STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NATHANIEL JAMAR ABRAHAM,

Defendant-Appellant.

FOR PUBLICATION
April 10, 2003
9:00 a.m.

No. 227938
Oakland Circuit Court
Family Division
LC No. 97-063787-FC

Updated Copy
May 23, 2003

Before: O'Connell, P.J., and Fitzgerald and Murray, JJ.

O'CONNELL, P.J.

Defendant Nathaniel Jamar Abraham appeals as of right his jury conviction and sentence for second-degree murder, MCL 750.317; see also MCL 712A.2d (statute allowing charging, trying, and sentencing juvenile as an adult). Defendant was sentenced to placement at the Maxey Boys Training School within the juvenile justice system until his twenty-first birthday. At the time of defendant's well-publicized trial, defendant was twelve years old. We affirm.

I. Facts and Proceedings

This is not the first time this case has been before us. In *People v Abraham*, 234 Mich App 640; 599 NW2d 736 (1999), this Court affirmed the trial court's order denying defendant's motion to quash the information. In addition, this Court reversed the trial court's order granting defendant's motion to suppress evidence of his statements to the police. We set out the facts in our previous opinion as follows:

> This case arises from the fatal shooting of Ronnie Green, and the nonfatal shooting of Michael Hudack, on October 29, 1997. Two days later the police questioned defendant about the shootings. According to the investigating officer, defendant first offered various innocent explanations of his role in the matter, then finally implicated himself in the shooting of Green. A probable cause hearing on the prosecution's petition requesting that defendant, then aged eleven years, be tried as an adult was held the following month. At the hearing, friends of defendant testified that defendant broke into a house and stole a .22-caliber rifle,

> practiced shooting at balloons and streetlights, stated an intention to shoot gang members who had been bothering him, and then boasted that he had shot someone. Defendant was bound over for trial on one count of first-degree premeditated murder, MCL 750.316(1)(a) . . . , one count of assault with intent to commit murder, MCL 750.83 . . . , and two counts of possession of a firearm during the commission of a felony, MCL 750.227b . . . .
>
> * * *
>
> The police took defendant from school to the police station for questioning, stopping on the way to apprise defendant's mother of the matter. Defendant's mother joined defendant at the police station several minutes after defendant arrived with the police. Defendant and his mother were advised of defendant's [*Miranda*[1] rights], in response to which they indicated that defendant did not wish to speak to an attorney and agreed to waive defendant's right to remain silent. Both signed a document stating that defendant waived his *Miranda* rights. [*Abraham, supra* at 643-644.]

II. Great Weight of the Evidence

The defense argues on appeal that a new trial was warranted because the prosecution failed to establish that defendant acted maliciously when he shot a gun at trees when people were nearby. We disagree.

As we held in *People v Simon*, 174 Mich App 649, 653; 436 NW2d 695 (1989):

> It is unclear whether defendant's argument addresses the sufficiency of the evidence or charges that the verdict was against the great weight of the evidence. Because defendant argued this issue both in a motion for a directed verdict and a motion for new trial, we will address it using the stricter standard applicable to reviewing a denial of a motion for new trial based on the verdict being against the great weight of the evidence.
>
> The standard of review applicable to a denial of a motion for a new trial is whether the trial court abused its discretion. The trial court may grant a new trial if it finds the verdict was not in accordance with the evidence and that an injustice has been done. *People v Hampton*, 407 Mich 354, 373; 285 NW2d 284 (1979) . . . . An appellate court will find an abuse of discretion only where the denial of the

---

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

motion was "manifestly against the clear weight of the evidence." *People v Ross*, 145 Mich App 483, 494; 378 NW2d 517 (1985).

See also *People v Stiller*, 242 Mich App 38, 53; 617 NW2d 697 (2000).

A conviction for the offense of second-degree murder requires proof of (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse. *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). "Second-degree murder is a general intent crime, which mandates proof that the killing was done with an intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm." *People v Herndon*, 246 Mich App 371, 386; 633 NW2d 376 (2001) (quotation omitted). This concept is also known as malice. *Stiller*, *supra* at 43.

