# Order

**Michigan Supreme Court**
**Lansing, Michigan**

October 28, 2015

Robert P. Young, Jr.,
Chief Justice

151059 & (60)(61)

Stephen J. Markman
Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 151059
COA: 317981
Oakland CC: 2012-241722-FC

MITCHELL JORDAN YOUNG,
Defendant-Appellant.

_____/

On order of the Court, the motion to file pro per supplement is GRANTED. The application for leave to appeal the December 23, 2014 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REVERSE in part the judgment of the Court of Appeals and we REMAND this case to the Oakland Circuit Court to determine whether the court would have imposed materially different sentences on the assault with intent to commit murder and armed robbery convictions under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. 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. The motion to remand for an evidentiary hearing is DENIED.

We do not retain jurisdiction.

t1019

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.

October 28, 2015

Clerk

# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>December 23, 2014 |
| v | No. 317981<br>Oakland Circuit Court |
| MITCHELL JORDAN YOUNG,<br><br>Defendant-Appellant. | LC No. 2012-241722-FC |

Before: MURRAY, P.J., and SAAD and HOEKSTRA, JJ.

PER CURIAM.

Defendant, Mitchell Jordan Young, appeals as of right his jury trial convictions of first-degree murder supported by alternative theories of premeditation and felony murder, MCL 750.316(1)(a); MCL 750.316(1)(b); two counts of assault with intent to murder, MCL 750.83; and armed robbery, MCL 750.529. The trial court sentenced defendant to life imprisonment without parole for the first-degree murder conviction, and identical terms of 23 to 60 years' imprisonment for the assault with intent to murder and armed robbery convictions. We affirm.

## I. BACKGROUND

This case arises out of the brutal murder of Robert Cipriano and the attacks on his wife and one of his sons in their Farmington Hills home during the early morning hours of April 16, 2012. Tucker Cipriano, Robert's adopted son, has already pleaded *nolo contendere* to charges arising out of his involvement in the slaying and beatings of his own family with baseball bats. He is currently serving a life sentence without parole. His friend, defendant, does not contest the factual basis supporting the jury's finding of his guilt in these heinous acts, but instead argues certain procedural errors require reversal of his convictions.

The plot to "go off and kill a family" for money was first hatched among three friends two weeks before the attacks. Each was in his late teens or early twenties. One of the three, Ian Zinderman, accepted immunity to explain this plan and outline defendant's involvement in it. According to Zinderman, defendant and Tucker approached him with a plan to loot a house and kill a family because Tucker, who had been kicked out of his house, was in violation of his parole and needed money and a car to flee to Mexico to avoid returning to jail. Defendant and Tucker had decided to target either Tucker's family or another family in the same neighborhood and estimated their total bounty would be $3,000. Zinderman's cut would be one-third for driving the getaway car. Zinderman told defendant and Tucker that he would consider their

offer. Although he never intended to carry out this plan, Zinderman joined Tucker and defendant in Keego Harbor on the night of April 15, 2012, at the house of 14-year-old Samantha Chick and her brother, 16-year-old Sebastian Chick.

According to Zinderman, he, Tucker, and defendant left the house shortly thereafter and drove to the Cipriano home in Farmington Hills with the goal of stealing money for synthetic marijuana known as Spice or K-2. As Zinderman testified, upon arriving at the house, defendant stayed in his truck while Zinderman assisted Tucker through a garage window. Tucker returned a short time later with a bank card, and the three went to two gas stations to purchase Spice and withdraw cash, among other things. Although their purchase attempts were successful at the first gas station, the friends were unable to obtain any Spice or cash at the second due to suspected debit card fraud, and so Tucker and defendant revived the plan to kill a family and loot a house. Because Tucker thought his family had more money than another in their neighborhood, he thought they were a good choice. Zinderman explained that Tucker and defendant then selected their victims. Tucker was to kill his brothers. Defendant was to kill Tucker's parents. Tucker's eight-year-old sister, Isabella—whom Tucker claimed to love deeply—was to be spared.

The three returned to the Cipriano home, but decided to look for money again instead of killing the family. In the garage, Tucker found a Visa gift card, but after visiting another gas station with defendant and Zinderman, learned it only contained $2.65. Zinderman noted that by 1:00 a.m., the three had returned to the Chicks' house in Keego Harbor where Zinderman said he wanted "out" and to spend the night with the Chicks instead.

Around 2:47 a.m., 911 dispatch received a call from 17-year-old Tanner Cipriano, one of Tucker's brothers. Tanner reported that he was hiding in an upstairs bedroom closet while Tucker and "his friend" were beating his parents with bats. Apparently, Isabella had brought one of the bats in an attempt to defend her parents during the attack.

Within minutes, police arrived at the house where defendant was observed knocking Isabella to the ground as he ran upstairs. Tucker's mother, Rose, was sitting on the staircase and his brother, Salvatore, lay on the ground under two aluminum baseball bats. Both had sustained severe, life-threatening head trauma and were bleeding profusely. Neither was responsive. In the kitchen Tucker's father, Robert, lay face down in a pool of blood wearing only his underwear, dead from multiple force head trauma. One hand was behind his back. Blood was spattered on the cabinets and ceiling in a manner consistent with the assailant standing over Robert while striking Robert's head with a bat. A BB gun lay near Robert's body with blood matching his DNA type.

