STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 24, 2014
v	No. 311850 Wayne Circuit Court
ANTONIO DANARD STALLING, Defendant-Appellant.	LC No. 12-001195-FC

Before: DONOFRIO, P.J., and GLEICHER and M.J. KELLY, JJ.

PER CURIAM.

Defendant was found guilty of assault with intent to murder, MCL 750.83, possession of a firearm by a felon (felon-in-possession), MCL 750.244f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, following a jury trial. He was sentenced to 15 to 25 years' imprisonment for the assault with intent to murder conviction, one to five years' imprisonment for the felon-in-possession conviction, and two years' imprisonment for the felony-firearm conviction. The shooting victim is defendant's first cousin. He was shot on New Year's Eve 2011 outside of his residence. Defendant appeals as of right, and we affirm.

I. EVIDENTIARY RULINGS

We review preserved evidentiary issues for an abuse of discretion. *People v Jackson*, 292 Mich App 583, 594; 808 NW2d 541 (2011). A trial court abuses its discretion when it "chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011). To the extent that defendant also argues that any evidentiary error caused a denial of due process, because no due-process objections were made at the trial court, that aspect of the issue is unpreserved and reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999); *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996).

Defendant first argues that the trial court erred in not allowing defense counsel to ask the victim if the prosecutor had threatened him with a perjury prosecution if he did not testify consistent with his testimony at the preliminary examination.

As background, the victim in this case, testified at the preliminary examination that he was shot by defendant. But before trial, he indicated that he did not want to testify. And when

he did testify, he stated that he was not sure now who shot him: it could have been defendant or his brother, who, according to the victim, looks very similar. As a result, the prosecution heavily relied on the victim's preliminary examination testimony. On cross-examination, defense counsel attempted to ask the victim if the prosecutor had threatened to charge him with perjury and if the prosecutor instructed him to testify according to his preliminary examination testimony. The trial court determined that this line of questioning was improper.

We agree with defendant that this type of questioning should have been permitted because an inquiry into a witness's credibility is always relevant. *People v McGhee*, 268 Mich App 600, 637; 709 NW2d 595 (2005); see also *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995) ("If a witness is offering relevant testimony, whether that witness is truthfully and accurately testifying is itself relevant because it affects the probability of the existence of a consequential fact."); *People v Crabtree*, 87 Mich App 722, 725-726; 276 NW2d 478 (1979). As such, "[a] witness's bias is always relevant." *McGhee*, 268 Mich App at 637. Obviously, if the prosecutor did instruct the victim to testify in any certain way, it would be important for the jury to know this. See *id.* ("'[A] defendant is entitled to have the jury consider any fact that may have influenced the witness'[s] testimony.'"). However, defendant's argument is perplexing because the victim *did not* testify consistently with his preliminary examination testimony. Thus, even if the prosecution did instruct the victim to testify consistently with his earlier testimony, it is clear that such a mandate was ignored. Accordingly, to the extent that defense counsel's attempt to impeach the victim's testimony at trial was improperly curtailed, any error was harmless beyond a reasonable doubt because the premise for the impeachment (the victim's testimony was the same as his preliminary examination testimony only because of improper prosecution threats) did not exist, as the victim backed away from directly identifying defendant as the shooter at trial. Likewise, defendant has failed to establish any plain error that affected a substantial right on his constitutional, due-process claim.

Next, defendant asserts that the court erred in admitting a recording of a phone call he made while in jail. The recording in issue was one of several recordings made of defendant's jail phone calls. Defendant objected on the first day of trial to the playing of any of the jail calls because there were perhaps "hundreds" of them and, with them being turned over the night before trial, there was insufficient time to adequately review all of them. The prosecutor stated that she only intended to play one of the calls, which lasted a minute, and stated that she identified it for defendant. The following day at trial, defense counsel stated that she listened to the entirety of the call that the prosecutor intended to play for the jury and had concerns about some portions of the call because they had "absolutely nothing to do with this case." After the prosecutor clarified that she was only going to be playing a certain 30-second portion of the call, where defendant was "only talking about how he wanted to waive his preliminary exam so that the witness, if he was killed in the interim, would not be able to—we would not be able to prosecute." Defense counsel replied, "That's fine. No, I take no—I have no qualms with that." When defense counsel clearly expresses satisfaction with an outcome, counsel's action will be deemed to constitute a waiver. *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011). And it is well established that wavier extinguishes any error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