The defense specifically contends that because defendant was developmentally, mentally, and emotionally impaired, he could not have had "wanton and wilful disregard of the likelihood that the natural tendency of his behavior is to cause death or great bodily harm." *Herndon, supra* at 386. Evidence was presented at trial that defendant announced he was going to shoot "someone" before the shooting occurred and told people about it afterward. The general intent to kill need not be directed at an identified individual or the eventual victim. See *Abraham, supra* at 658, citing *People v Lawton*, 196 Mich App 341, 350-351; 492 NW2d 810 (1992); see also *People v Plummer*, 229 Mich App 293, 304-305 & n 2; 581 NW2d 753 (1998) (the doctrine of transferred intent permits culpability for murder where the defendant intended to shoot someone other than actual victim). Clinical child psychologist Dr. Lynne Schwartz, who personally examined defendant, indicated that defendant stated that he was fearful that he might hit someone when shooting at trees. This testimony qualifies as showing that defendant had the "intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm," *Herndon, supra* at 386. It was not the place of the trial court to supersede the jury's credibility judgment believing those witnesses over defendant's psychological experts. *People v Elkhoja*, 251 Mich App 417, 446, 447; 651 NW2d 408 (2002), quoting *People v Lemmon*, 456 Mich 625, 642-643, 647; 576 NW2d 129 (1998). Moreover, circumstantial and inferential evidence is admissible at trial. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); *Abraham*, *supra* at 658. Therefore, the trial court did not abuse its discretion in denying defendant's motion for a new trial in light of the great weight of the evidence.[2] See *Simon*, *supra*.

III. Severance of the Charges

[2] Furthermore, one of the primary defenses asserted at trial, diminished capacity, has since been effectively abolished by our Supreme Court. See *People v Carpenter*, 464 Mich 223, 237; 627 NW2d 276 (2001).

Defendant argues that the trial court improperly denied him a fair trial by failing to sever the charges of first-degree murder,[3] MCL 750.316, and assault with intent to commit murder, MCL 750.83. We disagree.

Generally, the interpretation of a court rule is a question reviewed de novo. *People v Petit*, 466 Mich 624, 627; 648 NW2d 193 (2002). MCR 6.120 provides in pertinent part:

> (B) Right of Severance; Unrelated Offenses. On the defendant's motion, the court must sever unrelated offenses for separate trials. For purposes of this rule, two offenses are related if they are based on
>
> (1) the same conduct, or
>
> (2) a series of connected acts or acts constituting part of a single scheme or plan.

MCR 6.120(B) is a codification of our Supreme Court's decision in *People v Tobey*, 401 Mich 141, 153; 257 NW2d 537 (1977). In *Tobey*, our Supreme Court held that where "offenses are joined solely because they are of the same or similar character, the defendant shall have a right to severance of the offenses." *Id*. at 151; see also *People v Daughenbaugh*, 193 Mich App 506, 509-510; 484 NW2d 690 (1992), mod in part on other grounds 441 Mich 867 (1992).

Severance was not mandatory in the present case because the shootings occurred within a couple of hours of each other in the same neighborhood, with the same weapon, and were part of a set of events interspersed with target shooting at various outdoor objects. Further, the same witnesses testified to a single state of mind applicable to both offenses. In contrast, the two offenses that were severed in *Tobey*, *supra* at 144, arose out of events that occurred twelve days apart. In *Daughenbaugh*, *supra* at 510, the offenses occurred thirteen days apart. Thus, because the two incidents in the present case were "related" under MCR 6.120(B), severance was not mandatory.[4]

IV. Prosecutorial Misconduct

Defendant next claims that he was denied a fair trial by several instances of prosecutorial misconduct. We disagree.

Generally, a claim of prosecutorial misconduct is a constitutional issue reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice

---

[3] First-degree murder was one of the original charges, but the jury chose the lesser offense of second-degree murder in its verdict.