Police subsequently located Tanner and defendant, whom they subdued after a brief struggle. Police found two bats inside the house, a Quest and an Easton, both covered in blood. DNA samples from the Quest bat matched Salvatore and Rose's DNA. Robert and defendant's DNA did not match the samples on that bat, however. DNA samples from the Easton bat were sufficient to identify Rose, Salvatore and Robert as major donors. Defendant could not be excluded as a DNA donor on the bat's handle, but Tucker could. A knife was also found inside the master bedroom; defendant could not be excluded as a DNA donor, but Tucker could.

When police found defendant, he had blood on his hands, face, shirt, boots, and pants variously matching the DNA profiles of Robert, Rose and Salvatore. The blood on defendant's pants and boots was consistent with impact spatter, i.e., spatter caused from an object contacting blood with blunt force. The location of the blood on those pants suggested that defendant was standing over the blood source. Defendant told police that Tucker went crazy and started swinging. Defendant also complained of neck and back pain. He mentioned nothing about his jaw. Police took defendant to the hospital where he waived his *Miranda*[1] rights and provided a statement.

Defendant confessed that after helping Tucker into the house, Tucker slammed the family dog to the ground. Tucker's father, Robert, confronted them in the kitchen, and Tucker started beating Robert with a baseball bat. When defendant yelled, "what the f**k are you doing?" Tucker struck defendant with the bat and threatened, "If you don't get with the program, you're going to join him." Tucker then handed defendant the bat and told him to shut up his mother who had entered the kitchen and was pleading with Tucker to stop. Defendant admitted that when Rose continued screaming, he hit her in the head with the bat one or two times. Tucker then took his sister, Isabella, who had entered the room, upstairs and a fight ensued between Tucker and his brother, Salvatore. A bat and BB gun were used during the fight. Tucker attacked Salvatore with the bat. When headlights appeared outside, Tucker ran towards the back of the house and defendant ran upstairs.

Notably, defendant provided this version of events only after police confronted him with Tanner and Isabella's eyewitness accounts, as defendant had previously denied assaulting anyone in his initial statement. Defendant also never mentioned Tucker's first break-in with Zinderman or their attempts to use the bank card at the gas stations.

As for Tucker, the evidence established that by 4:00 a.m., he had returned to the Chicks' house. After cleaning the blood from his shirt and discovering an online report about him, he requested Zinderman to retrieve some clothes from the truck and then to dispose of a knife inside the truck as well as the truck itself. It was too late, however, as police had already arrived by tracking defendant's cell phone which he left in the truck. Police located defendant and he was arrested. Notably, while blood was found on Tucker's pants, the blood was not consistent with impact spatter. The blood on Tucker's clothes matched that of Rose and Salvatore, but not Robert. Salvatore's DNA was also found on a washcloth inside the Chicks' house and Robert's DNA was found from a blood stain on the patio door. Inside the truck, police found a Visa gift card and receipts listing Robert Cipriano as the card holder.

As noted, Tucker pleaded *nolo contendere* to charges arising out of these events; defendant contested his guilt. Following defendant's trial and convictions, this appeal ensued.

## II. DEFENDANT'S APPEAL

### A. INSTRUCTIONAL ERROR

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Defendant first argues that the trial court erred in failing to give a cautionary instruction regarding the reliability of Zinderman's testimony as an accomplice.[2] Generally, we review de novo claims of instructional error involving questions of law, and we review a trial court's decision regarding the applicability of an instruction for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). However, because defense counsel expressly responded, "No, your Honor," when asked if there were any objections to the instructions as read, this issue has been waived. See *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002) ("After sending the jury to deliberate, the trial court asked the parties, 'Any objections to the jury instructions as read?' Defense counsel answered, 'No, your honor.' By expressly approving the instructions, defendant has waived this issue on appeal"), citing *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Any error is therefore extinguished and appellate review is foreclosed. *Carter*, 462 Mich at 215.

But even were we to grant plenary review, this issue is otherwise meritless. Indeed, no evidence established that Zinderman participated in *any* of the crimes for which defendant was on trial, and an accomplice instruction is *only* appropriate if the witness was an accomplice to those crimes. *People v McGhee*, 268 Mich App 600, 609; 709 NW2d 595 (2005); *People v Ho*, 231 Mich App 178, 188-189; 585 NW2d 357 (1998). Moreover, even if Zinderman were a disputed accomplice or an accessory after the fact as defendant argues, this would not trigger the accomplice instruction. See *People v Young*, 472 Mich 130, 143-144; 693 NW2d 801 (2005) (declining to reverse for the failure to give a cautionary accomplice instruction where, among other things, it was unclear whether the witnesses at issue were accomplices); *People v Perry*, 460 Mich 55, 62; 594 NW2d 477 (1999) (an accessory after the fact does not participate in the principal offense because "[t]he crime of accessory after the fact is akin to obstruction of justice.").

In any event, the trial court covered defendant's concern of Zinderman's bias in providing an immunity instruction consistent with CJI2d 5.13 (currently, M Crim JI 5.13),[3] independent evidence (including bank records, text messages, surveillance videos, and Samantha Chick's testimony) corroborated Zinderman's testimony, and the DNA and blood spatter evidence independently linked defendant to the crimes.[4] Reversal is not warranted.