II. PROSECUTORIAL MISCONDUCT

Defendant next alleges several instances of prosecutorial misconduct. Defendant objected to only one of the instances he cites, and the others are, accordingly, unpreserved. Generally, claims of prosecutorial misconduct are reviewed de novo. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). The test is whether a defendant was denied a fair and impartial trial due to the actions of the prosecutor. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). However, defendant's unpreserved claims are reviewed for plain error affecting a substantial right. *People v Cross*, 281 Mich App 737, 738; 760 NW2d 314 (2008). Reversal is warranted only "if the defendant is actually innocent or the error seriously undermined the fairness, integrity, or public reputation of the trial." *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006). Thus, reversal for these unpreserved issues is necessary only if a timely instruction would have been inadequate to cure any defect. *Ackerman*, 257 Mich App at 449.

We review instances of prosecutorial misconduct on a case-by-case basis and examine the entire record to evaluate the prosecutor's comments in context. *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007). The comments also are evaluated in light of defendant's arguments, "and the relationship the comments bear to the evidence admitted at trial." *Id.*

We address the preserved issue first.

A. QUESTIONING REGARDING THREATS

The prosecutor asked the victim if he had been threatened since he testified at the preliminary examination. Defendant argues that the prosecutor committed misconduct by questioning the victim about the threats when there was no evidence that defendant made the threats.

At its heart, defendant's assertion of error is really an evidentiary issue. The prosecutor correctly stated that the threats were relevant to the victim's credibility, which, as already discussed, is always relevant. *McGhee*, 268 Mich App at 637. The victim's trial testimony was more equivocal than his preliminary examination testimony on the issue of who had shot him. Questioning about why his testimony had changed was relevant. The identity of the person who threatened the victim was irrelevant to whether evidence of the threats was admissible. As such, defendant was not denied a fair trial, and there was no prosecutorial misconduct on this issue.

Defendant mischaracterizes this Court's holding in *People v Kelly*, 231 Mich App 627, 640; 588 NW2d 480 (1998), by stating that "if there is no evidence that threats were made or that defendant was connected to them, questioning must cease." Nowhere in *Kelly* does this Court make that pronouncement. Instead, the issue before the *Kelly* Court was whether the prosecution asking the victim whether he was scared of the defendant was permissible, and the Court agreed that it was: "Evidence of a defendant's threat against a witness is generally admissible as conduct that can demonstrate consciousness of guilt." *Id.* In the present case, the purpose of the questioning was not necessarily to demonstrate a consciousness of guilt but, rather, was to demonstrate that something happened between the time of the preliminary examination and trial that affected the victim's testimony at trial. Because a party "is entitled to have the jury consider any fact that may have influenced the witness'[s] testimony," this type of questioning is permissible. *McGhee*, 268 Mich App at 637.

B. REFERENCE TO DEFENDANT'S CHARACTER

Defendant next argues that the prosecutor, in her closing argument, impermissibly referred to defendant's character. Specifically, defendant takes issue with the prosecutor's comments, "That is the type of man Mr. Stalling is," and "that showed his character."

During her closing argument, the prosecutor recounted the victim's testimony regarding being threatened by defendant after talking to the police:

> The car pulls up [next to the victim's car], what's [defendant] say? I saw you leave that police station. I saw you leave that police station. Your ho ass is not going to make it to testify.
>
> When did we hear those same, similar words? Because then you have to believe—to not believe him at the time, that he just made all this up. But then what do we hear? We hear a jail call, him saying the same thing? The same thing? Really?
>
> What does that do? That's credibility, corroboration. *That is the type of man [defendant] is*. He said it to him on the street and he says it on the jail calls. [Emphasis added.]

Later, regarding the jail calls, she stated:

> Jail calls. There are certain rules I do have to play by. I can't sit up here and play—you guys don't want to listen to him talking to his girlfriend. You know? Why would I play those? I've got to play *what shows his character*, what showed his mind frame. What shows the kind of person he is and what has he done in this case. [Emphasis added.]

Defendant asserts that the emphasized portions that referenced defendant's character were improper. We disagree.

The prosecution deprives a defendant of a fair trial when it argues that evidence of the defendant's "bad character" can be considered by the jury as substantive evidence of guilt. *People v Quinn*, 194 Mich App 250, 252-255; 486 NW2d 139 (1992). Further, "[i]t is not proper for the prosecutor to comment on the defendant's character when his character is not in issue." *Id.* at 253. However, the prosecutor was not making any arguments that defendant had "bad character" or that he must be guilty because he has "bad character." In the first instance, the prosecutor's comment of "[t]hat is the type of man [defendant] is" was her way of describing that it was not a coincidence that the two threats that the victim received used the same type of language. She permissibly argued that the fact that these two threats were so similar that it corroborated the victim's testimony that they came from the same person, namely defendant.

