STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY LARUE WILLIAMS,

Defendant-Appellant.

UNPUBLISHED
June 25, 2020

No. 348103
Oakland Circuit Court
LC No. 2017-264092-FC

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

PER CURIAM.

A jury convicted defendant of assault with intent to do great bodily harm less than murder, MCL 750.84,[1] felon in possession of a firearm, MCL 750.224f, felonious assault, MCL 750.82, and three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, for shooting Charles Donalson (the stepfather of defendant's grandson) during a fight at a fireworks store. Defendant raises a long list of challenges to his convictions and sentences, many of which merit no relief. However, days before oral argument in this appeal, the Michigan Supreme Court overruled a pivotal case addressing the lesser included offense issue raised in this case. We remand for a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), to consider whether defense counsel was ineffective in failing to request an instruction on the lesser included offense of assault and battery.

I. BACKGROUND

In the early morning hours of July 2, 2017, Charles Donalson visited a fireworks store with NJ, the five-year-old son of his fiancé, and his cousin, Kenneth Mullen. At the store, Donalson encountered NJ's father (Mario Jones), NJ's grandfather (defendant), and NJ's great-uncle (Derrick Williams). Donalson and Jones had been feuding for several years, ever since NJ's

[1] The jury acquitted defendant of the greater offense of assault with intent to commit murder, MCL 750.83.

mother ended her relationship with Jones and began dating Donalson. The parties presented conflicting evidence regarding who had threatened whom over the years.

On the night in question, defendant, Jones, and Williams confronted Donalson at the store. Williams struck Donalson in the head and Donalson chased Williams out of the store. As Donalson was exiting, defendant struck him in the head with a revolver. Outside, Donalson tackled Williams and started punching him. Defendant was standing behind the men and shot Donalson in the left shoulder. Defendant, Jones, and Williams then fled the scene. Surveillance cameras captured the events inside the store, but not in the parking lot.

On the night of the shooting, NJ told the police that defendant shot Donalson. NJ also identified defendant as the shooter at trial. Ronald Davis, who was working outside in a fireworks tent, provided a description of the shooter matching defendant. Donalson did not see who shot him, but testified that based on the locations of others who were present, defendant was the only person who could have shot him.

The defense argued that there was reasonable doubt regarding the identity of the shooter. The jury rejected that defense and convicted defendant as outlined above. Defendant now appeals, raising issues through appellate counsel and in a pro se brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4.

II. LESSER INCLUDED OFFENSE

The trial court instructed the jury on the charged offense of assault with intent to commit murder and the lesser included offense of assault with intent to do great bodily harm less than murder. The jury acquitted defendant of the greater offense and convicted him of the lesser. Defendant now argues that the trial court erred by failing to further instruct the jury on the lesser offense of assault and battery, and that defense counsel was ineffective for failing to request that instruction.

Trial courts may instruct only on necessarily included lesser offenses; instruction on cognate lesser offenses is not permitted. *People v Cornell*, 466 Mich 335, 354-357; 646 NW2d 127 (2002), overruled in part on other grounds by *People v Mendoza*, 468 Mich 527 (2003). In *People v Haynie*, 327 Mich App 555, 561-562; 934 NW2d 71 (2019), this Court held that assault and battery is not a necessarily included lesser offense of assault with intent to commit murder. However, on June 5, 2020, the Michigan Supreme Court reversed that portion of this Court's *Haynie* decision. Based on concessions by the prosecutor, the Court "assume[d] without deciding that assault and battery, MCL 750.81(1), is a lesser included offense of assault with intent to commit murder, MCL 750.83." *People v Haynie*, ___ Mich ___ (Docket No. 159619), at 1. The Court continued:

> A requested instruction on a lesser included offense is proper if the greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it. [*Cornell*, 466 Mich at 357.] There was evidence presented at trial that defendant had the intent necessary for assault and battery—that he either intended to commit a battery upon his mother, Patricia, or intended to make her reasonably fear an

