Order

Michigan Supreme Court
Lansing, Michigan

November 28, 2023

163990

Elizabeth T. Clement,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 163990
COA: 352830
Wayne CC: 19-006172-FC

MAURICE DESHAUN McNEELY,
Defendant-Appellant.

_______________________________________/

By order of May 31, 2022, the application for leave to appeal the December 16, 2021 judgment of the Court of Appeals was held in abeyance pending the decisions in *People v Posey* (Docket No. 162373) and *People v Stewart* (Docket No. 162497). On order of the Court, *Posey* having been decided on July 31, 2023, 512 Mich ___ (2023), and *Stewart* having been decided on July 31, 2023, 512 Mich ___ (2023), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals to the extent that it is inconsistent with our decision in *Posey* and REMAND this case to that court for reconsideration in light of *Posey*. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

We do not retain jurisdiction.

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.

November 28, 2023

Clerk

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If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 16, 2021
v	No. 352830 Wayne Circuit Court
MAURICE DESHAWN MCNEELY, Defendant-Appellant.	LC No. 19-006172-01-FC

Before: CAVANAGH, P.J., and SERVITTO and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317,[1] felon in possession of a firearm, MCL 750.224f(1), and two counts of possession of a firearm during the commission of a felony, second offense, MCL 750.227b. The trial court sentenced defendant as a third-offense habitual offender, MCL 769.11, to concurrent prison terms of 65 to 100 years for the murder conviction, and 2 to 10 years for the felon-in-possession conviction, to be served consecutive to two five-year terms of imprisonment for the felony-firearm convictions. We affirm.

Defendant's convictions arise from the fatal shooting of Martis James at a street party in Detroit late on July 4, 2019. At trial, the prosecutor argued that, after arriving at the party, defendant got into a car with friends. At one point, the victim and another man were involved in a confrontation that ended soon after it started. Afterward, defendant left the car, approached the victim, and made a comment to him. The victim responded by remarking that he did not know defendant. At that point, defendant pulled a gun from his pocket, shot the victim once in the chest, and then fled the scene. Defendant was later arrested in West Virginia.

At trial, the defense argued that defendant was misidentified as the shooter. The defense argued that the witnesses' testimony was not credible and inconsistent, and that they could be "covering the real shooter." In particular, the defense highlighted that only one shell casing was

[1] Defendant was charged with open murder, and the jury convicted him of second-degree murder.

found at the scene, but five gunshots were audible on a 911 recording, and that the police did not locate key witnesses, including the man who fought with the victim before the shooting.

I. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he is entitled to a new trial because defense counsel's representation at trial was ineffective. "Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law." *People v Solloway*, 316 Mich App 174, 187; 891 NW2d 255 (2016). Because defendant did not move for a new trial or a *Ginther*[2] hearing in the trial court, and because this Court denied his motion to remand, our review of defendant's ineffective-assistance claim is limited to mistakes apparent on the record. See *People v Abcumby-Blair*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 347369); slip op at 8; *Solloway*, 316 Mich App at 188. "To demonstrate ineffective assistance of counsel, a defendant must show that his or her attorney's performance fell below an objective standard of reasonableness under prevailing professional norms and that this performance caused him or her prejudice." *People v Nix*, 301 Mich App 195, 207; 836 NW2d 224 (2013). "To demonstrate prejudice, a defendant must show the probability that, but for counsel's errors, the result of the proceedings would have been different." *Id*. "A defendant must meet a heavy burden to overcome the presumption that counsel employed effective trial strategy." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

A. WITNESS CONDUCT

Defendant argues that defense counsel failed to properly address witness Corvel James's "inflammatory outburst" after James was called as a witness and was on his way to the witness stand. Although defense counsel moved to disqualify the witness, defendant now argues that counsel should have moved for a mistrial, or requested that the trial court either question the jurors or provide a curative instruction. We disagree.