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[2] Defendant originally requested accomplice instructions CJI2d 5.5 and 5.6, currently identified as M Crim JI 5.5 and 5.6.

[3] See *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012) (since "[t]he primary purpose of both [the accomplice and immunity] instructions is to raise the jury's awareness of the potential ulterior motives of the witness," the court's giving only the immunity instruction was sufficient to protect the defendant's rights under the circumstances).

[4] See *Young*, 472 Mich at 143-144 (declining to reverse alleged unpreserved error for the failure to give a cautionary accomplice instruction where it was unclear whether the witnesses were accomplices, evidence independent of those witnesses' testimony established the defendant's guilt, defense counsel cross-examined the witnesses and argued their credibility to the jury, and the court instructed the jury to consider any bias, prejudice or personal interest).

## B. DEFENDANT'S CONFESSION

Next, defendant claims his confession in the hospital was involuntary and should have been suppressed. Where a defendant challenges the admissibility of a confession, the prosecution must establish by a preponderance of the evidence that the confession was voluntary, and made after a knowing, intelligent and voluntary waiver of *Miranda* rights. *People v Daoud*, 462 Mich 621, 624; 614 NW2d 152 (2000); *People v Harris*, 261 Mich App 44, 55; 680 NW2d 17 (2004). Although an appellate court will review de novo the entire record regarding the trial court's resolution of these issues, we will not disturb the trial court's factual findings unless clearly erroneous. *Daoud*, 462 Mich at 629; *People v Gipson*, 287 Mich App 261, 264; 787 NW2d 126 (2010). Where resolution of a disputed fact turns on the credibility of witnesses or the weight of the evidence, we defer to the trial court's superior opportunity to make such assessments. *Daoud*, 462 Mich at 629; *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). Absent a definite or firm conviction of a trial court's mistake, we will affirm. *Gipson*, 287 Mich App at 264.

In evaluating the admissibility of defendant's statement, we consider the following nonexhaustive list of factors:

> [T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*People v Cipriano*, 431 Mich 315, 334, 429 NW2d 781 (1988) (citations omitted).]

A finding of voluntariness is not dependent upon the presence or absence of any one factor; rather "[t]he ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates it was freely and voluntarily made." *Sexton*, 461 Mich at 753 (quotation marks and citation omitted).

At defendant's *Walker* hearing,[5] the trial court found that no evidence established that defendant suffered head trauma, a blackout, confusion, a broken nose or any neurological deficits, and that even if defendant had a brief seizure, it had no effect on his ability to answer questions coherently and give medical personnel all the information required for treatment. The court additionally found that despite testimony that defendant had "spit up," there was no

[5] *People v Walker* (*On Rehearing*), 374 Mich 331, 338; 132 NW2 87 (1965).

evidence of dizziness, vomiting, memory problems, anything revealing trauma or that defendant was not in his right mind while coherently answering the officers' questions. Thus, where police coercion and threats were nonexistent, the trial court concluded that there was "no evidence on this record that this defendant was not of his right mind or was compromised in any way in his ability to give a proper and reliable statement to the detective."

Defendant challenges this ruling on several grounds, arguing that his confession was not voluntary where he had been up all night; the interrogation lasted three hours; he was handcuffed to the bed; he had suffered injuries to his face, jaw and abdomen with a bat; he had informed an officer of his Asperger's Syndrome; and he had tested positive for marijuana. After examining the totality of the circumstances, we are not left with a definite and firm conviction of error.

For starters, no evidence was presented showing that defendant's age, education or intelligence affected the voluntary nature of his confession. Nor did any evidence substantiate that defendant's injuries had any effect. To the contrary, although defendant arrived at the hospital with a dislocated jaw, there was no fracture and medical personnel did not deem it a serious injury, especially considering that defendant spoke clearly. Palpitations of defendant's chest and torso did reveal "tenderness" in the sternum area, but there was no pain rating. In fact, defendant did not even receive pain medication before the interrogation. The length of the interrogation during which defendant was handcuffed to the bed is likewise inconsequential. Again, besides citing these facts, defendant fails to explain how this in any way rendered his confession involuntary. See *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001) (issues not briefed or supported are abandoned). And in any event, a three-hour interview in a hospital bed—including breaks—is hardly dispositive, especially considering that defendant was there because of his own complaints of serious injury. See *McCalvin v Yukins*, 444 F3d 713, 720 (CA 6, 2006) (finding the confession voluntary where, among other things, defendant received breaks during four hours of interrogation); *Conner v McBride*, 375 F3d 643, 652 (CA 7, 2004) (finding confession voluntary even after three-hour interrogation). Finally, not only was defendant taking no medication for any pre-existing conditions, but he also did not appear tired or otherwise under the influence of any drugs, including marijuana. See *People v Dunlap*, 82 Mich App 171, 176; 266 NW2d 637 (1978) (the influence of drugs is not dispositive to a determination of whether a defendant's confession is voluntary). When this is coupled with defendant's coherent answers to medical personnel and police—which changed only after he was confronted with other eyewitness testimony—we can hardly conclude there was clear error.