> immediate battery. See *People v Johnson*, 407 Mich 196, 210[; 284 NW2d 718] (1979). However, the prosecutor argued that no rational view of the evidence in this case supports a conviction for anything less than assault with intent to commit great bodily harm less than murder. Whether the instruction on the lesser included offense should have been given thus turns on whether a rational view of the evidence supported the conclusion that defendant lacked both the intent to kill and the intent to do great bodily harm. See *Cornell*, 466 Mich at 345. Patricia testified that she believed defendant lacked even the intent to commit great bodily harm against her—he had "gone out of his way his whole life, even as a toddler, to keep [her] from any kind of pain." Defendant's sister testified that defendant and Patricia had a loving relationship, and there was no testimony that defendant and Patricia had any kind of falling out that might have motivated an intent to seriously harm or murder her. Defendant's statements to Patricia during the assault suggested that his intended purpose was to help his mother by ridding her of the devil—"[M]om, I've got to save you, Lucifer has you . . . ." Because "believability is for the jury to decide, not appellate judges," *People v Silver*, 466 Mich 386, 394[; 646 NW2d 150] (2002), the jury could have chosen to believe this testimony. A rational view of these facts regarding defendant's intent would allow a jury to conclude that defendant committed assault and battery.

This case is distinguishable from *Haynie* because defense counsel in this case did not request the lesser included offense instruction.

> Although a trial judge may "instruct sua sponte on a lesser included offense . . . if the evidence adduced at trial would warrant conviction of the lesser charge and defendant has been afforded fair notice of those lesser included offenses," *People v Chamblis*, 395 Mich 408, 417; 236 NW2d 473 (1975), he is not required to do so unless the defendant is charged with first-degree murder. *People v Henry*, 395 Mich 367, 374; 236 NW2d 489 (1975); *People v Jenkins*, 395 Mich 440; 236 NW2d 503 (1975). [*People v Jones*, 409 Mich 552, 562; 297 NW2d 115 (1980).]

The trial court was not required to sua sponte give an instruction that was not requested and cannot be deemed to have erred in failing to do so. Accordingly, we are left to consider defendant's alternate argument—that defense counsel was ineffective for failing to request an assault and battery instruction.

Defendant preserved his claim of ineffective assistance of counsel for appellate review by filing in this Court a motion to remand to the trial court for a *Ginther* hearing. See *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). This Court preliminarily denied defendant's motion, pending review by the case call panel. We now remand to the trial court to conduct such a hearing, but limited to the issue of whether defense counsel was constitutionally ineffective in failing to request an assault and battery instruction.

To establish ineffective assistance of counsel, a 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 the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant has the burden of demonstrating factual support for his ineffective-assistance claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). "In examining whether defense counsel's performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that counsel's performance was born from a sound trial strategy." *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). To establish prejudice, "[t]he defendant 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." *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

We cannot discern on this record whether defense counsel erred in failing to request an assault and battery instruction. We note that defendant's trial took place in 2017, a year before this Court held in *Haynie*, 327 Mich App at 561-562, that assault and battery is not a lesser offense of assault with intent to murder. As such, we know that counsel did not rely on *Haynie* in deciding against requesting an assault and battery instruction. And, as explained by the dissent in *Haynie*, 327 Mich App at 568-570 (GLEICHER, J., dissenting), there was a legal argument to be made in support of requesting the instruction. Specifically, although this Court held in *People v Ross*, 73 Mich App 588, 592; 252 NW2d 526 (1977), that assault and battery is not a necessarily included lesser offense of assault with intent to murder, *Ross* relied on a test outlined in *People v Ora Jones*, 395, Mich 379; 236 NW2d 461 (1975), that was overruled in *Cornell*, 466 Mich 335. *Haynie*, 327 Mich App at 568 (GLEICHER, J., dissenting). After the 2002 opinion in *Cornell*, Michigan courts must resort to the test of *Hanna v People*, 19 Mich 316 (1869), in determining whether something qualifies as a necessarily included lesser offense.

On remand, the parties may explore defense counsel's legal grounds for requesting an assault and battery instruction, as well as any potential strategic reasons not to request the instruction. The parties may develop a record regarding whether an assault and battery instruction would be supported by a rational view of the evidence. After these considerations are fleshed out, the trial court can determine in the first instance whether defense counsel's performance fell below an objective standard of reasonableness.

Even if the trial court finds that defense counsel acted reasonably, we direct the court to consider the prejudicial effect of the lack of the instruction. Whether the instruction is consistent with a rational view of the evidence will also be relevant to this consideration. We also emphasize the effect of defendant's conviction on a lesser included offense of the original charged count. When a jury "was given the option of an intermediate lesser offense . . . and rejected it in favor of the greater offense," there is no prejudice from the failure to give an instruction on an even lower level included offense. *People v Wilson*, 265 Mich App 386, 395-396; 695 NW2d 351 (2005), citing *Cornell*, 466 Mich at 365 n 19. The jury in this case, however, acquitted defendant of the greater offense and convicted of the lesser.