Defendant has failed to demonstrate that a mistrial was warranted. 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). Initially, defendant appears to overstate the extent of Corvel's conduct. Although defendant describes Corvel's conduct as involving an "inflammatory outburst," after defendant moved to disqualify Corvel, the trial court agreed that the witness "provided an angry stare" at defendant, but clarified that "it wasn't an aggressive gesture." Then, in response to defense counsel's statement that the court's "deputies had to step in and, and restrain him," the court again clarified that they did not "have to," but they "did approach him to make sure that there wasn't any incident." Corvel did not make any statements to defendant, and his objectionable conduct of giving "an angry look" was immediately halted. The trial court noted that the jury had observed what happened, and agreed "they're probably going to conclude that" Corvel "is very angry with"

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[2] *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

defendant.[3] However, the trial court found that Corvel's behavior was not cause for him to be disqualified as a witness, and the matter could be remedied by instructing him how to conduct himself on the stand. Given the trial court's comments and its denial of defendant's request to disqualify Corvel as a witness, there is no reasonable probability the court would have concluded that the objectionable behavior rose to the level of warranting a mistrial. Therefore, defense counsel's failure to move for a mistrial was not objectively unreasonable, nor can defendant demonstrate that he was prejudiced by counsel's failure to request a mistrial. "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

While it may have been reasonable for defense counsel to have asked the court to question the jurors about the potential influence of Corvel's conduct on their impartiality or request a curative instruction, especially since the trial court stated that it would entertain such a request, counsel's decision whether to pursue these options was a matter of trial strategy. Counsel reasonably may have preferred not to further highlight the matter before the jury. Moreover, there is no reasonable probability that counsel's failure to pursue these options affected the outcome of defendant's trial. Again, the record does not support that the objectionable conduct was as egregious as defendant suggests. Corvel did not make any statements to or about defendant, but only gave him an "angry look," which, as the trial court observed, could lead the jury to believe that he was angry with defendant. In its final instructions, the trial court instructed the jury that it was not to let sympathy or prejudice influence its decision, that it was to decide the case only on the basis of the properly admitted evidence, and that the jury was to follow the court's instructions. Juries are presumed to have followed their instructions. *People v Breidenbach*, 489 Mich 1, 13; 798 NW2d 738 (2011). Defendant has not presented any basis for overcoming the presumption that the jury followed these instructions. Consequently, defendant's claim of ineffective assistance of counsel on this basis must fail.

B. EXPERT TESTIMONY

Next, defendant argues that defense counsel was ineffective for failing to object "on all possible grounds" to the admission of Detroit Police Detective James Quinn-Johnson's expert testimony and supporting exhibits. Although counsel raised objections to Detective Quinn-Johnson's testimony, defendant essentially argues that his challenges were not adequate. We disagree. Again, our review of this issue is limited to mistakes apparent on the record. *Solloway*, 316 Mich App at 188.

The trial court qualified Detective Quinn-Johnson as an expert in "cell call detailed records and tower mapping." Detective Quinn-Johnson provided cell phone tracking testimony that placed defendant in a particular general area before and after the 911 call that reported the shooting. He explained that he used the cell phone tower tracking information to determine "the general area" of a phone that was linked to defendant at a particular time, but explained that cell tower information could not be used to pinpoint a specific location of a phone.

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[3] Corvel was the victim's cousin, claimed to have been present when defendant shot the victim, and said he tackled defendant after the shooting.

"[T]he determination regarding the qualification of an expert and the admissibility of expert testimony is within the trial court's discretion." *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). MRE 702 governs the admissibility of expert testimony and provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

MRE 702 requires "a court evaluating proposed expert testimony [to] ensure that the testimony (1) will assist the trier of fact to understand a fact in issue, (2) is provided by an expert qualified in the relevant field of knowledge, and (3) is based on reliable data, principles, and methodologies that are applied reliably to the facts of the case." *People v Kowalski*, 492 Mich 106, 120; 821 NW2d 14 (2012). This inquiry, however, is a flexible one and must be tied to the facts of the particular case; thus, the factors for determining reliability may be different depending upon the type of expert testimony offered, as well as the facts of the case. *Kumho Tire Co, Ltd v Carmichael*, 526 US 137, 150; 119 S Ct 1167; 143 L Ed 2d 238 (1999); *Daubert v Merrell Dow Pharm, Inc*, 509 US 579, 591; 113 S Ct 2786; 125 L Ed 2d 469 (1993).[4]