[4] Defendant does not challenge the trial court's ruling on the narrow ground of discretionary severance under MCR 6.120(C).

resulted). *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial-misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *Id*. For example, a prosecutor may not urge the jurors to convict the defendant as part of their civic duty. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). This type of argument unfairly places issues into the trial that are more comprehensive than a defendant's guilt or innocence and unfairly encourages jurors not to make reasoned judgments. *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991). In addition, a prosecutor may not appeal to the jury to sympathize with the deceased and his family. *Watson*, *supra* at 591. Furthermore, a prosecutor may not comment on a defendant's failure to testify or present evidence, i.e., the prosecutor may not attempt to shift the burden of proof. *People v Reid*, 233 Mich App 457, 477-478; 592 NW2d 767 (1999).

Defendant claims error in the following remarks made by the prosecutor in her rebuttal closing argument:

> [*Prosecutor*]: . . . [A]fter taking pause and looking at everything, there is an underlying determination that Ronnie Green deserves justice—[Objection overruled.]
>
> Ronnie Green deserves justice whether or not the bullet that killed him was fired from the gun of someone other than Nathaniel Abraham, or from the gun of Nathaniel Abraham. And when the facts support his guilt beyond a reasonable doubt that's why with all that pause I stand before you.
>
> * * *
>
> . . . Nathaniel Abraham walks in this courtroom cloaked with the presumption of innocence. . . . But you see, it can be removed. And as each piece of the puzzle has been handed to you, each bit of the factual evidence from the people who know, that cloak is removed more and more and more until it's completely gone. And he stands before you as he truly is. [Objections overruled.]
>
> If you consider all the evidence, you will know he's guilty; he's guilty.

The defense objected during this closing statement on the ground that it was not within the proper scope of rebuttal, that it was an improper revenge argument, and that it was an improper comment on the presumption of innocence.

On appeal, defendant first claims that the prosecutor improperly engaged in a "civic duty" or "justice" argument. However, defendant did not argue this ground at trial. Instead, defendant argued that the prosecutor's comments on this issue were outside the scope of rebuttal. In his motion for vacatur, however, defendant did claim that the prosecutor improperly made a civic-duty and justice argument. Thus, although defendant raised this issue in part before the trial court, see, generally, *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994), the issue is

unpreserved because defendant should have raised the entire challenge *at trial* for a possible curative jury instruction. See *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Consequently, review of this issue is limited to whether plain error affecting substantial rights occurred. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). Reversal here is warranted only when a plain error resulted in the conviction of an actually innocent defendant[5] or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Taken in context, the prosecutor's statement that "after taking pause and looking at everything, there is an underlying determination that Ronnie Green deserves justice" was a proper response to a defense argument. See *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *Schutte*, *supra* at 721. Indeed, in its closing statement, the defense had just sharply criticized the prosecution and the judicial system for putting a then-eleven-year-old child on trial, and accused them of "brutalizing" defendant. The prosecutor specifically replied that, contrary to defendant's argument of brutalization, she considered this case at length and with emotional difficulty, and came to the conclusion that bringing the charge was proper. Thus, this statement did not impermissibly implore the jury to do their civic duty. See *Bahoda*, *supra*.

The prosecutor's statement that "Ronnie Green deserves justice whether or not the bullet that killed him was fired from the gun of someone other than Nathaniel Abraham, or from the gun of Nathaniel Abraham," also was not challenged at trial. Therefore, we review this statement for plain error. See *Stanaway*, *supra*. Our review of the prosecutor's rebuttal argument reveals that the "justice" comment was unnecessary because there was no issue about causation, the comment was not responsive to a defense argument, and the comment was a clear misstatement of the law. See *Duncan*, *supra*; *Schutte*, *supra*; see also *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002) (a prosecutor's clear misstatement of the law, if uncorrected, can deprive a defendant of a fair trial). Contrary to the prosecutor's statement here, the jury could only convict defendant of murder if it believed *defendant* intentionally caused the death of the deceased. See MCL 750.317; *Goecke*, *supra* at 463-464.

However, this remark was isolated, poorly worded, and slightly difficult to understand. Thus, it could have been a mistake and not error requiring reversal. See *Bahoda*, *supra* at 272; see also generally *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Moreover, the trial court's instructions to the jury that the attorneys' arguments are not evidence, that the prosecution bears the burden of proof, and that the elements of the crime require proof that defendant killed Green likely cured any prejudice resulting from this statement. See, generally, *Watson*, *supra* at 586; *Grayer*, *supra*. Given the evidence presented in this case, this nonstructural error does not require reversal because it was harmless beyond a reasonable doubt. *People v Graves*, 458 Mich 476, 482; 581 NW2d 229 (1998); *People v Mass*, 464 Mich 615, 640 n 29; 628 NW2d 540 (2001).