III. IMPEACHMENT OF DONALSON

Although we are remanding for a Ginther hearing, we take this time to consider the remainder of defendant's appellate challenges, none of which merit relief.

On cross-examination at trial, defense counsel elicited evidence that Donalson had previously been convicted of home invasion. Defendant argues that defense counsel should have further impeached Donalson with evidence that he has a prior conviction of third-degree retail fraud. Unlike defendant's challenge to counsel's failure to request an assault and battery instruction, this issue can be reviewed on the existed record.

Defendant attempted to expand the record on appeal by presenting an iChat report indicating that defendant was convicted of misdemeanor third-degree retail fraud in 2006. Even with this evidence, however, defendant is not entitled to relief. The conviction would not have been admissible for impeachment purposes.

MRE 609(a) provides for the admission of certain prior convictions for impeachment purposes. However, "[e]vidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date." MRE 609(c). The iChat form indicates that defendant was convicted in 2006, 12 years before the trial in the current matter. It appears that Donalson received a probationary sentence only and was never confined. Accordingly, the conviction was inadmissible and counsel cannot be deemed ineffective for failing to present it. See *People v Crew*, 299 Mich App 381, 401; 829 NW2d 898 (2013).

IV. JURY INSTRUCTIONS REGARDING CREDIBILITY

At trial, the court read to the jury the general instruction on how to evaluate witness credibility—M Crim JI 3.6. Defendant asserts that the court should have read M Crim JI 5.1 (impeachment of a witness with a prior conviction) as well, and contends that counsel was ineffective for failing to request it. The omitted instruction, M Crim JI 5.1, would have further provided:

> (1) You have heard that one witness, _____, has been convicted of a crime in the past.
>
> (2) You should judge this witness's testimony the same way you judge the testimony of any other witness. You may consider [his / her] past criminal convictions, along with all the other evidence, when you decide whether you believe [his / her] testimony and how important you think it is.

M Crim JI 5.1 certainly would have been applicable in this case as the defense presented evidence that Donalson had been convicted of home invasion in the past. We perceive no strategic reason for failing to request this instruction, and if defendant succeeds in securing a new trial, defense counsel can request this instruction at that time. However, on this record defendant cannot establish prejudice. Defense counsel emphasized Donalson's prior conviction during cross-examination. Although M Crim JI 5.1 would have specifically added that the jury could consider Donalson's prior conviction as part of the general credibility assessment, the general instructions

regarding witness credibility were broad enough to allow the jury to consider this information. Accordingly, the omission of the instruction did not affect defendant's substantial rights or affect the outcome of these proceedings. See *Johnson v Corbet*, 423 Mich 304, 327-332; 377 NW2d 713 (1985).

V. PRIOR BAD ACTS EVIDENCE

Defendant next argues that evidence of his prior bad acts was erroneously introduced at trial, contrary to MRE 404(b)(1), and without the prosecution providing pretrial notice of its intent to offer the evidence, contrary to MRE 404(b)(2). Defendant further argues that the evidence was irrelevant and unduly prejudicial. We reject these claims of evidentiary error because it was *defense counsel*, not the prosecutor, who elicited the challenged testimony.

During cross-examination of Domynique Sanford (NJ's mother and defendant's former daughter-in-law) defense counsel engaged in the following inquiry:

> *Q.* How would you describe your relationship with the Defendant, Tony, while you were married to his son?
>
> *A.* Well, when [defendant] first came home from prison, I thought everything was okay between us and then me and [Jones] would have arguments and [Jones's] phone pocket dialed me and Tony was encouraging—I'm sorry, [defendant] was encouraging [Jones] to beat me.
>
> *Q.* The Defendant was encouraging him—
>
> *A.* Yes. Yes.
>
> *Q.* And why do you think he was saying that?
>
> *A.* I heard it out of his—I don't know why he said it, but [defendant] was encouraging [Jones] to beat me and then two weeks prior to that, [defendant] was staying across from us in these·apartments. Prior to that, [defendant] jumped on the woman that he was living with there and she put him out.
>
> *Q.* Okay. My original question to you was how would you describe the relationship between you—
>
> *A.* He doesn't like me.
>
> *Q.* —excuse me. Let me finish and I'll let you answer.
>
> What was the relationship between you and the Defendant?
>
> *A.* He don't like me.
>
> *Q.* All right. And so you really—really didn't have a father/daughter-in-law kind of a relationship, there was no relationship?