In this case, defendant's claims do not sufficiently challenge Detective Quinn-Johnson's qualifications to render an opinion using cell phone records and towers to track locations. A witness is qualified to testify as an expert based on knowledge, skill, experience, training, or education. *People v Whitfield*, 425 Mich 116, 122; 388 NW2d 206 (1986); see also *People v Dobek*, 274 Mich App 58, 79; 732 NW2d 546 (2007). The level of the expert's expertise is a consideration that goes to the weight of the evidence rather than its admissibility. See *Whitfield*, 425 Mich at 123. Detective Quinn-Johnson testified that he had worked in the Detroit Police Homicide Cell Phone Unit for 11 months. He had undergone training in "cell phone mapping and technology." He had undergone at least 30 hours of specialized training for Pen Link, which was the system and technology the department used for the cell phone mapping in this case, and had received four certificates from Pen Link after undergoing four separate training courses. He had also undergone a 16-hour training course with the FBI for mapping and call detail records, which are records from the phone company. Detective Quinn-Johnson was mentored by Stan Brue, who was known to the trial court and had been a qualified as an expert in the field, and Detective Quinn-Johnson had undergone approximately 300 hours of training over four to five months with Brue regarding cell phone mapping technology. Detective Quinn-Johnson testified that he took the phone records for the phone number provided in this case and used them to map the phone data in

[4] Indicia of reliability relevant to scientific fields include testability, publication, and peer review, known or potential rate of error, and general acceptance in the field. *Daubert*, 509 US at 593-594. The United States Supreme Court has explained, however, that reliability concerns may differ depending on the type of expertise offered, and whether that expertise is based on personal knowledge, experience, or skill. *Kumho Tire Co*, 526 US at 150.

the manner that he had been trained to do. He explained that he entered the phone number into the Pen Link program, and the program then produced "maps of which towers that those phones were utilized in."

Detective Quinn-Johnson's testimony clearly demonstrated that he was qualified to offer cell phone tracking testimony based on his experience and training. MRE 702. Moreover, because "[g]aps or weaknesses in the witness' expertise are a fit subject for cross-examination, and go to the weight of [the] testimony, not its admissibility," *People v Gambrell*, 429 Mich 401, 408; 415 NW2d 202 (1987), any further objection by defense counsel to Detective Quinn-Johnson's expert qualifications in this area would have been futile. As previously indicated, counsel is not ineffective for failing to raise a meritless objection. *Ericksen*, 288 Mich App at 201.

Detective Quinn-Johnson's testimony was also helpful in enabling the jury to understand information at issue in the case. See *Kowalski*, 492 Mich at 121 (proffered testimony must involve a matter that is beyond the common understanding of the jury). The average juror does not have knowledge of the functions and methodology of cell phone towers, derivative tracking, and techniques of locating or plotting origins of cell phone calls using cell phone records. Detective Quinn-Johnson testified regarding these methods and explained how this data was reflected in the cell phone records. His testimony assisted the jurors in understanding how defendant's cell phone records could be used to show the general location of his phone in certain areas before and after the 911 call reporting the shooting.

Defendant also argues that defense counsel should have requested a *Daubert* hearing to challenge the reliability and admissibility of the cell phone tracking evidence and exhibits used by Detective Quinn-Johnson. Defendant has not overcome the strong presumption that trial counsel's performance was within the range of reasonable professional conduct. See *Payne*, 285 Mich App at 190. Although defendant asserts that the cell phone tracking evidence used in this case, i.e., "the pie method," is unreliable, he has not identified any case where this type of cell phone tracking evidence has been rejected or its reliability questioned. Instead, defendant relies on a guide, "Daniel, McInvaille, & Grabski, Digital Forensics Guide," to argue that the expert's testimony and his exhibits, particularly the maps, were inadmissible. However, "a party may not expand the record on appeal, which consists of 'the original papers filed in that court or a certified copy, the transcript of any testimony or other proceedings in the case appealed, and the exhibits introduced.' " *People v Gingrich*, 307 Mich App 656; 659 n 1; 862 NW2d 432 (2014), quoting MCR 7.210(A)(1). This guide submitted by defendant is therefore not part of the record.