Likewise, for the second reference, the prosecutor's comment that she could only play tapes of the calls that "show[ed] [defendant's] character" did not describe or impugn defendant's character at all. Instead, she merely was explaining, although inartfully, that the types of calls she could play were ones that were relevant to the case, unlike those of him talking with his

girlfriend. The fact that the prosecutor implied that only calls that "show[ed] his character" were admissible was of little consequence since this is best described as a (mis)statement of the law that did not concern the jury and, consequently, had no bearing on the proceedings.[1]

Moreover, the two references were relatively innocuous and did not insinuate that defendant had a propensity to commit crimes or that such a propensity should be considered as substantive evidence of guilt. As such, even if any of the comments introduced any error, a curative instruction would have remedied the error, and reversal is unwarranted on this basis. See *Ackerman*, 257 Mich App at 449.

C. REFERENCE TO FACTS NOT IN EVIDENCE

It appears that the victim had some sort of "knots" or bumps on his head at trial. The prosecutor argued in closing argument that these protrusions were attributable to a beating the victim received before trial. Defendant argues that this was improper because the medical records established that these "knots" existed well before any attack.

The victim had testified to such an attack. He stated that he was hit "on the head with a gun" and knocked unconscious. Later, the prosecutor asked the victim about the timing of the attack:

> *Q.* The . . . attack on you that you just described to the jury previously, that was all done after the February 3rd date of your testimony at 36th District [at the preliminary examination]; is that right?
>
> *A.* I can't remember what day it was and all that. Like I say, you have to look at these knots on my head. So I can't remember a lot of stuff. You got—I got to be refreshed on a lot of stuff.

Prosecutors are allowed to argue the evidence and all reasonable inferences from the evidence. *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). Given the victim's testimony, the prosecutor made a reasonable inference that the victim received the knots on his head as a result of being struck on the head during the attack. Defense counsel later pointed out during her closing argument that the victim's medical records, which were admitted as exhibits, showed that the protrusion had existed long before the attack.[2] While the medical records weighed heavily against the prosecutor's argued inference, those records did not transform the prosecutor's comment into an impermissible one. Regardless, even if the comment was erroneous, it did not deprive defendant of a fair trial. First, defense counsel pointed out to the

[1] Whether the other calls were inadmissible because the prosecutor thought they did not "show" defendant's character or because they were otherwise inadmissible had no tangible effect on the jury.

[2] The victim's medical records identify the protrusion as a "[l]arge lipoma subcutaneous [on the] left temporal region."

jury that the medical records did not support the prosecutor's contention. Second, the salient point the prosecutor was making was that the victim was attacked, hit in the head, and knocked unconscious after he testified at the preliminary examination—a fact which was not disproven; whether that attack caused permanent knots to form on the victim's head carried little import.

Defendant also claims that the prosecutor's argument was improper because there was no evidence that defendant or "anyone connected to him" beat the victim. While it is true that there was no evidence that defendant beat or threatened the victim, it was reasonable for the prosecutor to infer that the beating and threats were committed at defendant's behest or by someone sympathetic to defendant. Read in context, this is what the prosecutor's argument suggested, and we find no error.

Defendant next argues that the prosecutor misstated the facts when she said that the victim had identified defendant as the shooter "from day one" because on the day he was shot, he did not identify the perpetrator. However, the prosecutor's statement should not be taken so literally. The idiom "from day one" should be understood as saying that the victim had never identified anyone other than defendant as the shooter until he equivocated his identification at trial. Thus, this argument was appropriate and did not deprive defendant of a fair trial.

D. REFERENCE TO UNPLAYED PHONE CALLS

Defendant next argues that the prosecutor "engaged in bolstering in her rebuttal argument when she told the jury that there were other unplayed recordings of phone calls between the defendant and his alibi witness" that could not be played "because of the rules." Defendant argues that "[t]he prosecutor was implying that those calls would have shown the alibi to be false." As discussed previously, in context, the prosecutor merely indicated that there were other recorded calls between defendant and his girlfriend that were irrelevant to the case, not that other calls would have shown his girlfriend's testimony to be false. As a result, defendant cannot show how he was denied a fair trial by the comment.