But even if there were error, it was harmless beyond a reasonable doubt. *People v McRunels*, 237 Mich App 168, 184; 603 NW2d 95 (1999) (the admission of an involuntary confession is subject to harmless-error analysis). Again, Zinderman's testimony detailing defendants' plan to kill Tucker's parents considered in conjunction with the blood spatter and DNA evidence showed that it was defendant who beat Robert to death.[6] Moreover, as the

[6] Although not dispositive, we are not blind to defendant's chameleon-like demeanor, which changed depending upon the circumstances. For example, upon leaving the district court defendant went from nearly crying, to smiling and asking the accompanying officer, "Off the record, how do you think I'm doing?"

prosecution points out, the lack of serious injury to defendant undercut his attempt to exculpate himself, especially considering that defendant could not keep the details of his own confession straight. Defendant's arguments hold no sway.

C. PROSECUTORIAL MISCONDUCT/INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant's third assignment of error is one of prosecutorial misconduct based on the prosecution's use of certain PowerPoint slides during closing argument. Defendant did not raise this issue below and so our review is for plain error affecting substantial rights, i.e., outcome determinative error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Reversal is warranted only when plain error resulted in the conviction of an innocent defendant or otherwise seriously affected the fairness, integrity or public reputation of the judicial proceedings independent of the defendant's innocence. *Ackerman*, 257 Mich App at 448-449.

To the extent defendant makes an accompanying claim of ineffective assistance of counsel, our review of any related constitutional question is de novo; the trial court's factual findings, if any, are reviewed for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To prevail, defendant must show his counsel's representation was objectively unreasonable under prevailing professional norms and that but for this representation, the result of the proceedings would have been different. *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008).

Notably, after this appeal was filed, we granted defendant's motion to supplement the record with the slides at issue,[7] and so our review includes that evidence. See *People v Moore*, 493 Mich 933; 825 NW2d 580 (2013).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). The Court must take into account all the facts of the case in determining the propriety of a prosecutor's conduct. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

The prosecution's PowerPoint presentation during closing argument included slides ranging from lists of the elements of the offenses to pictures of defendant and the victims with text adjacent to the pictures. While defendant claims the entire PowerPoint presentation was inflammatory, he specifically attacks only eight slides. These slides variously show photographs of the victims before and after the attack; medical personnel and police officers; a blood-stained Easton baseball bat; Tucker and defendant; and defendant's blood-stained pants. Several slides also contain text next to these pictures indicating "Murder Weapon," "Bob's DNA," "Tucker

[7] *People v Young*, unpublished order of the Court of Appeals, entered July 30, 2014 (Docket No. 317981).

excluded," and "Young cannot be excluded;" text of the word, "Killer," under defendant's picture; text of "Young said, Hit her one or two times in the head with the bat," "Multiple depressed comminuted skull fractures," and "Life threatening injures" next to Rose's hospital picture; and the elements of assault with intent to murder next to hospital photographs of Rose and Salvatore.

Defendant contends that the photographs in conjunction with the accompanying text prejudicially relayed the prosecution's opinion of his guilt and were a blatant appeal to the jury's emotion. See *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995) (a prosecutor may not assert personal beliefs of a defendant's guilt during closing argument); *People v Unger*, 278 Mich App 210, 237; 749 NW2d 272 (2008) (the prosecution may not urge the jury to convict on the "basis of its prejudices"). But the text defendant cites either restates direct evidence adduced at trial, or contains reasonable inferences based on that evidence. *Bahoda*, 448 Mich at 282 (a prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case). Indeed, the text concerning the DNA, bat and blood-spattered pants accurately relays the evidence presented at trial which created the reasonable inference that defendant beat Robert to death, i.e., that defendant was the killer. Even the descriptions of the victims' injuries contained in the slides came directly from the testimony of several witnesses. In light of this, we fail to see how the prosecution's argument—which need not be stated in the blandest possible terms, by the way, *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995)—was improper just because it was *also* presented in a visual medium.[8]

By the same token, although the victims' pictures were graphic, they mirrored the photographs already admitted into evidence. As it was otherwise proper to admit the victims' photographs to explain their injuries and to show defendant had the requisite intent, see *People v Howard*, 226 Mich App 528, 550; 575 NW2d 16 (1997) (finding autopsy photographs depicting injury properly admitted as probative of the issue of intent); *People v Flowers*, 222 Mich App 732, 736; 565 NW2d 12 (1997) (finding autopsy photographs relevant to an explanation of the nature of the injuries), we cannot conclude that the prosecution used the "modified" photographs in the slides to inflame the jury or otherwise arouse their emotions. Indeed, were the jury's emotions aroused, it would not be because of the prosecution's use of photographs "modified" with text, but due to the fact that graphic photographs, and accompanying explanatory testimony, were already admitted in the first place. See *People v Mills*, 450 Mich 61, 77; 537 NW2d 909 ("if photographs are otherwise admissible for a proper purpose, they are not rendered inadmissible merely because they bring vividly to the jurors the details of a gruesome or

[8] Defendant relies on *In re Glasmann*, 175 Wash 2d 696, 706; 286 P3d 673 (2012) (en banc) (finding prosecutorial misconduct where the prosecution presented images of the defendant containing text questioning his veracity and indicating he was "GUILTY") (capital letters in original). But the crux of the ruling in *Glasmann* was that the prosecution's captions were "the equivalent of unadmitted evidence" that ultimately expressed the prosecution's personal opinion of guilt. *Id*. at 678-679. In contrast, here, the text recited admitted evidence and reasonable inferences from that evidence, which the prosecution otherwise properly argued verbally. *Glasmann* causes us no pause in reaching our conclusion.