Defendant also argues that defense counsel should have called a defense cell phone expert. Decisions about defense strategy, including whether to call witnesses, are matters of trial strategy, *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999), and counsel has wide discretion in matters of trial strategy, *People v Heft*, 299 Mich App 69, 83; 829 NW2d 266 (2012). Moreover, defendant has not made an offer of proof regarding the substance of any testimony a defense expert on cell phone tracking could have offered. Defendant's mere speculation that an expert could have provided unspecified favorable testimony is insufficient to show that defense counsel's failure to call an expert was objectively unreasonable, or to show that there is a reasonable probability that the outcome of trial would have been different if an expert had been called. Accordingly, defendant has not demonstrated that defense counsel was ineffective for failing to call a defense expert.

Defendant also argues that, although defense counsel objected to the admission of the Sprint Certification on the basis that it was "not complete," he was ineffective for failing to object on the ground that the exhibit violated defendant's right of confrontation because a Sprint representative was not made available for cross-examination. The cell phone provider's certification provided that the technician had certified that the records attached "were made at or near the time of the occurrence of the matters set forth in the records, by, or from information transmitted by, a person with knowledge of those matters"; the records "were kept in the course of the regularly conducted business activity"; and "were made by the regularly conducted business activity as a regular practice."

"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."[5] *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007). "A pretrial statement is testimonial if the declarant should reasonably have expected the statement to be used in a prosecutorial manner and if the statement was made under circumstances that would cause an objective witness reasonably to believe that the statement would be available for use at a later trial." *People v Dendel (On Second Remand)*, 289 Mich App 445, 453; 797 NW2d 645 (2010), citing *Crawford v Washington*, 541 US 36, 53-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004). In *Crawford*, 541 US at 56, the United States Supreme Court stated that business records "by their nature" are not testimonial. In *Melendez-Diaz v Massachusetts*, 557 US 305, 324; 129 S Ct 2527, 174 L Ed 2d 314 (2009), the Supreme Court further explained: "Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial." However, a Confrontation Clause issue may arise "if the regularly conducted business activity is the production of evidence for use at trial." *Id*. at 321.

As defendant observes, in *People v Nunley*, 491 Mich 686, 689; 821 NW2d 642 (2012), our Supreme Court held that a Michigan Department of State (DOS) certificate of mailing, notifying the defendant that his driver's license had been revoked, "is not testimonial because the circumstances under which it is generated would not lead an objective witness reasonably to believe that the statement would be available for use at a later trial." The Court explained that the certificate "is a nontestimonial business record created primarily for an administrative reason rather than a testimonial affidavit or other record created for a prosecutorial or investigative reason." *Id*. at 706. "The certificate here is a routine, objective cataloging of an unambiguous factual matter, documenting that the DOS has undertaken its statutorily authorized bureaucratic responsibilities. Thus, the certificate is created for an administrative business reason and kept in the regular course of the DOS's operations in a way that is properly within the bureaucratic purview of a governmental agency." *Id*. at 707. The Court further explained that "the certificates of mailing may be comfortably classified as business records 'created for the administration of an

[5] Both the United States and the Michigan Constitutions guarantee a criminal defendant the right "to be confronted with the witnesses against him." *People v Nunley*, 491 Mich 686, 697; 821 NW2d 642 (2012); see also US Const, Am VI; Const 1963, art 1, § 20.

entity's affairs and not for the purpose of establishing or proving some fact at trial[.]' " *Id.* at 710 (brackets in original), quoting *Melendez-Diaz*, 557 US at 324.

In this case, the trial court admitted Sprints records, and the records were accompanied by a declaration of authenticity from Sprint. In *United States v Yeley-Davis*, 632 F3d 673, 679 (CA 10, 2011),[6] the court held that a cell phone provider's business records were not testimonial, noting that the provider had authenticated the phone records and had stated that the records were kept in the course of the provider's regularly conducted business. Nor was the cell phone provider's certification of the records' authenticity testimonial in nature. *Id.* at 680. It is evident that Sprint's business records were created for the administration of its affairs as a cell phone provider and not for the purpose of establishing or proving a fact at trial. Further, the records in this case were properly authenticated, because it is undisputed that a declaration of authenticity accompanied the records. Accordingly, the records were not testimonial, and their admission without confrontation at trial did not violate the Sixth Amendment. See *Nunley*, 491 Mich at 710; *Yeley-Davis*, 632 F3d at 679-680. Because an objection on confrontation grounds would have been unsuccessful, defense counsel was not ineffective for not objecting on this basis. See *Ericksen*, 288 Mich App at 201.

