

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
October 2, 2014

v

LAWRENCE VIRGIL WAGNER,  
Defendant-Appellant.

No. 316316  
Wayne Circuit Court  
LC No. 13-000550-FH

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Before: RIORDAN, P.J., and CAVANAGH and TALBOT, JJ.

PER CURIAM.

Lawrence Virgil Wagner appeals as of right his jury trial conviction of bribing, intimidating, or interfering with a witness.<sup>1</sup> Wagner was sentenced to 9 to 15 years' imprisonment for the conviction. We affirm.

Wagner first argues that there was insufficient evidence to support his conviction. We disagree. This Court reviews challenges to the sufficiency of the evidence de novo.<sup>2</sup> In making a determination regarding sufficiency of the evidence, “[w]e examine the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt.”<sup>3</sup>

Pursuant to MCL 750.122(6),<sup>4</sup> “[a] person shall not willfully impede, interfere with, prevent, or obstruct or attempt to willfully impede, interfere with, prevent, or obstruct the ability of a witness to attend, testify, or provide information in or for a present or future official proceeding.” Specifically, the prosecution must prove that the defendant:

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<sup>1</sup> MCL 750.122(7)(a).

<sup>2</sup> *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010).

<sup>3</sup> *Id.* at 196.

<sup>4</sup> MCL 750.122 prohibits several forms of witness tampering; however, each subsection within the statute prohibits distinct forms of conduct. See *People v Greene*, 255 Mich App 426, 438-439; 661 NW2d 616 (2003).

(1) committed or attempted to commit (2) an act that did not consist of bribery, threats or intimidation, or retaliation as defined in MCL 750.122 and applicable case law, (3) but was any act or attempt that was done willfully (4) to impede, interfere with, prevent, or obstruct (5) a witness's ability (6) to attend, testify, or provide information in or for a present or future official proceeding (7) having the knowledge or the reason to know that the person subjected to the interference could be a witness at any official proceeding.<sup>[5]</sup>

For the purposes of MCL 750.122(6), this Court considers the words “impede, interfere with, prevent, or obstruct” to be synonyms and refer to essentially the same conduct.<sup>6</sup> The offense requires two people: “the witness and the person committing the tampering.”<sup>7</sup> The statutory language is construed broadly, thus “any act or attempt, no matter its form, to keep the witness from attend[ing], testify[ing], or provid[ing] information in or for a present or future official proceeding by affecting the witness's ability to do so” is illegal.<sup>8</sup> In this case, the prosecution charged and convicted Wagner under MCL 750.122(7), which details, in part, the consequences for a violation of either subsection (3) or (6). While a defendant's use of threats or intimidation against a witness is not covered under MCL 750.122(6), intimidation of a witness is prohibited separately by MCL 750.122(3).<sup>9</sup>

On appeal, Wagner does not challenge the sufficiency of the evidence regarding the specific elements of the offense. Rather, he first argues that he was incorrectly identified as the person who visited Lutora Carlisle's house on the afternoon of December 10, 2012. Wagner asserts that Carlisle's identification of him was not credible because she only saw him outside her home for a few seconds. This argument lacks merit. Carlisle testified that she clearly saw Wagner's entire face through her front window. Carlisle remembered Wagner when she later saw him in the hallway of the courthouse on January 4, 2013. Thus, viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence presented that Wagner committed the crime.

Wagner additionally argues that the evidence was insufficient to convict him because Darell Shamar Wagner provided an alibi for his whereabouts on the day of the offense. Because Darell's testimony is contrary to that of Carlisle, who identified Wagner as the man who came to her house, this issue relates to the credibility of witnesses. “[T]he issue of credibility is for the jury to decide and we will not resolve credibility issues anew on appeal.”<sup>10</sup> Accordingly, this argument lacks merit.

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<sup>5</sup> *Id.* at 442-443.

<sup>6</sup> *Id.* at 439-440.

<sup>7</sup> *Id.* at 440.

<sup>8</sup> *Id.* at 441 (citation, quotation marks, and emphasis omitted).

<sup>9</sup> *Id.* at 441-442.

<sup>10</sup> *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002).

Wagner also raises several issues in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4. Wagner first argues that his conviction was against the great weight of the evidence. We disagree. This issue is unpreserved and as such our review “is limited to plain error affecting [Wagner’s] substantial rights.”<sup>11</sup>

A verdict is against the great weight of the evidence if “the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.”<sup>12</sup> Wagner contends that he should not have been convicted under MCL 750.122(6) because the prosecution alleged that he threatened or intimidated a witness, which is not an element of MCL 750.122(6). Threatening or intimidating a witness, however, is expressly prohibited by MCL 750.122(3).<sup>13</sup> As explained above, the prosecution charged and convicted Wagner under MCL 750.122(7), which details, in part, the consequences for a violation of either subsection (3) or (6). Thus, relief is not warranted.

