correct?
A Of course.
Q All right. Even though that's no longer the average middle of the guidelines at the time correct?
A Correct.
Q All right. Then going on further again with the document that was signed, the plea agreement, where it's got the box where it says defendant shall provide truthful testimony as required by prosecutor. You've seen that language numerous times correct?
A Yes.
Q You've had, I'm gonna guess out of the 4 to 600 that you've probably had at least half where those were co-defendant cases correct?
A Quite a few, yes.
Q Quite a few co-defendant cases on there as well. There's a spot for to be filled in right there. How often have you seen

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it where it is to testify truthfully against the co-defendant? How often do you recall you think you've seen that language on there?

A Frequently.

Q Frequently. Have you ever seen it where it says the language is to testify consistently with a statement--a particular statement?

A I don't recall, but I don't think that's unusual.

Q Have--again, have you--well, you say it's not un--you don't recall, but you don't think it's unusual. So you recall seeing in the past where you've said, you've seen it where the prosecutor says we want them to testify as to a specific statement?

A No.

Q Okay. And then going back again back to the sentencing guidelines, and I apologize, and the recommendation on that--

A Uh-hum.

Q --again, you had gone over that number with your client correct?

A The 64 point--yes.

Q 64.5 correct?

A 64.5, yes.

Q Okay. And he understood that that's what he was looking at correct?

A Until I got the presentence report.

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Q Okay. When you got the presentence report--well, had you explained to him before that he was looking at the middle of the guidelines?
A Correct.
Q All right. And again, also, just as well, as far as the record goes, the question was asked of both you and Ms. Jenkins, the assistant prosecutor were there any other promises, threats or inducements that were not placed on the record, is that correct?
A Correct. Correct.
Q And both of you answered that everything was on the record correct?
A Yes.
Q But that was not the case though correct?
A No. I don't know what you're saying.
Q Well again, what you're saying is your client is taking a plea because you've agreed out that he's gonna get minimum--he's gonna get the middle of the minimum range of the guidelines correct?
A Correct.
Q But as opposed to putting that, you put a specific number correct?
A Yes.
Q Which that number turned out to be incorrect, correct?
A Correct.

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Q So again, as far as that goes is there any promises, threats or inducements goes and everything, as opposed to placing on the record the middle of the guidelines you guys chose a specific number correct?

A Yes.

MR. WHITE: I have no further questions, Your Honor.

MR. SAWKA: One.

REDIRECT EXAMINATION

BY MR. SAWKA:

Q Would you agree this was a badly worded plea agreement?

A Yes.

MR. SAWKA: Nothing further.

THE COURT: Just to not confuse the jury, different kinds of charges have a maximum sentence, but a Court is also supposed to consider a minimum sentence. These guidelines only talk about what the minimum could be and because we use this formula, the minimum moves around. Am I correct, counselor?

THE WITNESS: That’s correct.

THE COURT: Step down please.

THE WITNESS: Thank you.

(At 12:22 p.m., witness excused)

THE COURT: All right. Let’s have lunch. So jury, leave your notes, go to your room, enjoy your meal.

MR. ELLIS: All rise for the jury.

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MR. SAWKA: I just have one question.

REDIRECT EXAMINATION

BY MR. SAWKA:

Q You searched the vehicle, did you find any guns in the trunk of the vehicle?

A No, sir.

MR. SAWKA: I don't have anything further. Thank you.

THE COURT: Any jury questions? Step down, madam.

THE WITNESS: Thank you, sir.

(At 3:48 p.m., witness excused)

MR. SAWKA: Judge, our last witness will be Detective Baldwin and it should be fairly short I believe.

THE COURT: Detective, you are still under oath from before. That obligation continues.

THE WITNESS: Yes, it does.

CHAD BALDWIN

(At 3:49 p.m., witness recalled and previously sworn, testified as follows)

DIRECT EXAMINATION

BY MR. SAWKA:

Q Detective Baldwin, you've already gone through the preliminary instructions--well questions I should say. As part of the City of Flint Police Department, you're not a trooper like Detective Moore is correct?

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A That is correct.
Q You actually work for the City of Flint Police only.
A I do.
Q And as part of the City of Flint Police, do you have a (sic) email account with the City of Flint as a part of the police department?
A I do.
Q Is your email address C--can I state it on the record, is that okay?
A Absolutely.
Q Okay. CBaldwin, B-A-L-D-W-I-N@cityofflint.com?
A That is correct.
Q I'm gonna direct your attention to January 5th, 2018. Did you receive an email on that date from a sender named autoemailer@cobrasoftwaregroup.net?
A I did.
Q Do you recognize that email address on that date? Did you recognize it?
A Yes, sir.
Q How did you recognize it?
A I recognized it as a Genesee County Jail email address.
Q I'm gonna approach and show you what's been marked and admitted as People's exhibit 53 and 54, if you could just hold onto those for a minute? Do you recognize those documents?
A Yes, sir.

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Q All right. Starting with People's exhibit 53, what is that?
A 53 is an autoemailer@cobrasoftwaregroup.net.
Q And it's a one-page document?
A Yes, sir.
Q Okay. Is it a--it's an email, is that correct?
A It's an email, yes.
Q And it's printed from your personal email account, the City of Flint account correct?
A It is.
Q And People's exhibit 54, how many pages is that?
A Five.
Q A five-page document. Similar facts that it's a (sic) email account in your printed emails?
A That is correct.
Q And People's exhibit 53, the date you receive the auto emailer account is that January 5th, 2018?
A It is.
Q Have there been any alterations or deletions to this email that you recall?
A No, sir.
Q Okay.

MR. SAWKA: And I ask to publish this one to the jury, People's exhibit 53 please.

THE COURT: Go ahead.

BY MR. SAWKA:

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Q Now it's difficult to see here, but that's the document you have in your hand correct?
A That is correct.
Q It's the one-page document. And it's probably not going to show up on the screen solely because it's very tiny print, but could you read the first--actually, start with where it is the title of the email and then go through the first line break where it cuts in your--the one that you have.
A It says, Davis, Donald Wayne sent the following message and is requesting an email reply.
Q And what does the message state?
A "This, Donald Davis 6, you guys told Major White I had info about another case, W-H-A-4-T type of deal can I--what type of deal can I get? Come talk to me."
Q And did you end up replying to that email?
A I don't believe I replied until the 8th. January the 8th.
Q The next email, People's exhibit 54, right?
A That's correct.
Q Now up at the top here it says Mr. Davis, People's exhibit 54. Are these titles? What is--how do we get the name Mr. Davis up at the top? Is that something you wrote or did that come with the email, do you know?
A That came with the email.
Q So in 53 it just says Davis at the top?
A That's correct.

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Q And on 54 it says Mr. Davis?
A That's correct.
Q And what does this one say? Same email address, auto emailer to you, your email address. What does it say?
A This is--"This is Donald Davis. You guys told Major White I had info about another case that can help me with my case. What kind of deal can I get? Come see me."
Q And that one was sent on January 8th of 2018?
A Yes, sir.
Q And did you actually end up going to see Mr. Davis as he--as the email requests?
A I never went and seen Mr. Davis.
Q Did your understanding of this email, who--I guess I should've rephrased that and I apologize, Mr. White. Donald Davis, who did you believe that to be in the email? Did you know a Donald Davis?
A Yes, sir.
Q And who did you believe it to be?
A Donald Davis.
Q The defendant here today?
A Yes, sir.
Q Or some other Donald Davis?
A The defendant here today.
Q Okay. And it's true as we've heard from Detective Moore, you believed he had information about another case correct?

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A He was involved in another case that I had.
Q And you--but you never made any--
MR. WHITE: I'm sorry, but I didn't hear that answer. It was kind of mumbled.
THE COURT: I did not hear you.
MR. WHITE: I did not hear that answer. It seemed like it was kind of (inaudible) Mr. Baldwin--
THE COURT: Say it again, sir.
THE WITNESS: I don't--I have--I had Mr. Davis, the defendant in another case that is currently going on right now.
BY MR. SAWKA:
Q Okay. But you never actually approached him as requested in this email believing that he was requesting you to come see him?
A I did not.
Q Okay. Why didn't you do that?
A Because that was--he has an attorney and this is an ongoing court proceedings (sic).
Q Now did you reply though to this one? On the January 8th email?
A I did.
Q Okay. What did you write?
A I responded we will talk with your lawyer and let you know.
Q And as you said you never actually went there and did anything

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right?
A That's correct.
Q At this point did you do anything else with the emails?
A I--
Q I think you might've actually forwarded them--one of them to my office? I know you sent one to me and that's how we got these emails, but did you go do anything else with them? Send them back to Mr. Davis or send them to anybody else?
A No, sir.
Q Was one of them however, I think you sent to, if you could look through there, another prosecutor in my office by chance? I don't remember.
A I don't believe so.
Q Okay. And I just wanted to ask if that's five pages, those other five pages, what do they contain so that the jury knows?
A The same information that's on the front page.
Q Did you ever try to reply to this email at any point?
A The only one I replied to was the response about talking to his lawyer.

MR. SAWKA: I don't have anything further, Judge. Thank you.

CROSS-EXAMINATION

BY MR. WHITE:
Q Detective Baldwin, this is just to be clear for the jury; when you said you have Mr. Davis on another case, Mr. Davis is not

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a suspect in that case correct?
A He is not a suspect in that case.
Q He had information that you believed would allow you to, how should we say; he'd be able to provide information that would be helpful to you correct?
A He's a witness in the case. Yes.
Q He's a witness and has information that you would like correct?
A That's correct.
Q That's the reason that you approached me to ask me if I would talk to him correct?
A Yes, sir.
Q And that would've been right after the preliminary examination at district court back on November the 7th correct?
A Yes, sir.
Q And that would've been after Mr. Holiday came into court and testified about what his plea agreement was correct?
A I believe on that date he testified to that, yes.
Q Thank you.

MR. WHITE: I have no further questions, Your Honor. Thank you.

MR. SAWKA: I don't have anything further, Judge. Thank you. Your Honor, at this time--

THE COURT: Wait a minute--

MR. SAWKA: --I'm going to--

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

PEOPLE OF THE STATE OF MICHIGAN,

v

Circuit Court No.
16-040020-FC

DONALD WAYNE DAVIS,

DIGITALLY RECORDED

Defendant.

_____/

JURY TRIAL - VOLUME V

BEFORE THE HONORABLE GEOFFREY L. NEITHERCUT, CIRCUIT JUDGE

Flint, Michigan – Thursday, March 1, 2018

APPEARANCES:

For the People:
Joseph F. Sawka, (P-74197)
Assistant Prosecuting Attorney
LeAnne M. Dao, (P-79247)
Assistant Prosecuting Attorney
900 South Saginaw Street
Flint, Michigan 48502
(810) 257-3232

For the Defendant:
Major J.C. White, (P-58800)
503 South Saginaw Street, Suite 519
Flint, Michigan 48502-1824
(810) 235-7996

Transcribed By:
Tamara Johns, CER 8749
2428 East Wilson Road
Clio, Michigan 48420
(810) 252-6985

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White decides to make a closing statement. Go ahead, sir.

MR. SAWKA: Thank you, Judge. If there's a point at which you can't see anything please let me know because it's about you at this point to understand, you can hear, you've seen everything.

Our theory of this case is you set certain events in motion by your own initial action. Defendant Davis set into motion every single event that occurred in this case and he is culpable and responsible for each of the charges that we have charged him with and the evidence supports a verdict of guilty for each charge.

I want to discuss the charges with you. The way I kind of do it is through more of like a professional teaching experience. I'm just not an emotional person necessarily, but I want to kind of go backwards with the charges because to me they seem to make more sense thinking backwards because they all seem to link to each other.

One of the charges we have is called felon in possession of a firearm, and the Judge is gonna read you a lot of law and you're gonna get a copy so please don't feel the need to actually write down every single thing by any means because like I said, the Judge--you're gonna get a copy of everything. And I'm gonna do--I believe I have the exact same information you're going to be getting with respect to the law. And I know the Judge will tell if me or Mr. White say

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anything different, you always just follow what the Judge says to follow. But there's two elements for felon in possession of a firearm. The first is the defendant possessed or used or carried a firearm in this state. Notice there are or's, meaning you don't have to have all three, it's one, maybe a combination or all three. It's up to you to decide, but it has to be at least one of these. And second, the defendant was convicted of a specified felony. We know number two has been met. We stipulated that the defendant has been convicted of a specified felony. And there's also a piece of evidence that you're going to be able to receive in the jury room and it's called what we know as a Judgment of Sentence. And this is evidence of the conviction itself.

With relation to the first element, that's also met. We know that because Spencer told us he had a gun, the defendant had a gun, and they were showing it to each other in the apartment complex and they walked outside with their guns. He's possessing a gun, he's using a gun, he used it when he shot Devante. There's no other evidence to suggest he didn't have a gun. We had two different bullets recovered from the car that were fired from two different guns matching what Spencer told us happened in that car. And in conjunction with the felon in possession of a firearm charge there's something called felony firearm, and with that there are two elements as well. First, the defendant committed the crime of felon in

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possession of a firearm. It's not necessary you convict him of it the law says, but you should be convicting him of it in this case based on the evidence, based on all the corroboration, based on all the testimony.

The second element is at the time he committed it he knowingly carried or possessed a firearm. So really what the felony firearm is saying, you've committed a felony and during the commission of this felony you had a firearm, which you can't use during the commission of a felony. It sounds a little redundant, but it's not. They are two separate charges and he is guilty of both of them. But what the law also says is, a firearm includes any weapon which will or is designed to or may readily be converted to expel a projectile by action of an explosive.

The gun that Spencer testified about looked like a 40 caliber gun. You heard from Lieutenant Crichton about what type of gun a 40 caliber could be. It--Spencer could've been wrong, he says it looked a 40 caliber, but you also heard Lieutenant Crichton tell us, well, you know guns can look the exact same but they can be .38 caliber or 40 caliber. But with this charge what matters is it's a gun that's readily usable. And how do we know it was readily usable in this case or that it was designed to be converted to expel a projectile? We know it because Devante died. Two gunshot wounds, one through the left, one through the right, one in the chest.

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And a pistol is a firearm. Each of the elements are met for this charge as well.

Felon in possession of ammunition is probably what you're already thinking and you're probably right. Two elements. First, he possessed or used or carried ammunition. We have bullets that were recovered at the scene, two different guns. Our theory, the only thing that makes sense in this case is, both defendants had a gun, both fired their gun thus it was loaded with ammunition because you can't fire a gun if it's not loaded with ammunition. It wouldn't make any sense. So that's why he's also again convicted of a specified felony, he can't possess ammunition, you can't, and he can't possess a gun so he's guilty of both of these charges as well. Which is also accompanying it, a felony firearm charge saying you've committed another felony and you can't have a gun when you commit this felony. And it's the same law applies that the Judge is going to tell you about as well.

Now, this is where we transfer into the other charges. Assault with intent to rob while armed. Generally, you might think well, armed robbery. It's not that charge. That's something different. Armed robbery has three elements associated with it. First, there are two ways to commit an assault and I have to prove beyond a reasonable doubt that defendant assaulted Devante Hanson. Either the defendant must have attempted or threatened to do immediate injury to Devante

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and was able to do so, or the defendant must have committed an act that would cause a reasonable person to fear or apprehend an immediate injury.

The second element is that at the time of the assault he was armed with a weapon designed to be dangerous and capable of causing death or injury. And the third element, which is why it's called assault with intent to rob while armed is, at the time of the assault defendant intended to commit armed robbery. Robbery can occur when a person assaults someone and takes money; but notice what the law's gonna tell you--what the Judge will tell is it is not necessary that the crime be completed or that the defendant actually had taken money or property. There just must be proof beyond a reasonable doubt that at the time he committed an assault he intended to commit the robbery. And that's why he's charged with assault with intent to rob while armed in this case.

The first element, what evidence do we have to show the defendant committed an assault, which is one of these things; he attempted or threatened an immediate injury and could do it or committed an act that caused a reasonable person to fear an immediate injury. Now notice it says a reasonable person. It does not say Devante Hanson because we don't know really what happened in Devante Hanson's mind. We have no evidence of that. We have evidence he turned around

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to grab the gun from the defendant, so you could probably think well that's--he clearly wasn't in fear, he was trying to grab the gun. That's not the standard because people react differently. The standard that you're required to determine is would a reasonable person fear an immediate injury. And I believe that every one of you sitting here if there was a gun pointed at you would say yeah, I would reasonably fear an immediate injury.

What the evidence in this case says what we know from Spencer, from all the corroborating evidence from the pictures is when Devante reentered that car in the video, Spencer told us that's when the defendant pulled out his gun and held it to the back of the headrest pointing it at Devante and tried to rob him. This is the threat to do an immediate injury and clearly, he had the capability to do it. Not only did he have the capability, he did do it. He did fire that weapon and he caused a reasonable person to fear an immediate battery. Devante turns around and tries to grab the gun from the defendant over the seat and the defendant shoots him. That's actually called a battery. That's the completed assault. The assault really can occur just from holding a gun at you. That's putting you in reasonable fear. But when that gun gets fired, we talked about this in voir dire, that's the immediate battery. That's the result of the assault. He fired that gun and it killed him.

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There's another act that I want you to think about too because it's--our theory is we have the back seat. Remember we had the chairs set up, Devante's leaned over the back seat, defendant has the gun pointed at him; intent. He's pointing it, he knows what he's doing. You don't just point a gun at someone and not know what you're doing. When he fired that shot, that was the first act where he was guilty of murder, which we'll get to in a minute.

There's a second act. When at that point Devante's lying there lifeless, slumped, not moving, not threatening anybody, you heard that Spencer said yeah, he then pointed the gun at me. He knew I had a gun. He didn't have it out, he had no--no one ever testified or heard--you heard there's no evidence Spencer ever had his gun pulled out. Spencer testified when he pointed the gun at me and told me to shoot him, I didn't know what to do. I wasn't gonna risk my own life. I was scared, so I did it, I pulled out my gun and I shot him. When he kept that gun pointed at Spencer there's another act there. He then caused another person to commit a murder that that person would not have committed. And we talked about that in voir dire. You've got the button and I hold a gun to your head and I say press it and you press it, then it's both of us culpable. We're both guilty of that. You--I don't get to walk free because if that's true we're all gonna be in trouble in this world. That's the easiest answer

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for any person who wants to kill somebody to say, I'm gonna hold a gun to this person's head, I'm then going to have this person shoot this person and I go off scot-free. I have nothing to take care of in this case. I'm done. That's wrong. We all know that's wrong.

But in this case the evidence shows that the defendant committed a full battery, he assaulted him by putting Devante, a reasonable person, in fear. And the defendant is the principal. We're gonna talk about something called aiding and abetting, but a principal is the person who is the main actor in what has occurred. And we assert the defendant is the principal in this entire situation. That's what makes sense. But for his actions, we would not be here today. We wouldn't be here had he not decided to rob Devante, had he not decided to pull his gun on Devante, had he not shot Devante, had he not pointed his gun at Spencer, had he not said shoot Devante, had he not said, okay. Now go to my sister's house. Okay. Now give me your gun. Okay. Now don't tell your brother. We wouldn't be here.

Spencer never said I had any intent I ever wanted to do this and there's no indication in any of this evidence he did ever intend or want to do this. He didn't even know Devante. Who knew Devante? The defendant knew him. Hey, I got a guy you could buy marijuana from. It's him. He set this up. He is the mastermind. Spencer, you get to determine

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your credibility of him. He is not a criminal mastermind. He doesn't come off as somebody who could set up an elaborate scheme, who's someone who can articulate a really great concept, who could think of such an amazing story that somehow it seems to fit all the evidence; where the gunshot was, why there are two bullets, why both of them are armed, why they run from the scene, who's this person, why are they doing--what are they doing here. I mean, that's a lot to create, and it doesn't make sense that he knew or do anything about it.

He can be an--defendant can also be an aider and abettor. You're gonna decide the case. You can think of it like this. Some of you and I can understand could say well, you know what, he didn't shoot him. Fine. Or Spencer shot him. He can't be--you can't hold somebody accountable for that. But if I intentionally assist, encourage, aid somebody else in committing a crime that I know they're going to commit that's called aiding and abetting. And you're gonna see a slide here that'll tell you that when you assist--intentionally assist somebody in aiding and abetting of a crime. Common examples we hear, getaway drivers. My friend comes up to me, hey, you want to go rob a bank? Yeah, if you're going to do the robbing, I'm just gonna drive away. Okay. I drive him there, he robs the bank, I wait outside, comes out with millions of bucks and we drive off; I'm aiding and abetting him in robbing the bank. I don't say oh, well, I

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didn't rob the bank, you can't hold me accountable. No. The law says no. You're culpable. You're accountable just as much as this person who robbed the bank. You don't get off for that. You don't get to play or, you know, game the system. That's the theory of aiding and abetting. You can be held accountable the exact same amount for the exact same actions as what your person that you assisted did. So, you have--you can consider both.

Some of you can say well I think he's the principal. I believe you all should say that, but some of you could say well I think he's an aider and abettor. As long as you agree as to one of these theories, he is still guilty of the crimes. These are called theories of the case, they aren't separate charges, they're just theories. You hold somebody accountable as a principal or as an aider and abettor, but they're still equally culpable (inaudible).

The second element of assault with intent to rob while armed is it's designed to be a dangerous weapon. The defendant was armed with a weapon designed to be dangerous or capable of causing injury. I don't think I need to repeat too much of that. He was armed with a gun, Devante died, that's what Spencer told us. He raised it, he threatened him. We know Spencer's versions of events make sense. Crichton gave us an expert opinion that the bullet jacket from the trunk and the bullet jacket from the back seat are different guns. Why

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are we having two different bullets from two different guns unless two people used two different guns?

Spencer's version of events make sense because of the bullet wounds sustained by Devante. Hunter told us in his expert opinion his wounds were caused by two different gunshots, not one. Spencer's versions of events make sense. Defendant fires the first shot, he then points his gun at Spencer who fires the second shot because Spencer feared for his own life. There's something we don't use in the law when it comes to homicide; duress. You don't say well my life was threatened so I had to kill him. No. The law says you risk your own life. You have to because otherwise again, it goes back to this theory that then nobody would be held accountable if you were under duress for it. A person who died for no reason. You were under duress therefore you get off. No. The law says duress does not apply to murder. That's 100 percent absolute.

Look at this, People's exhibit 10 and 42. These are the photographs. What I ask you to look at to show how this makes sense is the piece of fabric that's, you know, pushed out, like a bullet would fire from there, compare that with the mark that Dr. Hunter talked about. How there could be an intervening item or there would be an intervening item because he didn't see the circular pattern or the evidence he would expect to see if a gun was--nothing was in between the gun and

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the chest. I assert to you this little piece of fabric matches this little piece of blackness because if you, on Devante's chest take these photos, and if you overlay them such as Devante's body would be leaning over the seat, that little piece of fabric seems to match up almost identically where that bullet hole and that little black mark are, which--basically corroborates the story, the version of events Spencer gave us as to how the defendant shot Devante. 'Cause how do you get that unless somebody's in the back seat? Sure, you could probably think of a billion reasons, but what makes the most sense? What is reasonable based on the evidence? We don't have anybody else in the car. We don't have Spencer going into the back seat, we don't have anybody coming out of the vehicle, shooting outside the vehicle, coming through the back of the vehicle, nothing. You have to look at the evidence and use your common sense and judgment on this. That's what's gonna lead you to the correct conclusion in all of this.

The third element, he intended to rob. We talked about this in voir dire. How do I determine somebody's intent? Pancake batter. An iron, a griddle, whatever it is. I don't have to tell you a thing, you can infer my intent. In this case, we have the best evidence, statements of a person's intent. We know three times defendant Davis wanted to rob somebody. He said it at first to James Albert when Spencer

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was in his apartment and overheard him say, yeah, you know where I can hit a lick? Now if he's lying about that, why does he use the word hit a lick? Why doesn't he just say, well he wanted to rob somebody and he wanted to rob Devante? Why not make it easy? Why say hit a lick? But then when they're walking out in the elevator he again asked, hey, do you know anybody I can hit a lick from?

Now Spencer, he did--if some--if one of my friends who I'm--or somebody I know says that I'd be like I don't know anybody. Am I gonna go report that to the police? No. Because I don't know really what's going on. They could be joking, they could just be talking, they could be doing something stupid like when we all say, oh, I could kill this person. We don't mean that necessarily, but in this case, we have the direct evidence he did mean that he wanted to rob somebody because when we ended up watching the video, why in the world didn't defendant Davis just let Spencer walk to the store? Why did he have to stop him? Why did he have to say hey, I've got somebody you could buy from. Why did this car magically, randomly appear out of nowhere? Why wasn't defendant who ended up speaking to Devante first in the video? Because he wanted to rob him, and this was his time, his opportunity to do that. And he confirmed it to Spencer right in that vehicle when Spencer said yeah, when he got out of the vehicle, being the driver, he said I'm about to rob this dude

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or something to that effect. I don't want to use the flowery language that was actually stated by defendant if I don't have to, but I'm sure you remember what it was. He pulled out his gun and he said run it, give me it, whatever it was he said which clearly indicates his intent to rob.

There's no evidence that he took anything, that anybody took anything. There's just none. But that's the difference between armed robbery and assault with intent to rob. I assault you with the intent to rob. My assertion to you is the reason he didn't rob him is because he had at that point realized crap, I just killed somebody. Shoot him too, I want an accomplice, I want somebody to blame this on, I want somebody who's gonna go along with me because we all know misery loves company. So, Spencer shot him and at that point, defendant Davis knew he had to do something. They ran to his sister's house. They didn't run back into Spencer's apartment. Why didn't they run just back to Spencer's apartment? Because he's the mastermind, he did this, he knew what he was doing, he thought about this all. He said all right, let's go, my sister's house. All right. They get there. They're running from the scene clearly showing consciousness of guilt. They know they just did something bad. At that point he says, give me the gun, don't tell your brother, wrapped it up. Spencer--Spencer just for some reason doesn't do anything. Now that could be because he's still at

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defendant Davis' sister's house. And we'll talk about that in a minute. But all of the evidence indicates that the defendant had every intent to rob even though he didn't take anything. And we're not asserting he took anything. We could just say all right, he took something. No, we don't have evidence of that. We have evidence of his intent, and that's why each of these elements are met with assault to intent rob and you should return a verdict of guilty based on the evidence.

There's something you're going to be able to consider in the jury instructions when you get a verdict form. It's called attempt. An attempt is what we call a lesser included crime, it means it goes along with the higher crime. So for example, in this case there were two elements of attempt. He intended to commit the assault with intent to rob while armed, and he took action toward committing the crime but failed to complete the crime. So, you can think of it as I talk to you, I say, I want to go rob somebody. I'm gonna rob this guy. Okay. And you say all right, let's get together or let's drive to this place, okay, and we get out and we invite this person to the scene so we can rob him and then we say, you know, maybe we need to back off. Maybe I pull the gun but then I don't actually rob the person. That's the attempt. I--it could be different. I say to the person I'm gonna rob you and I start aiming the gun at you. That's

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I've completed the assault with intent to rob, but if I just kind of drive over there and get every--all the--everything is made. I don't just take preparations I actually make it happen. That's the attempt. But you don't--I don't even think you should consider it. I think you should just say this--all this evidence shows he actually committed assault with intent to rob while armed, and if you find that, you don't need to worry about assault--or the attempt because it already means it occurs. So, he didn't attempt it, it just already happened. So, it's something that you say higher charge, lower charge. If I can convince of the higher charge I don't need to go to the attempt. There's no reason to. But if you feel for some reason he didn't complete the assault with intent to rob while armed, then you should consider attempted assault with intent to rob while armed. But each element is met.

Now there's also a felony firearm count. He committed assault with intent to rob while armed with a firearm. It's the same elements from the other ones, it just changes with respect to which felony we're talking about.

Now I'm gonna talk about murder. When we started talking about this case I put up a lot of witnesses who kind of had to provide context. It was boring. I know that you were probably bored. It's like, oh my God, another police witness who's gonna tell us something that's not, you know,

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relevant. Well they were relevant because they had to build each little piece. If I leave pieces open, sometimes jurors go, well you didn't present this so therefore, I don't know what happened. I can't present you every single piece of evidence because I wasn't there. I can only give you the evidence that exists that makes sense that we can admit. So, I don't want you to think I was trying to hide anything from you with this. Please don't.

Felony murder has three elements. First, defendant caused the death of Devante Hanson. That means Devante died as a result of a gunshot wound or wounds. Second, three states of mind, keep this in mind. Felony murder has three states of mind. The first, an intent to kill or, remember this is an or, intent to do great bodily harm, or creating a very high risk of death or great bodily harm knowing death or such harm would be the likely result of his actions. And then a third element, that when he did the act that caused the death of Devante Hanson, defendant was committing or attempting to commit assault with intent to rob while armed. You probably can put it together and say, oh, now it makes sense what felony murder is. You committed a felony and somebody died in the process of it.

The first element, the cause of the death. Again, let's go back to my theory. There are two acts. We have defendant who shoots Devante the first time, and when he

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points his gun at Spencer and causes Spencer to shoot Devante to finish him off. Each of these acts are still set into motion and caused by the defendant and he is responsible for both of them. What evidence do you have? First, we have two gunshot wounds to the body that he--we know the cause of death; gunshot wounds. Dr. Hunter testified to that. We know there are two different bullets fired from two different guns. Dr.--or Lieutenant Crichton testified to that and we have the evidence of it. Spencer told us he had a gun and defendant had a gun matching up with the evidence. Defendant shot Devante from the back seat behind the driver's seat as defendant--or excuse me, as Devante tried to get the gun away from him. Again, corroborates this--it just makes so much sense because how do you get a gunshot wound or a gunshot hole from People's exhibit 10, coming from the back with this little piece pushed out. If this wasn't pushed out and pushed in, that might be a little concerning, but it's out, it's not in. It's not like somebody reached in and pulled it back out. Dr. Hunter told us Devante died of a gunshot wound. So, what's our conclusion? The gunshot wound caused by defendant killed Devante. And the gunshot wound caused by Spencer's gun was still the result of our defendant. We wouldn't be here for it but his own actions. Spencer wouldn't have shot, he told us that.

Those first three elements or first three pieces of

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evidence also relate to defendant causing Spencer to shoot Devante. But what else caused it? Well defendant knew Spencer had a gun. Defendant pointed his gun at Spencer, Spencer told us he did shoot Devante. Think about this; if you're trying to make up a story and lie about this why are you gonna say yeah, I did it? To me that just seemed the most corroborating evidence of a person who could be claimed to have been lying. Why would you implicate yourself in a murder? Why not go the easy route and say no, I was just there to--he told me shoot, I didn't shoot, I just gave him my gun and he shot? That's the easy way to go. He was not lying because the evidence supports his testimony.

Defendant was the principal or he aided and abetted Spencer when he told Spencer to shoot Devante. So, he is culpable for defendant's death but for his own actions. But for defendant doing what he wanted to do. That element is met. The bullet to the chest. If any of us get shot, the likelihood we all know is right there as Dr. Hunter said, yeah, you leave that untreated you're likely gonna die. They left him. But not only that, defendant wanted him finished him off so he had Spencer shoot him. This is back to the aiding and abetting. If you don't agree that he was the principal when he shot, theoretically he could be the aider and abettor. I think he's the principal, clearly if it's me (inaudible) this evidence, but an aider and abettor is as

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guilty as the person who directly commits it.

And there are three elements for aiding and abetting. First, the crime is actually committed by defendant or somebody else. It doesn't matter if anybody else has even been convicted of the crime. Before or during the crime, defendant did something to assist. He set this whole thing up. Well, I'm sure I'm repeating myself but it's important because again without it, we wouldn't be here. And at the time he intended the commission of the crime or know that the other person intended the commission of the crime, or that the crime is a natural, probable consequence. What's the natural, probable consequence of committing an assault with intent to rob while armed? Likely death. Pulling a gun on somebody, likely death. Shooting somebody, likely death. All three of those are met as I've stated, he intended to kill. He premeditated it, which I'll get to later actually, and he intended to cause great bodily harm when you shoot somebody, especially in the chest, and it's the natural probable consequence. That gunshot wound that Spencer admitted that he shot to the left, through and through certainly killed him too. But taken together, they're both deadly. Even taken apart they're both deadly. The likely consequence is death and that bullet was shot through into the car and that's where it landed which makes sense with the way Spencer demonstrated for us about having the gun pointed this way and coming out.

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Now, you're probably all wondering too as am I, if this is a bullet hole, defense exhibit number 3, how do we match it all up? Well, first of all, I don't even know if that's a bullet hole. I don't know when that occurred, where that came from. If it is, we heard Lieutenant Crichton say well there's wiring in a car and things can take different paths. This is a unique case. We love it when things all match up because it makes it easy. Murder trials are not easy. It's common sense and reason that has to meet us and guide us in the day. That gun that got shot by Spencer we know went through Devante. Now if it hit something in Devante as it came out or when it went to the back, if it hit something it can divert, ricochet, you hear about that all the time and common sense can tell us that. But we know that the bullet that was recovered seems to go in the exact same direction as Devante's body and we know the bullet was recovered from Devante's chest matched up with defendant Davis' shot from the back seat.

How do you determine the state of mind? You probably already can guess. You think about all the evidence. Can be inferred from the weapon used. You use a gun, yeah, you likely intend to kill somebody or hurt somebody or cause death to somebody. Circumstances that surround the killing, flight from the scene, fleeing from a scene, not calling police, not telling people. That's consciousness of guilt.

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And we're gonna talk about the emails. You can infer that he did--you can infer, the law lets you infer that the person intended to kill if he uses a dangerous weapon in a way that likely causes death, and the law says a gun is a dangerous weapon. For each of these ways to have felony murder, the intent, for intent to kill defendant shot Devante. No one forced him to kill him. Defendant told Spencer to shoot Devante, intent. Do it. This is the best evidence of his actual intent to kill.

Same evidence applies to doing great bodily harm and creating a high risk of death. He intended to rob Devante, he intended to use a gun, and a gun is a dangerous weapon, therefore he created a high risk of death. He set again, this into motion. Basically, he was the architect. He set it up, got Spencer to stop, not go to the store, come there, stay there wait for the man to get in the car, told him what's happening, do it, do this, do that, and then run away. All--defendant had actually I would assert each of these elements--states of mind, but only one is necessary. And you can say well, I'd say nine of you could say no, he intended to kill clearly, and the rest of you could say well, I don't know. Maybe, maybe not, but he clearly did something that would cause likelihood of death. As long as you agree that at least one of these states of mind exist, this element is met. You don't have to be unanimous on it. What you're unanimous on is

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the total verdict of the charge. To yes, committed felony murder. He just has to have one of these three states of mind, not all three, and that's your decision to make.

And third, he did the act which is the felony. We've already gone through that. I'm not gonna repeat that, but all the evidence makes only one logical conclusion, that he committed assault with intent to rob while armed. Now if he attempted it as well, if you say oh, he only did attempt, that still is part of what the felony murder rule says. Committed the crime of assault with intent to rob while armed or attempted to commit the crime. So, he has met all elements of felony murder. You can say he aided and abetted as we discussed as well. Each of those elements is met. And again, there is an accompanying felony firearm charge and each of those is met because he used a gun in the commission.

You get a lesser included offense the Judge will tell you about. I don't think you should even consider it. There's a difference. All these are met. The difference being this third element. If you don't think he committed the felony of assault with intent to rob or the attempt, that's what distinguishes felony murder from second degree murder. But this evidence, you should not even consider second degree murder. You should all be convinced and just say to yourselves reasonable, common sense, I'm not stupid, I know what happened, this is how it happened, and its felony murder.

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He committed--no reason otherwise to even have Devante there unless he wanted to rob him and did or tried.

Final charge, premeditated. We hear about this a lot on television, watch all the shows, this sounds like a fun charge, right? No. Cause of death, we discussed that already. Same element, right? Second element is the difference between this and felony murder. He intended to kill Devante Hanson. Third, it has to be premeditated, meaning thought out beforehand, and fourth it's called deliberate. He has to be deliberate. The law says deliberate means considering the pros and the cons of the killing. Real and substantial reflection long enough to give a reasonable person a chance to think twice about an intent to kill. The law does not say how much time is needed. We all think woah, premeditation and deliberation, I need five months ahead of time to make sure I plan this all out and get all the poison set out and get my guns and get everybody here. That's not it. That's not the law, that's fiction, that's television. The law says the killing cannot be the result of a sudden impulse without thought or reflection. It's up to you to decide if enough time passed for the law of the--for the circumstances in this case. A moment in time is a sufficient amount for intent to kill to make it premeditated and deliberate. Just a moment.

If I were to throw a ball at you right now and your

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reaction would all be kind of either do this or to catch it or dodge out of the way. I think we'd all agree with that. But there's a difference between throwing a ball at you and you reacting, and me pointing this gun at Stacey Moore's head. I have thought about what I'm doing. This isn't a reaction. I'm--my body's not spontaneously moving a gun about, it is thought about. I knew, defendant knew going into that car he was armed with a gun. He took out the gun, he aimed it at Devante's head. He knew, that's intent. That is premeditation. You have to think about taking your gun out. He didn't just have it out like this and Devante somehow sat in front of it. No, he thought about it, took it out, pointed it at him, run it. Devante turns around, he's not letting go of the gun, he fires.

Then further, he doesn't stop and this is what happens next according to Spencer. He realizes he just shot the guy. You shoot him now too. That is intent, that is thought out, you don't just say that to somebody and point the gun at them without thinking about it and then to say you do it too. That's the moment in time that the premeditation exists and is corroborating the first premeditation. Now he knows even more he's gotta make sure this guy's dead and he deliberates it. Think about how much time he needs to take. If I just shot the guy, defendant shoots Devante Hanson. He's got a moment, he's got the time to think about what do I need

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to do next, weigh my pros and cons, give me a substantial reflection. What does he do? He does all that and makes the conscious choice to aim it at Spencer. He makes the choice. His own actions did send Devante to his death. That is why he's guilty of first degree premeditated murder.

We know the first element is met, we know the second element is met. Let's talk about his state of mind again. It's the same stuff, but there's one addition. When you consider premeditation and deliberation it can be inferred from the actions of the defendant which show planning from any other circumstances surrounding the killing. I don't need to prove motive for the killing, but I think I have. That assault with intent to rob, his intent, the motive was to rob. But you can consider the evidence of motive in deciding if there was premeditation and deliberation. Motive itself doesn't prove it. Motive doesn't prove an element, motive is a reason to (inaudible).

We know Devante came to the scene, immediately talked to defendant. Spencer wanted to buy marijuana. Defendant didn't want to buy marijuana, there's no evidence of that. That's his opportunity. He's armed with a weapon, there's his means. Fourth, defendant told Spencer he was going to rob Devante and we know he was looking to hit a lick. There's your motive. Once he fired the initial shot which struck Devante's chest near his heart he made the following

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conscious and thought out decision and he did it beforehand. He took out his gun and raised it towards Spencer, scooted across the back seat. That takes action, that takes thought. You don't just scoot yourself across the back seat. And when you watch that video and that car shakes, which I'm going to show in a moment, that's when I think he scooted across the back seat with his gun, told Spencer to fire. So, he moves out of the way so he's not going to get hit by the bullet corroborating Spencer's story or version of events, whatever you want to call it. I think it's the truth based on this evidence, fires, and then they get out of the car, not the way he came in. And he continued to aim the gun at Spencer. It wasn't just do it, it was continuous aiming and he told him to shoot, and then he calmly walked away like (inaudible). Spencer bolts. He's--not any problem for him to kill, just do it. Why give him the gun? Why did he say give me the gun? He doesn't want anybody to know what just happened.

That blood smear, what we expect to be blood on People's exhibit 12 makes sense. If Devante's got the gun trying to wrestle it from you and you shoot him, we talked about the blood and how it might spatter to the back, gets on the defendant's hands maybe. Defendant gets out of the vehicle, right hand, left hand, we don't know. That kind of looks like a palm print area how it would smear, and he walks away. That's Devante's blood. I assert to you that's a

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reasonable inference because there's nobody else cut in that car that we know of. We know that Devante's dead and he's bleeding.

In this video, just think about this for a minute.

(At 10:12 a.m., video played)

When Devante gets out, one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen seconds to premeditate and deliberate the entire action. That is more than a substantial reflection, that is reflection.

The back seat, I don't see any blood right there. That's because it was on him. There's blood down near the area here, it kind of looks like maybe a body was positioned here. No blood. Thought out beforehand again does not mean years, months, it's a moment in time, substantial enough to have that conscious thought. He had that thought, he premeditated. Deliberation, weigh the pros and cons. Thirteen seconds to weigh the pros and cons of your actions. It's more than enough time for any of us to know right from wrong. That element is met.

Each element of first degree premeditated murder has been met and that's the only action that you should take is finding him guilty of first degree premeditated murder. You can do it on a principal theory, he shot Devante and then he aimed it at Spencer and premeditating, thinking about the whole thing knowing the actions, yep, you'd have to do it too.

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Or you can think of it as the aiding and abetting and saying well, he didn't--he wasn't the shooter, but that's I assert to you wrong. Aiding and abetting can't be the exact same. Each element of aiding and abetting was met and there's an accompanying felony firearm charge.

You're gonna get to consider second degree murder as well, it's called a lesser included. I don't even think you should consider it. I'm not even gonna go through it. Same elements, the only thing that differs is the intent, and there's no premeditation or deliberation for second degree murder. It's those other same things that I had talked about.

You'll get a verdict form, but before I go there, I want to say one last thing. These emails; I introduced these emails for consciousness of guilt, that's it. A person's not going to be willing to just straight up plead, ask for a plea deal on a murder case such as this unless they know that they've done something wrong. He knows he did something wrong, he wanted a deal. You know, I'd agree with you, I don't like to give murderers plea deals. I hate it, but sometimes we have to do things we just don't like. If we want to catch the most culpable murderer sometimes we have to make that deal that we have to swallow.

It was a poorly worded plea agreement and I apologize for that because I didn't want to bring in Ms. Lang. But sometimes I have to do things I have to do to explain to

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you what happened. I don't want you--and I'd ask you, don't hold that against Devante because my office made an agreement with Spencer. Consider Spencer's motives to testify here today--or excuse me, yesterday. He did testify. His stories make--his version of the events, I don't like calling it stories, stories sounds fake. Version of events made complete sense with all this evidence that we have. Yes, we have--we gave him a plea. We gave him a special offer. Why? To catch the most culpable person in this whole instance. He, however, was only willing to tell us anything if we gave him a plea deal.

Remember how Spencer made the phone call to Detective Moore? He called her before anything. Before there was a plea deal, before he'd spoken to police, before he'd spoken to our office through Ms. Lang. He never had anything on the table at that point. Nothing. And the second time he had nothing on the table. His version of events or the testimony was consistent with everything he said prior to having any motive to lie for a plea agreement.

People can tell stories two different ways. On my way to work I was cut-off by a car. I could tell somebody else then, yeah, on my way down 475, I got cut-off by a semi-truck. I changed car to semi-truck. Does it really matter to--the version of the story you're telling that I got cut-off on my way to work? He gave some inconsistent statements, I'm

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not trying to deny that. There are some things that didn't line up. At first, he said there was an impeachment about knowing versus discussing with Detective Watson. Did he discuss it. Well, he didn't discuss it, he found out about it in the vehicle. So, I don't know if that's really inconsistent, that's just more of a semantic, how do you interpret certain words and languages and how do other people than interpret them. You judge his credibility. It's your profess, that's what you get to do. But in the whole world of this evidence, it's uncontradicted. There's no other evidence that contradicts Spencer's version of events about what happened in the vehicle, what happened after the vehicle, or anything else.

And when you get the verdict form, my assertion to you based on all this evidence is to find the defendant guilty of first degree felony murder, guilty of felony firearm, guilty of first degree premeditated murder, guilty of felony firearm, guilty of assault with intent to rob, guilty of felony firearm. And then as to felon in possession of a firearm and felon in possession of ammunition and each accompanying felony firearm count, guilty.

Your own moral conscious may be telling you what happened with Spencer is not right. You're probably yeah, right now, but what happened with Spencer is not on trial. What's on trial is the death of Devante Hanson at defendant's

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hands and is he culpable, and he is.

THE COURT: Thank you, sir. You may, Mr. White.

MR. WHITE: Thank you, Your Honor.

THE COURT: Stand up for a minute, jury. Stretch it out. Okay, Mr. White.

MR. WHITE: Thank you, Your Honor. To begin with, normally I would walk in front of you, rant and rave and raise my arms. I'm suffering from a cold right now so I'm gonna stay back here so I don't spread it all over in front of you as I'm walking by. If I take a drink of water while I'm talking, I apologize, but that's to keep from coughing at you right now.

This is my last chance to talk to you. As I told you during the opening statement I would have one more chance to talk to you, this will be my closing. Judge informed you that after I'm done, Mr. Sawka's gonna get up and he's gonna then comment on what I say to try to convince you of a different point of view.

I told you at the beginning it was sort of like a movie trailer. I gave you an idea of what I thought you were gonna say, the evidence that you were going to hear. I'm gonna get to that in just a moment, but as I indicated at the beginning also as well that when you sat down here you didn't sit here as a clean slate. There were certain things, certain rules you had to abide by all the way through the trial, and

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you told us that you would do that, and Mr. Sawka, Mr. Davis, the Judge, myself, we all appreciate the fact that you did. I remind you of a couple of those things. Mr. Davis as he still sits here right at this moment and everything is presumed to be innocent until you--until I'm done, until Mr. Sawka's done, the Judge reads you the evidence--I mean, read's you the instructions and sends you back to the jury room, he is still presumed to be innocent. Verdict form. You're gonna get it, you're gonna notice it says guilty or not guilty. It does not say innocent on there because he is presumed to be innocent. It's up to Mr. Sawka to convince you otherwise and find him guilty--for you to find him guilty of the charges that he has.

The other things that we have as far as the reasonable doubt. You told us to begin with you would sit here, you're coming in here with your common sense. Judge is gonna read you the definition of reasonable doubt. It's fair, based on common sense and reason when you look at all the evidence taken as a whole for you to determine if there's reasonable doubt.

The other thing that we talked about before is as you know Mr. Davis did not testify. You swore at the beginning you would not hold that against him if he did not testify. What you have to consider is based on the evidence that was presented by the prosecution at this point in time. And one other thing to sort of mention also as well, and Mr.

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Sawka touched on as well is there's also a human element to all of this and everything. We have a young man who's dead. Shot twice. Has two children. Has a mother who has been sitting here in the courtroom who has been suffering. Unfortunately, with the system that we have right now, that's something that you're not allowed to take into consideration when you're deciding what's going on with this case. You swore an oath at the beginning that you would not do that and we're gonna hold you to that.

The final thing to mention also as well is the Judge will tell you that what I say, what Mr. Sawka says, that's not evidence. That's our view of things and how we think the case came in and what we think that you should do with it. And to point that out I think when Mr. Sawka was up here talking and giving his initial closing statement you hear words like theory. I think. Maybe. Looks like. All those things where it's a subjective point of view of how he looks at things.

So, let's go with what we can talk about right now that we know without a shadow of a doubt or uncontroverted as the evidence goes. We have two young men who walk out an apartment at 1111 at Father Dukette, we have the video, they walk out. No question about that whatsoever. They go downstairs. Again, video, no question about that whatsoever. The white car pulls up, again, no question about that whatsoever, it's on the video. A young man who we know as

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Devante Hanson gets out of that vehicle. Again, uncontroverted, you have video proof of that. Mr. Holiday gets into the front seat, Mr. Davis gets into the back seat behind the driver, doors shut. Doors open again, Mr. Holiday gets out, goes into the trunk of his car, is there I believe as Mr. Sawka just pointed out thirteen seconds or so. Gets back into his vehicle at that point in time. They're there for a while. You've seen the video, you can watch it again because it's part of the evidence that you will see.

Something happens inside that car. We don't know. What we do know though is that those two men get out of that vehicle. Mr. Davis gets out of the rear passenger seat, the opposite side that he had gotten into, Mr. Holiday gets out of his seat. They start walking toward Father Dukette, they then end up going toward another location. All of that is uncontroverted, no question about it whatsoever, you've got video that shows all of that.

We know that the police arrive on the scene. We know the young man, Mr. Hanson, is sitting in the front of the seat. We know that he has been shot two times. Mr. Mize testified what he observed. Dr. Hunter testified what he observed when he did the autopsy. What do we know from that autopsy based on Dr. Hunter's testimony? We know that Mr. Hanson was shot one time in the chest, one time through the side. You're gonna see in the autopsy report that there's

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what's referred to as gunshot one, gunshot two. Recall from Dr. Hunter's testimony he cannot tell you what happened first. He does not know based on that which gunshot happened in time. All he said was when he relays as one and two is that was when he was doing is his autopsy where he started at.

We know that gunshot one hit Mr. Hanson in the chest, hit his sternum as a matter of fact. Dr. Hunter testified that it pierced no veins, no arteries, did break some capillaries. That's what we have with that. We have the second shot that we know came from the left side of Mr. Hanson, went out the right side of Mr. Hanson. It was from slightly back toward front at a slightly downward angle. We know that that shot pierced his left lung, then pierced his heart, pierced his right lung, and then exited his body. That's what we know as far as what happened to Mr. Hanson.

We also know that there were two guns that were used as far as this goes. You heard from Lieutenant Crichton from the Michigan State Police. He told you that it was absolute two different guns that were fired. He cannot say again, you know, what order any shots were fired or anything of that nature, but he says that the bullet that was retrieved from Mr. Hanson's chest was not fired by the same gun that fired the bullet that ended up in the trunk.

Going on to the vehicle for a just a moment and what took place in the vehicle. We know that it was investigated

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by the police. We know that they had an opportunity to call the Michigan State Police Crime Lab which they did not. You've seen the photograph, you've heard the testimony of the injuries that were suffered. Again, your common sense. There were two gunshots in that car, the one from the back seat to the front seat that was recovered from Mr. Hanson's body. We also have the other shot that went through Mr. Hanson's body, exited into the rear seat. The photograph that I introduced to show you the hole in the back seat, use your common sense. There was a gunshot. The bullet pierced Mr. Hanson's body, exited the body, ends up in the trunk. Common sense would tell you that hole in the back seat and where it's located is where that bullet went through and landed.

Again, that's all the uncontroverted evidence that we have at this point in time. Mr. Sawka, and again, what the People have presented as well is that the evidence that they want you to rely on would be the evidence from Spencer Holiday. Let's look at Mr. Holiday for a second and what he has to say. Let's look at the individual that we have. We have a young man who is an admitted drug dealer as he told you. He sells marijuana and cocaine out of his house. Carries his gun at all times. He has some issues. His memory is a little fuzzy at times shall we say. The argument is is that oh well, Mr. Davis was the person that set this up, Mr.-- I mean, and that Mr. Holiday had nothing to do with this

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whatsoever.

You heard Mr. Holiday's story and Mr. Holiday gave various stories at various times. You've heard them all. First time he calls the police while on the phone at this point, he knows that Mr. Davis has already been arrested based on the conversation that he had with Detective Moore. He's had conversations with his brother or at least Detective Moore has contacted his brother at that point in time. And what does he say to the police at that point in time? Hey look, I have no idea what happened in there. They must've had something personal going on between the two of them. All I know is that the gun goes off and he points the gun at me and he tells me to shoot. Nothing about a robbery whatsoever, nothing about any information about Mr. Davis knowing that he had a gun or did not have a gun.

Second interview that he gives, again, no robbery at that point in time. Says nothing about that whatsoever. Third interview, again, we still have no robbery whatsoever. Fourth interview he goes and talks to Detective Watson. He tells Detective Watson, hey, I had no--starts out with look, I had no idea that there was a robbery going on. I have nothing that was--no idea what was going to happen. As a matter of fact, I was surprised when it went off and I just shot to protect him and to protect myself.

Detective Watson, you had a chance to listen to her

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talk. Her experience, she's conducted I believe thousands of interviews at this point in time. That's what she does. She starts to confront him, interrogate him, and then all of the sudden we have Mr. Holiday change his story to say, yeah, you know what, for the first time ever, we were talking about a robbery in that elevator. That's when that happened and everything. But hey, when this was going on I hear a shot go off and once again, I still fire off into the back seat to protect at this point.

Then we have Mr. Holiday, excuse me, Mr. Holiday who gives another version of events when he testifies at district court where all of the sudden now as he had testified to, Mr. Davis is talking about oh well, I need money, I need to hit a lick. Is anybody out there where I can hit a lick, where I can do something? He talks about it in the apartment, talks about it in the elevator, and then in the car tells a story now, we have Mr. Davis pulling out a gun, pointing it at the back seat and then a struggle ensues, a shot goes off, supposedly by Mr. Davis, and then Mr. Davis is again pointing the gun at him and saying hey, look, you've gotta shoot.

Then we have the testimony that he gave you here in court when he came in and testified. And what I though was curious is even as he's being questioned by the prosecutor at this point in time he's changed his story about whether or not Mr. Davis even knew that he had a gun or not. First time he

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testified under oath, he had no idea I had a gun. Being questioned here in court in front of you, oh yeah, it was on the windowsill, we're flashing guns to everyone. Not even be able to keep his story straight between all of that with what's happened. And then again, he goes on to say hey, by the way, there's a robbery getting ready to take place, we get inside the car and once we got inside the car, what do I do? I try to talk him out of it. Are you nuts? There are cameras around here, you can't rob anybody here at this point. Then again, he tells a story of Mr. Davis shooting from the back seat then supposedly pointing the gun at him and then running off to the--Mr. Davis' house where then at that point in time allegedly Mr. Davis says give me your gun, so he can get rid of it.

That's the alleged evidence that you have where the prosecutor's trying to convince you that Mr. Davis is guilty beyond a reasonable doubt of the charges that he has. This young man who came in and testified, that's what your evidence is. And what you have to do when you consider it just say look, okay, here's the evidence that we have been presented. How does this fit in with everything else that we have at this moment? If we're gonna talk theories here for a moment and what people are gonna do or what might have happened inside the car because again, we don't know, none of us were there.

We have the apartment at 111--or excuse me, 1111

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Father Dukette. Heard testimony there were multiple people present there. James Albert, which would be Mr. Holiday's brother, Mr. Holiday's girlfriend was there also as well. Recall Mr. Holiday says Donald Davis is out there and he's talking to my brother about hitting a lick. We know that the police interviewed Mr. Albert. Mr. Albert come in here and tell you hey, by the way, over at the apartment Mr. Davis is out there talking about that he's gotta hit a lick someplace. No. If somebody--if he had said and someone had heard that common sense would tell you would that person be in here testifying in front of you?

Mr. Holiday says oh well, even though I'm a drug dealer, I don't have any weed so I'm gonna go to the corner store and buy some for my girlfriend who is also present at that apartment. We know from the police she was there. Did we hear from her to say this was what was going on that morning in the apartment? We did not. Common sense as well to go out to say he tells you that Mr. Davis was the one who called Mr. Hanson and told him to arrive. Any phone records? Multiple phones were taken from everyone. Any records, anything to show that there was any conversation between either Mr. Davis or Mr. Holiday for Mr. Hanson to get him there at that location? No.

They're walking down the hallway together and allegedly Mr. Holiday says oh well, yeah, he's telling me he

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needs to hit a lick. Well let's think back for a second again, what's the relationship between Mr. Holiday and Mr. Davis based on what Mr. Holiday had told you? He had met him the day before, only known him a short period of time. So again, sound like something where Mr. Davis would sit there and say hey, by the way here's a complete stranger, hey let's go hit a lick or tell me what you can do about hitting a lick? It doesn't make sense. They go outside, a car just magically appears at that point in time. Again, there's no phone record to say who had contacted him. But we have an individual, Mr. Hanson, who is there to sell marijuana, a drug dealer also as well. Common sense would tell you who's more likely to have contact? One drug dealer to another?

They get inside the vehicle, Mr. Hanson--I mean, Mr. Holiday tells you his story of what allegedly happened inside that vehicle. Again, ask yourself does this make sense with what's going on? You've seen the photographs, you've heard the testimony of what happened inside that car. Try to determine when the bullets were fired or where they were fired, it's kind of hit or miss at this point in time. Again, we could've had the lab look at it, somebody could've used some rods to sort of determine what was going on at least as far as trajectory and angles. That was not done. Instead, we have police officers and detectives who are setting up chairs and hanging themselves over it to try to determine where the

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bullet came from, where it didn't come from. Also, we had to hear--you saw here today in court the same thing as well.

So, ask yourself when you look at the back of the vehicle and you look where the blood is located it's there. You see a big puddle of blood behind the rear, I mean, excuse me, behind the passenger seat in the rear seat that is there. Ask yourself, okay, well based on the testimony that I heard from Mr. Holiday how do we get that big puddle of blood right there? If Mr. Holiday is--if Mr. Davis is sitting there in that location, then how do we get that blood located right there? How do I get Mr. Davis' hat which allegedly fell off fell off into that puddle of blood that's going on right there? Look at the evidence that you saw where you have the shot that came from the back seat that went through the front seat. Again, when you look at that you see the smear, it's right there. Dr. Hunter is trying to say, oh well, the blood may have come off it. Well, if Mr. Hanson's chest is pressed against that seat right there and the bullet goes through it as we believe it did by looking at the evidence that we have, then how do we get the droplets back into the back seat?

Just as likely what happened in this is that there is an argument that takes with Mr. Holiday and Mr. Hanson and he shot at that point in time and then he tells Mr. Davis to shoot. There is no evidence to sit there and say anything other than that's what happened inside that vehicle. But

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again, and again, that's a theory. That's something I'm saying when you look at it, hear possible things that have happened again. I don't know, I wasn't there. The only thing you can determine is by listening to the evidence for you to decide what is there.

I will tell you based on this and based on the evidence I'm not trying to hide anything from you whatsoever. You see Mr. Davis get into the back seat, there's a shot that's fired through the back seat. There's paperwork that says he's guilty of being a felon in possession. So, when you look at your verdict form and based on the evidence that you have, count ten, possession of a firearm, it's the back seat there's a gun that was there it was fired, guilty of that one. Count nine, guilty; count eight, guilty; count ten, guilty. Anything possessing a firearm based on the evidence that's there, I cannot stand up here with a straight face and tell you anything any differently than that there was a gun at that point. So, when you go through that, look at that and find that to be so.

Going on to the other things that are going on, the other evidence that we have, what is curious as well is that there's also a search that's done at the Cornerbrook (sic) Circle address as well supposedly where they ran to where supposedly that's Mr. Davis' sister that lives there. We have multiple people that live there as well. Who did you hear

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from that address? No one. To say hey, by the way, they came running over, somebody had blood on them, somebody had a gun, somebody told us what happened. No one at that location came in here to tell you anything. You know that there was a search at that location, there was something found in the basement. We know that there were various phones, also a sweatshirt that Mr. Davis had been wearing also there as well. But we also have police down there conducting a search because they believe a murder has just happened. Do they find any firearms down there, did they find any t-shirts wrapped around guns? Supposedly that's what Mr. Holiday said happened at this point. We have none of that evidence that was shown to you either.

The other thing that I--that concerns me also is when we have the plea agreement that was signed by Mr. Holiday. Discussion is made about that to whether or not he had some sort of incentive to testify or not testify or change his story. Well remember the pattern of events that we have going on here. He gives versions of events to where it's oh well, I'm just in the car, he forces me to shoot. What did I do wrong? He keeps telling that story until he goes and talks to Detective Watson. Then all of the sudden he changes his story and adds in the robbery element of it because again, that makes felony robbery--that makes felony murder for the prosecutor at that point in time. If we're able to show that

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there's a robbery, then you can go the murder attaches right along on there and all of the sudden he starts changing his story.

Right after that--I shouldn't say right after that, it was several months after that he signs a plea agreement. The one that you will see when you get into evidence and you'll be able to look at it and look at it for yourself. It says in there as far as the recommendation goes, it goes 64 and a half months. That's what he's told that he's looking at on his minimum sentence. Ms. Lang came in who I've known for years and respect as well and says oh well, by the way, it's supposed to be, you know, sort of be in the middle. That's what we meant by doing this. The reason you sign a plea agreement and the reason this Judge always refers to it as a contract is because it's a binding document. That binding document wasn't bound to because that's not what he got sentenced to after he testified.

The other concerning part about it is when you look at it again you'll be able to see there's a spot on there testify truthfully as required by the prosecutor. Simple little box to check, that's all you have to do. It's not done. There's additional language that's added on there. The additional language that's added on there is we want you to testify to something specifically. We want you to testify to what you told Detective Watson. Detective Watson, which will

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be the same remember again the statement that he lied in. The statement that he gives one version of events says this is what happened but then changes his story and adds in additional details and since that point in time his testimony has been fairly consistent then with this robbery that's taken place. Mr. Holiday also told you from the stand when I questioned him if you come in and you say anything any differently other than this robbery, that a robbery took place caused by Donald Davis do you believe that you're going to get your plea offer? Do you believe you're still gonna get your sentence? His comment was no, I do not. So, take that into consideration when you evaluate his testimony and what he had to say.

The other thing that I wanted to comment was looking at with all the evidence that we have, and again, ask yourself beyond a reasonable doubt. Have I been shown anything that shows that Donald Davis did anything in that car other than pull a trigger? Granted, he did. There is no doubt about that whatsoever behind that back seat right there. There is no question about that whatsoever. But as far as a robbery, felony murder, premeditated murder, what have you heard to confirm that? Because again, with the robbery as we indicated before, supposedly he's so desperate to hit a lick. He needs money, he needs something, he's gotta have something. Mr. Hanson pulls up, he is killed, what is taken from him?

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Nothing. There's approximately $300.00 and I believe $40.00 or $360.00 cash in his pocket at that point in time. There's 26 grams of marijuana that we know at this point in time, based on what Mr. Holiday had told us probably has a street value of approximately $260.00 at that point in time. There's a wallet, there's a phone. Nothing's been robbed from him whatsoever.

So, when you listen to Mr. Holiday's story and supposedly the evidence, and again, what happened, I've told you what the uncontroverted evidence is, the only thing to say what took place inside that vehicle is what Mr. Holiday tells you that happens. So, when you evaluate it again, you have to go through and evaluate his credibility and I apologize, because I'm going to keep harping on it. He tells multiple different versions of what happened to the police. He never makes any mention of a robbery taking place until after he is confronted by a detective about what's going on and then he changes his story and then gets his plea offer after that.

And I apologize, I'm going digress back for something because as I was--forgot to mention earlier as well. Look at Mr. Holiday's story as well and see whether this makes sense or not. He tells you that Mr. Hanson gets back inside the vehicle, that Mr. Davis is sitting behind him. That Mr. Davis pulls a gun, points it at the back of Mr. Hanson's headrest, and basically makes a comment which I'm not going to

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repeat at this point in time. And according to Mr. Holiday, how the altercation then starts taking place in the car is Mr. Hanson turns around and grabs the gun with both hands over the seat. And ask yourself, does that make any sense whatsoever? I'm supposedly being robbed, I have no idea whether a gun is being pointed at me or not, but my reaction is is then to turn around and then grab the barrel of the gun with both hands at that point. So again, when you're evaluating Mr. Holiday's credibility, I forgot to mention that earlier, but also take that into consideration as well.

Going to the emails for a second, consciousness of guilt supposedly. You heard the testimony. Detective Baldwin contacted counsel which would be myself because they know cannot go talk to Mr. Davis directly. Contact was made. Based on the testimony after the preliminary examination where Mr. Holiday testified, where Mr. Holiday has already gotten his plea agreement at that point to where he's looking at doing a minimal amount of time. The police say hey, we believe that Mr. Davis might have information about another case, will you please talk to him about that, which I did. At that point in time, he said hey, by the way, do you guys still want to talk to me about that case because what he has just seen at that point in time is use your common sense as well, he's just seen a liar, because we know that Mr. Holiday has lied because he's changed his story. We had Detective Watson

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say that. We know that he's a liar, also a murderer. He's the one that shot the fatal shot, regardless of however it happened, he was the one that did it. So, you ask yourself well Mr. Davis, these emails, hey we've gotta hold this against him. He must be guilty of something at this point in time because he sent out that email. Well again, also take into consideration as Mr. Sawka had used the word context of what else was going on at that point. Contact from a police agent through his attorney to contact him after he has seen what's going on and say hey, by the way, if you guys are giving out deals to murderers allegedly at this point, well I didn't do anything and I can help you on another case, so why don't you help me do something at this point? So, consider that also as well.

At this point, I think I've argued to you everything that I can. I can just keep repeating the same stuff over and over again, but again, we don't know what happened inside the vehicle other than what Spencer Holiday allegedly said happened. Take into consideration everything that he has said, everything that he has said to everyone, his demeanor when he came into the courtroom and you'll determine whether or not you believe him at this point in time. You'll determine whether or not Mr. Sawka has proven his case beyond a reasonable doubt. Based on what you've heard, I don't believe that you have. I don't believe you have heard

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anything in any way, shape, or form that would implicate Mr. Davis in any robbery or any murder whatsoever at this point in time based on--and I would like to say also as well, thank you on behalf of Mr. Davis and myself for your attention to the matter. Thank you.

THE COURT: Thank you, Mr. White. Anything else, Mr. Sawka?

MR. SAWKA: The presumption of innocence is not a shield. It is something that exits in the law. It gets peeled away in a trial layer by layer. Spencer's testimony is important to this case. Yes, I told you that from the beginning. But when Mr. White used the word uncontroverted, what evidence controverts Spencer's testimony? Nothing. Spencer's testimony is uncontroverted. Mr. Davis--Mr. White talked about how we have other people allegedly, and how the interviews with these witnesses would somehow change the version of events is what I'm getting from the implication. How something else you should be presented. If there's something else that is known to Mr. White and his--defendant, he has an opportunity to present that to you. The Judge told you, a defendant does not have any burden here, it's my burden, but if he chooses to present evidence he can. He chose not to present evidence.

MR. WHITE: Objection, Your Honor, I apologize, but Detective Watson was called by Mr. Davis, so I resent the

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implication.

MR. SAWKA: Oh, excuse me. I agree, I'm wrong. He did present evidence. I would retract that statement and tell the jury to ignore that please.

THE COURT: I'm sorry?

MR. SAWKA: If you could tell the jury to ignore my last statement about not presenting the evidence.

THE COURT: You can ignore that.

MR. SAWKA: All right. He did present Detective Watson, it's in an unusual circumstance where I broke my case we could do that accommodate her schedule, yes. That was impeachment evidence. That is solely for you to consider the truthfulness of Spencer. You don't consider that as substantive evidence, and that's what the Judge is going to read you about impeachment is also the evidence. But again, there are other people, phones? He can present that evidence. If his theory is there's other evidence that should be presented he can do that. He didn't.

My case still proves beyond a reasonable doubt everything in this case. It's uncontroverted as to what happened in that car. Spencer testified, he told us, he told Detective Moore. Now the issue of the robbery, if you've just killed somebody think about what's going through your mind and what you're most concerned with. Murder. Not a fact of a robbery might have occurred. And actually, in fact, I'm not

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even asserting a robbery occurred, I'm asserting assault with intent to rob occurred. Because Spencer never testified that defendant Davis took anything. If he wanted to make up a lie so good, so clean, why not easily just say yeah, he took some marijuana, he took that money, he took a dollar, he took something. No, he didn't take anything.

And he also mentioned, Mr. White mentioned about the gun. Didn't know he had a gun. I heard--my--what I heard from the evidence was Spencer and Davis both showed each other a guns, but he did previously testify that he didn't think defendant Davis knew he had a gun. Why is that so important about knowing about a gun? In fact, defendants already admitted he did. He said he shot him in the back from this back seat, so he had a gun. Why does that matter about lying about guns, it's a murder and everything, I just don't understand it. Spencer's testimony has always been consistent. If I asked you a question about how many kids do you have and you give me, oh two. Well you didn't tell me you have a dog. You didn't ask me about a dog. Does that mean you're a liar then? No, it's context. I ask you questions you give me an answer, I interpret it a certain way, and if I wanted something else I could--I think one of the examples is if I tell you three dogs jumped through a hoop. Do you think oh, three dogs went through one hoop? No, no. Three dogs jumped through a hoop, three different dogs jumped through

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three different hoops. Semantics, thinking about what's being asked and what's being interpreted are very important. And I think that's what Detective Watson missed when I asked her about knowing and discussing and talking, that's what I was trying to get at is, we ask certain questions and we interpret them certain ways but somebody else who we're talking to interprets them in a different way.

One of the things is that you consider the absence of evidence evidence, right? The absence of evidence however does not mean (inaudible) evidence. It's a determination you can make, but I don't think it actually does that. Well you didn't present to me his brother, so therefore I (inaudible). I presented the person who was there and knew everything about everything. There's certain rules of evidence called hearsay that I can't get in. Spencer is the person that told us what happened in the car. Nobody else was there except him, Devante, and the defendant.

There is confirmation of assault with intent to rob. Yeah, there's no confirmation of robbery that's why it wasn't charged as robbery. The confirmation is this whole situation. There's no reason for any of it to actually even occur outside of a reason, a motive, an assault with intent to rob. He freaked out is my theory of that. When this happened, oh crap. Realizing what he had just done, then he needed an accomplice in the matter so he told Spencer to shoot him, and

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then he just said screw the robbery, I don't care, I need to get up out of here and he left. And that's why he wanted to dispose of the guns.