shocking accident or crime, even though they may tend to arouse the passion or prejudice of the jurors") mod 450 Mich 1212 (1995) (citations omitted). And as defendant does not challenge the court's evidentiary ruling on this score, we would be hard-pressed to find that the use of these "modified" photographs during closing argument denied defendant a fair trial.[9]

Regardless, in light of the physical DNA and blood spatter evidence linking defendant to Robert's murder and excluding Tucker coupled with Zinderman's damning testimony about defendant and Tucker's plan to kill the Ciprianos, we would not otherwise conclude that any error was outcome determinative, let alone that defendant was actually innocent or that the proceedings were somehow compromised. The trial court's clear instruction on the jurors' use of evidence, on the attorneys' arguments, and on excluding sympathy from their decision simply nailed the door shut on this issue. See *Watson*, 245 Mich App at 586 ("No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction") (citation omitted). Reversal is inappropriate.

On account of our conclusion that the prosecution did not act improperly, we likewise reject defendant's argument that his counsel was ineffective. Objections destined to lose are certainly unnecessary, *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997), and the trial court provided the proper instructions even without defense counsel's prompting. But even then, absent prejudice, defendant cannot make out the second element of an ineffective assistance claim. It, too, has no merit.

## D. SENTENCING

Next up is defendant's unpreserved sentencing challenge, specifically, that the trial court engaged in impermissible judicial fact-finding that increased his minimum sentence range for his assault with intent to murder and armed robbery convictions contrary to *Alleyne v United States*, 570 US ___, ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013). As defendant acknowledges, however, this Court has already determined that *Alleyne* is not applicable to Michigan's sentencing guidelines. *People v Lockridge*, 304 Mich App 278, 284; 849 NW2d 388 (2014), citing *People v Herron*, 303 Mich App 392; 845 NW2d 533 (2013). We are bound to follow that precedent, MCR 7.215(J)(1), irrespective of the fact that our Supreme Court granted leave to consider this issue in *People v Lockridge*, 496 Mich 852; 846 NW2d 925 (2014), MCR 7.215(C)(2). And, in any event, even if there were a scoring error, this unpreserved issue would be moot in light of defendant's mandatory life sentence without parole for his first-degree

[9] Accord *Connecticut v Francione, Jr*, 136 Conn App 302, 328; 46 A3d 219 (2012) (finding that the prosecution's use of a PowerPoint presentation summarizing testimony was not improper because "there would have been no meaningful distinction between presenting the information contained on the slides orally and displaying it on an overhead projector. The slides were not improper because all of the information adequately was supported by the evidence, the prosecutor was not appealing solely to the emotions of the jury, the prosecutor did not improperly express his opinion as to the guilt of the defendant or the credibility of the witnesses, and there was no reasonable likelihood that the presentation would confuse the jury or prejudice the defendant.").

murder conviction. See *People v Watkins*, 209 Mich App 1, 5; 530 NW2d 111 (1995) ("our affirmance of defendant Watkins' first-degree murder conviction, with its mandatory life sentence, effectively nullifies the significance of any sentences for the companion convictions"); *People v Passeno*, 195 Mich App 91, 102; 489 NW2d 152 (1992), overruled in part on other grounds by *People v Bigelow*, 229 Mich App 218; 581 NW2d 744 (1998). In light of this, any error could not have "seriously affected the fairness, integrity or public reputation of judicial proceedings." *Carines*, 460 Mich at 774. The issue is moot.

## III. DEFENDANT'S STANDARD 4 BRIEF

Defendant also filed a Standard 4 Brief. All of his arguments in that brief pertain to ineffective assistance of counsel or unpreserved claims of prosecutorial misconduct. Since we denied defendant's motion to remand for an evidentiary hearing,[10] our review of the former is limited to mistakes apparent on the existing record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). As set forth below, because we conclude all alleged errors are either nonexistent or not outcome determinative, we categorically reject defendant's claims.[11]

### A. DEFENDANT'S DOCTOR

Defendant claims his counsel was ineffective for failing to object to the hospital doctor's testimony describing his minor injuries and for failing to request a *Davis/Frye* hearing.[12] Defendant argues both were necessary because the doctor's trial testimony contradicted her prior sworn testimony that his face was swollen and that he was struck "with some object" or by "something." The record reveals, however, that it is defendant's argument which is contradicted. Indeed, the doctor expressly admitted at trial—consistent with her prior testimony—that defendant's injuries could result from being hit in the face and that he had sustained a legitimate injury, but that the injury "reduce[d] on its own." Accordingly, even if this testimony were subject to an MRE 702 analysis,[13] defendant has failed to establish a factual predicate that any hearing was necessary, let alone that an objection was called for. He therefore cannot establish ineffective assistance. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999) (defendant must establish a factual predicate to support his claim of ineffective assistance of counsel). Moreover, given the overwhelming physical evidence adduced against defendant, the failure to object or to

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[10] *People v Young*, unpublished order of the Court of Appeals, entered September 24, 2014 (Docket No. 317981).

[11] We have already set forth the relevant standards, and will not repeat them here.