---

[5] We do not believe that, given the evidence presented in this case, defendant was "actually innocent." See *People v Schutte*, 240 Mich App 713; 613 NW2d 370 (2000); see also section II, *supra*.

The second ground defendant briefly raises on appeal is that the prosecutor erroneously asked the jury to sympathize with the family of the deceased, presumably when she stated: "I have actually wept about my responsibility for the family of Ronnie Green. . . . Nicole Green and Robbin Adams have lost Ronnie. Was somebody's nephew, somebody's grandchild, somebody's son . . . ." This issue also was not raised specifically at trial or in the posttrial motion; thus, it is unpreserved. Although these statements were passionate, see *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995) (prosecution need not use the least prejudicial evidence available to establish a fact in issue), they were not plainly erroneous. See also *Schutte*, *supra*. Indeed, viewed in context, these statements followed the prosecutor's statement of concern for defendant's mother, concern for defendant's well-being at a young age, and, again, the prosecutor's defense of herself after being accused of brutalizing a child. See *Duncan*, *supra*; *Schutte*, *supra* at 721. Consequently, no error occurred here either.

Third, defendant now claims that the prosecutor attempted to shift the burden of proof to him. See *Reid*, *supra* at 477-478. Again, defendant does not point to where in the record this occurred. See *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). Moreover, this issue is unpreserved because it was never noted at trial. From our review of the record, we presume that the following excerpt is the most likely to form the basis for this challenge: "Nathaniel Abraham walks in this courtroom cloaked with the presumption of innocence. . . . But you see, it can be removed." While certainly illustrative, these statements by their terms do not assert that defendant has to prove he is not guilty. In any event, these statements are largely true—a defendant is presumed innocent, and, in fact, the prosecution can defeat the presumption with evidence. Thus, we find no merit to the claim that these statements attempted to shift the burden of proof to defendant. See *Reid*, *supra*.

Next, defendant raises residual issues regarding the above-alleged errors: that the timing of the prosecutor's rebuttal closing statement was especially prejudicial because she was last to speak, that her remarks were repetitively improper, and that the prosecutor's closing was especially prejudicial in light of the weak evidence against defendant. Our review of these issues results in a conclusion that they do not change the result because they add nothing to the above-stated analysis.

Finally, defendant claims that the prosecutor inserted improper, inflammatory "other act" evidence through her questioning of Dr. Shiener, in violation of MRE 404(b):

> *Q*. [*Prosecutor*]: Doctor, you also indicated that you reviewed reports from the Oakland County Community Mental Health Services and Child and . . . Adolescence Clinic . . . ?
>
> *A*. [*Dr. Shiener*]: Yes.
>
> *Q*. All right. And in reports dated May 10 of 1996, don't they indicate in there that the presenting problem of Nathaniel was fighting in school and not listening to teachers.
>
> *A*. On the intake, yes.

Q. And also presenting problems of stealing from neighbors' garages?

A. Yes.

Q. Under . . . social and emotional status, doesn't it indicate that he was suspended from school in October, '95 for carrying—

[*Defense counsel*]: Excuse me . . . Judge. What is this? . . . Is this 404B—? I hope not. What . . . are these issues going to? Judge he can—the basis of his opinion, but she can't stand here and do what I think she's doing, which is a direct violation . . . .

The court instructed the jury that they were to disregard the above colloquy between the prosecutor and Dr. Shiener in its entirety.

A finding of prosecutorial misconduct may not be based on a prosecutor's good-faith effort to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors. See *Graves*, *supra* at 486; see also generally *Stanaway*, *supra* at 687. We are not persuaded that the above exchange had a prejudicial effect so severe that it was not cured by the instruction appropriately issued. See *Duncan*, *supra* at 15-16. Defendant was entitled to a fair trial, not a perfect one. *People v Beach*, 429 Mich 450, 491; 418 NW2d 861 (1988). Therefore, we hold that none of the prosecutor's statements violated defendant's right to a fair trial.

