

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK ANTHONY THOMPSON,

Defendant-Appellant.

UNPUBLISHED

March 18, 2008

No. 272628

Wayne Circuit Court

LC No. 06-002802-01

Before: Talbot, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree murder, MCL 750.316(1)(a), felony firearm, MCL 750.227b, felony murder, MCL 750.316(1)(b), and conspiracy to commit first-degree murder, MCL 750.316(1)(a). Defendant was sentenced to life in prison without parole on the first-degree murder and felony murder convictions, life in prison on the conspiracy to commit first-degree murder conviction and two years' imprisonment on the felony firearm conviction. We affirm in part, vacate in part and remand for the ministerial purpose of correction of sentence.

I. Factual Background

This matter arises from the murder of Barbara Iske outside the residence of Ann Marasco at 21 Dodge Place, Grosse Pointe, Michigan. Iske served as the personal and business bookkeeper for the Marasco family and would routinely work for Ann Marasco at her residence on Tuesday mornings. On June 14, 2005, Iske arrived at the Marasco residence but was shot and killed in the driveway before entering the home. Three individuals were subsequently apprehended for the murder, including defendant, Derrick Anthony Thompson, and codefendants Andre Lamar Williams¹ and Joseph Michael Marasco², the son of Ann Marasco and a resident of 21 Dodge Place.

¹ Codefendant Williams pleaded guilty to second-degree murder, MCL 750.317, and felony firearm, MCL 750.227b.

² We note that defendant and codefendant Marasco were tried together, with separate juries. Originally this case was consolidated with an appeal by codefendant Marasco. However the
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The death of Iske comprised a murder-for-hire, which resulted from issues pertaining to the future distribution of the Marasco estate. Madelynn Sorge, the daughter of Ann Marasco and sister of codefendant Marasco, learned in 2004 that her mother had omitted her as a beneficiary from her will and that the entire estate would devolve to codefendant Marasco upon Ann's death. Sorge discussed this with her mother and ultimately the will and estate plan were revised giving Sorge and codefendant Marasco equal shares of the estate. Iske was designated to serve as a co-trustee for the estate. The relationship between Sorge and her brother was initially strained and further deteriorated following the will change. Employees of Ann Marasco indicated that her son displayed verbally hostile and argumentative behavior toward Iske, believing that she had influenced his mother's decision to alter her distribution of the estate.³ It was the prosecution's theory that codefendant Marasco hired defendant and Williams to kill Iske.

Defendant and Williams had been acquainted for many years, but did not routinely have contact with one another. In May 2005, Williams inadvertently encountered defendant and obtained his phone number. Defendant and Williams spoke by phone over the next several weeks with defendant inquiring whether Williams would be willing to "put some work in." Williams understood this inquiry to be a solicitation of his assistance in the commission of a murder. Defendant came to Williams' home on June 7, 2005, driving a blue Ford Tempo. Defendant drove with Williams to 21 Dodge Place and parked the vehicle across the street from the residence. Defendant and Williams waited approximately 35 minutes in the vehicle. When the intended victim, Iske, did not arrive as anticipated, defendant drove away. Defendant parked the car approximately four blocks from the residence and used a cell phone to place a call. Minutes later, another vehicle, driven by codefendant Marasco, arrived and parked behind defendant's car. Defendant left his vehicle and entered Marasco's car to converse. Shortly after returning to his own vehicle, defendant informed Williams that they were rescheduling the killing for the following week because Iske had not arrived at the home as anticipated.

On June 14, 2005, defendant arrived at Williams' home and, once again, drove Williams to the Marasco residence and parked. En route to the residence, defendant provided Williams with a revolver and instructed him to take from the victim the bag she would be carrying that would be of sufficient size to contain a laptop computer. Defendant identified Iske to Williams when she pulled into the driveway of the home. Williams exited the Tempo and approached Iske demanding the bag containing her laptop computer. Iske relinquished the bag and Williams shot her once in the head and a second time in the back to ensure she was dead. Williams ran back to defendant's vehicle and the two left the area, proceeding toward Detroit.