Defendant also argues that the prosecutor engaged in misconduct by impermissibly using the cell-phone-related expert testimony and exhibits to make improper arguments during closing argument. However, for the reasons discussed earlier, the prosecutor did not engage in misconduct by using evidence that was admitted during trial to argue that it supported defendant's guilt, specifically that the cell phone records supported an inference that defendant was in the general area of the shooting at the time of the offense. Prosecutors have great latitude when arguing at trial. *People v Fyda*, 288 Mich App 446, 461; 793 NW2d 712 (2010). They may argue the evidence and all reasonable inferences that arise from the evidence in relationship to their theory of the case, and they need not state their inferences in the blandest possible language. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *Dobek*, 274 Mich App at 66. Therefore, defense counsel's failure to object was not objectively unreasonable.

Lastly, defendant makes an overall claim that he was prejudiced by the admission of the expert testimony and related exhibits. Even if we were to credit any of defendant's claims, defendant has not demonstrated a reasonable probability that, but for counsel's inaction, the result of the proceedings would have been different. See *Nix*, 301 Mich App at 207. The challenged evidence was used to show that a phone affiliated with defendant was in the general area of the shooting around the time that the 911 call was made. However, there were multiple witnesses who were present at the time of the shooting and who testified that defendant was also present at the scene when the shooting occurred. Further, two eyewitnesses testified defendant was in the vehicle with them before the shooting, got out, and returned to the vehicle after the shooting with a gun in his hand. Corvel testified that defendant pulled his gun from his pocket and shot the victim. The driver of the car that defendant entered after the shooting also testified about defendant reentering her car and instructing her to drive him away from the scene. Thus, there was substantial evidence

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[6] This Court is not bound by decisions of federal courts, but those decisions may be considered as persuasive authority. *People v Jackson*, 292 Mich App 583, 595 n 3; 808 NW2d 541 (2011).

placing defendant in the vicinity at the time of the shooting. Defendant notes the expert testimony that the phone was last used in Ohio, which defendant argues the prosecutor used to argue that he was guilty. However, there was also unchallenged evidence that defendant was later located and arrested in West Virginia, making the fact that he may have been in Ohio days before unimpactful. Thus, given the substantial evidence that defendant was in the area at the time of the shooting, he cannot demonstrate any prejudice as a result of defense counsel's failure to take the actions he now raises on appeal. Defendant has not demonstrated that he was denied the effective assistance of counsel.

C. JURY INSTRUCTIONS

Defendant also argues that defense counsel was ineffective for failing to request a jury instruction on voluntary manslaughter as a lesser offense of the murder charge, and for failing to object to the homicide instructions as given. We disagree. Again, our review of this claim is limited to mistakes apparent on the record. *Solloway*, 316 Mich App at 188.

1. VOLUNTARY MANSLAUGHTER

The decision whether to request a lesser offense instruction is a matter of trial strategy. *People v Robinson*, 154 Mich App 92, 93-94; 397 NW2d 229 (1986). Both voluntary and involuntary manslaughter are lesser included offenses of murder, distinguished by the element of malice. *People v Mendoza*, 468 Mich 527, 533-534, 540-541; 664 NW2d 685 (2003). Consequently, if a defendant is charged with murder, an instruction for manslaughter must be given upon request if supported by a rational view of the evidence. *Id*. at 541.

Voluntary manslaughter requires "a showing that (1) defendant killed in the heat of passion, (2) this passion was caused by an adequate provocation, and (3) there was no lapse of time during which a reasonable person could have controlled his passions." *People v Roper*, 286 Mich App 77, 87; 777 NW2d 483 (2009). To mitigate a killing from murder to voluntary manslaughter, the necessary degree of provocation required " 'is that which causes the defendant to act out of passion rather than reason'; that is, adequate provocation is 'that which would cause the reasonable person to lose control.' " *Id*. (citation omitted).