E. REFERENCE TO "WE KNOW"

During closing argument, the prosecutor stated that "[w]hen you fire a gun at someone and pull the trigger one, two, three, four, five times[,] [y]our intent is to murder. You don't have to say hey, I'm going to murder you. Actions speak louder than words all day long. So we know that the person firing that gun was trying to kill [the victim]." Defendant claims that the prosecutor's use of the phrase "we know" "encouraged the jury to think that prosecutor and his [sic] officers knew facts not placed before the jury." We disagree. In context, it is clear that the prosecutor merely was arguing that common sense tells all of us, as people, that one who fires a gun multiple times at another person has the intent to kill—it does not convey that the prosecutor had some special or secret knowledge that was not presented to the jury.

F. TREATMENT OF DEFENSE COUNSEL

Defendant also argues that the prosecutor improperly impugned the character of his defense counsel in several ways.

In her closing argument, defense counsel referred to the prosecutor as "the government." She also criticized the investigation in the case and suggested that the prosecutor would not dismiss the case because she was invested in obtaining a conviction. On rebuttal, the prosecutor said, "I love when they call us the government. That's another little trick and all smoke and mirrors, and all that. Mean, nasty government people. It's ridiculous." Defendant argues that these and other similar comments were an improper attack on defense counsel.

The general rule is that "[a] prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury." *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). Here, however, the prosecutor's comments were made in response to defendant's arguments. Although colorful, the comments were responsive to any suggestion that the "government" prosecutor was more invested in getting a conviction than doing justice. *Id*. at 593.

Defendant next argues that the prosecutor "acted with disdain towards defense counsel" at certain points during the trial. "[A] prosecuting attorney may not personally attack defense counsel." *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003). The first instance he cites was during the prosecutor's cross-examination of defendant's girlfriend. The prosecutor was questioning her about who she told about the alibi. She testified that she had told defendant's former attorney. When the prosecutor asked if there was a way to corroborate this, she testified that she wrote a statement to the attorney. It appears that both parties were unaware of the existence of this statement, which was in the form of an affidavit. The prosecutor then asked defense counsel, "You got that statement?" Defense counsel replied, "Don't talk to me like that." The prosecutor then said to defense counsel, "I want to know the name of that attorney." Defense counsel responded, "I want to ask that she stop making comments in front of the jury." It is impossible to gauge the tenor of the prosecutor's statements from the transcript. However, given defense counsel's objections, it is likely that they were heated to some extent. While it was improper for the prosecutor to directly address counsel, the prosecutor was not impugning counsel's character. Further, defense counsel effectively responded, challenging the prosecutor's actions. Nonetheless, a curative instruction would have alleviated any prejudice.

Second, defendant challenges the prosecutor's statement during her closing argument that defense counsel "can get up and say, oh, it wasn't my client. You know it wasn't my client. He didn't say it was my client. My client didn't do that. Really?" In context, it appears that the prosecutor was rebutting the suggestion by defense counsel that defendant was not responsible for the beating, which was not improper. Furthermore, a prosecutor "need not confine argument to the blandest possible terms." *Dobek*, 274 Mich App at 66.

Third, defendant also takes issue with the prosecutor arguing during closing that defense counsel could not "trip up" the victim on cross-examination. Defendant argues that "[c]ross-examination is a right, one enshrined in the United States Constitution. It is not a tool designed to trip up witnesses." The prosecutor was merely arguing, however, that the victim did not contradict himself during cross-examination. This was an appropriate argument.

Defendant next alleges misconduct in the prosecutor's statement regarding her duty to pursue justice. In her opening statement, defense counsel suggested that the prosecutor would

not dismiss the case "because they don't have the guts to do the right thing." In her closing statement, the prosecutor referred to this statement:

> [Defendant's attorney], she then wants to get up in her opening statements and says the prosecution doesn't have the guts to take care of this case? Are you serious? I've never been more appalled by a comment in my life.
>
> The prosecution's duty is to make sure witnesses get the chance to testify. Make sure they get a chance to have justice done.

Defendant argues that "[t]his comment invited the jury to consider the differences in defense counsel's job and her own." He cites *People v Hunt*, 68 Mich App 145, 148; 242 NW2d 45 (1976), where this Court found the prosecutor "needlessly denigrated the role of defense counsel [by] stating that, as a prosecutor, his job was 'to see that justice is done' while defense counsel's job was 'to get his man acquitted.'" In the present case, the prosecutor's argument did not create such an insinuation. Rather, it was merely a response, albeit an impassioned one, to defense counsel's suggestion that the prosecutor did not have the strength of character to dismiss, what defendant characterized as, an obviously flawed prosecution. Given the implication, the impassioned response is understandable.