[12] See *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955); *Frye v United States*, 54 App DC 46; 293 F 1013 (1923). A *Davis/Frye* hearing is this state's predecessor to a *Daubert* hearing. See *Daubert v Merrell Dow Pharm, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

[13] MRE 702 "requires trial judges to act as gatekeepers who must exclude unreliable expert testimony." Staff Comment to 2004 Amendment of MRE 702, citing *Daubert*, and *Kumho Tire Co, Ltd v Carmichael*, 526 US 137; 119 S Ct 1167; 143 L Ed 2d 238 (1999).

request a hearing did not prejudice him, even if there were error. This unpreserved claim is a nonstarter.

## B. PROSECUTION'S CLOSING ARGUMENT

Next, defendant maintains that during closing argument the prosecution misstated that "everyone's" DNA was excluded from the Easton bat's handle except defendant's, that Zinderman had claimed Tucker wanted to escape to Tennessee, and that Tucker's ATM transaction at the gas station was denied. But even assuming these were misstatements of the evidence, *Ackerman*, 257 Mich App at 450 (prosecutor may not misstate evidence), reversal is not warranted.

As for the DNA argument, defendant ignores that the prosecution correctly told the jury that Tucker's DNA was excluded from the Easton's handle as well. As it was never suggested by anyone—including defendant—that any of the Ciprianos besides Tucker was involved in the slaughter, the prosecution's statement was hardly prejudicial. Similarly, although Zinderman did not mention Tennessee, defendant did in his confession to police. Equally inconsequential is whether the ATM card worked, and certainly the instruction that attorney's arguments are not evidence cleared up any potential problems here. *People v Mesik* (*On Reconsideration*), 285 Mich App 535, 541-542; 775 NW2d 857 (2009) (noting that even when a prosecutor misstates the law or argues facts not in evidence, proper jury instructions cure most errors because jurors are presumed to follow the court's instructions).

Even weaker are defendant's problems with the prosecution's argument that the Easton bat was the murder weapon and that defendant was the "killer." These were the perhaps the most reasonable inferences to draw from the physical evidence linking defendant to the crimes. Their presentation to the jury was wholly proper. *Ackerman*, 257 Mich App at 450 (prosecutor may argue reasonable inferences from the evidence).

Thus, not only was there no prosecutorial misconduct denying defendant a fair trial, but defendant can hardly fault defense counsel's apparent strategy not to quibble with the prosecution's minor misstatements and otherwise proper inferences. *People v Reed*, 449 Mich 375, 400; 535 NW2d 496 (1995) (the decision to object to minor, potential prosecutorial error during argument is trial strategy, not ineffective assistance). Claims of ineffective assistance on these grounds simply cannot stand.

## C. DNA EVIDENCE

Relying on *People v Coy*, 243 Mich App 283, 301-303; 620 NW2d 888 (2001) (determining expert witness testimony regarding DNA inadmissible absent statistical evidence), defendant claims that the prosecution's failure to present a statistical analysis of certain DNA evidence was error. But regardless of whether the presentation of the DNA evidence was incomplete, defendant admits that proper DNA analysis was presented regarding the presence of Robert's DNA on the Easton bat and on defendant's pants. This is fatal to defendant's DNA argument since the location of the blood spatter on defendant's pants suggests he stood over Robert while beating him with a bat or minimally that he aided and abetted someone who did. When this is considered in conjunction with defendant's confession placing him at the scene,

Zinderman's testimony, and the other physical evidence linking defendant to the crimes, support for defendant's guilt remains overwhelming. Cf. *id*. at 311-312 (holding that use of inadmissible DNA evidence to place the defendant at the scene was outcome determinative error *where no testimony otherwise did so*). Any potential error was not outcome determinative. *Carines*, 460 Mich at 763.

D. PRESENTATION OF THE DEFENSE

Defense counsel was also not ineffective for the rest of defendant's laundry list of alleged failures, including: (1) failing to present a claim of right defense to the charge of armed robbery, see *People v Cain*, 238 Mich App 95, 118-119, 605 NW2d 28 (1999) (a claim of right defense is viable "if a defendant had a good faith belief that the defendant had a legal right to take the property at issue"); (2) conceding that defendant had the intent to steal; (3) electing not to call a forensic expert; (4) failing to call "multiple" exculpatory witnesses; (5) relying solely on weaknesses in the prosecution's case; (6) failing to object to "minimally probative evidence"; and (7) failing to impeach key witnesses.

First, regarding the claim of right defense, defendant ignores that before the attack defendant had twice driven Tucker to the Cipriano house to steal money and that the ultimate goal of the plan to "kill a family" was to obtain money for Tucker's escape to Mexico. Defendant even admitted helping Tucker break in to the garage before the attack. We will not second guess defense counsel's decision to argue that defendant acted under duress, rather than to argue the weak theory defendant now argues on appeal. See *People v LaVearn*, 448 Mich 207, 214; 528 NW2d 721 (1995) (explaining that the Court should not second-guess a defense counsel's strategy to present one defense over another where the former "would have been weakened by the apparent purposefulness of the defendant's actions.").

Second, in conceding that defendant had the intent to steal, in context, it is clear counsel was attempting to contrast a petty thief (defendant) from a murderer (Tucker). This strategy was not improper, especially considering that intent is but one element of armed robbery, *People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007), and counsel did not completely concede defendant's guilt, *People v Krysztopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988) ("it is only a complete concession of defendant's guilt which constitutes ineffective assistance of counsel.").