First, defendant has not overcome the presumption that defense counsel reasonably declined to request a lesser offense instruction on voluntary manslaughter as a matter of trial strategy. See *Robinson*, 154 Mich App 93-94. It is reasonable strategy to forgo requesting a lesser offense instruction in an effort to obtain an outright acquittal. *Id*. at 94. The defense theory in this case was that defendant was misidentified as the shooter. An instruction on voluntary manslaughter would have been inconsistent with this defense, and may have reduced defendant's chance of acquittal. See *id.* Defendant has not demonstrated that, under the circumstances, it was objectively unreasonable for counsel not to request an instruction on voluntary manslaughter.

Second, a rational view of the evidence would not have supported a voluntary manslaughter instruction because of the absence of evidence of a heat-of-passion killing and the degree of provocation necessary to mitigate a killing from murder to manslaughter. *Roper*, 286 Mich App at 87. Defendant argues that the evidence supports that he killed the victim in the heat of passion, resulting from adequate provocation, because the "killing arose from a sudden affray at a crowded

Fourth of July party where the decedent had been in a physical fight with another person just prior to being shot" and "witnesses testified that a lot of people were fighting." We disagree.

The evidence showed that a physical fight occurred between the victim and another man, in which defendant was not involved, and that defendant approached the victim only after that fight had ended. Defendant then made a comment to the victim, which caused the victim to indicate that he did not even know defendant or that defendant had nothing to do with the matter. Defendant responded by pulling out a gun and shooting the victim in the chest, killing him. While defendant may have felt offended by the victim's comment, there was nothing incendiary about the comment that would provoke a reasonable person to react in the heat of passion by shooting the other person. Further, there was no evidence explaining why defendant interjected himself into the situation, which, again, involved a confrontation between the victim and another man, which had ended. Defendant also fails to adequately explain how the number of people on the street served as adequate provocation for him to shoot the victim, particularly when witnesses consistently testified that defendant was the only person observed to have a gun, and no one testified that the victim had exhibited any conduct toward defendant that would have provoked a reasonable person to respond by shooting a person. Thus, a rational view of the evidence did not support an instruction on voluntary manslaughter. No reasonable jury could have determined that there was adequate provocation in this matter that would cause a reasonable person to lose control in the manner that defendant did. Accordingly, defendant was not prejudiced by defense counsel's failure to request the instruction.

For these reasons, defendant is not entitled to a new trial on this basis.

2. MURDER INSTRUCTIONS

Defendant also makes a cursory complaint that defense counsel was ineffective for not objecting to the trial court's homicide instructions. Defendant complains that the warrant charged him with "open murder," yet the trial court instructed the jury that defendant was "charged with first degree premeditated murder" and that it could also "consider the lesser charge of second degree murder."

Whether defense counsel's failure to object to the trial court's jury instructions was objectively unreasonable depends on whether the court's instructions fairly presented the issues and sufficiently protected defendant's substantial rights. Due process requires that the trial court "properly instruct the jury so that it may correctly and intelligently decide the case." *People v Clark*, 453 Mich 572, 583; 556 NW2d 820 (1996). Jury instructions are, however, reviewed in their entirety to determine whether any error requiring reversal occurred. *People v Kowalski*, 489 Mich 488, 501; 803 NW2d 200 (2011). An imperfect instruction will not warrant reversal if the instructions, examined as a whole, fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id*. at 501-502.

The trial court's instructions, viewed in their entirety, fairly presented the elements necessary to establish the murder charge. The felony warrant charged defendant with

"HOMICIDE-OPEN MURDER-STATUTORY SHORT FORM"[7] and alleged that defendant murdered the victim, "contrary to MCL 750.316." Before jury selection began, the trial court advised that the information charged defendant in "Count 1 homicide open murder." Subsequently, in its preliminary and final instructions, the trial court instructed the jury on first-degree premeditated murder, MCL 750.316(1)(a), and "the lesser charge" of second-degree murder. Defendant has not offered a logical explanation for why these instructions should be considered error requiring reversal, or what instructions he believes that trial court should have given.[8] "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

In any event, defendant does not dispute that the trial court properly instructed the jury on the elements of both first-degree murder and second-degree murder, and the record discloses that the trial court properly instructed the jury that it could "find the defendant guilty of all, any one, any combination of these crimes, guilty of a less serious crime, or not guilty." Because the jury instructions fairly presented the issues and sufficiently protected defendant's substantial rights, defendant's challenge to the jury instructions are without merit. Accordingly, he cannot show that defense counsel's failure to object to the instructions was objectively unreasonable, or that he was prejudiced by counsel's failure to object. See *Nix*, 301 Mich App at 207. Accordingly, this claim of ineffective assistance of counsel must fail.