G. REFERENCE TO AFFIDAVIT

Defendant next takes issue with the following reference the prosecutor made to defendant's girlfriend's affidavit:

> There is an affidavit. That was never turned over to the prosecution. I had to just go and have it sent here today. Why aren't things turned over? Why don't I have a chance to investigate that? Why don't I have a chance to see if that's true?
>
> That's a good question. I can't give you an answer. You guys can come up with your own answer and figure that one out.

Defendant argues that this was false, as he had filed a notice of the alibi witness at least 10 days before trial. But the prosecutor's comments were not related to a lack of notice related to the existence of the alibi witness—instead, it was related to never receiving, let alone being made aware of, this affidavit from the alibi witness. Because it was undisputed that the affidavit was never provided before trial to the prosecutor,[3] we perceive no error. And if any error was introduced, defendant is not entitled to any relief because a curative instruction would have remedied the prosecutor's error. See *Unger*, 278 Mich App at 241.

H. REFERENCE TO DEFENDANT'S INABILITY TO "NEGATE" PROOF

[3] Defense counsel explained that even she was unaware of the affidavit because it initially was given to defendant's prior counsel.

Defendant also argues that when the prosecutor stated that defense counsel could not "negate anything," the prosecutor impermissibly shifted the burden of proof. In general, "[a] prosecutor may not imply in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof." *People v Fyda*, 288 Mich App 446, 463-464; 793 NW2d 712 (2010). However, it is not improper for a prosecutor to argue that evidence is "uncontradicted." *Id*. at 464. When viewing the prosecutor's comments in context, this is what the prosecutor was arguing.

I. ASSAULT TO DO GREAT BODILY HARM

Defendant claims that the prosecutor's characterization of assault with intent to do great bodily harm was erroneous. During her closing argument, the prosecutor stated:

> Assault with intent to do great bodily harm. That is a lesser included offense of assault with intent to murder. It takes the intent part away. You're just saying, I was just trying to hurt him. I was just trying to hurt him.
>
> Well, you know that's not the case here, because you didn't punch him. You weren't—you weren't doing anything like that. You used a gun.

Defendant argues that this characterization was incorrect and "lowered the burden of proof on the assault with intent to murder charge," because "[i]t implied to the jury that in determining which crime the defendant should be convicted of anything more than a punch in the arm evidenced an intent to murder."

"A prosecutor's clear misstatement of the law that remains uncorrected may deprive a defendant of a fair trial." *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818, 823 (2002). Nonetheless, "if the jury is correctly instructed on the law, an erroneous legal argument made by the prosecutor can potentially be cured." *Id*. In the present case, the prosecutor provided a somewhat muddled view of the law. The intent to do great bodily harm is "the intent to do serious injury of an aggravated nature." *People v Brown*, 267 Mich App 141, 149; 703 NW2d 230 (2005). Merely trying to "hurt" someone with a "punch" does not necessarily equate to the intent to do great bodily harm. However, in making this statement, the prosecutor was stressing that the jury was confronted with the use of a gun, and such use easily allows for an inference of an intent to kill. See *In re Guilty Plea Cases*, 395 Mich 96, 130; 235 NW2d 132 (1975). Regardless of any potential misstatements of the law on the part of the prosecution, any error was cured when the trial court provided the correct law on the subject. See *Grayer*, 252 Mich App at 357.

Defendant also takes issue with the prosecutor's comment, "And the Judge will tell you, a gun is inherently a dangerous weapon. It's used for one thing, and one thing only, and that is to kill. Period." The judge gave no such instruction. Defendant claims that this argument was untrue and "if the judge instructed the jury like that, it would be relieving the jury of finding the essential element of intent." Again, any error was cured when the trial court instructed the jury that, in order for it to convict defendant of assault with intent to murder, it must find that "defendant intended to kill the person he assaulted and the circumstances did not legally excuse

or reduce the crime." Thus, because a curative instruction would have remedied any error and because the trial court ultimately provided the correct law on the requisite intent, defendant is not entitled to any relief.

J. EXCERPT OF VICTIM'S PRELIMINARY EXAMINATION

Defendant next alleges that the prosecutor erred by reading the following statement from the victim's preliminary examination testimony:

> I don't want to put him in jail, but it gotta lead to this because it's going to get bigger. If he come out, I don't want him dead. It's just going to be the truth. You shot me, I know you shot me. Ain't nothing, a legal team or nothing can tell me, you shot me. You know you shot me. That's just point blank.