And reasonable doubt is not just a number, we talked about this, it is something that you decide. It's a common sense judgment. This evidence is--this common sense here leads to only the conclusions of what our theory is. We can't think of another theory that fits any of this. And I can go back to Spencer if you want to create a theory about this and you're gonna lie about it don't implicate yourself, implicate somebody else. Not saying yeah, I did it but this is how it happened.

And there's a good story. Judge talked to you about Abraham Lincoln and it's a very interesting thing that I think fits this case. When he was a lawyer, Abraham Lincoln had a trial going on, he had given, I don't know if it was opening or closing but or at this--it was closings, I don't know who went first but--I think it was his opponent gave a great closing statement. Said something so amazing, everything. Lincoln gets up and says, counsel, talking to his co-counsel--or not his co-counsel, his opposing counsel, how many legs does a sheep have? Opposing counsel says four. And if I tell you that that tail on a sheep is a leg, how many legs does a sheep have? Well, five. No, just because you say it's so doesn't make it so. It has four legs.

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Just because the defendant wants you to believe the opposite of everything doesn't make it so. My point is, use your common sense. A tail is not a leg. Legs are legs. This evidence, the way it matches up with Spencer's testimony, with Lieutenant Crichton's testimony, with Dr. Hunter's testimony, with the autopsy report, with the photos, with the (indiscernible), with the emails of consciousness of guilt, with the video leads to one conclusion; guilty of each charge and that's why we're here.

The defendant is guilty of felony murder because he wanted to commit assault with intent to rob and killed somebody in the process. And then he knew and thought about it the entire time as he's doing it and premeditated at when he actually shot, I assert, but then even more when he aimed his gun at Spencer and told Spencer to shoot thinking about the pros, the cons, weighing is ability saying I need an accomplice, I need somebody here to do this for me. That's the theory that we have that fits this evidence and there's no other theory we can think of that fits this.

So, we ask you to do your job, and the Judge is going to ask you to render a true and just verdict. That is the true and just verdict. Guilty of each charge as charged. Thank you.

THE COURT: Thank you, sir. Stand up again, jury. Now you've seen all of the evidence and you've heard the

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(At 11:48 a.m., court recessed)

(At 4:01 p.m., court reconvened)

MR. ELLIS: All rise for the jury.

(At 4:02 p.m., jury present)

THE COURT: Let's sit down please. When I was telling you about the two different kinds of evidence I talked about direct evidence and circumstantial evidence. That's direct evidence that it's snowing out. All right.

So, you are here to deliver your verdict and Mrs. Harger will guide you through that process so please pay attention to her.

MRS. HARGER: Will the members of the jury please stand? Members of the jury, have you agreed upon a verdict and if so, who will speak for you?

JURY PANEL: Yes. I will.

MRS. HARGER: Okay. By reading your verdict form count by count please tell us what is your verdict?

UNIDENTIFIED JUROR: Starting now?

MRS. HARGER: Start now.

UNIDENTIFIED JUROR: We the jury in the above captioned case find the defendant, Donald Wayne Davis, Junior to count one, first degree felony murder, guilty. Count two, possession of firearm at time of commission of--or attempted commission of first degree felony murder, guilty. Count three, first degree premeditated murder, guilty of first

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degree premeditated murder. Count four, possession of firearm at time of commission or attempted commission of first degree premeditated murder, guilty. Count five, assault with intent to rob while armed, guilty. Count six, possession of firearm at time of commission or attempted commission of assault with intent to rob while armed, guilty. Count seven, felon in possession of a firearm, guilty. Count eight, possession of firearm at time of commission or attempted commission of felon in possession of a firearm, guilty. Count nine, felon in possession of ammunition, guilty. Count ten, possession of firearm at time of commission or attempted commission of felon in possession of ammunition, guilty.

MRS. HARGER: Members of the jury who agree with the verdict raise your right hand and listen to your verdict as recorded. You and each of you do say upon your oath that you find the defendant, Donald Wayne Davis, Junior, guilty, count one, guilty of first degree felony murder. Count two, guilty of possession of firearm at time of commission or attempted commission of first degree felony murder. Count three, guilty of first degree premeditated murder. Count four, guilty of possession of firearm at time of commission or attempted commission of first degree premeditated murder. Count five, guilty of assault with intent to rob while armed. Count six, guilty of possession of firearm at time of commission or attempted commission of assault with intent to rob while

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armed. Count seven, guilty of felon in possession of a firearm. Count eight, guilty of possession of firearm at time of commission or attempted commission of felon in possession of a firearm. Count nine, guilty of felon in possession of ammunition. And count ten, guilty of possession of firearm at time of commission or attempted commission of felon in possession of ammunition. So say you foreperson, so say you members of the jury?

JURY PANEL: Yes.

MRS. HARGER: Thank you. You may be seated.

THE COURT: To fully understand your verdict, I'm going to ask the clerk of the court to question you individually if you agree or disagree with the verdict, so listen to her please.

MRS. HARGER: Members of the jury as I call your seat number please indicate whether you agree or disagree with the verdict as read. Juror in seat number one?

JUROR ONE: I agree.

MRS. HARGER: Seat number two?

JUROR TWO: I agree.

MRS. HARGER: Seat number three?

JUROR THREE: I agree.

MRS. HARGER: Seat number five?

JUROR FIVE: I agree.

MRS. HARGER: Seat number six?

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JUROR SIX: I agree.
MRS. HARGER: Seat number seven?
JUROR SEVEN: I agree.
MRS. HARGER: Seat number eight?
JUROR EIGHT: I agree.
MRS. HARGER: Seat number nine?
JUROR NINE: I agree.
MRS. HARGER: Seat number ten?
JUROR TEN: I agree.
MRS. HARGER: Seat number eleven?
JUROR ELEVEN: I agree.
MRS. HARGER: Seat number thirteen?
JUROR THIRTEEN: I agree.
MRS. HARGER: And seat number fourteen?
JUROR FOURTEEN: I agree.
MRS. HARGER: Your Honor, it appears to be unanimous.
THE COURT: It does. Thank you. Well, you gave us five days and you learned some things and you were alert and intelligent. I watched you out of the corner of my eye to make sure that you were part of the process and you were. You've been exercising your citizenship, you helped our judicial system go forward and so we thank you for all of that. Now things change, because you can talk about the case. As a matter of fact, if you have questions or you want to talk

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about the case we can arrange for you to meet with the prosecutor and the defense lawyer and even me in another room if you want to do that. On the other hand, if you want to go home and beat the weather, just leave right now. You can take your notes with you and you are free to go. So, thank you for giving us your time. Go ahead, Mr. Ellis.

MR. ELLIS: All rise for the jury.

(At 4:08 p.m., jury excused)

THE COURT: Now before we go further, ultimately, we're going to have to make a choice between the--what kind of murder we're dealing with, but I guess we can do that on a different day.

MR. SAWKA: We'll do that at sentencing day, Judge, please.

THE COURT: And Mr. Davis, what happens now is the probation department has to write a presentence report about you. So, they're going to come by and give you about 100 questions to write out answers to and they're also going to orally interview on a different time and everything you tell them they're going to use to write your life story to me. And that's what I read to decide your sentences. And we're going to come back in about probably a month. Let me see, this is--I think we should do this on Wednesday morning, March 28th at 8:30, the sentence. How do we want to handle the habitual offender status?

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Approved, SCAO

STATE OF MICHIGAN 7TH JUDICIAL CIRCUIT GENESEE COUNTY FILED	JUDGMENT OF SENTENCE COMMITMENT TO DEPARTMENT OF CORRECTIONS	CASE NO. 16-040020-FC-N

ORI
MI-250015J

Police Report No. 3161-16

2018 MAR 28 A 11: 29

Court Address
COUNTY CLERK
900 S. SAGINAW
FLINT, MI 48502

Court Telephone no.
810-257-3220

COUNTY CLERK

THE PEOPLE OF THE STATE OF MICHIGAN

V

Defendant's name, address, and telephone no.
DONALD WAYNE DAVIS JR
5611 BALSM LANE
FLINT, MI 48507

CTN/TCN	SID	DOB
251600175101	3037718T	10/02/94

Prosecuting attorney's name	Bar no.
LEYTON,DAVID S.,	35086

Defendant attorney's name	Bar no.
WHITE,MAJOR J.C.,	58800

THE COURT FINDS:

1. The defendant was found guilty on 3/01/18 (Date) of the crime(s) stated below.

Count	CONVICTED BY Plea*	Court	Jury	DISMISSED BY*	CRIME	CHARGE CODE(S) MCL citation/PACC code
1			X		HOMIC MURDER 1ST DEG FEL	750.316-B
2			X		FELONY FIREARMS	750.227B-A
3			X		HOMIC MURDER 1ST DEG PREM	750.316-A
4				D	FELONY FIREARMS	750.227B-A
5			X		ASSAULT TO ROB ARMED	750.89
6			X		FELONY FIREARMS	750.227B-A
7			X		WEAPONS-FIREARMS-POSSESS	750.224F
8			X		FELONY FIREARMS	750.227B-A
9			X		WEAPONS-AMMUNITION-POSSES	750.224F6
10			X		FELONY FIREARMS	750.227B-A
		X			HABITUAL OFFENDER 3RD CON	769.11

*Insert "G" for guilty plea, "NC" for nolo contendere, or "MI" for guilty but mentally ill, "D" for dismissed by court, or "NP" for dismissed by prosecutor/plaintiff.

IT IS ORDERED:

8. The defendant is sentenced to custody of the Michigan Department of Corrections. This sentence shall be executed immediately.

Count	SENTENCE DATE	MINIMUM Years	Mos.	Days	MAXIMUM Years	Mos.	Days	DATE SENTENCE BEGINS	JAIL CREDIT Mos.	Days	OTHER INFORMATION
1	3/28/18	LIFE			LIFE			3/28/18		0	
2	3/28/18	2			2			3/28/18		0	
3										0	
5	3/28/18		300			600		3/28/18		0	
6	3/28/18	2			2			3/28/18		0	
7	3/28/18		60			120		3/28/18		0	

SEE NEXT PAGE

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Approved AO

STATE OF MICHIGAN 7TH JUDICIAL CIRCUIT GENESEE COUNTY	JUDGMENT OF SENTENCE COMMITMENT TO DEPARTMENT OF CORRECTIONS	CASE NO. 16-040020-FC-N

Count	SENTENCE DATE	MINIMUM Years	MINIMUM Mos.	MINIMUM Days	MAXIMUM Years	MAXIMUM Mos.	MAXIMUM Days	DATE SENTENCE BEGINS	JAIL CREDIT Mos.	JAIL CREDIT Days	OTHER INFORMATION
8	3/28/18	2			2			3/28/18		0	
9	3/28/18		60			120		3/28/18		0	
10	3/28/18	2			2			3/28/18		0	

☒ 9. Sentence(s) to be served consecutively to (If this item is not checked, the sentence is concurrent.)
☐ each other. ☒ case numbers SEE COMMENTS BELOW.

10. The defendant shall pay: $130.00 CRIME VICTIM FEE $1795.00 RESTITUTION
$612.00 STATE MINIMUM COSTS $2537.00 TOTAL $2537.00 BALANCE

The due date for payment is 3/28/18. Fine, costs, and fees not paid within 56 days of the due date are subject to a 20% late penalty on the amount owed.

12. Court recommendation:
CHARLES EGELER RECEPTION AND GUIDANCE CENTER-JACKSON. THE COURT DID NOT SENTENCE ON COUNT THREE AS COUNT ONE WAS ISSUED UNDER TWO THEORIES AND COUNT THREE IS MERGED INTO THE SENTENCE ON COUNT ONE. THE SENTENCES ON COUNTS TWO, SIX, EIGHT AND TEN ARE CONCURRENT TO EACH OTHER AND CONSECUTIVE TO AND PRECEDING THEIR RELATED CHARGE. THESE SENTENCES ARE CONSECUTIVE TO PAROLE.

March 28, 2018
Date

Geoffrey L. Neithercut
Judge GEOFFREY L. NEITHERCUT

25466
Bar no.

I certify that this is a correct and complete abstract from the original court records. The sheriff shall, without needless delay, deliver the defendant to the Michigan Department of Corrections at a place designated by the department.

(SEAL)

Melodie C. Harger
Deputy court clerk

CC 219b (3/16) **JUDGMENT OF SENTENCE, COMMITMENT TO DEPARTMENT OF CORRECTIONS**
MCL 765.15(2), MCL 769.1k, MCL 769.16a, MCL 775.22, MCL 780.766, MCR 6.427

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STATE OF MICHIGAN

IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

Court of Appeals No. 343432

Lower Court No. 16-40020 FC

-vs-

DONALD WAYNE DAVIS

Defendant-Appellant.
_____/

MOTION TO REMAND

DONALD WAYNE DAVIS, Defendant-Appellant, through his attorneys, the **STATE APPELLATE DEFENDER OFFICE**, by **JACQUELINE J. MCCANN** and **STEVEN D. HELTON**, moves this Honorable Court to remand his case to the trial court, pursuant to MCR 7.211(C)(1), for an evidentiary hearing and to allow him to move for new trial and states the following:

1. Mr. Davis was convicted by jury of first degree murder, assault with intent to rob, possession of a firearm by a felon, possession of ammunition by a felon, and four counts of felony firearm on March 1, 2018, before the Honorable Geoffrey L Neithercut in the Genesee County Circuit Court. On Mach 28, 2018, Mr. Davis was sentenced to life in prison without the possibility of parole for his murder conviction in addition to other sentences.

2. Mr. Davis appealed as of right, and the issues Mr. Davis seeks to raise on remand concerning his convictions are as follows:

   a. Mr. Davis' state and federal rights to a fair trial, to due process, to effective assistance of counsel, and to a public trial were violated by the trial court's decision, to which defense counsel failed to object, to exclude all members of the public except for the decedent's mother from the majority of Mr. Davis' trial in response to the mother of the decedent's children asking a juror about where she worked.

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b. To the extent that the trial court's admission of an email Mr. Davis sent to a detective requesting information about the terms of the detective's offer to provide him assistance in the present case in exchange for Mr. Davis providing information about an unrelated case was due to defense counsel's failure to explicitly object on the grounds of MRE 403, Mr. Davis was denied effective assistance of counsel where the prosecutor announced at the hearing on his motion in limine that he viewed the email as "tantamount" to saying "I did it," and where the prosecutor proceeded under this interpretation of the email at trial, telling the jury "Why ask for something if you are innocent?" and "A person's not going to … ask for a plea deal on a murder case such as this unless they know that they've done something wrong. He knows he did something wrong, he wanted a deal."

3. A remand is necessary so that Mr. Davis can move in the trial court for a new trial, MCR 7.211(C)(2)(a)(i) for the reasons specified above, and in order to develop the factual record necessary for appellate review, MCR 7.211(C)(1)(a)(ii), for the following reasons: (A) defense counsel objected on the record to the decedent mother's emotional response while the jury walked past her but the record is silent as to her responses when the witnesses were testifying, when the parties were providing closing argument, when the trial court read its instructions, and when the jury delivered its verdict; (B) the record is currently silent as to who among Mr. Davis' friends and family were excluded from the trial as a result of the trial court's decision to close the trial to the public; (C) there is currently no explanation in the record as to why defense counsel failed to object to the trial court's decision to close the trial to all members of the public except the decedent's mother; and (D) there is currently no explanation on the record regarding why defense counsel failed to cite to MRE 403 in objecting to the prosecutor's motion in limine to introduce Mr. Davis' email to the detective inquiring about the terms of the detective's offer to provide assistance in exchange for information about an unrelated case.

4. The following are attached as offers of proof, along with additional documents referred to in the supporting brief:

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a. An affidavit of SADO Chief Investigator Julianne Cuneo, which is attached to the brief in support as Appendix A, detailing her conversation with Major White, Mr. Davis' trial counsel, who informed her that:

   i. He believed that he made it clear to the trial court that he objected to the prosecutor's motion in limine to introduce Mr. Davis' email to the detective because, in addition to it having no relevance, any probative value that it did have was substantially outweighed by the risk of unfair prejudice to Mr. Davis; and that

   ii. He had no objection to the trial court's decision to close the trial to the public and except the decedent's mother from the closure provided she not attempt to draw attention to herself due to the general right of the public to observe trials.

b. An affidavit of Bryan Wooten, which is attached to the Brief in Support as Appendix B, who has a paternal relationship with Mr. Davis, who attempted to attend Mr. Davis' trial but was unable to do so because of the trial court's decision to close the courtroom to all members of the public except for the decedent's mother.

5. The brief in support of this motion, which Mr. Davis incorporates herein, more thoroughly discusses the above issues and the need for remand. Because the facts concerning trial counsel's breaches are not entirely of record, a remand is necessary to allow Mr. Davis to develop the record and to move for a new trial. *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973); *People v Tranchida*, 131 Mich App 446; 346 NW2d 338 (1984).

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WHEREFORE, for the reasons stated above, Defendant-Appellant **DAVIS** respectfully asks that this Court to remand his case to the trial court, pursuant to MCR 7.211(C)(1), for an evidentiary hearing and to allow him to move for new trial.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: /s/ Jacqueline J. McCann
_____

JACQUELINE J. MCCANN (P58774)
STEVEN D. HELTON (P78141)
Assistant Defenders
Suite 3300 Penobscot Building
645 Griswold
Detroit, MI 48226
1 (313) 256 9833

Date: September 19, 2018

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Court of Appeals, State of Michigan

ORDER

People of MI v Donald Wayne Davis Jr

Docket No. 343432

LC No. 16-040020-FC

Jonathan Tukel
Presiding Judge

Mark J. Cavanagh

Colleen A. O'Brien
Judges

The Court orders that the motion to remand is GRANTED IN PART AND DENIED IN PART. The motion is GRANTED TO THE EXTENT that this case is REMANDED to the trial court to expand the factual record regarding its decision to close the trial to all members of the public except for the victim's mother, and to allow defendant to file a motion for new trial based on his claim that trial counsel was ineffective for failing to object to the court's decision. In all other respects, the motion to remand is DENIED for failure to persuade the Court of the necessity of a remand at this time.

Defendant shall initiate the proceedings on remand within 14 days of the date of this order. The Court retains jurisdiction and the time for proceeding with the appeal in this Court shall begin to run upon issuance of an order in the trial court that disposes of the remand proceedings. Defendant shall file with this Court a copy of any motion and supporting brief filed in the trial court within 14 days after the date of this order. Defendant shall also file with the Clerk of this Court copies of all orders entered on remand within 14 days after entry. The trial court shall hear and decide the matter within 56 days of the date of this order. The trial court shall make an appropriate determination on the record. The trial court shall cause a transcript of any hearing on remand to be prepared at public expense and filed within 21 days after completion of the proceedings. Defendant may file a supplemental brief pertaining to the issues raised on remand within 21 days after entry of the trial court's order deciding the matter or 21 days after the transcript of the hearing is filed, whichever is later. Plaintiff may file a supplemental brief in response.

The time for proceeding with the appeal shall begin to run 14 days after the date of this order if a motion to initiate the proceedings on remand is not filed in the trial court within that 14-day period.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

NOV 13 2018
Date

Chief Clerk

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

PEOPLE OF THE STATE OF MICHIGAN,

v

Circuit Court No.
16-040020-FC

DONALD WAYNE DAVIS,

DIGITALLY RECORDED

Defendant.

_____/

MOTION HEARING

BEFORE THE HONORABLE GEOFFREY L. NEITHERCUT, CIRCUIT JUDGE

Flint, Michigan – Monday, December 10, 2018

APPEARANCES:

For the People:
Rebecca A. Jurva-Brinn, (P-68790)
Assistant Prosecuting Attorney
900 South Saginaw Street
Flint, Michigan 48502
(810) 257-3232

For the Defendant:
Jacqueline J. McCann, (P-58774)
Steven D. Helton, (P-78141)
State Appellate Defender Office
Penobscot Building
645 Griswold, Suite 3300
Detroit, Michigan 48226

Transcribed By:
Tamara Johns, CER 8749
2428 East Wilson Road
Clio, Michigan 48420
(810) 252-6985

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MR. HELTON: Okay. We would like to call Major White.

THE COURT: Step up here, sir. Do you solemnly swear to tell the truth in this cause so help you God?

MR. WHITE: I do, Your Honor.

THE COURT: Be seated. Go ahead, counselor.

MAJOR WHITE

(At 4:00 p.m., witness sworn in, testified as follows)

DIRECT EXAMINATION

BY MR. HELTON:

Q Mr. White, thank you for being here. Do you recall about when you became Donald Davis' attorney?

A I believe it was either--I believe it was in June of '17 I believe.

Q And you recall the trial--

A Yes.

Q --in this courtroom? Okay. Do you remember about how many people were present in the courtroom before the Court issued its order excluding all members of the public except for the victim's mother?

A When you say member--who was present in the courtroom, I assume you mean members of the public correct?

Q Yes, correct.

A There was no one on defense side of the courtroom. On the

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victim's side of the courtroom, at least three and I would say probably less than ten. There was a group of people sitting there on the second and third row right there. I can't tell you exactly how many, I know there were at least three people over there and less than ten, so.

Q And you consider one side of the courtroom to be the--

A Oh, I apologize. On the left side of the courtroom, which would be where we would be sitting on the defense side of the courtroom there was no one present. The right side would've been the victim's family and various wit--I mean, various support people.

Q Okay. And you remember--you recall being made aware of, you know, perceived attempted tampering by a Ms. Daundria Frye--

A Yes.

Q --on the first day of trial? And you recall the Court's remedy for that attempted tampering?

A Yes.

Q And what was that?

A The Court had then at that point in time asked everyone, after reprimanding the young lady, asked everyone to leave and indicated that the only person that'd be allowed to observe the trial would be the victim's mother.

Q Okay. And after the Court issued that order, do you recall any member of the public other than the victim's mother being present in the gallery?

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A The only other person being present in the gallery would've been the support person from the prosecutor's office along with the victim's mother.

Q And was the victim's mother here every day of the trial?

A That I don't recall. I recall seeing her here numerous days. I don't recall if she was here every day. I can't answer that question.

Q Okay. And do you recall placing an objection to the victim's mother's, I don't know, demeanor at any point during the trial?

A Yes.

Q What was that in regards to?

A There--

MS. JURVA-BRINN: Objection, Your Honor. I think this is outside of the scope of the remand order issued by the Court of Appeals.

THE COURT: That's true.

MR. HELTON: I think the issue is prejudice here and we argue that because the jury was sitting there and they could see Ms. Given's reaction during, you know, throughout the trial, the objection he raised is evidence of what her demeanor was during the proceedings.

THE COURT: Go ahead.

MR. HELTON: Okay.

BY MR. HELTON:

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Q Do you recall that objection?
A Yes.
Q And what were you objecting to?
A I believe at the point in time the jury was getting ready to be released out for either a break or a lunch, and as they were leaving, the victim's mother and the support person stood up and the support person basically put her arm around her and is offering her some form of comfort.
Q Okay. And generally, you're sitting there at the table.
A Correct.
Q You don't see Ms. Givens most--throughout most of the trial because you're looking at what the jury--jurors are seeing, is that correct?
A That would be correct.
Q Okay.

MR. HELTON: And that--that's all I have, so thank you.

THE COURT: Ms. Jurva?

MS. JURVA-BRINN: Thank you, Your Honor.

CROSS-EXAMINATION

BY MS. JURVA-BRINN:
Q Good afternoon, Mr. White.
A Good afternoon.
Q So you said there was somewhere between three and ten people in the gallery?

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A Again, yes. I mean, I know for a fact that there were three there. I know that there was people on the second and third row there. As far as how many total, I didn't count at the time.
Q And were they all sitting together in a group?
A Yes.
Q And you stated there was no one sitting on the defense side?
A Correct.
Q Were you ever contacted by anybody from the defendant's family asking you about the trial or wanting to come to the trial?
A The only person that I believe we had any contact with would be the victim's mother. When my client, or Mr. Davis had asked for me to contact--
Q You mean the victim's mother or the defendant's mother?
A I apologize, the defendant's mother. Mr. Davis had contact--or had indicated to me if--he wanted his mother to know when he had trial dates and when court was coming up. My office contacted her to let her know of the trial dates and also to see if she would be willing or if she was able to provide clothing for him at trial.
Q Did she ever attempt to come to the trial?
A No. The only time that I ever saw Ms. Davis was that she appeared on the date of sentencing. I spoke to her at that point in time and indicated to her what was going to happen based on the conviction that Mr. Davis had then--and what the

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Judge was going to sentence him to. At that point in time, she broke down in tears and indicated she would not be able to watch her son--that happen to her son and asked me if I could give her a call once it was over.

Q Okay. Did you talk to her during the course of the trial?

A I did not speak to her directly during trial. I had--my secretary had contacted her to let her know what was going on as far as the dates and the times. And she had indicated to my secretary that if she--if she could just let her know what was going on and what was happening.

Q So she didn't plan to come to the trial?

A She indicated that--she'd indicated that she was--she was going to try to appear, but it was difficult for her to get off work to be able to appear at trial. And then my understanding is based on the information provided to me from secretary was that she was not able to get off work to come to the trial dates.

Q Did you ever hear from anybody by the name of Bryan Wooten?

A No.

Q How about Shamika James?

A That name doesn't ring a bell either.

Q Would--did anybody from the defendant's family or friends contact you about attending the trial?

A No.

Q During the time of the trial after Judge Neithercut asked

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everybody to leave the courtroom except for the victim's mother, did you ever see anybody try to come into the courtroom? Like any members of the public, obviously not--but not staff members or anything, but members of the public try to come in during the trial?

A Not that I'm aware of, no.

Q Do you know if there was a sign posted on the door that nobody was allowed to come in?

A I don't believe there was.

Q Was there a deputy posted outside the door not allowing anyone to come in?

A That I would not be aware of and I wouldn't know. Once I came into the courtroom, my focus was on Mr. Davis and the trial.

Q But when you were coming in and out of the room you didn't see anything that was stopping people from coming in?

A Not that I recall, no.

Q Was Mr. Davis ever alone in the courtroom that you recall?

A That I can't--I can't answer whether he was or not. He may have--they may have called him down and I may have stepped out to return a phone call or get a drink of water or something else. I'm not aware if he was--there may have been times he may have been sitting there when I wasn't here.

Q In your experience, would he have been able to communicate with a member of the public in the gallery during the--being in the courtroom?

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A Not in this county. I know that past experience has been that if the defendants try to interact or speak to anyone who's out in the viewing area out there that they are reprimanded for it. The people are usually asked to leave and generally the defendants get thrown back into the hole or reprimanded in some way when they go back over to the jail.

Q And you did not object when Judge Neithercut asked the victim's family members to leave, is that correct?

A No.

Q And why didn't you object?

A I--we had had no contact with Mr. Davis' family, there was no one here present for him. There were numerous people sitting over here on the victim's side during the course of trial, and my belief was that I didn't have an issue with the jury not seeing anyone but the victim's mother who they would expect--I would expect for them to be here at the trial on the dates he testified already, and if that was the only person that they saw, then there would be no prejudice to my client because they wouldn't look at him and say he has no one here supporting him.

Q So did you think it was actually better to only have the victim's mother here as opposed to having a large group of people?

A Absolutely.

Q And defense counsel asked you about when the victim's mother

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was crying in the courtroom. Is it common for members of the victim's--a deceased victim's family to get upset during the trial?

A I don't know if I would say common. I mean, it's happened in the past, yes.

Q Was there any other point during the trial that you felt that she was acting inappropriately or just that one time?

A That was the only time that I observed. Most of the time as I was asked previously, most of the time my focus was on the jury and also what's going on up here. And then during like when the jury was going out, standing up and then most of the time I was speaking to my client or saying something else. That was the only time I observed anything happening.

Q And was she being loud or was she just being quietly comforted?

A Just quietly comforted, but it was something where she was sitting on, I believe on the second row, and would've been right there as the jury passed by out of the courtroom. I would--I mean, would've walked right by her as they're going out of the courtroom and I didn't believe that was appropriate for fourteen people to see her being comforted as they were walking out.

Q Okay. But that was the only time you noticed her doing anything that made you feel that it was not okay?

A Yes.

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Q Okay. And after she was admonished by the Court, did she act appropriately after that?

A Best that I could tell, yes.

MS. JURVA-BRINN: I have no further questions.

MR. HELTON: I just have one follow-up.

THE COURT: Go ahead.

REDIRECT EXAMINATION

BY MR. HELTON:

Q When you refer to the defense side and the prosecutor's side, that's never made clear to the jury at any point?

A No, absolutely not. It's just from sitting here in the courtroom just based on past experience in the courtroom looking at it, that's generally how it plays out is that the victim's side or the, shall we say, the prosecution's side would be on the right and then the defendant's side would be on the left. That's never pointed out to them in any way, shape or form.

I think the only way that they would know is that-- by seeing a witness who has testified going to sit on that particular side of the courtroom. And if we have more than one witness who's done that, usually they sit together. So, I think that's the only way that they would know.

Q All right. Thank you.

THE COURT: Step down--well, do you have questions madam?

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MS. MCCANN: Oh, I was gonna get the next witness, I'm sorry.

THE COURT: Okay. Go ahead and get your next witness please. You can step down, Mr. White. Thank you.

(At 4:10 p.m., witness excused)

MR. WHITE: Thank you, Your Honor.

THE COURT: Good afternoon, madam. Would you walk up to me please? Walk right up here please.

MS. JAMES: I just wanted to take my coat off, sir.

THE COURT: I'm sorry?

MS. JAMES: I said I did want to take my coat off, but--

THE COURT: You can take it off. Go right ahead. Just lay it on that table there if you like. And then stand in front of me and raise your right hand. Do you solemnly swear to tell the truth in this cause so help you God?

MS. JAMES: Yes, sir.

THE COURT: Now be seated right here. You have to pull open that doorway. Go ahead, counselor.

SHAMIKA JAMES

(At 4:11 p.m., witness sworn in, testified as follows)

DIRECT EXAMINATION

BY MR. HELTON:

Q Could you state your name?

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A Shamika James.
Q Okay. And how do you know Mr. Davis?
A I'm his sister.
Q You grew up with him?
A Yes, sir.
Q From about--is he your older brother or younger brother?
A He's my younger brother and we've been together since he's been born. I'm 27 and I think he's 24 or 25. Yes.
Q So did you have a lot of other brothers and sisters?
A Yes.
Q All right. Do you have any family members here in the gallery right now?
A You say here?
Q Yeah.
A Yes.
Q Who is it? Can you identify them?
A My Uncle Junie, my brother Roderick, and my mother, Martha.
Q And--oh, okay. So, a number of people. And you didn't hear the testimony, but they're on the--they're on this side that has been identified as the prosecutor's side of the gallery.

When did you become aware that Mr. Davis was being charged with murder?

A What you mean, like when I was aware that he was in jail or?
Q Sure. When were you aware that he had been arrested regarding the charges that we are here about today?

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A I'm not sure with the dates.
Q Okay.
A I'm not good with the dates at all.
Q But you--this caused you concern when you did learn about it?
A The day--I want to say the day before trial because I got a call from your office saying could I return--could I come to court.
Q From my office, do you mean--
A Someone got or gave someone my number. Someone called me and had me physically come down here.
Q It was an attorney--
A Yes.
Q --of Donald um, and so, what was the nature of that conversation? Could you--
A They just said that Donald wanted to let me know that he was attending court today and could I make it and I told him yes.
Q And you got the impression this was someone from a legal office--
A Yes.
Q --from an office? Okay. And did you attempt to attend the trial?
A Yes, I did.
Q And what happened when you--
A I came down here and I don't know if they was on lunch or what, but the door was closed and locked, so I'm not sure what

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was taking place.
Q And you didn't attempt to come back the next--
A No.
Q --the next day?
A And then like um, I'm not saying I didn't come at all, but I did come and I felt threatened by the family.
Q The family of the victim?
A Yes.
Q How did you know who the family of the victim were? How did you know that they were members of the victim's family?
A You said how did I know?
Q Yes.
A We grew up with this person.
Q Oh.
A So I'm familiar with all his family--well not all of them, but most of them.
Q Sure. And you saw them out in the hallway?
A Yes.
Q Okay. And they were waiting out in the hallway as well--
A Yes.
Q --when you attempted to enter? Okay. I--why did you want to attend the hearing, the trial?
A He's my brother.
Q So, and--all right. Thank you very much.
A Uh-hum.

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CROSS-EXAMINATION

BY MS. JURVA-BRINN:

Q Ms. James, my name is Rebecca Jurva-Brinn. I am the prosecutor on this case. I just have a few questions for you, okay?

A Uh-hum.

Q What day did you try to come to court?

A I'm not sure what the dates--it was the very first day. The very first day.

Q Okay. The very first day? Do you know what time it was?

A 1:30.

Q 1:30.

A I believe it was 1:30.

Q How long did you stay?

A I stayed here for at least 20 minutes.

Q And it was the first day of trial?

A Yes, ma'am.

Q And then you never tried to come back?

A I tried to attend the next day, but like I said, I know their family so I felt threatened by their family.

Q Okay. What did they do that made you feel threatened?

A Just being in the midst of all of this and then trying to show support to my brother.

Q Okay. Did they say anything to you?

A Um, it's just the facial expressions, and yeah, they do know

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me outside of this situation, so--
Q Okay. So you knew them previously--
A Yes.
Q --and so you have a previous relationship?
A Yes.
Q Okay. But they didn't actually say anything threatening?
A No, not that I know of.
Q Did you tell anybody that you felt threatened?
A Yeah, I told the man at the front door, but he just told me, he's like, you know, if you feel threatened and you don't feel secure like you should leave, so I left.
Q The sheriff's deputy at the front door?
A Yes.
Q Of the courthouse?
A Yes.
Q Okay. When you came to the courtroom, were you able to get in the courtroom?
A No, the door was locked. I'm not sure if y'all was on lunch or what, but the door was locked.
Q And that's when you came that first day at 1:30?
A Yes, ma'am.
Q And that's the only time you actually tried to come up to the courtroom?
A Yes.
Q Okay. Then did you actually come back the next day or you

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just thought about coming back the next day?
A I thought about coming back, but like I said, I felt threatened and I felt like my life was in danger.
Q Okay.
A Because like I said, I know them beyond this situation.
Q Okay. So, but the only time you actually physically tried to come in the courtroom was the first day around 1:30?
A Yes.
Q Thank you.

MS. JURVA-BRINN: I have no further questions.

MR. HELTON: We don't have any rebuttal, for the record.

THE COURT: Would you state your name again and spell it for me please?

THE WITNESS: Shamika, S-H-A--

THE COURT: Do it again now?

THE WITNESS: S-H-A--

THE COURT: S-H-A--

THE WITNESS: --M-I-K-A. Last name James.

THE COURT: All right. Thank you, Ms. James. You can step down. Thank you for being here today.

(At 4:16 p.m., witness excused)

MS. JAMES: Uh-hum. You're welcome.

THE COURT: Good afternoon, sir. If you'd walk all the way up to my bench please. Raise your right hand. Do you

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solemnly swear to tell the truth in this cause so help you God?

MR. WOOTEN: Yes, I do.

THE COURT: Please be seated right here. Pull open that door and step up.

MR. WOOTEN: Pull it and step up.

THE COURT: Go ahead, sir.

BRYAN WOOTEN

(At 4:17 p.m., witness sworn in, testified as follows)

DIRECT EXAMINATION

BY MR. HELTON:

Q Sir, could you state your name?

A Brian Wooten.

Q Could you spell your last name?

A Wooten.

Q Okay. Could you spell it? Could you spell your name?

A W-O-O-T-E-N.

Q Okay.

THE COURT: And how do you spell Bryan?

THE WITNESS: B-R-Y-A-N.

THE COURT: Thank you.

BY MR. HELTON

Q How do you know Donald Davis?

A I used to date his mom for about nine years.

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Q How about how old were--was he when you met him?
A I'm not sure, 14, 15--I mean, about 15, something like that. I'm not sure.
Q Okay. So, did you live with him--
A Yes.
Q --at some point? And so, how would you describe your relationship with him?
A He's like a son to me. You know, I took him places and um, you know.
Q Sure. So even after he know--or did he live with you until you--until he was arrested in this case or did he move out at some time before that?
A Um, he stayed with us--he lived there with us.
Q Okay. All right. And when did you become aware that he was being charged with murder?
A It was way after the fact. I'm not sure exactly when. I tried to come to a court thing and I was--
Q So, let me ask you about that. You made an effort to attend trial one day?
A Yes, I came, yeah.
Q Can you tell me--do you know what day that was, that would've been?
A I'm not sure of the date, I can just--I just know who was here. It was a female officer sitting where that officer is sitting, and a lady with an oxygen mask on sitting where that

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gentlemen's sitting right there, and I sat right there where that lady was sitting.

Q And um--and what happened when you came into the court?

A I was asked--well the gesture was like for me to leave, so I thought I had to leave.

Q Who did the gesture come from?

A Donald.

Q Donald--

A Yes.

Q --gestured for you to leave?

A Yes, but I don't know if that's what it was. I don't--I took it as that's what it was.

Q What did--could you describe the gesture?

A It was just pointed towards the door--

Q He--

A --so I left. So, I'm thinking it's like the other people family or something, I'm thinking something like that, so I left.

Q And you didn't return?

A And I didn't come back.

Q Okay. Why did you want to attend the trial?

A Because like I said, he's like a son to me and I wanted to be here for some type of support, you know? 'Cause I don't think he--I know him, I mean, you know what I'm saying? I don't think he's a violent person, I--you know, any of that. And I

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know he's not.

Q All right. No more questions. Thank you, sir.

THE COURT: Wait just a minute, sir.

CROSS-EXAMINATION

BY MS. JURVA-BRINN:

Q Mr. Wooten, my name is Rebecca Jurva-Brinn. I'm from the prosecutor's office and I have just a couple of questions for you, okay?

A (no audible response)

Q Do you know which day of the trial it was, you might not remember the exact date, but do you know if it was the first day, the second day?

A That I have no idea.

Q You have no idea. Do you know what time of day it was?

A It was like noon.

Q Noon?

A It was like probably 1:00 something. Something like that. After 1:00, it was something like that.

Q Okay. And when you--so you actually came in the courtroom?

A I came in.

Q Okay. And you actually sat down in the--

A I sat right there.

Q Okay. And you said there was a deputy sitting in the back where that deputy is now?

A A woman.

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Q A woman deputy?
A Yeah.
Q Okay. Did she tell you you couldn't be in the courtroom?
A She didn't say anything.
Q She didn't say anything to you at all?
A No.
Q Was there a sign on the door saying you couldn't come in?
A No.
Q Was there anybody standing outside the door saying you couldn't come in?
A No.
Q So you--there was a gesture from the defendant--
A And, yes, and that--
Q --that made you believe you couldn't be there.
A Right and I'm thinking it was probably because of the family of the others. So I'm, you know, I'm--
Q But nobody--nobody from the court told you you couldn't be in the courtroom?
A No.
Q The Judge didn't tell you you couldn't be in the courtroom?
A No.
Q Was the Judge in the courtroom when you came in?
A The Judge wasn't in here yet.
Q Okay. So, the court was not in session at that time?
A No.

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Q Okay. Who--how many people were sitting up at the table up here, do you remember?
A There was one lady. I think it was just one lady sitting there.
Q Okay.
A I can't remember what she looked like, but it was one woman.
Q And what date--Mr. Davis was in the courtroom, obviously, if he made a gesture to you, right?
A Yes, he was here.
Q Okay. So, he was in the courtroom and there was a lady sitting up at the table?
A Yep.
Q Okay. And no one told you to leave?
A No.
Q Nobody related to the court told you to leave?
A No.
Q Okay. Thank you.

MS. JURVA-BRINN: I have nothing further.

MR. HELTON: We don't have any redirect.

THE COURT: Thank you for testifying, sir. You may step down now.

MR. HELTON: And we don't have any more witnesses.

THE COURT: Okay.

MS. JURVA-BRINN: I have no witnesses.

THE COURT: All right. Do we need argument?

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THE COURT: Well that's true. They did say that that may happen. Well this Court understands the public's right to participate in trial proceedings and the Court respects it. For 32 years of my practice what I have tried to do is make sure that somebody is here that's representative of each side of a dispute. And the problem for the defendant here is that there was nobody here to represent his side of the dispute.

The Court emptied the courtroom because there was a conversation that occurred between one of the victim's family and the jury, and I didn't want that to happen by either side so I ordered the courtroom emptied. But I did not lock the courtroom, I did not close it to the public, I just kicked out three to ten people. And I admit I poorly worded it because I said don't come back and I probably should've said don't come back today. That's my error. However, there was no one from the defendant's side to evict from the courtroom and the Court doesn't see any prejudice to him if his family were not present during the proceedings.

I agree with Ms. Jurva that Ms. James' testimony is not relevant, nor is Mr. Wooten's. And so, the motion for a new trial is denied and the record is made for the Court of Appeals. Thank you.

MS. JURVA-BRINN: Thank you, Your Honor.

MR. HELTON: Thank you.

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STATE OF MICHIGAN

IN THE GENESEE COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

Circuit Court No. 16-40020 FC

-vs-

Honorable Geoffrey L. Neithercut

DONALD WAYNE DAVIS,

Defendant.

_____/

ORDER DENYING DEFENDANT'S MOTION FOR A NEW TRIAL

At said session of said Court held in the County of Genesee, City of Flint, State of Michigan, on the 10th day of December, 2018.

THE HONORABLE GEOFFREY L. NEITHERCUT
Genesee County Circuit Court Judge

This matter having come to the Court by Defendant's motion, both parties having had the opportunity to be heard, and the Court being otherwise fully apprised of the premises,

IT IS HEREBY ORDERED that Defendant's motion for a new trial is denied for the reasons stated on the record.

SO ORDERED.

Date: December 11, 2018

Geoffrey L Neithercut
Judge Geoffrey L. Neithercut

CERTIFICATE OF SERVICE
The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on 12-13 20 18
By: ☒ U.S. Mail ☐ FAX
☐ Hand Delivered ☐ Overnight Courier
☐ Certified Mail ☒ Email:
Signature

A TRUE COPY
Genesee County Clerk

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD WAYNE DAVIS, JR.,

Defendant-Appellant.

FOR PUBLICATION
April 2, 2020
9:00 a.m.

No. 343432
Genesee Circuit Court
LC No. 16-040020-FC

Before: SWARTZLE, P.J., and MARKEY and REDFORD, JJ.

MARKEY, J.

Defendant appeals by right his convictions of first-degree felony murder, MCL 750.316(1)(b), first-degree premeditated murder, MCL 750.316(1)(a), four counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, assault with intent to rob while armed, MCL 750.89, felon in possession of a firearm, MCL 750.224f, and felon in possession of ammunition, MCL 750.224f(6). Defendant was sentenced as a third-offense habitual offender, MCL 769.11, to life imprisonment without the possibility of parole for the first-degree murder conviction (alternate theories), two years' imprisonment for each of the felony-firearm convictions, 25 to 50 years' imprisonment for the assault conviction, and 5 to 10 years' imprisonment for each of the felon-in-possession convictions. On appeal, defendant contends that he was denied his constitutional right to a public trial and that the trial court erred by admitting into evidence an e-mail defendant sent to a detective. Because we conclude the trial court did not close the courtroom to the public the second day of trial and because we find the admission of the e-mail did not constitute reversible error, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

On April 27, 2016, a security officer working at an apartment complex saw a running car parked outside the complex. When the security officer approached the parked car, he saw the victim, Devante Hanson, sitting in the driver's seat. The security officer could see that Hanson had blood on his chest and called 911. When police officers arrived, Hanson was pronounced dead, and it was determined that Hanson had suffered gunshot wounds.

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Video surveillance from the apartment complex showed two men, purportedly Spencer Holiday and defendant, entering Hanson's car. Holiday sat in the front passenger seat and defendant sat in the back passenger seat behind the driver's seat, which was occupied by Hanson. Hanson then exited the car, went to the trunk of the vehicle, and then returned to the driver's seat. The video footage showed that there was a lot of movement in the car, and then both Holiday and defendant left the vehicle and went back into the apartment complex. They proceeded through the lobby and subsequently entered another nearby apartment complex.

Holiday, who accepted a plea offer in exchange for his testimony against defendant, stated that on the date of the homicide, Holiday was with defendant in defendant's apartment when defendant told Holiday that he was looking for someone to rob. When Holiday left the apartment to buy marijuana and cigarettes, defendant accompanied Holiday. Holiday told defendant that Hanson was going to meet them and sell them some marijuana.

Holiday testified that when Hanson arrived, defendant and Holiday climbed into Hanson's car. Defendant, sitting in the backseat, pulled out a gun and demanded money and marijuana from Hanson. According to Holiday, Hanson grabbed defendant's gun, and defendant shot Hanson. After defendant shot Hanson, he pointed his gun at Holiday and told him to shoot Hanson or else defendant would shoot Holiday. Holiday acknowledged that he then shot Hanson in the ribs.

On February 21, 2018, the first day of trial, jury voir dire was conducted, a jury was selected, and the trial court gave the jurors their preliminary instructions. On February 22nd, opening statements were made and the prosecution presented three witnesses before a break for lunch. After the last morning witness was called, but before the court recessed for the lunch hour, the following colloquy between the trial court and counsel took place:

> *The Court*: Go ahead deputies. Yeah, just stay there please.
>
> *Mr. Sawka* [prosecutor]: I just want to let the Court know for the record, there were–
>
> *Mr. White* [defense counsel]: Yeah, I want to make sure that's–
>
> *Mr. Sawka*: –family members in the hallway, but there was no contact with the jury from what–as they passed by. I don't want there to be any issues.
>
> *The Court*: That's why I wanted everybody to wait.
>
> *Mr. Sawka*: Oh, yeah. They were–
>
> *Unidentified speaker*: They were outside the door.
>
> *Mr. Sawka*: They were already outside, that was the problem, so sorry.
>
> *(At 11:46 a.m., court recessed)*

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During the break, a woman, who identified herself as Daundria Frye and the mother of Hanson's child, made contact with a member of the jury. When court reconvened, the following is reflected in the trial transcript:

(At 1:58 p.m., court reconvened)

Mr. Ellis [court clerk]: All rise.

The Court: Okay. Thank you. Are we ready, Mr. Sawka?

Mr. Sawka: Yes, Your Honor.

The Court: Then we'll bring the jury in and you all can sit down until the jury enters the room please. Well no, we're not ready. We are not ready. Who is in the gallery that works at Hurley Hospital? Nobody in the gallery. You maybe? Do you work there or not?

Unidentified speaker: Pardon me, sir?

Ms. Frye: I work there.

The Court: Sit down. I want you to come up and stand at that lectern right there please.

Ms. Frye: Right there?

The Court: Yes. I want you to come up here and stand where that microphone is.

Ms. Frye: Okay.

The Court: What is your name?

Ms. Frye: Daundria Frye.

The Court: Say it again?

Ms. Frye: Daundria Frye.

The Court: Frye?

Ms. Frye: Uh-hum.

The Court: Spell it for me.

Ms. Frye: Um, D-A-U-N-D-R-I-A. Frye, F-R-Y-E.

The Court: Where do you work at Hurley Hospital?

Ms. Frye: Housekeeping. Environmental Services.

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The Court: And you are here watching this trial why?

Ms. Frye: Why am I watching it?

The Court: Yes.

Ms. Frye: Because Devante Hanson was my kid's father.

The Court: So you know, counselors, the jury has complained that that woman has tried to talk to them.

Ms. Frye: No. I didn't try to talk, I just saw a lady and I asked—I'm like did you—do you work at Hurley's? I know I'm not supposed to talk to them.

The Court: I've got two choices. One is to find you in contempt of court and lock you up.

Ms. Frye: [Are] you serious?

The Court: I'm serious. The other is to order everyone in the gallery to leave the courthouse and not come back. What we're going to do is this; in order to lock you up I'd have to get you a lawyer first and that wastes time because we have things to do here. So instead, I'm going to bar everyone from this courthouse except for [Hanson's] mother . . . . The rest of you leave. Don't you come back.

Ms. Frye: Okay.

The Court: Shame on you trying to subvert the justice system.

The Deputy: Just have them hold until somebody (inaudible). Your Honor, we're gonna have a deputy escort them out.

The Court: That's a good idea.

The Deputy: We're gonna get a deputy to escort you out.

Unidentified Speaker: Judge, you did mean for the remainder of the trial correct?

The Court: For the remainder of the trial, all the way into next week.

Unidentified Speaker: All right.

The Court: The only person allowed to watch this trial is the mother of the young man who died. What foolishness.

Mr. White: Your Honor, may we approach?

The Court: Yes. Do you want this on the record or off the record?

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Mr. Sawka: It probably should be on because I think it's for both of our benefit here.

The Court: Okay.

Mr. Sawka: Do you want to have the jurors who have a complaint to come in to double check to make sure that there has been no comment that has been made that's gonna prejudice the–anything?

The Court: No.

Mr. Sawka: Okay. Fair enough.

The Court: No. It was a short comment. What she asked one juror was, do you work at Hurley Hospital.

Mr. Sawka: Okay. So, there's nothing about the case itself that was implicated?

The Court: Right.

Mr. White: Well it's still enough to sit there to cause some concerns, but I guess you worked it out. I understand why the concern (inaudible).

The Court: Sure.

Mr. Sawka: It's up to you. Do you want him – are you okay with it?

Mr. White: (inaudible) with the Judge's decision.

Mr. Sawka: I don't have a need for a hearing if that's all that was said.

The Court: I don't think it's necessary.

Mr. Sawka: Okay. Thank you.

The Court: I don't want to make the jury nervous. Now we'll bring the jury out.

Court Clerk: All rise for the jury.

The jury then heard from two witnesses on the afternoon of February 22, 2018. On February 27th and 28th, during two full days of trial, the jury heard from 11 prosecution witnesses and one defense witness. On March 1st, closing arguments were presented; the jury was given final instructions, and verdicts were returned. Except for Hanson's mother, there is no indication any other spectators attended the trial, from the afternoon on the second day of trial until the verdicts were returned.

Defendant was convicted as indicated and filed his claim of appeal. Defendant subsequently filed a motion for remand, requesting the case be remanded for an evidentiary hearing and to allow defendant the opportunity to file a motion for new trial on a variety of issues. This

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Court granted the motion in part, remanding the case to the trial court "to expand the factual record regarding its decision to close the trial to all members of the public except for the victim's mother, and to allow defendant to file a motion for new trial based on his claim that trial counsel was ineffective for failing to object to the court's decision." *People v Davis*, unpublished order of the Court of Appeals, entered November 13, 2018 (Docket No. 343432).

The record reflects that on February 21, 2016, the first day of trial, the court was in session from 9:41 a.m. until 12:45 p.m., and from 2:21 p.m. until 3:04 p.m. On February 22, 2016, the second day of trial, the court was in session from 9:19 a.m. until 11:46 a.m., and from 1:58 p.m. until 3:14 p.m.

An evidentiary hearing was conducted on remand, and the trial court denied defendant's motion for new trial. Defendant's sister testified at the evidentiary hearing that she came to the courthouse during the trial and found the courtroom door locked, but she was unsure whether it was during a lunch break or other type of break. She came back the next day but then left after feeling threatened by the victim's family.

There was also testimony by Bryan Wooten, a man who had dated defendant's mother for about nine years. He stated that he came to the courthouse to attend the trial and was able to freely enter the courtroom without any difficulty. The courtroom door was not locked. No sign was posted excluding any person or persons. When he entered, a deputy was present. The deputy took no action whatsoever to exclude, remove, or otherwise deny access to Wooten. Once in the courtroom, however, defendant gestured for him to leave and he left the premises. Only defendant acted in a way to convince Wooten to leave the courtroom.

The court cleared the courtroom of the individuals the court felt were disruptive, all of whom were apparently there on behalf of the victim. Those individuals did not return to the courtroom for the remainder of the trial. There is, however, no evidence to suggest that the court was closed. On remand, the trial court specifically stated:

> The Court emptied the courtroom because there was a conversation that occurred between one of the victim's family and the jury, and I didn't want that to happen by either side so I ordered the courtroom emptied. But I did not lock the courtroom, I did not close it to the public, I just kicked out three to ten people. And I admit I poorly worded it because I said don't come back and I probably should've said don't come back today. That's my error. However, there was no one from the defendant's side to evict from the courtroom and the Court doesn't see any prejudice to him if his family were not present during the proceedings.
>
> I agree with Ms. Jurva that Ms. James' testimony is not relevant, nor is Mr. Wooten's. And so, the motion for a new trial is denied and the record is made for the Court of Appeals. Thank you.

At the evidentiary hearing, defendant's trial counsel testified. He was asked why he did not object to the trial court's decision to close the courtroom. Counsel explained that when the court made its decision *none* of the spectators or members of the public who were present in the courtroom were there to support defendant—no family, friends, or acquaintances. Instead,

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according to counsel, the three to ten individuals in the gallery were the victim's friends and family and were there to support the prosecution's case against defendant. Counsel indicated that it was preferable and less prejudicial to defendant to solely have the victim's mother present. Counsel testified as follows:

> *Q*. So did you think it was actually better to only have the victim's mother here as opposed to having a large group of people?
>
> *A*. Absolutely.

The trial court stated that it had removed everyone from the courtroom because there was a conversation between a juror and Frye. At the completion of the hearing on remand, the trial court ruled:

> [I] did not lock the courtroom, I did not close it to the public, I just kicked out three to ten people. And I admit I poorly worded it because I said don't come back and I probably should've said don't come back today. That's my error. However, there was no one from the defendant's side to evict from the courtroom and the [c]ourt doesn't see any prejudice to him if his family were not present during the proceedings.

II. ANALYSIS

On appeal, defendant argues that the trial court closed the courtroom to all members of the public except for the victim's grieving mother and that this resulted in an inherently unfair trial that requires defendant to receive a new trial. Defendant further contends that trial counsel was ineffective for failing to object to the trial court's decision to close the courtroom. Finally, defendant maintains that the trial court erred in allowing the admission of an e-mail that defendant sent to a detective while defendant was incarcerated. Defendant also claims that trial counsel was ineffective for failing to challenge the admission of the e-mail under MRE 403.

A. STANDARDS OF REVIEW

Defendant did not object to the trial court's actions, which he argues resulted in the closure of the courtroom. In *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), our Supreme Court set forth the plain-error test generally applicable to forfeited error:

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial

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> proceedings' independent of the defendant's innocence. [Quotation marks, citations, and alteration omitted.]

Whether counsel was ineffective presents a mixed question of fact and constitutional law, and factual findings are reviewed for clear error while we review de novo issues of constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

We review for an abuse of discretion a trial court's decision to admit evidence. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). "When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo." *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003).

B. THE COURTROOM

The Sixth Amendment to the United Stated Constitution provides that a criminal defendant "shall enjoy the right to a . . . public trial . . . ." "The Sixth Amendment right to a public trial is incorporated to the states by the Due Process Clause of the Fourteenth Amendment." *People v Vaughn*, 491 Mich 642, 650; 821 NW2d 288 (2012). In addition, article 1, § 20 of the Michigan Constitution guarantees that "the accused shall have the right to a speedy and public trial . . . ." "A defendant's Sixth Amendment right to a public trial is limited, and there are circumstances that allow the closure of a courtroom during any stage of a criminal proceeding, even over a defendant's objection[.]" *Vaughn*, 491 Mich at 653.

1. THE COURTROOM IN THIS MATTER WAS NOT CLOSED

We conclude based on a review of the entire record, both at trial and on remand, that the courtroom in this case was not closed. The record reflects that the trial judge *cleared* the courtroom of persons then present in the courtroom because Frye, the mother Hanson's child, had intentionally sought to have improper contact with the jury. Following the court's colloquy with Ms. Frye, as set forth above, the court ordered the persons then present in the courtroom with the exception of the victim's mother, to leave the courtroom and to not return.

2. ASSUMING ARGUENDO THE COURTROOM WAS CLOSED—ON THE FACTS AT BAR—REVERSAL IS NOT APPROPRIATE

The Court in *Vaughn* noted that the constitutional right to a public trial is structural in nature. *Id.* at 655. Nevertheless, the *Vaughn* Court held "that a defendant's right to a public trial is subject to the forfeiture rule articulated in . . . *Carines*[.]" *Id.* at 646. The *Vaughn* Court continued, stating:

> Thus, the failure to assert a constitutional right ordinarily constitutes a forfeiture of that right. In analyzing a forfeited claim of error, a defendant is not entitled to relief unless he can establish (1) that the error occurred, (2) that the error was "plain," (3) that the error affected substantial rights, and (4) that the error either

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> resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id*. at 654.

The Court rejected the proposition that the right to a public trial can be waived by remaining silent when a closure of the courtroom is ordered. *Vaughn*, 491 Mich at 661-664. Here, the facts differ as have been ascertained during the evidentiary hearing: defense counsel intentionally voiced no opposition to the trial court's clearing the courtroom because he thought it inured to defendant's benefit. Hence, we conclude that defendant purposely waived the right to a public trial in light of trial counsel's testimony at the evidentiary hearing following remand, if, indeed, the courtroom was actually closed, a fact not established in view of the testimony of the witnesses at the evidentiary hearing. Counsel strategically and intentionally relinquished or abandoned the right to a public trial in order to vastly reduce the number of supporters for the victim in the courtroom in an effort to mask the fact that no one was there for defendant. Trial counsel, however, did not *affirmatively* indicate an approval of the court's decision, so we will review the matter under the plain-error test in order to avoid any conflict with *Vaughn.*

We first hold that if the trial court had in fact closed the courtroom for almost the entire trial, it would have been plain error.[1] The trial court certainly had an overriding interest in preventing the jury from being tampered with or tainted through improper contact initiated by an individual with close ties to the victim. See *People v Wood*, 326 Mich App 561, 578; 928 NW2d 267 (2018) ("when it comes to the prevention of jury tampering, it has long been held that states may punish or regulate speech *intended to interfere* with court proceedings or with the right of an accused to have his case decided by an impartial jury"). But in closing the courtroom to all spectators for the vast majority of the trial,[2] the trial court would have implemented a mechanism to protect against jury tampering that was, under the circumstances, much broader than necessary to protect the valid interest in having and maintaining a fair and impartial jury. There were reasonable alternatives to closing the courtroom to all interested observers for the remainder of the trial following the incident involving Frye. The trial court could have held Frye in contempt, could have solely barred Frye from the courtroom for the day or duration of the trial, or, perhaps, the court could have closed the courtroom to all spectators, but only for the afternoon proceedings on February 22, 2018. The trial court's action in closing the courtroom for the entirety of the trial was not supported by adequate findings and reflected a bit of an overreaction to Frye's conduct. Moreover, we are operating under the assumption that Frye was acting with some nefarious intent by asking the juror about her employer instead of simply making an innocent mistake. If the trial

---

[1] The trial court stated that it did not actually close the courtroom to the public and that the doors were never locked, nor was anyone ever ejected from the courtroom after Frye's ejection. We decline to call into question the highly-respected jurist's credibility, so we shall proceed with our analysis on the *assumption* that the courtroom was closed for the remainder of the trial. We also note that the victim's mother had a statutory right to be present during the trial. See MCL 780.761 and MCL 780.752(1)(m)(*ii*)(C).

[2] For ease of reference, we shall not continually note that the victim's mother was permitted to be in the courtroom.

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court closed the courtroom, it was error and the error was clear and obvious, i.e., it constituted *plain* error. *Carines*, 460 Mich at 763.

The next question under the plain-error test is whether the plain error affected defendant's substantial rights or, stated otherwise, whether the plain error prejudiced defendant. *Id.* With respect to this third prong of the plain-error test in the context of a constitutional violation of the right to a public trial, the *Vaughn* Court stated:

> While the Supreme Court of the United States has specifically reserved judgment on whether an unpreserved structural error automatically affects a defendant's substantial rights, this Court[] . . . has explained that structural errors are intrinsically harmful, without regard to their effect on the outcome. Accordingly, our caselaw suggests that a plain structural error satisfies the third *Carines* prong.
>
> Nevertheless, even if defendant can show that the error satisfied the first three *Carines* requirements, we must exercise discretion and only grant defendant a new trial if the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. Although denial of the right to a public trial is a structural error, it is still subject to this requirement. While any error that is structural is likely to have *an* effect on the fairness, integrity or public reputation of judicial proceedings, the plain-error analysis requires us to consider whether an error *seriously* affected those factors. [*Vaughn*, 491 Mich at 666-667 (quotation marks, citations, alterations, and ellipses omitted).]

While our Supreme Court framed its discussion by stating that "our caselaw *suggests* that a plain structural error satisfies the third *Carines* prong[,]" we, as an intermediate appellate court, are not emboldened by this somewhat equivocal language to rule otherwise. (Emphasis added.) Accordingly, we hold that the trial court's plain error in closing the courtroom affected defendant's substantial rights as a matter of law, thereby satisfying the third prong of the *Carines* plain-error test.

The next step in the analysis requires us to exercise our discretion and ascertain whether the plain error resulted in the conviction of an actually innocent defendant or, in the alternative, whether the plain error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of defendant's innocence. We first conclude that the plain error in closing the courtroom did not result in the conviction of an actually innocent defendant. Rather, the prosecution presented evidence from which reasonable jurors could find defendant guilty beyond a reasonable doubt, and closing the courtroom likely had no impact on the jury's verdict. Accordingly, we must assess whether closing the courtroom seriously affected the fairness, integrity, or public reputation of the judicial proceedings. In *Vaughn*, 491 Mich at 667, the Supreme Court observed:

> The United States Court of Appeals for the Second Circuit has recognized that it does not follow that every temporary instance of unjustified exclusion of the public—no matter how brief or trivial, and no matter how inconsequential the

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> proceedings that occurred during an unjustified closure—would require that a conviction be overturned. While the Second Circuit's analysis does not dismiss a defendant's claim on the grounds that the defendant was guilty anyway or that he did not suffer prejudice or specific injury, it examines whether the actions of the court and the effect that they had on the conduct of the trial deprived the defendant—whether otherwise innocent or guilty—of the protections conferred by the Sixth Amendment. The goals sought by these protections include (1) ensuring a fair trial, (2) reminding the prosecution and court of their responsibility to the accused and the importance of their functions, (3) encouraging witnesses to come forward, and (4) discouraging perjury. [Citations omitted.]

Here, we are not addressing a situation involving a temporary, brief, or trivial instance of unjustified exclusion of the public, nor was the public barred solely during inconsequential portions of the proceedings. Instead, the courtroom was closed to the public during the testimony of 14 witnesses spanning several days of trial, along with being closed during closing arguments and final instructions. *Vaughn* and the Second Circuit opinion discussed in *Vaughn* concerned the closing of the courtroom during jury selection and voir dire, with the *Vaughn* Court noting that the protected values of encouraging witnesses to come forward and discouraging perjury were not implicated because no witnesses testified. *Vaughn*, 491 Mich at 667-668. Again, in the instant case, 14 witnesses testified during the closure.

Despite these circumstances, we simply cannot find that the closure of the courtroom seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of defendant's innocence. We reach this conclusion because of the circumstances surrounding the closure of the courtroom and the testimony by trial counsel and others at the evidentiary hearing. The initial closure effectively cleared out spectators who supported the prosecution, reduced the perception that the gallery was pro-victim and against defendant, and it made less glaring the fact that no one was there who supported defendant. According to defendant's counsel at the remand hearing, this is exactly why counsel did not object to the closure of the courtroom—it was to defendant's benefit at the time. Furthermore, under these circumstances, we cannot conclude that trial counsel's performance in failing to object to the closure fell below an objective standard of reasonableness, considering that there was much logic to counsel's silence. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Thus, counsel was not ineffective.

C. ADMISSION OF DEFENDANT'S E-MAIL

The prosecutor introduced evidence of an e-mail that defendant sent to a detective while defendant was in jail. Before trial, the detective had approached defense counsel and asked counsel to see if defendant would be interested in sharing information with the police regarding another case in exchange for some possible assistance relative to the pending charges. Counsel conveyed the message to defendant, and then defendant sent an e-mail to the detective asking what kind of a deal he could receive in exchange for the information. The prosecutor filed a pretrial motion seeking an order allowing the admission of defendant's e-mail for purposes of show consciousness of guilt. The prosecutor argued that the e-mail did not violate MRE 410 regarding the inadmissibility of plea discussions and related statements because a police officer and not a prosecutor was involved in the communications. Defendant maintained that the e-mail was not

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relevant, MRE 401 and 402. The trial court ruled that the e-mail was admissible, stating that it was up to the jury to interpret the e-mail's meaning. On appeal, defendant argues that the evidence was not relevant to consciousness of guilt, that the evidence was not admissible under MRE 403, and that trial counsel was ineffective for not raising an MRE 403 argument below.

We question the relevancy of the e-mail and whether it was probative of a consciousness of guilt, especially considering that no specific "deal" was ever offered or discussed. Also, we tend to believe that the evidence was problematic under MRE 403. Nevertheless, assuming error in the admission of the e-mail, we cannot conclude that the presumed error affected defendant's substantial rights, *Carines*, 460 Mich at 763, or that it "is more probable than not that a different outcome would have resulted without the error," *Lukity*, 460 Mich at 495. The evidence of defendant's guilt was substantial and the e-mail was of little probative value.

For the reasons stated above, we conclude that the courtroom was not closed by the trial judge. We further conclude that, under all of the facts and circumstances of this matter, if it were closed, reversal and remand for a new trial is not warranted for the reasons set forth above. Finally, regarding the introduction of the e-mail sent by defendant to the detectives, we conclude that it is not more probable than not that a different outcome would have resulted without the admission of the e-mail.

We affirm.

/s/ Jane E. Markey
/s/ James Robert Redford

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD WAYNE DAVIS, JR.,

Defendant-Appellant.

FOR PUBLICATION
April 2, 2020

No. 343432
Genesee Circuit Court
LC No. 16-040020-FC

Before: SWARTZLE, P.J., and MARKEY and REDFORD, JJ.

SWARTZLE, P.J. (*concurring in part, dissenting in part*).

As our Supreme Court explained long ago, "Constitutions were written to be obeyed." *People v Micalizzi*, 223 Mich 580, 582; 194 NW 540 (1925). In this case, our Constitutions were not obeyed, specifically with respect to defendant's right to a public trial guaranteed under Article 1, § 20, of Michigan's 1963 Constitution and the Sixth Amendment to the United States Constitution. Although I agree with the majority that defense counsel did not render ineffective assistance of counsel and the admission of defendant's e-mail message into evidence was not outcome determinative, I cannot agree with the majority's conclusion that the violation of the right to a public trial does not warrant a new trial in this case. Therefore, I respectfully concur in part and dissent in part.

The Trial Court Ordered the Courtroom Closed. At the outset, I disagree with the majority regarding its characterization of the trial court's decision to close the courtroom to all members of the public—with the notable exception of the victim's mother—from the afternoon on the second day of defendant's trial until the jury returned its verdict. The trial court ordered from the bench, "I'm going to bar everyone from this courthouse except for [the victim's] mother. . . . The rest of you leave. Don't you come back." When immediately asked for clarification, the trial court explained that the order applied "[f]or the remainder of the trial, all the way into next week. . . . The only person allowed to watch this trial is the mother of the young man who died." Although, when on remand from this Court, the trial court subsequently interpreted its earlier order more narrowly, the contemporaneous record is clear—the trial court ordered the courtroom closed for

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the rest of the trial, and we should not second-guess whether the trial court really meant what it said at the time.[1]

Forfeiture, Not Waiver. Moreover, defendant did not waive his constitutional right to a public trial. Waiver is the "intentional abandonment of a known right," *LME v ARS*, 261 Mich App 273, 277; 680 NW2d 902 (2004), while forfeiture is the failure to object or otherwise preserve a right, *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). In the context of criminal law, "waiver is where the defendant *affirmatively agrees* with the course of action taken by the trial court." 2 Gillespie Michigan Criminal Law & Procedure § 21:15 (2d ed) (emphasis added). Here, regardless of what defense counsel or defendant might have thought at the time, it is undisputed that neither counsel nor defendant himself made any affirmative statement requesting, concurring with, or otherwise approving the trial court's decision to close the courtroom. Nor was there an objection, so it is appropriate that the Court reviews defendant's public-trial claim under the plain-error standard. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The Trial Court Plainly Erred. I agree with the majority that the trial court's closure of the courtroom to all but the victim's mother constituted plain error. I note that the trial court failed to make any factual findings that the person who spoke to a juror—the mother of the victim's child—intended to interfere with court proceedings or intended to engage in jury tampering. Although her actions could be interpreted in this manner, it would be inappropriate for this Court to make its own factual evaluation on the issue in the absence of affirmative factual findings by the trial court at the time the trial court decided to close the courtroom. And, even if the trial court had made such findings, the record confirms that closure of the courtroom to all but the victim's mother was much broader than necessary to protect the valid interest in having and maintaining a fair and impartial jury. The trial court failed to comply with the requirements set forth in *People v Vaughn*, 491 Mich 642, 653; 821 NW2d 288 (2012), for closing a courtroom during a criminal trial. Not only was the closure broader than necessary, but the trial court failed to consider reasonable alternatives to closing the courtroom. Therefore, the trial court committed plain error, and both the first and second prongs of the plain-error test have been satisfied. See *Carines*, 460 Mich at 763.