II. SENTENCING

Defendant also presents several arguments in support of his request to be resentenced, none of which have merit.

A. SCORING OF OV 3

Defendant argues that the trial court erred by assigning a 25-point score for offense variable (OV) 3. We disagree.

When reviewing a trial court's scoring decision, the trial court's "factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.*

OV 3 considers physical injury to a victim. MCL 777.33(1). A score of 25 points is appropriate if a "[l]ife threatening or permanent incapacitating injury occurred to a victim[.]"

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[7] MCL 750.318 provides in pertinent part: "The jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, ascertain in their verdict, whether it be murder of the first or second degree . . . ."

[8] Indeed, defendant acknowledges in his appellate brief that "there is no model jury instruction for open murder."

MCL 777.33(1)(c). Our Supreme Court has held that 25 points is the correct score for OV 3 if the victim's death resulted from a crime, and homicide was the sentencing offense. *People v Houston*, 473 Mich 399, 405, 407; 702 NW2d 530 (2005). The statute mandates assessment of "the highest number of points possible." *Id*. at 402. Although defendant acknowledges that the decision in *Houston* supports the trial court's 25-point score for OV 3, he argues that *Houston* was wrongly decided and should be reversed by our Supreme Court. However, this Court is bound to follow decisions of our Supreme Court that have not been overruled or superseded. *People v Anthony*, 327 Mich App 24, 44; 932 NW2d 202 (2019). Accordingly, we affirm the trial court's 25-point score for OV 3.

B. FAILURE TO ADMIT GUILT

Defendant argues that the trial court improperly considered his refusal to admit guilt, as evidenced by its remark at sentencing that "there's been certainly no remorse on behalf of Mr. McNeely." We disagree.

"A sentencing court cannot base a sentence even in part on a defendant's refusal to admit guilt." *Payne*, 285 Mich App at 193-194 (citation omitted). We look to three factors to determine whether the sentencing court incorrectly considered a defendant's refusal to admit guilt: "(1) the defendant's maintenance of innocence after conviction; (2) the judge's attempt to get the defendant to admit guilt; and (3) the appearance that had the defendant affirmatively admitted guilt, his sentence would not have been so severe." *Id*. at 194 (citation omitted). When the three factors are implicated, the "sentence was likely to have been improperly influenced by the defendant's persistence in his innocence." *Dobek*, 274 Mich App at 104 (quotation marks and citation omitted.)

In this case, the trial court's remark does not indicate that it improperly considered defendant's refusal to admit guilt. The trial court explained, in detail, its reasoning for sentencing defendant to 65 years' imprisonment for the second-degree murder conviction. The court did not ask defendant to admit guilt or offer him a lesser sentence if he did. There is no other indication that the court would have sentenced defendant to a less severe sentence if defendant had admitted guilt. Instead, the court noted defendant's lack of remorse, also noting that there was "no evidence that . . . this wouldn't happen again." In context, the trial court's remark was relating to defendant's diminished potential for rehabilitation. "[E]vidence of a lack of remorse can be considered in determining an individual's potential for rehabilitation." *Id*. Consequently, defendant is not entitled to resentencing on this basis.

C. UNREASONABLE AND DISPROPORTIONATE SENTENCE

Defendant argues that the 65-year minimum sentence for second-degree murder is a "de facto life without parole sentence," and thus, is disproportionate and unreasonable. We disagree.

The trial court scored the guidelines for defendant's conviction of second-degree murder, and sentenced defendant to a minimum term of 65 years (780 months), which is near the upper