Defendant argues that the reference to "a legal team" in the testimony that the prosecutor read was an improper comment on his exercise of his right to counsel and that the prosecutor thereby committed misconduct. However, the victim, not the prosecutor, made the comment. And in context, the victim was saying that he was certain that defendant was the shooter, not that defendant's retention of an attorney was somehow evidence of his guilt. No error is shown.

K. SYMPATHY FOR VICTIM

Defendant argues that the prosecutor's reference to the victim being "beat down" was an improper appeal to the sympathy of the jury. In her closing argument, the prosecutor stated:

> [The victim] saw [defendant] and described him when it first happened on the 1st [of January], on the 5th [of January], [and] at preliminary exam. Whole time, nothing changed until he was beat down. Beat down. Everything is still the same, it's just an ID question.

It is well-settled that "[a] prosecutor may not appeal to the jury to sympathize with the victim." *Unger*, 278 Mich App at 237. However, looking at the comment in context reveals that the prosecutor was not referencing the attack and the fact that the victim was "beat down" in order to gain sympathy. Instead, the prosecutor was highlighting the intervening attack on the victim as the reason why he changed his testimony at trial from his earlier testimony, and this comment was not improper.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant moved this Court to remand this case to the trial court for a *Ginther*[4] hearing. This Court granted the motion. *People v Stalling*, unpublished order of the Court of Appeals, entered June 14, 2013 (Docket No. 311850). Following the hearing, the trial court issued an

[4] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

opinion, holding that defendant's trial counsel did not render ineffective assistance of counsel. "Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Findings of fact are reviewed for clear error, while determinations of constitutional law are reviewed de novo. *Id.* This Court must give due regard "'to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.'" *People v Dendel*, 481 Mich 114, 130; 748 NW2d 859, amended on other grounds 481 Mich 1201 (2008), quoting MCR 2.613(C).

The Sixth Amendment to the United States Constitution and Article I, § 20 of the Michigan Constitution guarantee the right to effective assistance of counsel for criminal defendants. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). To establish that his counsel did not render effective assistance and therefore that he is entitled to a new trial, "defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009) (quotation marks omitted).

Defendant first argues that his trial counsel rendered ineffective assistance by failing to call his mother as a witness. At the *Ginther* hearing, trial counsel testified that she declined to call the mother because she was "going to fabricate." The trial court credited this assertion, which we do not find clearly erroneous. A claim of ineffective assistance of counsel cannot be based on the failure to present what counsel reasonably suspects to be perjurious testimony. *People v LaVearn*, 448 Mich 207, 217-218; 528 NW2d 721 (1995).

Defendant next argues that trial counsel should have objected to alleged instances of prosecutorial misconduct. The trial court found that any failure to object was not unreasonable. We agree. As stated above, defendant's claims of error regarding prosecutorial misconduct are without merit. Consequently, defendant's counsel did not render ineffective assistance by declining to object. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997) (declining to raise a meritless objection does not constitute ineffective assistance). Additionally, to the extent that any of the prosecutor's comments introduced any error, any prejudice was minimal, and defendant cannot establish how such minimal prejudice affected the outcome of the trial.

Before trial, defendant's trial counsel moved the trial court "to prevent any mention of [defendant's] prior record . . . unless he testifies." The trial court granted the motion, and defendant did not testify. The prosecutor and defendant later agreed to a stipulation regarding defendant's previous felony conviction and his resultant ineligibility to possess a firearm. The prosecutor told the jury that the parties had stipulated that "at the time of December 31, 2011, the defendant had previously been convicted of a felony and was therefore ineligible to carry a firearm at that time."

Defendant next argues that his trial counsel's testimony establishes that she was ineffective because "she did not know that she could ask for an instruction which would have told the jury to only consider the prior felony conviction on the charge of felon in possession." This is a mischaracterization of trial counsel's testimony. At the *Ginther* hearing, defendant's appellate counsel asked trial counsel why she did not ask for a limiting instruction on the proper use of this stipulation. Defendant's trial counsel answered, "It seem—I don't know, it seems common sense. I've done these trials. It's just for the count of felon in possession. That's it." She added, "I would not have asked for one." When asked, "So if it's not in the standard jury instructions, you would not offer it to the Court," she answered, "I've done special jury instructions before, but this did not seem a time or a place to do one."