Third, defendant admits that his counsel interviewed a forensic expert, whom counsel concluded would be unfavorable. Needless to say counsel's strategy on this score was a good one. See *People v Grant*, 470 Mich 477, 493; 684 NW2d 686 (2004) ("The failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome") (citation omitted).

Fourth, defendant fails to identify a single witness counsel otherwise failed to call, let alone specify their "favorable testimony." See *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002) ("other than defendant's statements, there is simply no showing that these witnesses exist or that their testimony would have benefited defendant had they been called. Thus, there are no errors apparent on the record.").

Fifth, while defense counsel called no witnesses, defendant completely ignores counsel's aggressive pretrial attempts to suppress incriminating and potentially volatile evidence, such as the victims' photographs, and his motion for separate trials. This is hardly the passive strategy defendant suggests.

Sixth, defendant identifies no other "minimally probative" evidence aside from the knife, the importance of which defendant overstates relative to the other physical evidence regarding the bats and defendant's clothes. *People v Ullah*, 216 Mich App 669, 685-686, 550 NW2d 568 (1996) (whether to object to evidence is a matter of trial strategy necessitating reversal only if the failure to do so was outcome determinative).

Seventh, the only witness defendant specifically claims should have been impeached was Zinderman, but defendant fails to specify the inconsistencies leaving Zinderman exposed to "effective and total impeachment," which in any event would not have been outcome determinative. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008) (the questioning of witnesses is trial strategy, which requires reversal only where it was outcome determinative).

Finally, because the only errors raised were either *de minimis* or insubstantial, we are not persuaded that they cumulatively affected the trial's fairness as defendant argues. *People v Knapp*, 244 Mich App 361, 387-388; 624 NW2d 227 (2001).

Affirmed.

/s/ Christopher M. Murray
/s/ Henry William Saad

# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>December 23, 2014 |
| v | No. 317981<br>Oakland Circuit Court |
| MITCHELL JORDAN YOUNG,<br><br>Defendant-Appellant. | LC No. 2012-241722-FC |

Before: MURRAY, P.J., and SAAD and HOEKSTRA, JJ.

HOEKSTRA, J., (*concurring).*

I concur in the majority's decision to affirm defendant's convictions. However, I write separately because, in my judgment, the prosecutor committed misconduct by manipulating certain photographs for use in a PowerPoint presentation shown during closing arguments. Although I see this conduct as improper, given the overwhelming evidence in this case, I would nonetheless affirm because defendant failed to object to the PowerPoint presentation at trial and he has not met his burden of showing plain error affecting his substantial rights or that defense counsel's failure to object deprived defendant of the effective assistance of counsel.

In this case, during closing arguments the prosecutor made use of a 99 page PowerPoint presentation involving pictures of the victims, witnesses, the crime scene, and other evidence. These photographs were accompanied by bullet points of the prosecutor's argument, as well as arrows or other illustrations designed to connect various photographs and pieces of evidence. On appeal, defendant has challenged several particular slides. Specifically, slides 25 and 26 displayed a photograph of Robert Cipriano's body at the scene of the crime over which a photograph of a blood covered baseball bat had been superimposed. On slide 26, a picture of defendant also appeared and the word "Killer" had been added in typeface across his photograph. Slide 18 displayed another picture of the blood covered bat with the words "murder weapon" written below. Slide 20 showed a photograph of defendant's pants splattered in blood over which photographs of Cipriano and defendant had been superimposed. Photographs of the other victims as they appeared in the hospital were shown on several slides challenged by defendant, namely slides 31, 35, and 45. Lastly, toward the end of the presentation, on slide 93, a photograph of a smiling Cipriano was juxtaposed with a photograph of his blood covered legs where he lay on the kitchen floor.

In considering the propriety of the prosecutor's conduct, it must be remembered that "a prosecutor's role and responsibility is to seek justice and not merely convict." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). The prosecutor's conduct is evaluated on a case-by-case basis, considering the entire record and analyzing the prosecutor's remarks in context, to determine whether a defendant was denied a fair and impartial trial. *Id.* Prosecutors are free to argue the evidence and reasonable inferences arising from the evidence, and they are generally given wide latitude in regard to their arguments and conduct at trial. *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). For example, a prosecutor may, depending on the circumstances of the case, display admitted exhibits during closing arguments, see, e.g., *People v Coddington*, 188 Mich App 584, 603; 470 NW2d 478 (1991), and the use of visual aids during closing arguments may be appropriate where designed to simplify or summarize complicated evidence. See 6 Am. Jur. Trials 873; *Campbell v Menze Const Co*, 15 Mich App 407, 409; 166 NW2d 624 (1968). Moreover, the prosecutor is not required to confine arguments to the "blandest of all possible terms." *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001) (citation omitted). A prosecutor may not, however, appeal to the jury to sympathize with the victim. *Unger*, 278 Mich App at 237. Likewise, the prosecutor exceeds the bounds of proper argument by mischaracterizing the evidence presented or arguing facts not in evidence. *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). See also *People v Finley*, 161 Mich App 1, 9; 410 NW2d 282 (1987) ("Closing argument is not the time to introduce new evidence.").