A. I thought it was like that in the beginning and then like I said again, he—he feels like if the woman doesn't do what the man says, then there's a problem and that where me and [Jones's] whole conflict came in at.

Q. All right.

A. [Defendant] is a put your hands on the woman to get what you want from her type of guy.

Sanford did testify regarding defendant's prior bad acts of domestic violence and encouraging domestic violence. The prosecution could not provide notice, however, as the evidence was not offered by the prosecution.

Defendant primarily argues that defense counsel was ineffective for asking Sanford questions that led to her offering the problematic testimony. Trial counsel's decisions concerning how to question a witness are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). And the evidence came into the record as an unexpected answer to a question posed by defense counsel. Counsel was merely trying to show that Sanford and defendant had a poor relationship, which was relevant to show her bias against defendant. Rather than objecting to Sanford's testimony, which may have highlighted the testimony for the jury, counsel refocused his questioning to the specific subject of Sanford's relationship with defendant. Ultimately, Sanford's testimony served to demonstrate her dislike of defendant, suggesting bias. Accordingly, defendant cannot establish that counsel was ineffective.

VI. COURT COSTS

Finally, through counsel, defendant contends that the trial court unlawfully assessed court costs of $200 because the costs are an unconstitutional tax. Defendant acknowledges that his arguments were rejected by this Court in *People v Cameron*, 319 Mich App 215, 228-229, 231, 235; 900 NW2d 658 (2017). Although defendant argues that *Cameron* was wrongly decided, we are bound to follow that decision. MCR 7.215(J)(1). Therefore, we reject this claim of error.

VII. DEFENDANT'S STANDARD 4 BRIEF

Defendant also raises a series of challenges in pro per in a Standard 4 brief. None of these challenges merit relief, either.

A. JURY COMPOSITION

Defendant, who is African-American, argues that he is entitled to a new trial because African-Americans were underrepresented in his jury venire, in violation of his right to equal protection and his Sixth Amendment right to be tried by a jury drawn from a fair cross-section of the community. Defendant objected to the composition of the venire shortly before the jury returned its verdict, but did not raise a timely objection before the jury was impaneled and sworn. Therefore, the issue is unpreserved, *People v Taylor*, 275 Mich App 177, 184; 737 NW2d 790 (2007), and our review is limited to plain error affecting substantial rights. *Carines*, 460 Mich at 763-764.

Defendants are entitled to an impartial jury drawn from a fair cross-section of the community, US Const, Am VI, but that does not mean a "jury that exactly mirrors the community." *People v Howard*, 226 Mich App 528, 532-533; 575 NW2d 16 (1997). "To establish a prima facie violation of the fair cross-section requirement, a defendant must show that a distinctive group was underrepresented in his venire or jury pool, and that the underrepresentation was the result of systematic exclusion of the group from the jury selection process." *People v Smith*, 463 Mich 199, 203; 615 NW2d 1 (2000).

The record does not support defendant's claim that African-Americans were underrepresented on his jury. Defendant was tried in Oakland County, in which approximately 13% of the population is African-American. Two of the 14 jurors who sat on defendant's jury were African-American. This percentage—14.29%—approximates the asserted percentage of African-Americans in Oakland County. Therefore, defendant has not shown that his actual jury underrepresented the African-American population in Oakland County.

Defendant also has not shown that any alleged underrepresentation was due to systematic exclusion. In a factually similar case, this Court rejected a defendant's fair cross-section challenge, stating:

> Defendant satisfies the first prong of the *Duren/Hubbard* test.[2] "African-Americans are considered a constitutionally cognizable group for Sixth Amendment fair-cross-section purposes." *Hubbard*, [217 Mich App] at 473. However, neither the second nor third prong is satisfied. "[T]he second prong is satisfied where it has been shown that a distinctive group is substantially underrepresented in the jury pool." *Id.* at 474. However, like the defendant in [*Howard*, 226 Mich App at 533], this defendant asserts that African-Americans were underrepresented in his particular array, but presents no evidence on jury venires in general. "Merely showing one case of alleged underrepresentation does not rise to a 'general' underrepresentation that is required for establishing a prima facie case." *Id.*
>
> Even if defendant had satisfied the second prong of the test, he has clearly failed to satisfy the third prong, which requires him to show that any underrepresentation is due to systematic exclusion. *Hubbard*, [217 Mich App] at 481. Defendant simply argues that "this prong will be met if a hearing is held on remand," and points out that "of the 50 prospective jurors, only two were African-American," while "nine percent of Kalamazoo County is African-American." "[I]t is well settled that systematic exclusion cannot be shown by one or two incidents of a particular venire being disproportionate." *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). Furthermore, "[w]hile a criminal defendant is entitled to an impartial jury drawn from a fair cross section of the community, he is not entitled to a petit jury that exactly mirrors the community," and a "bald