I also agree with the majority that the trial court's violation of defendant's constitutional right to a public trial was a structural error. See *Vaughn*, 491 Mich at 655, 667. Therefore, the

[1] The majority notes that, on a single occasion, Bryan Wooten attempted to observe the trial, but defendant gestured Mr. Wooten to leave. It is unknown on this record whether defendant gestured because he did not want to anger the trial court by having a supporter defy the trial court's earlier order or, rather, because he did not want someone who supported him to observe the trial, though the latter conclusion would seem to be an odd one to draw. Moreover, whether a single person on a single occasion was able to enter the courtroom briefly is a far cry from showing that the courtroom was open to the general public throughout the trial. In any event, rather than rely on supposition, it would seem to be the better practice to rely on the trial court's order from the bench, which, as I have explained, is quite clear.

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trial court's plain error affected defendant's substantial rights, and the third prong of the plain-error test has also been satisfied. See *Carines*, 460 Mich at 763.

Serious Impact on Fairness, Integrity, or Public Reputation of Proceeding. Our Supreme Court has made clear that, even though "the denial of the right to a public trial is a structural error," it remains subject to the fourth prong of the *Carines* plain-error test. See *Vaughn*, 491 Mich at 666-667. Therefore, defendant must show that "the plain, forfeited error resulted in the conviction of an actually innocent defendant" or the error "seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Carines*, 460 Mich at 763 (cleaned up). I agree with the majority that defendant has failed to demonstrate on appeal that he was actually innocent of the crimes for which he was convicted. Yet, this does not end our review.

In *Vaughn*, our Supreme Court found persuasive the analysis from the United States Court of Appeals for the Second Circuit, recognizing that a defendant's claim regarding the violation of his constitutional right to a public trial should not be dismissed "on the grounds that the defendant was guilty anyway or that he did not suffer 'prejudice' or 'specific injury.' " *Vaughn*, 491 Mich at 667, quoting *United States v Gupta*, 650 F3d 863, 867 (CA 2, 2011). Rather, a defendant's claim should be examined through the lens of "whether the actions of the court and the effect that they had on the conduct of the trial deprived the defendant—whether otherwise innocent or guilty—of the protections conferred by the Sixth Amendment." *Id*., quoting *Gupta*, 650 F3d at 867. This analysis is consistent with well-established precedent from our Supreme Court:

> We are not concerned with the guilt or the innocence of this defendant. We are concerned with whether his constitutional rights have been invaded. Constitutions were written to be obeyed. Their provisions are mandatory. They protect the humblest as well as the powerful, the meanest as well as the upright. The defendant by the Constitution was guaranteed a public trial, not one behind locked doors; he was guaranteed a trial to which the public was admitted, not part of the public and part of the time, but the public generally and all of the time. [*Micalizzi*, 223 Mich at 582.]

Under this rubric, we must consider the degree of impact the trial court's decision had on the fairness, integrity, or public reputation of defendant's trial. "While any error that is structural is likely to have *an* effect on the fairness, integrity or public reputation of judicial proceedings, the plain-error analysis requires us to consider whether an error *seriously* affected those factors." *Vaughn*, 491 Mich at 667 (cleaned up). It is at this juncture that I fundamentally part ways with my colleagues, as I believe that the closure had a serious impact on these concerns, not just a marginal impact.

Compare the Closure Here With People v Vaughn. " 'The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions . . . .' " *Gannett Co, Inc v DePasquale*, 443 US 368, 380; 99 S Ct 2898; 61 L Ed 2d 608 (1979), quoting *In re Oliver*, 333 US 257, 270 n 25; 68 S Ct 499; 92 L Ed 2d 682 (1948). In addition to ensuring that the judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward

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and discourages perjury. See *In re Oliver*, 333 US at 270 n 24. To this end, the goals of the protections conferred by the Sixth Amendment include "(1) ensuring a fair trial, (2) reminding the prosecution and court of their responsibility to the accused and the importance of their functions, (3) encouraging witnesses to come forward, and (4) discouraging perjury." *Vaughn*, 491 Mich at 667.

When compared with the courtroom closure in *Vaughn*, the seriousness of the closure here becomes evident. *Vaughn* involved a trial court's temporary closure of the courtroom during *voir dire* of the jury. See *id.* at 647, 665. Our Supreme Court found it notable that the *venire* was present during this portion of the trial-court proceedings, and it concluded that " 'the presence of the *venire* lessens the extent to which [the court's] closure implicates the defendant's public trial right because the *venire*, derived from and representative of the public, guarantees that the *voir dire* proceedings will be subject to a substantial degree of continued public review.' " *Id*. at 668, quoting *Gupta*, 650 F3d at 870-871. In contrast, the trial court in this case closed the courtroom after the jury had been seated and the *venire* had been dismissed. The closure was of far greater extent than the closure considered in *Vaughn*, and because the *venire* was not present during the closure, defendant's trial proceedings were not "subject to a substantial degree of continued public review." *Id*.

Furthermore, the *Vaughn* Court acknowledged that, like in *Gupta*, no witnesses testified during the closure of the courtroom, as the trial court closed only the *voir dire* proceedings. *Id*. at 668. Again, in contrast, during the period when the courtroom was closed here, the jury heard the testimony of 14 witnesses, 13 of whom testified for the prosecution. Counsel then presented their closing arguments, the trial court instructed the jury, and the jury returned its verdict—all in private. The first, third, and fourth values protected by the constitutional right to a public trial were undermined here, unlike the situation presented in *Vaughn*.

If Not Here, Where? There are certainly situations when it is appropriate to close the courtroom (fully or partially); for example, when a witness has a legitimate fear of reprisal from specific spectators, where there is limited seating capacity during *voir dire*, or when public-health measures involve social distancing (e.g., the novel coronavirus). See *id*. at 653; *EW Scripps Co v Fulton*, 100 Ohio App 157, 168 (1955) (noting that a trial judge can exclude the public when necessary to "protect the public health, the public morals and the public safety"). This was not one of those situations. Given all that happened behind closed doors—most of the witness testimony, arguments, instructions, and the rendering of the verdict—I find little to doubt that the closure seriously affected the fairness, integrity, and public reputation of this trial.

In *Micalizzi*, the trial court physically barred the public. Here, the trial court orally barred the public. No matter, the effect was the same. As our Supreme Court put the matter, "If a portion of the trial may be conducted behind barred doors, it may all be conducted behind barred doors. If one constitutional right may be violated with impunity, all may be, and the bill of rights becomes but a scrap of paper. The defendant has not had the public trial guaranteed him by the Constitution." *Micalizzi*, 223 Mich at 585.

Accordingly, I would reverse defendant's convictions and remand for a new, public trial.

/s/ Brock A. Swartzle

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Order

Michigan Supreme Court
Lansing, Michigan

January 20, 2021

Bridget M. McCormack,
Chief Justice

161396

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 161396
COA: 343432
Genesee CC: 16-040020-FC

DONALD WAYNE DAVIS, JR.,
Defendant-Appellant.

_____/

On order of the Court, the application for leave to appeal the April 2, 2020 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1).

The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether he was denied his right to a public trial pursuant to US Const, Am VI, and Const 1963, art 1, § 20 where the Genesee Circuit Court stated that it was barring everyone, but the decedent's mother, from the courtroom for the remainder of the trial and told others in the courtroom to leave and not return; (2) whether, despite the court's statement, the courtroom remained open to the public because the courtroom door was unlocked, no sign was posted advising members of the public that the courtroom was closed, and court personnel did not prevent persons from entering the courtroom; (3) whether the appellant waived his right to a public trial; (4) whether trial counsel rendered ineffective assistance in failing to object; see *Weaver v Massachusetts*, 582 US ___; 137 S Ct 1899, 1913 (2017); and (5) whether the trial court committed plain error entitling the appellant to a new trial. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

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Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

s0113

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

January 20, 2021

Clerk

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STATE OF MICHIGAN
IN THE SUPREME COURT

People of the State of Michigan

Plaintiff-Appellee,

v.

Donald Wayne Davis

Defendant-Appellant.

MSC No. 161396

COA No. 343432

Genesee County Circuit Court
Case No. 16-40020-FC

Filed under AO 2019-6

Unpublished Opinions Cited in Defendant-Appellant's Supplemental Brief

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#	Name	COA #	Date
1	*People v Hunter*[1]	297542	August 30, 2012
2	*People v Bennett*	303025	September 25, 2012
3	*People v Williams*	301336	October 9, 2012
4	*People v Daniels*	300354	October 11, 2012
5	*People v Willis*	298643	November 1, 2012
6	*People v Hicks*	297058	December 18, 2012
7	*People v Blackwell*	305243	January 29, 2013
8	*People v Gibbs*	306124	February 14, 2013
9	*People v Patterson*	304724	March 26, 2013
10	*People v Fomby*	305602	April 2, 2013
11	*People v Witherspoon*	302711	April 4, 2013
12	*People v Foster*	301361	August 8, 2013
13	*People v Robinson*	304936	September 12, 2013
14	*People v Smith*	300581	October 17, 2013
15	*People v Stalling*[2]	311850	June 24, 2014
16	*People v Scott*	320321	September 22, 2015
17	*People v Shaul*	326905	November 22, 2016
18	*People v Stanley*	340464	June 25, 2019
19	*People v Williams*	345096	March 19, 2020

[1] Reversed in part on other grounds, 493 Mich 1015 (2013).

[2] Concurrences of Judges Gleicher and Kelly found defendant was not entitled to reversal for public trial violation during opening and closing argument under plain error review.

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People v Hunter

COA No. 297542

August 30, 2012

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 30, 2012
v	No. 297542 Wayne Circuit Court
ANDRE LARMAR HUNTER, Defendant-Appellant.	LC No. 09-022865-FC

Before: MURRAY, P.J., and FORT HOOD and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life in prison for the murder conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. We now affirm.

I. BACKGROUND

The victim, David Hall, was fatally shot outside of the Tippin Inn in Detroit during the early morning hours of January 25, 2009. Hall's girlfriend, Patrice Walker, was an eyewitness to the shooting and she identified defendant as the shooter. Defendant's first trial was declared a mistrial because the jury was unable to reach a verdict. A second trial was held a week later. During jury deliberations, the jury in the second trial reported three times that it was deadlocked, but the trial court instructed it to continue deliberating. The jury eventually found defendant guilty of first-degree murder and felony-firearm. Following his convictions, defendant filed a motion for a new trial, arguing that the jury's verdict was against the great weight of the evidence and he was denied the effective assistance of counsel. After holding a *Ginther*[1] hearing, the trial court denied defendant's motion.

II. ANALYSIS

A. RIGHT TO A PUBLIC TRIAL

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

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Defendant argues that the trial court violated his constitutional right to a public trial by excluding the public from the courtroom first during jury voir dire and again when the jury, during deliberations, asked to review a DVD video exhibit of footage from surveillance cameras at the Tippin Inn, which had previously been played at trial. This issue implicates defendant's constitutional right to a public trial. US Const, Am VI; *Waller v Georgia*, 467 US 39, 48-49; 104 S Ct 2210; 81 L Ed 2d 31 (1984).

The Michigan Supreme Court recently ruled on this issue in *People v Vaughn*, __ Mich __ ; __ NW2d __ (Docket No. 142627, decided July 9, 2012), slip op, p 1. In *Vaughn*, the trial court closed the courtroom at the beginning of jury voir dire. The trial court failed to provide a reason for this closure, and the defendant failed to object to the closure. *Id*. at 3. This Court held that the defendant waived his right to a public trial by failing to object when the trial court closed the courtroom, *People v Vaughn*, 291 Mich App 183, 195-196; 804 NW2d 764 (2010), but the Supreme Court overruled this Court and held that the defendant's failure to object implicated the forfeiture rule and applied the plain error doctrine. *Vaughn*, __ Mich at __ (slip op at 1-2).

Because defendant in this case failed to object on the basis that he had a right to a public trial when the trial court closed the courtroom, he forfeited his claim of constitutional error. *Vaughn*, __ Mich at __ (slip op at 21). Accordingly, to receive relief, defendant must "establish (1) that the error occurred, (2) that the error was 'plain,' (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id*., citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999) (footnote omitted).

The United States and Michigan constitutions enumerate the right to a public trial. *Vaughn*, __ Mich at __ (slip op at 6), citing US Const, Am VI; Const 1963, art 1, § 20. This right includes the right to keep the courtroom open to the public during jury voir dire. *Id*. However, a defendant's right to a public trial is limited and a courtroom may be closed under certain circumstances:

> [T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure. [*Vaughn*, __ Mich at __ (slip op at 9) (quotations, citation and footnote omitted).]

As in *Vaughn*, when the trial court closed the courtroom at the beginning of jury voir dire, defendant failed to object and the trial court failed to provide support for the closure on the record. However, unlike *Vaughn*, here the trial court held a *Ginther* hearing and at that time acknowledged that it closed the courtroom in order to accommodate the large pool of potential jurors. Nevertheless, because the trial court failed to place its reasoning on the record at the time of the courtroom closure, we conclude that an error occurred. Likewise, this error is plain because the record clearly supports that the courtroom was closed during voir dire. *Vaughn*, __ Mich at __ (slip op at 22). Moreover, as concluded by the *Vaughn* Court, the denial of the right to a public trial is structural error that affects a defendant's substantial rights. *Id*. at 23. But, like the *Vaughn* Court, in exercising our discretion we cannot conclude that the limited closure of the

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courtroom in this case "'seriously affected the fairness, integrity, or public reputation of judicial proceedings[,]'" because the closure was brief and for a specific purpose. *Vaughn*, __ Mich at __ (slip op at 25-26) (citation and footnote omitted). Thus, defendant is not entitled to a new trial.

Additionally, although defendant failed to object to the exclusion of the public during the jury's viewing of the DVD video exhibit after the jury began deliberations, relief is not warranted because defendant does not have the right to have the public present during jury deliberations. See *People v Hoffman*, 142 Mich 531, 582; 105 NW 838 (1905), quoting *People v Knapp*, 42 Mich 267, 269-270; 3 NW 927 (1879) ("'When the jury retire from the presence of the court, it is in order that they may have opportunity for private and confidential discussion, and the necessity for this is assumed in every case . . . . The presence of a single other person in the room is an intrusion upon this privacy and confidence, and tends to defeat the purpose for which they are sent out.'"). The court did not exclude the public when it originally played the video during trial and the second viewing occurred in the context of the jury's deliberations, in response to a jury request to review the video. It appears that the courtroom was merely a more convenient location for showing the video. Defendant has failed to show plain error.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant raises several claims of ineffective assistance of counsel. As previously noted, a *Ginther* hearing was held by the lower court after which it determined that defendant was not denied the effective assistance of counsel.

To establish that he received ineffective assistance of counsel, a petitioner must show, first, that counsel's performance was deficient and, second, that counsel's deficient performance prejudiced the petitioner. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). A petitioner may show that counsel's performance was deficient by establishing that counsel's performance was outside the wide range of professionally competent assistance. *Id*. at 689. This requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. *Id*. at 687. To satisfy the prejudice prong, a petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*. at 694. A court's review of counsel's performance must be highly deferential. *Id*. at 689.

In reviewing this issue, defense counsel is afforded wide latitude on matters of trial strategy. *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008). This Court will not substitute its judgment for that of defense counsel on matters of strategy. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). "A particular strategy does not constitute ineffective assistance of counsel simply because it does not work." *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004).

1. FAILURE TO OBTAIN THE TRANSCRIPTS OF THE FIRST TRIAL

Defendant first argues that his trial counsel was ineffective for failing to properly prepare for the second trial by not obtaining the transcript from defendant's first trial. A defendant

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claiming that defense counsel failed to adequately prepare for trial must demonstrate prejudice resulting from an alleged lack of preparation. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990).

After defendant's first trial ended in a mistrial, defense counsel agreed to schedule a second trial less than a week later. At the *Ginther* hearing, counsel testified that he had no recollection of whether he made a request for a copy of the transcript of the first trial before the start of the second trial, even after he reviewed the Registrar of Actions, which indicated that on February 23, 2010, he made a motion to stay proceedings to obtain transcripts from the first trial that was denied.[2] However, counsel also stated that he knew that the transcript of the first trial would not be available for use at the second trial, and that he did not believe the transcripts would be necessary for an effective defense at the second trial.

Defendant argues that counsel's failure to obtain the transcripts was objectively unreasonable, and it prevented counsel from effectively impeaching witness testimony at the second trial. However, counsel's decision to proceed promptly with a second trial, knowing that the transcript from the first trial would not be ready, was a matter of strategy. This Court will not substitute its judgment for that of defense counsel on matters of strategy. *Avant*, 235 Mich App at 508. Defendant relies on *Britt v North Carolina*, 404 US 226; 92 S Ct 431; 30 L Ed 2d 400 (1971), in arguing that there is significant value in reviewing a transcript of prior proceedings as a tool for preparation and for the impeachment of prosecution witnesses. In *Britt*, the United States Supreme Court held that an indigent defendant is entitled to a copy of transcripts of a prior court proceeding when the transcripts are needed for effective defense or appeal. *Id*. at 227. However, *Britt* does not *require* defense counsel to obtain the transcripts nor does it conclude that failing to do so is objectively unreasonable. *Id*. *Britt*, therefore, offers no support for this issue.

In addition, defendant has not demonstrated what value would have been added by the transcript from the first trial, or how the failure to obtain the transcript prevented counsel from effectively impeaching witness testimony at the second trial. Defendant did compile a list of nine instances in which he argues counsel could have used testimony from the first trial to impeach Patrice Walker at the second trial, but a review of the testimony reveals that these alleged missed opportunities of impeachment were insignificant, failed to highlight an inconsistency, or they were not the subject of testimony at the second trial.

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[2] During the *Ginther* hearing defense trial counsel exhibited a degree of unprofessionalism not reflective of our profession. Although normally the tenor of an examination is difficult to discern from a cold record, and though we realize the trial court found defense trial counsel to be credible, the answers given by defense trial counsel during the examination by defense appellate counsel were quite remarkable. Defense trial counsel showed a blatant disrespect towards appellant counsel and repeatedly refused to answer simple, clear questions during cross-examination. It would behoove defense trial counsel to remember that "[a]s officers of the court, lawyers have special duties to avoid conduct that undermines the integrity of the adjudicative process." Comment to MRPC 3.3.

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Moreover, defendant has not shown that he was prejudiced by the absence of the transcript at the second trial. Although the transcript from the first trial could have provided additional opportunities for impeachment, considering the ample evidence already available and counsel's rigorous and thorough examination of Walker at the second trial, defendant has not demonstrated that the outcome of the proceedings would have been different. Even without the transcripts, defense counsel scrutinized details of her testimony, challenged her reliability, and relentlessly questioned her regarding inconsistencies in her testimony from the first trial. Defendant was not denied the effective assistance of counsel on this ground.

2. FAILURE TO INVESTIGATE AND PRESENT WITNESSES

Defendant next argues that counsel was ineffective for failing to call as a witness or interview Michael Turner and Germeka Whitaker as exculpatory and alibi witnesses, respectively. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Defendant argues that since counsel testified at the *Ginther* hearing that he had no recollection of the names Michael Turner or Germeka Whitaker that there can be no strategy for failure to investigate or present him. However, defense counsel testified at the *Ginther* hearing that defendant had admitted to him that he shot and killed Hall in retaliation for Hall's prior theft of drugs or money. Counsel further explained that in light of this confession he declined to advance these witnesses' testimony because he could not knowingly present perjured testimony. An attorney's refusal to knowingly facilitate or assist in the presentation of perjured testimony is consistent with his ethical obligations and, therefore, does not constitute ineffective assistance of counsel. See *Nix v Whiteside*, 475 US 157, 174-175; 106 S Ct 988; 89 L Ed 2d 123 (1986); *People v Toma*, 462 Mich 281, 303 n 16; 613 NW2d 694 (2000).

Defendant argues that counsel's testimony regarding defendant's alleged confession should not be accepted because it is inherently incredible and contrary to common sense, unsupported by other witnesses, and internally inconsistent. However, the trial court expressly found that defense counsel was credible, and we defer to the trial court's superior opportunity to determine the credibility of the witnesses who appear before it.[3] *People v Dagwan*, 269 Mich App 338, 342; 711 NW2d 386 (2005). Accordingly, since defendant has not demonstrated that counsel's actions were objectively unreasonable, this claim of ineffective assistance of counsel fails.

3. FAILURE TO INFORM THE COURT AND JURY THAT COUNSEL ADVISED DEFENDANT NOT TO ATTEND THE LINEUP WITHOUT COUNSEL PRESENT

[3] Furthermore, this Court cannot consider evidence that was not considered by the trial court in deciding the motion, see *Lakeview Commons, LP v Empower Yourself, LLC*, 290 Mich App 503, 506; 802 NW2d 712 (2010), including the transcripts proffered by defendant suggesting that counsel has provided the same explanation at other *Ginther* hearings regarding why he did not conduct further investigation.

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We next address whether counsel was ineffective for wrongfully advising him not to participate in a corporal lineup unless counsel was present, and failing to inform the court and jury of this direction. In particular, defense counsel unsuccessfully attempted to elicit testimony from Detroit Police Homicide Sergeant Kevin Hanus that defendant refused to participate in the lineup because his attorney was not present. Defendant argues, however, that counsel should have advised the jury that he advised defendant to refuse to participate unless defense counsel was present.

While defendant could have testified at trial and explained his reasons for not participating in the lineup, the decision whether to call defendant for that purpose was a matter of trial strategy. *Rockey*, 237 Mich App at 76. For example, calling defendant to testify on this point would have subjected him to examination regarding other matters. Accordingly, defendant has not overcome the presumption that defense counsel's decision not to call defendant for that purpose constituted sound trial strategy.

Defendant also argues that his wife and parents could have testified that defense counsel advised defendant not to participate. However, these potential witnesses were not present when counsel advised defendant. Instead, they learned the information second-hand from defendant or counsel. Therefore, their testimony would have been inadmissible hearsay. MRE 801; 802. Since defendant has not shown that defense counsel acted unreasonably, this claim of ineffective assistance of counsel cannot succeed.

4. FAILURE TO MEET WITH DEFENDANT AND PROPERLY PREPARE A DEFENSE

Counsel was also not ineffective for not providing defendant with any discovery materials and ignoring information about his witnesses and his defense. The trial court also rejected this argument, finding instead that defense counsel credibly testified that he met with defendant, but that defendant's admission that he committed the charged crime limited defense counsel's options for defending the charges. Again, this Court defers to the trial court's determination that defense counsel's testimony was credible. *Dagwan*, 269 Mich App at 342. Accordingly, given the trial court's findings of fact, defendant has not demonstrated that counsel's actions were objectively unreasonable, and this claim of ineffective assistance of counsel cannot succeed.

5. FAILURE TO OBJECT TO THE PROSECUTION'S CLOSING ARGUMENT

Defendant next argues that counsel was ineffective for failing to object during the prosecution's closing argument – thus leaving it unrebutted – that defendant refused to participate in the corporal lineup because he was guilty. This argument was particularly influential on the jury, according to defendant, because the other evidence in the case was neither compelling nor overwhelming, and so there is a reasonable probability that there would have been a different outcome without this closing argument.

However, "declining to raise objections, especially during closing arguments, can often be consistent with sound trial strategy." *Unger*, 278 Mich App at 242. Counsel could have declined to object to the prosecution's argument because of the absence of testimony as to why

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defendant refused to attend the lineup. Thus, defendant has not overcome the presumption that defense counsel's decision constituted sound trial strategy.

6. FAILURE TO OBJECT TO THE CLOSING OF THE COURTROOM

Defendant argues that defense counsel was ineffective for failing to object to the closure of the courtroom during jury voire dire and when the video exhibit was shown to the jury. The *Vaughn* Court noted that counsel could have had several reasons for failing to object to the closure of the courtroom during jury voire dire, including a belief that the procedure would remove extraneous influences and expedite the proceedings. *Vaughn*, __ Mich at __ (slip op at 27). Also, defendant did not have a right to have the public present when the video exhibit was shown to the jury during deliberations. Defendant has not overcome the presumption that defense counsel's actions constituted sound trial strategy, and this claim of ineffective assistance of counsel cannot succeed.

7. THE CUMULATIVE EFFECT OF THE ERRORS COMBINED TO DEPRIVE DEFENDANT OF A FAIR TRIAL

Finally, defendant argues that the cumulative effect of the alleged errors by defense counsel deprived him of a fair trial. "The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not." *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003). Because defendant has failed to show the merit of any alleged error, his cumulative error argument is also without merit.

For these reasons, defendant has not established that he was denied the effective assistance of counsel at trial.

C. GREAT WEIGHT OF THE EVIDENCE

The trial court did not abuse its discretion in denying his motion for a new trial on the ground that the jury's verdict was against the great weight of the evidence. *Unger*, 278 Mich App at 232. To grant a new trial because the jury's verdict is against the great weight of the evidence, the evidence must preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the jury's verdict to stand. *People v Lemmon*, 456 Mich 625, 627, 635; 576 NW2d 129 (1998); *Unger*, 278 Mich App at 232.

The elements of first-degree premeditated murder are that the defendant killed the victim and that the killing was "willful, deliberate, and premeditated . . . ." MCL 750.316(1)(a); *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). Identity is an essential element of every offense. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008), citing *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). Identity may be proven by either direct or circumstantial evidence. *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967).

Defendant argues that the outcome of the trial hinged entirely on Walker's credibility, and that Walker was not credible. Defendant also asserts that there was no apparent motive for him to shoot Hall, whereas the evidence established a clear motive for another suspect, Douglas Samuels, who had just found out that Hall had fathered a child with Samuels's wife.

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"Conflicting testimony and questions of witness credibility are generally insufficient grounds for granting a new trial." *Unger*, 278 Mich App at 232. "Absent exceptional circumstances, issues of witness credibility are for the trier of fact." *Id.* A difference of opinion over witness credibility cannot support the grant of a motion for new trial unless the witness testimony "contradicts indisputable physical facts or laws," "is patently incredibly or defies physical realities," "is so inherently implausible that it could not be believed[,]" or is so impeached as to riddle the trial with "uncertainties and discrepancies." *Lemmon*, 456 Mich at 643-644 (quotations and citations omitted). The hurdle that a judge must clear to overrule a jury and grant a new trial "is unquestionably among the highest in our law." *Unger*, 278 Mich App at 232 (quotations and citation omitted).

Although defendant asserts that Walker's testimony was "riddle[d] . . . with uncertainties and discrepancies" regarding the shooter's clothing, whether she saw a gun, and her inability to see more than half of the shooter's face, her testimony was not contrary to physical facts or laws, nor was it so inherently implausible that it could not be believed. Walker stated that she saw one side of the shooter's face as the shooter approached Hall and shot him before getting into a passing car. She testified that the shooter wore a yellow hoodie, and that she saw a patron in the bar wearing a yellow hoodie. The jury heard this testimony and viewed a video of footage from surveillance cameras at the Tippin Inn, and apparently found Walker's testimony credible. Defense counsel extensively attempted to impeach Walker's testimony, eliciting discrepancies between her testimony and her statements to the police and her testimony at the preliminary examination and the first trial. However, Walker did not deviate from her essential testimony that she saw enough of the shooter's face to identify defendant as the shooter. Further, although defendant argues that the evidence established a motive for Samuels to kill Hall, testimony indicated that Samuels walked with a limp and dragged one leg, and that the shooter did not have such a disability, thereby enabling the jury to conclude that Samuels was not the shooter. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

D. COERCED VERDICT

Defendant's final argument is that the trial court improperly coerced a verdict by instructing the jury to continue deliberations despite receiving a fourth note from the jury expressing that it was "a hung jury." A trial court's decision to continue jury deliberations instead of declaring a mistrial because of jury deadlock is reviewed for an abuse of discretion. *Arizona v Washington*, 434 US 497, 509-510; 98 S Ct 824; 54 L Ed 2d 717 (1978); *People v Harvey*, 121 Mich App 681, 689; 329 NW2d 456 (1982). "An abuse of discretion occurs when the trial court chooses an outcome that falls outside the permissible range of principled outcomes." *People v Brown*, 294 Mich App 377, 385; 811 NW2d 531 (2011).

"Claims of coerced verdicts are reviewed on a case-by-case basis, and all of the facts and circumstances, as well as the particular language used by the trial judge, must be considered." *People v Malone*, 180 Mich App 347, 352; 447 NW2d 157 (1989). In this case, defendant does

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not contend that any specific comments by the trial court were inherently coercive,[4] but rather argues that it was coercive for the court to instruct the jury to continuing deliberating after the jury sent a fourth note indicating that it was deadlocked.

The trial court did not abuse its discretion in ordering the jury to continue in its deliberations. Before the trial court was able to respond to the fourth jury note expressing that the jury was hung, the jury sent another note asking for the opportunity to review the video exhibit. The trial court reasonably viewed that note as an indication that jurors were willing to take another look at the evidence to determine whether it would help resolve the deadlock. The jury's request indicated that it had not abandoned efforts to reach a unanimous verdict. It was reasonable for the court to accommodate the jury's request to review the requested evidence before declaring a mistrial. Although the trial court informed that parties that a mistrial would likely be necessary if the jury was unable to reach a verdict by the end of the day, the court did not communicate that view to the jury, or otherwise impose any time constraints on the jury for either reaching a verdict or continuing with deliberations. See *Malone*, 180 Mich App at 351-352. Under the circumstances, the trial court's decision to instruct the jury to continue deliberations was neither coercive nor outside the permissible range of principled outcomes.

Affirmed.

/s/ Christopher M. Murray
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello

[4] Defendant's brief references a statement by the trial court when responding to defense counsel's objection to allowing the jury to view the DVD video. The trial court expressed its belief that reasonable efforts should be made to accommodate the jury's request and then remarked, outside the presence of the jury, "in light of the fact that we already had one mistrial in regard to this matter, we don't want to have a second one." Because the statement was not made in the presence of the jury, it could not have had any coercive effect on the jury's verdict.

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People v Bennett

COA No. 303025

September 25, 2012

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 25, 2012
v	No. 303025 Oakland Circuit Court
ELLERY TERRENCE BENNETT, Defendant-Appellant.	LC No. 2010-233589-FC

Before: FORT HOOD, P.J., and METER and MURRAY, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), in connection with the stabbing death of his wife. He appeals by right. We affirm.

We first address defendant's argument that the evidence was insufficient to support his conviction of first-degree premeditated murder. A challenge to the sufficiency of the evidence is reviewed de novo on appeal. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). This Court must review the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997); *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). Circumstantial evidence and reasonable inferences drawn therefrom are sufficient to prove the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The trier of fact determines what inferences may be fairly drawn from the evidence and the weight to be accorded those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). All conflicts in the evidence are to be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The elements of first-degree premeditated murder are: "(1) the intentional killing of a human (2) with premeditation and deliberation." *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). "Premeditation and deliberation characterize a thought process undisturbed by hot blood." *People v Conklin*, 118 Mich App 90, 93; 324 NW2d 537 (1982). That is, the defendant must have "had sufficient time to think about his actions before the commission of the crime and evaluate the consequences and alternatives." *People v Wells*, 87 Mich App 402, 409; 274 NW2d 797 (1978). "[T]he minimum time necessary to exercise this process is incapable of

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exact determination." *People v Glover*, 154 Mich App 22, 28; 397 NW2d 199 (1986), overruled in part on other grounds by *People v Hawthorne*, 474 Mich 174, 180 n 3 (2006). It "may be merely seconds, or minutes, or hours, or more, dependent on the totality of the circumstances surrounding the killing." *Conklin*, 118 Mich App at 93. "Premeditation can be established from reasonable inferences drawn entirely from circumstantial evidence." *Wells*, 87 Mich App at 409. It may also be established from such factors as "(1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide." *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995).

Defendant's conviction arises from what was an apparent murder and suicide attempt involving defendant and his wife Lisa. Defendant admittedly killed Lisa, who died from multiple stab wounds. Evidence was presented that defendant left apparent suicide notes and tried to kill himself. When he did not die, he went to Beaumont Hospital for treatment of his wounds.

The prosecution presented evidence of a motive to kill Lisa, which is probative of premeditation and deliberation. *People v Youngblood*, 165 Mich App 381, 387; 418 NW2d 472 (1988). The evidence showed that defendant believed that Lisa was seeing other men and that Lisa had threatened to leave defendant and take their daughter with her. Approximately a week before Lisa was killed, she filed a complaint for divorce and requested sole legal and physical custody of their daughter. Financial difficulties limited defendant's ability to hire an attorney to contest the divorce and custody action. The evidence also showed that defendant admittedly wrote several letters allegedly after Lisa was killed.[1] In the letters, defendant admitted that Lisa's conduct and threats to leave him made him "furious" and engendered "hatred for Lisa." Defendant told Detective Gruenwald that "he couldn't live with" such a situation and, in other letters, defendant stated that there was "[n]o way" he would let that happen. In his apparent suicide notes, defendant stated that he hated Lisa for threatening to separate him from his daughter, that he could not let that happen, and that he had let Lisa get the better of him. Defendant also referred to Lisa's death as a "choice" he had made. He further stated that Lisa's interest in other men "caused the final result," thereby supporting an inference that he intentionally killed Lisa because of her infidelity.

Most indicative of defendant's intent is a letter defendant wrote to a business associate. In that letter, defendant stated that his associate was one of two people that defendant "couldn't stand." Defendant admitted that the second person he was referring to in the letter was Lisa. In the letter, defendant told the associate, "You avoided meeting me, which saved your life . . . . I was able to get one, my goal was to get both of you," thus indicating that defendant had set a goal of killing Lisa and intended to kill his associate as well. Evidence was presented that defendant had attempted to meet with the associate on the evening before Lisa's death, but was

[1] Defendant testified that he wrote the letters after the stabbing. However, defendant discarded the computer on which he wrote the letters, and this computer was never recovered.

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not successful. Detective Gruenwald testified that defendant stated that he had intended to kill the associate that evening if they had met.

Defendant also made conflicting statements, which are evidence of consciousness of guilt. *People v Cowell*, 44 Mich App 623, 625; 205 NW2d 600 (1973). Defendant initially told the police that he struck Lisa while they were both standing by the bed and she fell onto the bed. After an evidence technician testified that such a scenario was unlikely, defendant changed his story to coincide with the physical evidence and testified that he and Lisa were both on the bed when he stabbed her. Defendant admittedly tried to commit suicide by cutting himself after he stabbed Lisa, which is further evidence of consciousness of guilt. *United States v Cody*, 498 F3d 582, 591-592 (CA 6, 2007). The evidence showed that defendant had cuts to his neck, chest, and wrist, and that defendant told some hospital personnel and a police officer that his injuries were self-inflicted. However, he also used the cuts to his chest to create an issue of self-defense by claiming that Lisa had stabbed him in the chest. Moreover, he testified that she stabbed him so hard that he could feel the knife blade "hit the bone," but a treating physician described the chest wounds as "superficial." Evidence that defendant attempted to create a false defense, like other false exculpatory statements, also supported an inference of consciousness of guilt. *People v Dandron*, 70 Mich App 439, 442-443; 245 NW2d 782 (1976).

The foregoing evidence, taken together, was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant intentionally killed Lisa with premeditation and deliberation.

Defendant also suggests that the jury's verdict is against the great weight of the evidence, but he did not preserve this argument by raising it in a motion for a new trial. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). Therefore, our review of this issue is limited to plain error affecting defendant's substantial rights. *Id.* "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id.* at 218-219. In light of the evidence of defendant's admitted hatred for Lisa, his motive to kill her because of infidelity, his desire to prevent his separation from his daughter, his letters evidencing a premeditated intent to kill Lisa, his inconsistent statements to the police, and the physical evidence that contradicted defendant's claim of self-defense, the jury's verdict is not against the great weight of the evidence. Thus, defendant has failed to demonstrate a plain error affecting his substantial rights.

We next address defendant's argument that the trial court improperly allowed Sylvia Wasson to offer hearsay testimony that, shortly before Lisa's death, Lisa told Wasson that defendant had threatened to kill her. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). An abuse of discretion occurs when the court selects an outcome that is outside the range of reasonable and principled outcomes. *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007). "When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo." *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003).

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Assuming without deciding that Lisa's statement to Wasson that defendant had threatened to kill her should not have been admitted, we find no basis for relief because it is clear that the statement was not outcome determinative. A preserved nonconstitutional error in the admission of evidence is presumed to be harmless. The error justifies reversal only if it is more probable than not that it determined the outcome of the case. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). An error is not outcome determinative unless it undermines the reliability of the verdict in light of the untainted evidence. *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001).

First, Wasson's testimony was cumulative evidence because defendant's mother-in-law testified that Lisa told her the same thing. That a hearsay statement is cumulative "is an indicator that the error was not highly prejudicial, particularly in the presence of other corroborating evidence." *People v Gursky*, 486 Mich 596, 623; 786 NW2d 579 (2010). Second, there was substantial other corroborating evidence of defendant's motive and intent to kill Lisa. In defendant's letter to his business associate, defendant stated that the associate was one of two people that he "couldn't stand." Defendant admitted that the second person he was referring to in the letter was Lisa. There was evidence that defendant attempted to meet with his associate on the night Lisa was killed, but was not successful. Defendant stated in his letter, "You avoided meeting me, which saved your life . . . . I was able to get one, my goal was to get both of you." This statement indicates that defendant intended to kill his associate just as he had killed Lisa. In another letter left by defendant, defendant stated that Lisa's interest in other men "caused the final result," an indication that he intentionally killed her because of her infidelity. In a letter to his daughter, defendant stated that he was "very sorry for the choice I made." In a letter to some friends, defendant stated that he hated Lisa for threatening to separate him from his daughter, that he could not let that happen, that he had let Lisa get the better of him, and that he made a poor "choice." These various statements indicate that defendant made a deliberate decision to kill Lisa.

Additionally, evidence contradicted defendant's claim that he acted in self-defense. Defendant told Officer St. Germaine that all of his injuries were self-inflicted. Defendant told Officer Fisher that Lisa had attacked him while they were standing by the bed, that he was able to get the knife away from her and stabbed her, and that she fell onto the bed. After Officer Fedoronko testified that such a scenario was unlikely given the absence of evidence of arterial spurting on the floor or wall, defendant changed his story to coincide with the physical evidence, testifying that he and Lisa were both on the bed when he stabbed her.

In light of the foregoing evidence, any error in the admission of Lisa's statement that defendant had threatened to kill her was not outcome determinative. *Lukity*, 460 Mich at 495-496. The statement does not undermine the reliability of the verdict in light of the untainted evidence that defendant committed a premeditated killing.

Next, we address defendant's claim that the prosecutor improperly appealed to the jury's sympathy for the victim during opening statement and closing argument. To preserve a claim of prosecutorial misconduct, the defendant must make "a timely, contemporaneous objection and request for a curative instruction." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Defendant did not object to the prosecutor's remarks during closing argument, leaving that issue unpreserved. We review unpreserved claims of prosecutorial misconduct for plain

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error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Goodin*, 257 Mich App 425, 431; 668 NW2d 392 (2003). Although defendant did object to the prosecutor's remark during opening statement, he did not request a curative instruction or any other form of relief. To the extent that this issue could nevertheless be considered preserved, we review the record de novo to determine whether defendant was denied a fair and impartial trial. *People v Akins*, 259 Mich App 545, 562; 675 NW2d 863 (2003).

"The purpose of an opening statement is to tell the jury what the advocate proposes to show." *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976) (KELLY, J., concurring), aff'd sub nom *People v Tilley*, 405 Mich 38 (1979). During closing argument, the prosecutor may argue the evidence and all reasonable inferences therefrom as it relates to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). He may not inject "unfounded or prejudicial innuendo into the proceedings." *People v George*, 130 Mich App 174, 180; 342 NW2d 908 (1983). Specifically, the "prosecutor may not appeal to the jury to sympathize with the victim." *People v Unger*, 278 Mich App 210, 237; 749 NW2d 272 (2008). Such arguments are improper where they invite the jurors to suspend their power of judgment and decide the case based on their sympathy for the victim. *People v Hoffman*, 205 Mich App 1, 21; 518 NW2d 817 (1994). Opening statements and closing arguments are not evidence, *People v Bailey*, 451 Mich 657, 681; 549 NW2d 325 (1996), amended 453 Mich 1204 (1996), and the prejudicial effect of most inappropriate prosecutorial statements can be cured by a cautionary instruction, *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009), such as an instruction that counsel's arguments are not evidence. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993).

In his opening statement, the prosecutor discussed the elements of the offense. He then turned to a summary of the evidence, beginning with an introduction to the victim. He stated:

> Lisa Bennett. You have met the defendant, Ellery Bennett. He's here in the courtroom. Lisa Bennett cannot be here to meet you in person. Lisa Bennett will not see her children grow up. Lisa Bennett will not enjoy the things that we all look forward to in life.

These statements are factually accurate. But the fact that Lisa had been deprived of her life and the joys it could have brought her had no bearing on whether defendant intentionally killed her or acted with premeditation and deliberation, and thus improperly appealed to the jury's sympathy. However, these were but two statements uttered during a lengthy opening statement, at the beginning of a five-day trial. Given their brief and isolated nature, they "did not likely deflect the jury's attention from the evidence presented in this case." *Unger*, 278 Mich App at 237. Further, the trial court gave preliminary and final instructions that opening statements and closing arguments are not evidence, that the case is to be decided only on the evidence, and that the jury must not let its decision be influenced by sympathy. The trial court's instructions were sufficient to protect defendant's right to a fair trial. Accordingly, the prosecutor's remarks during opening statement do not require reversal.

The prosecutor began his closing argument by thanking the jurors for their service. He stated:

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> The first thing I would like to say to you is the first thing I said to you when you were seated as the jury, and that's to thank you for doing your service. On behalf of Lisa Bennett's family and friends that are in the courtroom and have been here during trial, I would like to thank you for doing your duty.

There is nothing in this simple expression of appreciation for the jurors' time and attention to suggest that the prosecutor was trying to persuade the jury to decide this case based on something other than the evidence that was presented in court. Thus, this brief statement was not plain error. Even if it could be viewed as an improper appeal to sympathy for the victim and her family, the trial court's instructions were sufficient to ameliorate any prejudicial effect and protect defendant's substantial rights.

Defendant's final issue is that his right to a public trial was violated when some of his relatives were excluded from the courtroom during jury voir dire. Defendant did not assert his right to a public trial in the trial court or otherwise object to any closure of the courtroom. Accordingly, this issue is unpreserved and, therefore, is reviewed for plain error affecting defendant's substantial rights. *People v Vaughn,* ___ Mich ___; ___ NW2d ___ (Docket No. 142627, decided July 9, 2012), slip op at 20-21; *Carines*, 460 Mich at 763-764.

A criminal defendant has a constitutional right to a public trial. US Const, Am VI; Const 1963, art 1, § 20. A public trial is "'one which is not limited or restricted to any particular class of the community, but is open to the free observation of all.'" *People v Greeson,* 230 Mich 124, 147; 203 NW 141 (1925), quoting 8 RCL, § 29, p 75. The Sixth Amendment right to a public trial extends to jury selection. *Presley v Georgia,* 558 US 209; 130 S Ct 721, 724; 175 L Ed 2d 675 (2010). "A defendant's Sixth Amendment right to a public trial is limited, and there are circumstances that allow the closure of a courtroom during any stage of a criminal proceeding[.]" *Vaughn*, ___ Mich ___, slip op at 9. The requirements for total closure are "(1) The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) it must make findings adequate to support the closure." *People v Kline,* 197 Mich App 165, 169; 494 NW2d 756 (1992). When there is a partial rather than total closure, "only a substantial, rather than a compelling, reason for the closure is necessary." *Id*. at 170. However, the *Kline* Court opined that the removal of family members should be based on compelling reasons. *Id.* at 171 n 2.

The record shows that during voir dire, neither party requested closure of the courtroom and the court never ordered that the courtroom be closed. Therefore, the record does not establish a plain error. Defendant has attempted to show an error by submitting affidavits from relatives indicating that a sheriff's deputy or another person prohibited them from entering the courtroom during voir dire. Appellate review is limited to the record established by the trial court, and an expansion of the record on appeal is impermissible. *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 4993 (1999). Even if these affidavits are considered, however, defendant has not shown a right to relief. Assuming that improper closure occurred and that the error affected defendant's substantial rights, relief is not warranted unless the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines*, 460 Mich at 763. Defendant does not claim, nor does the record suggest, that defendant is actually innocent. "Because the closure of the

courtroom was limited to a vigorous voir dire process that ultimately yielded a jury that satisfied both parties," it did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. *Vaughn*, ___ Mich ___, slip op at 25-26. Therefore, defendant is not entitled to relief on the basis of this unpreserved issue.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Patrick M. Meter
/s/ Christopher M. Murray

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People v Williams

COA No. 301336

October 9, 2012

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 9, 2012
v	No. 301336 Wayne Circuit Court
SHAVONTAE LADON WILLIAMS, Defendant-Appellant.	LC No. 09-030893-FC

Before: MURRAY, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317,[1] and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to a prison term of 25 to 40 years for the murder conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from the October 6, 2009, shooting death of 17-year-old Nathan Jimerson in Detroit. Defendant was tried jointly with codefendant Rayshun Williams (who is defendant's cousin), before separate juries. The evidence showed that Jimerson was shot 25 times. According to witnesses, Rayshun and Jimerson were involved in a verbal confrontation earlier in the day, which angered Rayshun. Defendant was also present during this earlier confrontation. Witnesses testified that Rayshun and defendant both later approached Jimerson on the street and shot him, with Rayshun using an assault rifle and defendant using a shotgun. Evidence collected from the scene indicated that a third weapon may also have been involved. Defendant presented an alibi defense at trial, but also alternatively argued that the evidence collected from the scene suggested that the shooting occurred during a shootout, not as part of an execution-style killing as alleged by the prosecution, and accordingly, Jimerson's shooting death was not premeditated. The jury acquitted defendant of first-degree murder, but convicted him of the lesser offense of second-degree murder, as well as felony-firearm. Rayshun was acquitted of all charges.

[1] Defendant was charged with first-degree premeditated murder, MCL 750.316(1)(a). The jury convicted him of the lesser included offense of second-degree murder.

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I. MISTRIAL

Defendant first argues that the trial court abused its discretion by denying his motions for a mistrial after the jury indicated that it was unable to reach a verdict. The grant or denial of a mistrial is generally within the sound discretion of the trial court. *People v Lett*, 466 Mich 206, 216; 644 NW2d 743 (2002). "The trial judge's decision to declare a mistrial when he considers the jury deadlocked is accorded great deference by a reviewing court." *Id. at* 213. "At most, . . . the inquiry . . . turns upon [the] determination [of] whether the trial judge was entitled to conclude that the jury in fact was unable to reach a verdict." *Id.* (citation omitted).

The record discloses that on the first full day of deliberations,[2] the jury sent out a note at 3:50 p.m. stating that it was not likely to reach a verdict that day and asking if it could be excused for the day. The trial judge was unavailable and, therefore, an acting judge agreed to excuse the jury and directed it to return the next day to resume deliberations. The following day, after deliberating for approximately 45 minutes, the jury sent out a note stating that it was unable to reach a verdict. The acting judge denied defendant's request for a mistrial and instead gave the deadlocked jury instruction in accordance with CJI2d 3.12. The judge also advised the jury that playing cards and magazines would be removed from the jury room. Shortly after noon that Friday, the jury sent out another note explaining that there were "emotional dynamics" going on in the jury room, resulting in discord among the jurors and causing some jurors to cry, and that one juror had asked to go home. The acting judge again denied defendant's renewed motion for a mistrial, but agreed to send the jury home early that afternoon because he did not believe that continued deliberations were likely to be productive that afternoon.

When the jury returned the following Monday, defendant continued to argue that the jury was hung. The trial judge addressed the jury and explained that it was not unusual for emotions to run high in a criminal trial, and instructed the jury in accordance with CJI2d 3.11. Approximately 80 minutes after the jury was excused to resume deliberations, it returned its verdict finding defendant guilty of second-degree murder and felony-firearm.

We conclude that neither the acting judge nor the trial judge abused his discretion by having the jury continue to deliberate and refusing to declare a mistrial. In *Arizona v Washington*, 434 US 497, 510; 98 S Ct 824; 54 L Ed 2d 717 (1978), the United States Supreme Court observed:

> At the other extreme is the mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict, long considered the classic basis for a proper mistrial. The argument that a jury's inability to agree establishes reasonable doubt as to the defendant's guilt, and therefore requires acquittal, has been uniformly rejected in this country. Instead, without exception, the courts have held that the trial judge may discharge a genuinely deadlocked jury and

[2] The record indicates that the jury was excused to begin deliberations late in the afternoon of September 15, 2010. Although it is unclear how long the jury actually deliberated that day, later comments on the record indicate that the period was brief.

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> require the defendant to submit to a second trial. This rule accords recognition to society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws.
>
> Moreover, in this situation there are especially compelling reasons for allowing the trial judge to exercise broad discretion in deciding whether or not "manifest necessity" justifies a discharge of the jury. On the one hand, if he discharges the jury when further deliberations may produce a fair verdict, the defendant is deprived of his "valued right to have his trial completed by a particular tribunal." But if he fails to discharge a jury which is unable to reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors. If retrial of the defendant were barred whenever an appellate court views the "necessity" for a mistrial differently from the trial judge, there would be a danger that the latter, cognizant of the serious societal consequences of an erroneous ruling, would employ coercive means to break the apparent deadlock. Such a rule would frustrate the public interest in just judgments. The trial judge's decision to declare a mistrial when he considers the jury deadlocked is therefore accorded great deference by a reviewing court. [Footnotes omitted.]

In this case, the jury had deliberated for a little more than one full day when the acting judge denied defendant's initial request for a mistrial and instead gave the deadlocked jury instruction. Considering the four-week length of the trial, it was reasonable to conclude that the jury had not exhausted all efforts to fully consider and resolve the differing views of the jurors in relation to the volume of evidence and testimony that had been presented. Further, there were indications that some jurors may have been distracted by playing cards and magazines, and as a consequence the judge ordered those items to be removed from the jury room. There was little basis for believing that the case had reached a point where the jurors had made all efforts to reach a verdict and simply could not resolve their different, strongly held beliefs. It was also not an abuse of discretion for the acting judge to excuse the jury early that afternoon without declaring a mistrial. The judge had an appropriate basis for believing that further deliberations that Friday afternoon were not likely to be productive, but that the jury was still capable of resolving its differences and reaching a verdict.

Similarly, when the jury and the trial judge returned the following Monday, it was not unreasonable for him to provide appropriate guidance when instructing the jury to continue deliberating. The judge's instructions were responsive to the jury's last note from the previous Friday. Defendant argues that it is apparent that the court's refusal to declare a mistrial and its insistence that the jury continue deliberating had a coercive impact on the jury, because the jury reached a verdict approximately 80 minutes after the court instructed it to continue deliberating. He also argues that the guilty verdict of second-degree murder was incompatible with the evidence, thereby indicating that the jury reached a compromise verdict because it felt compelled to come to an agreement. We disagree. First, defendant has not identified any particular aspect of the trial court's instruction that was inherently coercive. Second, contrary to what defendant asserts on appeal, a second-degree murder verdict was not completely out of the question. Indeed, during closing argument, defense counsel argued that there was evidence that three guns

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may have been involved, which suggested that Jimerson may have been shot during a shootout, not as part of an execution-style shooting, and thus was not shot with premeditation and deliberation. Third, the fact that the jury reached a verdict a little more than an hour after the court's reinstruction does not compel the conclusion that the verdict was coerced. Nothing in the record suggests that the jurors were not able to simply resolve their differences and freely come to a verdict with the guidance it received from the court.

Accordingly, we reject defendant's claim that either the acting judge or the trial judge abused his discretion by refusing to declare a mistrial.

Defendant also argues that the judges' instructions, which were based on CJI2d 3.11 and CJI2d 3.12, were themselves coercive. Because defendant did not object to the instructions below, this claim is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *People v Nash*, 244 Mich App 93, 97; 625 NW2d 87 (2000). Although defendant generally asserts that an *Allen*[3] charge has been criticized in other jurisdictions, see *United States v Rey*, 811 F2d 1453, 1458 (CA 11, 1987), the instructions given by the trial court were modified versions of the *Allen* charge. See *People v Sullivan*, 392 Mich 324; 220 NW2d 441 (1974). Our Supreme Court has confirmed that these instructions are appropriate. *People v Rouse*, 477 Mich 1063; 728 NW2d 457 (2007), and *People v Pollick*, 448 Mich 376, 386; 531 NW2d 159 (1995). Further, as previously indicated, defendant has not identified any particular aspect of the instructions that can be considered inherently coercive. Accordingly, defendant has not established a plain error.

We also reject defendant's argument that the trial court erred by failing to inquire into possible juror misconduct after one of the jury notes suggested that one or more jurors may be exerting undue influence upon other jurors. Defendant's failure to object on that basis below or otherwise request that the court make such an inquiry leave this issue unpreserved. Accordingly, defendant must establish a plain error affecting his substantial rights. *Nash*, 244 Mich App at 97.

A trial court's ability to inquire into the deliberative process of a jury is very limited. In *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997), this Court explained:

> A trial court's denial of a motion for a mistrial based on juror misconduct is an abuse of discretion only where the misconduct was such that it affected the impartiality of the jury or disqualified its members from exercising the powers of reason and judgment. A new trial will not be granted if no substantial harm was done thereby to the defendant, even though the misconduct may merit a rebuke from the trial court if brought to its notice. *People v Rohrer*, 174 Mich App 732, 740; 436 NW2d 743 (1989). Misconduct can be demonstrated with evidence pertaining to outside or extraneous influences, but cannot be demonstrated with evidence indicating matters that inhere in the verdict, such as juror thought processes and interjuror inducements. *People v Smith*, 106 Mich App 203, 211-212; 307 NW2d 441 (1981).

[3] *Allen v United States*, 164 US 492; 17 S Ct 154; 41 L Ed 528 (1896).

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Similarly, MRE 606(b) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

The jury's note does not suggest that any external influences were affecting its deliberations. Rather, it alludes only to interjuror inducements. Such influences are part of the jury's deliberative process, which is not subject to inquiry. Further, the trial judge appropriately addressed any concerns of interjuror pressures by advising the jury during reinstruction that "none of you should give up your honest opinion about the case just because other jurors disagree with you or just for the sake of reaching a verdict." Moreover, the jury was polled and all jurors agreed that they had voted to convict defendant of second-degree murder and felony-firearm. Accordingly, defendant has not shown any error, plain or otherwise, in connection with this issue. Compare *People v Echavarria*, 233 Mich App 356, 358-362; 592 NW2d 737 (1999).

II. PUBLIC TRIAL

Defendant lastly argues that reversal is required because the trial court's exclusion of the public from the courtroom during jury voir dire violated his right to a public trial. Although defendant's failure to object to the closure of the courtroom during voir dire did not result in a waiver of this issue, defendant is not entitled to relief unless he satisfies these requirements: (1) that an error occurred, (2) that the error was "plain," (3) that the plain error affected his substantial rights, and (4) that the error either resulted in a conviction of an actually innocent defendant or it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *People v Vaughn*, 491 Mich 642, 665; ___ NW2d ___ (2012). In *Vaughn*, the Supreme Court held that closure of a courtroom to the public during voir dire is a plain structural error that satisfies the first three requirements of this test. *Id.* at 665-666. Accordingly, resolution of this issue comes down to the fourth requirement of the plain-error test. Defendant has not shown that the error wrongly resulted in his conviction because he is actually innocent. Therefore, to be entitled to relief, defendant must show that the courtroom closure seriously affected the fairness, integrity, or public reputation of the proceedings. *Id*. at 667.

In *Vaughn*, 491 Mich at 667-669, the Supreme Court explained that the closure of the courtroom during voir dire did not seriously affect the proceedings in that case, stating:

> The United States Court of Appeals for the Second Circuit has recognized that "it does not follow that every temporary instance of unjustified exclusion of the public—no matter how brief or trivial, and no matter how inconsequential the

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> proceedings that occurred during an unjustified closure—would require that a conviction be overturned." While the Second Circuit's analysis "does not dismiss a defendant's claim on the grounds that the defendant was guilty anyway or that he did not suffer 'prejudice' or 'specific injury,'" it examines "whether the actions of the court and the effect that they had on the conduct of the trial deprived the defendant—whether otherwise innocent or guilty—of the protections conferred by the Sixth Amendment." The goals sought by these protections include (1) ensuring a fair trial, (2) reminding the prosecution and court of their responsibility to the accused and the importance of their functions, (3) encouraging witnesses to come forward, and (4) discouraging perjury.
>
> In reviewing the closure of a courtroom during the first day of jury selection, the Second Circuit determined that the third and fourth protected values were "not implicated by voir dire because no witnesses testified." The Second Circuit then analyzed the remaining two protected values within the particular circumstances of the case before it and concluded that "limiting presence at the voir dire proceedings to only the attorneys, judge, defendant, and prospective jurors for one afternoon did not subvert these values."
>
> A review of the circuit court transcript during defendant's voir dire shows that both parties engaged in a vigorous voir dire process, that there were no objections to either party's peremptory challenges of potential jurors, and that each party expressed satisfaction with the ultimate jury chosen. Moreover, because "the *venire* is drawn from the public itself," individual veniremembers "remain public witnesses during much of the *voir dire* proceedings, listening to the court's questions and observing the conduct of counsel, until such time as they are chosen for the jury, disqualified, or excused." Thus, "the presence of the *venire* lessens the extent to which [the court's] closure implicates the defendant's public trial right because the *venire*, derived from and representative of the public, guarantees that the *voir dire* proceedings will be subject to a substantial degree of continued public review." Because the closure of the courtroom was limited to a vigorous voir dire process that ultimately yielded a jury that satisfied both parties, we cannot conclude that the closure "seriously affected the fairness, integrity, or public reputation of judicial proceedings." Defendant is not entitled to a new trial on the basis of his forfeited claim of error. [Footnotes omitted.]

In this case, like in *Vaughn*, it is apparent that there were a large number of potential jurors because some had to be seated in the gallery area. Those jurors were also members of the public at large. While defendant's family members were apparently not permitted inside the courtroom, there is no indication that their exclusion during voir dire seriously affected the fairness, integrity, or public reputation of the voir dire process. Defendant has not explained how their absence during the jury selection process affected the fairness or integrity of the proceeding. Accordingly, defendant is not entitled to relief on the basis of this unpreserved issue.

Defendant alternatively argues that trial counsel was ineffective for not objecting to the closure of the courtroom. Following an evidentiary hearing, the trial court found that defendant

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had not overcome the presumption that trial counsel reasonably failed to object as a matter of trial strategy, or shown that he was prejudiced by counsel's failure to object. Whether defendant was denied the effective assistance of counsel is a mixed question of fact and constitutional law. This Court reviews the trial court's factual findings for clear error, and its constitutional determinations de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). 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). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

In this case, defendant was unable to establish whether defense counsel purposefully declined to object as a matter of strategy because counsel had died before the evidentiary hearing. However, as in *Vaughn*, there is every reason to believe that the jury selection process was not hindered by the absence of spectators from the courtroom. Therefore, even if trial counsel should have objected, defendant has not shown that the closure adversely affected either the voir dire process or the ultimate jury that was selected. Accordingly, defendant is unable to establish the requisite prejudice to succeed on a claim of ineffective assistance of counsel.

Affirmed.

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens

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People v Daniels

COA No. 300354

October 11, 2012

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 11, 2012
v AARON LAMONT DANIELS, Defendant-Appellant.	No. 300354 Wayne Circuit Court LC No. 10-004178-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v MARTEZ ROMAL BICKHAM, Defendant-Appellant.	No. 300952 Wayne Circuit Court LC No. 10-004178-FC

Before: K. F. KELLY, P.J., and MARKEY and SERVITTO, JJ.

PER CURIAM.

Defendants Aaron Lamont Daniels and Martez Romal Bickham were tried jointly before separate juries. Defendant Daniels was convicted of first-degree premeditated murder, MCL 750.316(1)(a), first-degree felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, assault with intent to rob while armed,[1] MCL 750.89, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant Daniels to concurrent terms of life imprisonment for one count of first-degree murder supported by two theories, and 20 to 40 years for the armed robbery conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction.

[1] The court subsequently vacated defendant Daniels's conviction for assault with intent to rob while armed.

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Defendant Bickham was convicted of second-degree murder, MCL 750.317, armed robbery, assault with intent to rob while armed, and felony-firearm. The trial court sentenced defendant Bickham to concurrent prison terms of 25 to 40 years for the murder conviction, 15 to 30 years for the robbery and assault convictions, and a consecutive two-year term for the felony-firearm conviction.

Defendant Daniels appeals as of right in Docket No. 300354, and defendant Bickham appeals as of right in Docket No. 300952. The appeals have been consolidated for this Court's consideration. *People v Daniels*, unpublished order of the Court of Appeals, entered December 15, 2010 (Docket Nos. 300354 and 300354). We affirm in both appeals.

I. DOCKET NO 300354

A. SUBSTITUTE COUNSEL

Defendant Daniels initially contends that the trial court erred by denying his request for substitute trial counsel, which he made approximately three weeks before trial was scheduled to start. This Court reviews for an abuse of discretion a "trial court's decision regarding substitution of counsel." *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

> "An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic." [*Id.*, quoting *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991).]

We have reviewed the transcripts of the several pretrial hearings during which defendant Daniels, his appointed counsel, and the court discussed the relationship between Daniels and his appointed attorney. The transcripts reveal that the trial court solicitously invited defendant Daniels on several occasions to elaborate on his complaints concerning appointed counsel, but that defendant Daniels never specified any legitimate difference of opinion between them with regard to a fundamental trial tactic. The record also fails to disclose any inadequacy of representation, or absence of diligence or disinterest by appointed counsel. *People v Ginther*, 390 Mich 436, 441-442; 212 NW2d 922 (1973). To the contrary, appointed counsel regularly visited defendant Daniels in jail and spent substantial time preparing for his trial. The trial court, which had some familiarity with defendant Daniels's appointed counsel, characterized him as a very competent lawyer, a point that defendant Daniels conceded more than once. The primary strain that existed between defendant Daniels and appointed counsel stemmed from their arguments attributable to defendant Daniels's emotional state. However, defendant Daniels "may not purposely break down the attorney-client relationship by refusing to cooperate with his assigned attorney and then argue that there is good cause for a substitution." *Traylor*, 245 Mich App at 462 (internal quotation and citation omitted). Furthermore, the trial court observed on several occasions that a substitution of counsel close to trial likely would prejudice defendant Daniels. And the court suggested that any substitution of counsel shortly before the trial, a date

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scheduled for trial with another defendant and several attorneys, likely would unreasonably disrupt the proceedings.

Accordingly, we conclude that the trial court acted within its discretion in denying defendant Daniels's request for substitute counsel.

II. VOLUNTARY MANSLAUGHTER INSTRUCTION

Defendant Daniels argues that the trial court erred in denying his request for a voluntary manslaughter instruction as a lesser-included offense of murder. We disagree. We review de novo claims of instructional error. *People v Wade*, 283 Mich App 462, 464; 771 NW2d 447 (2009).

"[A]n inferior-offense instruction is appropriate only if the lesser offense is necessarily included in the greater offense; meaning, all the elements of the lesser offense are included in the greater offense, and *a rational view of the evidence would support such an instruction*." *People v Mendoza*, 468 Mich 527, 533; 664 NW2d 685 (2003) (emphasis added). "Manslaughter is an inferior offense of murder because manslaughter is a necessarily included lesser offense of murder." *Id.* "Manslaughter is murder without malice." *Id*. at 534:

> The act of killing, though intentional, is committed under the influence of passion or in heat of blood, produced by an adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control, and is the result of the temporary excitement, by which the control of reason was disturbed, rather than of any wickedness of heart or cruelty or recklessness of disposition. [*Id*. at 535 (internal quotation and citation omitted).]

"Thus, to show voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions." *Id*. at 535-536.

Our review of the record reveals no evidence reasonably substantiating any adequate provocation for the shooting of the decedent. In support of defendant Daniels's request for a voluntary manslaughter jury instruction, he proffered a defense theory grounded in anger that a Chevrolet Trailblazer driven by the decedent stopped in a Coney Island parking lot behind an old, white Mercedes driven by defendant Daniels and a Ford Taurus containing defendant Bickham. The record confirms that the decedent parked the Trailblazer behind the Mercedes and Taurus in anticipation of taking on a female passenger, but nothing in the record suggests that defendants approached the Trailblazer provoked by anger over being blocked into their parking spaces; instead, the record shows only that defendants approached the Trailblazer and confronted the decedent and robbery victim Rodrick Wilson, intending to deprive them of their property. With respect to the further defense suggestion that arguments outside the Trailblazer shortly before the shooting may have escalated tempers, some evidence showed that people who had

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disembarked from the Mercedes or Taurus were talking loudly or arguing, but the record reveals no evidence of any specific argument that could qualify as adequate or reasonable provocation for the robbery and shooting.[2] Moreover, no evidence of record suggests that the decedent or Wilson possessed a firearm or any kind of weapon. Accordingly, because the record reveals no factual circumstances that would potentially allow a jury to find defendant Daniels guilty of voluntary manslaughter, the trial court properly declined to instruct the jury on voluntary manslaughter as a lesser-included offense of second-degree murder.

II. DOCKET NO. 300952

A. PUBLIC TRIAL

Defendant Bickham first argues that the trial court's closure of the courtroom during voir dire violated his right to a public trial and amounts to a structural error mandating the reversal of his convictions. We disagree.

After the trial court directed the jury panel to enter the courtroom, defendant Bickham's attorney and the court shared the following colloquy:

> *[Defendant Bickham's counsel]*: Not to cause a lot of consternation, but . . . just for the record, . . . [*Presley v Georgia*, 558 US 209; 130 S Ct 721; 175 L Ed 2d 675 (2010)]. I believe it's improper for court officers to clear the courtroom in voir dire process. [*Presley*,] decided last April indicated that the family members or witnesses for the defendant can be present during voir dire.
>
> *The Court*: The Court is not excluding people from being in the courtroom. Right now the deputies are removing the spectators or people who are in the courtroom in order to allow that the jury panel of over fifty people be allowed in, and so that they are not intermixed with the audience, and so once the whole panel is in, those who fit separately from the jury can be allowed in. But we cannot bring a jury in with the number of people in this courtroom. They fill the bleachers, and in order to conduct voir dire, we need the jury panel to fit into the courtroom.

[2] Defendant Daniels also submits that some discussion or argument occurred concerning something that the decedent had asked for from 15-year-old Jazmine Young, in exchange for his driving Young and her friend Lakisha Crawley downtown. Young testified that the decedent "asked me to do something I didn't want to do," but denied that anyone inside the Trailblazer had broached the topic of oral sex. Wilson testified that the decedent and Young had agreed that "if [the decedent] could get [Young's] friend that's in trouble [downtown], they would see each other," and Crawley denied that the decedent and Young had touched each other inside the Trailblazer. Again, no evidence showed that the decedent or Wilson had conducted themselves during the ride in a manner that would qualify as reasonable provocation for the shooting and robbery.

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> At this point, there were no available seats to fit jurors in. So for that reason, those people have to be removed initially in order to bring in the panel.

After jury selection concluded, defendant Bickham's attorney and the court engaged in the following discussion:

> *[Defendant Bickham's counsel]*: Judge, I would just once again under [*Presley*], the other family members of the defendant, supporters and possible witnesses were not allowed to come back in, or were not allowed to be seated in the courtroom during voir dire after they were excluded for the seating.
>
> *The Court*: All right. Thank you. I would state that there was no additional request made after the court explained the situation, and that the jury panel being [a] fifty-two member panel filled the entire courtroom, except for the small bench that can hold two people. If there was a request for two people to be in, specifically because there was a crowd of probably fifty people in the courtroom, some may be family or friends, or some having to do with other cases, I have no idea who they were. But there was no ruling made on any request. It was not made. . . .

Because defendant Bickham's attorney never asked the trial court to readmit any spectators during jury selection, and instead only mentioned the courtroom closure after the jury selection was completed, he did not preserve this issue with a timely objection.

An unpreserved claim involving "a defendant's right to a public trial is subject to the forfeiture rule articulated in *People v Carines*," 460 Mich 750, 763; 597 NW2d 130 (1999). *People v Vaughn*, 491 Mich 642, 646; ___ NW2d ___ (2012).

> In analyzing a forfeited claim of error, a defendant is not entitled to relief unless he can establish (1) that the error occurred, (2) that the error was "plain," (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. [*Id.* at 654.]

A criminal defendant possesses "the right to . . . a public trial" pursuant to the federal and Michigan constitutions. *Id.* at 650, citing US Const, Ams VI and XIV, and Const 1963, art 1, § 20. The "right to a public trial . . . encompasses the right to public voir dire proceedings." *Vaughn*, slip op at 6. In *Vaughn*, our Supreme Court analyzed a defendant's unpreserved claim that his right to a public trial was violated when the trial court closed the courtroom to the public during jury selection. The Court stated that plain error had occurred given the trial court's neglect to "advance an overriding interest . . . likely to be prejudiced" absent closure of the courtroom during voir dire. *Id.* at 665 (internal quotation and citations omitted). The Court also found "that a plain structural error satisfies the third *Carines* prong" because "structural errors are intrinsically harmful, without regard to their effect on the outcome." *Id.* at 665-666 (internal quotation and citation omitted).