Given the wide latitude typically afforded to prosecutors, as a general matter, I see nothing intrinsically wrong in the use of a PowerPoint presentation as a visual aid during closing arguments when it is used to simplify or summarize complicated evidence for the jury. However, in my judgment, a problem arises when, as part of a PowerPoint presentation, photographs are manipulated in a manner that would arouse the sympathy of the jury. In such circumstances, I believe that the manipulation and alteration of photographs crosses the line from the permissible display of exhibits and the permissible use of visual aids into an improper appeal to juror sympathy and, arguably, the improper presentation of materials not in evidence. In this case, I would conclude that the prosecutor's PowerPoint presentation crossed that line.

For example, I find it particularly troubling that the prosecution altered a photograph of defendant to include the word "killer." Certainly, the prosecutor could argue based on the evidence presented that defendant was a "killer," but no photograph identifying defendant as such was introduced into evidence and the creation of such a photograph is analogous to the improper presentation of new evidence. See *In re Glasmann*, 175 Wash 2d 696, 705-706; 286 P3d 673 (2012) (en banc). Moreover, unlike reasoned oral argument to the effect that the evidence shows a defendant is guilty beyond a reasonable doubt, see, e.g., *People v Bahoda*, 448 Mich 261, 286; 531 NW2d 659 (1995), the altered photograph instead definitely declared, with all the power of a visual image's tendency to evoke an emotional response, that defendant was a "killer." Cf. *Watters v State*, 129 Nev Adv Op 94; 313 P3d 243, 247-248 (2013). See also *In re Glasmann*, 175 Wash 2d at 708-709 ("[V]isual arguments manipulate audiences by harnessing rapid unconscious or emotional reasoning processes and by exploiting the fact that we do not generally question the rapid conclusions we reach based on visually presented information." (citation omitted)). In this respect, it bears remembering that photographs are powerful tools that can be used in a calculated manner to arouse sympathy and prejudice, and that photographs used merely for this purpose should not be presented to the jury, particularly if they are not

substantially necessary or instructive to show material facts or conditions. See *People v Mills*, 450 Mich 61, 77; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995); *In re Glasmann*, 175 Wash 2d at 708-709. I view a photograph labeling defendant categorically as a "killer" to be entirely unhelpful to the jury's understanding of the case and highly likely to arouse the jury's sympathies or prejudices. For this reason, I cannot sanction the prosecutor's inclusion of such a photograph in a PowerPoint presentation during closing arguments.

Similarly, I view with disfavor practices such as superimposing one image over another, such as superimposing a photograph of a baseball bat over Cipriano's body or superimposing photographs of defendant and Cipriano over defendant's blood covered pants. Certainly, the prosecutor could argue that the baseball bat was the murder weapon or that Cipriano's blood was found on defendant's pants, but I find unacceptable supporting this argument through the creation of essentially new images involving the manipulation of exhibits. Such manipulation borders on the improper presentation of new evidence, see *In re Glasmann*, 175 Wash 2d at 705-706, and it poses the risk of unfairly prejudicing defendant. Gruesome photographs undoubtedly have a proper and necessary role in many criminal cases, see *Mills*, 450 Mich at 77-78, but I find unacceptable additional efforts by the prosecutor to increase the power of an image through manipulation, alteration, or theatrical display of the photograph. Thus, in my judgment, photographs used during closing arguments should be confined to the accurate factual representations of the photograph as admitted as exhibits, free from alteration or manipulation by the prosecutor. See generally *id.*

Finally, I can see no reason for the juxtaposition of a photograph depicting Cipriano's blood covered legs with that of a photograph depicting a smiling Cipriano other than to arouse juror sympathy, which the prosecutor may not do. See *People v Dalessandro*, 165 Mich App 569, 581; 419 NW2d 609 (1988). I question too whether the repeated presentation of photographs depicting the severely injured victims in the hospital was part of a permissible argument or whether it was an improper effort to appeal to the jurors' sympathies. Photographs may of course be admitted into evidence when relevant and may be used by the prosecutor to argue his or her theory of the case. But, there is a line between arguing that the injuries depicted support the prosecution's theory of the case and repeatedly presenting those images to the jury in a manner that garners sympathy for the victims. Cf. *id.* (concluding repeated references to "the poor innocent baby" during closing were intended to elicit an emotional response from the jury). Given the powerful effect photographs may have on their viewers, see *Mills*, 450 Mich 76- 77, I believe prosecutors making use of photographs during closing arguments should recall their obligation to seek justice and scrupulously limit the use of photographs to their proper purpose.

Although in my view there were numerous improprieties in the prosecutor's use of photographs in the course of the PowerPoint presentation, I nonetheless concur in the majority's affirmance of defendant's convictions. Defendant did not offer an objection to the PowerPoint presentation at trial and, given the overwhelming evidence of his guilt, he has not shown any impropriety by the prosecutor affected his substantial rights. See *People v Ericksen*, 288 Mich App 192, 198; 793 NW2d 120 (2010). Given the overwhelming evidence presented, defendant has also not shown that, but for defense counsel's failure to object, there was a reasonable probability of a different outcome. See *People v Grant*, 470 Mich 477, 486; 684 NW2d 686 (2004). Consequently, I agree that defendant is not entitled to relief and that his convictions should be affirmed.

/s/ Joel P. Hoekstra