[2] *Duren v Missouri*, 439 US 357; 99 S Ct 664; 58 L Ed 2d 579 (1979); *People v Hubbard*, 217 Mich App 459; 552 NW2d 493 (1996), overruled in part on other grounds by *People v Bryant*, 491 Mich 575, 617-618 (2012), and *People v Harris*, 495 Mich 120, 123 (2014).

> assertion" that systematic exclusion must have occurred is insufficient to make out a claim of systematic exclusion. *Id*. at 736-737. Defendant has the burden of demonstrating a problem inherent within the selection process that results in systematic exclusion. Defendant has failed to do so. [*People v Williams*, 241 Mich App 519. 526-527; 616 NW2d 710 (2000).]

Similarly, in this case, defendant has not offered any evidence of jury venires in general in Oakland County, or any evidence that any underrepresentation of African-Americans is due to systematic exclusion. Accordingly, defendant has not established a prima facie violation of the fair cross-section requirement.

B. PERJURED TESTIMONY

Defendant also contends that he is entitled to a new trial because one of the prosecution witnesses recanted his testimony after the trial. Because defendant did not raise this issue in a motion for a new trial in the trial court, the issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764.

At trial, the prosecution called Eddie Owens, who testified that he was defendant's cellmate in jail and claimed that defendant admitted to him that he had shot Donalson. Defendant asserts that after his trial, he received a letter from Owens, claiming that he was coerced into falsely testifying against defendant. Defendant argues that the letter is newly discovered evidence that entitles him to a new trial. Although defendant refers to the letter as an affidavit, the letter does not qualify as such because it is not notarized as a statement made under oath. See *People v Sloan*, 450 Mich 160, 177 n 8; 538 NW2d 380 (1995), overruled in part on other grounds by *People v Hawkins*, 468 Mich 488, 502 (2003), and *People v Wager*, 460 Mich 118, 123 (1999). At best, the letter is an offer of proof, purportedly from Owens.

To obtain a new trial

> on the basis of newly discovered evidence, a defendant must show that: (1) the evidence itself, not merely its materiality, is newly discovered; (2) the newly discovered evidence is 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. [*People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) (quotation marks and citation omitted).]

Newly discovered evidence may be grounds for granting a new trial even if it could be used only for impeachment purposes, as long as it satisfies the four-part *Cress* test. *People v Grissom*, 492 Mich 296, 299-300; 821 NW2d 50 (2012). "[A] material, exculpatory connection must exist between the newly discovered evidence and significantly important evidence presented at trial." *Id*. at 300. The newly discovered evidence "may be of a general character and need not contradict specific testimony at trial," but it must make a different result probable on retrial. *Id*.

Several factors weigh against granting defendant a new trial on the basis of Owens's letter. First, recantation testimony is considered exceedingly unreliable, suspect, and untrustworthy when offered as newly discovered evidence. *People v Johnson*, 502 Mich 541, 578; 918 NW2d 676 (2018). In this case, defendant has offered only an unsworn letter, purportedly authored by Owens,

in support of this claim. The allegations in the letter are not supported by any affidavit from Owens himself.

Second, Owens's testimony was not the linchpin of the contested issue in this case—the shooter's identity. Donalson and NJ provided eyewitness accounts and identified defendant as the shooter. Davis, a disinterested witness who was working at the fireworks store on the night of the shooting, described the shooter consistent with defendant's appearance. In addition, a bullet fragment recovered from Donalson's body and the absence of shell casings at the scene were consistent with Donalson having been shot with a revolver. Surveillance footage inside the store showed defendant holding a revolver. Owens's testimony was superfluous; the prosecution could have proved its case without it. Accordingly, defendant is not entitled to a new trial.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also raises several additional claims of ineffective assistance of counsel in his Standard 4 brief. Defendant contends that defense counsel was ineffective for not objecting to many instances of purported inadmissible hearsay. MRE 801(c) defines hearsay as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is not admissible unless it falls within an exception to the hearsay rule. MRE 802; *People v McDade*, 301 Mich App 343, 353; 836 NW2d 266 (2013).