However, the Court cautioned that "even if [a] defendant can show that the error satisfied the first three *Carines* requirements," an appellate court "must exercise discretion and only grant

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. . . a new trial if the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.* (internal quotation and citation omitted).[3] The Court in *Vaughn*, *Id.* at 668, held as follows that the courtroom closure in that case did not *seriously* and adversely impact those judicial proceedings:

> A review of the circuit court transcript during defendant's voir dire shows that both parties engaged in a vigorous voir dire process, that there were no objections to either party's peremptory challenges of potential jurors, and that each party expressed satisfaction with the ultimate jury chosen. Moreover, because "the *venire* is drawn from the public itself," individual veniremembers "remain public witnesses during much of the *voir dire* proceedings, listening to the court's questions and observing the conduct of counsel, until such time as they are chosen for the jury, disqualified, or excused." [*United States v Gupta*, 650 F3d 863, 870 (CA 2, 2011).] Thus, "the presence of the *venire* lessens the extent to which (the court's) closure implicates the defendant's public trial right because the *venire*, derived from and representative of the public, guarantees that the *voir dire* proceedings will be subject to a substantial degree of continued public review." [*Id.* at 870-871.] Because the closure of the courtroom was limited to a vigorous voir dire process that ultimately yielded a jury that satisfied both parties, we cannot conclude that the closure "seriously affected the fairness, integrity, or public reputation of judicial proceedings." [*Carines*, 460 Mich at 774.] . . .

In *People v Russell*, ___ Mich App ___; ___ NW2d ___ (Docket No. 304159, issued September 4, 2012), this Court considered whether the defense counsel was ineffective for "failing to object to the [trial court's] partial closure of the courtroom during jury voir dire." *Id.*, slip op at 6. We noted:

> A defendant has the right to a public trial, which includes the right to have the courtroom open to the public during jury voir dire. *Vaughn*, [491 Mich 650-653]. However, the effect of a partial closure of trial does not reach the level of total closure and only a substantial, rather than compelling, reason for the closure is required. *People v Kline*, 197 Mich App 165, 170; 494 NW2d 756 (1992).
>
> The record reveals that the voir dire proceedings were partially closed as a result of the limited capacity of the courtroom. The limited capacity of the courtroom was a substantial reason for the closure, and thus, this partial closure did not deny defendant his right to a public trial. [*Russell*, slip op at 7.]

Here, as in *Vaughn*, the trial court closed the courtroom only during a probing voir dire of the prospective jurors; neither the prosecutor nor either defense counsel objected to "any peremptory challenges of potential jurors," and neither the prosecutor nor either defense counsel voiced objections to the juries selected. Therefore, as in *Vaughn*, we cannot conclude that the

[3] No indication exists that defendant Bickham is actually innocent.

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closure seriously affected the fairness, integrity, or public reputation of judicial proceedings. Similarly, as in *Russell*, the trial court cited the limited courtroom capacity as the basis for the partial courtroom closure during voir dire. Defendant Bickham's attorney did not dispute the trial court's courtroom-space explanation. The limited capacity of the courtroom was a substantial reason for the closure, and, thus, this partial closure did not deny defendant his right to a public trial. Accordingly, defendant is not entitled to relief on appeal with respect to this issue.

B. VERDICT FORM

Defendant Bickham next complains that the verdict form improperly precluded the jury from finding him not guilty of second-degree murder, as a lesser offense of first-degree felony murder and that defense counsel was ineffective in failing to raise a timely objection to the jury form. We disagree. The record reflects that defendant Bickham's counsel affirmatively expressed approval of the jury instructions and verdict form, which constitutes a waiver that extinguishes any appellate claims of verdict-form-related error. *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000); *People v Dobek*, 274 Mich App 58, 65-66; 732 NW2d 546 (2007). Furthermore, our review of the verdict form reveals that, contrary to the defective verdict form in *Wade*, 283 Mich App at 464-468, on which defendant Bickham premises his appellate argument, the present form "included a box through which the jury could have found defendant not guilty of [first-degree felony murder and not guilty of] second-degree murder." *Id.* at 468. The form in the record reflects that defendant Bickham's jury returned the following verdict:

Count No. 2

POSSIBLE VERDICTS:

You may return only one verdict on this charge. Mark only one box on this charge.

[ ] Not Guilty

Or

[ ] Guilty of Felony Murder (while in the perpetration or attempted perpetration of an Armed robbery)

-OR- Guilty of the Lesser Offense of:

[X] Second-Degree Murder

Thus, the verdict form was proper and counsel was not ineffective for neglecting to raise a groundless objection to the proper verdict form. *People v Comella*, ___ Mich App ___; ___ NW2d ___ (Docket No. 301458, issued May 24, 2012), slip op at 7.

C. RIGHT OF CONFRONTATION

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Defendant Bickham additionally avers that the prosecutor's introduction of a Coney Island surveillance video recording enhanced by a witness who did not testify at trial violated his constitutional right of confrontation. We disagree. An appellate court generally reviews "for an abuse of discretion a circuit court's decision concerning the admission of evidence," but considers de novo preliminary questions of constitutional law. *People v Dinardo*, 290 Mich App 280, 287; 801 NW2d 73 (2010).

> A defendant has the right to be confronted with the witnesses against him or her. US Const, Am VI; Const 1963, art 1, § 20; *Crawford*[*v Washington*, 541 US 36, 41; 124 S Ct 1354; 158 L Ed 2d 177 (2004)]. 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, 10-11; 742 NW2d 610 (2007) (emphasis added, some citations omitted).]

In *Crawford*, 541 US at 51-52, the United States Supreme Court offered the following guidance for discerning whether a statement qualified as "testimonial":

> An accuser who makes a formal statement to government officers bears testimony . . . .
>
> Various formulations of this core class of "testimonial" statements exist: *ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; [and] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition—for example, *ex parte* testimony at a preliminary hearing. [Internal quotations and citations omitted.]

Defendant Bickham theorizes that a blue dot oval enhancement to the Coney Island surveillance video played for the jury meets the definition of a hearsay "statement" in MRE 801(a), specifically an "assertion that the person circled at the beginning of the video was the same person circled at the back door of . . . [the] Trailblazer at the point when . . . Wilson claimed he was robbed" by defendant Bickham and that the introduction of the video without accompanying testimony by the police sergeant who placed the blue dot oval in the enhanced video recording constituted a violation of defendant Bickham's right of confrontation.

Even assuming that the enhanced Coney Island surveillance video embodied testimonial evidence violative of defendant Bickham's right of confrontation, we conclude that after a thorough review of the entire record, "it is clear beyond a reasonable doubt that a rational jury would have found . . . defendant [Bickham] guilty absent the error." *People v Shepherd*, 472

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Mich 343, 347-348; 697 NW2d 144 (2005) (internal quotation and citations omitted). Other evidence, which defendant Bickham does not specifically challenge on appeal, amply establishes his guilt of aiding and abetting the decedent's murder and his armed robbery of Wilson. Wilson testified that at the Coney Island, defendant Bickham opened the Trailblazer's rear passenger door nearest Wilson, approached him, pointed a black revolver at Wilson's stomach, said "We about to eat," "took the phone out of [Wilson's] lap, and then put his hand in [Wilson's] pocket" and took $10 or $20." Wilson then saw defendant Daniels produce a dark gun containing a clip, point it at the decedent's head, and use the gun to strike the decedent's head. Wilson recalled seeing defendant Bickham standing "right . . . next to" defendant Daniels and hearing defendant Bickham announce, "We need the car, too." Wilson observed that as the decedent began to drive away, defendant Bickham grabbed the Trailblazer's interior, "grabbed [the decedent's] neck, and put [the Trailblazer] in park," shortly before defendant Daniels shot the decedent. Wilson testified that he had a clear view of defendant Bickham during the robbery and shooting, and Wilson identified defendant Bickham at trial. Moreover, the prosecutor initially introduced into evidence and played for the jury an unenhanced copy of the Coney Island surveillance video, the admissibility of which defendant Bickham does not challenge, thereafter introduced and played for the jury a copy of the enhanced Coney Island surveillance video, and during deliberations the jury specifically asked to see only the unenhanced Coney Island surveillance video, which the trial court twice played for the jury. Accordingly, an error in the introduction of the enhanced video was harmless.

D. PROSECUTOR'S CONDUCT

Finally, defendant Bickham argues that the prosecutor deprived him of a fair trial by injecting two inappropriate instances of argument during closing arguments. We disagree. Defendant Bickham failed to preserve either claim of misconduct because he lodged no timely, contemporaneous objection to the allegedly improper arguments by the prosecutor. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). We review for plain error unpreserved claims of prosecutorial misconduct. *Id.*

We review a prosecutor's conduct in accordance with the following standards:

> Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. 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. [*People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled on other grounds in *Crawford*, 541 US at 64.]

1. IMPROPER VOUCHING

Defendant Bickham first contends that the prosecutor improperly vouched for her case. During the closing argument of defendant Bickham's counsel, he repeatedly suggested that the

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prosecutor had shifted the burden of proof to the defense by failing to investigate and present all pertinent evidence. Defense counsel further asserted:

> The court is going to give you an[] instruction as to whether or not you think the witnesses were testifying honestly, or whether they are trying to be cooperative or they are trying to come up with an answer to the question. I am going to submit to you that all of the prosecution's witnesses including police officer, they didn't want to come forward with the frank admission they don't have all of the evidence to prove their case. And it's my argument that's why the assistant prosecuting attorney always asks questions they know aren't really questions. They are statements and then asks the officer to adopt her statement.

The prosecutor began her rebuttal argument as follows:

> Ladies and gentlemen, there is an old expression. I don't know, but it's a saying: if you don't have a defense try the police, try the prosecutor. If you don't have a defense then try the witnesses. And if that doesn't work then try pounding on the podium. We have seen all of that here.
>
> What counsel is suggesting—and then I'm going to move out of this because it is so ridiculous—is that I am going to put my career, my family, my freedom on the line, and hide evidence to get people and [let] another murderer go free. That Sergeant Bowser, fourteen years is going to do that. Sergeant Gibson, 33 years, put his family, his freedom on the line to get these people he has never seen in [his] life; and Officer Sullivan. That we have had to get together and do that, and conspire to do it, and then we are to rely on 15 year olds to back us up. That, ladies and gentlemen, is ridiculous. It is a desperate defense and it makes no sense.

We conclude that no impropriety inherent in the prosecutor's remarks affected defendant Bickham's substantial rights. Instead, the prosecutor properly responded to defendant Bickham's misleading suggestion that the police and the prosecution manufactured the case against him. To the extent that the prosecutor's comments reflect some element of improper vouching, the trial court properly instructed the jury regarding defendant's presumption of innocence, the prosecutor's burden of proof, that the arguments and statements of the attorneys did not constitute evidence, and that the jury "should only accept things that the lawyers say that are supported by the evidence or by your own common sense and general knowledge." "Thus, the trial court's instructions dispelled any prejudice arising from the prosecutor's comment, and defendant received a fair and impartial trial." *Callon*, 256 Mich App at 331.

2. MISSTATEMENT OF LAW

Defendant Bickham additionally complains that the prosecutor misstated Michigan law regarding aiding and abetting when she declared in her closing argument, "There is an expression: in for a penny or in for a pound. Martez Bickham and Aaron Daniels were in it together, with each other and accomplices." However, defendant Bickham's contention ignores the fact that the prosecutor's preceding remarks correctly describing the elements of aiding and

abetting contained in CJI2d 8.1(3). Additionally, the trial court's instructed the jury that "[i]t is my duty to instruct you on the law, and you must take the law as I give it to you. If a lawyer said something different about the law, follow what I say" and then correctly set forth the law concerning a defendant's potential guilt as an aider and abettor of a crime, MCL 767.39, by reading instructions substantially tracking CJI2d 8. 1 (aiding and abetting), 8.4 (inducement) and 8.5 (mere presence insufficient). *People v Grayer*, 252 Mich App 349, 358-359; 651 NW2d 818 (2002) ("[r]egardless of our conclusion that some of the prosecutor's statements were erroneous statements regarding the law, we hold that any error was harmless because the trial court correctly instructed the jury on the law and the essential [offense] elements").

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Deborah A. Servitto

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People v Willis

COA No. 298643

November 1, 2012

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v MARIO WILLIS, Defendant-Appellant.	UNPUBLISHED November 1, 2012 No. 298643 Wayne Circuit Court LC No. 09-028750-01-FC

Before: K. F. KELLY, P.J., and MARKEY and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, and arson of a dwelling house, MCL 750.72. He was sentenced to concurrent prison terms of 500 to 750 months for the murder conviction and 10 to 20 years for the arson conviction. We affirm defendant's convictions, but remand for resentencing.

I. RELEVANT FACTS AND PROCEDURAL HISTORY

Defendant's convictions arise from his participation in an arson fire on November 15, 2008, which caused the death of Detroit Firefighter Walter Harris. The prosecutor's theory of the case was that defendant paid one of his employees, Darian Dove, to set fire to a house owned by defendant's then-girlfriend, Megan Daniel, at 7418 East Kirby in the city of Detroit and, after Detroit firefighters responded to the scene, the roof collapsed on Firefighter Harris, who had entered the house, causing his death. Dove pleaded guilty to second-degree murder for his role in the offense and testified against defendant at trial. Defendant denied any involvement in the offense and presented an alibi defense.

The evidence at trial showed that Megan purchased the house from defendant in 2006 and obtained a mortgage loan to finance the purchase. A fire previously damaged the house in September 2007 and Megan received insurance proceeds to make repairs. Dove, an employee of defendant's landscaping business, testified at trial that he intentionally set both the September 2007 fire and the November 15, 2008, fire at issue in this case, at defendant's request. According to Dove, defendant drove him to a gas station to purchase gasoline for the second fire, dropped him off near the house, and gave him $20 after he set the fire. Dove testified that he expected to receive additional compensation that included a truck, but never received it.

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When Detroit firefighters arrived at the house fire shortly after 5:00 a.m. on November 15, 2008, fire was emanating from the top portion of the two-story house. The roof collapsed while firefighters were inside the house. Harris was buried by debris and died from his injuries.

In November 2009, Dove pleaded guilty to second-degree murder pursuant to a plea agreement that entitled him to a minimum sentence of 17 years in exchange for his cooperation in testifying truthfully against defendant in this case. On April 6, 2010, defendant filed a notice of alibi in which he named Megan as an alibi witness to testify that defendant was with her at the time of the fire. Defendant was charged with first-degree felony-murder and arson, but the jury found defendant guilty of the lesser offense of second-degree murder and arson. After defendant was sentenced, he filed a motion for a new trial or resentencing, raising many of the claims that he raises in this appeal. He requested a *Ginther*[1] hearing with respect to a claim of ineffective assistance of counsel, but the trial court determined that an evidentiary hearing was not necessary. This Court subsequently denied defendant's motion to remand for an evidentiary hearing on his claims. *People v Willis*, unpublished order of the Court of Appeals, entered March 18, 2011 (Docket No. 298643).

II. PUBLIC TRIAL

We first address defendant's claim that his right to a public trial was violated by the trial court's alleged closure of the courtroom during jury selection. We consider this issue to be unpreserved because defendant failed to assert this right at trial. *People v Vaughn*, 491 Mich 642; ___ NW2d ___ (2012). Accordingly, defendant's entitlement to relief is subject to the forfeiture rule in *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999). *Vaughn*, 491 Mich at 662-663. As explained in *Vaughn*, in analyzing a forfeited claim of error, a defendant is not entitled to relief unless he can establish:

> (1) that the error occurred, (2) that the error was "plain," (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. [*Vaughn*, 491 Mich at 663].

Defendant did raise this issue in his motion for new trial. MCR 6.431(B) provides that a trial court "may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." We review a trial court's decision on a motion for a new trial for an abuse of discretion, and review any findings of fact made by the court for clear error. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). "An abuse of discretion occurs when the trial court renders a decision falling outside the range of principled decisions." *People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012). We review issues of constitutional law de novo. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011).

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

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A defendant's Sixth Amendment right to a public trial extends to jury selection. *Vaughn*, 491 Mich at 648-650. The record indicates that the trial court only ordered persons who would be testifying at trial to leave the courtroom before jury selection. When denying defendant's motion for a new trial, the trial court expressly found that it did not close the courtroom. Although defendant submitted affidavits from relatives which indicate that deputies asked nonwitnesses to leave the courtroom because there was not enough room for the potential jurors, given the trial court's express finding that it did not close the courtroom and the absence of any indication in the record that the courtroom was closed, we cannot conclude that the deputies' alleged conduct in asking nonwitnesses to leave the courtroom may be attributed to the trial court.

Regardless, defendant's claim that he was deprived of his right to a public trial remains a forfeited issue because it was not timely presented to the trial court. While the denial of a right to a public trial may be considered a structural error, the plain-error analysis applicable to forfeited claims of error still requires a defendant to show that the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Vaughn*, 491 Mich at 665. The record in this case indicates that both the prosecutor and defense counsel participated in the voir dire of potential jurors. The two-day voir dire process ended with neither party expressing dissatisfaction with the jury. Because there is nothing in the record to indicate that the alleged closure of the courtroom during jury selection seriously affected the fairness, integrity, or public reputation of the proceedings, defendant is not entitled to a new trial on the basis of this issue.

III. DEFENDANT'S TRIAL EXHIBIT Y

Defendant next argues that the trial court deprived him of his constitutional rights to confront and cross-examine witnesses and to present a defense by barring defense counsel from playing a video recording of a June 9, 2009, six-hour police interview of Dove, which was admitted at trial as defendant's exhibit Y. Defendant argues that he should have been permitted to play approximately three hours of the recording to show the jury that police officers pressured Dove to adopt their scenario of how the fire occurred.

"The proponent of evidence bears the burden of establishing its relevance and admissibility." *People v Martin*, 271 Mich App 280, 316; 721 NW2d 815 (2006). Where a trial court excludes evidence, a proper offer of proof requires that the defendant specify the purpose of the evidence, unless the substance of the evidence is apparent from the context in which questions are asked. See MRE 103(a)(2); *People v Hackett*, 421 Mich 338, 352; 365 NW2d 120 (1984). Although this case does not involve excluded evidence, we believe that these principles are applicable here because they involve the mode for presenting evidence to the jury. MRE 611(a) provides:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

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At trial, the trial court permitted defense counsel to play 45 minutes of the various recordings that had been introduced as defense exhibits. Defense counsel had previously informed the court that he did not intend "to play six hours worth" of the recordings. Because defense counsel never objected to the time limitations imposed by trial court for playing the recordings and never made an offer of proof with respect to the relevancy or importance of exhibit Y in particular, either in whole or in part, we conclude that this issue is unpreserved. See MRE 103(d). We review unpreserved claims of constitutional error for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

The right to present evidence in support of a defense and the right to confront witnesses are not absolute. *People v Unger*, 278 Mich App 210, 250; 749 NW2d 272 (2008); *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). The defendant must still comply with rules of procedure and evidence that are designed to ensure fairness and reliability in the ascertainment of guilt or innocence. *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984); see also *People v Kowalski*, 492 Mich 106, 138; ___ NW2d ___ (2012). Examining defendant's claim in the context of the limited offer of proof made by defense counsel at trial regarding the recordings, defendant has not established anything about the trial court's ruling regarding the mode for presenting the evidence that infringed on his constitutional rights. Accordingly, defendant has not established a plain error entitling him to relief.

IV. PROSECUTORIAL MISCONDUCT

Defendant next argues that the prosecutor's conduct denied him a fair trial. Defendant concedes that he did not object to the prosecutor's conduct at trial, leaving this issue unpreserved. We review an unpreserved claim of prosecutorial misconduct for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763; *People v Fyda*, 288 Mich App 446, 460-461; 793 NW2d 712 (2010). The general test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Id.* at 460. Not all claims of prosecutorial misconduct are constitutional in nature. *People v Blackmon*, 280 Mich App 253, 259; 761 NW2d 172 (2008). "Where there is no allegation that prosecutorial misconduct violated a specific constitutional right, a court must determine whether the error so infected the trial with unfairness as to make the resulting conviction a denial of due process of law." *Id.* at 262.

Initially, we reject defendant's claim that the prosecutor's closing remarks regarding whether Megan provided a "rock solid alibi" to Officer Shea during a recorded interview on June 10, 2009, had the effect of improperly shifting the burden of proof. A prosecutor may not imply in closing argument that the defendant must prove something because this type of argument tends to shift the burden of proof. *Fyda*, 288 Mich App at 464. But alibi testimony is testimony offered to place the defendant elsewhere than at the scene of the crime when the crime is committed. *People v McGinnis*, 402 Mich 343, 345; 262 NW2d 669 (1978). Although a defendant's presentation of an alibi does not absolve the prosecution of its duty to prove that the defendant committed the crime beyond a reasonable doubt, *People v Erb*, 48 Mich App 622, 629; 211 NW2d 51 (1973), "once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof." *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). Prosecutors are generally free to argue the evidence and all reasonable inferences from the evidence related to their theory of the case. *Unger*, 278 Mich App at 236.

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The argument need not be stated in the blandest possible terms. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007).

The prosecutor's "rock solid" comment, examined in context, constituted proper comment on the weakness of defendant's alibi claim relative to whether Megan provided an alibi on June 10, 2009, for defendant's whereabouts at a place other than the area of the fire on East Kirby Street on November 15, 2008. According to the prosecutor's theory, that fire was started by Dove while defendant was waiting for him in the area in an Excursion truck. While Megan provided information regarding a "date night" with defendant on the evening of November 14 and extending into November 15, 2008, the prosecutor could reasonably infer from the evidence that Megan failed to provide the necessary details to account for defendant's whereabouts at the actual time of the fire. In addition, the trial court instructed the jury before deliberations that the prosecutor has the burden of proof and that defendant was not required to prove that he was somewhere else. The jury is presumed to have followed the court's instructions, which were sufficient to protect defendant's substantial rights. *Unger*, 278 Mich App at 235; see also *Fyda*, 288 Mich App at 465.

We also reject defendant's argument that the prosecutor shifted the burden of proof by challenging defense counsel in rebuttal argument to show that Dove is a liar. Examined in context, the challenged remarks were directed at the weakness of defendant's alibi theory in light of other evidence, such as cell phone records, that supported Dove's account of defendant's involvement in the arson fire. Because the prosecutor was permitted to comment on the weakness of defendant's alibi theory, there was no plain error. *Fields*, 450 Mich at 115.

Defendant also argues that the prosecutor misled the jury in closing arguments when commenting on evidence regarding when Megan first disclosed defendant's alibi. We disagree. The essence of Megan's trial testimony was that she and defendant had a "date night" on November 14 and 15, 2008, that defendant briefly left their home to purchase cigarettes after they returned from "date night" at 12:30 a.m., and that they thereafter slept together. Megan testified that she would have known if defendant left the house while she was asleep because of an alarm system in the house. While there was evidence that Megan made earlier statements regarding the "date night" and defendant going out for cigarettes, which included statements by Megan in the recorded police interview on June 10, 2009, Dove testified that he set the fire after 4:00 a.m., and the evidence showed that the firefighters were dispatched to the fire scene at approximately 5:00 a.m. Absent further detail in Megan's prior statements to indicate that she could adequately account for defendant's whereabouts at the time of the fire, the prosecutor could reasonably infer that the alibi was developed between the time of the June 10, 2009, interview and the filing of the notice of alibi on April 6, 2010. It was not improper for the prosecutor to comment on the timing of the notice of alibi to support this argument. *People v Holland*, 179 Mich App 184, 190; 445 NW2d 206 (1989). Because the prosecutor was permitted to argue all reasonable inferences arising from the evidence in support of his theory of the case, defendant has not established a plain error. *Unger*, 278 Mich App at 236.

Defendant also argues that during opening statement and again in closing and rebuttal arguments, the prosecutor made an improper appeal to the jury to convict him on the basis of wealth and class bias. It is improper for a prosecutor to inject issues broader than a defendant's guilt or innocence. *People v Bahoda*, 448 Mich 261, 284; 531 NW2d 659 (1995). Some federal

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cases hold that a prosecutor's appeal to class bias to obtain a conviction is improper. But as explained in *United States v Derman*, 211 F3d 175, 179 (CA 1, 2000), a case-by-case approach is applicable in evaluating such claims to determine if there are improper appeals to class prejudice or argument relevant to the issues at hand.

In this case, it is not apparent from the record that the prosecutor made an improper appeal to class prejudices. The challenged remarks, examined in context, were directed at relevant issues concerning the relationship between defendant and Dove in order to explain why Dove would set the fire at defendant's request. In his opening statement, the prosecutor stated that Dove was "an ordinary minion who thrives and survives based on what [defendant] provides him for work. He's a nothin [sic]. He's a handyman," while defendant was "his boss, a coward who sends this person out to take the hit." These remarks were not an appeal to class bias. The prosecutor's closing remark that defendant was more polished and refined than Dove, examined in context, also did not constitute an improper appeal to class bias. And while the prosecutor commented in rebuttal argument that "this is a little bit about class," we note that defense counsel had also addressed this issue in his closing argument by stating that "the prosecutor keeps bringing in the class thing" and that "[t]his isn't about class, it's about whether [defendant] knew about a fire and whether he aided and abetted." The prosecutor's response that "this is a little about class" was accompanied by an argument that Dove was a "follower" and "flunky" for defendant, who was described as a businessman. Examined in context, it is apparent that the prosecutor was suggesting that the jury evaluate defendant's and Dove's respective positions in evaluating their different roles in the fire. The prosecutor's rebuttal argument was supported by defendant's own testimony, which described Dove as a "grunt," although defendant denied any involvement in the fire.

Considering the record as a whole, defendant has not established a plain error. Further, to the extent that the prosecutor's remarks could be considered improper, the trial court instructed the jury that "you have taken an oath to return a true and just verdict based only on the evidence and my instructions on the law. Do not let sympathy or prejudice influence your decision." The court's instructions were sufficient to protect defendant's substantial rights.

Defendant next argues that the prosecutor made improper appeals to the jury to convict him based on the jury's civic duty or out of sympathy for the victim, a low-paid hero in a dangerous profession. Prosecutorial arguments that appeal to the jury's civic duty or sympathy for the victim are improper. *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). The prosecutor must refrain from appealing to the jury's fears and prejudices. *Bahoda*, 448 Mich at 282; *Unger*, 278 Mich App at 237. The prosecutor's characterization of the victim as heroic in opening was tied to the conduct that resulted in his death. The prosecutor was not required to state his argument in the blandest possible terms. *Dobek*, 274 Mich App at 66. As a whole, the prosecutor's opening remarks were directed at the facts that he intended to prove with respect to why the victim, a firefighter, would enter a burning house. A firefighter's duties were particularly relevant in this case because the murder charge required proof that defendant acted with malice when he sent Dove into the house to set the fire. The malice necessary to establish murder requires an intent to kill, an intent to cause great bodily harm, or a wanton and willful disregard that the natural tendency of the defendant's behavior is to cause death or great bodily harm. *People v Nowack*, 462 Mich 392, 408; 614 NW2d 78 (2000). Like common-law arson, it manifests contempt for human life. *Id.* Because the challenged opening remarks did not inject

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issues broader than defendant's guilt or innocence, and did not plainly appeal to the jury's sympathy, they were not plain error. *Carines*, 460 Mich at 763; *Abraham*, 256 Mich App at 273.

We reach this same conclusion with respect to the prosecutor's remarks in closing and rebuttal arguments. At most, we would question whether the prosecutor made a statement unsupported by the evidence and that lacked relevancy to the charges when he remarked that firefighters have low-paying jobs. But considering that the jury was instructed that the lawyers' statements and arguments are not evidence, those remarks do not rise to the level of outcome-determinative plain error. *Unger*, 278 Mich App at 237.

Defendant also argues that the prosecutor engaged in improper "name calling" by referring to him as a "coward" in opening statement and closing argument. We disagree. In *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996), this Court found that the prosecutor's use of the terms "coward," "moron," and "idiot" to describe the defendant exceeded the bounds of proper comment on the evidence, but did not require reversal because of the overwhelming evidence against the defendant and the isolated nature of the comments. Nonetheless, a prosecutor may use "hard language" when it is supported by the evidence. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996); see also *People v McElhaney*, 215 Mich App 269, 285; 545 NW2d 18 (1996) (the prosecutor's use of the word "monster" to describe the defendant was a permissible comment on the evidence). Here, the prosecutor's reference to defendant as a "coward" was based on the evidence showing that defendant made Dove set the fire. The prosecutor's argument was not plain error.

Defendant also argues that the prosecutor improperly disparaged him by arguing that he lacked a conscious. Again, we are not persuaded that the remarks were improper considering that they were directed at evidence that Dove, unlike defendant, admitted involvement in setting the fire.

Defendant also argues that the prosecutor engaged in improper vouching and bolstering by remarking in closing argument that his job was to "see that justice is done" and that he had found the responsible parties. While it is the prosecutor's duty to seek justice, *People v Wallace*, 160 Mich App 1, 9; 408 NW2d 87 (1987), a prosecutor may not use the prestige of his office to inject a personal opinion. *Bahoda*, 448 Mich at 286. In addition, a prosecutor may not vouch for the credibility of a witness or imply some special knowledge regarding whether a witness is testifying truthfully. *Dobek*, 274 Mich App at 66. For the most part, the challenged remarks were not improper because they were directed at evidence that Dove's testimony regarding the responsible parties for the fire was credible. *Id.* To the extent that the prosecutor exceeded the bounds of proper argument by emphasizing his responsibilities to do justice and to find the responsible parties, given the isolated nature of the arguments and the trial court's instructions that the jury was to decide this case based only on the evidence, the remarks did not affect defendant's substantial rights. *Unger*, 278 Mich App at 235.

Defendant next argues that the prosecutor provided unsworn testimony during closing argument by stating that he did not offer Dove a deal before he confessed. We disagree. Dove testified that he did not reach a plea agreement with the prosecutor until November 3, 2009. Thus, it was not improper for the prosecutor to argue that Dove did not have a "deal" at the time

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of his police interview in June 2009, when Dove admitted his involvement in starting the fire. Accordingly, there was no plain error.

Defendant also argues that the cumulative effect of the prosecutor's improper conduct deprived him of a fair trial. The cumulative effect of several errors may be sufficiently prejudicial to deny a defendant a fair trial. *People v Brown*, 279 Mich App 116, 145-146; 755 NW2d 664 (2008). But only actual errors are aggregated to determine their cumulative effect. *Bahoda*, 448 Mich at 292 n 64. Here, defendant has not established any errors that, considered singularly or cumulatively, denied him a fair trial.

V. UNDISCLOSED EXCULPATORY EVIDENCE

Defendant next argues that a new trial is required because the prosecutor failed to disclose evidence that would have supported his alibi defense, namely, a statement allegedly provided by Megan at the fire department on November 19, 2008, which was allegedly written on a yellow legal pad. This issue is unpreserved because it was never presented to the trial court, either before or at trial, notwithstanding Megan's trial testimony that she initialed a statement on a yellow legal pad at the fire department on November 19, 2008, which contained answers to the questions "where we were," "where was Mario," and "what we did that day." To properly preserve an issue for appeal, a defendant must timely assert the right. *Carines*, 460 Mich at 762-763.

Although defendant later raised this issue in his motion for a new trial, we are not persuaded that the trial court abused its discretion by deciding the motion without conducting an evidentiary hearing, MCR 6.431(B); *Miller*, 482 Mich at 544, nor are we persuaded that remand for an evidentiary hearing is necessary. *People v Williams*, 275 Mich App 194, 200; 737 NW2d 797 (2007).

Under *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), a prosecutor has a duty to disclose impeachment and exculpatory evidence that might lead the jury to entertain a reasonable doubt regarding a defendant's guilt. *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998).

> In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *United States v Meros*, 866 F2d 1304, 1308 (CA 11, 1989), cert den 493 US 932; 110 S Ct 322; 107 L Ed 2d 312 (1989). [*Lester*, 232 Mich App at 281-282.]

In this case, defendant's claim that material exculpatory evidence was not disclosed by the prosecutor fails when analyzed as an unpreserved forfeited issue because, apart from the lack of evidence that Megan said anything on November 19, 2008, that would account for defendant's whereabouts at the time of the fire, it is not clear from the trial record that the alleged written statement exists. Although defendant submitted an affidavit from Megan in support of his new

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trial motion, Megan did not identify any individual from either the fire department or police department who took the statement. Even assuming that defendant could establish that Lieutenant Chuck Simms, or someone else from the fire or police departments, had prepared a written statement on a yellow legal pad, Megan's affidavit offers nothing of substance to show that she accounted for defendant's whereabouts at the time of the fire on November 15, 2008. "Undisclosed evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 281-282. There must be a probability sufficient to undermine confidence in the outcome of the proceeding. *Id.* Because defendant failed to establish a reasonable probability that the result of the proceeding would have been different if he was able to corroborate Megan's trial testimony regarding her disclosure that she had "date night" with him and sent him out for cigarettes using a writing from the November 19, 2008, interview at the fire department, the trial court did not abuse its discretion in denying the motion for a new trial without an evidentiary hearing.

VI. NEWLY DISCOVERED EVIDENCE

Defendant argues that his convictions must be vacated on the ground that newly discovered evidence shows that Dove committed perjury at trial. We conclude that defendant failed to establish entitlement to a new trial, and that he has not shown that remand for further factual development of this issue is required.

The decision whether to grant a new trial based on newly discovered evidence is governed by the following test set forth in *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003):

> [A] defendant must show that: (1) "the evidence itself, not merely its materiality, was newly discovered"; (2) "the newly discovered evidence was not cumulative"; (3) "the party could not, using reasonable diligence, have discovered and produced the evidence at trial"; and (4) the new evidence makes a different result probable on retrial. [Citation omitted.]

Newly discovered impeachment evidence may be grounds for a new trial if it satisfies this four-part test. *People v Grissom*, 492 Mich 296, 304; ___ NW2d __ (2012). "More specifically, newly discovered impeachment evidence satisfies *Cress* when (1) there is an exculpatory connection on a material matter between a witness's testimony at trial and the new evidence and (2) a different result is probable on retrial." *Id.* at 306.

Newly discovered evidence in the form of recanted testimony may provide a basis for a new trial, but such testimony has traditionally been regarded as suspect and untrustworthy. *People v Canter*, 197 Mich App 550, 559; 496 NW2d 336 (1992). Our Supreme Court has recognized that "[a]s a rule the court is not impressed by the recanting affidavits of witnesses who attempt to show that they perjured themselves at the trial." *People v Smallwood*, 306 Mich 49, 55; 10 NW2d 303 (1943). But other circumstances, such as a hostile motive of the recanting witness for making a false charge against a defendant, may justify a new trial. *Id.*

In this case, defendant did not submit any affidavits to establish that Dove intended to recant his trial testimony, but rather relied on statements allegedly made by Dove in prison that

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were consistent with Dove's original claims in June 2009 that, while inside the house with a woman, he started a fire to keep warm and that the fire accidentally spread to the structure. The primary statement on which defendant relied consists of a five-page "prisoner kite" form that is labeled "the truth statement." Defendant alleged in an affidavit that he received this "letter" from another inmate in June 2010. In the letter, Dove states that he put a "little gas" on metal to start a fire in the upstairs portion of the house to keep himself and a woman named Felicia warm, but forgot to move the gas can. He stated that the house caught on fire after he and Felicia went downstairs, and that they went to a telephone booth to call 911. Dove claimed that the police put words in his mouth when he was interviewed, and that he was scared because he was told that he could spend the rest of his life in prison. The other statement submitted by defendant was purportedly written by a prison inmate, Nikemo Burton, who wrote that Dove told him in May 2010 that he was given a 20-year sentence for the fire and that he had been "with one of girls they was getting high and made a mistake and started a fire."

We agree with prosecutor that this new version of what occurred is inconsistent with the physical evidence that gasoline was poured along the walls in the upstairs portion of the house. In addition, the trial court found it clear that the jury chose to believe Dove's version of the events, which the jury understood was given pursuant to a plea agreement that included a 17-year minimum sentence for his plea to second-degree murder. The recanting statements are particularly suspect because, assuming that Dove actually made the statements, he apparently waited until after he learned the full extent of his sentence and made statements that tended to reduce his own culpability by characterizing the fire as accidental.

Considering the suspect nature of recanting testimony, the fact that the recanting statements do not adequately explain the physical evidence of gasoline along the walls, and the other evidence presented at trial pertaining to the credibility of the version that Dove provided to the jury as part of a plea agreement, we reject defendant's claim on appeal that he has established that Dove's trial testimony was perjured. We are not persuaded that defendant has established entitlement to a new trial or a remand for further proceedings with respect to this claim. *Williams*, 275 Mich App at 200.

VII. INEFFECTIVE ASSISTANCE OF COUNSEL

Next, we address defendant's numerous claims of ineffective assistance of counsel. Ineffective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, defendant has the burden of showing both deficient performance and resulting prejudice. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Defendant "must show that (1) counsel's performance fell below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). Defendant must overcome a strong presumption that counsel's performance was sound trial strategy. *Carbin*, 463 Mich at 600. Counsel is strongly presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional judgment. *Vaughn*, 491 Mich at 669.

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First, the record does not support defendant's claim that defense counsel did not interview Megan. Indeed, Megan averred in her affidavit that she told defense counsel about defendant's alibi. To the extent that defendant argues that counsel performed deficiently by not eliciting from Megan on redirect-examination that she was subjected to two separate interviews on November 19, 2008, we note that "[d]ecisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy." *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Counsel's decisions will not be assessed with the benefit of hindsight. *Unger*, 278 Mich App at 243; *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). But "[a] defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). A defense is substantial if it might have made a difference in the outcome of the trial. *Id.*

In this case, Megan's trial testimony was vague concerning who was present at the fire department when she was allegedly interviewed. She testified that "they" asked "where we were," "where was Mario," and "[w]hat we did that day." But her testimony left no doubt that she was claiming that two written statements were taken from her. Although Megan averred in her posttrial affidavit that two separate interviews were conducted and that she told defense counsel about the two interviews, as indicated previously, Megan's affidavit does not indicate that she could account for defendant's whereabouts at the actual time of the fire. Megan averred that she told one interviewer that "November 14-15, 2008, was date night" and "[w]e went out and then when we returned I sent [defendant] back out to buy clove cigarettes for me at the gas station." This offer of proof does not establish a factual basis for concluding that there is a reasonable probability that the result of the trial would have been different but for defense counsel's alleged errors in questioning Megan and failure to request a copy of the alleged written statement.

Defendant also failed to offer factual support for his claim that counsel should have called Lieutenant Simms to testify regarding the alleged November 19, 2008, interview of Megan that was recorded on a yellow legal pad. Defendant has the burden of establishing the factual predicate of his claim. *Carbin*, 463 Mich at 600. Because defendant failed to offer any evidence in support of his claim that Lieutenant Simms could have provided any testimony favorable to the defense, this ineffective assistance of counsel claim cannot succeed and defendant has not established any basis for remanding this case for an evidentiary hearing regarding this claim.

Defendant next argues that counsel was ineffective for failing to subpoena Walter Collier to testify at trial. According to Collier's affidavit, he and Dove were in the same ward in the Wayne County Jail when Dove told him sometime in 2009 that "the fire in the house started from chemicals that got accidentally knocked over" and that he "was with a woman when this happened." Dove allegedly told Collier that he wanted to get back at defendant for giving his name to the police. Collier averred that he told defendant what Dove said when they met outside a courtroom. Defendant averred in a separate affidavit that he informed defense counsel about Collier and counsel later told him "that this was hearsay and could not be used at trial."

Although defendant argues on his appeal that Collier's testimony could have been used to attack Dove's credibility, defendant has not established that the proposed testimony could have

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provided a substantial defense, especially given the physical evidence that gasoline had been poured along the walls and that the fire did not result from an accidental spill from "chemicals," and defendant's acknowledgement that Dove previously presented this accidental fire theory to the police. In addition, counsel reasonably could have had concerns about using a jail inmate who had contact with defendant to present this evidence. The jury was apprised of other evidence placing Dove with a woman named Felicia, including Officer Scott Shea's testimony that Dove identified Felicia as woman in the background with his 911 telephone call to report the fire. The jury also heard other evidence of prior inconsistent statements by Dove and testimony from several defense witnesses that called Dove's credibility into question without having to address whether a fire was accidentally set. The jury was also aware that Dove was testifying pursuant to a plea agreement, as well as evidence that he had attempted to withdraw his plea before trial.

Given this record, defendant's claim that counsel's performance was deficient cannot succeed. In addition, the affidavits on which defendant relies are insufficient to justify a remand to the trial court. The offer of proof is insufficient to support a finding of either deficient performance or prejudice relative to counsel's failure to subpoena Collier to testify at trial.

Defendant next raises several issues concerning the various recordings that were presented at trial as defense or prosecution exhibits. Defendant's principal argument is that counsel should have requested transcripts of the various recordings that were introduced at trial so that they could be supplied to the jury or used at trial to make objections, question witnesses, or provide content for closing arguments. Transcripts of recorded conversations may be provided to a jury, provided the parties stipulate to their accuracy or the trial court uses a method that ensures the accuracy and fairness of the transcripts. See *People v Lester*, 172 Mich App 769, 775-776; 432 NW2d 433 (1988).

To the extent that defendant argues that Dove's 911 telephone call contains a statement by a woman in the background that "clinches" the defense, the record indicates that this call was one of the recordings that defense counsel chose to play to the jury at trial. Further, Dove testified at trial that the woman's voice in recording belonged to Felicia. In his closing argument, defense counsel argued that "Felicia is there when this fire is happening. She's there because we know she's in the background of the 9-1-1 tape." A decision concerning what evidence to highlight in closing argument is presumed to be a matter of trial strategy. *Horn*, 279 Mich App at 39. Defendant has not overcome the strong presumption that his counsel's strategy was sound. *Carbin*, 463 Mich at 600.

We also reject defendant's argument that defense counsel erred by failing to object to the prosecutor's elicitation of testimony from Dove regarding what defendant told him about obtaining an attorney. Contrary to what defendant argues, that statement was not made during the recorded telephone conversation between Dove and defendant while Dove was being interviewed by the police. Rather, as plaintiff argues, Dove's testimony pertained to a conversation that Dove had with defendant when the police "surrounded" his house and brought him in. Accordingly, we find no factual support for defendant's claim of error.

The record also does not support defendant's claim that defense counsel mistakenly believed that he had to play the entire recording of Dove's six-hour police interview on June 9,

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2009, which was admitted as defense exhibit Y, when making his offer of proof regarding this evidence at trial. Nor does the record indicate that defense counsel was unprepared to use this exhibit at trial. Defense counsel's failure to object to the prosecutor's apparent misstatement of this evidence in his closing argument with respect to when Dove started to "come clean" during the interview does not establish that counsel was unprepared. "[D]eclining to raise objections, especially during closing arguments, can often be consistent with sound trial strategy." *Unger*, 278 Mich App at 242. Although defendant suggests on appeal that the timing and other circumstances of the June 9, 2009, interview was crucial for the purpose of attacking Dove's credibility at trial, it is apparent from the record that defense counsel chose to highlight other prior statements, such as Dove's preliminary examination testimony regarding his access to defendant's cell phones, to attack Dove's credibility. This Court will not substitute its judgment for that of counsel on matters of trial strategy, or evaluate counsel's strategy with the benefit of hindsight. *Id.* at 242-243. Defendant has not overcome the strong presumption that counsel's strategy with respect to the use of exhibit Y was sound. *Carbin*, 463 Mich at 600.

To the extent that defendant argues that counsel should have obtained a transcript of the recording of Megan's June 10, 2009, police interview to pinpoint where Megan talked about defendant's alibi and to challenge Officer Shea's credibility, it is apparent from the record that defense counsel did not need a transcript to bring out relevant information. In fact, defense counsel elicited from Officer Shea that Megan stated that defendant went to purchase cigarettes for her. Accordingly, defendant has not established either deficient performance or prejudice with respect to this matter.

Defendant next argues that counsel was ineffective for not introducing the recording of Dove's June 11, 2009, interview at the police station. Defendant argues that this interview was material because it was the first time that Dove claimed that gasoline was used to start the fire. However, defendant's submitted transcript of that June 11, 2009, interview does not establish factual support for his claim. That interview indicates that Dove started a "light fire," with a concoction containing detergent, bleach, and ammonia, but also had a bottle of gasoline that he must have "kicked." It also contains information regarding defendant's cell phones that, consistent with Dove's trial testimony, would tie defendant to a particular cell phone that the prosecutor claimed was used by defendant during the relevant time period of the arson. Defense counsel reasonably may have chosen not to use the June, 11, 2009, police interview to avoid the jury hearing Dove's prior statements regarding the cell phone. The jury was amply apprised of the evolution of Dove's claims regarding the circumstances of the fire and other circumstances, such as his plea agreement, that affected his credibility. Therefore, while the failure to introduce evidence that can catch a witness in a lie can constitute deficient performance, *Armstrong*, 490 Mich at 290-291, given the record in this case and the offer of proof made by defendant in support of his motion for new trial, it cannot be said that defense counsel's failure to introduce the recorded June 11, 2009, interview amounts to ineffective assistance of counsel.

Defendant next seeks an evidentiary hearing regarding whether counsel was ineffective for not objecting to the closure of the courtroom during jury selection. We have previously determined in part II of our opinion that the alleged closure of the courtroom by deputies does not require reversal. In addition, as discussed in *Vaughn*, 491 Mich at 669-670, a defense attorney reasonably could determine that closure of the courtroom during voir dire will benefit the defendant because it will encourage potential jurors to be more forthcoming in their

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responses, or counsel may simply prefer a closed courtroom to expedite the process. Further, a defendant must still demonstrate actual prejudice. *Id.* at 673. Because defendant does not claim actual prejudice and did not offer any proof that counsel's performance was deficient, we deny defendant's request to remand for a hearing regarding this issue.

Defendant next argues that his counsel was ineffective by not requiring the prosecutor to produce the original surveillance tapes from a gas station. According to Detroit Police Sergeant Ronald Gibson, who was qualified as an expert in digital multimedia forensic evidence, the gas station used a computer-based surveillance system, which he used to download video recordings of surveillance at the gas station and to produce still photographs of an Excursion-type vehicle. The trial court allowed the prosecutor to introduce this evidence, over defense counsel's objection to the authentication of the evidence. Because the record shows that defense counsel objected to the evidence based on lack of authentication, defendant has failed to establish that any request for the prosecutor to bring the original to court or that any further argument regarding this evidence would reasonably have resulted in its exclusion at trial. Thus, this claim cannot succeed.

Defendant next argues that counsel was ineffective for not objecting to an exhibit that depicted his "7MONSTRA" license plate on the rear of an Excursion truck on the ground that it was confusing and misleading. Although MRE 403 permits a trial court to exclude evidence on the ground that its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ," the license plate in this case was a feature that Dove used to identify the vehicle driven by defendant at the time of the fire. We find no support for defendant's claim that the photograph was objectionable on the ground that it was misleading or confusing. Accordingly, we reject defendant's claim that counsel was ineffective regarding this matter. See *Horn*, 279 Mich App at 39-40 (counsel need not make a futile objection).

To the extent that defendant's argument is directed at the inferences drawn by the prosecutor in his opening statement and closing argument with respect to whether "7MONSTRA" was depicted in still photographs produced from the gas station, and defense counsel's failure to object to the prosecutor's arguments, we also conclude that defense counsel was not ineffective. As indicated previously, a prosecutor may generally argue the evidence and all reasonable inferences from the evidence. *Unger*, 278 Mich App at 236. Here, defendant has failed to establish that the prosecutor's inferences were unreasonable. Thus, counsel was not ineffective for failing to object.

Defendant next argues that counsel was ineffective for failing to object to the prosecutor's alleged misconduct addressed in part IV of this opinion. Given our conclusion that the prosecutor's conduct was for the most part proper, and that any perceived misconduct did not affect defendant's substantial rights, defendant has not established that counsel's failure to object deprived him of the effective assistance of counsel.

Defendant also argues that counsel should have asked the trial court to take judicial notice of the alibi statute and brought out when he was informed of the alibi through the testimony of Megan and defendant at trial. We note, however, that one of defendant's trial attorneys elicited testimony from Megan on redirect examination that she provided her "alibi

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witness" before the preliminary examination. While this led to further questioning by the prosecutor in which Megan testified regarding her alleged recorded statement on the yellow legal pad at the fire department, considering that the matter was explored by defense counsel, defendant has failed to establish either deficient performance or resulting prejudice with respect to this issue. Because Megan claimed that she provided her "alibi witness" before the preliminary examination, defense counsel reasonably could have concluded that it was unnecessary to address the notice requirements of the alibi statute.[2]

Defendant next argues that defense counsel was ineffective for not objecting to other-acts evidence at trial, namely, the evidence that he was involved with Dove in setting the first fire at the house on East Kirby in September 2007. Defendant argues that an objection should have been raised under MRE 403 on the ground that the probative value of the evidence did not outweigh its prejudicial effect. The balancing test in MRE 403 requires a court to assess whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice. "Unfair prejudice may exist where there is a danger that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow use of the evidence." *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008). While an assessment under MRE 403 is part of the analytic framework for admitting other-acts evidence under MRE 404(b), *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000), defendant has not established any basis for concluding that an objection under MRE 403 stood a reasonable likelihood of success. Therefore, we find no basis for concluding that counsel was ineffective regarding this evidence.

Defendant also argues that counsel should have objected to the prosecutor's remark during closing argument regarding evidence of a letter written by Dove to a judge on the ground that other-acts evidence was used to shore up Dove's credibility. The record indicates that the letter was part of Dove's attempt to withdraw his guilty plea before trial. The prosecutor introduced the letter after defense counsel elicited testimony from Dove regarding his attempt to withdraw the plea. Dove wrote in the letter that he should not receive a sentence of 17 years because defendant was the mastermind behind the offense. Dove testified at trial that he was angry with defendant and that the letter was the first time that he told someone about the first fire at the house. Examined in this context, we reject defendant's argument that the prosecutor's remarks about the letter in closing argument were improper. The prosecutor's remarks were a fair response to the testimony elicited by defense counsel. See *Brown*, 279 Mich App at 135 (a prosecutor may fairly respond to issues raised by the defendant). Thus, counsel was not ineffective for failing to object.

[2] MCL 768.20(1) provides that "[i]f a defendant in a felony case proposes to offer in his defense testimony to establish an alibi at the time of the alleged offense, the defendant shall at the time of arraignment on the information or within 15 days after that arraignment but not less than 10 days before the trial of the case, or at such other time as the court directs, file and serve upon the prosecuting attorney a notice in writing of his intention to claim that defense."

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Defendant also argues that defense counsel was ineffective for failing to object to the trial court's limiting instruction concerning the other-acts evidence on the ground that it was too broad. A trial court is only required to give a limiting instruction with respect to other-acts evidence if requested. MRE 105; *Sabin*, 463 Mich at 56. Jury instructions are generally read as a whole to determine if error occurred. *People v Kowalski*, 489 Mich 488, 501; 803 NW2d 200 (2011). Even if instructions are imperfect, reversal is not warranted where the instructions fairly present the issues and adequately protect the defendant's rights. *Id.* at 501-502. We reject defendant's argument that the jury would have concluded that the limiting instruction applied to evidence other than the evidence of defendant's involvement in the September 2007 arson fire. Moreover, a more specific instruction might have highlighted the evidence of defendant's involvement in the prior arson. This Court will not substitute its judgment for counsel on matters of trial strategy. *Unger*, 278 Mich App at 242.

We also reject defendant's argument that counsel was ineffective for not objecting to certain purposes of the evidence that the jury could consider pursuant to the limiting instruction. Contrary to defendant's argument on appeal, his general denial of the charges placed all elements of the charges, including his state of mind, at issue. *Sabin*, 463 Mich at 60. Examined as whole, the limiting instruction fairly presented the issues and adequately protected defendant's rights. Therefore, defendant has failed to establish that counsel was ineffective for not objecting to the instruction.

Defendant also argues that defense counsel wrongfully withdrew an argument regarding the scope of his cross-examination of the prosecutor's arson expert. Defendant argues that counsel should have responded to the trial court's inquiry regarding the relevancy of his cross-examination of the expert, with respect to his prior testimony at the preliminary examination, by offering to show that the expert was exaggerating the number of fires that he had responded to as a firefighter and an investigator and, accordingly, lacked credibility. But considering the preliminary examination testimony and the distinctions that were made by the expert with respect to his experience as a firefighter and as an investigator, we find no basis for concluding that further cross-examination would have revealed the exaggerated testimony suggested by defendant on appeal. In addition, considering that defendant was not contesting the origin and cause of the fire, but rather his participation in crimes, counsel reasonably could have concluded that it was unnecessary to try to persuade the trial court that the proposed impeachment evidence was relevant. Decisions regarding how to question witnesses are presumed to be matters of trial strategy. *Horn*, 279 Mich App at 39. Defendant has not overcome the strong presumption that counsel's decision not to pursue this matter was sound trial strategy, or shown any resulting prejudice.

Lastly, defendant argues that counsel was ineffective for failing to object to the scoring of the sentencing guidelines at sentencing. The record establishes that defendant was afforded an opportunity to raise any objections that were not made at sentencing in a motion for resentencing. Although the trial court denied the motion, considering defendant's opportunity to raise his objections, defendant cannot establish that he was prejudiced by his counsel's failure to object.

In sum, defendant has failed to establish any deficiency on the part of trial counsel that amounts to a denial of his right to the effective assistance of counsel at trial or sentencing.

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VIII. SENTENCING

Defendant argues that he is entitled to resentencing because the trial court erred in scoring the sentencing guidelines and improperly exceeded the sentencing guidelines range of 225 to 375 months for reasons that were not substantial and compelling and without justifying the extent of the departure.[3] We review a trial court's scoring decisions to determine whether the court properly exercised its discretion and whether there is any record evidence to support the decisions. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009). We review the trial court's interpretation of the statutory sentencing guidelines de novo as a question of a law. *Id.*

Initially, we reject defendant's reliance on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), to argue that he was entitled to a jury determination of all facts used to score the sentencing guidelines offense variables. It is well established that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Harper*, 479 Mich 599, 615; 739 NW2d 523 (2007); see also *People v McCuller*, 479 Mich 672, 683; 739 NW2d 563 (2007).

Defendant challenges the trial court's scores of 20 points for OV 1, MCL 777.31, and 15 points for OV 2, MCL 777.32, on the basis that points were improperly awarded for the use and possession of an "incendiary device." The primary goal in construing a statute is to give effect to the Legislature's intent. *People v Wilcox*, 486 Mich 60, 64; 781 NW2d 784 (2010). "The first step in ascertaining intent is to focus on the language of the statute. If the language is unambiguous, we presume that the Legislature intended the meaning expressed." *Id.* Defendant's reliance on the definition of "chemical irritant device" in chapter XXXIII of the Penal Code, MCL 750.520h(2), to argue that gasoline does not qualify as an "incendiary device" for purposes of OV 1 and OV 2 is misplaced. The statutes that govern the scoring of OV 1 and OV 2 case expressly define an "incendiary device" as including gasoline. MCL 777.31(3)(b) and MCL 777.32(3)(d). Because the evidence established that the fire was set using gasoline, defendant has not established an error with respect to the scoring of OV 1 and OV 2.

Next, defendant acknowledges that the trial court's 25-point score for OV 3, MCL 777.33, is supported by our Supreme Court's decision in *People v Houston*, 473 Mich 399; 702 NW2d 530 (2005), but argues that *Houston* was wrongfully decided. "[S]tare decisis dictates that a decision of the majority of the justices of our Supreme Court is binding upon lower courts." *Felsner v McDonald Rent-A-Car, Inc*, 193 Mich App 565, 569; 484 NW2d 408 (1992); see also *People v Mitchell*, 428 Mich 364, 369; 408 NW2d 798 (1987). Because we are bound by the decision in *Houston*, we reject defendant's argument that OV 3 was improperly scored.

[3] Although the sentencing information report discloses that defendant received 135 total offense variable points, the trial court incorrectly referred to defendant's score as 120 points. The discrepancy appears to be attributable to offense variable (OV) 5, which was scored at 15 points and was not challenged by either party at sentencing. This discrepancy does not affect the guidelines range because defendant was placed in OV Level III, which is the highest level of offense severity for second-degree murder, see MCL 777.16p and MCL 777.61, and requires a minimum score of only 100 points.

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Lastly, defendant challenges the trial court's score of 25 points for OV 9, MCL 777.39(1)(b), which is appropriate where there were "10 or more victims who were placed in danger of physical injury or death." Conversely, a score of 10 points is proper where there were "2 to 9 victims who were placed in danger of physical injury or death." MCL 777.39(1)(c). The instructions for OV 9 state that a court is to "[c]ount each person who was placed in danger of physical injury or loss of life or property as a victim." MCL 777.39(2)(a). While a separate criminal offense with respect to each person is not required, each person must be in danger of injury or loss of life. *People v Sargeant*, 481 Mich 346, 350-351 n 2; 750 NW2d 161 (2008).

In this case, the trial court correctly rejected defendant's argument that zero points should be scored for OV 9 because a danger of physical injury is inherent in a firefighter's work. However, although there clearly was evidence that several firefighters were placed in danger of physical injury or loss of life by the fire, the trial court did not require the prosecutor to introduce evidence establishing that at least 10 firefighters were so endangered by the fire. Nonetheless, the evidence minimally established that at least three firefighters were in danger of physical injury or loss of life, thereby justifying a score of at least 10 points. Because a 15-point reduction in the scoring of OV 9 would not affect the ultimate guidelines range, any error in the scoring of OV 9 does not require resentencing. *People v Sims*, 489 Mich 970; 798 NW2d 796 (2011), mod 490 Mich 857 (2011).

Defendant next argues that the trial court erred by departing from the guidelines range of 225 to 375 months, and sentencing him to a prison term of 500 to 750 months for the second-degree murder conviction. A trial court may depart from the sentencing guidelines range if there is "a substantial and compelling reason for that departure and [the court] states on the record the reasons for departure." MCL 769.34(3). The trial court's reasons for departure must be objective and verifiable. *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008). "To be objective and verifiable, a reason must be based on actions or occurrences external to the minds of those involved in the decision, and must be capable of being confirmed." *Horn*, 279 Mich App at 43 n 6. To be substantial and compelling, the reasons for departure "must be of considerable worth in determining the length of the sentence and should keenly and irresistibly grab the court's attention." *Smith*, 482 Mich at 299. "For a departure to be justified, the minimum sentence imposed must be proportionate to the defendant's conduct and prior criminal history." *Id.* at 300.

We disagree with defendant's argument that the trial court improperly exceeded the guidelines range based on findings regarding his greed and motivation. A trial court is not precluded from drawing inferences regarding a defendant's behavior from objective evidence in determining if there are substantial and compelling reasons for departing from the sentencing guidelines. *People v Petri*, 279 Mich App 407, 422; 760 NW2d 882 (2008). While the trial court used words like "greed" and "scofflaw" when addressing defendant's motivation, the thrust of its finding was that defendant had a financial motive for having Dove set the fire. Because objective evidence from the trial supports a reasonable inference that defendant had assumed responsibility for the house and had a financial incentive for the second fire, the trial court did not err in considering that evidence as a reason for exceeding the guidelines.

Defendant also argues that the trial court erred in considering the victim's status as a firefighter to exceed the guidelines. Defendant asserts that only vulnerable individuals are given

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special status under the guidelines. He asserts that he could not have foreseen that a firefighter would be harmed under the circumstances of this case where, according to firefighter Hamm's trial testimony, the Detroit Fire Department changed its policy after the victim's death so that an "obviously vacant structure that is consumed by fire" will not be entered until the fire chief arrives at the scene.

We reject defendant's arguments because they fail to consider that a firefighter becomes vulnerable to injury because he or she is responding to the fire. The fact that a fire department might take additional precautions to protect firefighters does not make the risk of harm unforeseeable. Because the inferences drawn by the trial court regarding the foreseeability of harm are supported by objective and verifiable evidence, and could keenly and irresistibly grab the court's attention, it was not improper for the trial court to consider it as a reason for departing from the guidelines range. Cf. *People v Marshall*, 204 Mich App 584, 589; 517 NW2d 554 (1994) (defendant's act of shooting on-duty police officer attempting to make lawful arrest justified a departure from the former judicial sentencing guidelines).[4]

We also reject defendant's argument that the trial court erred in finding that he orchestrated perjury by Megan to support his alibi defense and in using that finding as a basis for departure from the guidelines. Perjury requires that there be a willful false statement under oath. See *People v Lively*, 470 Mich 248, 253-254; 680 NW2d 878 (2004) (discussing a statutory offense of perjury regarding matters for which an oath is authorized or required under MCL 750.423). A defendant's perjury can be an objective and verifiable basis for departing from the guidelines range. See *People v Kahley*, 277 Mich App 182, 188; 744 NW2d 194 (2007). A defendant's perjury may also be used to score OV 19, MCL 777.49, where the offender interferes with or attempts to interfere with the administration of justice. See *People v Underwood*, 278 Mich App 334, 338-339; 750 NW2d 612 (2008). Further, events occurring after the sentencing offense has been completed may be used to score OV 19. *People v Smith*, 488 Mich 193, 202; 793 NW2d 666 (2010).

Here, while the trial court's departure reason was not based on defendant's perjury, it did involve defendant's interference with the administration of justice through the presentation of perjured alibi testimony. While we question the trial court's failure to consider this factor under OV 19, the court reasonably could infer that defendant willfully presented Megan's perjured testimony at trial to avoid responsibility for the arson. Thus, we find no error in the trial court's finding that Megan committed perjury or in its use of this factor to determine defendant's sentence.[5]

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[4] The legislative guidelines apply to felonies committed on or after January 1, 1999. See MCL 769.34(1).

[5] As further explained below, we conclude that resentencing is required because the trial court failed to justify the extent of the departure. At resentencing, the trial court shall consider whether any involvement by defendant in orchestrating Megan's perjury should be scored under OV 19 and, if so, limit its consideration of this conduct as a basis for departure consistent with MCL 769.34(3)(b).

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In sum, the trial court departed from the guidelines for reasons that were objective and verifiable. The reasons for departure satisfy the requirement in MCL 769.34(3) that a court articulate substantial and compelling reasons for the departure. Contrary to defendant's argument on appeal, the trial court did not err by failing to treat the wanton and willful form of malice that supported his conviction for second-degree murder as a less culpable form of the offense. All forms of malice manifest contempt for human life. *Nowack*, 462 Mich at 408. "The same level of criminal culpability exists regardless whether a defendant wantonly and willfully disregards the consequences of his actions or intends to cause the prohibited harm." *Id.*

Nonetheless, when departing from the guidelines range, the trial court must also "explain why the sentence imposed is more proportionate than a sentence within the guidelines would have been." *Smith*, 482 Mich at 304. In this case, the trial court did not attempt to justify the extent of its departure independent of its reasons for the departure, either at sentencing or when denying defendant's motion for resentencing. Further, the trial court is required to evaluate both the nature of the offense and the defendant's criminal history in determining the proportionality of a sentence. *Id.* at 309, 318. Here, defendant has a minimal criminal history, although the trial court did find that defendant participated in a prior arson that did not result in a conviction. Although departures from the guidelines range are not determined with mathematical precision, because the trial court did not justify the extent of its departure in this case, resentencing is required. Accordingly, we vacate defendant's sentences and remand for resentencing and an explanation of the extent of any departure from the guidelines range. *Id.* at 319.

Finally, we have considered defendant's request for resentencing before a different judge, but conclude that reassignment is not warranted. *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997).

We affirm defendant's convictions, but vacate his sentences and remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Deborah A. Servitto

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People v Hicks

COA No. 297058

December 18, 2012

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JONATHAN HICKS,

Defendant-Appellant.

UNPUBLISHED
December 18, 2012

No. 297058
Ingham Circuit Court
LC No. 09-000961-FC

Before: O'CONNELL, P.J., and CAVANAGH and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of two counts of second-degree murder, MCL 750.317, possession of a firearm by a felon, MCL 750.224f, and felony-firearm, MCL 750.227b. We affirm.

I. FACTS

This case arises from the double homicide of cousins, Brandy Lowe and Betsy Lowe. Levon Pate shot and killed both at Walsh Park in Lansing. Defendant was prosecuted as an aider and abettor. The prosecutor's theory was that Pate and defendant, while under the influence of drugs, took the victims to a remote location, planning to shoot them simultaneously. When defendant's gun malfunctioned, Pate shot the cousins in succession.

On appeal, appellate counsel argues that the trial court erred in denying a motion for a mistrial based on juror misconduct, in removing defendant's relatives from the courtroom for part of jury selection, in denying a motion for a directed verdict based on the sufficiency of the evidence, and in denying a motion for a new trial based on the great weight of the evidence. Appellate counsel additionally claims that defendant's trial counsel was ineffective and, alternatively, that the trial court erred in denying a motion for an evidentiary hearing to develop that issue. Defendant, in his Standard 4 brief, also argues that his trial counsel was ineffective, and additionally argues that he was denied a fair trial by prosecutorial misconduct or the cumulative effect of trial errors, and that African-Americans and other minorities were underrepresented on his jury.

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II. JUROR MISCONDUCT

This issue stems from two irregularities. The first concerned juror number one who admitted reading an article about the case on the Internet which reported that another suspect was already imprisoned, a gun jammed, and the murders were execution style. The juror advised that he felt he had acquired a bias in the matter and admitted that he had told the other jurors about the conviction. The prosecuting attorney argued that mentioning the other suspect's conviction was not problematic because that fact would be brought to the jury's attention. But the trial court excused juror number one. Thereafter, each individual juror was asked if what they heard regarding the article went beyond the fact that a codefendant was convicted and each responded in the negative. The court also invited the attorneys to question the jurors on the matter and defense counsel stated, "I just want to make sure . . . there's nobody . . . answering the questions in the way that they are because they have any type of fear about getting in trouble," and when that inquiry aroused no response, counsel stated, "That's all, Your Honor. I'm satisfied."

The second juror irregularity concerned juror number four. After the first several prosecution witnesses had testified, that juror informed the trial court that she personally knew one of the witnesses, Ashley Tarrow. They were casual high school friends several years earlier, but had a few spotty contacts since, including about five or six months earlier. The juror elaborated that she recognized Pate's name as that of Tarrow's boyfriend, but she knew Pate by name only. When she realized she knew one of the witnesses, she mentioned it to a fellow juror who told her to disclose the situation. She did not tell the other juror anything else. Juror number 4 assured the court that she knew nothing about the case before becoming a juror, and that her past familiarity with Tarrow would not interfere with her ability to objectively assess Tarrow's credibility, but the trial court excused her from deliberations.

On appeal, appellant counsel argues that the trial court abused its discretion when it denied his motion for a mistrial premised on these two irregularities. See *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997). We disagree.

"A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant, and impairs his ability to get a fair trial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) (citations omitted). Appellate counsel has failed to show how either irregularity was prejudicial to defendant's rights or impaired his ability to get a fair trial. First, juror number four was excused from deliberations. And appellate counsel does not suggest that the juror spoke out of turn, or otherwise tainted the remaining jurors before being excused. Further, the remaining jurors were instructed to decide the case solely on the basis of the evidence, and not to use any personal knowledge about a person involved in the process. "Jurors are presumed to follow instructions, and instructions are presumed to cure most errors." *People v Petri*, 279 Mich App 407, 414; 760 NW2d 882 (2008). Second, juror number one was excused and defense counsel expressed satisfaction with how the trial court handled the matter. Accordingly, the trial court did not abuse its discretion when in concluded that these two juror irregularities did not warrant a mistrial.

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III. REMOVAL OF DEFENDANT'S RELATIVES

At the start of jury selection, the trial court was concerned about having enough seats for the unusually large number of prospective jurors. With defense counsel's acquiescence, the trial court asked defendant's parents, and possibly other relatives, to leave the courtroom to make room for the jurors. After about an hour, they were allowed back in, and jury selection continued for about four more hours. In a post-trial motion for a new trial, appellate counsel argued that this partial and temporary closure of the courtroom constituted a structural error warranting a new trial. The trial court denied the motion, holding that only a few spectators were removed for only a short time and its policy was to prefer relatives of the victims over relatives of the defendant in such situations.

Appellate objections relating to a criminal defendant's right to a public trial are subject to forfeiture and, thus, review for plain error affecting substantial rights. *People v Vaughn*, 491 Mich 642, 646; 821 NW2d 288 (2012), citing *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999). Where plain error is shown, the reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Vaughn*, 491 Mich at 646, quoting *Carines*, 460 Mich at 774.

Our state and federal constitutions both guarantee the right to a public trial. *Vaughn*, 491 Mich at 650, citing US Const, Am VI; Const 1963, art 1, § 20. That right encompasses voir dire proceedings. *Vaughn*, 491 Mich at 651-652. Complementing a defendant's Sixth Amendment right to a public trial is the general public's First Amendment right to attend trials. *Id*. at 652. In light of the fundamental importance of keeping judicial proceedings open to the public, such a proceeding may be closed to the public only if some overriding interest compels doing so, and when such an interest does arise the closure should be no broader than necessary to address that interest. *Id*. at 653.