Defendant and Williams returned to Williams' home and looked through the bag obtained from Iske, which contained a computer, deposit slips and miscellaneous documents. Williams changed his clothes and drove with defendant to a car wash where they disposed of the

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order consolidating the appeals was subsequently vacated following the death of codefendant Marasco. *People v Marasco*, unpublished order of the Court of Appeals, entered October 3, 2007 (Docket No. 272629).

³ Ann Marasco was confined to a wheelchair and employed several personal caregivers on a 24-hour a day, seven-day a week basis to assist her in her home.

computer, laptop bag, paperwork and the handgun used to commit the murder. Defendant and Williams then proceeded to arrange for Williams to be paid. Defendant placed a cell phone call and, shortly thereafter, he and Williams went to the Greektown Casino in Detroit. While in the casino, defendant made several additional cell phone calls in Williams' presence. After a short time period, defendant left Williams to retrieve payment. When defendant returned, he had approximately \$3,500 in cash, which was counted out. Williams received \$3,300 and defendant retained \$200 for having killed Iske.

II. Analysis

A. Admissibility of Co-Conspirator Statements

Defendant first contends that the trial court erred in admitting into evidence statements by the co-conspirators because insufficient independent evidence was presented to demonstrate the existence of a conspiracy. Specifically, defendant asserts Williams' statements regarding conversations with defendant were inadmissible under MRE 801(d)(2)(E) because the prosecutor failed to establish a sufficient foundation, prior to their admission, by independent proof of the existence of a conspiracy. "The trial court's decision to admit or exclude evidence is generally reviewed for an abuse of discretion." *People v Spanke*, 254 Mich App 642, 644; 658 NW2d 504 (2003).

"[A] statement is not hearsay if the statement is offered against a party and is 'a statement made by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy.'" *People v Martin*, 271 Mich App 280, 316; 721 NW2d 815 (2006), quoting MRE 801(d)(2)(E). To qualify under this hearsay exception, three requirements must be met:

First, the proponent must establish by a preponderance of the evidence that a conspiracy existed through independent evidence. A conspiracy exists where two or more persons combine with the intent to accomplish an illegal objective. It is not necessary to offer direct proof of the conspiracy. Instead, it is "sufficient if the circumstances, acts, and conduct of the parties establish an agreement in fact." Circumstantial evidence and inference may be used to establish the existence of the conspiracy. Second, the proponent must establish that the statement was made during the course of the conspiracy. The conspiracy continues "until the common enterprise has been fully completed, abandoned, or terminated." Third, the proponent must establish that the statement furthered the conspiracy. [*Martin*, *supra* at 316-317 (internal citations omitted).]

The issue in this appeal focuses on the requirement that independent proof of the conspiracy must be presented before the co-conspirator statements are admissible. *People v Vega*, 413 Mich 773, 774 n 2, 780-782; 321 NW2d 675 (1982).

Defendant notes that the only evidence presented, before Williams' testimony, pertaining to the existence of a conspiracy was provided by Sorge and David Macon. Sorge testified that codefendant Marasco lived with his mother at the residence on Dodge Place, the location of the shooting. Sorge indicated that Iske worked routinely on Tuesdays, arriving at a specified time and carrying a laptop, which contained information pertaining to Ann Marasco's business and

personal financial matters. Sorge related details regarding the alteration of Ann Marasco's will and estate plan, Iske's identification as a trustee and the further deterioration of her relationship with her brother following these testamentary changes. David Macon was a passenger in a vehicle on Dodge Place at the time of the shooting. Macon observed two African-American males running together from the yard of a residence at that location, enter a parked vehicle and leave at a high rate of speed. Although Macon could not identify defendant or Williams, he did describe the vehicle he observed as a two-door green-colored Tempo.