Defendant argues that Sanford offered inadmissible hearsay when she described overhearing threats made by defendant toward her family, and commented that she had heard "on the streets" that Jones and defendant had purchased a gun. To the extent that Sanford described threatening statements made by defendant, those statements were admissions by a party-opponent and are exempt from the definition of hearsay. MRE 801(d)(2). Further, to the extent that Sanford testified that people "on the streets" had said that defendant and Jones had purchased a gun, the testimony was offered to explain why Sanford was fearful when Donalson did not return from the fireworks store, not to prove the truth of the matter asserted.

Defendant also argues that Donalson provided hearsay testimony when he described the initial verbal exchange between himself and Jones in the fireworks store. This testimony was not offered to prove the truth of the matters asserted, but to explain how the situation began and evolved into a physical confrontation.

Defendant also challenges the following testimony by Donalson:

> *Q.* I know your attention was not on [NJ] during this whole thing, but did you observe how he was reacting during this whole thing?
>
> *A.* Yes. He kept saying "Daddy stop, granddaddy stop, Chuck stop."
>
> *Q.* And at that time would you—how would you describe him; was he crying at that time?
>
> *A.* Yes, he was crying and very distraught.

Q. And obviously upset at what he was seeing?

A. He was very upset, yeah.

According to this testimony, NJ's statements were made as he witnessed the evolving confrontation between his father, grandfather, stepfather, and great-uncle, and Donalson's description of the child substantiates that he was emotionally overwhelmed. NJ's statements qualified for admission as an excited utterance under MRE 803(2), the hearsay exception for "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

Lastly, defendant argues that Donalson's cousin, Kenneth Mullen, provided inadmissible hearsay when he testified that a worker at the fireworks stand told them that they had to go inside the store before purchasing fireworks in the tent. Mullen's testimony was not offered to prove the truth of the statement, but to explain why he and Donalson entered the store. Accordingly, it was not hearsay.

In sum, defendant has not shown that any of the challenged testimony involved inadmissible hearsay. Any hearsay objection would have been futile and counsel cannot be deemed ineffective for failing to object. See *Crews*, 299 Mich App at 401.

Defendant next argues that defense counsel was ineffective for not adequately impeaching witnesses with prior inconsistent statements. First, defendant complains that defense counsel did not impeach Sanford after she denied on cross-examination that Donalson carried a gun or sold drugs. Although defendant claims that counsel could have impeached Sanford on these points by using her prior recorded statement to the police, he has not offered any evidence that these alleged prior inconsistent statements existed. Therefore, defendant has not met his burden of demonstrating the necessary factual predicate for this claim. *Hoag*, 460 Mich at 6.

Second, defendant complains that counsel failed to impeach Sanford with her prior inconsistent statements regarding the type of vehicle Jones drove. The record does not support this claim. On the contrary, the record discloses that defense counsel cross-examined Sanford on this subject, including by referencing her prior statements to the police. Defendant appears to suggest that counsel should have shown the jury the video of Sanford's actual recorded police statement. However, counsel's decision regarding how to question Sanford was a matter of trial strategy, which we evaluate for reasonableness. *Rockey*, 237 Mich App at 76. Defendant has not overcome the presumption that counsel's manner of cross-examination was reasonable as it accomplished the desired goal of informing the jury of Sanford's prior police statements regarding the vehicle Jones was driving at the time of the incident. There is no reasonable probability that the outcome of defendant's trial would have been different if the jury had viewed the video of Sanford's recorded statement that contained this same information.

Defendant also complains that counsel failed to develop an alleged inconsistency with Sanford's testimony that she tried to call Donalson when he did not return from the store. During her testimony, Sanford explained that she and Donalson shared one cell phone, which Donalson did not take with him when he, Mullen, and NJ left. Therefore, she used their shared phone to call

Mullen's phone. Defendant cites no prior inconsistent statement and any claim that Sanford could not have called Donalson was explained away.