Here, the trial court was within its rights in limiting public access to voir dire proceedings in deference to the numerous jurors, for as long as the supply of seats fell below demand. But the court plainly erred in arbitrarily selecting persons aligned with defendant for exclusion, in open preference for those aligned with the prosecution. See US Const, Am XIV, § 1; Const 1963, art 1, §§ 2, 17. However, appellate counsel has failed to show how defendant's substantial rights were affected by this brief exclusion. Excluding defendant's relatives from one out of five hours of jury selection, in connection with a nine-day jury trial, was not serious enough an irregularity to throw the fairness or integrity of the proceedings into doubt, or to bring them into public disrepute. Accordingly, no appellate relief is warranted.

IV. SUFFICIENCY OR GREAT WEIGHT OF THE EVIDENCE

Appellate counsel next argues that the evidence was insufficient to sustain a conviction and that the verdict was against the great weight of the evidence. We disagree.

When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecution, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v*

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Mayhew, 236 Mich App 112, 124; 600 NW2d 370 (1999). A trial court's decision on a motion for a new trial premised on the ground that the verdict was against the great weight of the evidence is reviewed for an abuse of discretion. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). "A trial court abuses its discretion when it fails to select a principled outcome from a range of reasonable and principled outcomes." *People v Kahley*, 277 Mich App 182, 184; 744 NW2d 194 (2007).

"Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense." MCL 767.39.

> A conviction of aiding and abetting requires proof of the following elements: (1) the underlying crime was committed by either the defendant or some other person, (2) the defendant performed acts or gave encouragement that aided and assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time of giving aid or encouragement. [*People v Smielewski*, 235 Mich App 196, 207; 596 NW2d 636 (1999).]

"Mere presence, even with knowledge that an offense is about to be committed or is being committed, is insufficient to show that a person is an aider and abettor." *People v Wilson*, 196 Mich App 604, 614; 493 NW2d 471 (1992). However, any advice, aid, or encouragement, however slight, if effective, is sufficient to establish guilt on an aiding and abetting theory. *Id*. The intent element may be satisfied by proof that the defendant had a specific intent to commit the crime, that the defendant had knowledge of the principal's intent, or that the criminal act committed by the principal was an incidental consequence that might reasonably have been expected to result as a natural and probable consequence of the intended wrong. *People v Robinson*, 475 Mich 1, 6-7, 9; 715 NW2d 44 (2006). Intent may be inferred from all of the facts and circumstances, and minimal circumstantial evidence is sufficient. *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998).

Here, defendant argues that witness Douglas Teed's testimony was not credible and did not tend to prove that defendant aided and abetted in the murders. Teed had been incarcerated with defendant and testified about purported conversations he had with defendant regarding the murders. Defendant argues that Teed's timing of the events can readily be rebutted by police testimony and that Teed could have learned about defendant's presence at the murders, including the tendency of his gun to jam, from a newspaper article. We agree that Teed's testimony was impeached, at least in part. But a trial judge does not sit as the thirteenth juror in ruling on motions for a new trial. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). And "[c]onflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *Id*. at 647. Further, Teed's testimony that defendant intended to participate in the murders was not the only evidence of defendant's active involvement. Pate also testified that defendant attempted to shoot one of the victims but his gun jammed. And after defendant fled from police, a gun was recovered that was malfunctioning in a way that would cause it to jam. That gun was identified by a witness as defendant's gun. Thus, there was evidence, in addition to Teed's testimony, that could persuade a rational trier of fact that

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defendant aided and abetted in the murders and was not merely present at the crime scene. Accordingly, the trial court did not err in denying the motion for directed verdict which challenged the sufficiency of the evidence, or the motion for a mistrial that challenged the verdict as against the great weight of the evidence.

V. ASSISTANCE OF COUNSEL

Appellate counsel argues that defendant's trial counsel was ineffective because he failed to object to the removal of defendant's relatives for part of jury selection and because he failed to secure the testimony of certain witnesses. We disagree.

"To prevail on a claim of ineffective assistance of counsel, defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) the resultant proceedings were fundamentally unfair or unreliable." *People v Brown*, 294 Mich App 377, 387-388; 811 NW2d 531 (2011).

Counsel's decisions concerning the choice of witnesses or theories to present are presumed to be exercises of sound trial strategy. *People v Julian*, 171 Mich App 153, 158-159; 429 NW2d 615 (1988). To overcome that presumption, a defendant must show that counsel's failure to prepare for trial resulted in counsel's remaining ignorant of substantially beneficial evidence that accordingly did not get presented. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990). "[T]he failure to interview witnesses does not itself establish inadequate preparation." *Id*. at 642.

Appellate counsel first makes issue of defense counsel's acquiescence in the trial court's insistence that defendant's relatives leave the courtroom for part of jury selection in order to make room for the unusually large number of prospective jurors. As discussed above, the trial court was within its rights in asking spectators to make space for prospective jurors, but erred in asking only defendant's relatives to make that accommodation. But, as discussed above, we conclude this was not serious enough an irregularity to have affected the outcome, or rendered the proceedings fundamentally unfair or unreliable. See *Brown*, 294 Mich App at 387-388.

Appellate counsel otherwise supports the claim of ineffective assistance of counsel by arguing that defense counsel failed to call two "exculpatory witnesses" who were incarcerated with defendant and were prepared to testify that defendant never spoke of the murders or of his gun jamming. Trial counsel, however, did call two different witnesses who testified that they were incarcerated with defendant, associating with him on a nearly daily basis, and that defendant never spoke of being involved in a murder, having "two under his belt," or having had a gun-jamming incident.

Nevertheless, appellate counsel argues that trial counsel should have called Julius Rolland and Robert Lee Curry to testify. Appellate counsel offers a statement from an investigator who reported that he was denied access to Rolland, but did meet with Curry and Curry was very cooperative, opining that defendant would never confide anything to Teed. Appellate counsel also offers an informal statement from Rolland, as transcribed by appellate counsel, asserting that Rolland had been "bunkmates" with defendant and Teed, was with

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defendant most of the day, and that Rolland never heard defendant speak of a murder or a gun jamming. Rolland also claimed that Teed was known to be a liar. Appellate counsel acknowledges that "the investigator says he never actually spoke with Rolland," but asserts even so that "Julius Rolland says indeed he did talk to the investigator and told him he would be willing to testify." Appellate counsel thus admits that, at best, calling Rolland would have introduced a credibility contest between Rolland and the investigator. Appellate counsel does not explain why the jury would have likely resolved that conflict by crediting the prisoner over the investigator. Further, defense counsel presented testimony from two inmates who gave substantially similar testimony to the testimony that appellate counsel claims Rolland and Curry would have provided. Thus, the presumption that defense counsel's decision was a matter of trial strategy has not been overcome. See *Julian*, 171 Mich App at 158-159.

Moreover, we note that trial counsel did effectively cross-examine Teed regarding his self-interested motives for helping the police and about his review of a newspaper article for information related to the gun jamming. And, in closing argument, defense counsel effectively disparaged Teed's credibility, including pointing out that Teed "told you about a conversation that occurred in May of 2006" but he was "paroled in April of 2006," stressing that Teed could have learned of defendant's jamming gun from information available in the newspaper. Accordingly, we conclude that appellate counsel has failed to show that trial counsel's performance fell below the objectively reasonable, let alone that the outcome would have been different if counsel had acted differently.

Appellate counsel additionally argues that the trial court abused its discretion in denying a post-trial motion for an evidentiary hearing to develop the issue of trial counsel's effectiveness. See *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Appellate counsel included with her motion for a new trial an alternative prayer for an evidentiary hearing "in order to determine whether Defendant received ineffective assistance of counsel." However, the hearing on the motion included no mention of any request for an evidentiary hearing, and the order denying the motion for a new trial likewise said nothing about a request for a *Ginther* hearing. This issue was thus raised, but then abandoned.

VI. PROSECUTORIAL MISCONDUCT

In his Standard 4 brief, defendant argues that the prosecuting attorney's remarks included several assertions not supported by the evidence, along with improper appeals to the juror's fears and sense of civic duty. However, defendant admits that none of the challenged remarks were objected to at trial, leaving appellate objections unpreserved. An unpreserved claim of prosecutorial misconduct is reviewed for plain error affecting substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Relief for unpreserved issues of prosecutorial misconduct is appropriate only "when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice." *Unger*, 278 Mich App at 234-235 (citation omitted).

Typically prosecutors are afforded great latitude regarding their arguments and conduct at trial. *Id*. at 236. They are free to argue the evidence and all reasonable inferences arising from the evidence. *Id*. And a prosecutor need not confine argument to the "'blandest of all possible terms.'" *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989), quoting *People v*

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Cowell, 44 Mich App 623, 628-629; 205 NW2d 600 (1973). "The test for determining whether prosecutorial misconduct requires reversal is whether the defendant was denied a fair and impartial trial." *Marji*, 180 Mich App at 536. Claims of prosecutorial misconduct are decided on a case-by-case basis, evaluating each challenge in context. *Id*. at 537.

A. FACTS NOT IN EVIDENCE

"Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case." *Thomas*, 260 Mich App at 453-454.

In arguing that the prosecuting attorney violated this rule, defendant first asserts that the prosecuting attorney stated that "defendant 'himself admitted' to having the .22 revolver the night of the killings," but that "[a]t no time during his testimony did the defendant make any such statements." Defendant cites three pages of transcript in support of this argument. On the first, we find the prosecuting attorney saying, "We know that the defendant himself also corroborates Ashley's testimony about this gun in People's [exhibit] 72. Defendant admits, *practically*, that he had it." (Emphasis added.) The italicized qualifying word indicates that the prosecuting attorney was in fact arguing an inference from the evidence, not actually attributing to defendant a confession of his having had the gun on the night in question. Defendant denied having it on the night of the murders, but admitted that he was caught in possession of it several days later when he and Pate ran from the police, and had carried the gun for the few days ahead of that time. The prosecuting attorney did not commit misconduct by suggesting that defendant testified truthfully about having the gun when he was arrested, while acting on his obvious incentive to disclaim any such thing on the night of the killings. Where the jury is faced with a credibility question, the prosecutor is free to argue credibility from the evidence. *People v Smith*, 158 Mich App 220, 231; 405 NW2d 156 (1987). Defendant also cites the next page of trial transcript, upon which nothing even implies that defendant admitted having had the gun. Defendant's final record citation for this assertion presents the prosecuting attorney saying, "We know, ladies and gentlemen, that [defendant] comes back with that 22 caliber gun that jams." Viewed in context, the prosecuting attorney was not attributing a confession to defendant, but rather was arguing inferences from Tarrow's testimony.

Defendant next objects that the prosecuting attorney "stated that Ashley Tarrow testified that she 'seen' the defendant 'return' to her apartment that night with the .22." Checking the three transcript pages cited, we first find the prosecuting attorney saying, "Ashley told you that that was the gun she saw him with and that was the gun that he came back with in the early morning hours of October 10, 2004." On the following page, the prosecuting attorney continues, "why . . . discount what [Tarrow] tells you about the little things that the defendant didn't tell you? Like, defendant had a gun when he came back." On the last page cited, the prosecuting attorney reiterates, "he comes back with that 22 caliber gun that jams," but there is no mention of Tarrow. Tarrow in fact testified that defendant customarily carried the gun in question, and that Pate and defendant lay down in the living room with their familiar handguns on the night in question. Characterizing Tarrow's account as indicating that defendant came back to her house in possession of the gun in question was reasonable inference from the testimony.

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Defendant's next objection: "The prosecutor stated that the defendant and Pate had a 'dispute' with Brown and we took 'lethal force' to settle this dispute one way or another. He stated, 'the evidence and testimony' shows this." Here defendant accurately represents what the prosecuting attorney said, and that Brown and Pate became embroiled in conflict is much in evidence. Although there was no testimony indicating that defendant shared in the antagonism, the evidence of defendant's and Pate's close association generally, and acting much in tandem on the night in question, gave rise to a reasonable inference that he did so.

Defendant next makes issue of the following: "The prosecution's statement about corroboration in terms of Douglas Teed, that defendant and Teed had a conversation about a 'gun that jams' and lo and behold, this man, from the evidence and testimony, has a 'gun that jams.'" Defendant argues that Teed described a conversation about a handgun that was a "semi-auto," and protests that the .22 caliber handgun at issue was a revolver, thus not the same gun. But the prosecuting attorney's comments included no attempt to conflate the properties to two dissimilar weapons; instead, the commentary emphasized that Teed spoke of defendant's boasting of having a gun that sometimes malfunctioned, and that defendant did indeed go about in possession of a gun that jammed. This commentary did not deviate from matters in evidence.

Next, defendant asserts that the prosecuting attorney stated that "defendant's 'words and actions' before the park shows he participated in premeditated murder," and argues that there was no testimony to the effect that defendant was angry, or otherwise of a mind to harm someone, on the night in question, and that his only "action" on the way to the park was sitting in the back seat of a car. In fact, the prosecuting attorney described defendant's actions in being with Pate on the night in question, having a gun at the time, and having the gun malfunction, which implies that defendant was trying to fire it. The prosecuting attorney did not attribute words to defendant while specifically on the way to the park that night, but instead spoke of defendant's actions and words after the murders. In evidence was that defendant was carrying a gun that tended to malfunction that night, he complained to Pate of just that malfunction at the time, and mentioned it also to some fellow inmates while incarcerated. Again, the prosecuting attorney was arguing from the evidence.

Defendant bases his last allegation of arguing facts not in evidence on "[t]he prosecutor's statement that there was an argument in the car and the park over where [Undra] Brown is and defendant has his gun aimed at Brandy because the 'plan' is to shoot at the same time," complaining that there was no testimony of an argument in the car, or in the park, or about where Brown was. But the prosecuting attorney made clear that he was using inferences to fill in some evidentiary blanks, saying that what "*probably* happens in that car is they are arguing over where Undra is" (emphasis added), and that defendant "most likely" aimed his gun at one of the victims in furtherance of a decision of which he was a part. The prosecuting attorney elaborated, "I say probably, but . . . the plan most likely is that they would fire at the same time so that there would be no screams, but we know from Levon Pate's second plea that he says [defendant's] gun jammed." The prosecuting attorney thus did not misrepresent the facts in evidence, but instead offered a theory based on what was in evidence.

Defendant asserts that trial counsel was ineffective for failing to object to any of these prosecutorial comments, but because defendant has failed to show that the prosecuting attorney argued beyond the evidence and reasonable inferences from it, trial counsel's disinclination to

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raise objections in the matter cannot support a claim of ineffective assistance. "Trial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

B. CIVIC DUTY, FEAR OR PASSION

"Civic duty arguments are generally condemned because they inject issues into the trial that are broader than a defendant's guilt or innocence and because they encourage the jurors to suspend their own powers of judgment." *People v Potra*, 191 Mich App 503, 512; 479 NW2d 707 (1991). Nor should a prosecuting attorney resort to argument intended to inflame the passions or prejudices of the jury. *People v Pennington*, 113 Mich App 688, 690-692; 318 NW2d 542 (1982). Defendant argues that the prosecuting attorney ran afoul of both principles with the following statements:

> [Defense counsel] asked you essentially in his argument to be afraid. That's what his argument was. He pedaled [sic] fear to you, ladies and gentlemen, fear of the big decision that you have to make and tells you that there is not credible evidence. He tells you that this man right here was afraid of his friend, Levon Pate, and he tells you that the [victims], well, if this actually happened, then they wouldn't be afraid, they would have fought back. His whole argument, ladies and gentlemen, is permeated with the idea of fear and it's designed to play on your fear. Because, as you know, you have . . . a big decision before you. You must decide the fate of this man right here based on the evidence and testimony before you.
>
> . . . But to be just, each and every one of you knows, to be just and fair you must also be brave. And so I ask you to set aside your fear for a second and think about the evidence and testimony you've heard and think about this supposed fear of this man right here, [defendant]; drug dealer, living in the streets, always carrying a gun, as Ashley said. Think about his fear in relation to Levon Pate, . . . who, conveniently enough for [defendant and his attorney], has been convicted of this. He offers you, ladies and gentlemen, a way out. A way out of your difficult decision by saying, that man up there, that cold hearted killer, Levon Pate, he's already taken responsibility, let this man go. Don't make the hard decision, don't consider what he did. Justice has been served.
>
> Fear and a way out. Don't take that way out.

Defendant argues that this commentary "in an unsubtle fashion was appealing to the unstated apprehension that by acquitting this Defendant, the jury would be letting a cold, depraved killer out on the street," and that "this is exactly the kind of argument that is prohibited, because it improperly appeals to emotion rather than factual innocence or guilt." We reject defendant's characterization. The prosecuting attorney was not trying to put the jury into fear of having defendant at large in society, but was trying to show concern for the weighty decision the jurors had to make, and to urge them to resist any hesitation to avoid making a decision that would have severe consequences for defendant through the expedient of satisfying themselves that the admitted killer was already behind bars.

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For these reasons, defendant has failed to bring any prosecutorial misconduct to light and no appellate relief is warranted.

VII. COMPOSITION OF THE JURY ARRAY

Defendant in his Standard 4 brief asserts that he "was denied his Sixth Amendment right to an impartial jury drawn from a cross-section of the community." Defendant further states that defense counsel preserved this issue with a timely objection. We disagree with both assertions.

At the end of jury selection, defense counsel estimated that, out of one hundred prospective jurors, only between four and six were African-American.[1] Counsel protested the dearth of African-Americans, but conceded that one of the criteria for identifying a constitutional infirmity in this regard could not be shown from the record. Counsel spoke of investigating further, but this was counsel's last mention of the issue. Defense counsel thus raised concerns about the makeup of the jury array, but conceded that he was not immediately able to show error in the process used in this instance, then did not follow through with the further industry he thought might bring error to light. Accordingly, defense counsel raised, and then abandoned, objections to the jury selection process.

Moreover, to establish a prima facie case of a violation of the Sixth Amendment's fair-cross-section requirement, a defendant must show:

> (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. [*People v Bryant*, 491 Mich 575, 597; 822 NW2d 124 (2012), quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).]

On appeal, however, defendant does not show that the fair-cross-section requirement was violated; instead, he requests this Court to assist in investigating that possibility. But defendant is asking for a form of appellate relief that is beyond the scope of what this Court can provide; thus, no appellate relief is warranted.

VIII. CUMULATIVE ERROR

Defendant argues that, even if no single error in the proceedings below was serious enough to warrant reversal on its own, the cumulative effect of all such error denied him a fair trial and so reversal is warranted.

However, of the several issues argued by defendant and appellate counsel, the only allegation of error that had any merit was the trial court's decision to select defendant's parents

[1] Apparently one of whom was seated on defendant's petit jury.

and other partisans, in preference for spectators aligned with the victims, for removal from the courtroom for part of jury selection in an effort to make room for the unusually large number of prospective jurors. But, as discussed above, that error was not of structural significance and did not affect the outcome. And because that is the only error the defense has brought to light, there was no other error to consider with it for purposes of cumulative-error analysis.

Affirmed.

/s/ Peter D. O'Connell
/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio

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People v Blackwell

305243

January 29, 2013

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 29, 2013
v	No. 305243 Saginaw Circuit Court
ANGELA ALLEN BLACKWELL, Defendant-Appellant.	LC No. 10-034179-FC

Before: TALBOT, P.J., and WILDER and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right from her jury trial convictions for first-degree criminal sexual conduct (CSC I), MCL 750.520b; second-degree criminal sexual conduct (CSC II), MCL 750.520c; pandering, MCL 750.455; and possession of cocaine under 25 grams, MCL 333.7403(2)(a)(v). Defendant's CSC convictions were based on a theory of her aiding and abetting Johnnie Griffin in his sexual assault of defendant's granddaughters. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to concurrent terms of three to 15 years for possession and of 25 to 40 years for the remaining convictions. We affirm.

I.

Defendant was a crack cocaine user who obtained cocaine from her friend Johnnie Griffin. Defendant regularly cared for her 11-year-old granddaughter and had also cared for her 15-year-old granddaughter. In March 2010, defendant was arrested for possession of cocaine and aiding and abetting several acts of criminal sexual conduct perpetrated by Griffin against the children while they were in defendant's care.

At trial, the 15-year-old granddaughter testified that Griffin had bought her a bus ticket to come stay at defendant's house. She also testified that defendant had sent her into Griffin's house, where Griffin groped her and gave her drugs to deliver to defendant. Further, the 15-year-old stated that defendant told her to get inside Griffin's truck on another occasion and that Griffin groped her at that time as well. The 11-year-old granddaughter, however, had difficulty testifying about the specific sexual acts Griffin performed on her during direct examination by the prosecutor. The prosecutor requested a recess and following the recess moved, pursuant to MCL 600.2163a(13), that the courtroom be closed to the public. The prosecutor advised that the 11-year-old had told him during the recess that the number of people in the courtroom, the subject matter of the testimony, and the non-verbal conduct of some of the members of the

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gallery made her unable to continue her testimony. Defendant objected to the motion for closure on the basis that it was untimely, in that MCL 600.2163a(13) required the motion for closure to be brought before the preliminary examination. The trial court granted the prosecution's motion:

> THE COURT: Well, given the fact that--first of all, the prosecutor probably could not have anticipated whether the witness was going to have problems with this, but definitely the age is a factor. At least if she testifies to what's in the Information, it certainly would be the type of information that you wouldn't want to be talked about in front of other people. And on the representation of counsel, it's the witness and her family's desire that the courtroom be closed.
>
> * * *
>
> If we could--other than the support person and, I guess, the detective, everybody goes out I guess, until –
>
> Which [victim] is this?
>
> MR. DONKER: [the 11-year-old child].
>
> THE COURT: – Until [the 11-year-old child] is done and then we'll open the courtroom again.

After the courtroom was closed, the 11-year-old testified that defendant took her to Griffin's bedroom on several occasions. She explained that while in the bedroom, defendant told her to take off her clothes and to lie on the bed. Defendant would then watch Griffin penetrate the girl with his finger and penis. The 11-year-old also testified that at the conclusion of those acts, Griffin gave her money and gave defendant cocaine. She explained that, afterwards, defendant instructed her not to tell anyone because if others found out about the acts, Griffin and defendant would go to jail. Prosecution witnesses testified that the 11-year-old girl tested positive for trichomonas, a sexually transmitted infection. Defendant denied having any knowledge of improper contact between Griffin and her granddaughters.

After deliberating, the jury convicted defendant of CSC I, MCL 750.520b; CSC II, MCL 750.520c; pandering, MCL 750.455; and possession of cocaine under 25 grams, MCL 333.7403(2)(a)(v). Defendant appeals as of right.

II.

Defendant first argues that her state and federal constitutional right to a public trial was violated by the trial court's decision to close proceedings to the public during a portion of the 11-year-old victim's testimony. We disagree. Defendant objected at trial to the closure of the courtroom on the basis that, because the prosecutor had not made a motion before the

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preliminary examination as provided in MCL 600.2163(a)(13)[1] for special arrangements, the motion was untimely. Defendant did not object on the basis that the courtroom closure violated the Michigan or United States Constitution. Therefore, this constitutional issue is not preserved. See *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993) ("[a]n objection based on one ground is insufficient to preserve an appellate attack based on a different ground"). We therefore review this unpreserved issue that the closed courtroom violated defendant's constitutional rights for plain error. *People v Vaughn*, 491 Mich 642, 654-655; ___ NW2d ___ (2012). Thus, "defendant must establish (1) that the error occurred, (2) that the error was 'plain,' (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 664-665.

The Sixth Amendment guarantees every criminal defendant a "speedy and public trial." US Const, Am VI; Const 1963, art 1, § 20. The right to an open trial is not absolute, but that right will only rarely give way to other interests. *Waller v Georgia*, 467 US 39; 104 S Ct 2210; 81 L Ed 2d 31 (1984). The *Waller* Court outlined the requirements for the total closure of trial: (1) the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) it must make findings adequate to support the closure. *Id*. at 48.

The first two requirements under *Waller* are easily met. First, the prosecution advanced protecting a young witness as an overriding interest that would be prejudiced by the failure to close the trial. This Court has recognized that the government may have a substantial or compelling interest in protecting young witnesses who are called to testify in cases involving allegations of sexual abuse. *People v Kline*, 197 Mich App 165, 171; 494 NW2d 756 (1992). Second, the closure was limited to the portion of the 11-year-old victim's testimony dealing with the details of her sexual abuse, which was not broader than necessary to protect the witness.

Contrary to its responsibility, the trial court did not make explicit findings regarding the final two *Waller* requirements.[2] Nevertheless, we find that the record establishes that these requirements were satisfied. Although the trial court did not specifically consider any alternatives to clearing the courtroom during the 11-year-old's testimony on the record, the trial court referenced the victim's tender age and concluded that it was reasonable for someone that young to have difficulties testifying regarding the details of the sexual assaults in the presence of many strangers. See *Kline*, 197 Mich App at 171. Moreover, immediately prior to the

[1] 2012 PA 170 subsequently revised the statute, such that MCL 600.2163a(13) is now found in MCL 600.2163a(14). The subsection provides: "If, upon the motion of a party made before the preliminary examination, the court finds on the record that the special arrangements specified in subsection (14) [(15) in current version] are necessary to protect the welfare of the witness, the court shall order those special arrangements. . . ."

[2] A trial court must make "findings adequate to support the closure [of the courtroom]." *Waller*, 467 US at 48

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prosecutor bringing the motion, the witness was incapable of answering the question, "Where did he touch you?" with the courtroom open. As such, though the trial court erred by not making all of the *Waller* findings on the record, we conclude that the trial court's failure to consider alternative options on the record does not require reversal. Defendant has failed to establish that she was actually innocent or that any error seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

Defendant, in her brief on appeal, argues that "[t]he jury could have reasonably concluded that the public was excluded due to the inappropriate conduct of Defendant-Appellant." We interpret this argument to mean that the jury could have concluded that the reason the courtroom was cleared was because defendant actually committed the alleged acts. However, we find that such conclusions are not only speculative, but are entirely contrary to common sense. The courtroom was cleared when the witness answered "yes" to whether she needed "a minute" to compose herself after she was unable to respond to the prosecutor's question of "Where did [Griffin] touch you?" Thus, we find no basis for defendant's argument that the jury could infer that the reason the courtroom was cleared was because defendant was necessarily guilty.[3] Rather, the context is patently clear that the witness was unable to proceed with the sensitive testimony in front of the entire gallery. Therefore, because defendant has failed to establish that the temporary closure "seriously affected the fairness, integrity, or public reputation of judicial proceedings," defendant is not entitled to any relief.

III.

Next, defendant argues that she was denied a fair trial due to improper remarks made by the prosecution during closing argument. We disagree. We review unpreserved issues of prosecutorial misconduct for outcome-determinative plain error. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

During closing arguments, the prosecution made the following comments:

> To show that Miss Blackwell was an aider and abettor, we have to show, number one, that crimes were actually committed, that Mr. Griffin actually performed the sexual acts with [the 11-year-old victim]. Number two, that Miss Blackwell did something to assist in the commission of those crimes. And three, that either she intended it to happen or that she knew it was going to happen. One of those three.
>
> And I would assert as far as knowledge, that when this happens seven or eight times and the same thing happens over and over again, that is certainly knowledge.

[3] We also note that this assertion is even more dubious when considering that the trial court instructed the jury that defendant is "presumed to be innocent" and that it was "free to believe all, none, or part of any person's testimony."

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> Now, the amount of assistance that she has to give, that's required by law, is very minimal. But let's think about the evidence that we have in this case. The first thing she did to assist was to take [the 11-year-old victim] from a place of relative security, which was her house, over to [Griffin's place]. Transportation is a form of assistance.
>
> Second-most in a sentence that will forever be edged [sic] in my memory, take your clothes off. When a grandmother tells her granddaughter to take your clothes off, that is an overt act of assistance in the commission of a crime. Staying in the bedroom, seeing this take place, is assistance. Now you'll be getting an instruction that says knowledge plus presence isn't assistance.
>
> But put yourselves back, I had the privilege of knowing my grandmothers, both of them, think about doing something in the presence of your grandmother. If you could do it when grandma was there, it was all right. It was the thing to do. Because if it wasn't, we would expect grandma to stop it. Not the fact here. Miss Blackwell stayed, her presence alone is assistance. Also telling [the 11-year-old victim] not to contact the police, don't say anything about this or we'll go to jail, helping her, keeping her, from announcing this to somebody else or to tell somebody else what had happened, that is assistance.

Defendant argues that the prosecution engaged in blatant misconduct by telling the jury to ignore the fact that "knowledge plus presence isn't assistance," and asserting a "grandma exception" to the applicable law. Indeed, the trial court correctly instructed the jury that "[the mere fact that [defendant] was present when [the crime] was committed is not enough to prove that she assisted in committing it." Thus, while the prosecutor's argument that defendant's "presence alone is assistance" contradicted the jury instruction, any error is harmless. The jury was properly instructed with regard to the law of aiding and abetting, and jurors are presumed to follow their instructions. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Defendant has not shown that this isolated comment deprived her of a fair trial. Furthermore, the evidence of defendant's assistance in the commission of Griffin's sexual assaults was overwhelming. Defendant was shown to have received consideration from Griffin in the form of money and drugs, in exchange for defendant making arrangements for Griffin to have access to her granddaughters so that he could assault them. Defendant has failed to show how any error was outcome determinative, and she is not entitled to any relief.

Affirmed.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder
/s/ Michael J. Riordan

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People v Gibbs

306124

February 14, 2013

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v PHILLIP CHARLES GIBBS, Defendant-Appellant.	FOR PUBLICATION February 14, 2013 9:05 a.m. No. 306124 Genesee Circuit Court LC No. 11-028140-FC
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v TYRELL HENDERSON, Defendant-Appellant.	No. 306127 Genesee Circuit Court LC No. 11-028141-FC Advance Sheets Version

Before: K. F. KELLY, P.J., and MARKEY and FORT HOOD, JJ.

PER CURIAM.

In Docket No. 306124, defendant, Phillip Charles Gibbs, was convicted by a jury of two counts of armed robbery, MCL 750.529, one count of unarmed robbery, MCL 750.530, and one count of conspiracy to commit armed robbery, MCL 750.157a and 750.529. Gibbs was sentenced to 17½ to 30 years' imprisonment for each count of armed robbery, 100 months to 15 years' imprisonment for the unarmed robbery conviction, and 17½ to 30 years' imprisonment for the conviction of conspiracy to commit armed robbery.

In Docket No. 306127, defendant, Tyrell Henderson, was convicted by a jury of three counts of armed robbery, MCL 750.529, one count of conspiracy to commit armed robbery, MCL 750.157a and 750.529, one count of assault with intent to rob while armed, MCL 750.89, one count of carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Henderson was sentenced to 225 months to 40 years' imprisonment for each count of armed robbery, 225 months to 40 years' imprisonment for the conviction of conspiracy to commit armed robbery, 225 months to 40

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years' imprisonment for the conviction of assault with intent to rob while armed, 24 to 60 months' imprisonment for the conviction of carrying a concealed weapon, and 2 years' imprisonment for the felony-firearm conviction.

Defendants were tried together in front of separate juries. They both appeal as of right.[1] We vacate Henderson's conviction for assault with intent to rob while armed, but otherwise affirm both defendants' convictions and sentences.

I. BASIC FACTS AND PROCEDURAL HISTORY

A. TRIAL

This case arises from an armed robbery that occurred at a store called Wholesale 4 U in Flint, Michigan, on October 26, 2010. Nancy Anagnostopoulos and her husband, Costas Anagnostopoulos, owned the store and were present at the time of the robbery. Also present was employee Jeremy Kassing. Defendants had been to the store together numerous times that day. Originally, they had hoped to pawn some jewelry. After finding out that the jewelry had no value, Henderson purchased a video game. He later decided to return it. Defendants entered the store and told Costas that the game did not work. As Costas attempted to help determine what was wrong with the game, Henderson struck him in the head with a gun. Gibbs, who was not personally armed during the incident, approached Nancy and removed her necklaces and ring. He took her identification and purse. Gibbs also took an iPod from the store, as well as a number of laptop computers. In the meantime, Henderson took Costas's jewelry, wallet, and money. He ordered Costas to open the store's register and then took Costas to a back room where a safe was kept. Part of Costas's ear was cut off as a result of the blow he received, and he received stitches for the injury. Kassing's wallet was also taken. A subsequent search of the home Gibbs shared with his mother uncovered a sandwich bag containing jewelry, a sandwich bag containing papers and the identifications of the three victims, and several watches identified as those taken from the store.

In separate police interviews, both defendants admitted their involvement. However, Gibbs told the officer that his involvement was involuntary. Gibbs believed that they were going to the store to return the video game and had no idea that Henderson was planning a robbery. Gibbs stated that Henderson ordered him to take the victims' belongings and other store items. Gibbs testified at trial that he complied only because he did not want anything to happen to him.

The juries convicted defendants and they were sentenced as outlined previously.

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[1] On September 14, 2011, Henderson filed a claim of appeal, and on September 16, 2011, Gibbs filed his claim of appeal. On December 7, 2011, this Court entered an order consolidating the appeals. *People v Gibbs*, unpublished order of the Court of Appeals, entered December 7, 2011 (Docket Nos. 306124 and 306127).

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B. GIBBS'S MOTION FOR REMAND

On May 23, 2012, Gibbs filed a motion to remand with this Court in order to make two objections to his sentencing, develop his argument that he was denied the right to a public trial, and, alternatively, argue that his counsel was ineffective. We granted Gibbs's motion to remand and remanded for Gibbs to file a motion for resentencing regarding prior record variable (PRV) 5 and PRV 6 and to file a motion for a new trial. *People v Gibbs*, unpublished order of the Court of Appeals, entered June 20, 2012 (Docket No. 306124). We ordered the trial court to hold an evidentiary hearing concerning the closure of the courtroom during voir dire. *Id.*

On remand, Gibbs argued that his right to a public trial was violated by the closing of the courtroom and the exclusion of his family from jury selection. Gibbs also argued that he was entitled to resentencing on the basis of the incorrect scoring on PRV 5 and PRV 6. The trial court declined to conduct a full hearing on the court-closure issue. The trial court admitted that its procedure is that, after jury selection begins, it does not allow people to enter or leave the courtroom. The trial court stated that if individuals came after jury selection started, then they would not have been allowed in the courtroom. The trial court denied the motion for a new trial. The trial court also found that Gibbs had a relationship to the criminal justice system on the date of the offenses for purposes of scoring PRV 5 and PRV 6 and denied the motion for resentencing.

II. GIBBS'S APPEAL

A. RIGHT TO A PUBLIC TRIAL

Gibbs argues that the trial court violated his right to a public trial and that he is entitled to automatic reversal. We disagree.

Gibbs did not object to the closure at trial. The Michigan Supreme Court recently held that the plain-error standard applies to a defendant's forfeited claim that the trial court violated the defendant's Sixth Amendment right to a public trial. *People v Vaughn*, 491 Mich 642, 664, 674-675; 821 NW2d 288 (2012).

> [I]n order to receive relief on [a] forfeited claim of constitutional error, [a] defendant must establish (1) that the error occurred, (2) that the error was "plain," (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. [*Id.* at 664-665.]

The *Vaughn* Court concluded that the first two prongs of the analysis were satisfied because the trial court ordered the courtroom closed before voir dire without advancing "an overriding interest that is likely to be prejudiced" and the error was "clear or obvious" because it was "readily apparent" that the trial court closed the courtroom and it is "well settled" that the right to a public trial extends to voir dire. *Id.* at 665 (citations and quotation marks omitted). The Court also concluded that the third prong was satisfied because the closure of the courtroom was "a plain structural error." *Id.* at 666. However, the Court held that the fourth prong was not satisfied because "both parties engaged in a vigorous voir dire process," "there were no objections to either party's peremptory challenges of potential jurors," and "each party expressed

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satisfaction with the ultimate jury chosen." *Id.* at 668-669. Additionally, the Court noted that the presence of the venire—members of the public—lessened the extent to which the closure implicated the defendant's right and guaranteed that the proceedings were subject to a substantial degree of public review. *Id.* at 668. The Court concluded that the defendant was not entitled to a new trial. *Id.* at 669.

In *People v Russell*, 297 Mich App 707, 720; 825 NW2d 263 (2012), this Court stated that "the effect of a partial closure of trial does not reach the level of a total closure and only a substantial, rather than a compelling, reason for the closure is required." The Court concluded that the voir dire proceedings were partially closed because of the limited capacity in the courtroom and that the limited capacity was a substantial reason for the closure. *Id.* Accordingly, the partial closure did not deny the defendant his right to a public trial. *Id.*

Gibbs contends that his family and members of the public were prevented from entering the courtroom during jury selection. The record reveals that before jury selection began, the trial court stated, "And if any spectators would like to come in they're welcome but they do have to sit over here by the law clerk, not in the middle of the pool." Gibbs submitted affidavits indicating that individuals were not allowed to enter the courtroom during jury selection. Even accepting Gibbs's contention as true, we find no error given the trial court's statement. It appears that the courtroom was opened to the public initially, but then closed once jury selection began. On remand, the trial court did not conduct a full hearing and acknowledged that once jury selection had begun, the courtroom was closed and suggested that it was "too confusing" to allow individuals to come and go during jury selection. Even if we were to find error on the basis of the trial court's admitted refusal to allow individuals to enter once jury selection began, Gibbs is not entitled to a new trial or evidentiary hearing. As in *Vaughn*, both parties engaged in vigorous voir dire, there were no objections to either party's peremptory challenges, and each side expressed satisfaction with the jury. Further, the venire itself was present. Accordingly, Gibbs fails to satisfy the fourth prong as set forth in *Vaughn* and is not entitled to a new trial.

B. PREARREST SILENCE

Gibbs argues that the prosecutor violated his Fifth Amendment right to remain silent by using his prearrest silence to impeach his testimony and by referring to his prearrest silence during closing argument. We disagree.

Gibbs failed to object to the prosecutor's questions during his cross-examination; therefore, the issue is unpreserved. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). To the extent that Gibbs's argument alleges prosecutorial misconduct, because Gibbs did not object to the prosecutor's statements, the issue is also unpreserved. *People v Cain*, 299 Mich App 27, 35; 829 NW2d 37 (2012). "This Court reviews unpreserved constitutional errors for plain error affecting substantial rights." *Id.* at 40. This Court also reviews unpreserved claims of prosecutorial misconduct for plain error. *Id.* at 35.

During Gibbs's testimony, the prosecutor asked Gibbs when he told his mother what had happened and when he told the police that Henderson made him rob the store. The prosecutor asked Gibbs if he went to the police station on October 26, 2010, or after he talked to his brother the next day. In her closing argument, the prosecutor stated:

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> Because remember despite what Phillip Gibbs testified to here in the courtroom about what his knowledge was, what his role or lack thereof was, he doesn't take an opportunity to run out of the store. He doesn't call 911 from inside the store. He doesn't run away separate from Mr. Henderson after this robbery occurred. He doesn't tell his mother. He doesn't go to the police.

The prosecutor again referred during her rebuttal to Gibbs's failure to turn himself in.

Contrary to Gibbs's assertion, the prosecutor did not violate his constitutional right to remain silent by questioning Gibbs about his failure to alert his mother or law enforcement concerning the robbery.

> A defendant's constitutional right to remain silent is not violated by the prosecutor's comment on his silence before custodial interrogation and before *Miranda*[2] warnings have been given. A prosecutor may not comment on a defendant's silence in the face of accusation, but may comment on silence that occurred before any police contact.
>
> "[A] prosecutor may comment on a defendant's failure to report a crime when reporting the crime would have been natural if the defendant's version of the events were true." [*People v McGhee*, 268 Mich App 600, 634-635; 709 NW2d 595 (2005) (citations omitted).]

However, "[w]here it would not have been natural for the defendant to contact the police—where doing so may have resulted in the defendant incriminating himself—the prosecution cannot properly comment on the defendant's failure to contact the police." *People v Dye*, 431 Mich 58, 80; 427 NW2d 501 (1988).

The prosecutor's comments referred to Gibbs's prearrest silence and, therefore, did not violate his right to remain silent. *McGhee*, 268 Mich App at 634. The prosecutor's comments on Gibbs's failure to report the crime suggested that if Gibbs's testimony were true—that his participation in the robbery was coerced—he would have called 911 or gone to the police immediately. Gibbs, however, claims that it would not have been natural for him to contact the police because he would have believed that Henderson might harm him. We conclude that if Gibbs's version of the events were true—that he did not know Henderson was going to rob the store and he was acting under duress by Henderson—then it would have been natural for him to contact the police. Therefore, the prosecutor's comments were proper and there was no plain error.

C. SENTENCING ERRORS

Finally, Gibbs contends that he is entitled to resentencing because of the erroneous scoring of PRV 5, PRV 6, and offense variable (OV) 13.

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

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> Under MCL 769.34(10), if a minimum sentence is within the appropriate guidelines sentence range, we must affirm the sentence and may not remand for resentencing absent an error in scoring the sentencing guidelines or reliance on inaccurate information in determining the sentence. A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. Scoring decisions for which there is any evidence in support will be upheld. Additionally, we review de novo as a question of law the interpretation of the statutory sentencing guidelines. [*People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006) (citations omitted).]

1. PRV 5

"Prior record variable 5 is prior misdemeanor convictions or prior misdemeanor juvenile adjudications." MCL 777.55(1). The sentencing court must assess 2 points if "[t]he offender has 1 prior misdemeanor conviction or prior misdemeanor juvenile adjudication[.]" MCL 777.55(1)(e). The sentencing court must assess zero points if "[t]he offender has no prior misdemeanor convictions or prior misdemeanor juvenile adjudications[.]" MCL 777.55(1)(f). "'Prior misdemeanor juvenile adjudication' means a juvenile adjudication for conduct that if committed by an adult would be a misdemeanor under a law of this state, a political subdivision of this state, another state, a political subdivision of another state, or the United States *if the order of disposition was entered before the sentencing offense was committed*." MCL 777.55(3)(b) (emphasis added).

Gibbs's presentence investigation report (PSIR) indicates that he pleaded guilty of illegal entry without the owner's permission, a misdemeanor, on August 3, 2010, and was sentenced to probation for the offense on November 9, 2010. This was a juvenile adjudication. The PSIR indicates that the "Disposition Date" was November 9, 2010. The sentencing offense was committed on October 26, 2010. Accordingly, the order of disposition was not entered before the sentencing offense was committed and Gibbs's juvenile adjudication does not constitute a prior misdemeanor juvenile adjudication for purposes of assessing points under PRV 5. MCL 777.55(3)(b). Therefore, the trial court erred by assessing 2 points under PRV 5. However, because a reduction by 2 points from Gibbs's prior record variable score would not change his PRV level, MCL 777.62, resentencing is not required.

2. PRV 6

"Prior record variable 6 is relationship to the criminal justice system." MCL 777.56(1). The sentencing court must assess 5 points if "[t]he offender is on probation or delayed sentence status or on bond awaiting adjudication or sentencing for a misdemeanor[.]" MCL 777.56(1)(d). The sentencing court must assess zero points if "[t]he offender has no relationship to the criminal justice system[.]" MCL 777.56(1)(e).

As mentioned earlier, Gibbs entered a guilty plea to illegal entry without the owner's permission, a misdemeanor, on August 3, 2010, and was sentenced to probation for the offense on November 9, 2010. This was a juvenile adjudication. This Court has held that a defendant's prior juvenile adjudications supported the scoring of PRV 6. *People v Anderson*, 298 Mich App

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178, 182; 825 NW2d 678 (2012) ("The phrase 'criminal justice system' is not limited to adversarial criminal proceedings."). Thus, contrary to Gibbs's assertion, points could be assessed under PRV 6 for his relationship with the juvenile justice system.

There is no evidence that Gibbs was on probation, delayed-sentence status, or bond at the time of the sentencing offense. His PSIR indicates only that he was placed on probation at sentencing or disposition, which took place on November 9, 2010. It appears that Gibbs was, however, awaiting adjudication or sentencing at the time he committed the sentencing offense, given that he had already entered a plea. This Court has stated:

> *Endres* suggests that a five-point score for PRV 6 is not improper when the defendant committed the sentencing offense while awaiting adjudication or sentencing for a misdemeanor, regardless of his or her bond status. The case illustrates this Court's refusal to categorize a defendant as having no relationship with the criminal justice system when it is obvious that such a relationship exists. [*People v Johnson*, 293 Mich App 79, 88; 808 NW2d 815 (2011).]

Therefore, the trial court properly assessed 5 points under PRV 6, even if Gibbs was not on bond at the time he committed the sentencing offense.

3. OV 13

"Offense variable 13 is continuing pattern of criminal behavior." MCL 777.43(1). The sentencing court must assess 25 points if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person[.]" MCL 777.43(1)(c). "For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). The sentencing court must assess zero points if "[n]o pattern of felonious criminal activity existed[.]" MCL 777.43(1)(g).

Gibbs was convicted of two counts of armed robbery and one count of unarmed robbery, which are all classified under the sentencing guidelines as crimes against a person. MCL 777.16y. Gibbs argues that his convictions arose out of one incident and that he could not have 25 points assessed. However, there is nothing in the language of MCL 777.43(1)(c) to support Gibbs's argument that multiple convictions arising from the same incident cannot be considered for scoring OV 13. In *People v Harmon*, 248 Mich App 522; 640 NW2d 314 (2001), the defendant was convicted of four counts of making child sexually abusive material. He photographed two 15-year-old girls. There were four photos in all—two of each girl, taken on a single date. *Id.* at 524-526. We held that 25 points were properly assessed under OV 13 because of the "defendant's four concurrent convictions . . . ." *Id.* at 532. Similarly, in this case, while the robberies arose out of a single criminal episode, Gibbs committed three separate acts against each of the three victims and these three distinct crimes constituted a pattern of criminal activity. Additionally, although some subsections of MCL 777.43 contain limitations on a trial court's ability to score for more than one instance arising out of the same criminal episode, subsection (1)(c) contains no such limitation. Accordingly, because multiple concurrent offenses arising from the same incident are properly used in scoring OV 13, the trial court did not err by assessing 25 points for that variable.

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III. HENDERSON'S APPEAL

A. DOUBLE JEOPARDY

Henderson contends that his convictions for both assault with intent to rob while armed and armed robbery violate double jeopardy protections. The prosecution concedes error and writes: "Plaintiff agrees that [Henderson's] conviction for assault with intent to rob while armed must be vacated because he is also convicted for [sic] armed robbery involving the same victim during the same criminal episode." We agree that for purposes of the "multiple punishment" analysis under double jeopardy, assault with intent to rob while armed is the "same offense" as armed robbery and that Henderson's conviction for the lesser crime must be vacated.

This Court reviews de novo questions of law, such as a double jeopardy challenge. *People v Garland*, 286 Mich App 1, 4; 777 NW2d 732 (2009).

The prohibition against double jeopardy in both the federal and state constitutions protects against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). The third of these protections exists to "protect the defendant from being sentenced to more punishment than the Legislature intended." *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005). In this case, Henderson claims that he has been punished twice for the same offense.

We have previously held that assault with intent to rob while armed is a lesser included offense of armed robbery. *People v Akins*, 259 Mich App 545, 552; 675 NW2d 863 (2003); *People v Johnson*, 90 Mich App 415, 421; 282 NW2d 340 (1979). A lesser included offense is "a crime for which it is impossible to commit the greater offense without first having committed the lesser." *People v Walls*, 265 Mich App 642, 645; 697 NW2d 535 (2005). Stated differently, for an offense "[t]o be a lesser included offense, the elements necessary for commission of the greater offense must subsume the elements necessary for commission of the lesser offense." *People v Heft*, 299 Mich App 69, 74-75; 829 NW2d 266 (2012). However,

> [i]n *People v Smith,* 478 Mich 292, 315; 733 NW2d 351 (2007), our Supreme Court held that the "same elements" test set forth in *Blockburger v United States,* 284 US 299, 304; 52 SCt 180; 76 L Ed 306 (1932), is "the appropriate test to determine whether multiple punishments are barred by Const 1963, art 1, § 15." . . . The *Blockburger* test focuses on the statutory elements of the offense, without considering whether a substantial overlap exists in the proofs offered to establish the offense. If each offense requires proof of elements that the other does not, the *Blockburger* test is satisfied and no double jeopardy violation is involved. [*People v Baker*, 288 Mich App 378, 381-382; 792 NW2d 420 (2010) (citations omitted).]

Accordingly, it is necessary to consider the elements of each offense.

MCL 750.89 is the statute prohibiting assault with intent to rob while armed and provides:

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> Any person, being armed with a dangerous weapon, or any article used or fashioned in a manner to lead a person so assaulted reasonably to believe it to be a dangerous weapon, who shall assault another with intent to rob and steal shall be guilty of a felony, punishable by imprisonment in the state prison for life, or for any term of years.

Therefore, in order to obtain a conviction for assault with intent to rob while armed, a prosecutor must demonstrate "(1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant's being armed." *Akins*, 259 Mich App at 554 (citation and quotation marks omitted).

The revised armed robbery statute,[3] MCL 750.529, now provides:

> A person who engages in conduct proscribed under [MCL 750.530 (robbery)] and who in the course of engaging in that conduct, possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon, is guilty of a felony punishable by imprisonment for life or for any term of years. If an aggravated assault or serious injury is inflicted by any person while violating this section, the person shall be sentenced to a minimum term of imprisonment of not less than 2 years.

Therefore, in order to obtain a conviction for armed robbery, a prosecutor must prove that

> (1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon. [*People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007).]

We discern no substantive difference between the elements of the two crimes. Because assault with intent to rob while armed is a lesser included offense of armed robbery and neither crime contains an element the other does not, Henderson could not have been convicted of both. Under the same-elements test that is now applicable to the multiple-punishments strand of double jeopardy under *Smith*, his assault conviction must be vacated. *Meshell*, 265 Mich App at 633-634 ("The remedy for conviction of multiple offenses in violation of double jeopardy is to affirm the conviction on the greater charge and to vacate the conviction on the lesser charge.").

[3] As amended by 2004 PA 128, effective July 1, 2004.

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B. SENTENCING ERRORS

Henderson also contends that he is entitled to resentencing, in his case because of the erroneous scoring of OV 3, OV 4, OV 13, and OV 14. We disagree.

Henderson preserved his objection to the scoring of OV 13 by objecting at sentencing. Cf. *Endres*, 269 Mich App at 417. Henderson did not preserve his objections to the scoring of OV 3, OV 4, or OV 14. Cf. *id*. at 422. As noted earlier:

> Under MCL 769.34(10), if a minimum sentence is within the appropriate guidelines sentence range, we must affirm the sentence and may not remand for resentencing absent an error in scoring the sentencing guidelines or reliance on inaccurate information in determining the sentence. A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. Scoring decisions for which there is any evidence in support will be upheld. Additionally, we review de novo as a question of law the interpretation of the statutory sentencing guidelines. [*Id*. at 417 (citations omitted).]

This Court reviews unpreserved claims for plain error affecting a defendant's substantial rights. *Id*. at 422.

1. OV 3

"Offense variable 3 is physical injury to a victim." MCL 777.33(1). The sentencing court must assess 10 points if "[b]odily injury requiring medical treatment occurred to a victim[.]" MCL 777.33(1)(d). "As used in this section, 'requiring medical treatment' refers to the necessity for treatment and not the victim's success in obtaining treatment." MCL 777.33(3). This Court has stated that "'bodily injury' encompasses anything that the victim would, under the circumstances, perceive as some unwanted physically damaging consequence." *People v McDonald*, 293 Mich App 292, 298; 811 NW2d 507 (2011).

Costas testified that Henderson hit him between his neck and head and on the side of the face. According to Nancy, Costas had blood dripping down his face and neck. Part of Costas's ear was cut off, and he received four stitches at Hurley Medical Hospital. He also sees his physician for frequent headaches. Nancy suffered whiplash and completed seven weeks of physical therapy. Therefore, the trial court properly assessed 10 points for OV 3.

2. OV 4

"Offense variable 4 is psychological injury to a victim." MCL 777.34(1). The sentencing court must assess 10 points if "[s]erious psychological injury requiring professional treatment occurred to a victim[.]" MCL 777.34(1)(a). The sentencing court must also "[s]core 10 points if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive." MCL 777.34(2).

This Court has determined that depression and personality changes are sufficient to uphold the scoring of OV 4. *People v Ericksen*, 288 Mich App 192, 203; 793 NW2d 120 (2010).

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This Court has also held that a victim's "statements about feeling angry, hurt, violated, and frightened support [the] score under our caselaw." *People v Williams*, 298 Mich App 121, 124; 825 NW2d 671 (2012).

Kassing testified that the experience was traumatic and he had bad dreams about it. At sentencing, Nancy stated, "Not to mention what you took from us psychologically." In Costas's victim impact statement, he indicated that he did not feel safe in his store. These statements support a score of 10 points for OV 4.

3. OV 13

As mentioned in part II(C)(3) of this opinion, because multiple concurrent offenses arising from the same incident are properly used in scoring OV 13, the trial court did not err by assessing 25 points for that variable.

4. OV 14

"Offense variable 14 is the offender's role." MCL 777.44(1). The sentencing court must assess 10 points if "[t]he offender was a leader in a multiple offender situation." MCL 777.44(1)(a). In scoring this variable, "[t]he entire criminal transaction should be considered . . . ." MCL 777.44(2)(a); see also *People v Apgar*, 264 Mich App 321, 330; 690 NW2d 312 (2004) (opinion by GAGE, J.).

There was evidence that Henderson was the only perpetrator with a gun, did most of the talking, gave orders to Gibbs, and checked to make sure Gibbs took everything of value. Kassing specifically testified that he believed Henderson was the leader. Further, Gibbs's testimony supports the finding that Henderson was the leader. While neither Nancy nor Costas believed that either defendant was "the leader," "[s]coring decisions for which there is any evidence in support will be upheld." *Endres*, 269 Mich App at 417. Accordingly, the trial court did not err by assessing 10 points for OV 14.

Henderson's conviction of assault with intent to rob while armed vacated. Affirmed in all other respects.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Karen M. Fort Hood

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People v Patterson

COA No. 304724

March 26, 2013

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Court of Appeals, State of Michigan

ORDER

People of MI v Elliott Lavone Patterson

Docket No. 304724

LC No. 2010-003670-FC

Stephen L. Borrello
Presiding Judge

Michael J. Kelly

Mark T. Boonstra
Judges

The Court orders that the 3/21/2013 opinion is hereby VACATED, and a new opinion is attached.

A true copy entered and certified by Larry S. Royster, Chief Clerk, on

MAR 26 2013
Date

Chief Clerk

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 26, 2013
v	No. 304724 Calhoun Circuit Court
ELLIOTT LAVONE PATTERSON, Defendant-Appellant.	LC No. 2010-003670-FC

Before: BORRELLO, P.J., and M.J. KELLY and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for two counts of first-degree premeditated murder, MCL 750.316(1)(a); one count of assault with intent to murder, MCL 750.83; and three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. For the reasons set forth in this opinion, we affirm.

In the early morning hours of March 13, 2004, Eric Wanzer drove a car to an empty parking lot. Defendant was in the passenger seat of the car, and Antwain Carmouche and Clova Keyes were in the rear seat of the car. Defendant had arranged for Carmouche to purchase drugs in the parking lot from a person defendant referred to as "Red." Sometime after arriving at the parking lot, Carmouche and Keyes were shot and killed and Wanzer was shot and seriously injured. Later that morning, the police observed Wanzer, still alive, in the car with Carmouche's and Keyes' bodies in the rear seat. Defendant was not in the car. When the police later interviewed defendant, he stated that "Red" was Hasheem Bell and that Bell was the shooter. After initially stating that he did not observe the shootings, defendant told the police that he witnessed the shootings from the passenger seat of the car. The police investigated Bell and ruled him out as a suspect. Autopsies on the deceased victims indicated that the shooter shot the victims from inside the car. At trial, Wanzer testified that he did not know if the shooter was defendant or another person, but stated that he did not see Bell or any other person in the parking lot at the time of the shooting.

I. PROSECUTORIAL MISCONDUCT.

Defendant first argues that the prosecutor committed misconduct during opening statement when he referred to a letter purportedly written by defendant, the letter was never subsequently offered into evidence during the trial. The prosecutor and defendant disagree on the proper standard of review for this issue; however, our case law makes clear that: "The test of

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prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *People v Mesik (On Reconsideration)*, 285 Mich App 535, 541; 775 NW2d 857 (2009). "[A]llegations of prosecutorial misconduct are considered on a case-by-case basis, and the reviewing court must consider the prosecutor's remarks in context." *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). "A defendant pressing an unpreserved claim of error must show a plain error that affected substantial rights, and the reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Parker*, 288 Mich App 500, 509; 795 NW2d 596 (2010), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

"Opening statement is the appropriate time to state the facts that will be proved at trial." *People v Ericksen*, 288 Mich App 192, 199; 793 NW2d 120 (2010). A prosecutor may not refer to facts that are not subsequently supported by the evidence. See *People v Meissner*, 294 Mich App 438, 456-457; 812 NW2d 37 (2011). Nevertheless, "[w]hen a prosecutor states that evidence will be submitted to the jury, which subsequently is not presented, reversal is not warranted if the prosecutor acted in good faith." *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991).

In this case, during the assistant prosecutor's opening statement, he stated that the police received a letter that defendant allegedly wrote to his grandmother: "So the police continue to investigate and they are getting nowhere until a letter is received. A letter is received by [defendant's] grandmother. Why? Because he [defendant] wrote it. And addressed it to her and sent it to her. And in this letter what he says is basically 'Grandma, I'm sorry. I am responsible for death of [Keyes] and [Carmouche] and I'm responsible for shooting of Eric.'" The prosecution argues on appeal that the remark was merely intended as background information to alert the jury as to why police focused on defendant. However, the intent or meaning of the remark is irrelevant. Rather, our initial inquiry into this issue centers on whether the prosecutor acted in good faith when the remark was made. *Johnson*, 187 Mich App at 626. Here, the prosecution did not endorse defendant's grandmother, leaving the record devoid of any basis on which the letter may have been introduced during trial. Additionally, review of the record reveals that the assistant prosecutor never sought introduction of the purported letter at any time during the trial. Hence, we are left to conclude that at the time the assistant prosecutor made the remarks, he had no intention of introducing the letter. Based on the record before us, we conclude that the prosecutor's statements quoting the alleged letter sent by defendant were not made in good faith. Consequently, we find that the assistant prosecutor committed prosecutorial misconduct by purposefully introducing evidence in his opening statement that he never intended to introduce at trial. Under the plain error rule, we therefore conclude that error has occurred in this case, and that the error was obvious.

Having found the assistant prosecutor did not act in good faith when making statements about evidence he had no intention of introducing, we next turn to the issue of whether the prosecutor's misconduct affected defendant's substantial rights by prejudicing defendant or affecting the outcome of his trial. Reversal is not proper unless defendant shows that the error affected his substantial rights, i.e., that the error affected the outcome of the trial. *Parker*, 288 Mich App at 509; *Carines*, 460 Mich at 763. Furthermore, "[e]rror requiring reversal will not be found if a curative instruction could have alleviated any prejudicial effect, given that jurors are

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presumed to follow their instructions." *People v Likine*, 288 Mich App 648, 659; 794 NW2d 85 (2010), rev'd on other grounds 492 Mich 367 (2012).

In this case, defense counsel failed to object, therefore, review is generally precluded unless a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). In cases involving prosecutorial misconduct of the nature found here, our Courts have often found a curative instruction in the trial court's instructions that the lawyers' comments are not evidence. Such an instruction has previously been held by our Court as sufficient to cure any prejudice arising from the misconduct of a prosecutor. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001), quoting *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Our review of the record reveals that at the beginning and the close of the this trial, the trial court informed the jury that it must decide the facts of the case solely on the basis of the evidence presented at trial and instructed the jury that it "cannot make any decision on the facts of this case from the opening statement of the lawyers." Hence, based on our prior decision in *Long*, a curative instruction was read to the jury that was presumed to cure any prejudice caused by the prosecutor. *Id.* Even assuming that the trial court's instructions did not cure the prejudice caused by the prosecutor in this case, we cannot find, given the amount and type of admissible evidence that was presented in this trial that defendant was denied a fair trial. Nor does the record evidence presented persuade us to conclude that the prosecutorial misconduct resulted in the conviction of an otherwise innocent defendant.

Defendant also argues that his trial counsel was ineffective for failing to object to the prosecutor's reference to the letter during opening statements. This Court denied defendant's motion to remand for an evidentiary hearing and, thus, our review of defendant's claim is limited to errors apparent in the record. *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008). "[T]his Court presumes that a defendant received effective assistance of counsel, and the defendant bears a heavy burden to prove otherwise." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). "To establish ineffective assistance of counsel, the defendant must first show: (1) that counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008).

In his affidavit, defendant's trial counsel asserted that he did not object to the statements at issue here and provides no basis for his failure to object. Given that the statements could be construed to infer a confession by defendant, we conclude that trial counsel's failure to object fell below an objective standard of reasonableness. Thus, we conclude that trial counsel was ineffective for failing to object to the statements made by the assistant prosecutor during opening statements. However, this does not end this Court's inquiry of the issue. In order to prevail, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Yost*, 278 Mich App at 387.

Again, we turn to the entire record of the trial and conclude that in this case, there was considerable evidence of defendant's guilt. As a consequence, defendant has not shown that this error affected the outcome of his trial. *Yost*, 278 Mich App at 387. Additionally, as previously noted, the trial court's jury instructions were sufficient to cure any prejudice created by the

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assistant prosecutor's misconduct. *Long*, 246 Mich App at 588 (citation omitted); see also *Carines*, 460 Mich at 763.

II. ALLEGED CLOSURE OF COURTROOM DURING VOIR DIRE.

Finally, defendant argues that the trial court violated his constitutional right to a public trial when it closed the courtroom during voir dire without "mak[ing] any findings to support the closure." Defendant did not object regarding the openness of the voir dire proceedings and, thus, forfeited his claim of constitutional error. *People v Vaughn*, 491 Mich 642, 674; 821 NW2d 288 (2012).

> [I]n order to receive relief on his forfeited claim of constitutional error, [a] defendant must establish (1) that the error occurred, (2) that the error was "plain," (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. [*Id*. at 664-665, citing *Carines*, 460 Mich at 763.]

"The Sixth Amendment of the United States Constitution expressly enumerates" a criminal defendant's right to a public trial. *Vaughn*, 491 Mich at 650; see also *Presley v Georgia*, 558 US 209, ___; 130 S Ct 721; 175 L Ed 2d 675 (2010). "Additionally, article 1, § 20 of the 1963 Michigan Constitution guarantees that a criminal defendant 'shall have the right to a . . . public trial . . . .' That the right to a public trial also encompasses the right to public voir dire proceedings is 'well settled.'" *Vaughn*, 491 Mich at 650-652, quoting *Presley*, 558 US at ___ (footnote omitted).

As defendant acknowledges in his brief on appeal, the record provides no indication that the trial court closed the courtroom during voir dire.[1] On May 30, 2012, defendant moved to remand, seeking an evidentiary hearing, in part to develop the record regarding whether the courtroom was closed during voir dire. We denied defendant's motion on July 5, 2012, but instructed defendant that he could refile his motion following the Michigan Supreme Court's pending decision in *People v Vaughn*. *People v Patterson*, unpublished order of the Court of Appeals, entered July 5, 2012 (Docket No. 304724). On July 9, 2012, the Supreme Court decided *People v Vaughn*, 491 Mich 642.[2] Therefore, on the record properly before us, defendant has not met his burden of establishing a plain error. *Carines*, 460 Mich at 763; Cf. *Vaughn*, 491 Mich at 665 (finding that the first two prongs of the *Carines* were satisfied where it

[1] The only evidence offered by defendant on this issue comes from his trial counsel's affidavit wherein he asserts that he is "95% sure" the trial court closed the courtroom during voir dire.

[2] Defendant filed a motion to remand for an evidentiary hearing on March 7, 2013, which was a restatement of the position in his brief with the only supporting documentation an affidavit from trial counsel. We denied the motion on the basis that closure was not readily apparent from the record and even if defendant could demonstrate closure, he is not entitled to relief under *Vaughn*, 491 Mich 642.

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was "readily apparent from the record that the circuit court closed the courtroom during voir dire" without making findings adequate to support such closure).

Moreover, even assuming *arguendo* that defendant established the existence of a plain error, relief would still be unwarranted under *Vaughn*, 491 Mich 642. In the present case, as in *Vaughn*, neither party objected to the other party's peremptory challenges of potential jurors, and "each party expressed satisfaction with the ultimate jury chosen." *Id*. at 668. Accordingly, this Court should not find that any closure of the courtroom during voir dire seriously affected the fairness, integrity, or public reputation of judicial proceedings.[3] *Id*. at 668-669, quoting *Carines*, 460 Mich at 774 ("Because the closure of the courtroom was limited to a vigorous voir dire process that ultimately yielded a jury that satisfied both parties, we cannot conclude that the closure 'seriously affected the fairness, integrity, or public reputation of judicial proceedings.' Defendant is not entitled to a new trial on the basis of his forfeited claim of error.").

Affirmed.

/s/ Stephen L. Borrello
/s/ Michael J. Kelly
/s/ Mark T. Boonstra

[3] Because defendant did not argue that he was actually innocent, "we review his claim of error only with regard to whether his conviction seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id*. at 666 n 92.

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10

People v Fomby

305602

April 2, 2013

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 2, 2013
v	No. 305602 Wayne Circuit Court
TERRANCE MAURICE FOMBY, Defendant-Appellant.	LC No. 11-001965-FC

Before: MURRAY, P.J., and MARKEY and WHITBECK, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of first-degree felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, carjacking, MCL 750.529a, and carrying or possessing a firearm when committing or attempting to commit a felony, MCL 750.227b. The trial court sentenced defendant to serve life in prison for felony murder, 20 to 60 years' imprisonment for armed robbery and carjacking, and two years' imprisonment for felony-firearm. We affirm.

Defendant first argues that his right to a public trial was violated when the trial court had the courtroom doors closed and locked during the opening statements and closing arguments of the parties' counsel. We disagree.

Generally, "[f]or an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court." *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Defense counsel did not object to the trial court's closing and locking the courtroom doors during opening statements and closing arguments. "[T]he failure to assert a constitutional right ordinarily constitutes a forfeiture of that right." *People v Vaughn*, 491 Mich 642, 654; 821 NW2d 288 (2012). A member of the public can invoke the right to a public trial pursuant to the First Amendment; however, because defendant invokes the right on appeal, his claim is under the Sixth Amendment and subject to traditional waiver and forfeiture rules. *Id.* at 652, 659. Defendant has not preserved his Sixth Amendment argument for appeal.

On the other hand, a defendant's failure to preserve his Sixth Amendment right to a public trial for appeal does not foreclose his opportunity to raise the issue. *Vaughn*, 491 Mich at 663-664. The plain error test for forfeited claims established in *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999), "applies to [a] defendant's forfeited claim that the trial court violated his Sixth Amendment public trial right." *Vaughn*, 491 Mich at 664. To obtain relief on forfeited

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constitutional error, a "defendant must establish (1) that the error occurred, (2) that the error was 'plain,' (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 664-665, citing *Carines*, 460 Mich at 763. Whether the lower court violated defendant's Sixth Amendment right to a public trial is a question of law this Court reviews de novo. *Vaughn*, 491 Mich at 649-650. A violation of a defendant's right to a public trial is a structural error, which if found, satisfies the third prong of *Carines*, namely that the error affected defendant's substantial rights. *Id.* at 665-666.

The right to a public trial is guaranteed by the Sixth Amendment of the United States Constitution and article 1, § 20 of the 1963 Michigan Constitution. *Vaughn*, 491 Mich at 650. Although the right is not absolute and may be limited, *id* at 653, to facilitate appellate review of whether the trial court's decision to close the courtroom was proper, a trial court must state the interest that justified the closure and articulate specific findings that explain why that interest justified the closure. *People v Kline*, 197 Mich App 165, 169; 494 NW2d 756 (1992). Further, the closure must be no broader than needed to protect the interest justifying it, that is, it must be "narrowly tailored" to satisfy the purpose for which closure was ordered. *Id*. at 169, 171. There is also a distinction between partially and fully closing courtrooms to the public. *Id*. at 169-170. "[T]he effect of a partial closure of trial does not reach the level of a total closure and only a substantial, rather than compelling reason for the closure is required." *People v Russell*, 297 Mich App 707, 720; 825 NW2d 623 (2012), citing *Kline*, 197 Mich App at 170.

It is not absolutely clear from the record whether members of the public were present when the courtroom doors were closed and locked, but the public's presence can be inferred from the fact that the trial judge specifically addressed the "ladies and gentlemen in the audience" and "those of you who are in the courtroom." No one was removed from the courtroom during either the opening statements or closing arguments, and all members of the public who were then present were permitted to stay. The trial judge asked that if anyone needed to leave the courtroom that they do so before the beginning of the opening statements and closing arguments. The trial judge had the courtroom doors closed and locked so the attorneys could present their opening statements and closing arguments without interruption. Thus, the closure was only partial.

In this case, the trial court provided a reason for the closures—to allow the parties to present and the jury to hear opening statements and closing arguments uninterrupted. The trial court's closure of the courtroom was narrowly tailored to serve this purpose because the trial judge (1) only had the doors closed and locked during the opening statements and closing arguments, and (2) she did not require members of the public already present to leave the courtroom. Therefore, the closure excluded the public only to the extent necessary to prevent disruptions during the opening statements and closing arguments. Defendant presents an alternative argument that the trial court could have posted warnings to those entering the courtroom or that it could have had a court officer deal with any problems were there any. But these solutions would not have prevented an interruption as effectively as closing the courtroom for this short period of time.