The trial court found that "the decision not to highlight Defendant's prior conviction by requesting a limited instruction was a strategic decision made on the part of trial counsel." The trial court's finding was not clearly erroneous. Furthermore, this Court will not second-guess matters of trial strategy. *People v Rice*, 235 Mich App 429, 445; 597 NW2d 843 (1999). The stipulation itself made clear the purpose to which it could be used—to show that defendant "was therefore ineligible to carry a firearm at that time."

Defendant next argues that trial counsel was ineffective for failing to move to strike the victim's testimony regarding threats to prevent him from testifying. The trial court stated that it found "no merit" in this argument, and we agree. As stated above, this was a proper inquiry for the prosecutor, as it was relevant to the victim's credibility. Consequently, trial counsel was not ineffective for failing to move to strike. *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003) ("Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion.").

Defendant also argues that trial counsel was ineffective for failing to object when the prosecutor read the victim's preliminary examination testimony that included a reference to "a legal team." The trial court stated that it found "no merit" in this argument. For the reasons stated previously on this topic, we agree.

Finally, defendant argues that trial counsel was ineffective for failing to object to the closure of the courtroom, which allegedly violated defendant's right to a public trial. During opening and closing argument, the trial court closed the courtroom to prevent the jury from being distracted. Neither party objected. The substantive issue of whether the closure of the courtroom was improper is addressed below. For the reasons stated in Part V of this opinion, *infra*, we find no merit to defendant's assertion that counsel's representation with respect to the issue was unreasonable.

IV. SUFFICIENCY OF THE EVIDENCE

When examining whether there was sufficient evidence to support a conviction, the evidence is reviewed de novo in a light most favorable to the prosecution to determine "whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt." *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010). In reviewing the sufficiency of the evidence, this Court must not interfere with the role of the trier of fact in determining "'the weight of the evidence or the credibility of witnesses.'" *People*

v Eisen, 296 Mich App 326, 331; 820 NW2d 229 (2012), quoting *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). Furthermore, "[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). "'Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.'" *Carines*, 460 Mich at 757, quoting *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

Defendant first argues that there was insufficient evidence that he had the intent to murder the victim. Defendant only takes issue with this element, and does not argue that there was insufficient evidence to fulfill any of the elements of the other convictions. "The elements of assault with intent to commit murder are (1) an assault, (2) with the specific intent to commit murder, (3) which, if successful, would make the killing murder." *People v Beard*, 171 Mich App 538, 541; 431 NW2d 232 (1988). Defendant argues that there was insufficient evidence that he had the intent to murder because he did not shoot the victim at close range, he only struck his toe and lower leg, and the victim's injuries only required hospitalization for one day.

Although only two bullets hit the victim, he testified that he heard "about like eight or nine" shots and elaborated that it was more than three but less than ten. While the areas of his body where he was shot were not vital and the injuries were not severe, the fact that defendant fired several bullets tends to show that he had the intent to kill. See *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996) (sufficient evidence of intent to kill where defendant pulled trigger on gun several times, although no bullets fired). That the victim was not more severely injured can be understood as fortuitous. Viewing this evidence in the light most favorable to the prosecution, there was sufficient evidence that defendant intended to kill the victim.

Defendant also argues that the victim's "equivocal identification testimony" did not furnish proof beyond a reasonable doubt that defendant was the shooter. While the victim's testimony at trial was equivocal, his testimony at the preliminary examination that identified defendant as the shooter, which the prosecutor introduced, was not. Because the victim's testimony at trial was inconsistent with his testimony at the preliminary examination, the preliminary examination testimony was admissible as substantive evidence under MRE 801(d)(1)(A). See *People v Malone*, 445 Mich 369, 378; 518 NW2d 418 (1994). Thus, the jury was permitted to credit that account, and the evidence was sufficient to support the jury's finding.

V. RIGHT TO A PUBLIC TRIAL

During opening and closing argument, the trial court closed the courtroom to prevent the jury from being distracted. Defendant argues that this closure deprived him of his right to a public trial. Defendant failed to object, and consequentially we review the claim for plain error affecting substantial rights. *Carines*, 460 Mich at 763. To establish such a claim, a defendant must prove (1) the existence of an error, (2) the error was plain or obvious, and (3) the error affected the outcome of the proceedings. *Id.*

The Sixth Amendment to the United States Constitution and Article I, § 20 of the Michigan Constitution guarantee criminal defendants a public trial. *People v Vaughn*, 491 Mich

642, 650; 821 NW2d 288 (2012). "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Waller v Georgia*, 467 US 39, 46; 104 S Ct 2210; 81 L Ed 2d 31 (1984) (internal quotation marks, alteration, and citation omitted). Furthermore, "[i]n addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury." *Id.* In the present case, it is unclear whether this right was in fact violated. It appears that members of the public were indeed present for opening and closing arguments, as the trial court told them that they could stay in the courtroom. Defendant does not contend that anyone was told to leave or that anyone who wanted to watch the arguments was excluded. Therefore, the rationale behind the right to a public trial was not infringed. In his brief, defendant appears to assume that the trial court's actions violated this right, as he mainly addresses the justification for the closure. Consequently, defendant has failed to establish the presence of any plain or obvious error.