Next, defendant argues that defense counsel was ineffective for not moving to have NJ declared incompetent as a witness, and for not more aggressively impeaching him with evidence of inconsistencies between his testimony and other evidence. "All witnesses are presumed . . . competent to testify." *People v Watson*, 245 Mich App 572, 583; 629 NW2d 411 (2001). "The test of competency is . . . whether the witness has the capacity and sense of obligation to testify truthfully and understandably." *Id.* Before NJ testified, the trial court questioned him to determine his competency as a witness. His responses established that he understood the difference between "the truth" and "not the truth," and that he was aware of his obligation to answer all questions truthfully. Defendant argues that there were inconsistencies or inaccuracies in some of NJ's testimony at trial. However, "[w]here the trial court examines a child witness and determines that the child is competent to testify, a later showing of the child's inability to testify truthfully reflects on credibility, not competency." *Id.* (quotation marks and citation omitted). Therefore, any perceived inconsistencies with NJ's testimony were for the jury to resolve. And counsel was not ineffective for not requesting that NJ be declared incompetent.

Defendant complains that defense counsel did not more aggressively cross-examine NJ to explore the perceived inconsistencies with his testimony. Again, counsel's decision regarding how to question the witness was a matter of trial strategy. *Rockey*, 237 Mich App at 76. Counsel's strategy was to highlight perceived inaccuracies or inconsistencies between NJ's testimony and other evidence in closing argument, and to argue that NJ's testimony was not credible because he was mistaken about what he observed. This strategy was not unreasonable, especially considering that more aggressive questioning of a child witness could have alienated the jury. Defendant has not overcome the presumption of reasonable trial strategy with respect to counsel's cross-examination of NJ and counsel's decisions on how to deal with his testimony.

Defendant next asserts that defense counsel improperly admitted defendant's guilt when he remarked in opening statement that "[w]e think everybody had a gun in this situation and we can't prove what they did with their guns, because they left." When a defendant is charged with several offenses, it can be a reasonable strategy for counsel to concede some of the charges while maintaining the defendant's innocence on others. *People v Matuszak*, 263 Mich App 42, 60-61; 687 NW2d 342 (2004). As there was video evidence showing defendant in possession of a gun, it was not unreasonable to concede that point and instead deny that defendant used his gun to shoot Donalson.

D. PROSECUTORIAL MISCONDUCT

Defendant argues that he is entitled to a new trial because of improper statements by the prosecutor in opening statement and closing argument and contends that defense counsel was ineffective for failing to object. Defendant failed to preserve his challenges by raising contemporaneous objections. See *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Generally, "[i]ssues of prosecutorial misconduct are reviewed de novo to determine whether the defendant was denied a fair and impartial trial." *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). "Where a defendant fails to object to an alleged prosecutorial

impropriety, the issue is reviewed for plain error." *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

When evaluating allegations of prosecutorial misconduct, the test is whether a defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). "Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context." *Id*. at 64.

Defendant challenges the evidentiary support for several comments in the prosecutor's opening statement. During an opening statement, a prosecutor is permitted to state facts that he intends to prove at trial. *People v Meissner*, 294 Mich App 438, 456; 812 NW2d 37 (2011). If the prosecutor made the statements in good faith and the statements did not overly prejudice the defendant, it does not constitute error if the evidence is not ultimately presented. *People v Wolverton*, 227 Mich App 72, 75-77; 574 NW2d 703 (1997).

Defendant argues that the prosecutor improperly stated that defendant hid a gun underneath his clothing without qualifying those comments by citing the supporting evidence. This argument is without merit because the prosecutor made only factual statements in his opening statement (i.e., that a gun was hidden in defendant's clothing) without going into actual argument (i.e., arguing that defendant intentionally hid the gun in his clothing). Even if the evidence did not ultimately establish that defendant intentionally hid a gun on his person, there is no indication that the prosecutor acted in bad faith in phrasing his statement as he did.

Defendant also argues that the prosecutor improperly remarked during opening statement that the video evidence would (1) show him with a gun, (2) show that he pulled the gun from underneath his clothing, and (3) depict that he struck Donalson with the gun. Defendant misinterprets the prosecutor's remarks. The prosecutor merely remarked that the video would show defendant holding a revolver in his right hand at one point during the incident. The prosecutor's other statements referred to facts that would be established by witness testimony. The remarks were supported by evidence later presented at trial. Therefore, the remarks were not improper.

Defendant complains about factual inaccuracies in additional portions of the prosecutor's opening statement, specifically that the surveillance footage did not capture all the events described by the prosecutor. However, all of the prosecutor's statements were supported, if not by the video, by witness testimony. Thus, the prosecutor had a good-faith basis for each of the statements and defendant cannot establish that he was prejudiced by any of the remarks.