At this point in trial, the prosecutor placed Williams on the stand. Williams acknowledged that he shot Iske. Williams described his physical encounters with defendant on both June 7, 2005 and June 14, 2005, when they drove to 21 Dodge Place. During the prosecutor's examination of Williams, no testimony was elicited regarding conversations had or overheard by Williams with defendant or codefendant Marasco. Williams' testimony comprised merely his own observations, as a witness, of what transpired, who was present, and his own actions on the relevant dates. Based on this evidence, and over the objection of defendant's and codefendant's attorneys, the trial court found that sufficient independent evidence of a conspiracy existed to permit further testimony by Williams regarding statements made by defendant and codefendant Marasco.

A conspiracy is defined as comprising a partnership by two or more individuals to effectuate a criminal purpose. A conspiracy is deemed "complete upon formation of the agreement." In order to demonstrate the existence of a conspiracy, it must be shown "that the parties specifically intended to further, promote, advance, or pursue an unlawful objective." *People v Justice (After Remand)*, 454 Mich 334, 345-347; 562 NW2d 652 (1997) (internal citations omitted). We find that the testimony and evidence relied on to prove the existence of a conspiracy provided a sufficient foundation for the subsequent admission of the co-conspirator statements. Specifically, defendant argues that reliance on the testimony of Williams to prove the existence of the conspiracy was improper. However, the testimony presented by the prosecutor, before admission of the co-conspirator statements, did not comprise hearsay, as it was Williams' description of events that he witnessed and in which he participated. This testimony aptly demonstrated, at a minimum, the existence of a conspiracy between Williams and defendant.

Williams' testimony that he was the shooter and was transported to and from the scene of Iske's killing by defendant comprises sufficient independent evidence of a conspiracy or "concert of action." Williams asserted that he procured the weapon to execute Iske directly from defendant and that, together, he and defendant examined the items taken from Iske, disposed of them and the weapon and that defendant remitted payment to him upon completion of the murder. Williams further indicated that he had several contacts with defendant, including June 7, 2005, demonstrating the existence of a plan of action to effectuate the killing. This evidence, coupled with observations by Macon near the Marasco residence at the date and time of the killing of two males running from the scene and leaving in a vehicle matching the description of a car driven by defendant and, later demonstrated to be owned by defendant's girlfriend along with Sorge's testimony pertaining to Iske's routine, constituted sufficient independent evidence of a conspiracy between these individuals to permit admission of the co-conspirator statements.

In addition, once the co-conspirator statements were admitted into evidence, the prosecutor came forward with additional testimony and evidence to corroborate the existence of

a conspiracy. Several employees of Ann Marasco testified that they had observed codefendant Marasco engaged in heated exchanges with Iske and that he had verbally expressed his anger and dislike of the victim. One caregiver indicated that codefendant Marasco stated that he had saved money in order to pay people to kill Iske. The prosecutor also presented cell phone records establishing the existence of a pattern of calls placed between defendant, Williams and codefendant Marasco, which coordinated with dates and times alleged by Williams regarding arrangements to effectuate the murder. Although the existence of a conspiracy must be demonstrated by a preponderance of the evidence, *Martin, supra* at 316-317, a conspiracy can be established by circumstantial evidence and inferences. *People v Till*, 115 Mich App 788, 794; 323 NW2d 14 (1982). Contrary to defendant's assertion on appeal, "the order of the presentation of the proofs is unimportant. A trial court may vary the order of proofs and admit a co-conspirator's statement contingent upon later production of the independent evidence required under MRE 801(d)(2)(E)." *Till, supra* at 794. Based on the plethora of evidence presented by the prosecution, a sufficient foundation existed for the trial court's determination regarding the admissibility of the co-conspirator statements.

B. Ineffective Assistance of Counsel

Defendant also alleges several instances of ineffective assistance of counsel. Specifically, defendant contends his trial counsel was (a) not adequately prepared for trial, (b) failed to sufficiently investigate and/or pursue his alibi defense, (c) failed to challenge the authenticity of a statement allegedly made by defendant to police before trial to preclude its admission or to secure an expert witness to challenge defendant's signature on the statement, and (d) failed to present evidence during the trial to support assertions made in his opening statement. Defendant contends that even if each of these assertions is inadequate individually to constitute ineffective assistance of counsel, their cumulative effect denied him effective counsel.