Even so, assuming without deciding that the closure was plain error that affected defendant's substantial rights, defendant has still not established that he is entitled to any relief. Under the plain-error doctrine, reversal is warranted only if the defendant was actually innocent or if the error *seriously* affected the fairness, integrity, or public reputation of the judicial proceedings. *Carines*, 460 Mich at 763; see also *Vaughn*, 491 Mich at 666-667 (stating that this requirement still applies when a defendant raises the unpreserved issue of being denied the right to a public trial). Here, the "closures" in this case were innocuous. They only occurred during opening and closing arguments, the public nonetheless was permitted to stay, and the closures were undertaken so that the jury would not be distracted by people entering and leaving the courtroom. Consequently, it did not seriously affect the fairness, integrity, or public reputation of judicial proceedings.

Affirmed.

/s/ Pat M. Donofrio

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 24, 2014
v	No. 311850 Wayne Circuit Court
ANTONIO DANARD STALLING, Defendant-Appellant.	LC No. 12-001195-FC

Before: DONOFRIO, P.J., and GLEICHER and M. J. KELLY, JJ.

GLEICHER, J. (*concurring*).

I concur with the majority opinion's decision to affirm defendant's convictions. However, I respectfully disagree with the majority opinion's analysis of defendant's public trial argument.

The trial court closed the courtroom during opening statements and closing arguments because it feared that people entering or exiting through a door facing the jury box might distract the jurors. A trial court may close a courtroom under rare and special circumstances. This was not one of them.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . public trial." Const 1963, art 1, § 20 similarly guarantees that a criminal defendant "shall have the right to a . . . public trial . . . ." In *Waller v Georgia*, 467 US 39, 48; 104 S Ct 2210; 81 L Ed 2d 31 (1984), the United States Supreme Court established that to justify closing the courtroom, the party seeking closure "must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." The closure in this case failed to satisfy this standard. The trial court considered no alternatives to closure (such as a sign advising that arguments were in progress) and made no specific findings justifying closure. Furthermore, it defies logic that an "overriding interest" in avoiding disruption would exist only during counsels' arguments and not throughout the presentation of the proofs.

"Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials." *Presley v Georgia*, 558 US 209, 215; 130 S Ct 721; 175 L Ed 2d 675 (2010). The United States Supreme Court has applied that obligation to jury selection and suppression hearings. The Court emphasized in *Presley* that the right to a public trial extends to

"any stage of a criminal trial." *Id.* at 724. I can think of no reason for relieving courts of this responsibility during opening statements and closing arguments. Indeed, closing argument often supplies the most intense and meaningful moments in a trial.

The majority opinion expresses that because the trial court did not clear the courtroom, members of the public likely were present when the doors were closed, and defendant has failed to identify anyone with an interest in the proceedings who was excluded. I take no solace in these observations. The trial court made no record of those present and those who left to avoid being "locked in." Absent any demonstration of an "overriding interest that is likely to be prejudiced," closing the courtroom to the public during two important portions of a criminal trial clearly violates a Constitutional mandate. *Waller*, 467 US at 48. Moreover, in *Waller*, the United States Supreme Court stated clearly that "the defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee." To require a defendant to identify interested parties who were turned away after meeting a closed and locked door presents an insurmountable obstacle to vindication of a clearly established constitutional right.

I would hold that the trial court's courtroom closure constituted structural error. However, because defendant's attorney neglected to object, *People v Vaughn*, 491 Mich 642, 650; 821 NW2d 288 (2012), we are compelled to employ plain error review. Under that exacting standard, defendant has failed to establish entitlement to relief.

/s/ Elizabeth L. Gleicher

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M. J. KELLY, J., (*concurring*).

I concur fully with the analysis and conclusions stated in sections I through IV of the majority opinion. However, for the reasons stated in Judge Gleicher's concurrence, I concur in the result only with regard to defendant's claim that the trial court deprived him of the right to a public trial.

/s/ Michael J. Kelly