Because the closure was only partial, the trial court needed only provide a substantial, rather than compelling, reason for the partial closure of the courtroom based upon findings made

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on the record. *Russell*, 297 Mich App at 720; *Kline*, 197 Mich App at 170. We conclude that the trial court provided a substantial reason for the partial courtroom closure and that it did not unnecessarily interfere with defendant's right to a public trial. We find the facts of this case similar to those in *People v Bails*, 163 Mich App 209, 211; 413 NW2d 709 (1987), where the trial court closed and locked the courtroom doors for thirty to forty-five minutes during the reading of jury instructions. The court did so "to prevent people from moving in and out of the courtroom on a sentencing day when the increased traffic would have been distracting to the jury." *Id*. There was no evidence that anyone was actually excluded from the courtroom during its closure. The Court held that the defendant's constitutional right to a public trial was not violated. *Id*. at 212. We also conclude that defendant's constitutional right to a public trial was not violated.

Defendant cites *People v Micalizzi*, 223 Mich 580; 194 NW 540 (1923), where the courtroom doors were closed and locked during the charge of the jury and where one of defendant's attorneys along with other individuals were denied admission to the courtroom. Our Supreme Court set aside the conviction and ordered a new trial. *Id.* at 585. A court officer asked that those who wanted to leave do so before the charge of the jury because the doors to the courtroom were going to be locked. *Id.* at 581. *Micalizzi* is distinguishable from the present case. First, defendant does not claim that anyone was denied admission to the courtroom during the period of time when the doors were closed and locked. See *Bails*, 163 Mich App at 212 (distinguishing *Micalizzi* in part because there was no evidence of anyone's being excluded from the courtroom due to the closure of the courtroom). Second, the *Micalizzi* opinion does not indicate that the trial court provided a reason for closing and locking the courtroom, whereas the trial court in this case provided a substantial reason for doing so: to prevent interruptions during the opening statements and closing arguments of the parties. Therefore, unlike *Micalizzi*, the partial closure of the courtroom in the present case does not warrant a new trial.

Moreover, even if we were to conclude that defendant has satisfied the first three prongs of the plain error test for relief from unpreserved constitutional error—(1) that the error occurred, (2) that the error was plain, and (3) that the error affected substantial rights—defendant cannot satisfy the fourth prong for relief—that the plain error "resulted in the conviction of an actually innocent defendant" or *seriously* affected "the fairness, integrity, or public reputation of judicial proceedings." See *Vaughn*, 491 Mich at 666-667. As discussed already, the closure of the courtroom in this case was limited to the time during which the parties' counsel were presenting their opening statements and closing arguments to the jury. This partial closure served the substantial purpose of permitting the uninterrupted presentation of the parties' position regarding the trial evidence to the jury. A fair reading of the record indicates that members of the public were present in the courtroom during the closures, and there is no evidence that any member of the public that desired to be present was refused. Under these circumstances, "we cannot conclude that the closure 'seriously affected the fairness, integrity, or public reputation of judicial proceedings.'" See, *Id*. at 668-669, quoting *Carines*, 460 Mich at 774. Defendant is not entitled to a new trial on the basis of his unpreserved claim of constitutional error. *Id*.

Defendant alternatively argues that his trial counsel's failure to object to the closure of the courtroom doors during opening statements and closing arguments constitutes ineffective assistance of counsel. We disagree.

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To establish a claim of ineffective assistance of counsel, defendant must establish that his counsel's representation fell below an objective standard of reasonableness and that a reasonable probability exists that, but for counsel's errors, the result of the proceeding would have been different. *Vaughn*, 491 Mich at 669. To prove the first prong of deficient performance, "'the defendant must overcome the strong presumption that counsel's assistance constituted sound trial strategy.'" *Russell*, 297 Mich App at 715-716, quoting *People v Armstrong*, 490 Mich 281, 290; 806 NW2d 676 (2011). "This Court does not second-guess counsel on matters of trial strategy, nor does it assess counsel's competence with the benefit of hindsight." *Id*. at 716.

In the present case, defendant cannot overcome the presumption that counsel's failure to object to closure of the courtroom during the attorneys' presentations to the jury was sound trial strategy. After all, both defense counsel and the prosecuting attorney would benefit from having the undivided attention of the jury while presenting their view of the how the evidence supported their theory of the case. See e.g., *Vaughn*, 491 Mich at 670-671. We will not second-guess counsel on matters of trial strategy. *Russell*, 297 Mich App at 716.

Defendant also cannot show that, but for the locking of the courtroom door during the attorneys' presentations, there is a reasonable probability that the result of the proceeding would have been different. The locking of the courtroom door would not be evidence for the jury to consider in deciding the case; nor could it possibly have precluded the admission of relevant evidence. Defendant simply cannot establish that the locked courtroom door affected the outcome of the trial; thus, he cannot establish counsel's failure to object resulted in the actual prejudice necessary to establish ineffective assistance of counsel. *Vaughn*, 491 Mich at 672-674.

Defendant next argues that because the crime was committed before the Legislature increased the crime victim's rights fee assessment, the prohibition against ex post facto laws was violated. We disagree.

Defendant failed to preserve this issue for appeal by raising it below. *People v Earl*, 297 Mich App 104, 111; 822 NW2d 271 (2012). We review this claim for "plain error affecting defendant's substantial rights." *Id*.

In *Earl*, this Court addressed this precise issue and held the prohibition against ex post facto laws pursuant to state and federal constitutions was not violated where the crime occurred before the Legislature increased the fee assessment because the assessment is neither restitution nor punishment. *Id.* at 111-114. We are bound to follow *Earl*. MCR 7.215(J)(1). Therefore, defendant has failed to establish plain error.

We affirm.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ William C. Whitbeck

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People v Witherspoon

302711

April 4, 2013

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 4, 2013
v	No. 302711 Macomb Circuit Court
HERBERT JAMAL WITHERSPOON, Defendant-Appellant.	LC No. 2008-005143-FC

Before: WHITBECK, P.J., and JANSEN and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals by leave granted his jury-trial convictions of first-degree premeditated murder, MCL 750.316(1)(a), first-degree felony murder, MCL 750.316(1)(b), kidnapping, MCL 750.349, first-degree home invasion, MCL 750.110a(2), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to concurrent prison terms of life without parole for the first-degree murder conviction, 285 months to 40 years for the kidnapping conviction, and 10 to 20 years for the first-degree home invasion conviction. He was also sentenced to a consecutive prison term of two years for the felony-firearm conviction. We affirm.

I

Defendant first argues that the prosecution failed to present sufficient evidence to link him to the crimes. We disagree.

Claims of insufficient evidence in a criminal case are reviewed de novo and in a light most favorable to the prosecution. *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010). We determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Railer*, 288 Mich App 213, 217; 792 NW2d 776 (2010). Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of the crime. *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010).

The elements of first-degree premeditated murder are (1) the intentional killing of a human (2) with premeditation and deliberation. *Id.* at 472. Premeditation and deliberation can be shown by, among other things, the circumstances of the killing itself. *People v Moorer*, 262 Mich App 64, 77-78; 683 NW2d 736 (2004). The elements of first-degree felony murder are (1)

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the killing of a human being, (2) with malice, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316(1)(b). *People v Smith*, 478 Mich 292, 318-319; 733 NW2d 351 (2007).

The elements of kidnapping are set forth in MCL 750.349(1), which provides:

> A person commits the crime of kidnapping if he or she knowingly restrains another person with the intent to do 1 or more of the following:
>
> (a) Hold that person for ransom or reward.
>
> (b) Use that person as a shield or hostage.
>
> (c) Engage in criminal sexual penetration or criminal sexual contact with that person.
>
> (d) Take that person outside of this state.
>
> (e) Hold that person in involuntary servitude.

The elements of first-degree home invasion are set forth in MCL 750.110a(2), which provides:

> A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:
>
> (a) The person is armed with a dangerous weapon.
>
> (b) Another person is lawfully present in the dwelling.

The elements of felony-firearm are: (1) the defendant carried or possessed a firearm (2) during the course of a felony or an attempted felony. *People v Duncan*, 462 Mich 47, 49 n 3; 610 NW2d 551 (2000).

A conviction under an aiding and abetting theory requires proof that (1) the crime charged was committed by the defendant or another, (2) the defendant performed acts or gave encouragement that assisted in the commission of the crime, and (3) the defendant intended the crime to occur or had knowledge that the principal intended to commit the crime at the time that the defendant gave aid or encouragement. *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006). Aiding and abetting is not a separate offense, but merely a theory of prosecution. *Id*. Any person who aids and abets the commission of a crime may be prosecuted, tried, and punished as if he or she had directly committed the offense. MCL 767.39.

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The medical examiner testified that one of the victims, Rico White, was shot six times from close range in the back of the head. The investigating officers testified that the back door of one of the victim's homes had been broken down and that the house was ransacked. One of the victims testified that the assailants broke into her house and held her family against their will. She also testified that the kidnappers had at least three guns. The prosecution presented evidence to establish that defendant had a preconceived plan to kidnap the family. It would have been reasonable for the jury to infer that all of the kidnappers were armed, including defendant. Furthermore, officers recovered ammunition and an apparent "to-do" list that referenced obtaining guns from a room where defendant stayed. This evidence, together with the reasonable inferences arising therefrom, was sufficient to prove the commission of the crimes of murder, kidnapping, first-degree home invasion, and felony-firearm beyond a reasonable doubt.

But defendant argues that the prosecution failed to offer sufficient proof regarding one additional element—namely, his identity as one of the perpetrators. "[I]dentity is an element of every offense." *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). Circumstantial evidence and reasonable inferences may be used to prove a defendant's identity. See *Bennett*, 290 Mich App at 472.

There was substantial circumstantial evidence linking defendant to the crimes. Text messages recovered from defendant's phone referred to each of the kidnappers by number. Further, under an aiding and abetting theory, the prosecution did not have to show that defendant was directly involved as a principal. MCL 767.39. The fact that the medical examiner did not testify regarding who actually fired the fatal shots is immaterial. Similarly, it is of little consequence that there was no DNA evidence linking defendant to the crimes, especially in view of the fact that one of the victims testified that the assailants were wearing gloves.

Moreover, there was a strong connection between White's murder and the items found in defendant's bedroom and minivan. The prosecution presented evidence that defendant was staying in a bedroom at his father's duplex at the time of the search. Most of the items were discovered in this bedroom. In addition, defendant was actually in the bedroom when the officers executed the warrant. In sum, police officers found (1) a magazine and ammunition from a .40-caliber handgun; (2) a list stating "pistol from aunt," "pistol from Reece," and "w[ipe] van out"; (3) duct tape in the blue minivan driven by defendant; (4) pawn receipts indicating the sale of jewelry; and (5) various cell phones. Reasonable jurors could have concluded that these items were connected to the crimes. White was shot with .40-caliber bullets. One of the victims testified that she was put into, and dropped off, in a dark-colored van. She was also missing some of her jewelry after the attack. Defendant's father testified inconsistently regarding whether the bullets belonged to him or defendant.

The facts that the murder weapon was never recovered and that defendant did not confess to the crimes did not negate the circumstantial and physical evidence that linked defendant to the offenses. The prosecution presented evidence that spent rounds of .40-caliber ammunition found near White's body matched the ammunition found in defendant's room at the duplex. The prosecution's expert testified that it was not likely that other ammunition in the geographic area would have had the same markings. We conclude that the prosecution presented sufficient circumstantial evidence to prove defendant's identity as one of the perpetrators of the crimes beyond a reasonable doubt.

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II

Defendant also argues that the trial court should have suppressed the evidence obtained from the duplex and the minivan because the officers obtained the evidence in violation of the United States and Michigan Constitutions. We disagree.

We will not reverse a trial court's factual findings with regard to a motion to suppress evidence unless they were clearly erroneous. *People v Waclawski*, 286 Mich App 634, 693; 780 NW2d 321 (2009). We review de novo the trial court's ultimate decision on a motion to suppress. *Id*.

The right to be free from unreasonable searches and seizures is guaranteed by the United States and Michigan Constitutions. US Const, Am IV; Const 1963, art 1, § 11; *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005). A search that exceeds the scope of the warrant is invalid unless an exception applies. *People v Martin*, 271 Mich App 280, 306-307; 721 NW2d 815 (2006). Generally, if evidence is unconstitutionally seized, it must be excluded from trial. *People v Hyde*, 285 Mich App 428, 439; 775 NW2d 833 (2009).

Police officers may conduct a protective sweep of a residence after arresting a suspect if the officers have a reasonable belief that there may be individuals that pose a danger to them. *People v Gonzalez*, 256 Mich App 212, 233; 663 NW2d 499 (2003). The plain-view exception allows an officer to seize objects within his or her plain view. *People v Galloway*, 259 Mich App 634, 639; 675 NW2d 883 (2003). The plain view doctrine requires (1) that the police are lawfully present in the otherwise-protected area and (2) that the evidence, which is in plain view, is clearly incriminatory or contraband. *Id*.

Both the DNA warrant and the later-issued search warrant for the duplex were properly obtained, valid warrants. Defendant argues that both warrants were invalid because the DNA warrant lacked a witness's signature and the search warrant for the duplex lacked a date. This argument is without merit. When the error on a warrant is "ministerial" or "hypertechnical," the evidence seized should not be suppressed. *People v Myers*, 163 Mich App 120, 123; 413 NW2d 749 (1987). The missing witness's signature was a hypertechnical error. Furthermore, the search warrant did have a date; it was just the wrong date. Here, the good-faith exception to the exclusionary rule applies because the officers relied upon the search warrant in good faith, even though it was dated June 6, 2008, rather than June 5, 2008. See *People v Goldston*, 470 Mich 523, 528-531; 682 NW2d 479 (2004).[1]

[1] Even if the second search warrant was not valid, the evidence that the officers discovered in plain view during their protective sweep of the duplex could have been immediately seized. One of the officers testified that defendant was in the bedroom when they entered the duplex and that he noticed an open box containing ammunition. This evidence was in plain view, the officers were legally in the bedroom, and it was immediately apparent that the evidence might have been connected to White's murder. See *Galloway*, 259 Mich App at 639.

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Furthermore, the trial court did not find, as defendant claims, that the officers opened dresser drawers and boxes in the bedroom before the search warrant was obtained. The trial judge simply stated that there was evidence presented to this effect. However, the judge went on to state that "there was significant credible evidence that established the search and seizure of evidence did not occur until after the search warrant [for the duplex] was obtained." In other words, the trial court weighed the evidence and determined that the officers did not conduct the search prior to obtaining the search warrant for the duplex, despite testimony to the contrary. This finding was not clearly erroneous. See *Waclawski*, 286 Mich App at 693. The trial court did not err by denying defendant's motion to suppress the evidence.

III

Defendant next argues that his right against self-incrimination was violated when a detective testified that defendant had refused to sign his constitutional rights form, answer questions about the crimes, and answer further questions about the ammunition found in his room. We disagree.

This unpreserved claim of constitutional error is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "As a general rule, if a person remains silent after being arrested and given *Miranda*[2] warnings, that silence may not be used as evidence against that person." *People v Shafier*, 483 Mich 205, 212; 768 NW2d 305 (2009). Prosecutorial reference to a defendant's post-*Miranda* silence typically violates the defendant's due process rights. *Id*. at 212-213; *People v Rice (On Remand)*, 235 Mich App 429, 436; 597 NW2d 843 (1999).

Defendant argues that his right against self-incrimination was violated when a detective testified about his silence during his interrogation. This argument lacks merit. Defendant does not argue on appeal that he did not waive his right to remain silent. Indeed, the detective testified that defendant waived his *Miranda* rights prior to the interrogation. Defendant then made several statements during the interrogation relating to the crimes. He stated that he disliked White and that the ammunition found in the duplex was given to him. Defendant continued to answer questions that did not relate to the crimes. He stated that he was tired when the detective asked him about the crimes. He did not invoke his right to silence during the interview. Nor did he ask the officers to stop questioning him. Quite simply, there was no evidence to establish that defendant revoked his earlier waiver at any time during the interview. See *Rice*, 235 Mich App at 436; see also *People v McReavy*, 436 Mich 197, 219-220; 462 NW2d 1 (1990). Absent an affirmative and unequivocal invocation of defendant's right to remain silent following his *Miranda* waiver, defendant cannot claim that his right to remain silent was infringed by the detective's testimony concerning his failure to answer certain questions. *People v Davis*, 191 Mich App 29, 36-37; 477 NW2d 438 (1991). Admission of the detective's testimony did not constitute plain error that affected defendant's substantial rights.

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

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IV

Defendant also argues that his right to a speedy trial was violated. Again, we disagree. We review unpreserved claims of constitutional error for plain error affecting the defendant's substantial rights. *Carines*, 460 Mich at 763. The right to a speedy trial is guaranteed to criminal defendants by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Williams*, 475 Mich 245, 261; 716 NW2d 208 (2006). In order to determine whether a defendant has been denied a speedy trial, a court must weigh (1) the length of the delay, (2) the reasons for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4) prejudice to the defendant from the delay. *Id.* at 261-262.

When the total delay is less than 18 months, the burden is on the defendant to show prejudice, *Waclawski*, 286 Mich App at 665, but when a delay is more than 18 months, the delay is presumptively prejudicial and the burden shifts to the prosecutor to show a lack of prejudice, *Williams*, 475 Mich at 262.

In evaluating the reasons for the total delay, each individual delay is attributed to either the prosecutor or the defendant. *People v Ross*, 145 Mich App 483, 491; 378 NW2d 517 (1985). Any unexplained delays are attributed to the prosecutor. *Waclawski*, 286 Mich App at 666. Scheduling delays and delays caused by the court system are also attributed to the prosecutor, but are only given minimal weight. *Id*.

Defendant was arrested in September 2008.[3] Defendant's trial took place from January 26, 2010, through January 29, 2010. Even if defendant was arrested at the beginning of September 2008, his trial was completed approximately 17 months after his arrest. Therefore, defendant has the burden of proving that he was prejudiced by the delay. *Waclawski*, 286 Mich App at 665.

First, defendant failed to assert his right to a speedy trial in the trial court. Second, many of the delays were caused by defendant's own motions and evidentiary hearings. Third, defendant failed to show that he was prejudiced by the delay. He claims that he lost exculpatory evidence, valuable witnesses, and personal memory of the events. He also alleges that he suffered from anxiety, depression, stress, and mental anguish. However, defendant fails to state what evidence, witnesses, and memories were lost that would have helped his defense. His claim of prejudice to his person is similarly without merit. See *Williams*, 475 Mich at 264. There is simply no evidence that defendant's opportunity for a fair trial was jeopardized by the delay. See *People v Chism*, 390 Mich 104, 115; 211 NW2d 193 (1973). We perceive no plain error affecting defendant's substantial rights.

[3] Defendant erroneously asserts in his brief on appeal that he was arrested in June 2008. Contrary to this assertion, the record evidence clearly shows that defendant was arrested in September 2008.

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V

Defendant contends that his jury was not drawn from a fair cross-section of the community. We disagree. This unpreserved claim of constitutional error is reviewed for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

The Sixth Amendment guarantees a criminal defendant the right to be tried by an impartial jury drawn from a fair cross-section of the community. *People v Bryant*, 491 Mich 575, 595; 822 NW2d 124 (2012). In order to establish a violation of this right, the defendant must show: "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979). A defendant is not entitled to a petit jury of any particular composition. *Bryant*, 491 Mich at 596 n 47.

African-Americans are considered a constitutionally cognizable group for Sixth Amendment fair-cross-section purposes. *Id.* at 598. Therefore, defendant has satisfied the first prong of the *Duren* test.

But defendant has failed to show that African-Americans were substantially underrepresented in the jury venire. Defendant claims that his jury pool was comprised of about four African-Americans, or eight percent of the venire. However, defendant does not attempt to establish by any statistical data that African-Americans were underrepresented in the pool. See *Bryant*, 491 Mich at 599-600. An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). Furthermore, even if defendant could satisfy this second prong, he fails to show any proof of *systematic* exclusion.[4] Defendant has failed to show that the jury venire was not composed of a fair cross-section of the community.

VI

Defendant further argues that his First and Sixth Amendment rights were violated when the trial court "cleared the courtroom" before jury selection began. Defendant failed to object to the trial court's alleged closure of the courtroom. Therefore, this claim is reviewed for plain error affecting defendant's substantial rights. *People v Vaughn*, 491 Mich 642, 664; 821 NW2d 288 (2012); *Carines*, 460 Mich at 763.

[4] Systematic exclusion cannot be shown by one or two disproportionate venires. *People v Hubbard*, 217 Mich App 459, 481; 552 NW2d 493 (1996), overruled on other grounds by *Bryant*, 491 Mich 575 (2012); see also *Ford v Seabold*, 841 F2d 677, 685 (CA 6, 1988). Defendant simply announces his belief that the jury selection process in Macomb County systematically excludes African-Americans, but gives no indication of how this alleged systematic exclusion is accomplished or how the system may be otherwise unfair.

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"It is . . . 'well settled' that the Sixth Amendment right to a public trial extends to voir dire." *Vaughn*, 491 Mich at 665, quoting *Presley v Georgia*, 558 US 209, 213; 130 S Ct 721, 724; 175 L Ed 2d 675 (2010). Assuming that the trial court actually "cleared the courtroom" as defendant asserts, this action surely constituted plain error as no overriding interest was advanced for the closure in this case. See *Vaughn*, 491 Mich at 665. Nevertheless, a review of the trial transcripts shows that the voir dire process was fair and unimpaired by any irregularities that would subject it to doubt or call it into question. Accordingly, we cannot conclude that any plain error in this regard "'seriously affected the fairness, integrity, or public reputation of judicial proceedings.'" *Id*. at 668-669, quoting *Carines*, 460 Mich at 774. Nor do we conclude, given the record before us, that the error resulted in the conviction of a defendant who was "actually innocent." *Id*. Defendant is not entitled to relief on the basis of this forfeited claim of error.

Nor did the trial court violate defendant's First Amendment rights. When asserted by the accused, the right to public voir dire is based solely in the Sixth Amendment, not the First Amendment. *Vaughn*, 491 Mich at 652. It is true that members of the public have a First Amendment right to attend criminal trials, including voir dire. *Id*.; see also *Presley*, 558 US at 212. However, the defendant has no First Amendment right to a public trial.

VII

Lastly, defendant contends that his Sixth Amendment right to confront the witnesses against him was violated when the trial court allowed transcribed, telephonic testimony from the preliminary examination to be read into evidence at trial. Although this is arguably the most significant issue raised by defendant on appeal, we are compelled to conclude that defendant waived his Sixth Amendment right of confrontation through the actions of his trial attorney.

One of the victims in this case, Samantha Wright, was allowed to testify via telephone at defendant's preliminary examination. Wright's transcribed preliminary examination testimony was then read to the jury at defendant's trial, as substantive evidence for the prosecution. It is undisputed that defendant's trial attorney did not object to this. In fact, defense counsel fully consented to the use of Wright's preliminary examination testimony at trial. Defendant, himself, did not object on the record or otherwise indicate any disagreement with the use of Wright's transcribed testimony.

After oral argument in this case, we remanded the matter to the trial court for an evidentiary hearing concerning the use of Wright's preliminary examination testimony at defendant's trial. *People v Witherspoon*, unpublished order of the Court of Appeals, entered March 16, 2012 (Docket Nos. 300875 & 302711).[5] We directed the trial court to take testimony and make findings of fact with regard to several specific questions. *Id*.

[5] Our remand order of March 16, 2012, also pertained to the case against defendant's cousin, Kenneth Ray Witherspoon, Jr. (Kenneth), who was tried separately before the Macomb Circuit Court and convicted of similar offenses. Although our remand order consolidated the cases

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Following the evidentiary hearing, at which defendant's attorney and several other witnesses testified, the trial court issued a thorough opinion and order responding to our inquiries. The trial judge made several well-supported findings of fact, including: (1) it was actually Wright who had testified via telephone at defendant's preliminary examination; (2) Wright had been properly sworn before giving her telephonic testimony at the preliminary examination; (3) there existed "good cause" under MCR 6.006(B) to allow Wright to testify via telephone at the preliminary examination;[6] (4) defendant's counsel had a full and adequate opportunity to cross-examine Wright over the telephone at the preliminary examination; (5) despite a material witness warrant that had issued for Wright on December 21, 2009, Wright stopped communicating with the police and prosecution and failed to appear for defendant's trial; (6) defendant's trial attorney did not object to the use of Wright's transcribed testimony at trial and even participated in reading portions of the testimony to the jury; and (7) defendant's trial attorney believed that using Wright's preliminary examination testimony would not prejudice defendant because the predominant issue in the case was identification and Wright had never identified defendant in her testimony.

In general, we review de novo whether a defendant's right of confrontation has been violated. *People v Buie*, 491 Mich 294, 304; 817 NW2d 33 (2012). However, unpreserved claims of constitutional error are reviewed for plain error affecting the defendant's substantial rights. *Carines*, 460 Mich at 763. We review for clear error the trial court's findings of fact following an evidentiary hearing. *Buie*, 491 Mich at 304.

In *Buie*, our Supreme Court recently held that a criminal defendant's Sixth Amendment right of confrontation can be waived by trial counsel as long as counsel's actions constitute reasonable trial strategy, which is presumed, and the defendant does not object on the record. *Id.* at 315. The trial court in *Buie* had permitted two witnesses for the prosecution, a doctor and a forensic expert, to testify at the defendant's trial by way of two-way, interactive videoconferencing. *Id*. at 297-298. Although the defendant, himself, did not affirmatively consent to the use of the video testimony, the defendant's attorney expressly approved the use of the video testimony and did not object to allowing the witnesses to testify without being physically present at trial. *Id*. at 298, 300-303.

Our Supreme Court agreed with the trial judge's factual finding, following an evidentiary hearing, that the defendant had not objected on the record to the use of the video testimony or otherwise expressed his personal dissatisfaction with the procedure. *Id*. at 302-303, 317-318.

against defendant and Kenneth for purposes of the trial court's evidentiary hearing, their appeals otherwise remain separate. Kenneth's substantive issues on appeal will be addressed in a separate opinion of this Court in Docket No. 300875.

[6] To the extent that defendant argues Wright should not have been permitted to testify via telephone at his preliminary examination, we note that the trial court found that the requirements of MCR 6.006(B) had been satisfied. Pursuant to MCR 6.006(B), a district court is permitted to take telephonic testimony at a preliminary examination (1) from an expert witness, or (2) from any witness who is in another location upon a showing of good cause. We do not disturb the trial court's determination that there existed "good cause" to permit Wright to testify via telephone at the preliminary examination. See *People v Buie*, 491 Mich 294, 320; 817 NW2d 33 (2012).

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The *Buie* Court also agreed with the trial judge's finding that defense counsel's approval of the videoconferencing procedure had constituted reasonable trial strategy, especially in light of the fact that the defendant had introduced no proofs at the evidentiary hearing to rebut this presumption.[7] *Id*. at 317-318. Accordingly, the *Buie* Court concluded, trial counsel's approval of the videoconferencing procedure had effectively waived the defendant's Sixth Amendment right of confrontation, thereby extinguishing any error. *Id.* at 318.

The issues presented in the instant case are similar to those presented in *Buie*. In the case at bar, the trial court found that defense counsel did not object to the use of Wright's preliminary examination testimony and that counsel participated in the presentation of the transcribed testimony by reading portions of it to the jury. Given the proofs presented at the evidentiary hearing, we perceive no clear error in either of these findings. Indeed, defense counsel's participation by reading portions of Wright's transcribed preliminary examination testimony to the jury was equivalent to his express approval of the practice.

We acknowledge that defense counsel testified at the evidentiary hearing that his acquiescence in the admission of Wright's transcribed preliminary testimony was "certainly not a trial strategy[.]" However, counsel also testified that the matter of using Wright's transcribed testimony was a "bump[in] the road that we felt we had to deal with," and that it was his understanding that Wright's transcribed testimony would inevitably be admitted into evidence at defendant's trial. In other words, while defense counsel's acquiescence in the admission of Wright's transcribed preliminary examination testimony may not have been be strategic as such, there is no question that counsel made a conscious decision not to object to the admission of the testimony and to participate in presenting it to the jury. Given that the primary issue at trial was the identity of the assailants, and that Wright never identified defendant as one of her attackers, we cannot conclude that defense counsel's conscious choice to acquiesce in the admission of Wright's transcribed testimony was unreasonable. See MCR 7.215(A)(6) (permitting this Court to "draw inferences of fact"); see also *Geralds v Munson Healthcare*, 259 Mich App 225, 233-234; 673 NW2d 792 (2003) (determining that an attorney's action was unreasonable "under the circumstances"), overruled on other grounds by *Kirkaldy v Rim*, 478 Mich 581; 734 NW2d 201 (2007).

Finally, as explained earlier, defendant did not personally object on the record or otherwise indicate his disagreement with the use of Wright's preliminary examination testimony at trial. Even if defendant privately expressed his dissatisfaction off the record, this was not sufficient to prevent or override counsel's waiver of his confrontation right at trial. "[A]ny objection a defendant may have must be made on the record." *Id.* at 311; see also *People v Murray*, 52 Mich 288, 290-291; 17 NW 843 (1883). As our Supreme Court explained in *Buie*, 491 Mich at 313:

[7] There is a "strong presumption" that defense counsel's actions constitute reasonable trial strategy. *People v Armstrong*, 490 Mich 281, 290; 806 NW2d 676 (2011); *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

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> [A]llowing a defendant to object to defense counsel's consent off the record provides a defendant with "an appellate parachute." Under such a rule, a defendant might acquiesce in or even expressly agree with defense counsel's waiver outside of court and then claim to have objected behind closed doors, or even in his own mind, when he does not enjoy the outcome he desires.

In sum, defense counsel expressly approved the use of Wright's preliminary examination testimony at trial and defendant did not object on the record. In addition, there has been no showing that defense counsel's actions were unreasonable. Accordingly, as in *Buie*, we are compelled to conclude that defendant waived his Sixth Amendment right of confrontation through the actions of trial counsel.

Of course, a defendant who waives his or her Sixth Amendment right of confrontation though the actions of counsel may seek relief by establishing that his or her attorney rendered ineffective assistance. *Id.* at 315 n 13. As mentioned earlier, the primary issue at trial was the identity of the assailants. Wright never identified defendant as one of the assailants during her preliminary examination testimony. We have already concluded that defense counsel's decision to acquiesce in the admission of Wright's transcribed testimony was not unreasonable. But even assuming arguendo that counsel acquiescence in the admission of the transcribed testimony fell below objective standards of reasonableness, defendant could not demonstrate a "reasonable probability that, but for the deficiency, the factfinder would not have convicted [him]." *People v Snider*, 239 Mich App 393, 424; 608 NW2d 502 (2000). Given that Wright never identified defendant as one of the perpetrators of the crimes, it would be impossible for defendant to establish that counsel's acquiescence in the admission of Wright's testimony resulted in actual prejudice. See *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

Affirmed.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly

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12

People v Foster

301361

August 8, 2013

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 8, 2013
v	No. 301361 Van Buren Circuit Court
EDWARD DEON FOSTER, Defendant-Appellant.	LC No. 10-017033-FC

Before: MURPHY, C.J., and SAAD and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of felony murder, MCL 750.316(1)(b). Defendant was sentenced to life in prison without the possibility of parole as a result of the conviction. We affirm.

On April 26, 1998, Deborah Boothby and a friend went to the Blue Star Lounge, a bar located on the Blue Star Highway near South Haven, Michigan. By most accounts, Boothby became intoxicated and disruptive, engaging in an argument with an ex-boyfriend and his girlfriend. The argument caused the bar owner to order everyone to leave the bar, early. As the patrons left the bar, several people observed a fight in the parking lot involving Boothby and several other individuals.

Police were dispatched to the Blue Star Lounge some time after 2:30 a.m. on April 26, 1998, in response to a 911 call reporting that a woman had been hit by a car. Responders found Boothby lying on the Blue Star Highway a short distance from the lounge, bleeding and severely injured. She died from multiple injuries after being transported to the hospital.

The case remained unsolved for several years, after which the police received information and tips that named defendant and the others that were involved in the fight that was described as a brutal beating of Boothby. Witnesses also described defendant helping another individual drag Boothby to a vehicle after the beating stopped, and later a vehicle driving over Boothby, several times, while she was lying in the road. Adrienne Burnette, the girlfriend of one of the beating participants, admitted to watching Boothby being placed in a vehicle driven by a co-defendant and occupied by defendant after Boothby was severely beaten by defendant and others. Burnette followed the car containing Boothby to another location where defendant and others beat her again. Burnette also described watching as defendant and his co-defendants later placed Boothby in the road and drove over Boothby, two times. Burnette also admitted to

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driving over Boothby with her vehicle. Defendant and three others were eventually charged in connection with Boothby's death. All four were tried jointly, but defendant had a jury separate from that of his three co-defendants. Defendant was found guilty of first degree felony murder.[1]

On appeal, defendant first asserts that the trial court violated his Sixth Amendment right to a public trial by holding key portions of pretrial proceedings and voir dire in chambers with no access by the public. Defendant further argues that his trial counsel was ineffective for failing to object to the public's exclusion from these key portions of pretrial proceedings. We disagree.

Because defendant did not object to this error at the time it occurred, we review defendant's forfeited constitutional claim, for plain error that affected his substantial rights. *People v Vaughn*, 491 Mich 642, 664; 821 NW2d 288 (2012). To receive relief under this standard, defendant must establish (1) that the error occurred, (2) that the error was "plain," (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id*. at 664-665. Additionally, because defendant did not raise an ineffective assistance of counsel claim in the trial court, our review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658–659; 620 NW2d 19 (2000).

The Sixth Amendment of the United States Constitution expressly states that a criminal defendant "shall enjoy the right to a . . . public trial . . . ." US Const. Am VI. The Sixth Amendment right to a public trial is applicable to the states by the Due Process Clause of the Fourteenth Amendment. "Additionally, article 1, § 20 of the 1963 Michigan Constitution guarantees that a criminal defendant 'shall have the right to a . . . public trial . . . .'" *Vaughn*, 491 Mich at 650. "That the right to a public trial also encompasses the right to public voir dire proceedings is 'well settled.'" *Id*. at 650-652.

As a panel of this Court acknowledged in *People v Orlewicz*, 293 Mich App 96, 112-113; 809 NW2d 194 (2011), the United State Supreme Court has held that the Sixth Amendment right to a public trial extends to the voir dire of prospective jurors, subject to certain exceptions:

> The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure. [quoting *Presley v Georgia*, 558 US 209, 214; 130 S Ct 721; 175 L Ed 2d 675 (2010)(internal citations omitted)]

[1] Defendant was charged with and found guilty of both first degree felony murder and second degree murder. At sentencing, the second degree murder conviction was properly vacated and defendant proceeded to sentencing on only the felony murder conviction.

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However, where proceedings are only partially, rather than totally closed, only a substantial reason (as opposed to a compelling reason) must be given for the closure. *People v Russell*, 297 Mich App 707, 720; 825 NW2d 623 (2012).

Defendant dedicates a significant portion of his argument on this issue to whether his failure to object constitutes waiver of the right to a public trial, as was held in *People v Vaughn*, 291 Mich App 183 (2010). Defendant argued that *Vaughn* was wrongly decided and that he did not waive his right to a public trial. Our Supreme Court has since agreed, reversing the *Vaughn* decision and holding that a failure to object did not constitute a waiver of the right to a public trial that precluded review on appeal, but instead constituted a forfeiture of a constitutional right subject to plain error analysis on review. See *Vaughn*, 491 Mich 642.

In any event, applying a plain error analysis to the three proceedings defendant contends violated his Sixth Amendment right to a public trial clearly demonstrates that defendant is not entitled to relief. The first proceeding took place on the fourth day of jury selection, before a jury was impaneled. A potential juror requested a conference in chambers, which was thereafter held with all counsel, the trial judge, and a court reporter present. The potential juror advised that she recognized a couple of the co-defendants from high school as well as some of the people in the audience, though she was not friends with them. She stated that she did not feel it would make her uncomfortable to sit as a juror but felt she should bring the matter to the court's attention. This juror was ultimately excused from the jury for cause. Where the content of the closed-door conference did not affect defendant or any of his rights and the potential juror did not even serve on his jury, had an error in the closing of the potential juror's questioning occurred, it did not result in the conviction of an actually innocent defendant or affect the outcome of the proceedings in any manner. There was thus no plain error affecting defendant's substantial rights.

The second proceeding took place immediately after the above potential juror left the trial court's chambers. The trial judge's bailiff stated that a lady had approached him and told him that some of the potential jurors were talking about the defendants being in shackles and that they had apparently seen the defendants being transported. The bailiff indicated that when the defendants left the courtroom for bathroom breaks and the like, they were put in handcuffs. The court did not have the room to place the large number of potential jurors (around 80) comfortably in the court room during the breaks to avoid the defendants, so they were having the jurors go into the building next door until a certain time. Despite this precaution, some of the jurors would still come back to court early and there was no way to prevent the jurors from reentering the court building early to prevent them from seeing the defendants being transported in handcuffs.

The trial court acknowledged the practical problem presented by the layout of the courthouse facility and the difficulty of preventing observation of the defendants while traveling. The judge stated that if someone did see something on the defendants' legs, he would be willing to give some kind of instruction if counsel desired. The judge also indicated a willingness to question jurors about what they saw.

Defendant's counsel expressed grave concern over jurors seeing defendant in handcuffs and the potential prejudicial effect, but indicated that he did not think there was an instruction that could fix the impression that such a view gives a jury. He ultimately indicated that he would

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prefer no instruction be given because it calls attention to the fact and because perhaps not all of the jurors had seen anything. He also did not want the jury questioned. The parties all then discussed various potential ways that the defendants could be transported without the risk of the jurors seeing them in handcuffs.

This proceeding, again, fails plain error analysis. Included within the right to a fair trial, absent extraordinary circumstances, is the right to be free of shackles or handcuffs in the courtroom. *People v Payne*, 285 Mich App 181, 186; 774 NW2d 714 (2009). The trial court, in consulting with all counsel and the deputy assigned to transporting defendant and his co-defendants to the courthouse, did its best to ensure that defendant's right was not compromised in any way and no error occurred where the logistics of transporting defendant without having the jury see him in handcuffs was discussed outside the public view. Had the discussion been conducted in open court, it would have been implied that defendant was in custody—an implication defendant was entitled to avoid and would likely want to avoid. Because the discussion involved a compelling right, a substantial reason for closing the proceeding existed. *Russell*, 297 Mich App at 720; 825 NW2d 623 (2012).

Had an error in the closing of this proceeding occurred, it did not result in the conviction of an actually innocent defendant or affect the outcome of the proceedings in any manner. How defendant was transported to the courtroom to avoid being seen by the potential jurors did not affect an ultimate issue of guilt and there is no allegation or evidence that any juror actually saw defendant being transported to or from the courtroom in handcuffs. Thus, there is no error requiring reversal. *Vaughn*, 491 Mich at 664.

The third proceeding also took place on the fourth day of jury selection. All counsel as well as a court reporter was present in the judge's chambers. All counsel waived the presence of their respective clients, including defendant's counsel. The trial judge's bailiff indicated that one of the security officers told him that the potential juror who they had spoken to that morning, needed to talk to him. The security officer brought her back to the bailiff's office, and she was shaking and crying. The potential juror advised that she was too upset to serve on the jury due to her knowing the people involved. Though she was not yet impaneled as a juror, no counsel objected to her being excused.

Defendant's counsel then asked at that point if they could have the person who told the bailiff that she had heard jurors discussing the defendants in shackles brought in and questioned. A juror was then brought in who related that she heard a lady ask "where do the defendants come from, are they from jail?" The juror stated that a man responded that he saw one come in shackles and he thought he was in jail now for something else. The juror said she knew who the woman was, and that the woman was on a jury panel, but did not know who the man was. The juror stated that hearing the conversation did not impact her in any way.

The judge then brought the woman identified as a participant in the conversation into chambers, Juror Schoenborn. Juror Schoenborn indicated that she had heard people discussing whether the defendants were in custody but that she had not seen anybody in custody. Juror Schoenborn also stated that she heard people ask if anyone knew if the defendants were in custody and she stated that to her knowledge no one knew the answer because no one answered the question. Juror Schoenborn told the judge that she had not seen the defendants coming or

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going from the courthouse. Juror Schoenborn stated that whether the defendants were in custody or not would not have any effect of her view of them.

Defendant's counsel indicated again that he did not want a cautionary instruction because he was concerned that it would make the issue more serious and more of a concern. He did register an objection to the jury array, however. The juror who reported hearing the conversation did not serve on defendant's jury and Juror Schoenborn was excused from the jury. Notably, defendant does not argue that he wanted either of these jurors to serve on his jury.

While the trial court did not state why he was having the upset potential juror brought back to his chambers rather than addressing her in public, the fact that she was crying, shaking, and seriously distraught over having to consider the case may have adversely affected the other jurors. This was a substantial reason for closing the proceeding. *Russell*, 297 Mich App at 720. Similarly, the discussion with the two other jurors concerning a conversation they may or may not have had as to whether they had possibly seen defendant or his co-defendants in handcuffs or shackles, or were discussing the possibility of defendant being in handcuffs, was a substantial reason for closing the proceeding. *Russell*, 297 Mich App at 720. And, neither of the jurors questioned served on defendant's jury.

The court went to great lengths to ensure that defendant and his co-defendants were not seen in handcuffs. When it was brought to the trial court's attention that one or more jurors were discussing the fact that defendant or his co-defendants were or may have been handcuffed, the trial judge appropriately investigated the matter outside the presence of the other jurors. Had the questioning of these jurors taken place in open court, the handcuffing issue would have been brought to all of the juror's attention, placing defendant's right to a fair trial in serious jeopardy.

As pointed out by the *Vaughn* Court, the actions of the court in closing a proceeding to the public are to be examined in the context of the effect the action had on the protections afforded by the Sixth Amendment. 491 Mich at 667. "The goals sought by these protections include (1) ensuring a fair trial, (2) reminding the prosecution and court of their responsibility to the accused and the importance of their functions, (3) encouraging witnesses to come forward, and (4) discouraging perjury." *Id*. The trial court's closing of proceedings in all three of the above instances does not subvert any of these values.

Defendant also claims that his counsel's failure to object to the courtroom's closure during voir dire entitles him to a new trial on the basis of ineffective assistance of counsel. To establish ineffective assistance of counsel, defendant first must show that counsel's performance was below an objective standard of reasonableness. In doing so, defendant must overcome the strong presumption that counsel's assistance was sound trial strategy. Second, 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).

Concerning the first proceeding, because defense counsel had no reason to know what the potential juror would be disclosing during a private conference held at her request, counsel was not ineffective for failing to object to the conference being held privately. For all counsel (or defendant) knew, the juror could have been disclosing information detrimental to his client

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and/or case, personal information about herself, personal information about defendant that he would prefer to not have made public, or any number of other matters. Defense counsel may reasonably have concluded that closing the proceeding to the public may have benefitted his client because whatever the potential juror had to say may have tainted the remaining jurors. And, again, the potential juror was ultimately excused from the jury. Counsel was thus not ineffective for failing to object when the juror requested a private conference with the trial court.

As to the second proceeding, defense counsel also could reasonably have concluded that closing the proceeding to the public would benefit his client. Discussing how to transport defendant to and from the courthouse and courtroom in handcuffs without having the jury view him was not a discussion that should have been held in public. Defendant was presumed to be innocent throughout his trial and having the public aware that he was being escorted to and from the courthouse in handcuffs would carry the implication that he was currently incarcerated and/or already guilty of the current or some other crime. That connotation could only work to defendant's detriment. Counsel was not ineffective for failing to object to having the second proceeding held publicly.

The third proceeding also need not have been held publicly, as it could reasonably have been viewed as detrimental to defendant. The potential juror was shaking and crying. Having one of the jurors visibly shaken by the trial proceeding could potentially have a domino effect on the other jurors or make the case appear to be more devastating than the other jurors had initially thought. And, the discussion with two jurors about whether they had seen defendant or his co-defendants in handcuffs or had heard that any of them were handcuffed had the potential to affect defendant's right to a fair trial. Making anyone else aware that defendant may be handcuffed would only exacerbate the issue or bring to everyone's attention an issue that they may not have otherwise have known or wondered about. Counsel was not ineffective for failing to object to having this proceeding closed. Defendant was thus not denied his right to a public trial or his right to effective assistance of counsel where portions of pretrial proceedings and voir dire were conducted in chambers with no access by the public.

Defendant next claims that he is entitled to a new trial because his statutory and constitutional right to be present during a critical stage of his trial was violated due to his absence from the pretrial proceedings outlined above. We disagree.

There was no objection to holding these proceedings in defendant's absence. We thus review this unpreserved claim of constitutional error for plain error affecting substantial rights. See *Carines*, 460 Mich at 764.

An accused has a right to be present at his trial. This right is conferred by statute, MCL 768.3, guaranteed by the federal and state Confrontation Clauses, U.S. Const, Am VI; Const 1963, art 1, § 20, and also grounded in common law. *People v Mallory*, 421 Mich 229, 246 n 10; 365 NW2d 673 (1984). The right to be present at trial includes the right to be present during "the voir dire, selection of and subsequent challenges to the jury, presentation of evidence, summation of counsel, instructions to the jury, rendition of the verdict, imposition of sentence, and any other stage of trial where the defendant's substantial rights might be adversely affected." *Mallory*, 421 Mich at 247.

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This Court has recognized that only "a defendant may waive both his statutory and constitutional right to be present during his trial." *People v Montgomery*, 64 Mich App 101, 103; 235 NW2d 75 (1975). Waiver is defined as "the intentional relinquishment or abandonment of a known right." *Carines*, 460 Mich at 762 n 7 (quotation marks and citation omitted). However, where a defendant does not waive his right to be present does not automatically entitle him to a new trial. "[T]he test for whether defendant's absence from a part of his trial requires reversal of his conviction is whether there was any reasonable possibility that defendant was prejudiced by his absence." *People v Armstrong*, 212 Mich App 121, 129; 536 NW2d 789 (1995).

Here, defendant was absent for only a short period during the voir dire proceedings addressed above. During the first proceeding, the only issue discussed at that time was a potential juror's recognition of co-defendants, and several members of their families. There was no trial strategy, right, or evidence at issue during the proceeding and defendant suggests nothing that he could have added to or advised counsel about concerning this discussion. And, the potential juror was ultimately excused from jury duty. There is no evidence in the record to support a finding that there was any "reasonable possibility" that defendant was prejudiced by his absence during this proceeding. *Armstrong*, 212 Mich App at 129. Even if his absence during the first proceeding was in error, reversal is not warranted because the evidence does not support that defendant is actually innocent or that the alleged error seriously affected the fairness, integrity, or public reputation of judicial proceedings. See *Carines*, 460 Mich at 763–764.

During the second proceeding, the logistics of being transported to and from the courthouse through certain doors while handcuffed without being seen by jurors while the jurors were on their breaks or loitering prior to or after the trial proceedings had begun or concluded for the day was discussed. Defendant would have had no input on which door he would have been permitted to enter through or how to otherwise traverse the courtroom building while under the requirement of handcuffs while at the same time be shielded from view of the jury to protect his constitutional rights. There is no evidence in the record to support a finding that there was any "reasonable possibility" that defendant was prejudiced by his absence during this proceeding. *Armstrong*, 212 Mich App at 129.

During the third proceeding, counsel specifically waived his client's presence. Whether the waiver was appropriate or not, there is no evidence in the record to support a finding that there was any "reasonable possibility" that defendant was prejudiced by his absence during this proceeding. *Armstrong*, 212 Mich App at 129. A potential juror was excused from the jury due to her emotional admission that seeing people she knew in the audience (including co-defendants' family and friends) bothered her and that she did not think she could serve as a juror. Defendant identified nothing that he could have taken from or added to this part of the proceeding. Two other jurors were then questioned concerning what they may have heard or seen with respect to defendant or his co-defendants being handcuffed. Defendant's counsel was vigorously engaged in voir dire of these two jurors, who ultimately did not serve on defendant's jury. Because the closure of the courtroom was limited to a vigorous voir dire process that ultimately yielded a jury that satisfied both parties (and did not include either of the questioned potential jurors), the closure did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. Defendant is not entitled to a new trial on the basis of his forfeited claim of error.

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Defendant also contends that counsel was ineffective for failing to object to defendant's lack of presence at these proceedings. Again, to establish ineffective assistance of counsel, defendant first must show that counsel's performance was below an objective standard of reasonableness and that but for counsel's deficient performance, it is reasonably probable that the result of the proceeding would have been different. *Armstrong*, 490 Mich 289–290. Where the proceedings involved jurors that did not ultimately serve on defendant's jury, defendant has offered no reasonable argument that his lack of the presence at the proceedings affected the outcome of his trial. He has not suggested how his presence would have impacted the voir dire proceedings or, indeed, argued that he wanted these jurors on his panel. Counsel was not ineffective for failing to object to defendant's absence. Defendant is not entitled to a new trial because his constitutional and statutory right to presence during a critical stage of his trial was not violated and defense counsel did not render ineffective assistance of counsel by failing to object to the proceedings being held without defendant's attendance.

Defendant next argues that his Due Process right to a fair trial was violated where there was evidence that he was seen by the jury in handcuffs and appeared before the jury obviously wearing leg restraints. We disagree.

The Constitution forbids the use of visible shackles during trial, unless that use is justified by an essential state interest specific to the defendant on trial. *Deck v Missouri*, 544 US 622; 125 S Ct 2007; 161 L Ed 2d 953 (2005). Included within the right to a fair trial, absent extraordinary circumstances, is the right to be free of shackles or handcuffs in the courtroom. *Payne*, 285 Mich App at 186. A defendant may be shackled only on a finding supported by record evidence that this is necessary to prevent escape, injury to persons in the courtroom or to maintain order. *Id.* However, even if a trial court abuses its discretion in requiring a defendant to wear restraints, the defendant must show that he suffered prejudice as a result of the restraints to be entitled to relief. *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008). "[A] defendant is not prejudiced if the jury was unable to see the shackles on the defendant." *Id.*

In the instant matter, it is unclear why defendant was made to wear a knee locking device under his pants while in the courtroom. There was no finding made on the record (or record evidence to support) that the same was necessary to prevent defendant's escape, that he posed a risk of injury to persons in the courtroom, that the restraints were necessary to maintain order in the courtroom, or that defendant was somehow unruly. Thus, the trial court abused its discretion in requiring defendant to wear the knee-locking device during trial and in the jury's presence. As indicated above, however, defendant must nonetheless show prejudice as a result of the restraints to be entitled to recovery and no prejudice is found where the jury is unable to see the shackles or, in this case, the knee-locking device. *Horn*, 279 Mich App at 36; See also, *People v Johnson*, 160 Mich App 490, 493; 408 NW2d 485 (1987).

Defendant does not argue that the jury *saw* the knee-locking device, as it was concealed by his pants, but argues that the jury was *aware* of the knee-locking device by virtue of the fact that it made him "shuffle" while walking. However, defendant has provided no evidence of the same. Defendant has come forward with no statement by a juror or any other indication that anyone noticed that defendant "shuffled" when he walked or that if they did take notice of his manner of walking, that they were aware that the same was caused by the use of a knee-locking device.

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The only evidence that defendant presents with respect to any jury seeing defendant in shackles was the statement made by a juror (who did not serve on his jury) telling the trial court in one of the closed proceedings discussed above that she had overheard a female potential juror asking a man "where do the Defendants come from, are they from jail?" When questioned by the trial judge, the female, identified as potential juror Schoenborn, specifically stated that no one made an affirmative statement to her about the defendants in the case being in handcuffs or shackles. Schoenborn further stated that she had not seen the defendants coming or going from the courthouse.

Based upon the above, there is no record evidence upon which to conclude that any juror was aware that defendant was, in fact, in shackles during, before, or after trial. Thus, while the trial court abused its discretion in requiring defendant to wear shackles during trial, the defendant has not shown that any member of the jury saw the shackles or that he suffered prejudice as a result of wearing the shackles. *Horn*, 279 Mich App at 36.

Defendant also contends that he was visible to potential jurors during jury selection while being transported to and from the courtroom in handcuffs. Notably, there has been no argument made that he was ever handcuffed while in the courtroom or while in the presence of the jury. As conceded by defendant, the prohibition against shackling does not extend to safety precautions taken by officers while transporting a defendant to and from the courtroom. *People v Panko*, 34 Mich App 297, 300; 191 NW2d 75 (1971). *Horn*, 279 Mich App 31, 37. And, there has been no definitive evidence that any juror did, in fact, see defendant in handcuffs. At best, a man, who may or may not have ultimately served on either jury, may have said to a woman, who did not serve on either jury, that he saw one defendant (of which there were four) being brought over to the court in shackles. This does not equate with a juror having seen *defendant* in handcuffs.

Finally, even where jurors inadvertently see a defendant in restraints, there still must be some showing that the defendant was prejudiced. *Horn*, 279 Mich App 31, 37. Defendant argues that he was prejudiced by this possible view because the visible restraints likely tipped the scales against defendant in what he deemed a close case. However, defendant ignores that two "jailhouse snitches" testified to statements defendant made to them while they shared jail cells with defendant. Thus, the jurors were made well aware that defendant was incarcerated very recently. And, defendant's portrayal of his case as "close" is questionable. Even aside from the testimony of Adrienne Burnette, whom defendant argues is untrustworthy, several witnesses still testified to seeing defendant kick and stomp Boothby in the parking lot of the lounge; one testified he kicked her hard in the head. Witnesses further testified that Boothby appeared dead or unconscious in the parking lot after the assault. Several other witnesses testified to seeing defendant help a co-defendant carry/drag Boothby to a car and place her in the back of the car, then get in the same car and drive off. Defendant's participation in at least the beating of Boothby was clearly established. And, given the medical examiner's testimony that Boothby died from a constellation of injuries inflicted by more than simply being run over by a car, it is unclear exactly what injury caused Boothby's death, or even the moment of her death. Defendant could reasonably be held culpable for Boothby's death simply due to his participation in stomping and kicking her in the head. Defendant's due process right to fair trial was not violated and he is not entitled to relief on this issue.

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Defendant also argues that his due process right to a fair trial was violated due to the introduction of false and perjured testimony from Keith Nickerson. We disagree.

It is well settled that a conviction obtained through the knowing use of perjured testimony offends a defendant's due process protections guaranteed under the Fourteenth Amendment. *Mooney v Holohan*, 294 US 103, 112; 55 S Ct 340; 79 L Ed 791 (1935); *Pyle v Kansas*, 317 US 213, 216; 63 S Ct 177; 87 L Ed 214 (1942); *Napue v Illinois*, 360 US 264, 269; 79 S Ct 1173; 3 L Ed 2d 1217 (1959). Accordingly, a prosecutor has an obligation to correct perjured testimony that relates to the facts of the case or a witness's credibility. *People v Lester*, 232 Mich App 262, 277; 591 NW2d 267 (1998). When a conviction is obtained through the knowing use of perjured testimony, a new trial is required "only if the tainted evidence is material to the defendant's guilt or punishment." *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009). So whether a new trial is warranted depends on the effect the misconduct had on the trial. *Id.* at 390. "The entire focus of [the] analysis must be on the fairness of the trial, not on the prosecutor's or the court's culpability." *Id.*

The prosecutor called Keith Nickerson, a "jailhouse snitch" as one of its witnesses. Nickerson testified that in March 2010, he was awaiting federal sentencing on a bank robbery charge. Nickerson testified that in April 2010, he was sentenced on the federal bank robbery charge to ten years and eight months and that he is currently serving that sentence. Nickerson testified that the prosecutor in the instant case did not indicate that he would do anything for him with regard to the cases he had pending and that the prosecutor has not done anything on his behalf. When asked again by the prosecutor, "Have I offered to do anything on your behalf in regard to your testifying?" Nickerson responded, "No." The following exchange then took place:

> Q: Is there any benefit that you know of that you could receive for testifying today?
>
> A: No.
>
> Q: Now, at the time that you were sentenced in April of 2010, sir, did you happen to mention to the Judge your involvement in this case?
>
> A: No.
>
> Q: Now, I believe you had written a letter to your attorney, Craig. Do you know if your attorney, Craig, mentioned to the Judge what was going on here?
>
> A: No, I mean, well, he kind of mentioned it. He is attorney. He knows everything that I do. So, he chose to say something about it, but I didn't personally.

On cross-examination, defense counsel elicited from Nickerson that he also testified at defendant's preliminary examination and at that time, he had not yet been sentenced in his federal bank robbery case. Defense counsel then asked:

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Q: And you have indicated a number of times that nobody has done anything for you to give you a benefit for your testimony; is that right?

A: Correct.

Q: Meaning that as far as you knew, as least at that time, nobody had called and said, hey give this guy a break, he's helping out in a murder case or nothing like that?

A: True.

Q: Today you indicated you didn't say anything about that at your sentencing, but your attorney did, isn't that correct?

A: Correct.

***

Q: Is it true that the United State Attorney's Office filed a specific motion called a 5K motion to give you a departure below your originally scored guidelines?

A: Yes.

***

Q: And as a result of this 5K Motion filed by the Federal Government, you received a reduction . . . is that right?

A: That is not why I got a reduction.

Q: You didn't get a reduction because of the 5k Motion?

A: No.

***

Q: Were you sitting in the courtroom when the federal judge sentenced you to your 128 months?

A: Yes, I was.

Q: Did you hear the federal judge mention a number of times that based upon your substantial assistance in a state murder case, along with some dispute about a definition of career criminal, that he was going to give you a three-level departure below [what] your original guidelines were?

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A: The departure was because of the close proximity of my previous offenses.

***

Q: The judge did say at your sentencing that as a result also of your cooperation he was going to give you this benefit. In fact, he went so far as to say it was only as a result of the benefit that you gave up to that date and had nothing to do with any future benefit. Do you remember that?

A: No, I don't remember specifically what you are saying. I got credit for this, but I didn't get credit for this. That is not what happened.

Defense counsel thereafter elicited from Nickerson that his defense counsel at the federal sentencing may have told the federal judge that Nickerson helped in a murder investigation and should get some credit for that and that the judge may have said that he should be given a break because of his cooperation in a murder case. Nickerson acknowledged that the federal judge stated that Nickerson had done so at great personal risk, and that the departure did not bar Nickerson from getting a modification from his sentence later on, but still asserted that "I didn't receive a reduction [for] my assistance in this case."

Based upon documentation provided by defendant as a result of this Court's February 2, 2012 order allowing defendant to supplement the record on appeal, it is clear that Nickerson received a benefit from the 5K motion, which was based upon his cooperation in the instant matter. In the motion, the U.S. Attorney specifically stated that Nickerson's testimony concerning the instant matter "proved to be instrumental in murder charges subsequently brought against five individuals by the Michigan Attorney General" and that "[u]ndersigned counsel has spoken to Assistant Attorney General Dennis Pheney about the defendant's assistance and was advised that the defendant testified at a preliminary examination and was an important witness in the case." The motion concluded, "The United States has concluded that the activity described above constitutes 'substantial assistance' . . . [a]ccordingly, the government requests that the Court grant a downward departure on this basis."

At Nickerson's April 19, 2010, sentencing, Nickerson's defense counsel offered several arguments in support for a sentence lower than the 188 to 235 guidelines range, including the US Attorney's 5K motion. In imposing sentence, the federal judge stated:

I ordinarily, without the 5K consideration, would have sentenced Mr. Nickerson , in light of his prior record, at least in the middle of the attendant guideline range, which was—which would have been approximately 212 months, but the—and a three level departure from the low end of the 188 guideline range would have been 140 months. I believe a sentence of a level that gives credit to Mr. Nickerson's cooperation, as well as the fact that at the margin his career offender guideline does over score him. Accordingly, I intend to depart downward in a manner consistent with his 5K cooperation, as well as giving him a modest decrease for the fact that the career guideline overstates the seriousness of his particular situation. Accordingly, it's the judgment of the Court that the

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> defendant be committed to the custody of the Bureau of prisons for a period of 128 months.

It is abundantly clear from Nickerson's federal sentencing transcript that as a result of his cooperation and preliminary examination testimony in the instant case, he received a three level downward departure in his federal bank robbery sentencing. However, while the U.S. Attorney did state in its 5K motion that it spoke to the prosecutor in this case, it does not state that the prosecutor in this case promised Nickerson anything for his testimony or did anything other than provide information to the U.S. Attorney. It is not clear who initiated the contact between the two or that the prosecutor was advised that a 5K motion would be filed. And, there is no indication that the *state prosecutor* promised Nickerson any benefit for his cooperation or testimony.

It is also abundantly clear from the trial transcript in this case that Nickerson testified contrary to what was placed on the record at his federal sentencing. He did, indeed, receive a benefit from the 5K motion (which was based on his cooperation in the instant matter) in the form of a reduced sentence and yet unequivocally testified that he did not receive a reduction in his sentence because of his assistance in the instant matter. Nickerson's testimony was thus contrary to the actual facts.

However, as illustrated above, defense counsel cross-examined Nickerson extensively on this issue and elicited the pertinent information from Nickerson. Counsel pointed out the fact that a 5K motion was filed on his behalf; that Nickerson's guidelines were originally 188 months but that he was sentenced to 128 months; that his attorney may have asked for credit due to his cooperation in a murder investigation; and, that the judge had stated that Nickerson had cooperated at great personal risk to himself. Defense counsel also specifically asked Nickerson, "The federal government filed a specific motion saying that as a result of the information that they received from Mr. Pheney indicating that you had testified, that they would agree to the reduction; isn't that right?" Nickerson simply responded that he didn't receive a reduction for his assistance in this case and defense counsel asked if that was his understanding, to which Nickerson responded that it was. Counsel thus established that Nickerson's subjective belief was at odds with what actually occurred. Because defense counsel adequately placed before the jury the fact that Nickerson's testimony conflicted with the motion actually filed by the federal government and the federal judge's statements at sentencing, his credibility as to whether he received any benefit for testifying was placed in issue. And, the jury heard what defendant ultimately sought to have them hear—that Nickerson received a benefit for his cooperation and testimony and thus had a motive to testify as he did against defendant. Defense counsel's cross-examination called Nickerson's credibility even more into question. It cannot therefore be concluded that defendant's conviction was thus obtained through perjured testimony.

Had Nickerson's testimony been the only evidence against defendant, the situation may be different. However, as previously discussed, there was significant other evidence concerning defendant's participation in at least the beating of Boothby. Thus, Defendant's due process right to a fair trial was not violated by the introduction of false and perjured testimony from Nickerson.

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Finally, defendant contends that the trial court abused its discretion in refusing to allow the jury to view the scene(s) of the crime. We disagree.

MCL 768.28 provides that "[t]he court may order a view by any jury empanelled to try a criminal case, whenever such court shall deem such view necessary." Granting a motion for a jury view is proper when it is believed that a personal view of the scene would enable the jurors to comprehend more clearly the evidence already received. *People v Connor*, 295 Mich 1, 6; 294 NW 74 (1940); *People v Curry*, 49 Mich App 64, 67; 211 NW2d 254 (1973). Thus, the trial court must generally conduct a jury view *after* the relevant evidence has been admitted at trial. *People v Unger*, 278 Mich App 210, 256-257; 749 NW2d 272 (2008). "Where . . . a judge finds that photographs in conjunction with a diagram accurately depict the scene of a crime, that there is no factual dispute concerning the accuracy of the photographs, and that a view would not help decide the facts in this case, an abuse of discretion cannot be said to have occurred." *People v Anderson*, 112 Mich App 640, 648; 317 NW2d 205 (1981). And, where the judge gave cogent reasons for denying the request, an abuse of discretion cannot be said to have occurred. *People v Crown*, 75 Mich App 206, 212; 254 NW2d 843 (1977), rev'd on other grounds 417 Mich 908 (1983).

Defendant requested that the court allow the jury to visit the scene, specifically the Blue Star Lounge, after dark, to allow the jury to see the difficulty that any witness would have had seeing due to the limited lighting, the layout of the bar, and the fence that was present. Defendant also requested the opportunity to travel to the second scene where the victim was allegedly assaulted, if possible. Defendant argued that given the vast number of different stories, and the age of the memories, it would be beneficial to the jury to view the scene.

The trial court denied the motion, indicating that it did not recall any witness testifying that they could not see what was going on because it was dark. Various witnesses testified that they could not see because of all of the people surrounding the victim or because they were standing at a particular angle or a particular location. The trial judge stated that no witness testified that he or she was inside the bar and could not see out at what was occurring, so a view of the scene would not assist with that issue. He also indicated that something that could not be recreated for the jury was the witnesses' alcohol and drug use, which may have impacted some of the witnesses' testimony and credibility, and that a view of the scene would not assist with that issue.

The trial court's reasoning was sound. Numerous photographs of the crime scene, including close-ups and aerial photographs of the lounge parking lot, the lounge itself, and the general location were entered as exhibits and blown up for the jury, as were diagrams of both the interior and exterior of the lounge. And, the witnesses provided clear testimony as to how close they were to certain locations and testified as to what they saw. As indicated by the trial court, all witnesses were thoroughly examined by the attorneys as to what they saw and what may have affected their view. No particular witness gave any relevant testimony that would be assisted by a view of the scene. Defendant does not, in fact, point to any particular testimony that would be aided by a jury view. The trial court thus did not abuse its discretion in denying defendant's motion for jury view.

Affirmed.

/s/ William B. Murphy
/s/ Henry William Saad
/s/ Deborah A. Servitto

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People v Robinson

304936

September 12, 2013

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 12, 2013
v	No. 304936 Genesee Circuit Court
GARY LEE ROBINSON, Defendant-Appellant.	LC No. 10-026762-FC

Before: FORT HOOD, P.J., and FITZGERALD and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant, Gary Lee Robinson, appeals as of right his jury trial convictions of first-degree 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. Robinson was sentenced to life in prison on the first-degree murder conviction, 24 to 60 months' imprisonment for the felon in possession of a firearm conviction, and two years in prison for the felony-firearm conviction. This case arises from the murder of Gregory Ingram, Jr. on February 26, 2010, in Flint, Michigan. Robinson was tried with his co-defendants, Dequeze Dixon and Calvin LeSears, before separate juries. Dixon and LeSears appeal separately in Docket Nos. 305185 and 305314, respectively. We affirm.

The primary witness was Jason Sutton, who was present during the murder but uninvolved. He testified that he knew Robinson and Dixon already at the time, but he discovered LeSears's identity later. Sutton testified that he was picked up by defendants while walking home. Dixon was driving a vehicle owned by his girlfriend, Devonda Jiles. Either Dixon or Robinson told Sutton, "If we didn't know who you was, we were going to get you." They drove past the victim, at which point Dixon said, "There's Greg, let's get on him." Robinson got out of the car first, and then Dixon turned the car around and parked, whereupon Dixon and LeSears also got out. Sutton remained in the vehicle using his telephone.

Sutton testified that he heard a barrage of gunfire from multiple guns: an assault rifle, a shotgun, and a handgun. He saw all three defendants outside shooting the victim. A medical examination would later identify the victim's cause of death as multiple gunshot wounds from at least three different kinds of guns. When defendants returned to the vehicle, Sutton observed Robinson with an assault rifle, Dixon with a shotgun, and LeSears with a handgun. Dixon advised Sutton that they would kill him if he told anyone about the events of the evening. They

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then dropped Sutton off at his house. Sutton continued to associate with defendants out of fear that they would believe he had told authorities about the shooting. A few weeks later, Sutton was again in the same vehicle with Dixon and Sutton's cousin, when police attempted to pull the vehicle over, apparently for unrelated reasons. All of the occupants jumped out and fled; Sutton was the only one apprehended. He was taken into custody for fleeing and eluding, and Jiles's car was impounded.

When Jiles discovered that her car had been impounded, she falsely informed 9-1-1 and a police officer that her vehicle had been stolen. While incarcerated, Sutton asked to talk to the police about the victim's murder. After Sutton was interviewed, Robinson was arrested two days later, and Dixon was arrested later that same day. Sutton subsequently picked LeSears out of a photographic lineup as the third individual, asserting that he was about 80 percent certain. LeSears was arrested about a month later for an unrelated matter, after which Sutton identified LeSears with certainty out of a physical lineup.

Defendant Robinson was interviewed several times by the police, and defendant contends that his inculpatory statements were inadmissible because they were involuntary. We disagree. We review a trial court's ultimate decision on a motion to suppress de novo, but we review the court's factual findings for clear error. *People v Elliott*, 295 Mich App 623, 631; 815 NW2d 575 (2012). The trial court held a *Walker*[1] hearing and reviewed the video recording of defendant's interviews. At the hearing, defendant was read his *Miranda*[2] rights, and defendant waived those rights. The interviewing officer asked defendant some preliminary questions to establish defendant's identity and coherence. The first interview lasted approximately three hours and ended when defendant "denied any knowledge of the homicide, stated that he wasn't involved." Although defendant placed his head down on the table and appeared tired, defendant continued to be questioned. At the end of that interview, defendant was returned to a holding cell.