The prosecutor also stated that the video evidence showed that NJ was outside the store when Williams and Donalson were fighting. Defendant argues that this was inaccurate because NJ later testified that he was inside the store when the gunshots were fired. Both sides acknowledged that NJ was incorrect when he described being inside the store at the time of the shooting. Indeed, defense counsel referred to that inaccuracy to support an argument that NJ was mistaken about what he saw, and therefore, his testimony was not credible. Because it was defendant's position that NJ's testimony on this point was inaccurate, defendant cannot rely on that testimony to establish that the prosecutor's remark during opening statement was improper.

Defendant also challenges several portions of the prosecutor's closing argument. In closing, prosecutors "are free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Defendant first argues that the prosecutor improperly stated that Donalson was shot twice when the witnesses described hearing only one gunshot. The prosecutor did not state that Donalson had been shot twice, but only stated that he was treated for two gunshot wounds. That was not inaccurate. Testimony indicated that Donalson had two gunshots wounds. Donalson's treating physician testified that Donalson had two puncture wounds consistent with gunshot wounds, but only a single bullet was found. The doctor opined that one bullet might have caused both injuries. The prosecutor's argument was consistent with the evidence that Donalson was treated for two separate wounds.

Defendant also contends that the prosecutor improperly argued that "[n]ow, you know the Defendant is the one that fired the shot and you know that through a number of witnesses." This statement was also supported by the evidence. NJ expressly identified defendant as the shooter, Donalson testified that defendant was the only person in the right position to be the shooter, and Davis's description of the shooter matched defendant.

Defendant argues that the prosecutor improperly stated that defendant used a revolver to shoot Donalson. The prosecutor's arguments were supported by the video evidence, together with witness testimony describing the characteristics of a revolver and the likelihood that the weapon involved was a revolver. Accordingly, there was no error.

Defendant again contends that the prosecutor improperly argued that NJ was outside the store at the time of the shooting when he stated:

> [W]hen you watch the video if you care to see it again, you see young [NJ] is outside watching at the time this happens. He's right there. Right there. Granddaddy Tony [defendant] shot [Donalson] and the evidence shows that.

As discussed earlier, although NJ testified that he was inside the store at the time of the shooting, the parties agreed that he was outside the store at that point. Despite NJ's testimony, it was not improper for the prosecutor to argue that other evidence showed NJ's location outside the store at the time of the shooting.

And as the prosecutor made no improper statements in the opening or closing, defense counsel had no reason to object and cannot be deemed ineffective for remaining silent. See *Crews*, 299 Mich App at 401.

E. CUMULATIVE ERROR

Defendant argues that the cumulative effect of each of the errors raised in his Standard 4 brief support a new trial. Although a single error in a trial may not necessarily provide a basis for granting a new trial, the cumulative effect of multiple errors may add up to error requiring reversal.

People v Anderson, 166 Mich App 455, 472-473; 421 NW2d 200 (1988). Because defendant has not established any individual errors through his Standard 4 brief, there can be no cumulative effect to support reversal of his convictions. *Dobek*, 274 Mich App at 106.

We remand to the trial court for a *Ginther* hearing. We retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ David H. Sawyer
/s/ Patrick M. Meter

Court of Appeals, State of Michigan

ORDER

People of MI v Anthony Larue Williams

Docket No. 348103

LC No. 2017-264092-FC

Elizabeth L. Gleicher
Presiding Judge

David H. Sawyer

Patrick M. Meter
Judges

The motion to remand is GRANTED. This case is REMANDED to the trial court for an evidentiary hearing and decision whether defendant was denied the effective assistance of counsel. *People v Ginther*, 390 Mich 436 (1993). Proceedings on remand are limited to the issues raised in the motion to remand. This Court Retains Jurisdiction.

Defendant shall initiate the proceedings on remand within 14 days of the date of this order. The time for further proceedings in this appeal shall begin to run on the issuance of an order in the trial court that concludes the remand proceedings. However, if defendant fails to file a motion to initiate the proceedings within the time provided, the time for further proceedings in this appeal shall begin to run at the conclusion of that 14-day period. Defendant shall file with this Court a copy of any motion and supporting brief filed in the trial court, and defendant shall file a copy of any order entered within 14 days after entry.

The trial court shall hear and decide the matter within 56 days of the date of this order and shall make an appropriate determination on the record.

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

6/25/2020
Date

Chief Clerk