Wagner next argues that the prosecution committed misconduct at trial when it argued that Darell’s testimony lacked credibility. We disagree. This unpreserved claim of prosecutorial misconduct is reviewed for plain error.<sup>14</sup> “Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.”<sup>15</sup>

A prosecutor has committed misconduct if a defendant was denied a fair and impartial trial.<sup>16</sup> A determination of whether prosecutorial misconduct has occurred is evaluated “on a case-by-case basis.”<sup>17</sup> Comments made by a prosecutor must be read as a whole and evaluated in the context of a defendant’s arguments and the relationship they bear to the evidence admitted at trial.<sup>18</sup> A prosecutor may not vouch for the credibility of a witness with the implication that the prosecutor has special knowledge of the truthfulness of that witness.<sup>19</sup> A prosecutor can, however, argue that the defendant or a witness is worthy or not worthy of belief.<sup>20</sup>

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<sup>11</sup> *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

<sup>12</sup> *Id.* at 218-219.

<sup>13</sup> *Greene*, 255 Mich App at 438.

<sup>14</sup> *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

<sup>15</sup> *Id.*

<sup>16</sup> *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007).

<sup>17</sup> *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010) (citation and quotation marks omitted).

<sup>18</sup> *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005).

<sup>19</sup> *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009).

<sup>20</sup> *Dobek*, 274 Mich App at 67.

The prosecution's closing argument did allude to the fact that Darell's credibility may be affected because he is Wagner's brother. The prosecution's statements, however, do not amount to misconduct as the prosecution did not imply that it had special knowledge regarding the truthfulness of Darell's testimony, nor did it suggest that defense counsel was attempting to mislead the jury. Rather, the statements were an appropriate argument that Darell was not worthy of belief.<sup>21</sup> Therefore, there was no reversible error.

Wagner also asserts that he was denied the effective assistance of counsel at trial for various reasons, all of which lack merit. Ineffective assistance of counsel claims are mixed questions of fact and constitutional law.<sup>22</sup> The lower court's findings of fact are reviewed for clear error, while "[q]uestions of constitutional law are reviewed . . . de novo."<sup>23</sup> Because Wagner did not move for a new trial or for a hearing pursuant to *People v Ginther*,<sup>24</sup> as required to preserve this issue for appeal, this Court's review is limited to errors apparent on the existing record.<sup>25</sup>

To establish ineffective assistance of counsel, a criminal defendant must show that (1) under prevailing professional norms, counsel's performance fell below an objective standard of reasonableness; (2) but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different; and (3) the proceedings were fundamentally unfair or unreliable.<sup>26</sup> Presumptions exist that counsel's assistance was adequate and that counsel's performance constituted sound trial strategy.<sup>27</sup> As a result, there is a heavy burden upon the defendant to prove otherwise.<sup>28</sup> Counsel is not ineffective for failing to raise futile objections.<sup>29</sup>

Wagner raises three errors allegedly made by defense counsel at trial which include: (1) his failure to object during the prosecution's opening statement and closing argument, (2) his failure to highlight Wagner's appearance being inconsistent with Carlisle's initial description of the man at her door, and (3) his failure to fully investigate exonerating alibi evidence.

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<sup>21</sup> See *id.*

<sup>22</sup> *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

<sup>23</sup> *Id.*

<sup>24</sup> 390 Mich 436; 212 NW2d 922 (1973).

<sup>25</sup> *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

<sup>26</sup> *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012).

<sup>27</sup> *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012); *People v Armstrong*, 490 Mich 281, 290; 806 NW2d 676 (2011).

<sup>28</sup> *Seals*, 285 Mich App at 17; *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

<sup>29</sup> *Ericksen*, 288 Mich App at 201.