Defendant was given some food and was interviewed a second time after the police continued their investigation and obtained more information. Defendant was not re-read his *Miranda* rights, but he was advised that he was still under arrest and he verified that he recalled and understood his rights. Robinson was specifically asked about the homicide and informed that Dixon had been arrested. Defendant stated, "I'm done, I got nothing to say." The police continued to question defendant, noting that Dixon and Sutton had both given statements that Robinson participated in the homicide. Defendant did not specifically ask to terminate the questioning or request an attorney, but he eventually said, "I'm ready to go and I'm done with it." The interview was terminated after less than half an hour, after which an evidence technician took defendant's shoes into evidence.

Later that night, while the police officer was interviewing Dixon, Robinson asked to talk to the police officer. Robinson confirmed that he understood his rights and made an inculpatory statement regarding his involvement in the Ingram homicide and verbally provided a statement

[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

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

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that was written out by the interviewing officer. Robinson then added information pertaining to the location of the gun used during the homicide, indicated his willingness to take police to the location, and signed the statement. In his own hand, Robinson also wrote out apologies to the prosecutor and Ingram's aunt. Following an inquiry regarding his treatment, Robinson agreed to write down that he had been treated fairly.

The interviewing officer testified at the *Walker* hearing that Robinson had never requested an attorney or to stop the interviews. He acknowledged that he was not always truthful with Robinson during the interviews, in part, suggesting that Dixon and Sutton had "put it all on him." He also acknowledged the possibility that he raised his voice during the interview. He opined that a suspect's indication that he refused to answer a specific question did not require termination of the interview. After reviewing the video recording of the interview, the trial court denied Robinson's motion to suppress his statement, finding the reminder of his rights, as opposed to completely re-reading him his *Miranda* rights, was sufficient, particularly given that the third interview occurred on Robinson's request.

At issue is whether "the confession is the product of an essentially free and unconstrained choice by its maker, or whether the accused's will has been overborne and his capacity for self-determination critically impaired." *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988) (citation omitted). There is no dispute that defendant was in custody and under arrest, so his interrogation was "custodial" and subject to the requirement that he must be advised of his rights prior to questioning. See *Elliott*, 295 Mich App at 631-632. However, "[t]he police are not required to read *Miranda* rights every time a defendant is questioned." *People v Littlejohn*, 197 Mich App 220, 223; 495 NW2d 171 (1992), citing *People v Godboldo*, 158 Mich App 603, 605; 405 NW2d 114 (1986) (footnote omitted). The delays between the reading of defendant's rights and his subsequent interviews were not substantial, there was no evidence defendant was impaired or incompetent, and defendant confirmed that he still understood his rights. His final interview was, in fact, at his own initiative.

To determine whether a defendant's statement was voluntary the totality of the circumstances are to be considered, including:

> the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Cipriano*, 431 Mich at 334.]

The voluntariness of a defendant's statement is evaluated by an examination of the conduct of the police. *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005). "[T]he voluntariness prong cannot be resolved in defendant's favor absent evidence of police coercion or misconduct." *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997). "The test of

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voluntariness is whether, considering the totality of all the surrounding circumstances, the confession is the product of an essentially free and unconstrained choice by its maker, or whether the accused's will has been overborne and his capacity for self-determination critically impaired." *People v Givans*, 227 Mich App 113, 121; 575 NW2d 84 (1997).

The fact that the police were untruthful to defendant can influence whether a defendant's statement is voluntary, but will not necessarily render an otherwise voluntary statement involuntary. *People v Hicks*, 185 Mich App 107, 113; 460 NW2d 569 (1990). The police may use psychological tactics in conducting the interrogation of a suspect. *Haynes v Washington*, 373 US 503, 514-515; 83 S Ct 1336; 10 L Ed 2d 513 (1963). Here, although the police lied that Dixon *and* Sutton had *both* implicated Robinson, the statement was actually accurate as to Sutton. Consequently, it was at least broadly truthful to tell defendant that the police had evidence from witnesses against him. Furthermore, suggesting that defendant may have had lesser culpability is hardly the kind of tactic that would undermine an interviewee's free will. Significantly, defendant's third interview was at his *own* initiative. The evidence was that defendant was supposed to have been transported back to jail after the second interview, but the transport was delayed. There is no indication that police continued any form of interaction with Robinson that improperly influenced his election to initiate the third interview or affected its voluntary nature.

Robinson also contends that the length of time he was subjected to interrogation, from the time of provision of his *Miranda* rights, should be considered in determining the voluntary nature of his confession. We agree, but we find no extraordinarily time periods here. He was in custody for approximately 17.5 hours from the time of his arrest until the conclusion of his third interview and spent a total of just over five and a half hours being interviewed. He was fed and offered a beverage, and although he only received one meal, there is no indication that he requested and was denied any other sustenance. In fact, Robinson wrote out a statement, which has not been contradicted, indicating he was treated fairly and not substantially deprived of necessities, such as food and water, while in custody.

Finally, Robinson does not contend that he ever requested counsel to be present. While his statements near the conclusion of the second interview suggest he did not wish to continue the interrogation, asserting he was ready to go to the county jail, those statements do not serve to contradict the voluntary nature of his third interview. First, the statements by Robinson occurred at 8:26 p.m., only eight minutes before the interview was in fact concluded. Second, Robinson did not confess during this second interview. Thus, even if the failure of police to halt the interview is deemed improper, there is nothing inculpatory to suppress. Third and finally, it cannot be stressed enough that Robinson initiated the third interview, precluding the implication that his statement to police during that interview was involuntary. None of the factors relied on by Robinson are sufficient, individually or in conjunction, to demonstrate that Robinson was so overcome that he was incapable of making a voluntary decision to confess.

Next, Robinson asserts that the closing of the courtroom to the public violated his constitutional right to a public trial. We agree. The federal and Michigan constitutions afford a criminal defendant a right to a public trial. US Const, Ams VI and XIV, and Const 1963, art 1, § 20. However, although a courtroom open to public scrutiny helps insure that a criminal defendant will be given a fair trial, *Waller v Georgia*, 467 US 39, 46; 104 S Ct 2210; 81 L Ed 2d

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31 (1984), the right to a public trial is not absolute. *Id*. at 45. Significantly, the right to a public trial must be asserted; because defendant neither objected nor asserted his right to a public trial, our review is for plain error affecting defendant's substantial rights. *People v Vaughn*, 491 Mich 642, 653-664; 821 NW2d 288 (2012). Not only must defendant establish that an error plainly occurred, but "that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the proceedings." *Id*. at 664-665, citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

At the beginning of Sutton's testimony, the judge heard a ringing telephone in the courtroom and stated:

> Who's got the ringing phone? Whoever's got it better give it up or I'm going to kick everybody out of the courtroom. Who's got the ringing phone? Okay, everybody leave the gallery. You're gone. Everybody's gone.

The courtroom was then cleared. When counsel requested to approach, the following interaction transpired:

> *The Court:* This is my courtroom, sir. Everyone will leave.
>
> *Dixon's Counsel:* No. I'm not-I'm not-that's not my concern. I don't care who's in the gallery. That's not my concern.

The court conducted a bench conference with counsel for approximately two minutes before Sutton's testimony resumed. It appears that no spectators were permitted to re-enter the courtroom that day, although it also appears that a representative from the media, who had previously requested and obtained permission to video record Sutton's testimony, was permitted to continue to do so. On the next day of trial, the restriction regarding spectators was not implemented based on the trial court's permission to counsel to open the courtroom despite the lack of seats available, presumably due to the presence of three juries.

In our view, the trial court's reaction was extreme and excessive; justice is better served by a calmer and more measured response. However, it appears on balance that the trial court's closure was less "to exclude the public, but to control courtroom distractions." *People v Bails*, 163 Mich App 209, 211; 413 NW2d 709 (1987). In any event, none of the defendants objected to the closure, so even if we were—hypothetically—to conclude that the closure was plainly erroneous, reversal would only be warranted of the closure *also* affected defendant's substantial rights. We find no indication that Robinson is actually innocent, especially considering his confession. Because the courtroom closure has not been demonstrated to have impacted the ability of counsel to examine the witness thoroughly or in any manner "seriously affect[] the fairness, integrity, or public reputation of [the] judicial proceedings," Robinson cannot demonstrate entitlement to a new trial. *Carines*, 460 Mich at 774.

Finally, Robinson contends that his trial counsel was ineffective for failing to object to the closure of the courtroom to the public. We disagree. Because defendant did not seek a

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Ginther[3] hearing, we review only mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). "In order to obtain a new trial, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 51; 826 NW2d 136 (2012). As discussed, we perceive no reason why the outcome of the proceedings would have been different had the courtroom not been closed, so we are unable to conclude that counsel's failure to object to that closure could have affected the outcome. Furthermore, given the importance of Sutton's testimony and the fact that the atmosphere in the courtroom was apparently tense—and had already been seriously disrupted the previous day—we are unable to say that it was unsound strategy for counsel to decline to object to the closure. "This Court does not second-guess counsel on matters of trial strategy, nor does it assess counsel's competence with the benefit of hindsight." *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012).

Affirmed.

/s/ Karen M. Fort Hood
/s/ E. Thomas Fitzgerald
/s/ Amy Ronayne Krause

[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

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14

People v Smith

COA No. 300581

October 17, 2013

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JONATHON SMITH,

Defendant-Appellant.

UNPUBLISHED
October 17, 2013

No. 300581
Wayne Circuit Court
LC No. 10-001380-FH

Before: SAAD, P.J., and SAWYER and JANSEN, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial conviction of second-degree home invasion, MCL 750.110a(3), for which he was sentenced to 90 to 180 months in prison. We affirm.

Defendant's first argument on appeal concerns his trial counsel's alleged conduct in engaging in a loud argument with defendant and defendant's mother and grandmother outside the courtroom following jury selection in this case. Trial counsel allegedly said that defendant should have been in prison and referred to defendant's first trial in this matter, which ended in a hung jury. Although no such incident was reported during or immediately after trial by defendant, his family members, or the jurors, defendant and his family members testified about this alleged incident at the *Ginther*[1] hearing on defendant's claim of ineffective assistance of trial counsel. Trial counsel also testified at the hearing. He testified that he would never discuss a case in front of jurors. Though he did not specifically recall any conversation in the hallway, he denied ever telling defendant that he should be in prison. He acknowledged that he might have said that defendant was fortunate because of the outcome of the first trial.

Defendant argues that his initial appellate counsel, who represented him at the *Ginther* hearing, rendered ineffective assistance by failing to call the jurors from his trial to testify at the hearing. Defendant argues that the jurors' testimony was necessary to establish that trial counsel's alleged conduct was prejudicial. Defendant also argues that the trial court had a duty to call and question the jurors *sua sponte*. We disagree with defendant.

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

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Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews a trial court's findings of fact for clear error, and questions of constitutional law de novo. *Id*.

Effective assistance of counsel is presumed and a defendant bears a heavy burden of proving otherwise. *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005). "'In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms. Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different.'" *Id*. (citations omitted). "[T]he test of ineffective assistance of appellate counsel is the same as that applicable to a claim of ineffective assistance of trial counsel." *People v Uphaus* (*On Remand*), 278 Mich App 174, 186; 748 NW2d 899 (2008). Thus, a defendant must show that appellate counsel's performance "fell below an objective standard of reasonableness and prejudiced his appeal." *Id*.

Defendant fails to establish that appellate counsel was ineffective for failing to call the jurors to testify at the *Ginther* hearing. First, decisions regarding what evidence to present and which witnesses to call are presumed to be matters of strategy. *People v Dunigan*, 299 Mich App 579, 589-590; 831 NW2d 243 (2013). "[W]e will not second-guess strategic decisions with the benefit of hindsight." *Id*. This rule presumably applies not only to trials, but also to evidentiary hearings such as that conducted in this case. Appellate counsel may have believed that the testimony of defendant and his family members was sufficient to establish that trial counsel's conduct was deficient and unprofessional, and that some jurors were likely present in the hallway and overheard the discussion. He may have calculated that the time and expense of subpoenaing the jurors was unnecessary.

Second, defendant cannot establish that appellate counsel's allegedly unreasonable performance prejudiced him at the *Ginther* hearing unless he can demonstrate that calling the jurors as witnesses would have established the prejudice prong of his claim of ineffective assistance of trial counsel. Several things must have occurred in order for trial counsel's conduct to have prejudiced defendant at trial: (1) the exchange between trial counsel and defendant's family must have actually occurred as defendant claims, (2) one or more jurors must have been present to hear the exchange, and, most importantly, (3) the exchange must have caused the jury to convict defendant when it otherwise would have acquitted him.

A review of the evidence strongly suggests that the jurors would have convicted defendant of second-degree home invasion regardless of whether they overheard trial counsel's alleged statements in the hallway. "Second-degree home invasion requires proof that the defendant entered a dwelling by breaking or without the permission of any person in ownership or lawful possession or control of the dwelling and did so with the intent to commit a felony, larceny, or assault therein or committed a felony, larceny, or assault while entering, present in, or exiting the dwelling." *Dunigan*, 299 Mich App at 582; see also MCL 750.110a(3).

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According to the testimony at trial, while the owner of the home in question was away, a next-door neighbor saw a man get out of a black car and try to enter the home. The next-door neighbor alerted a second neighbor, who called 911. A short time later, the police arrived and went around the back of the house. They observed that a back window and door were open, and that the house had been "ransacked." As the police officers walked through the house and toward the front door, the second neighbor saw the man come out the front door and get into the black car. She alerted the police. One of the police officers saw that the neighbor was pointing to a black Intrepid. The police officers followed the car, never losing sight of it. They were able to stop it about a mile later, and arrested defendant, who was the only occupant of the car. The homeowner testified that he had not given anyone permission to enter his home while he was away, and this was not disputed. Though the homeowner testified that nothing was missing from the home, he also testified that he returned to find the home a mess, that things had been moved, and that the television was on the couch. As the prosecutor argued at trial, this demonstrated defendant's intent to commit larceny. Nor was there any serious question of mistaken identity. Given the strength of the evidence presented at trial, appellate counsel's questioning of the jurors at the *Ginther* hearing could not have established prejudice with respect to defendant's claim of ineffective assistance of trial counsel. Therefore, defendant cannot establish that appellate counsel's failure to call the jurors affected the outcome of the *Ginther* hearing.

Defendant also argues that the trial court "had an inherent duty to control the proceedings and to inquire of the jurors as to whether their verdict was impacted by the alleged knowledge of [trial counsel's] comments." This argument was not raised below, and is therefore reviewed for plain error. *People v Conley*, 270 Mich App 301, 305; 715 NW2d 377 (2006).

The only legal support defendant offers for his argument is a passing reference to *People v Spencer*, 130 Mich App 527; 343 NW2d 607 (1983), and MCL 768.29. The *Spencer* Court considered a trial court's "'duty . . . to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved.'" *Spencer*, 130 Mich App at 539, quoting MCL 768.29 The trial court in *Spencer* had acknowledged on the record that inadmissible and highly prejudicial evidence was admitted during the jury trial, yet failed to declare a mistrial. This Court concluded that the trial court should have declared a mistrial because the errors that pervaded the trial deprived the defendant of a fair trial. *Id*. at 541.

MCL 768.29 applies specifically to *trial* proceedings, and *Spencer* concerned the effect of inadmissible and prejudicial evidence introduced during a jury trial. Defendant fails to support the proposition that the trial court in this case had an affirmative duty to subpoena witnesses to testify at a *Ginther* hearing. Indeed, it was defendant's burden at the *Ginther* hearing to establish the factual predicate for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Defendant has not demonstrated that the trial court had a duty to *sua sponte* call and question the jurors during the *Ginther* hearing.

Defendant's second argument on appeal is that the closure of the courtroom during voir dire violated his Sixth Amendment right to a public trial. Alternatively, he argues that trial counsel's failure to object to the closure constituted ineffective assistance of counsel.

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Because defendant failed to make a timely assertion of his Sixth Amendment right to a public trial before the trial court, this claim is forfeited and our review is for plain error affecting defendant's substantial rights. *People v Vaughn*, 491 Mich 642, 653-665; 821 NW2d 288 (2012).

There is no reference in the trial transcript to any decision to close the courtroom, or any indication that anyone was asked to leave the courtroom before voir dire. At the *Ginther* hearing, however, defendant's grandmother and mother both testified that they were asked to leave the courtroom during voir dire, and were told that they could reenter after the jury was selected. Defendant's grandmother said that it might have been the bailiff who asked them to leave, but she did not recall. Defendant also testified, "My mom and them, nobody was in the courtroom besides the people that are here now, the prosecutor, the lawyer, me and just the jury . . . ." We will assume, for the sake of addressing defendant's argument, that defendant's mother and grandmother were in fact asked to leave the courtroom.

When the circuit court orders the courtroom closed before voir dire without advancing an overriding interest, a plain error has occurred. *Vaughn*, 491 Mich at 665. The *Vaughn* Court also held that, because structural errors are intrinsically harmful without regard to their outcome, a plain structural error such as this affects a defendant's substantial rights. *Id*. at 666.

Because defendant does not claim that he is actually innocent, the issue here, as in *Vaughn*, is whether closure of the courtroom was an error that seriously affected the fairness, integrity, or public reputation of the proceedings. In *Vaughn*, the Court concluded that "[b]ecause the closure of the courtroom was limited to a vigorous voir dire process that ultimately yielded a jury that satisfied both parties, we cannot conclude that the closure 'seriously affected the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* at 668-669.

The same is true here. Both parties asked several questions of the potential jurors, excused some, and had no further challenges or objections to the jurors that were ultimately selected. Defendant has not established that the exclusion of his family members from the courtroom during the voir dire process seriously compromised the fairness, integrity, or public reputation of the trial. *Id*.

Defendant argues in the alternative that trial counsel was ineffective for failing to object to the closure of the courtroom. We review this unpreserved claim of ineffective assistance of counsel for errors apparent on the record. *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011).

As the *Vaughn* Court explained:

> Defense counsel should be "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." The inquiry into whether counsel's performance was reasonable is an objective one and requires the reviewing court to "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." This standard

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> requires a reviewing court "to affirmatively entertain the range of possible 'reasons . . . counsel may have had for proceeding as they did.'" [*Vaughn*, 491 Mich at 670 (citations omitted).]

Here, as in *Vaughn*, defendant's trial counsel might have reasonably concluded that proceeding with a jury voir dire that was closed to the public benefitted defendant. *Id.* at 670. After all, "'[r]easonable trial counsel might conclude that the potential jurors will be more forthcoming in their responses when the courtroom is closed, that the proceedings will be less likely to be tainted by outside influences, or might simply find the procedure preferable because it will expedite the proceedings.'" *Id*. (citation omitted). Defendant has not overcome the presumption that trial counsel's apparent failure to object was reasonable.

Even if defendant had shown that trial counsel's performance was unreasonable, "an ineffective assistance of counsel claim premised on either counsel's waiver of or failure to object to the Sixth Amendment right to a public trial requires a showing of actual prejudice before the defendant is entitled to relief." *Id.* at 674. Because defendant does not claim that closure of the courtroom during voir dire tainted the jury selection process or the jury that was ultimately chosen, and because defense counsel actively participated in the process and was apparently satisfied with the outcome, it must be presumed that the resulting jury was able to act as a fair and neutral fact finder. *Id*. Defendant is not entitled to relief on his claim of ineffective assistance of counsel.

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Kathleen Jansen

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People v Stalling

COA No. 311850

June 24, 2014

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 24, 2014
v	No. 311850 Wayne Circuit Court
ANTONIO DANARD STALLING, Defendant-Appellant.	LC No. 12-001195-FC

Before: DONOFRIO, P.J., and GLEICHER and M.J. KELLY, JJ.

PER CURIAM.

Defendant was found guilty of assault with intent to murder, MCL 750.83, possession of a firearm by a felon (felon-in-possession), MCL 750.244f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, following a jury trial. He was sentenced to 15 to 25 years' imprisonment for the assault with intent to murder conviction, one to five years' imprisonment for the felon-in-possession conviction, and two years' imprisonment for the felony-firearm conviction. The shooting victim is defendant's first cousin. He was shot on New Year's Eve 2011 outside of his residence. Defendant appeals as of right, and we affirm.

I. EVIDENTIARY RULINGS

We review preserved evidentiary issues for an abuse of discretion. *People v Jackson*, 292 Mich App 583, 594; 808 NW2d 541 (2011). A trial court abuses its discretion when it "chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011). To the extent that defendant also argues that any evidentiary error caused a denial of due process, because no due-process objections were made at the trial court, that aspect of the issue is unpreserved and reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999); *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996).

Defendant first argues that the trial court erred in not allowing defense counsel to ask the victim if the prosecutor had threatened him with a perjury prosecution if he did not testify consistent with his testimony at the preliminary examination.

As background, the victim in this case, testified at the preliminary examination that he was shot by defendant. But before trial, he indicated that he did not want to testify. And when

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he did testify, he stated that he was not sure now who shot him: it could have been defendant or his brother, who, according to the victim, looks very similar. As a result, the prosecution heavily relied on the victim's preliminary examination testimony. On cross-examination, defense counsel attempted to ask the victim if the prosecutor had threatened to charge him with perjury and if the prosecutor instructed him to testify according to his preliminary examination testimony. The trial court determined that this line of questioning was improper.

We agree with defendant that this type of questioning should have been permitted because an inquiry into a witness's credibility is always relevant. *People v McGhee*, 268 Mich App 600, 637; 709 NW2d 595 (2005); see also *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995) ("If a witness is offering relevant testimony, whether that witness is truthfully and accurately testifying is itself relevant because it affects the probability of the existence of a consequential fact."); *People v Crabtree*, 87 Mich App 722, 725-726; 276 NW2d 478 (1979). As such, "[a] witness's bias is always relevant." *McGhee*, 268 Mich App at 637. Obviously, if the prosecutor did instruct the victim to testify in any certain way, it would be important for the jury to know this. See *id.* ("'[A] defendant is entitled to have the jury consider any fact that may have influenced the witness'[s] testimony.'"). However, defendant's argument is perplexing because the victim *did not* testify consistently with his preliminary examination testimony. Thus, even if the prosecution did instruct the victim to testify consistently with his earlier testimony, it is clear that such a mandate was ignored. Accordingly, to the extent that defense counsel's attempt to impeach the victim's testimony at trial was improperly curtailed, any error was harmless beyond a reasonable doubt because the premise for the impeachment (the victim's testimony was the same as his preliminary examination testimony only because of improper prosecution threats) did not exist, as the victim backed away from directly identifying defendant as the shooter at trial. Likewise, defendant has failed to establish any plain error that affected a substantial right on his constitutional, due-process claim.

Next, defendant asserts that the court erred in admitting a recording of a phone call he made while in jail. The recording in issue was one of several recordings made of defendant's jail phone calls. Defendant objected on the first day of trial to the playing of any of the jail calls because there were perhaps "hundreds" of them and, with them being turned over the night before trial, there was insufficient time to adequately review all of them. The prosecutor stated that she only intended to play one of the calls, which lasted a minute, and stated that she identified it for defendant. The following day at trial, defense counsel stated that she listened to the entirety of the call that the prosecutor intended to play for the jury and had concerns about some portions of the call because they had "absolutely nothing to do with this case." After the prosecutor clarified that she was only going to be playing a certain 30-second portion of the call, where defendant was "only talking about how he wanted to waive his preliminary exam so that the witness, if he was killed in the interim, would not be able to—we would not be able to prosecute." Defense counsel replied, "That's fine. No, I take no—I have no qualms with that." When defense counsel clearly expresses satisfaction with an outcome, counsel's action will be deemed to constitute a waiver. *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011). And it is well established that wavier extinguishes any error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

II. PROSECUTORIAL MISCONDUCT

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Defendant next alleges several instances of prosecutorial misconduct. Defendant objected to only one of the instances he cites, and the others are, accordingly, unpreserved. Generally, claims of prosecutorial misconduct are reviewed de novo. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). The test is whether a defendant was denied a fair and impartial trial due to the actions of the prosecutor. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). However, defendant's unpreserved claims are reviewed for plain error affecting a substantial right. *People v Cross*, 281 Mich App 737, 738; 760 NW2d 314 (2008). Reversal is warranted only "if the defendant is actually innocent or the error seriously undermined the fairness, integrity, or public reputation of the trial." *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006). Thus, reversal for these unpreserved issues is necessary only if a timely instruction would have been inadequate to cure any defect. *Ackerman*, 257 Mich App at 449.

We review instances of prosecutorial misconduct on a case-by-case basis and examine the entire record to evaluate the prosecutor's comments in context. *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007). The comments also are evaluated in light of defendant's arguments, "and the relationship the comments bear to the evidence admitted at trial." *Id.*

We address the preserved issue first.

A. QUESTIONING REGARDING THREATS

The prosecutor asked the victim if he had been threatened since he testified at the preliminary examination. Defendant argues that the prosecutor committed misconduct by questioning the victim about the threats when there was no evidence that defendant made the threats.

At its heart, defendant's assertion of error is really an evidentiary issue. The prosecutor correctly stated that the threats were relevant to the victim's credibility, which, as already discussed, is always relevant. *McGhee*, 268 Mich App at 637. The victim's trial testimony was more equivocal than his preliminary examination testimony on the issue of who had shot him. Questioning about why his testimony had changed was relevant. The identity of the person who threatened the victim was irrelevant to whether evidence of the threats was admissible. As such, defendant was not denied a fair trial, and there was no prosecutorial misconduct on this issue.

Defendant mischaracterizes this Court's holding in *People v Kelly*, 231 Mich App 627, 640; 588 NW2d 480 (1998), by stating that "if there is no evidence that threats were made or that defendant was connected to them, questioning must cease." Nowhere in *Kelly* does this Court make that pronouncement. Instead, the issue before the *Kelly* Court was whether the prosecution asking the victim whether he was scared of the defendant was permissible, and the Court agreed that it was: "Evidence of a defendant's threat against a witness is generally admissible as conduct that can demonstrate consciousness of guilt." *Id.* In the present case, the purpose of the questioning was not necessarily to demonstrate a consciousness of guilt but, rather, was to demonstrate that something happened between the time of the preliminary examination and trial that affected the victim's testimony at trial. Because a party "is entitled to have the jury consider any fact that may have influenced the witness'[s] testimony," this type of questioning is permissible. *McGhee*, 268 Mich App at 637.

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B. REFERENCE TO DEFENDANT'S CHARACTER

Defendant next argues that the prosecutor, in her closing argument, impermissibly referred to defendant's character. Specifically, defendant takes issue with the prosecutor's comments, "That is the type of man Mr. Stalling is," and "that showed his character."

During her closing argument, the prosecutor recounted the victim's testimony regarding being threatened by defendant after talking to the police:

> The car pulls up [next to the victim's car], what's [defendant] say? I saw you leave that police station. I saw you leave that police station. Your ho ass is not going to make it to testify.
>
> When did we hear those same, similar words? Because then you have to believe—to not believe him at the time, that he just made all this up. But then what do we hear? We hear a jail call, him saying the same thing? The same thing? Really?
>
> What does that do? That's credibility, corroboration. *That is the type of man [defendant] is*. He said it to him on the street and he says it on the jail calls. [Emphasis added.]

Later, regarding the jail calls, she stated:

> Jail calls. There are certain rules I do have to play by. I can't sit up here and play—you guys don't want to listen to him talking to his girlfriend. You know? Why would I play those? I've got to play *what shows his character*, what showed his mind frame. What shows the kind of person he is and what has he done in this case. [Emphasis added.]

Defendant asserts that the emphasized portions that referenced defendant's character were improper. We disagree.

The prosecution deprives a defendant of a fair trial when it argues that evidence of the defendant's "bad character" can be considered by the jury as substantive evidence of guilt. *People v Quinn*, 194 Mich App 250, 252-255; 486 NW2d 139 (1992). Further, "[i]t is not proper for the prosecutor to comment on the defendant's character when his character is not in issue." *Id.* at 253. However, the prosecutor was not making any arguments that defendant had "bad character" or that he must be guilty because he has "bad character." In the first instance, the prosecutor's comment of "[t]hat is the type of man [defendant] is" was her way of describing that it was not a coincidence that the two threats that the victim received used the same type of language. She permissibly argued that the fact that these two threats were so similar that it corroborated the victim's testimony that they came from the same person, namely defendant.

Likewise, for the second reference, the prosecutor's comment that she could only play tapes of the calls that "show[ed] [defendant's] character" did not describe or impugn defendant's character at all. Instead, she merely was explaining, although inartfully, that the types of calls she could play were ones that were relevant to the case, unlike those of him talking with his

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girlfriend. The fact that the prosecutor implied that only calls that "show[ed] his character" were admissible was of little consequence since this is best described as a (mis)statement of the law that did not concern the jury and, consequently, had no bearing on the proceedings.[1]

Moreover, the two references were relatively innocuous and did not insinuate that defendant had a propensity to commit crimes or that such a propensity should be considered as substantive evidence of guilt. As such, even if any of the comments introduced any error, a curative instruction would have remedied the error, and reversal is unwarranted on this basis. See *Ackerman*, 257 Mich App at 449.

C. REFERENCE TO FACTS NOT IN EVIDENCE

It appears that the victim had some sort of "knots" or bumps on his head at trial. The prosecutor argued in closing argument that these protrusions were attributable to a beating the victim received before trial. Defendant argues that this was improper because the medical records established that these "knots" existed well before any attack.

The victim had testified to such an attack. He stated that he was hit "on the head with a gun" and knocked unconscious. Later, the prosecutor asked the victim about the timing of the attack:

> *Q.* The . . . attack on you that you just described to the jury previously, that was all done after the February 3rd date of your testimony at 36th District [at the preliminary examination]; is that right?
>
> *A.* I can't remember what day it was and all that. Like I say, you have to look at these knots on my head. So I can't remember a lot of stuff. You got—I got to be refreshed on a lot of stuff.

Prosecutors are allowed to argue the evidence and all reasonable inferences from the evidence. *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). Given the victim's testimony, the prosecutor made a reasonable inference that the victim received the knots on his head as a result of being struck on the head during the attack. Defense counsel later pointed out during her closing argument that the victim's medical records, which were admitted as exhibits, showed that the protrusion had existed long before the attack.[2] While the medical records weighed heavily against the prosecutor's argued inference, those records did not transform the prosecutor's comment into an impermissible one. Regardless, even if the comment was erroneous, it did not deprive defendant of a fair trial. First, defense counsel pointed out to the

[1] Whether the other calls were inadmissible because the prosecutor thought they did not "show" defendant's character or because they were otherwise inadmissible had no tangible effect on the jury.

[2] The victim's medical records identify the protrusion as a "[l]arge lipoma subcutaneous [on the] left temporal region."

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jury that the medical records did not support the prosecutor's contention. Second, the salient point the prosecutor was making was that the victim was attacked, hit in the head, and knocked unconscious after he testified at the preliminary examination—a fact which was not disproven; whether that attack caused permanent knots to form on the victim's head carried little import.

Defendant also claims that the prosecutor's argument was improper because there was no evidence that defendant or "anyone connected to him" beat the victim. While it is true that there was no evidence that defendant beat or threatened the victim, it was reasonable for the prosecutor to infer that the beating and threats were committed at defendant's behest or by someone sympathetic to defendant. Read in context, this is what the prosecutor's argument suggested, and we find no error.

Defendant next argues that the prosecutor misstated the facts when she said that the victim had identified defendant as the shooter "from day one" because on the day he was shot, he did not identify the perpetrator. However, the prosecutor's statement should not be taken so literally. The idiom "from day one" should be understood as saying that the victim had never identified anyone other than defendant as the shooter until he equivocated his identification at trial. Thus, this argument was appropriate and did not deprive defendant of a fair trial.

D. REFERENCE TO UNPLAYED PHONE CALLS

Defendant next argues that the prosecutor "engaged in bolstering in her rebuttal argument when she told the jury that there were other unplayed recordings of phone calls between the defendant and his alibi witness" that could not be played "because of the rules." Defendant argues that "[t]he prosecutor was implying that those calls would have shown the alibi to be false." As discussed previously, in context, the prosecutor merely indicated that there were other recorded calls between defendant and his girlfriend that were irrelevant to the case, not that other calls would have shown his girlfriend's testimony to be false. As a result, defendant cannot show how he was denied a fair trial by the comment.

E. REFERENCE TO "WE KNOW"

During closing argument, the prosecutor stated that "[w]hen you fire a gun at someone and pull the trigger one, two, three, four, five times[,] [y]our intent is to murder. You don't have to say hey, I'm going to murder you. Actions speak louder than words all day long. So we know that the person firing that gun was trying to kill [the victim]." Defendant claims that the prosecutor's use of the phrase "we know" "encouraged the jury to think that prosecutor and his [sic] officers knew facts not placed before the jury." We disagree. In context, it is clear that the prosecutor merely was arguing that common sense tells all of us, as people, that one who fires a gun multiple times at another person has the intent to kill—it does not convey that the prosecutor had some special or secret knowledge that was not presented to the jury.

F. TREATMENT OF DEFENSE COUNSEL

Defendant also argues that the prosecutor improperly impugned the character of his defense counsel in several ways.

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In her closing argument, defense counsel referred to the prosecutor as "the government." She also criticized the investigation in the case and suggested that the prosecutor would not dismiss the case because she was invested in obtaining a conviction. On rebuttal, the prosecutor said, "I love when they call us the government. That's another little trick and all smoke and mirrors, and all that. Mean, nasty government people. It's ridiculous." Defendant argues that these and other similar comments were an improper attack on defense counsel.

The general rule is that "[a] prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury." *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). Here, however, the prosecutor's comments were made in response to defendant's arguments. Although colorful, the comments were responsive to any suggestion that the "government" prosecutor was more invested in getting a conviction than doing justice. *Id*. at 593.

Defendant next argues that the prosecutor "acted with disdain towards defense counsel" at certain points during the trial. "[A] prosecuting attorney may not personally attack defense counsel." *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003). The first instance he cites was during the prosecutor's cross-examination of defendant's girlfriend. The prosecutor was questioning her about who she told about the alibi. She testified that she had told defendant's former attorney. When the prosecutor asked if there was a way to corroborate this, she testified that she wrote a statement to the attorney. It appears that both parties were unaware of the existence of this statement, which was in the form of an affidavit. The prosecutor then asked defense counsel, "You got that statement?" Defense counsel replied, "Don't talk to me like that." The prosecutor then said to defense counsel, "I want to know the name of that attorney." Defense counsel responded, "I want to ask that she stop making comments in front of the jury." It is impossible to gauge the tenor of the prosecutor's statements from the transcript. However, given defense counsel's objections, it is likely that they were heated to some extent. While it was improper for the prosecutor to directly address counsel, the prosecutor was not impugning counsel's character. Further, defense counsel effectively responded, challenging the prosecutor's actions. Nonetheless, a curative instruction would have alleviated any prejudice.

Second, defendant challenges the prosecutor's statement during her closing argument that defense counsel "can get up and say, oh, it wasn't my client. You know it wasn't my client. He didn't say it was my client. My client didn't do that. Really?" In context, it appears that the prosecutor was rebutting the suggestion by defense counsel that defendant was not responsible for the beating, which was not improper. Furthermore, a prosecutor "need not confine argument to the blandest possible terms." *Dobek*, 274 Mich App at 66.

Third, defendant also takes issue with the prosecutor arguing during closing that defense counsel could not "trip up" the victim on cross-examination. Defendant argues that "[c]ross-examination is a right, one enshrined in the United States Constitution. It is not a tool designed to trip up witnesses." The prosecutor was merely arguing, however, that the victim did not contradict himself during cross-examination. This was an appropriate argument.

Defendant next alleges misconduct in the prosecutor's statement regarding her duty to pursue justice. In her opening statement, defense counsel suggested that the prosecutor would

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not dismiss the case "because they don't have the guts to do the right thing." In her closing statement, the prosecutor referred to this statement:

> [Defendant's attorney], she then wants to get up in her opening statements and says the prosecution doesn't have the guts to take care of this case? Are you serious? I've never been more appalled by a comment in my life.
>
> The prosecution's duty is to make sure witnesses get the chance to testify. Make sure they get a chance to have justice done.

Defendant argues that "[t]his comment invited the jury to consider the differences in defense counsel's job and her own." He cites *People v Hunt*, 68 Mich App 145, 148; 242 NW2d 45 (1976), where this Court found the prosecutor "needlessly denigrated the role of defense counsel [by] stating that, as a prosecutor, his job was 'to see that justice is done' while defense counsel's job was 'to get his man acquitted.'" In the present case, the prosecutor's argument did not create such an insinuation. Rather, it was merely a response, albeit an impassioned one, to defense counsel's suggestion that the prosecutor did not have the strength of character to dismiss, what defendant characterized as, an obviously flawed prosecution. Given the implication, the impassioned response is understandable.

G. REFERENCE TO AFFIDAVIT

Defendant next takes issue with the following reference the prosecutor made to defendant's girlfriend's affidavit:

> There is an affidavit. That was never turned over to the prosecution. I had to just go and have it sent here today. Why aren't things turned over? Why don't I have a chance to investigate that? Why don't I have a chance to see if that's true?
>
> That's a good question. I can't give you an answer. You guys can come up with your own answer and figure that one out.

Defendant argues that this was false, as he had filed a notice of the alibi witness at least 10 days before trial. But the prosecutor's comments were not related to a lack of notice related to the existence of the alibi witness—instead, it was related to never receiving, let alone being made aware of, this affidavit from the alibi witness. Because it was undisputed that the affidavit was never provided before trial to the prosecutor,[3] we perceive no error. And if any error was introduced, defendant is not entitled to any relief because a curative instruction would have remedied the prosecutor's error. See *Unger*, 278 Mich App at 241.

H. REFERENCE TO DEFENDANT'S INABILITY TO "NEGATE" PROOF

[3] Defense counsel explained that even she was unaware of the affidavit because it initially was given to defendant's prior counsel.

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Defendant also argues that when the prosecutor stated that defense counsel could not "negate anything," the prosecutor impermissibly shifted the burden of proof. In general, "[a] prosecutor may not imply in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof." *People v Fyda*, 288 Mich App 446, 463-464; 793 NW2d 712 (2010). However, it is not improper for a prosecutor to argue that evidence is "uncontradicted." *Id*. at 464. When viewing the prosecutor's comments in context, this is what the prosecutor was arguing.

I. ASSAULT TO DO GREAT BODILY HARM

Defendant claims that the prosecutor's characterization of assault with intent to do great bodily harm was erroneous. During her closing argument, the prosecutor stated:

> Assault with intent to do great bodily harm. That is a lesser included offense of assault with intent to murder. It takes the intent part away. You're just saying, I was just trying to hurt him. I was just trying to hurt him.
>
> Well, you know that's not the case here, because you didn't punch him. You weren't—you weren't doing anything like that. You used a gun.

Defendant argues that this characterization was incorrect and "lowered the burden of proof on the assault with intent to murder charge," because "[i]t implied to the jury that in determining which crime the defendant should be convicted of anything more than a punch in the arm evidenced an intent to murder."

"A prosecutor's clear misstatement of the law that remains uncorrected may deprive a defendant of a fair trial." *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818, 823 (2002). Nonetheless, "if the jury is correctly instructed on the law, an erroneous legal argument made by the prosecutor can potentially be cured." *Id*. In the present case, the prosecutor provided a somewhat muddled view of the law. The intent to do great bodily harm is "the intent to do serious injury of an aggravated nature." *People v Brown*, 267 Mich App 141, 149; 703 NW2d 230 (2005). Merely trying to "hurt" someone with a "punch" does not necessarily equate to the intent to do great bodily harm. However, in making this statement, the prosecutor was stressing that the jury was confronted with the use of a gun, and such use easily allows for an inference of an intent to kill. See *In re Guilty Plea Cases*, 395 Mich 96, 130; 235 NW2d 132 (1975). Regardless of any potential misstatements of the law on the part of the prosecution, any error was cured when the trial court provided the correct law on the subject. See *Grayer*, 252 Mich App at 357.

Defendant also takes issue with the prosecutor's comment, "And the Judge will tell you, a gun is inherently a dangerous weapon. It's used for one thing, and one thing only, and that is to kill. Period." The judge gave no such instruction. Defendant claims that this argument was untrue and "if the judge instructed the jury like that, it would be relieving the jury of finding the essential element of intent." Again, any error was cured when the trial court instructed the jury that, in order for it to convict defendant of assault with intent to murder, it must find that "defendant intended to kill the person he assaulted and the circumstances did not legally excuse

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or reduce the crime." Thus, because a curative instruction would have remedied any error and because the trial court ultimately provided the correct law on the requisite intent, defendant is not entitled to any relief.

J. EXCERPT OF VICTIM'S PRELIMINARY EXAMINATION

Defendant next alleges that the prosecutor erred by reading the following statement from the victim's preliminary examination testimony:

> I don't want to put him in jail, but it gotta lead to this because it's going to get bigger. If he come out, I don't want him dead. It's just going to be the truth. You shot me, I know you shot me. Ain't nothing, a legal team or nothing can tell me, you shot me. You know you shot me. That's just point blank.

Defendant argues that the reference to "a legal team" in the testimony that the prosecutor read was an improper comment on his exercise of his right to counsel and that the prosecutor thereby committed misconduct. However, the victim, not the prosecutor, made the comment. And in context, the victim was saying that he was certain that defendant was the shooter, not that defendant's retention of an attorney was somehow evidence of his guilt. No error is shown.

K. SYMPATHY FOR VICTIM

Defendant argues that the prosecutor's reference to the victim being "beat down" was an improper appeal to the sympathy of the jury. In her closing argument, the prosecutor stated:

> [The victim] saw [defendant] and described him when it first happened on the 1st [of January], on the 5th [of January], [and] at preliminary exam. Whole time, nothing changed until he was beat down. Beat down. Everything is still the same, it's just an ID question.

It is well-settled that "[a] prosecutor may not appeal to the jury to sympathize with the victim." *Unger*, 278 Mich App at 237. However, looking at the comment in context reveals that the prosecutor was not referencing the attack and the fact that the victim was "beat down" in order to gain sympathy. Instead, the prosecutor was highlighting the intervening attack on the victim as the reason why he changed his testimony at trial from his earlier testimony, and this comment was not improper.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant moved this Court to remand this case to the trial court for a *Ginther*[4] hearing. This Court granted the motion. *People v Stalling*, unpublished order of the Court of Appeals, entered June 14, 2013 (Docket No. 311850). Following the hearing, the trial court issued an

[4] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

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opinion, holding that defendant's trial counsel did not render ineffective assistance of counsel. "Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Findings of fact are reviewed for clear error, while determinations of constitutional law are reviewed de novo. *Id.* This Court must give due regard "'to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.'" *People v Dendel*, 481 Mich 114, 130; 748 NW2d 859, amended on other grounds 481 Mich 1201 (2008), quoting MCR 2.613(C).

The Sixth Amendment to the United States Constitution and Article I, § 20 of the Michigan Constitution guarantee the right to effective assistance of counsel for criminal defendants. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). To establish that his counsel did not render effective assistance and therefore that he is entitled to a new trial, "defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009) (quotation marks omitted).

Defendant first argues that his trial counsel rendered ineffective assistance by failing to call his mother as a witness. At the *Ginther* hearing, trial counsel testified that she declined to call the mother because she was "going to fabricate." The trial court credited this assertion, which we do not find clearly erroneous. A claim of ineffective assistance of counsel cannot be based on the failure to present what counsel reasonably suspects to be perjurious testimony. *People v LaVearn*, 448 Mich 207, 217-218; 528 NW2d 721 (1995).

Defendant next argues that trial counsel should have objected to alleged instances of prosecutorial misconduct. The trial court found that any failure to object was not unreasonable. We agree. As stated above, defendant's claims of error regarding prosecutorial misconduct are without merit. Consequently, defendant's counsel did not render ineffective assistance by declining to object. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997) (declining to raise a meritless objection does not constitute ineffective assistance). Additionally, to the extent that any of the prosecutor's comments introduced any error, any prejudice was minimal, and defendant cannot establish how such minimal prejudice affected the outcome of the trial.

Before trial, defendant's trial counsel moved the trial court "to prevent any mention of [defendant's] prior record . . . unless he testifies." The trial court granted the motion, and defendant did not testify. The prosecutor and defendant later agreed to a stipulation regarding defendant's previous felony conviction and his resultant ineligibility to possess a firearm. The prosecutor told the jury that the parties had stipulated that "at the time of December 31, 2011, the defendant had previously been convicted of a felony and was therefore ineligible to carry a firearm at that time."

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Defendant next argues that his trial counsel's testimony establishes that she was ineffective because "she did not know that she could ask for an instruction which would have told the jury to only consider the prior felony conviction on the charge of felon in possession." This is a mischaracterization of trial counsel's testimony. At the *Ginther* hearing, defendant's appellate counsel asked trial counsel why she did not ask for a limiting instruction on the proper use of this stipulation. Defendant's trial counsel answered, "It seem—I don't know, it seems common sense. I've done these trials. It's just for the count of felon in possession. That's it." She added, "I would not have asked for one." When asked, "So if it's not in the standard jury instructions, you would not offer it to the Court," she answered, "I've done special jury instructions before, but this did not seem a time or a place to do one."

The trial court found that "the decision not to highlight Defendant's prior conviction by requesting a limited instruction was a strategic decision made on the part of trial counsel." The trial court's finding was not clearly erroneous. Furthermore, this Court will not second-guess matters of trial strategy. *People v Rice*, 235 Mich App 429, 445; 597 NW2d 843 (1999). The stipulation itself made clear the purpose to which it could be used—to show that defendant "was therefore ineligible to carry a firearm at that time."

Defendant next argues that trial counsel was ineffective for failing to move to strike the victim's testimony regarding threats to prevent him from testifying. The trial court stated that it found "no merit" in this argument, and we agree. As stated above, this was a proper inquiry for the prosecutor, as it was relevant to the victim's credibility. Consequently, trial counsel was not ineffective for failing to move to strike. *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003) ("Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion.").

Defendant also argues that trial counsel was ineffective for failing to object when the prosecutor read the victim's preliminary examination testimony that included a reference to "a legal team." The trial court stated that it found "no merit" in this argument. For the reasons stated previously on this topic, we agree.

Finally, defendant argues that trial counsel was ineffective for failing to object to the closure of the courtroom, which allegedly violated defendant's right to a public trial. During opening and closing argument, the trial court closed the courtroom to prevent the jury from being distracted. Neither party objected. The substantive issue of whether the closure of the courtroom was improper is addressed below. For the reasons stated in Part V of this opinion, *infra*, we find no merit to defendant's assertion that counsel's representation with respect to the issue was unreasonable.

IV. SUFFICIENCY OF THE EVIDENCE

When examining whether there was sufficient evidence to support a conviction, the evidence is reviewed de novo in a light most favorable to the prosecution to determine "whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt." *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010). In reviewing the sufficiency of the evidence, this Court must not interfere with the role of the trier of fact in determining "'the weight of the evidence or the credibility of witnesses.'" *People*

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v Eisen, 296 Mich App 326, 331; 820 NW2d 229 (2012), quoting *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). Furthermore, "[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). "'Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.'" *Carines*, 460 Mich at 757, quoting *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

Defendant first argues that there was insufficient evidence that he had the intent to murder the victim. Defendant only takes issue with this element, and does not argue that there was insufficient evidence to fulfill any of the elements of the other convictions. "The elements of assault with intent to commit murder are (1) an assault, (2) with the specific intent to commit murder, (3) which, if successful, would make the killing murder." *People v Beard*, 171 Mich App 538, 541; 431 NW2d 232 (1988). Defendant argues that there was insufficient evidence that he had the intent to murder because he did not shoot the victim at close range, he only struck his toe and lower leg, and the victim's injuries only required hospitalization for one day.

Although only two bullets hit the victim, he testified that he heard "about like eight or nine" shots and elaborated that it was more than three but less than ten. While the areas of his body where he was shot were not vital and the injuries were not severe, the fact that defendant fired several bullets tends to show that he had the intent to kill. See *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996) (sufficient evidence of intent to kill where defendant pulled trigger on gun several times, although no bullets fired). That the victim was not more severely injured can be understood as fortuitous. Viewing this evidence in the light most favorable to the prosecution, there was sufficient evidence that defendant intended to kill the victim.

Defendant also argues that the victim's "equivocal identification testimony" did not furnish proof beyond a reasonable doubt that defendant was the shooter. While the victim's testimony at trial was equivocal, his testimony at the preliminary examination that identified defendant as the shooter, which the prosecutor introduced, was not. Because the victim's testimony at trial was inconsistent with his testimony at the preliminary examination, the preliminary examination testimony was admissible as substantive evidence under MRE 801(d)(1)(A). See *People v Malone*, 445 Mich 369, 378; 518 NW2d 418 (1994). Thus, the jury was permitted to credit that account, and the evidence was sufficient to support the jury's finding.

V. RIGHT TO A PUBLIC TRIAL

During opening and closing argument, the trial court closed the courtroom to prevent the jury from being distracted. Defendant argues that this closure deprived him of his right to a public trial. Defendant failed to object, and consequentially we review the claim for plain error affecting substantial rights. *Carines*, 460 Mich at 763. To establish such a claim, a defendant must prove (1) the existence of an error, (2) the error was plain or obvious, and (3) the error affected the outcome of the proceedings. *Id.*

The Sixth Amendment to the United States Constitution and Article I, § 20 of the Michigan Constitution guarantee criminal defendants a public trial. *People v Vaughn*, 491 Mich

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642, 650; 821 NW2d 288 (2012). "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Waller v Georgia*, 467 US 39, 46; 104 S Ct 2210; 81 L Ed 2d 31 (1984) (internal quotation marks, alteration, and citation omitted). Furthermore, "[i]n addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury." *Id.* In the present case, it is unclear whether this right was in fact violated. It appears that members of the public were indeed present for opening and closing arguments, as the trial court told them that they could stay in the courtroom. Defendant does not contend that anyone was told to leave or that anyone who wanted to watch the arguments was excluded. Therefore, the rationale behind the right to a public trial was not infringed. In his brief, defendant appears to assume that the trial court's actions violated this right, as he mainly addresses the justification for the closure. Consequently, defendant has failed to establish the presence of any plain or obvious error.

Even so, assuming without deciding that the closure was plain error that affected defendant's substantial rights, defendant has still not established that he is entitled to any relief. Under the plain-error doctrine, reversal is warranted only if the defendant was actually innocent or if the error *seriously* affected the fairness, integrity, or public reputation of the judicial proceedings. *Carines*, 460 Mich at 763; see also *Vaughn*, 491 Mich at 666-667 (stating that this requirement still applies when a defendant raises the unpreserved issue of being denied the right to a public trial). Here, the "closures" in this case were innocuous. They only occurred during opening and closing arguments, the public nonetheless was permitted to stay, and the closures were undertaken so that the jury would not be distracted by people entering and leaving the courtroom. Consequently, it did not seriously affect the fairness, integrity, or public reputation of judicial proceedings.

Affirmed.

/s/ Pat M. Donofrio

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 24, 2014
v	No. 311850 Wayne Circuit Court
ANTONIO DANARD STALLING, Defendant-Appellant.	LC No. 12-001195-FC

Before: DONOFRIO, P.J., and GLEICHER and M. J. KELLY, JJ.

GLEICHER, J. (*concurring*).

I concur with the majority opinion's decision to affirm defendant's convictions. However, I respectfully disagree with the majority opinion's analysis of defendant's public trial argument.

The trial court closed the courtroom during opening statements and closing arguments because it feared that people entering or exiting through a door facing the jury box might distract the jurors. A trial court may close a courtroom under rare and special circumstances. This was not one of them.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . public trial." Const 1963, art 1, § 20 similarly guarantees that a criminal defendant "shall have the right to a . . . public trial . . . ." In *Waller v Georgia*, 467 US 39, 48; 104 S Ct 2210; 81 L Ed 2d 31 (1984), the United States Supreme Court established that to justify closing the courtroom, the party seeking closure "must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." The closure in this case failed to satisfy this standard. The trial court considered no alternatives to closure (such as a sign advising that arguments were in progress) and made no specific findings justifying closure. Furthermore, it defies logic that an "overriding interest" in avoiding disruption would exist only during counsels' arguments and not throughout the presentation of the proofs.

"Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials." *Presley v Georgia*, 558 US 209, 215; 130 S Ct 721; 175 L Ed 2d 675 (2010). The United States Supreme Court has applied that obligation to jury selection and suppression hearings. The Court emphasized in *Presley* that the right to a public trial extends to

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"any stage of a criminal trial." *Id.* at 724. I can think of no reason for relieving courts of this responsibility during opening statements and closing arguments. Indeed, closing argument often supplies the most intense and meaningful moments in a trial.

The majority opinion expresses that because the trial court did not clear the courtroom, members of the public likely were present when the doors were closed, and defendant has failed to identify anyone with an interest in the proceedings who was excluded. I take no solace in these observations. The trial court made no record of those present and those who left to avoid being "locked in." Absent any demonstration of an "overriding interest that is likely to be prejudiced," closing the courtroom to the public during two important portions of a criminal trial clearly violates a Constitutional mandate. *Waller*, 467 US at 48. Moreover, in *Waller*, the United States Supreme Court stated clearly that "the defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee." To require a defendant to identify interested parties who were turned away after meeting a closed and locked door presents an insurmountable obstacle to vindication of a clearly established constitutional right.

I would hold that the trial court's courtroom closure constituted structural error. However, because defendant's attorney neglected to object, *People v Vaughn*, 491 Mich 642, 650; 821 NW2d 288 (2012), we are compelled to employ plain error review. Under that exacting standard, defendant has failed to establish entitlement to relief.

/s/ Elizabeth L. Gleicher

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 24, 2014
v	No. 311850 Wayne Circuit Court
ANTONIO DANARD STALLING, Defendant-Appellant.	LC No. 12-001195-FC

Before: DONOFRIO, P.J., and GLEICHER and M. J. KELLY, JJ.

M. J. KELLY, J., (*concurring*).

I concur fully with the analysis and conclusions stated in sections I through IV of the majority opinion. However, for the reasons stated in Judge Gleicher's concurrence, I concur in the result only with regard to defendant's claim that the trial court deprived him of the right to a public trial.

/s/ Michael J. Kelly

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People v Scott

COA No. 320321

September 22, 2015

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 22, 2015
v	No. 320321 Wayne Circuit Court
KENNETH MICQUEL SCOTT, Defendant-Appellant.	LC No. 13-007495-FC

Before: MURRAY, P.J., and METER and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felon-firearm), MCL 750.227b.[1] The court sentenced defendant as a second-offense habitual offender, MCL 769.10, to consecutive prison terms of two years for felony-firearm and two to seven and one-half years for felon in possession, with those terms to run consecutively to an earlier prison sentence for which defendant was on parole at the time he committed the instant offenses. We affirm.

The complainant testified that he is a marijuana dealer and on the day in issue, defendant arrived at his home to purchase marijuana. The complainant testified that the two went into the basement and smoked marijuana. Defendant then became sick, the complainant testified, and went into the bathroom. According to the complainant, when defendant returned he shot the complainant in the head. The complainant then went into the bathroom and, when he returned, shot at defendant.

A police officer, Khary Mason, testified that defendant admitted shooting the complainant in the head while the complainant was sitting on a couch. According to Mason, defendant stated that the complainant then went into the bathroom, came out, and began shooting at defendant. Defendant wrote and signed a letter, admitted into evidence, in which he

[1] Defendant was acquitted of additional charges of armed robbery, MCL 750.529, assault with intent to commit murder, MCL 750.83, and assault with intent to do great bodily harm less than murder, MCL 750.84.

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apologized to the complainant and stated that he was "truly sorry and upset with [himself] for what [he] did" and that he was glad the complainant was alive. At trial, defendant admitted shooting at the complainant but claimed that the complainant shot at him first.

Defendant first argues that he was entitled to a new trial because the trial court closed the courtroom to the public during the first day of jury voir dire. During the second day of trial, and during continued voir dire, defense counsel took issue with the fact that some members of defendant's family had been excluded from the courtroom during the prior day and requested a mistrial. Defense counsel explained to the court that while he had become aware at some point during the prior day that defendant's family members were not in the courtroom, he was not aware "before it began" that the family members had been asked to step outside the courtroom. Counsel stated that he did not immediately bring the matter to the court's attention because he was not then aware whether jury selection "was covered under the right to a public trial," but that he had learned on the way home that it was a structural error. Defendant's family members were allowed to be in the courtroom on the second day of trial, including for the remainder of jury selection. The court denied the motion for a mistrial.

While we conclude that the trial court erred in its decision to close the courtroom, we find that, under these particular circumstances, defendant cannot show that any further relief is warranted.

As discussed in *People v Vaughn*, 491 Mich 642, 650-651; 821 NW2d 288 (2012), the Sixth Amendment right to a public trial also encompasses the right to public voir dire. Therefore, the trial court's ability to close the courtroom during voir dire is limited:

> [T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure. [*Waller v Georgia*, 467 US 39, 48; 104 S Ct 2210; 81 L Ed 2d 31 (1984); see also *Presley v Georgia*, 558 US 209, 213-214; 130 S Ct 721; 175 L Ed 2d 675 (2010).]

Vaughn recognized that a violation of the right to a public trial is a "structural error." *Vaughn*, 491 Mich at 666-667. The *Vaughn* Court noted that normally structural errors are "'are intrinsically harmful, without regard to their effect on the outcome. . . .'" *Id.*, quoting *People v Duncan*, 462 Mich 47, 51; 610 NW2d 551 (2000). The Court also found that "if there is a timely assertion of the Sixth Amendment public trial right, the remedy for a violation must be "'appropriate to the violation,'" although "'the defendant should not be required to prove specific prejudice in order to obtain relief. . . .'" *Vaughn*, 491 Mich at 653, quoting *Waller*, 467 US at 49-50.

Vaughn also explained that despite its structural basis, the right to a public trial can be forfeited by a defendant, as can most claims of constitutional error. *Vaughn*, 491 Mich at 663-664. In such cases:

> the failure to assert a constitutional right ordinarily constitutes a forfeiture of that right.[37] In analyzing a forfeited claim of error, a defendant is not entitled to relief

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> unless he can establish (1) that the error occurred, (2) that the error was "plain," (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. [*Id.* at 654.]

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[37] [*United States v*] *Olano*, 507 US [725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993)] ("[F]orfeiture is the failure to make the timely assertion of a right . . . .")

The courtroom should not have been closed during voir dire. The stated reason for the closure was the trial court's policy of closing the courtroom due to seating capacity. In discussing the related right of the public to attend court proceedings, the Michigan Supreme Court has observed that the size of the courtroom may justifiably limit attendance. *Detroit Free Press v Recorder's Court Judge*, 409 Mich 364, 386-387; 294 NW2d 827 (1980). "However, even where the reason offered is space limitations, the court must still narrowly tailor the closure order." *In re Closure of Jury Voir Dire*, 204 Mich App 592, 595; 516 NW2d 514 (1994). Here, the trial court did not narrowly tailor its order; it totally closed the courtroom. Such a procedure requires an overriding reason, as opposed to a partial closure, which requires only a substantial one. See *People v Kline*, 197 Mich App 165, 169; 494 NW2d 756 (1992).

In *In re Closure of Jury Voir Dire*, this Court found that a total closure during voir dire due to a lack of space was not "narrowly tailored" to solve the problem:

> The concern over lack of space did not necessarily mandate closing the entire proceeding to all members of the press. Because there were not enough permanent seats in the courtroom, the court brought in twenty additional chairs to accommodate the prospective jurors. It seems that space for a limited number of journalists, or at least one, could also have been found. The court's concern regarding the reporters mingling with the prospective jurors could have been addressed by an order requiring the reporters to be segregated from the prospective jurors or by informing the prospective jurors about the presence of the journalists and warning both prospective jurors and journalists not to talk about the case. Further, the court gave no reason why every member of the jury pool had to be in the courtroom at one time. The court apparently did not even consider keeping some of the prospective jurors in jury rooms or other parts of the courthouse until it was determined that they were needed in the courtroom. [*In re Closure of Jury Voir Dire*, 204 Mich App at 595-596.]

The circumstances in the instant case are analogous. The court could have kept part of the jury pool in other rooms, e.g., the jury deliberation room. Further, there was testimony that most of the row reserved for police officers and attorneys had been empty. The trial court should have allowed defendant's family members or other members of the public to occupy those seats, and if the court was concerned about any interaction between the jurors seated in the row and members of the public, the court could have instituted protections against such contact.

However, defendant is not entitled to a reversal of his convictions under the particular circumstances of the instant case. Defendant did not raise the issue until the second day of trial,

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and the members of defendant's family were able to watch the trial during a portion of the voir dire proceedings on the second day, which was the day testimony began. As the *Vaughn* Court discussed, the members of the jury venire were members of the public, which "guarantees that the *voir dire* proceedings will be subject to a substantial degree of continued public review." *Vaughn*, 491 Mich at 668 (internal quotation marks and citation omitted). Defense counsel expressed satisfaction with the jury selected. See *id*. at 668. There was appropriate questioning of jurors during the first day, and as in *Vaughn*, the closure did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. *Id*. at 668-669. Further, there is no indication that defendant was actually innocent. See *id*. at 654. We find no basis for reversal.

Defendant also argues that the trial court impermissibly engaged in judicial fact-finding during sentencing under *Alleyne v United States*, ___ US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013). Recently, the Michigan Supreme Court concluded that our prior sentencing scheme violated the Sixth Amendment because it allowed a sentencing judge to engage in judicial fact-finding when deciding how to score a particular sentencing variable, which is used in turn to mandatorily increase the floor of the guidelines minimum sentence range. *People v Lockridge*, ____ Mich ___; ___ NW2d ___ (2015) (Docket No. 149073); slip op at 1-2, 11-12, 16, 36. As a result, when the guidelines scoring involves fact-finding other than facts admitted to by a defendant or found beyond a reasonable doubt by a jury, the imposition of a sentence within the guidelines is no longer mandatory under MCL 769.34(2). *Lockridge*, __ Mich at ___; slip op at 2, 28. In these cases, the guidelines are still to be scored, but are advisory only. *Id*. at ___; slip op at 28-29. However, if it is evident from the record that there was no judicial fact-finding that increased the applicable cell in the sentencing grid, and thus the defendant's guidelines minimum sentence range, then there is no constitutional violation. *Id*. at ___; slip op at 32.

Defendant takes issue with the scoring of offense variables (OVs) 1 and 3.[2] The trial court scored 25 points for OV 1 and 10 points for OV 3. Twenty-five points are to be scored for OV 1 when "[a] firearm was discharged at or toward a human being or a victim was cut or stabbed with a knife or other cutting or stabbing weapon[.]" MCL 777.31(1)(a). Ten points are to be scored for OV 3 points when "[b]odily injury requiring medical treatment occurred to a victim[.]" MCL 777.33(1)(d).

Both of these facts were admitted to by defendant during trial. Defendant freely admitted that he shot at the victim. He also testified that "once the detective told me that I actually did hit him I felt bad about it." Defendant admitted that the detective told him where the victim had been hit and defendant admitted that he "knew [the victim] could have died . . . ." Defendant is not entitled to resentencing because no improper judicial fact-finding occurred.

Defendant further argues that because the scoring of offense variables is, unless otherwise stated, offense-specific, these OVs should have been scored at zero points because they relate to the assault and robbery offenses for which defendant was acquitted. Defendant is correct that, as a general rule, the scoring of offense variables is "offense specific" and should be

[2] We note that defendant did not raise an argument about the prior record variables either below or on appeal.

made "on the basis of the sentencing offense." *People v Sargent*, 481 Mich 346, 348; 750 NW2d 161 (2008). However, possession is a continuing offense, which lasted here as long as defendant still retained control of his weapon. See *People v Burgenmeyer*, 461 Mich 431, 436-440; 606 NW2d 645 (2000) ("possession" for purposes of a possessory firearm offense occurs while the defendant has proximity and reasonable accessibility to the weapon), and *People v Owen*, 251 Mich App 76, 82-83; 649 NW2d 777 (2002) ("[the] defendant's concealing or storing a stolen firearm . . . was a continuing offense as long as [the concealment or storage] existed") (internal quotation marks and citation omitted). Defendant shot the complainant while he illegally possessed the firearm. Defendant is not entitled to relief.

Affirmed.

/s/ Christopher M. Murray
/s/ Patrick M. Meter
/s/ Donald S. Owens

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People v Shaul

COA No. 326905

November 22, 2016

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES HOWARD SHAUL,

Defendant-Appellant.

UNPUBLISHED
November 22, 2016

No. 326905
Chippewa Circuit Court
LC No. 14-001528-FC

Before: OWENS, P.J., and SAWYER and SHAPIRO, JJ.

PER CURIAM.

A jury convicted defendant of first-degree criminal sexual conduct, MCL 750.520b(1)(g) (sexual penetration of a physically helpless victim causing injury); first-degree vulnerable adult abuse, MCL 750.145n(1); fourth-degree criminal sexual conduct (sexual contact by force or coercion); and violation of the Sex Offender's Registration Act (SORA[1]) by residing in a student safety zone, MCL 28.735(2)(a). The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 60 to 90 years for the CSC I conviction, 3 years and 10 months to 15 years each for the first-degree vulnerable adult abuse and CSC IV convictions, and to a 12-month jail term for the SORA violation conviction. Defendant appeals as of right. We affirm in part, vacate in part, and remand for resentencing.

According to the 56-year-old immobile and wheelchair-bound quadriplegic victim, defendant, who was the then-boyfriend of one of her caregivers, was alone with the victim when he began asking her personal sexual questions while he was "touching himself" in her presence. Defendant then approached and stood beside the victim, exposed his penis, and asked her if she wanted to touch it or put it in her mouth. The victim testified that defendant then rubbed her left nipple through her shirt. She testified that defendant tried to put his finger in her "private part" but never did and that he "only touched the hairs of my private area" and "didn't touch the inside." He then pulled up her shirt, spit "over [her] private part", and ejaculated on her stomach. According to the victim, during the incident her urostomy bag was torn from her body. She testified that defendant refused her repeated requests for him to leave her home or to allow her to call a caregiver.

[1] MCL 78.721 *et seq.*

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I. RIGHT TO A PUBLIC TRIAL

Defendant argues that the trial court violated his constitutional right to a public trial by closing the courtroom during the victim's testimony. The record reveals that the trial judge had a meeting in chambers with the prosecutor and defense counsel regarding the prosecutor's earlier request to close the courtroom during the victim's testimony so as to not cause further psychological trauma to the victim.[2] The trial court thereafter announced on the record, without objection from defense counsel, that the courtroom would be closed during the victim's testimony. For a defendant to receive relief pursuant to a "forfeited claim of constitutional error, defendant must establish (1) that the error occurred, (2) that the error was 'plain,' (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Vaughn*, 491 Mich 642, 664-665; 821 NW2d 288 (2012).

The right to a public trial is guaranteed by both the Sixth Amendment of the United States Constitution and article 1, § 20 of the 1963 Michigan Constitution. *Vaughn*, 491 Mich at 650. The right is not absolute, however. In *Vaughn*, *id*. at 653, the Court, quoting *Presley v Georgia*, 558 US 209, 214; 130 S Ct 721; 175 L Ed 2d 675 (2010), observed that "[a] defendant's Sixth Amendment right to a public trial is limited, and there are circumstances that allow the closure of a courtroom during any stage of a criminal proceeding even over a defendant's objection." The United States Supreme Court declared the following requirements when the courtroom is closed:

> The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure. [*Waller v Georgia*, 467 US 39, 48; 104 S Ct 2210; 81 L Ed 2d 31 (1984).]

Thus, to facilitate appellate review of whether the trial court's decision to close the courtroom was proper, a trial court must state the interest that justified the closure and articulate specific findings that explain why that interest justified the closure. *People v Kline*, 197 Mich App 165, 169; 494 NW2d 756 (1992). Further, the closure must be no broader than needed to protect the interest justifying it; that is, it must be "narrowly tailored" to satisfy the purpose for which closure was ordered. *Id*. at 169, 171.

Here, the trial court's comment on the record before the in-chambers meeting indicates that the court agreed with the prosecutor that the presence of others in the courtroom during the victim's testimony would "run a risk of causing additional trauma." The prosecutor does not dispute that the trial court, on the record, did not consider reasonable alternatives to closing the proceeding and did not make findings adequate to support the closure. Even assuming that the trial court erred by closing the courtroom during the victim's testimony and that the error

[2] At that time of the prosecutor's request, defense counsel stated, "I don't see why my client's support personnel, being his parents[,] can't be here. There's a no contact order."

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satisfied the first three *Carines* requirements, reversal would only be warranted if the error "resulted in the conviction of an actually innocent defendant" or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Vaughn*, 491 Mich at 666. Defendant has neither argued in this issue nor established that he was actually innocent and, because the courtroom closure has not been shown to have impacted the ability of counsel to examine the victim thoroughly, or to have seriously affected the fairness, integrity, or public reputation of the judicial proceedings, defendant has not demonstrated entitlement to a new trial. *Vaughn*, 460 Mich at 774.