V. The Constitutionality of MCL 712A.2d

Defendant contends that the statute allowing the trial and sentencing of juvenile defendants as adults is unconstitutionally violative of due process because it allows the prosecutor discretion to charge and try juveniles as adults for certain offenses. Again, we disagree.[6] The statute provides in part:

(1) In a petition . . . alleging that a juvenile is within the court's jurisdiction . . . for a specified juvenile violation, the prosecuting attorney may designate the case as a case in which the juvenile is to be tried in the same manner as an adult. . . .

[6] The prosecution claims that defendant has no standing with regard to this issue because he was not sentenced as an adult. See *Dep't of Consumer & Industry Services v Shah*, 236 Mich App 381, 385; 600 NW2d 406 (1999), and *People v Yeoman*, 218 Mich App 406, 420; 554 NW2d 577 (1996) (To have standing to bring an appeal, a party must be aggrieved by the lower court's decision, there must be some substantial judgment to appeal, and there must be some substantial right that the judgment would prejudice.). However, because defendant is precisely challenging the juvenile *trial* portion of MCL 712A.2d, by which he was tried as an adult and convicted of second-degree murder, we decline to deny defendant standing in this matter.

* * *

> (3) If a case is designated under this section, the case shall be set for trial in the same manner as the trial of an adult in a court of general criminal jurisdiction unless a probable cause hearing is required under subsection (4). [MCL 712A.2d.[7]]

Defendant's lengthy, intertwined due-process arguments break down into four main claims. First, defendant argues that the statute is unconstitutional because it permits the prosecutor in its discretion to automatically waive a particular defendant into criminal court without a special prior hearing under MCL 712A.2d(1), (3).

The constitutionality of a statute is a question ordinarily reviewed de novo. *People v Jensen (On Remand)*, 231 Mich App 439, 444; 586 NW2d 748 (1998). Statutes are presumed constitutional, and courts must construe a statute as constitutional if at all possible. *People v Hubbard (After Remand)*, 217 Mich App 459, 483-484; 552 NW2d 593 (1996). The party challenging the constitutionality of the statute has the burden of proving its unconstitutionality. *People v Trinity*, 189 Mich App 19, 21; 471 NW2d 626 (1991). The challenger to the face of a statute must establish that no circumstances exist under which it would be valid. *Council of Orgs v Governor*, 455 Mich 557, 568; 566 NW2d 208 (1997). One general proposition to keep in mind is that, while it may be controversial, juveniles currently have no constitutional right to be treated differently in criminal matters than adults. *People v Conat*, 238 Mich App 134, 158; 605 NW2d 49 (1999) (O'Connell, J., holding that statute requiring adult sentence for juveniles tried as adults, MCL 769.1, was constitutional). Whether this principle of law should be changed is an inquiry for our Supreme Court or the Legislature.[8] See *People v Kirby*, 440 Mich 485, 493-494; 487 NW2d 404 (1992), cited in *Conat*, *supra* at 164.

Consequently, defendant's argument on appeal, while interesting in its recitation of history of the juvenile justice system in this country and in its comparison of other states' juvenile charging and sentencing statutes, does not add very much to this Court's task on appeal. See *id*. (arguments concerning whether the law is undesirable, unfair, unjust, or inhumane should be addressed to the Legislature). Defendant repeatedly claims that he was denied due process as a juvenile subjected to an adult proceeding. We disagree. Defendant was tried in an ordinary criminal trial in the family division of the circuit court and received all due-process protections to which any defendant is entitled:[9] notice of the charges against him by way of an indictment; a

[7] For a concise explication of the juvenile "waiver" statutes, see, e.g., *People v Conat*, 238 Mich App 134, 139-143; 605 NW2d 49 (1999).

[8] This is particularly true of defendant's appealed sub-issue, "MCL 712A.2d is not rational and is against public policy."