As explained above, there was no misconduct by the prosecutor. Because any objection by defense counsel would have been futile, relief for defense counsel's failure to object during the prosecution's opening statement and closing argument is not warranted. Next, in regards to Wagner's claim that defense counsel's failure to highlight Wagner's appearance being inconsistent with Carlisle's initial description of the man at her door constituted reversible error, although Wagner provided a photocopy of his identification card on appeal, that photocopy is not part of the record. Because the record fails to contain a description of Wagner for comparison to Carlisle's initial statement, we are unable to conclude that counsel's behavior fell below an objective standard of reasonableness. Finally, Wagner asserts that defense counsel failed to investigate evidence that would have supported his alibi and asks this Court to consider four letters alleged to have been written by people who were purportedly willing to testify in support of his alibi. First, the record fails to demonstrate that defense counsel did not investigate these witnesses. Second, as Wagner had two alibi witnesses testify at trial, Wagner has failed to rebut the presumption that counsel's failure to call duplicative alibi witnesses at trial was not sound trial strategy.<sup>30</sup> Thus, Wagner's arguments must fail.

Wagner finally contends that he is entitled to resentencing because the trial court erred when it departed upward from the appropriate sentencing guidelines range. We disagree.

Where a sentence departs from the guidelines range, "courts review the reasons given for a departure for clear error."<sup>31</sup> "Clear error is present when the reviewing court is left with a definite and firm conviction that an error occurred."<sup>32</sup> The determination that a sentencing factor is objective and verifiable is reviewed de novo.<sup>33</sup> The court's finding that "the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion, as is the amount of the departure."<sup>34</sup> An abuse of discretion is present when the sentence assessed is not within the range of principled outcomes.<sup>35</sup> Throughout the inquiry, however, this Court must defer to the trial court's firsthand knowledge of the facts and the defendant.<sup>36</sup>

"[I]t is well established that '[a] court may depart from the appropriate sentence range . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure.' "<sup>37</sup> In order to be substantial and compelling, the reasons upon which the

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<sup>30</sup> *Armstrong*, 490 Mich at 290.

<sup>31</sup> *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008).

<sup>32</sup> *People v Fawaz*, 299 Mich App 55, 60; 829 NW2d 259 (2012) (citation and quotations omitted).

<sup>33</sup> *People v Anderson*, 298 Mich App 178, 184; 825 NW2d 678 (2012).

<sup>34</sup> *Smith*, 482 Mich at 300.

<sup>35</sup> *Id.*

<sup>36</sup> *People v Babcock*, 469 Mich 247, 270; 666 NW2d 231 (2003).

<sup>37</sup> *Anderson*, 298 Mich App at 183, quoting MCL 769.34(3).

trial court relied must be objective and verifiable, and must “be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court’s attention.”<sup>38</sup> “The trial court may not base a departure ‘on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range *unless* the court finds from the facts . . . that the characteristic has been given inadequate or disproportionate weight.’ ”<sup>39</sup> Additionally, the trial court “must justify on the record both the departure and extent of the departure.”<sup>40</sup> Departure should only occur in the most exceptional cases.<sup>41</sup>

The trial court articulated several reasons for its departure from the guidelines, which included: (1) Wagner’s numerous prior convictions,<sup>42</sup> (2) Wagner’s status as a parolee at the time of the offense,<sup>43</sup> and (3) the nature of Wagner’s conduct.<sup>44</sup> The above reasons for departure were considered by the prior record and offense variables. The trial court, however, provided further support for its departure from the guidelines when it expressed its outrage at the circumstances of the case and explained that the Wagner’s attempt to influence the jury and the court systems was the most outrageous that the court had seen in 17 years. Accordingly, based on the record evidence and deferring to the trial court’s firsthand knowledge of the facts,<sup>45</sup> we find that resentencing is unnecessary.

Affirmed.

/s/ Michael J. Riordan  
/s/ Mark J. Cavanagh  
/s/ Michael J. Talbot

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<sup>38</sup> *Smith*, 482 Mich at 299.

<sup>39</sup> *Id.* at 300, quoting MCL 769.34(3)(b) (emphasis added).

<sup>40</sup> *Id.* at 313 (emphasis omitted).

<sup>41</sup> *Babcock*, 469 Mich at 257.

<sup>42</sup> MCL 777.52; MCL 777.54. Wagner was assessed 30 points for prior record variable (PRV) 2 because he had been convicted of four or more prior low severity felony convictions, and he was assessed 20 points for PRV 4 because he had been convicted of six or more prior low severity juvenile adjudications.

<sup>43</sup> MCL 777.56. Wagner was assessed 10 points for PRV 6 because he was on parole at the time of the offense.

<sup>44</sup> MCL 777.49(b). Wagner was assessed 15 points for offense variable (OV) 19 because he used the threat of force against another person or the property of another person in an attempt to interfere with the administration of justice.

<sup>45</sup> *Babcock*, 469 Mich at 270.