This Court's review of an unpreserved claim of ineffective assistance of counsel "is limited to mistakes apparent on the record." *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Factual findings by the trial court are reviewed for clear error and constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance "fell below an objective standard of reasonableness" under prevailing professional norms, and that this performance was so prejudicial that it denied the defendant a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2004). A defendant must also overcome the strong presumption that counsel was effective and that choices made by defense counsel constituted sound trial strategy. *Id.*; *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). A defendant must show a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. *Toma, supra* at 302-303.

Defendant first asserts that his counsel was not prepared for trial. Primarily defendant contends his counsel failed to obtain and review all of the relevant discovery materials made available by the prosecution. In support of this contention, defendant cites to a statement by the prosecutor indicating counsel had not procured a discovery packet from the prosecutor's office. However, the length of the trial as well as statements by all of the attorneys involved and the trial court indicate that discovery in this matter was particularly voluminous. Throughout the trial it

became evident that counsel for codefendants were cooperating in sharing discovery materials in order to minimize costs to both parties. Defendant's counsel consistently represented to the trial court that he was prepared to go forward at all stages of the proceedings. The only example provided by defendant in support of his contention counsel was unprepared for trial involved his inability to locate a copy of the search warrant return when questioning a police officer. Once counsel realized he was unable to find the document, he continued questioning the officer regarding other matters. Contrary to defendant's assertion on appeal, trial was not delayed as cross-examination of the police officer continued until the jury was dismissed for the day. Cross-examination of the officer resumed the following day and, at this time, counsel had a copy of the document available. Further, the prosecutor indicated that the document had been provided to counsel. Given the absence of any delay in the progress of the trial and the availability of the document for counsel's cross-examination of the witness, defendant has failed to demonstrate any prejudice resulting from the alleged lack of preparation or efforts to coordinate and share discovery with codefendant's counsel. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990).

Defendant also asserts counsel did not submit proposed jury instructions as directed by the trial court. However, the lower court record does not support this assertion. When the trial court requested the proposed jury instructions and verdict forms, defendant's counsel indicated he tendered a copy of his proposed jury instructions, which was verified by the prosecutor. Defense counsel also provided a proposed verdict form to the trial court at this time. The only omission by counsel appears to have been the failure to provide the trial court with multiple copies of these documents, which he was permitted by the trial court to rectify.

Defendant next contends his trial counsel was ineffective for having failed to timely file notice of alibi witnesses and lack of proper investigation regarding the possible testimony of these witnesses. Defendant is correct that his attorney was verbally chastised by the trial court for his failure to timely file and the improper format of his notice of alibi witnesses. However, defendant suffered no prejudice from this failure as the trial court permitted the late filing of the notice and provided assistance to counsel to assure the availability of the witnesses for trial through the issuance of bench warrants.

Defendant's trial counsel asserted that he did not obtain access to the alibi witnesses, who were the minor granddaughters of defendant's girlfriend, until after defendant's jury had been selected. Counsel indicated that he did not file the alibi notice until he had the opportunity to interview the girls and evaluate the information they possessed regarding defendant's whereabouts on the date and time of Iske's murder. Counsel indicated that the girls had initially asserted they were with defendant at an unrelated location at the time of the murder. However, as the trial progressed defendant's counsel had difficulty securing the witnesses because their mother refused to cooperate and bring them to court. The witnesses were present in court at the end of the trial when counsel became aware that the girls were now asserting that they had erred regarding the date they were with defendant and it became evident that their testimony could subject them to charges of perjury. At this point, the trial court appointed separate legal counsel

for the girls who advised them to assert their Fifth Amendment⁴ rights if called to the stand. The girls were dismissed as witnesses without providing testimony.

Although defendant's counsel filed an untimely and improperly formatted notice of alibi witnesses, defendant cannot demonstrate any prejudice that was outcome determinative. Any discussions or motions pertaining to these witnesses were conducted outside the presence of the jury. Despite counsel's dilatory behavior, the trial court permitted him to file the alibi notice and assisted in procuring the witnesses in time for trial. "Even the failure to interview witnesses does not itself establish inadequate preparation. It must be shown that the failure resulted in counsel's ignorance of valuable evidence which would have substantially benefited the accused." *Caballero, supra* at 642 (citations omitted). Counsel acted on the information he had available at the time. It was only later that the alibi witnesses asserted they were mistaken regarding the date they were with defendant, effectively negating the presentation of a viable alibi defense.