[9] Recall that defendant and his mother together waived his *Miranda* rights before answering police questions in this matter. See *Abraham*, *supra* at 651-652. Furthermore, as the prosecution points out, defendant had the additional due-process protection of twelve jurors in his trial as opposed to the six jurors that serve in an ordinary family-division trial. See MCR 5.911(C).

preliminary examination determining whether the evidence was sufficient for bindover; initial counsel provided by the state, not to mention that defendant retained *three* other attorneys of some repute; and a fair, albeit imperfect trial. See MCL 712A.2d(4) (providing for a probable-cause hearing—also known as a preliminary examination—for juveniles tried as adults), (7) (providing for all ordinary due-process protections afforded in ordinary criminal court). In *Conat*, *supra* at 159, this Court held that the statute requiring adult sentences for juveniles tried as adults, MCL 769.1, does not violate due process. The same reasoning applies to MCL 712A.2d. Furthermore, the preeminent consideration in this case, that juveniles are simply not constitutionally entitled to better treatment or more procedural protections than adults in criminal courts, controls. See *Conat*, *supra* at 158.

Second, defendant contends that MCL 712A.2d is unconstitutional because it does not specify a minimum age under which a juvenile may *not* be charged and tried as an adult in any circumstances. In addition to the other reasons stated above for sustaining the statute at issue, we reiterate that the wisdom or humanity of MCL 712A.2d is not within the authority of this Court to determine where children have no constitutional right to juvenile prosecution in this state.[10] See *Conat*, *supra*; *Kirby*, *supra*. It is properly within the prosecution's discretion to determine whether the state can prove the criminal intent of a child at any particular age. See *Conat*, *supra* at 150-153. This analysis also subsumes defendant's third argument, that the prosecutor has unconstitutionally unfettered charging discretion. This Court in *Conat*, *supra*, disposed of this argument in a similar manner, and we conclude that its reasoning is equally applicable in the present case:

> [T]his argument ignores the commonplace interaction between all three branches of government in determining what punishment is given to criminal offenders; namely, that the Legislature defines the sentences, the court fashions and imposes individual sentences within the legislatively defined parameters, and the prosecutor brings charges against defendants that inevitably affect which sentences are available for the court to impose.
>
> The judicial power to hear and determine controversies includes the power to exercise discretion in imposing sentences. However, this sentencing discretion is limited by the Legislature, which has the power to establish sentences. For example, the Legislature may set a minimum and a maximum sentence for a particular offense. Courts have no sentencing discretion unless it be conferred upon them by law. In other words, the Legislature has the exclusive power to determine the sentence prescribed by law for a crime, and the function of the court is only to impose a sentence under and in accord with the statute. [*Id*. at 147 (citations and quotations omitted).]

---

[10] For the above-stated reasons, defendant's "as-applied" challenge to MCL 712A.2d concerning himself, allegedly a developmentally six- to eight-year-old child, also fails. See *Paragon Properties Co v Novi*, 452 Mich 568, 576; 550 NW2d 772 (1996) ("An 'as applied' challenge alleges a present infringement or denial of a specific right or of a particular injury in process of actual execution.").

Fourth and finally, defendant failed to preserve for appeal the issue whether he was competent to stand trial because he did not move for a new trial and evidentiary hearing on this basis in the trial court. See *People v Lucas*, 393 Mich 522, 529; 227 NW2d 763 (1975); see also generally *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995). Thus, reversal would be warranted only if a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Schutte*, *supra* at 720. A defendant is presumed to be competent to stand trial. MCL 330.2020(1); *People v Harris*, 185 Mich App 100, 102; 460 NW2d 239 (1990). In the present case, defendant's competency was evaluated and confirmed three times—by Drs. Schwartz and Margaret Stack and the trial court itself. We are not persuaded that plain error occurred in this regard.[11] See *Schutte*, *supra*. Therefore, the trial court did not err in denying defendant's motion for vacatur on this ground.

Affirmed.

Murray, J., concurred.

/s/ Peter D. O'Connell
/s/ Christopher M. Murray

[11] We do not undertake lightly the specter of the criminal prosecution of an impaired child. However, we reiterate that we must follow the law in this state, that defendant was sentenced to juvenile detention—not adult imprisonment, and that defendant will be released on his twenty-first birthday.