end, but within, the applicable guidelines range of 315 to 787 months.[9] Because defendant did not receive a sentence that exceeds the advisory sentencing guidelines range, his sentence may not be reviewed for reasonableness. "[T]his Court is required to review for reasonableness only those sentences that depart from the range recommended by the statutory guidelines." *People v Anderson*, 322 Mich App 622, 636; 912 NW2d 607 (2018). If a trial court does not depart from the recommended minimum sentence range, this Court need not evaluate the defendant's sentence for reasonableness and must affirm unless there was an error in scoring the guidelines or the trial court relied on inaccurate information. *Id*. at 636-637, citing MCL 769.34(10) (if a sentence is within the sentencing guidelines range, this Court must affirm the sentence absent a scoring error or reliance on inaccurate information); see also *People v Posey*, 334 Mich App 338, 355-356; 964 NW2d 862 (2020). As discussed earlier, there was no error in the scoring of OV 3, and thus, defendant has not demonstrated any error in the calculation of his minimum sentence range. Further, the trial court did not rely on defendant's refusal to admit guilt, and thus, the trial court did not rely on an impermissible consideration or inaccurate information. Accordingly, because defendant's minimum sentence for second-degree murder is within the sentencing guidelines range, we must affirm defendant's sentence, absent any constitutional violation.

D. CRUEL AND/OR UNUSUAL PUNISHMENT

Defendant also argues that his 65-year minimum sentence constitutes cruel or unusual punishment. To preserve a claim that a defendant's sentence is unconstitutionally cruel or unusual, the defendant must raise the claim in the trial court. *People v Bowling*, 299 Mich App 552, 557; 830 NW2d 800 (2013). Because defendant did not argue below that a guidelines sentence would be cruel or unusual punishment, we review defendant's unpreserved constitutional claim for plain error affecting defendant's substantial rights. See *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999); *Anderson*, 322 Mich App at 634. An error is plain if it is "clear or obvious." *Id*. at 634-635. The defendant has the burden of establishing entitlement to relief under plain-error review. *Carines*, 460 Mich at 763.

Regarding defendant's constitutional argument, "[t]he Michigan Constitution prohibits cruel *or* unusual punishment, Const 1963, art 1, § 16,[10] whereas the United States Constitution prohibits cruel *and* unusual punishment, US Const, Am VIII.[11]" *People v Benton*, 294 Mich App 191, 204; 817 NW2d 599 (2011). This includes "a prohibition on grossly disproportionate

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[9] The trial court scored the guidelines for defendant's conviction of second-degree murder, which is a class M2 offense, MCL 777.16p. The trial court's scoring of the guidelines placed defendant in the E-III cell of the applicable sentencing grid, for which the minimum sentence range is 315 to 525 months. MCL 777.61. Because defendant was sentenced as a third-offense habitual offender, the upper limit of his guidelines range is increased by 50%, MCL 777.21(3)(b), resulting in an enhanced sentencing guidelines range of 315 to 787 months.

[10] The Michigan Constitution provides, "cruel or unusual punishment shall not be inflicted[.]" Const 1963, art 1, § 16.

[11] The Eighth Amendment of the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." US Const, Am VIII.

sentences." *People v Bullock*, 440 Mich 15, 32; 485 NW2d 866 (1992). But "[a] sentence within the guidelines range is presumptively proportionate, and a proportionate sentence is not cruel or unusual." *Bowling*, 299 Mich App at 558. "In order to overcome the presumption that the sentence is proportionate, a defendant must present unusual circumstances that would render the presumptively proportionate sentence disproportionate." *Id.* (quotation marks and citation omitted).

Defendant's primary dispute, that his sentence is a de facto life sentence without parole because he will be 100 years old after serving the 65-year minimum sentence for second-degree murder, is unavailing. Defendant incorrectly assumes that he is entitled to parole. See *Bowling*, 299 Mich App at 558. Further, a sentence is not cruel or unusual because the defendant's age will effectively result in the defendant spending the remainder of his or her life in prison. *Id.* This is especially true when the defendant has a lengthy criminal record and has committed a grave offense. *Id.* at 558-560. As previously discussed, defendant's sentence is within the guidelines range, and therefore, it is presumptively not cruel or unusual. See *id.* at 558. Defendant's age is not a basis to overcome that presumption, particularly when defendant has a lengthy criminal record and his crime caused the death of another person.[12] Therefore, defendant has not demonstrated that his sentence is cruel or unusual.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto
/s/ Michael J. Kelly

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[12] According to defendant's presentence report, his criminal history includes a prior conviction for assault with intent to commit murder, MCL 750.83, for which he was sentenced in 2008 to a prison term of 9 to 20 years. Defendant was paroled in January 2019, approximately six months before he committed the instant offense.