Defendant contends his trial counsel was ineffective for failing to file a motion to suppress a statement allegedly made by defendant to police. Specifically, defendant asserted that the statement purportedly derived from his second interview with police on November 16, 2005 was not authentic, denying the content of the statement and that the initials and/or signature on the document were his. On appeal, defendant's argument is disingenuous as he recognizes that a *Walker*⁵ hearing is not appropriate when a defendant is challenging the authenticity of the statement and not merely whether it was voluntarily made. *People v Shelton*, 150 Mich App 718, 724; 389 NW2d 159 (1986). Defendant further acknowledges that counsel's decision whether to file a pretrial motion falls squarely within the realm of trial strategy, which will not be second-guessed on appeal. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597NW2d 843 (1999).

In conjunction with defendant's assertion that the authenticity of this second statement should have been challenged, he contends trial counsel was ineffective in failing to secure a handwriting expert. Contrary to defendant's contention that his counsel should have sought the trial court's appointment of a handwriting expert, we note that counsel was retained and that defendant did not assert status as an indigent, precluding entitlement to a court-appointed expert witness. MCL 775.15. In addition, trial counsel indicated that the disparity in defendant's signature from prior documents was sufficiently glaring to be evident to even a layperson. Although the police officer averred that defendant voluntarily made the challenged statement, defense counsel effectively questioned this witness who ultimately acknowledged the discrepancy in the initials and signature. As a result, defendant has failed to demonstrate that the manner selected by his trial counsel to challenge the authenticity of the statement resulted in outcome-determinative prejudice, particularly given the absence of any proofs by defendant that an expert would have provided favorable testimony in support of his contention and the sufficiency of proofs affirming defendant's involvement in the crime. *LeBlanc, supra* at 578.

⁴ US Const, Am V; Const 1963, art 1, § 17.

⁵ *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).

Defendant next contends trial counsel was ineffective because he failed to present evidence supporting assertions made during his opening statement that (a) he would call a witness, Sharlie Huff, who would testify that she had overheard another man claiming to have killed Iske and seeing her laptop computer at a location, contradicting the testimony of Williams, (b) present evidence challenging the authenticity of defendant's signature on a statement purportedly made to police, and (c) defendant procured prostitutes and drugs for co-defendant Marasco as an alternative means to explain the telephone contacts between them.

Although trial counsel did not seek to admit additional documents to demonstrate the alleged signature discrepancy on defendant's second statement to police, he did provide documentary comparisons, which ultimately led to an acknowledgement by police of the handwriting disparity. Consequently, defendant's argument is specious as he fails to indicate what benefit would have been secured through the admission of additional documents given the successful questioning by counsel regarding the acknowledged signature discrepancies. Defendant further asserts trial counsel was ineffective for failing to present evidence of the alleged relationship between defendant and co-defendant Marasco. Although trial counsel indicated in opening statements that such evidence would be forthcoming, defendant has failed to rebut the presumption that the decision not to come forward with such evidence constituted trial strategy and does not set forth any argument demonstrating that the failure to do so resulted in outcome-determinative prejudice.

Defendant also contends trial counsel was ineffective for failing to call Sharlie Huff as a witness to contradict Williams' testimony regarding disposal of the laptop computer taken from Iske and that another, unrelated individual had asserted responsibility for the crime. As discussed in more detail, *infra*, in conjunction with defendant's assertion of error regarding the trial court's determination of due diligence in the unsuccessful efforts made to locate Huff, this witness was not available for trial despite concerted efforts to obtain her presence by all involved. At the beginning of trial both defense counsel sought to obtain this individual to testify and maintained a good faith belief that she would be produced. Despite Huff's absence, defense counsel was able to introduce testimony from police that information obtained from this individual was used to secure a search warrant. However, defendant is unable to demonstrate that Huff's availability at trial would have been beneficial given testimony by police that the information she provided them regarding the presence of the stolen laptop and gun used in the homicide was proven to be completely unreliable on further investigation.