II. INEFFECTIVE ASSISTANCE OF COUNSEL DURING PLEA NEGOTIATIONS

Defendant argues that his counsel's deficient advice led to his rejection of a plea offer. In order to preserve the issue of ineffective assistance of counsel, a defendant must file a timely motion in the trial court for a new trial raising the issue, *People v Ginther,* 390 Mich 436, 443–444; 212 NW2d 922 (1973), or move in this Court to remand the case to the trial court so that he may properly preserve the issue for appellate review. *Id*. at 444–445. Defendant did not file a motion in the trial court and did not bring a motion to remand in this Court. This issue is not preserved, and review is therefore limited to the existing record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

Both the United States and Michigan Constitutions grant criminal defendants the right to the effective assistance of counsel at trial. US Const, Am VI; Const 1963, art 1, § 20; *People v Trakhtenberg,* 493 Mich 38, 51; 826 NW2d 136 (2012). A defendant claiming ineffective assistance of counsel must establish (1) that "counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *Id.* at 51–52 (citation omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Carbin,* 463 Mich 590, 600; 623 NW2d 884 (2001) (citation and quotation marks omitted). Effective assistance of counsel is presumed, and a defendant bears the heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). This Court does not apply the benefit of hindsight when determining whether trial counsel performed competently. *People v Payne,* 285 Mich App 181, 190; 774 NW2d 714 (2009).

Criminal defendants are also entitled to effective assistance of competent counsel during plea negotiations. *Lafler v Cooper,* 566 US ___; 132 S Ct 1376, 1384; 182 L Ed 2d 398 (2012) (citations omitted). When considering whether trial counsel is ineffective in the context of the plea process, the defendant "must show that the outcome of the plea process would have been different with competent advice." *Id.* at 1384 (citation omitted). When a defendant chooses to stand trial and claims ineffective assistance of counsel during plea bargaining, in order to satisfy the second part of the ineffective assistance test, known as the prejudice prong, the

> defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the

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> offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. [*Id.* at 1385.]

Defendant has failed to identify the allegedly deficient advice that he received. Defense counsel stated on the record that the plea offer, which included a guilty plea to the uncharged offense of CSC I, would require defendant to "concede facts that were not in evidence" and "plead to a life offense with a habitual offender second." Defendant was fully advised of the plea offer, as well as the parties' calculation of the guidelines range at 135 to 280 months for purposes of the plea offer, on the record. Defendant affirmatively stated that he formally rejected the plea offer as stated on the record. Defense counsel indicated that defendant had rejected each previous plea offer that the prosecution had offered, which was consistent with defendant's claim of innocence. Defendant has failed to demonstrate that counsel's performance fell below an objective standard of reasonableness and that he was denied the effective assistance of counsel.[3]

III. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the prosecution failed to present sufficient evidence of sexual penetration to support defendant's first-degree CSC conviction. This Court reviews de novo challenges to the sufficiency of the evidence to determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Lockett*, 295 Mich App 165, 180; 814 NW2d 295 (2012).

In reviewing a challenge to the sufficiency of the evidence, "[t]his Court reviews the evidence in the light most favorable to the prosecution." *Id.* "This Court resolves all conflicts regarding the evidence in favor of the prosecution," *Lockett*, 295 Mich App at 180, and "[q]uestions of credibility are left to the trier of fact and will not be resolved anew by this Court," *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

Defendant's first-degree CSC conviction arose under MCL 750.520b(1)(g). The essential elements of that charge are that the defendant (1) engaged in sexual penetration with the victim, (2) caused personal injury to the victim, and (3) that the victim was mentally incapable, mentally incapacitated, or physically helpless at the time of the alleged act. Defendant challenges only the sufficiency of the evidence regarding the element of sexual penetration. "Sexual penetration" is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body . . . into the genital or anal openings of another person's body . . ." MCL 750.520a(r). The labia are included in the "genital openings" of the female. See *People v Bristol*, 115 Mich App 236, 238; 320 NW2d 229 (1981).

The victim testified that defendant "only touched the hairs of my private area. He didn't touch the inside." She testified that defendant "tried to go in my private part" but that he "never did." The prosecution acknowledges in its brief that the victim never explicitly testified that defendant's actions met the definition of sexual penetration. The prosecutor argues, however,

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[3] Thus, we need not reach the "prejudice" prong.

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that the testimony of the sexual assault nurse examiner who examined the victim 5 days after the assault was sufficient to support a finding that defendant had sexually penetrated the victim. The nurse examiner testified that the victim indicated that her vagina was hurting, that the victim had post-menopausal atrophic vaginitis that can be irritated by digital manipulation, and that what she observed in the victim was consistent with sexual penetration, However, the nurse examiner also testified that the victim denied penetration and that atrophic vaginitis can be caused by *any* contact. Given the victim's denial of penetration and the lack of evidence regarding an intrusion into the victim's genital opening, as well as the nurse examiner's testimony that *any* contact can irritate atrophic vaginitis, the evidence, when viewed in the light most favorable to the prosecution, was not sufficient to enable the jury to find beyond a reasonable doubt that defendant sexually penetrated the victim. Consequently, we vacate defendant's CSC I conviction and sentence and remand for resentencing.

IV. SENTENCING GUIDELINES

Defendant argues that the trial court erred in scoring Offense Variables (OV) 3, 4, 7, 11, 12, and 13. We address defendant's arguments in the event defendant raises the arguments at resentencing. We review for clear error the trial court's factual determinations at sentencing, which must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). Whether the factual determinations were sufficient to assess the offense variables is a question this Court reviews de novo. *Id.* See *People v Steanhouse,* 313 Mich App 1; 880 NW2d 297 (2015), lv gtd 499 Mich 934 (2016); slip op p 19 (holding that because scoring the offense variables remains relevant under *People v Lockridge*, 498 Mich 358; 870 NW2d 502, cert den ___ US ___; 136 S Ct 590; 193 L Ed 2d 487 (2015), the standards of review traditionally applied to the trial court's scoring of the offense variables remain viable). This Court also reviews de novo, as a question of law, the proper interpretation of the sentencing guidelines. *People v Gullett,* 277 Mich App 214, 217; 744 NW2d 200 (2007).

Defendant first argues that the trial court erred by scoring ten points for offense variable (OV) 3, "bodily injury requiring medical treatment occurred to a victim." MCL 777.33(1)(d). The evidence revealed that the victim went to the hospital five days after the incident for the purpose of having a sexual assault examination performed. The sexual assault nurse examiner observed no evidence of bruising, biting, or "any other physical evidence." The nurse examiner did not testify regarding any injuries necessitating medical treatment and did not testify that the victim received any treatment. The evidence did not support the assessment of 10 points under OV 3 because there was no evidence that medical treatment was necessary. See *People v Armstrong*, 305 Mich App 230; 851 NW2d 856 (2014).

Defendant also argues that the trial court erred by scoring 10 points for OV 4, "serious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). Whether the victim has sought treatment does not determine whether the injury may require professional treatment. MCL 777.34(2). The trial court may assess 10 points for OV 4 if the victim suffers, among other possible psychological effects, personality changes, anger, fright, or feelings of being hurt, unsafe, or violated. *People v Gibbs*, 299 Mich App 473, 493; 830 NW2d 821 (2013). Here, evidence was presented that the victim was anxious, could not sleep, was depressed, and was scared after the incident. She was treated with medication, therapy, and counseling, and at the time of trial was still being treated for anxiety. The victim testified that

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since the assault she has been fearful of strangers and does not want to come out of her home. She testified that she had a light put behind her house and that she sits in a different spot in her home so that she can see the doorway. The trial court did not clearly err when it found that the victim suffered a serious psychological injury requiring professional treatment.

Defendant next argues that the trial court erred by scoring 50 points for OV 7. MCL 777.37(1)(a) authorizes a 50-point score for OV 7 if "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense."[4] In determining whether a 50–point score for OV 7 is justified, "[t]he relevant inquiries are (1) whether the defendant engaged in conduct beyond the minimum required to commit the offense; and, if so, (2) whether the conduct was intended to make a victim's fear or anxiety greater by a considerable amount." *Hardy*, 494 Mich at 443–444.

Defendant's conduct during the offense was insufficient to warrant an assessment of 50 points for OV 7. Defendant's only conduct during the offense that would have increased the victim's fear and anxiety was his refusal to allow her to use the telephone to call for assistance. This does not appear to be the type of conduct *designed to substantially* increase a victim's fear or anxiety *by a considerable amount*, nor does it evidence an intent on the part of defendant to do so. See MCL 777.37(1)(a); *Hardy*, 494 Mich at 443. Therefore, the trial court erred in assessing 50 points for OV 7.

Defendant next argues that the trial court erred by scoring 25 points for OV 11. Under OV 11, all "sexual penetrations of the victim arising out of the sentencing offense" must be scored. MCL 777.41(2)(a). Twenty-five points are to be scored for one criminal sexual penetration. MCL 777.41(2)(b). Given our conclusion that the evidence was insufficient to support a finding that defendant sexually penetrated the victim, the evidence would not support a score of 25 points but, rather, a score of zero points for "no criminal sexual penetrations." MCL 777.41(1)(c).

Defendant also objects to the scoring of 25 points for OV 12. MCL 777.42(1) addresses contemporaneous criminal acts. Under OV 12, a court must assess 25 points if "three or more contemporaneous felonious criminal acts involving crimes against a person were committed." MCL 777.42(1)(a). A felonious criminal act is contemporaneous if it occurred within 24 hours of the sentencing offenses and it has not and will not result in a separate conviction. MCL 777.42(2)(a); *People v Light*, 290 Mich App 717, 722; 803 NW2d 720 (2010). It must be separate from the behavior establishing the sentencing offenses. *Id.* at 723.

The trial court scored 25 points because "[t]he defendant spit on the victim's pubic hair, masturbated in front of her and ejaculated on her person." Defendant argues only that OV 12 should have been scored at zero because "Count 3 covered all of these in the Vulnerable Adult Abuse Conviction" and because "CSC 4 covers the spitting." None of these acts, however, were

[4] MCL 777.38(1)(a) has since been amended by 2015 PA 137, effective Jan. 5, 2016, to read: "A victim was treated with sadism, torture, excessive brutality, or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense."

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charged, and they are not encompassed within the vulnerable adult abuse charge or the fourth-degree CSC charge.[5] Defendant raises no other argument with respect to the scoring of OV 12. Defendant has failed to demonstrate that the trial court erred by assessing 25 points for OV 12.

Lastly, defendant argues that the trial court erred by scoring 25 points for OV 13. "Offense variable 13 is continuing pattern of criminal behavior." MCL 777.43. OV 13 should be assessed at 25 points when "[t]he offense was part of a pattern of felonious criminal activity involving three or more crimes against a person." MCL 777.43(1)(c). A pattern of criminal activity may be based on multiple concurrent offenses arising from a single event. *People v Harmon,* 248 Mich App 522, 532; 640 NW2d 314 (2001). When a trial court assesses this variable, it is required to count "all crimes within a 5–year period, including the sentencing offense . . . regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). Contrary to defendant's argument, MCL 777.43 does not limit the "trial court's ability to score more than one instance arising out of the same criminal episode." *Gibbs*, 299 Mich App at 488. "[M]ultiple concurrent offenses arising from the same incident are properly used in scoring OV 13 [.]" *Id.* at 488. Indeed, MCL 777.43(2)(a) mandates consideration of *all* crimes within a 5–year period. The trial court did not err in assessing 25 points for OV 13.

The prosecutor concedes that the trial court improperly imposed a probation oversight fee under MCL 771.3c because defendant was not sentenced to probation. On remand, the fee shall not be imposed if defendant does not receive a probationary sentence.

Defendant has also argued that the trial court's scoring of the OVs was based on unconstitutional judicial fact-finding. In *People v Lockridge,* 498 Mich 358, 399; 870 NW2d 502 (2015), our Supreme Court held that Michigan's sentencing guidelines are advisory, remedying the constitutional violation presented by allowing mandatory minimum sentences to be increased based on judicial fact-finding. Because we conclude that defendant is entitled to be resentenced, defendant's *Lockridge* issue is now moot, and we need not address it. "An issue is moot when an event occurs that renders it impossible for the reviewing court to fashion a remedy to the controversy." *People v Cathey,* 261 Mich App 506, 510; 681 NW2d 661 (2004). This Court generally does not decide moot issues. *B P 7 v Bureau of State Lottery,* 231 Mich App 356, 359; 586 NW2d 117 (1998).

V. STANDARD FOUR BRIEF

Defendant argues that the prosecutor committed error with respect to a remark made during opening statements and a remark made during closing arguments, both of which he asserts vouched for the credibility of the victim. Because defendant did not object to the allegedly improper remarks and request a curative instruction, our review of this issue is limited to ascertaining whether there was plain error that affected defendant's substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

[5] The fourth-degree CSC charge involved the touching of the victim's groin and/or chest.

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The test for prosecutor error is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). A prosecutor may not vouch for the credibility of a witness by implying that he or she has some special knowledge of the witness's truthfulness. *People v Thomas,* 260 Mich App 450, 455; 678 NW2d 631 (2004). But the prosecutor is free to argue the evidence and the reasonable inferences that arise from it. *People v Seals,* 285 Mich App 1, 22; 776 NW2d 314 (2009).

Contrary to defendant's argument, the prosecutor's remark during opening statements about the victim's bravery in overcoming the obstacles relating to the 1983 attack that rendered her a quadriplegic was not a statement vouching for the victim's credibility. Similarly, there was nothing improper about the prosecutor's remark during closing arguments that, based on the facts in the record, the victim had no reason to lie about what defendant had done to her and that she had exposed herself to embarrassment and the difficulty of getting to a hospital to undergo a sexual assault examination because she was telling the truth. The prosecutor's remarks do not amount to error. We therefore also reject defendant's abandoned argument that counsel was ineffective for failing to object to the prosecutor's remarks. MCR 7.212(C)(5); *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Defendant next argues that the prosecutor improperly elicited testimony regarding defendant's previous CSC conviction and his status as a registered sex offender living within a student safety zone. However, two of the crimes of which defendant was charged – failure to register as a sex offender under SORA and violation of SORA by residing in a student safety zone – required the prosecutor to prove that defendant was a registered sex offender. Consequently, defendant's contention that evidence that defendant was a registered sex offender was irrelevant, prejudicial, and not probative, is misplaced. And, because the evidence was an element of the crimes for which defendant was charged, defense counsel was not ineffective for failing to object to it. *Ericksen*, 288 Mich App at 201.

Next, defendant asserts that the trial court erred by allowing the prosecutor to elicit testimony from a police officer concerning the effect of trauma on a victim's memory without the officer being qualified as an expert. We review for an abuse of discretion the trial court's evidentiary rulings that have been properly preserved. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). Preliminary questions of law are reviewed de novo. *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007). An erroneous evidentiary ruling does not require reversal unless it affirmatively appears that it is more probable than not that the error was outcome determinative. MCL 769.26; *People v Lukity*, 460 Mich 484, 488, 495–496; 596 NW2d 607 (1999).

The officer testified that he had been trained to investigate the crime of criminal sexual conduct, that the training included the interviewing of CSC victims, and that he was specifically trained in "dealing with the process of memory for someone experiencing trauma." He opined that it is not uncommon for victims of traumatic events to be unable to initially recall details of the event and to recall details over time.

MRE 701 provides the framework for opinion testimony from a lay witness:

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> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

On the other hand, in order to give opinion testimony based on specialized knowledge, a witness must first be qualified as an expert under MRE 702. In this case, the officer testified several times "based on his experience and training." His testimony was "rationally based on" his perceptions of victims of trauma and sexual abuse and presumably "helpful to a clear understanding of a fact in issue," i.e., the victim's conduct. MRE 701. The question is whether his testimony was also grounded in "scientific, technical, or other specialized knowledge," requiring that he be qualified as an expert. MRE 702.

Although the officer's testimony was not "a technical or scientific" analysis, it was nevertheless based on his specialized knowledge of trauma and sexual abuse victims and acquired through his training and experience as a police officer. See *People v Petri*, 279 Mich App 407, 416; 760 NW2d 882 (2008); *Dobek*, 274 Mich App at 77-78. His testimony was not simply a "common sense" opinion but was expressly qualified as an opinion arising from training and experience. See *People v McLaughlin*, 258 Mich App 635, 658; 672 NW2d 860 (2003). And, the officer's testimony was not directly related to his own perceptions of the victim. Rather, the officer testified regarding the delayed memory tendencies of victims like the victim in this case without actually stating that the present victim exhibited those tendencies. The officer's testimony constituted expert testimony because it went beyond his perceptions and common sense inferences arising therefrom, and was based on his specialized training and experience as a police officer. The trial court erred by admitting this testimony without requiring that the officer be qualified as an expert.

Nevertheless, a police officer can be qualified as an expert on the basis of experience or training. See, e.g., *Petri*, 279 Mich App at 416. The officer's testimony was expressly limited to observations arising out of his training and experience as a police officer. Thus, the officer would have qualified as an expert witness for the purpose of making these observations. He testified that he had investigated hundreds of criminal sexual conduct cases and that he had attended several trainings involving the investigation of the crime of criminal sexual conduct and interviewing and obtaining evidence from CSC victims. He also testified that he had specific training in dealing with the memory process of victims who experience trauma. See *id*. Because the record demonstrates that the officer would have qualified as an expert witness, the error was not outcome determinative.[6]

Defendant also argues that the prosecutor committed error by asking leading questions of the victim about defendant's finger. Review of alleged prosecutorial error is precluded unless the defendant timely and specifically objected below, unless an objection could not have cured

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[6] We note that the sexual assault nurse examiner presented similar testimony regarding the effect of trauma on the memories of victims and that defendant has not challenged that testimony on appeal.

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the error, or failure to review the issue would result in a miscarriage of justice. *Unger*, 278 Mich App at 234-235. Because defendant failed to raise a contemporaneous objection and request a curative instruction, our review is limited to ascertaining whether there was plain error that affected substantial rights. *Brown*, 279 Mich App at 134. Reversal is warranted only when plain error resulted in the conviction of an innocent person, or seriously affected the fairness, integrity, or public reputation of the proceedings. *Unger*, 278 Mich App at 235.

Under MRE 611(d)(1), leading questions are not to be used during direct examination unless they are necessary to develop a witness's testimony. While a prosecutor technically commits an error when he or she asks an improper leading question, such an error does not normally warrant reversal of a defendant's conviction. *People v Watson,* 245 Mich App 572, 587; 629 NW2d 411 (2001). In order to warrant reversal, a defendant must show prejudice, or a "pattern of eliciting inadmissible testimony." *Id.*

Defendant's argument fails to present the challenged questions in context. The victim had already testified about defendant's finger feeling like sandpaper and about biting his finger before the prosecutor asked the allegedly improper questions about defendant's finger. Thus, the prosecutor was restating testimony that had already been offered by the victim. The questions did not amount to improper leading questions. Further, even assuming the questions were improper leading questions, defendant has failed "to show some prejudice or pattern of eliciting inadmissible testimony." *Watson*, 245 Mich App at 588. Additionally, counsel was not ineffective for failing to raise a futile objection. *Ericksen*, 288 Mich App at 201.

Defendant also argues that he was denied the right to a fair trial by pretrial publicity and that trial counsel was ineffective for failing to move for a change of venue based upon pretrial publicity. Defendant has provided no citation to the transcript to support any of his bare assertions regarding pretrial publicity. Our review of the transcripts has unveiled no mention whatsoever of pretrial publicity.[7] Defendant has utterly failed to show that "there is either a pattern of strong community feeling against him and that the publicity is so extensive and inflammatory that jurors could not remain impartial when exposed to it, or that the jury was actually prejudiced or the atmosphere surrounding the trial was such as would create a probability of prejudice." *People v Cline*, 276 Mich App 634, 639; 741 NW2d 563 (2007) (internal quotation marks and citation omitted). He has failed to demonstrate that the jury actually chosen could not remain impartial, or that there was any actual prejudice or probability of prejudice. *Cline*, 276 Mich App at 639. He has failed to demonstrate that he was denied the right to a fair trial by pretrial publicity. Therefore, a motion to change venue from defense

[7] At the beginning of the second day of trial, the trial court stated "there has been little snippets on both 9 & 10 news and 7 & 4 news. I don't know if any of you seen it. If you have seen it, disregard it. . . . So it wasn't . . . anything that was detrimental it just identified that the matter, the trial was going on." The trial court's comments clearly indicate that the court found the news snippets not to have been detrimental and to have merely indicated that the trial was taking place. There is nothing in the court's comments to suggest that the news report contained any details about the trial or provided any "unduly prejudicial publicity."

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counsel would have been futile; counsel is not ineffective for failing to raise futile motions. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

Lastly, defendant argues that the prosecutor failed to present sufficient evidence to identify defendant as the perpetrator of the offenses. A defendant's challenge to the sufficiency of the evidence is reviewed de novo on appeal. This Court reviews de novo challenges to the sufficiency of the evidence to determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Lockett*, 295 Mich App at 180.

"[I]t is well settled that identity is an element of every offense." *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). Thus, the prosecution must prove the identity of defendant as the perpetrator of the crime beyond a reasonable doubt. *Id.* "[T]his Court has stated that positive identification by witnesses may be sufficient to support a conviction of a crime." *People v Davis,* 241 Mich App 697, 700; 617 NW2d 381 (2000). "The credibility of identification testimony is a question for the trier of fact that we do not resolve anew." *Id.*

The victim identified defendant in the courtroom as the perpetrator of the crimes. Defendant asserts that the victim's identification testimony was weak because the victim referred to defendant as "Jamie." However, several witnesses, including defendant's former girlfriend, referred to defendant as "Jamie" throughout the trial, and the victim referred to "Jamie Shaul" when she identified him in court. The prosecution provided sufficient evidence to establish defendant's identity as the perpetrator of the crimes.

Affirmed in part, vacated in part, and remanded for resentencing. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Douglas B. Shapiro

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People v Stanley

COA No. 340464

June 25, 2019

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 25, 2019
v PERRY STANLEY, Defendant-Appellant.	No. 340464 Wayne Circuit Court LC No. 17-003086-01-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v PERRY STANLEY, Defendant-Appellant.	No. 340465 Wayne Circuit Court LC No. 17-003087-01-FC

Before: CAMERON, P.J., and MARKEY and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions in two separate cases that were consolidated for trial. In Docket No. 340464, defendant appeals his convictions of armed robbery, MCL 750.529, assault with intent to do great bodily harm less than murder, MCL 750.84, carrying a concealed weapon (CCW), MCL 750.227, and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. In Docket No. 340465, defendant appeals his convictions of conspiracy to commit armed robbery, MCL 750.157a & MCL 750.529, armed robbery, and felony-firearm. In Docket No. 340464, the court sentenced defendant to prison terms of 14 to 30 years for the armed robbery conviction, 5 to 10 years for the assault conviction, one to five years for the CCW conviction, and two years for each felony-firearm conviction. In Docket No. 340465, the court sentenced defendant to prison terms of 10 to 30 years each for the conspiracy and armed robbery convictions, and two years for

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the felony-firearm conviction.[1] For the reasons set forth in this opinion, we reverse defendant's conviction and sentence for conspiracy to commit armed robbery, and remand for the purposes of correcting the judgment of sentence. In all other aspects we affirm.

I. BACKGROUND

These cases arise from two armed robberies that occurred on the evening of December 16, 2016, in Detroit. At trial, the prosecution presented evidence that defendant approached Hosea Hyman Perez Ortiz (Perez) as Perez was returning to his house, robbed him at gunpoint, and then shot him in the back. A little while later, as Gladiola Vasquez Hernandez (Vasquez) was returning to her home, defendant robbed her at gunpoint and hit her in the face with the gun. Vasquez observed defendant get into the driver's seat of a vehicle that was occupied by at least two other individuals. After a border agent sighted a vehicle matching Vasquez's description and ran the license plate number, they obtained the address of defendant's father, Prentice Russ, to whom the vehicle was registered. When the vehicle returned to Russ's residence on Lesure Street in Detroit, defendant, Russ, and defendant's brother got out of the vehicle. No weapons or evidence related to the robberies were found.

At trial, Perez testified that he did not recognize defendant while he was being robbed, but after police showed him a photographic lineup he realized that he knew defendant. Perez identified defendant in the photographic lineup and at trial as the man who robbed him. Similarly, Vasquez identified defendant in a photographic lineup and at trial as the man who robbed her. Defendant did not testify or present any witnesses at trial. The defense theory at trial was misidentification. Defendant was convicted of armed robbery, assault with intent to do great bodily harm less than murder, CCW, and two counts of felony-firearm related to Perez, and conspiracy to commit armed robbery, armed robbery, and felony-firearm related to Vasquez. Defendant was sentenced as indicated above, and now brings this appeal as of right.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

On appeal, defendant first argues that he was denied the effective assistance of counsel by defense counsel's failure to (1) present an alibi defense after filing an alibi notice, and (2) request the appointment of an expert on eyewitness identification evidence.

"Generally, whether a defendant had the effective assistance of counsel is a mixed question of fact and constitutional law. This Court reviews findings of fact for clear error and questions of law de novo." *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012) (quotation marks and citations omitted). However, because defendant did not raise his claims of ineffective assistance of counsel in a motion for a new trial or request for an evidentiary hearing in the trial court, our review of this issue "is limited to mistakes apparent from the record." *Id*.

In *Heft*, this Court stated:

[1] The sentences in both cases run concurrently with one another, with the felony-firearm sentences all running concurrently with one another and consecutive to the other sentences.

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> A criminal defendant has the fundamental right to effective assistance of counsel. However, it is the defendant's burden to prove that counsel did not provide effective assistance. To prove that defense counsel was not effective, the defendant must show that (1) defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and (2) there is a reasonable probability that defense counsel's deficient performance prejudiced the defendant. The defendant was prejudiced if, but for defense counsel's errors, the result of the proceeding would have been different. [*Id.* at 80-81 (citations omitted).]

"Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *People v Jackson (On Reconsideration)*, 313 Mich App 409, 432; 884 NW2d 297 (2015) (quotation marks and citation omitted).

A. FAILURE TO PRESENT AN ALIBI DEFENSE

First, defendant argues that defense counsel provided ineffective assistance by failing to present an alibi defense at trial after he previously filed an alibi notice and identified the alibi witnesses for the jury during voir dire. The defense filed a "Notice Of Alibi" on July 24, 2017. According to defendant, the notice listed four alibi witnesses who would have testified that defendant was with them at an address on Barton Street until 10:30 p.m. on December 16, 2016. At the start of the trial, the trial court listed "witnesses who may be called during this trial" and asked the potential jurors whether they knew any of the named witnesses. The trial court's list included the four alibi witnesses' names.[2] At trial, however, defense counsel did not call any witnesses to testify.

As stated by this Court in *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009):

> An attorney's decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy. A defendant must meet a heavy burden to overcome the presumption that counsel employed effective trial strategy. In general, the failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. [Quotation marks and citations omitted.]

This Court will not substitute its judgment for that of counsel on matters of trial strategy, nor will it use the benefit of hindsight when assessing counsel's competence. *Id.*

[2] Contrary to defendant's assertions, the trial court, not defense counsel, named the witnesses for the potential jurors. Furthermore, the potential witnesses were not identified as alibi witnesses. Thus, defendant's claim that defense counsel's failure to call those witnesses was "tantamount to a concession of guilt" is without merit.

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Defendant fails to overcome the presumption that defense counsel's decision not to call the alibi witnesses at trial was sound trial strategy. Defense counsel indicated on the record at trial that the defense intended to rest without calling any witnesses, stating:

> I've had many occasions to speak with my young client about his absolute right to testify, and indeed produce witnesses. The Court ordered that an Investigator be appointed, we've secured statements from several witnesses. As a strategic matter, the defense lawyer's not going to call these witnesses.

Thereafter, the trial court asked defendant whether he had heard what defense counsel had said, and defendant said yes. Defendant then waived his right to testify. Even though defendant did not expressly state his agreement with the decision not to call any witnesses, defense counsel's statements establish that he obtained statements from witnesses and that his decision not to present an alibi defense was a matter of strategy. Instead of presenting an alibi defense, defense counsel proceeded on a theory of false or mistaken identification. Because it is apparent from the record that defense counsel elected not to call witnesses in support of an alibi defense as a matter of trial strategy, and defendant has not presented any evidence to overcome the presumption of sound strategy, defendant fails to establish that defense counsel's performance fell below an objective standard of reasonableness. Accordingly, defendant is not entitled to relief on this issue.

B. FAILURE TO REQUEST THE APPOINTMENT OF AN EXPERT

Defendant also argues that defense counsel was ineffective for failing to request the appointment of an expert on eyewitness identification. The prosecution's case at trial was based on the victims' identifications of defendant, and the defense theory was mistaken identification. However, defendant again fails to overcome the presumption that defense counsel's decision not to retain an expert witness was sound trial strategy. Principally, defendant fails to establish the factual predicate for his claim. Defendant argues that an expert could have testified about the unreliability of eyewitness identification, including how the stress of the event made it less likely that the identifications were reliable. While defendant relies on numerous studies, treatises, and reports, he fails to offer any affidavit from an expert or some other offer of proof that an expert witness would have testified in the manner he alleges or in any manner favorable to the defense. There is nothing provided on appeal from which we could glean a rationale or basis for a finding that the retention and testimony of such an expert witness would have had an impact on the result of these proceedings or that the failure to procure such an expert resulted in prejudice to defendant. Thus, even presuming that defendant was ineffective for failing to provide an expert on identification, defendant has not established a reasonable probability that, but for counsel's alleged error, the result of the proceedings would have been different. See *People v Ackerman*, 257 Mich App 434, 455-456; 669 NW2d 818 (2003).

II. RIGHT TO A PUBLIC TRIAL

Next, defendant contends that the trial court erred by excluding his mother from the courtroom during part of the trial, in violation of his Sixth Amendment right to a public trial. Defendant failed to preserve his claim that the trial court violated his Sixth Amendment right to a public trial by objecting in the trial court. See *People v Vaughn*, 491 Mich 642, 646; 821 NW2d

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288 (2012). Thus, our review is for plain error affecting defendant's substantial rights. *Id*. at 664-665. Defendant must show "(1) that the error occurred, (2) that the error was 'plain,' (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id*. at 665 (citation omitted).

On the second day of trial, the prosecutor stated that she was informed that, after the end of the first day of trial, individuals heard defendant's mother yelling at defense counsel in the hallway and Juror Number 5 was present. Defense counsel told defendant's mother that they needed to "go over here" because there was a juror present. The prosecutor believed that she heard defendant's mother yell, "well you know what, it doesn't matter anyway, because half those juries live in my community, and I know them." The trial court agreed to question Juror Number 5 regarding what he had heard. The trial court also questioned defendant's mother, Katrina Stanley, who indicated that she understood that she could not yell outside the courtroom because of the presence of jurors, but stated that she had not seen the juror. She denied saying "half of those jurors," and told the trial court that she had said that one of the jurors looked familiar. The trial court told Katrina that her behavior was inappropriate and asked her to leave the courtroom and the building until the trial was over. The trial court warned the other members of the public not to "talk or be in sight of" any juror and that "if anybody else does that, there's going to be just as serious, if not more serious consequences." Thereafter, the trial court and the attorneys questioned Juror Number 5, but he was not dismissed from the jury.

The Sixth Amendment of the United States Constitution and Const 1963, article 1, § 20 guarantee the right to a public trial. *Vaughn*, 491 Mich at 650. As stated in *Vaughn*:

> A defendant's Sixth Amendment right to a public trial is limited, and there are circumstances that allow the closure of a courtroom during any stage of a criminal proceeding, even over a defendant's objection:
>
> > [T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure. [*Id.* at 653 (quotation marks and citation omitted).]

"[I]t does not follow that every temporary instance of unjustified exclusion of the public—no matter how brief or trivial, and no matter how inconsequential the proceedings that occurred during an unjustified closure—would require that a conviction be overturned." *Id*. at 667 (quotation marks and citation omitted). The right to a public trial serves the goals of "(1) ensuring a fair trial, (2) reminding the prosecution and court of their responsibility to the accused and the importance of their functions, (3) encouraging witnesses to come forward, and (4) discouraging perjury." *Id*. Only a substantial, rather than a compelling, reason in required for a partial closures. *People v Gibbs*, 299 Mich App 473, 481; 830 NW2d 821 (2013).

MCR 8.116(D)(1), which governs access to court proceedings, provides:

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> Except as otherwise provided by statute or court rule, a court may not limit access by the public to a court proceeding unless
>
> (a) a party has filed a written motion that identifies the specific interest to be protected, or the court *sua sponte* has identified a specific interest to be protected, and the court determines that the interest outweighs the right of access;
>
> (b) the denial of access is narrowly tailored to accommodate the interest to be protected, and there is no less restrictive means to adequately and effectively protect the interest; and
>
> (c) the court states on the record the specific reasons for the decision to limit access to the proceeding.

In *Presley v Georgia*, 558 US 209, 210; 130 S Ct 721; 175 L Ed 2d 675 (2010), the trial court excluded the lone courtroom observer, the defendant's uncle, from the courtroom during voir dire, citing concerns about space. The trial court indicated that the observer could return after voir dire. *Id*. At a hearing on the defendant's motion for a new trial, defendant showed that there would have been adequate room for the public in the courtroom. *Id*. at 210-211. The Supreme Court concluded that the trial court failed to take every reasonable measure to accommodate public attendance at criminal trials by failing to consider alternatives to closure. *Id*. at 215. The Court further stated that "even assuming, *arguendo*, that the trial court had an overriding interest in closing *voir dire*, it was still incumbent upon it to consider all reasonable alternatives to closure." *Id*. at 216.

We begin our analysis of this issue by applying the factors set forth by our Supreme Court in *Vaughn*. Applying those factors we conclude: "(1) that the error occurred, (2) that the error was 'plain,' (3) that the error affected substantial rights." *Id*. at 665 (citation omitted). Here, the trial court excluded defendant's mother without first considering any reasonable alternatives to her exclusion from the courtroom and the courthouse. The failure to consider alternatives to closure is error under *Presley*. 558 US at 216. Additionally, the trial court made no finding as to whether the exclusion of defendant's mother would be broader than necessary to protect the interests the trial court had in preventing inappropriate behavior in front of jurors[3]. In sum, the trial court failed to follow MCR 8.116(D)(1). Accordingly, error occurred and the error was plain. As to the third factor in *Vaughn*, because we are dealing with unpreserved structural error, our Supreme Court instructed us in *People v Duncan* 462 Mich 47, 51; 610 NW2d 551 (2000), that such errors "are intrinsically harmful, without regard to their effect on the outcome . . . " See also, *Vaughn*, 491 Mich at 666. Accordingly, our caselaw suggests that a plain structural error satisfies the third *Vaughn* prong. Left open then is the question of whether " the error

[3] We note that the trial court never specifically stated its explicit basis for its exclusion of defendant's mother. However, our review of the trial court's statements lead us to conclude that the trial court's chief concern was preventing improper behavior by defendant's mother and deterring others from engaging in similar disruptive conduct in front of the jury.

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either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id*. at 665.

In *Vaughn*, our Supreme Court set forth the standard of review to be utilized when deciding this issue:

> Nevertheless, even if defendant can show that the error satisfied the first three *Carines* requirements, we "must exercise . . . discretion" and only grant defendant a new trial if the error "resulted in the conviction of an actually innocent defendant" or seriously affected the fairness, integrity, or public reputation of judicial proceedings. Although denial of the right to a public trial is a structural error, it is still subject to this requirement. While "any error that is 'structural' is likely to have *an* effect on the fairness, integrity or public reputation of judicial proceedings," the plain-error analysis requires us to "consider whether an error '*seriously*' affected those factors." *Id.*at 666-667. (internal citations omitted).

We therefore set forth to determine whether exclusion of defendant's mother from the courtroom resulted in an actually innocent defendant being convicted or that her removal seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

A. Denial of Defendant's Claim will not Result in an Actually Innocent Defendant being Convicted.

In keeping with our Supreme Court's mandate, we review the trial court record to determine if the error resulted in the conviction of an actually innocent defendant. Our review of the record does not lead us to any factual or legal connection between the exclusion of defendant's mother from the courtroom and the jury's verdict. Further, there is nothing within the record which leads us to conclude that defendant did not receive a fair trial based on the exclusion of his mother. Rather, our review leads us to conclude that based on the record evidence produced, there was sufficient evidence from which a rational jury could conclude beyond a reasonable doubt that defendant committed the offenses for which he had been charged. Both victims identified defendant from a photographic lineup and at trial. One of the victims realized he knew defendant after viewing the photographic lineup. During all stages of proceedings in this matter, neither victim wavered in either their descriptions of events or in their description and identification of defendant. On this record, we are not presented with any basis from which we may conclude that an actually innocent defendant was convicted in this case. Hence, we turn to whether exclusion seriously affected the fairness, integrity or public reputation of the proceedings.

B. Exclusion of Defendant's Mother did not Seriously Affect the Fairness, Integrity, or Public Reputation of Judicial Proceedings.

Next we examine if the trial court's exclusion of defendant's mother seriously affected the fairness, integrity, or public reputation of judicial proceedings. Anytime a trial court excludes a member of the public and does so in violation of court rule and our Constitutions, there will, of course, be some affect as to the fairness, integrity, or public reputation of judicial

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proceedings. However, the issue presented here is whether the exclusion *seriously* affected the fairness, integrity, or public reputation of judicial proceedings. To answer, we again turn to the record evidence presented.

We note that our examination of this issue is independent from our conclusions as to defendant's guilt as to the charged offenses. Indeed, the objective of our analysis is to ensure that during the proceedings, defendant was afforded the protections of the Sixth Amendment, irrespective of his guilt or innocence. As stated, in *Vaughn*, the goals sought by these protections include (1) ensuring a fair trial, (2) reminding the prosecution and court of their responsibility to the accused and the importance of their functions, (3) encouraging witnesses to come forward, and (4) discouraging perjury. *Vaughn*, 491 Mich at 667. After review of the record, we cannot find any evidence, and defendant has not alerted us to any evidence, which would lead us to conclude that defendant was denied any of these goals.

We note that our presumed basis for defendant's mother being excluded from the courthouse was to discourage improper behavior and conduct in front of the jury. Such a rationale supports a finding that the trial court was seeking to protect important interests, namely the orderly running of the trial coupled with the freedom from fear for jurors to render their verdict based on the evidence and not how their verdict will impact singular members of their community. However, as we have already held, based on the lack of a record as to its reasons, removal of defendant's mother, was likely broader than necessary to protect that interest. However, our earlier holding of error does not preclude us from also holding that the trial court, in ordering the removal of defendant's mother from the courtroom, was seeking to protect these important interests.

Additionally, we note that at the time of the removal, the remaining witnesses who were called to testify were police officers who were aware of their obligations to come forward and testify truthfully. Further, there were no additional restrictions as to members of the public gaining access to the proceedings, and nothing within the record indicates that any of the witnesses called after exclusion of defendant's mother from the courtroom testified in a manner inconsistent with their reports or prior testimony.

The record therefore reveals that there existed a legitimate basis to seek the removal of defendant's mother from the courtroom. Further, based on the mother's conduct, we can envision a scenario where defendant's mother could have been lawfully removed from the courtroom based on her behavior—as a deterrent to her and to others not to engage in such antics. Hence, examination of the record as a whole leads us to conclude that---whether defendant was actually innocent or guilty of the charges against him---exclusion of defendant's mother from the courtroom midway through the trial did not deprive defendant of the of the protections conferred by the Sixth Amendment. Accordingly, we cannot find that exclusion of defendant's mother midway through the trial seriously affected the fairness, integrity, or public reputation of judicial proceedings. Defendant is not entitled to relief on this issue.

III. JOINDER

Defendant next argues that the trial court erred by permitting the prosecution to join two separate criminal incidents into a single prosecution for trial.

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In *People v Williams*, 483 Mich 226, 231; 769 NW2d 605 (2009), our Supreme Court stated:

> Generally, this Court reviews questions of law de novo and factual findings for clear error. The interpretation of a court rule, like matters of statutory interpretation, is a question of law that we review de novo. To determine whether joinder is permissible, a trial court must first find the relevant facts and then must decide whether those facts constitute "related" offenses for which joinder is appropriate. Because this case presents a mixed question of fact and law, it is subject to both a clear error and a de novo standard of review. [Citations omitted.]

MCR 6.120(B), which governs postcharging permissive joinder, provides:

> On its own initiative, the motion of a party, or the stipulation of all parties, except as provided in subrule (C), the court may join offenses charged in two or more informations or indictments against a single defendant, or sever offenses charged in a single information or indictment against a single defendant, when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense.
>
> (1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on
>
> (a) the same conduct or transaction, or
>
> (b) a series of connected acts, or
>
> (c) a series of acts constituting parts of a single scheme or plan.
>
> (2) Other relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial.
>
> (3) If the court acts on its own initiative, it must provide the parties an opportunity to be heard.

Accordingly, "[o]ffenses are 'related' if they comprise either 'the same conduct' or 'a series of connected acts or acts constituting part of a single scheme or plan.' " *Williams*, 483 Mich at 233 (citation omitted).[4] The *Williams* Court explained that charges are not related

[4] In *Williams*, the Court analyzed an earlier version of the court rule. *Williams*, 483 Mich at 233 & n 5.

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"simply because they [are] of the same of similar character." *Id*. at 235 (quotation marks and citation omitted). Moreover, joinder is appropriate when the charges are "logically related" and "there is a large area of overlapping proof." *Id*. at 237 (quotation marks and citation omitted).

Defendant argues that the two incidents that were joined for trial were "completely different" because they involved different victims, occurred at different times, and occurred under different circumstances. He also argues that the first act did not facilitate the second. However, the facts at trial established that the two offenses were a series of acts constituting parts of a single scheme or plan. The armed robberies of Perez and Vasquez were similar in character. Both robberies appeared be part of a scheme to commit armed robberies on isolated victims as they were returning to their homes in Detroit on the evening of December 16, 2016. The evidence indicated that the two offenses occurred less than two hours apart. The similarity of defendant's conduct during the two offenses and the closeness in time between the offenses shows a logical and temporal relationship between the charges. Moreover, the record establishes that there was a "large area of overlapping proof." *Williams*, 483 Mich at 237 (quotation marks and citation omitted). The evidence regarding the border patrol agent's observation and pursuit of the vehicle involved and the investigation of the occupants of the vehicle at the Lesure address was relevant to both cases. Other factors also weighed in favor of joinder—the prosecution's motion appeared to be timely, there was little potential for confusion or prejudice from joinder of the two offenses, and joinder was convenient for the witnesses who would have been called to testify at both trials. Thus, the trial court did not err by ruling that joinder was permissible.

IV. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that there was insufficient evidence to support his conviction of conspiracy to commit armed robbery.

This Court reviews de novo a challenge to the sufficiency of the evidence. *People v Willis*, 322 Mich App 579, 583; 914 NW2d 384 (2018). In determining whether sufficient evidence to support a conviction was presented at trial, "this Court 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 proved beyond a reasonable doubt." *Id*. "Whether conduct falls within the scope of a criminal statute . . . is a question of statutory interpretation that we review de novo." *Id*. at 584.

MCL 750.157a provides that "[a]ny person who conspires together with 1 or more persons to commit an offense prohibited by law, or to commit a legal act in an illegal manner is guilty of the crime of conspiracy punishable as provided herein . . . ." In *People v Jackson*, 292 Mich App 583, 588; 808 NW2d 541 (2011), this Court explained:

> A criminal conspiracy is a partnership in criminal purposes, under which two or more individuals voluntarily agree to effectuate the commission of a criminal offense. The individuals must specifically intend to combine to pursue the criminal objective, and the offense is complete upon the formation of the agreement. The intent, including knowledge of the intent, must be shared by the individuals. Thus, there must be proof showing that the parties specifically intended to further, promote, advance, or pursue an unlawful objective. Direct

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> proof of a conspiracy is not required; rather, proof may be derived from the circumstances, acts, and conduct of the parties. [Quotation marks and citations omitted.]

"Conspiracy is a specific-intent crime, because it requires both the intent to combine with others and the intent to accomplish the illegal objective." *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001). "For intent to exist, the defendant must know of the conspiracy, must know of the objective of the conspiracy, and must intend to participate cooperatively to further that objective." *People v Blume*, 443 Mich 476, 485; 505 NW2d 843 (1993).

As stated by this Court in *People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007), the elements of armed robbery are:

> (1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon.

Defendant argues that there was no evidence that he intended to conspire or agreed with the other individuals in the vehicle to rob Vasquez. We agree with defendant's assertion that there was no direct evidence of a conspiracy, and the circumstantial evidence was insufficient for a rational trier of fact to conclude that defendant conspired with the individuals in the vehicle to commit armed robbery on Vasquez. Vasquez testified that she saw three or four individuals in the vehicle that defendant got into after the offense. There was, however, no direct or circumstantial evidence that the other individuals were aware of the plan to rob Vasquez and intended to participate in that plan. Vasquez testified that defendant got into the driver's seat after he robbed her. Thus, there was no evidence that one of the other individuals drove to or from the armed robbery, which might have supported a reasonable inference that the individual had the knowledge and intent to conspire with defendant. Furthermore, while Perez observed a similar vehicle during the first armed robbery, he did not see any individuals in the vehicle. Accordingly, there was no evidence that the other individuals were present during or aware of the earlier armed robbery of Perez, such that their knowledge and intent to commit the second robbery of Vasquez could be inferred. Finally, given Vasquez's testimony that defendant got into the driver's seat of the vehicle, the conduct in fleeing from law enforcement after the armed robbery can only be attributed to defendant. While a backseat occupant turned around and looked at the border patrol agent before the vehicle accelerated, there was no evidence that such individual had any knowledge of the armed robbery or intended to further the conspiracy by fleeing from the police. Based on the testimony presented at trial, the other individuals were merely present in the vehicle while defendant committed the armed robbery of Vasquez, which is insufficient to establish that they conspired with defendant to commit the offense. Accordingly, there was insufficient evidence to establish a conspiracy.

We reverse defendant's conviction and sentence for conspiracy to commit armed robbery in Docket No. 340465, and remand for correction of the judgment of sentence. We affirm defendant's remaining convictions and sentences in both appeals. We do not retain jurisdiction.

/s/ Thomas C. Cameron
/s/ Jane E. Markey
/s/ Stephen L. Borrello

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People v Williams

COA No. 345096

March 19, 2020

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 19, 2020
v	No. 345096 Saginaw Circuit Court
JEREMY LEE WILLIAMS, Defendant-Appellant.	LC No. 17-044434-FC

Before: BOONSTRA, P.J., and RIORDAN and REDFORD, JJ.

PER CURIAM.

Defendant appeals by right his convictions by a jury of one count of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(2)(b) (penetration of a person under age 13 by an individual age 17 or older), and one count of accosting a child for immoral purposes, MCL 750.145a. The trial court sentenced defendant as a second-offense habitual offender, MCL 769.10, to concurrent terms of 300 to 600 months' imprisonment for his CSC-I conviction and 28 to 72 months' imprisonment for his accosting a child for immoral purposes conviction.[1] We affirm.

I. BACKGROUND

Defendant and his wife, Connie Williams, were charged separately with CSC-I and accosting a child for immoral purposes for offenses they committed against their daughters. At trial, one of defendant's daughters testified that when she was six years old defendant called her from her upstairs bedroom and when she arrived downstairs he grabbed her and pulled her into his and Connie's downstairs bedroom, locked the door, and had anal intercourse with her. Connie separately arranged for unknown, older men to come to the house and have anal intercourse with

[1] This Court denied without prejudice defendant's motion to remand on the grounds similar to the main issues on which he bases his appeal. *People v Williams*, unpublished order of the Court of Appeals, entered May 7, 2019 (Docket No. 345096).

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that same daughter for money. Connie's accosting a child for immoral purposes conviction arose from her having their other daughter take sexually explicit photos of Connie.

Two Michigan State Police officers interviewed defendant. During defendant's first interview in May 2017, he denied to the trooper that he had a sexual relationship with one of his daughters and accused her of lying about it. During his second interview with a sergeant in July 2017, the trooper from the first interview watched from another room via closed-circuit television. Defendant initially denied that he had anal intercourse with his daughter but later admitted having done so. The sergeant gave defendant a set of written questions based on defendant's statements during his interview. Defendant read the questions and wrote "yes" in answer to questions whether he had anal intercourse with his daughter and that he told the truth about his actions. The sergeant also drew a diagram of a penis, and defendant drew a line that indicated how far his penis penetrated his daughter's anus. Defendant also later affirmed to the trooper the admissions he made to the sergeant.

At trial, defendant denied that he had sex with his daughter or that he ever had a sexual relationship with her. Defendant testified that the admissions he made to the sergeant and the trooper were false because he "was scared" and "didn't know what to do." Defendant also stated that he made a false admission to the trooper because he feared for his daughter's life.

II. JOINT TRIAL

Defendant first argues that the trial court erred by trying him and Connie jointly before the same jury. Defendant, however, did not object or move for separate trials. Absent such a motion in the trial court, appellate review is generally precluded. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Because defendant failed to raise this issue before the trial court, it is unpreserved. Therefore, defendant may only obtain relief if he establishes that an (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To establish that his substantial rights were affected, defendant must show that the error caused him prejudice by affecting the outcome of the lower court proceedings. *Id*. Reversal is only warranted "when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id.* (quotation marks and citation omitted; alteration in original). Joinder of these defendants' trials was proper, and even if it had been inappropriate in this case, any error did not affect defendant's substantial rights.

A defendant does not have an absolute right to a separate trial. *People v Hoffman*, 205 Mich App 1, 20; 518 NW2d 817 (1994). A strong policy exists that favors the conduct of joint trials in the interest of justice, judicial economy, and administration. *People v Etheridge*, 196 Mich App 43, 52-53; 492 NW2d 490 (1992). The "joinder of distinct criminal charges" is permissible against multiple defendants when "(1) there is a significant overlapping of issues and evidence, (2) the charges constitute a series of events, and (3) there is a substantial interconnectedness between the parties defendant, the trial proofs, and the factual and legal bases of the crimes charged." *People v Missouri*, 100 Mich App 310, 349; 299 NW2d 346 (1980). "Moreover, even the improper joining of defendants for trial under separate offenses is not per se reversible error."

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Id. Under MCL 768.5 and MCR 6.121(D), the trial court has discretion regarding trying criminal defendants jointly. *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994).

MCR 6.121 provides, in relevant part:

> (A) An information or indictment may charge two or more defendants with the same offense. It may charge two or more defendants with two or more offenses when
>
> (1) each defendant is charged with accountability for each offense, or
>
> (2) the offenses are related as defined in MCR 6.120(B).
>
> When more than one offense is alleged, each offense must be stated in a separate count. Two or more informations or indictments against different defendants may be consolidated for a single trial whenever the defendants could be charged in the same information or indictment under this rule.
>
> (B) On a defendant's motion, the court must sever offenses that are not related as defined in MCR 6.120(B).
>
> (C) On a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant.
>
> (D) On the motion of any party, the court may sever the trial of defendants on the ground that severance is appropriate to promote fairness to the parties and a fair determination of the guilt or innocence of one or more of the defendants. Relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of defendants or the complexity or nature of the evidence, the convenience of witnesses, and the parties' readiness for trial.

MCR 6.120(B) provides, in relevant part:

> (1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on
>
> (a) the same conduct or transaction, or
>
> (b) a series of connected acts, or
>
> (c) a series of acts constituting parts of a single scheme or plan.

In *Hana*, 447 Mich at 346-347 (quotation marks and citations omitted), our Supreme Court explained:

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> [S]everance should be granted only if there is a serious risk that a joint trial would compromise a specific trial right . . . or prevent the jury from making a reliable judgment about guilt or innocence.
>
> * * *
>
> Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision.

As an initial matter, defendant and Connie were not charged with "accountability" for the other's offenses. MCR 6.121(A)(1). Therefore, their informations could be consolidated for a single trial if each defendant could be charged in the same information or indictment under MCR 6.121(A)(2), meaning that the offenses were "related" as defined in MCR 6.120(B)(1).

In *People v Williams*, 483 Mich 226, 234-235; 769 NW2d 605 (2009), our Supreme Court concluded that a drug transaction on November 4, 2004, and a drug transaction on February 2, 2005, were part of a " 'single scheme or plan' of drug trafficking." The Court concluded that the charges were "not 'related' simply because they were 'of the same or similar character.' " *Id.* at 235. Rather, the charges "were related because the evidence indicated that defendant engaged in ongoing acts constituting parts of his overall scheme or plan to package cocaine for distribution."[2] *Id.* "Common plan offenses . . . [are] dependent upon the existence of a plan that ties the offenses together and demonstrates that the objective of each offense was to contribute to the achievement of a goal not attainable by the commission of any of the individual offenses." *People v McCune*, 125 Mich App 100, 103; 336 NW2d 11 (1983) (quotation marks and citation omitted).

In this case, defendant and Connie were separately charged with CSC-I and accosting a child for immoral purposes. Respecting the CSC-I charges, although the allegations against defendant and Connie involved the same victim, the charges stemmed from separate and distinct events. The prosecution alleged that defendant committed CSC-I by using his penis to penetrate his victim's anus. The prosecution alleged that Connie committed CSC-I by aiding and abetting men other than defendant to penetrate the same daughter's anus.

With respect to the accosting a child for immoral purposes charges, the allegations against defendant and Connie involved different conduct and different victims. The prosecution alleged that defendant accosted one of his daughters to engage in sexual acts with him; whereas, the prosecution alleged that Connie accosted the other daughter to take sexually explicit photos of Connie.

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[2] The *Williams* Court analyzed an earlier version of MCR 6.120 which stated "the same conduct or transaction" instead of "the same conduct."

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While there were differences in the facts giving rise to the charges against defendants, Jeremy and Connie Williams, the criminal acts of the two defendants, jointly tried, were inextricably intertwined with one another. Defendant raped his daughter by penile anal penetration in the family home. Defendant accosted this same daughter for immoral sexual purposes. Defendant's wife, Connie, with whom he was jointly tried, had their other daughter take sexually explicit photos of Connie which she then transmitted. Connie also allowed other males to anally rape defendant's rape victim in the same place and manner as defendant did, and she also received money for this. These horrific acts of depravity were connected together in place, manner and their vile nature. They were properly tried together.[3]

The record reflects that the prosecution presented sufficient evidence from which reasonable jurors could convict defendant of CSC-I and accosting a child for immoral purposes. A defendant is guilty of CSC-I under MCL 750.520b(1)(a) if "(1) the defendant engaged in sexual penetration with another person and (2) the other person was under 13 years of age." *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012). Under MCL 750.520a, "sexual penetration" includes "anal intercourse[.]" Defendant's victim's testimony and defendant's admissions established that he committed the charged offense against his victim when she was under 13 years old.

Similarly, the prosecution presented sufficient evidence to convict defendant of accosting a child for immoral purposes. MCL 750.145a provides that "[a] person who accosts, entices, or solicits a child less than 16 years of age . . . with the intent to induce or force that child . . . to commit an immoral act, to submit to an act of sexual intercourse or an act of gross indecency, or to any other act of depravity or delinquency, . . . is guilty of a felony . . . ." In this case, the prosecution presented evidence that established that defendant called his victim down from her room, pulled her into his bedroom, and had anal intercourse with her. The evidence established that defendant accosted his victim who was under 16 years of age with the intent to induce or force her to engage in sexual intercourse, a proscribed act. MCL 750.145a. Defendant is not entitled to relief.

III. CLOSURE OF THE COURTROOM AND SUPPORT PERSON

Defendant argues that the trial court erred by closing the courtroom and by allowing a support person to be in the courtroom during defendant's victim's testimony. When the prosecution requested the closing of the courtroom and asked if defendant had any objection, defense counsel responded, "No." When the prosecution requested the allowance of a support person during defendant's victim's testimony, defendant did not object or raise any issue before the trial court. Defendant, therefore, failed to preserve these issues for appellate review. Accordingly, we review these claims of error under the unpreserved, forfeited constitutional plain error standard. *People v Vaughn*, 491 Mich 642, 664; 821 NW2d 288 (2012). Defendant must establish that an (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain

[3] Even if there was merit to defendant's arguments against the joint nature of his trial, he would be entitled to no relief because he has failed to establish that the plain error resulted in the conviction of an actually innocent defendant or that the error seriously affected the fairness, integrity or public reputation of the proceedings independent of his innocence. *Carines*, 460 Mich at 763.

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error affected the defendant's substantial rights. *Carines*, 460 Mich at 763. To establish that his substantial rights were affected, defendant must show that the error caused him prejudice by affecting the outcome of the lower court proceedings. *Id*. Reversal is only warranted if the plain, forfeited error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings independent of his innocence. *Id.*

Defendant argues that the trial court violated his Sixth Amendment rights under the United States Constitution by closing the courtroom during his victim's testimony. A criminal defendant has both a state and federal constitutional right to a public trial. US Const Am VI; Const 1963, art 1, § 20. Although "a 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 Johnson*, 315 Mich App 163, 179; 889 NW2d 513 (2016). A defendant's right to a public trial under the Sixth Amendment is "limited":

> [T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure. [*Vaughn*, 491 Mich at 653 (quotation marks and citations omitted).]

Defendant also vaguely asserts that the trial court violated his First Amendment rights under the United States Constitution by closing the courtroom during his victim's testimony. "[A] member of the public can invoke the right to a public trial under the First Amendment." *Id*. at 652. However, "[b]ecause this case involves the accused who invoked his right to a public trial, albeit after the fact, this case proceeds solely under the Sixth Amendment." *Id.* (quotation marks and citation omitted).

At the time of trial, MCL 600.2163a provided in relevant part:

> (16) If upon the motion of a party made before trial the court finds on the record that the special arrangements specified in subsection (17) are necessary to protect the welfare of the witness, the court shall order those special arrangements. In determining whether it is necessary to protect the welfare of the witness, the court shall consider all of the following:
>
> (a) The age of the witness.
>
> (b) The nature of the offense or offenses.
>
> (c) The desire of the witness or the witness's family or guardian to have the testimony taken in a room closed to the public.
>
> (d) The physical condition of the witness.
>
> (17) If the court determines on the record that it is necessary to protect the welfare of the witness and grants the motion made under subsection (16), the court shall order 1 or more of the following:

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> (a) All persons not necessary to the proceeding shall be excluded during the witness's testimony from the courtroom where the trial is held. The witness's testimony shall be broadcast by closed-circuit television to the public in another location out of sight of the witness.

On the first day of trial, the prosecution made a pretrial motion to close the courtroom "when the witness is testifying." The record is unclear regarding to whom the prosecution referred. The record is also unclear whether the trial court actually closed the courtroom during victim witness testimony. Assuming that the trial court closed the courtroom during one of Connie's victim's testimony as contended on appeal by defendant, the trial court committed plain error because it never determined on the record as required under MCL 600.2163a(17) whether the circumstances required closing the courtroom under MCL 600.2163a(16) to protect the welfare of the victim.[4]

This error violated defendant's Sixth Amendment right to a public trial. See *Vaughn*, 491 Mich at 665. "[D]enial of the right to a public trial is a structural error . . . ." *Id.* at 666-667. "[S]tructural errors are intrinsically harmful, without regard to their effect on the outcome . . . ." *Vaughn*, 491 Mich at 666 (quotation marks and citation omitted; ellipsis in original). "[A] plain structural error satisfies the third *Carines* prong." *Id.* at 666. In *Vaughn*, however, our Supreme Court explained:

> Nevertheless, even if defendant can show that the error satisfied the first three *Carines* requirements, we "must exercise . . . discretion" and only grant defendant a new trial if the error "resulted in the conviction of an actually innocent defendant" or seriously affected the fairness, integrity, or public reputation of judicial proceedings. [*Id.*, quoting *Carines*, 460 Mich at 763 (ellipsis in original).]

"Because defendant has not argued that he is actually innocent, we review his claim of error only with regard to whether his conviction seriously affected the fairness, integrity, or public reputation of judicial proceedings." See *id.* at 666 n 92. The focus is whether defendant was denied the protections afforded by the Sixth Amendment. *Id.* at 667. "The goals sought by these protections include (1) ensuring a fair trial, (2) reminding the prosecution and court of their responsibility to the accused and the importance of their functions, (3) encouraging witnesses to come forward, and (4) discouraging perjury." *Id.*

In this case, the record does not support defendant's contention that closing the courtroom to the public during Connie's victim's testimony undermined the integrity of the proceedings or affected the fairness, or public reputation of judicial proceedings independent of his innocence. Connie's victim's testimony did not implicate defendant. In fact, she testified that defendant was never around when she took explicit photos of Connie. Defendant has failed to show that the

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[4] The trial court also did not follow the requirements of MCR 8.116(D). The record does not reflect that the prosecution filed a *written* motion and the trial court did not state on the record specific reasons for its decision to limit access to the proceedings. See MCR 8.116(D)(1)(a) and (c).

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closing of the courtroom in this case violated his right to a fair trial.[5] See *Vaughn*, 491 Mich at 667. Defendant, therefore, is not entitled to a new trial.

Similarly, defendant is not entitled to relief on the ground that the trial court permitted a support person to accompany the witness. Under MCL 600.2163a(4), a victim of criminal sexual conduct "who is called upon to testify shall be permitted to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony." The prosecution, however, was obligated to provide notice of intent to use a support person. *Id*. In this case, the prosecution made a pretrial motion to have a support person "inside the courtroom" during the victim's testimony but the record does not reflect that the prosecution provided the requisite notice of intent. Assuming that the trial court allowed a support person's presence in the courtroom during the victim's testimony, the trial court committed plain error because no evidence establishes that the prosecution filed a notice of intent.[6]

Although the trial court plainly erred to the extent that it allowed a support person's presence during the victim's testimony, defendant has failed to establish that the result of the proceedings would have been different had the trial court not done so. *Carines*, 460 Mich at 763. The victim's testimony did not directly implicate defendant, and the prosecution presented sufficient evidence, separate from the victim's testimony, to convict defendant of CSC-I and accosting a child for immoral purposes. Defendant cannot establish his actual innocence, nor that the trial court's error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. Therefore, defendant is not entitled to relief.

IV. PIERCING THE VEIL OF JUDICIAL IMPARTIALITY

Defendant also argues that the trial court's questioning of him pierced the veil of judicial impartiality, depriving him of a fair trial. We disagree.

"The question whether a judge's conduct has denied a defendant a fair trial is a question of constitutional law that this Court reviews de novo." *People v Swilley*, 504 Mich 350, 370; 934 NW2d 771 (2019) (quotation marks and citation omitted). However, because defendant did not object to the challenged conduct in the trial court, we review this argument for plain error affecting substantial rights. *Carines*, 460 Mich at 763.

"A trial judge's conduct deprives a party of a fair trial if the conduct pierces the veil of judicial impartiality." *People v Stevens*, 498 Mich 162, 164; 869 NW2d 233 (2015). "A judge's conduct pierces this veil and violates the constitutional guarantee of a fair trial when, considering the totality of the circumstances, it is reasonably likely that the judge's conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party." *Id.* at 171. In *Stevens*, our Supreme Court instructed:

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[5] Defendant does not appear to argue that closing the courtroom during Connie's victim's testimony denied him any other Sixth Amendment protections.

[6] The record also is unclear whether a support person attended the victim's testimony.

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> In evaluating the totality of the circumstances, the reviewing court should inquire into a variety of factors, including the nature of the judicial conduct, the tone and demeanor of the trial judge, the scope of the judicial conduct in the context of the length and complexity of the trial and issues therein, the extent to which the judge's conduct was directed at one side more than the other, and the presence of any curative instructions. This list of factors is not intended to be exhaustive. Reviewing courts may consider additional factors if they are relevant to the determination of partiality in a particular case. Moreover, the aggrieved party need not establish that each factor weighs in favor of the conclusion that the judge demonstrated the appearance of partiality for the reviewing court to hold that there is a reasonable likelihood that the judge's conduct improperly influenced the jury. The reviewing court must consider the relevance and weigh the significance of each factor under the totality of the circumstances of the case. [*Id.* at 172 (citation omitted).]

In this case, after the prosecution finished cross-examination of defendant, the trial court asked the following questions:

> *The Court*: Mr. Williams, you indicated that you admitted or confessed because you feared for your daughter's life?
>
> *Defendant*: I did.
>
> *The Court*: How is that the admission or confession helped with your fear for her life?
>
> *Defendant*: Well, she was going—she was going through a lot, and I didn't—I felt like I didn't want her to go through any more.
>
> *The Court*: But how would that help that situation?
>
> *Defendant*: Help in what way?
>
> *The Court*: Well, you admitted and confessed, so you tell me how it would help, in what way?
>
> *Defendant*: Just relieve the pain that she would—I guess she would—it would relieve the pressure of trying to find out who it is.
>
> *The Court*: Okay. Anything else, Mr. White?
>
> *Mr. White* [defendant's counsel]: No, Your Honor. Thank you.
>
> *The Court*: You may step down.

Under the totality of the circumstances, we cannot conclude that the trial court pierced the veil of judicial impartiality. The trial transcript does not indicate that the trial court expressed a hostile tone or demeanor, or expressed incredulity at defendant's testimony. Rather, the record

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reflects that the trial court interjected questions to permit defendant to clarify his testimony. Defendant's testimony elicited during direct and cross-examination left unclear why his confession arose from fear for the victim's life. The trial court's brief questioning for clarification did not prejudice defendant's case or undermine his defense.

Further, "the presence or absence of a curative instruction is a factor in determining whether a court displayed the appearance of advocacy or partiality." *Stevens*, 498 Mich App at 177. In this case, the trial court instructed the jury as follows:

> My comments, rulings, questions, and instructions are also not evidence. It is my duty to see that the trial is conducted according to the law and to tell you the law that applies to this case. However, when I make a comment or give an instruction, I'm not trying to influence your vote or express an opinion about the case. If you believe that I have an opinion about how you should decide this case, you must pay no attention to that opinion. You are the only judges of the facts, and you should decide this case from the evidence.

Jurors are presumed to follow their instructions. *Mahone*, 294 Mich App at 212. Defendant has not rebutted that presumption. Although "judicial conduct may so overstep its bounds that no instruction can erase the appearance of partiality," *Stevens*, 498 Mich App at 177-178, we conclude that, under the totality of the circumstances in this case, the trial court's conduct does not entitle defendant to relief.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that his counsel provided ineffective assistance by (1) failing to object to the joint trial, (2) failing to object to the closure of the courtroom during the victim's testimony, and (3) failing to object to allowing a support person in the courtroom during a victim's testimony. We disagree.

To preserve a claim of ineffective assistance of counsel, a defendant must move for a new trial or an evidentiary hearing.[7] *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012). Defendant did not move for a new trial or an evidentiary hearing in the trial court, nor did he so move in this Court on the ground that his trial counsel failed to provide him effective assistance. Therefore, our "review is for mistakes that are apparent on the record alone." *People v McFarlane*, 325 Mich App 507, 527; 926 NW2d 339 (2018).

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *Lockett*, 295 Mich App at 187. To establish that his counsel provided ineffective assistance, defendant must demonstrate that "(1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). A strong presumption exists that defense counsel performed based upon a sound trial strategy. *Lockett*, 295 Mich App at 187. "A particular strategy does not

[7] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

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constitute ineffective assistance of counsel simply because it does not work." *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004).

In this case, defendant cannot overcome the presumption that defense counsel provided him effective assistance. Respecting his contention that his counsel failed to provide effective assistance by not objecting to the plain errors committed by the trial court, although we are not fully persuaded, we will assume that defense counsel's performance fell below an objective standard of reasonableness. Nevertheless, defendant has not established that, but for his counsel's deficient performance, there is a reasonable probability that the outcome would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The record in this case indicates that the prosecution presented sufficient evidence, including defendant's victim's testimony and witness testimony regarding his confession, that reasonable jurors could find established beyond a reasonable doubt defendant's guilt of the charged offenses. The record does not establish that a reasonable probability exists that the outcome would have been different but for defense counsel's performance. Accordingly, defendant has failed and cannot establish his claim of ineffective assistance of counsel.

VI. OFFENSE VARIABLES

Defendant argues that he is entitled to resentencing because of purported errors in his sentencing guidelines scoring.

Because rescoring would not change defendant's minimum sentence, he is not entitled to remand. Likewise, even if we were to conclude that the trial court misscored all of the offense variables (OVs) defendant asserts were incorrect, remand is unnecessary because, as part of his concurrent sentencing, defendant must serve the statutory minimum sentence for his CSC-I conviction. MCL 750.520b(2)(b) provides that when an individual who is at least 17 years old commits CSC-I against an individual under 13 years old, he has committed a felony punishable "by imprisonment for life or any term of years, but not less than 25 years." Consequently, even if we were to remand for resentencing, there would be no practical impact on the minimum sentence that defendant must serve. Therefore, providing defendant the remedy he seeks regarding OV scoring will not change the minimum term of his imprisonment. Moreover, in a case like this involving multiple concurrent convictions, the sentencing guidelines apply only to the highest-crime-class conviction, and the trial court was only required to score the highest-class offense. *People v Mack*, 265 Mich App 122, 127-128, 130; 695 NW2d 342 (2005). Here, defendant's highest-crime-class offense was CSC-I, a Class A offense. See MCL 777.16y. Accosting a child for immoral purposes is a Class F offense. See MCL 777.16g. Accordingly, the trial court was not required to apply the guidelines to his accosting a child for immoral purposes offense. Defendant does not argue that he is entitled to resentencing on his CSC-I conviction. Therefore,

because the trial court was statutorily obligated to impose a minimum sentence of at least 25 years' imprisonment for his CSC-I conviction, defendant's scoring challenges lack merit and he is not entitled to resentencing.

Affirmed.

/s/ Mark T. Boonstra
/s/ Michael J. Riordan
/s/ James Robert Redford

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