Defendant contends that the cumulative effect of errors alleged at trial regarding the ineffectiveness of his counsel were so prejudicial that he was denied a fair trial. As noted by defendant, "[t]he cumulative effect of several small errors may warrant reversal even where the individual errors would not warrant reversal." *People v Hill*, 257 Mich App 126, 152; 667 NW2d 78 (2003). "It is true that the cumulative effect of several errors can constitute sufficient prejudice to warrant reversal where the prejudice of any one error would not." *LeBlanc, supra* at 591. However, as outlined, *supra*, there are no errors by counsel to aggregate, which would have denied defendant a fair trial or to cause unfair prejudice. *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003). "Because no errors were found with regard to any of the above issues, a cumulative effect of errors is incapable of being found." *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

C. Due Diligence

For his final issue on appeal, defendant contends the trial court erred in determining the prosecutor had exercised due diligence in trying to produce Huff to testify at trial. Notably, the prosecution did not list Huff as a witness in accordance with MCL 767.40a(1), and did not endorse her as a trial witness pursuant to MCL 767.40a(3). Contrary to defendant's premise for this issue, the standard of "due diligence" for excusing the prosecution from producing this witness is no longer applicable, given the amendment of MCL 767.40a. 1986 PA 46. The applicable version of MCL 767.40a now requires the prosecutor only to advise defense counsel of all *res gestae* witnesses intended to be produced for trial, MCL 767.40a(1) and (2), and "provide to the defendant, or defense counsel, upon request, reasonable assistance, including investigative assistance, as may be necessary to locate and serve process upon a witness." MCL 767.40a(5).

A review of the transcript of the due diligence hearing conducted by the trial court, demonstrates that the prosecutor and police met the higher requirement of due diligence in attempting to secure this witness. It is well recognized that the test used to prove the exercise of due diligence is whether the prosecutor put forth a good faith effort to produce the witness, "not whether increased efforts would have produced" the witness for trial. *People v Watkins*, 209 Mich App 1, 4; 530 NW2d 111 (1995). In this case, two police agencies coordinated efforts to locate this witness. Testimony indicated that Huff was a known prostitute and drug user who used several aliases and had outstanding warrants for her arrest. Both agencies ran law enforcement information network (LEIN) inquiries regarding Huff and investigated several past addresses linked to her. Police spoke with individuals at these locations in an attempt to secure updated information, albeit without success. Police patrolled an area known to be frequented by Huff, but were unable to find her. Police checked several jails, local hospitals and a morgue searching for Huff, including investigating the death of a prostitute in a fire to determine if it was Huff's body. Following the testimony of the two lead police officers coordinating the search, the trial court determined that the prosecution had made a diligent and good faith effort to locate Huff. "Under these circumstances, the prosecution clearly gave reasonable assistance to defendant to locate [Huff]. MCL 767.40a(5). Therefore, the trial court's finding of due diligence went well beyond the statutory requirement and there is no error with respect to the trial court's ruling." *People v Long*, 246 Mich App 582, 586; 633 NW2d 843 (2001) (internal citation omitted).

D. Double Jeopardy

Finally, although appellate counsel has not raised the violation of double jeopardy as an issue on appeal and the record does not reflect an objection at the time of sentencing, we raise the issue *sua sponte*. In accordance with this Court's prior ruling in *People v Williams*, 265 Mich App 68, 72; 692 NW2d 722 (2005), "double jeopardy protections are violated when a defendant is convicted of both first-degree premeditated murder and first-degree felony murder arising out of the death of a single victim." The proper remedy for this violation is to modify the conviction to denote "a single conviction for murder based on two alternative theories." *Id.* As a result, we remand this matter to the trial court for the ministerial purpose of correcting defendant's sentence.

III. Conclusion

Affirmed in part, vacated in part and remanded for correction of sentence. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra