STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILBERT L. GRIZZARD,

Defendant-Appellant.

UNPUBLISHED
April 23, 1999

No. 203709
Recorder's Court
LC No. 96-007147

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ADRIAN L. ORR,

Defendant-Appellant.

No. 203766
Recorder's Court
LC No. 96-007147

Before: Smolenski, P.J., and McDonald and Doctoroff, JJ.

PER CURIAM.

Defendants Grizzard and Orr appeal as of right from their convictions, at separate jury trials, arising out of the shooting death of Alice Patton and the assaults of Noah Shelton and Wallace Sims. Defendant Grizzard was convicted of second-degree murder, MCL 750.317; MSA 28.549, assault with intent to commit murder, MCL 750.83; MSA 28.278, felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to concurrent terms of life imprisonment for the second-degree murder and assault with intent to commit murder convictions, forty to sixty months' imprisonment for the felonious assault conviction, and a consecutive two-year term for the felony-firearm conviction. Defendant Orr was convicted of first-degree murder, MCL 750.316; MSA 28.548, two counts of

assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227(b); MSA 28.424(2). He was sentenced to life imprisonment without parole for the first-degree murder conviction, life imprisonment for each of the assault with intent to commit murder convictions, and a consecutive two-year term for the felony-firearm conviction. We affirm defendant Grizzard's convictions, but remand for resentencing. We affirm defendant Orr's convictions and sentences.

Docket No. 203709

First, defendant Grizzard claims that his forty to sixty month sentence for felonious assault exceeds the maximum sentence allowed by statute. We agree. We review sentencing issues for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

The felonious assault statute, MCL 750.82; MSA 28.277, provides that a person convicted of that crime may be imprisoned "for not more than 4 years." While defendant Grizzard's minimum sentence is less than the statutory maximum, his maximum sentence exceeds the statutory limit. Moreover, because the maximum sentence for felonious assault is forty-eight months, defendant's minimum sentence of forty months is excessive under *People v Tanner*, 387 Mich 683; 199 NW2d 202 (1972), because it exceeds two-thirds of the maximum. Therefore, defendant Grizzard is entitled to resentencing.

Next, defendant Grizzard claims that the trial court improperly exceeded the guidelines range for second-degree murder and improperly imposed life sentences for the second-degree murder and assault with intent to commit murder convictions without sufficient justification. We disagree.

The guidelines recommended a minimum sentence of 120 to 300 months' imprisonment for the second-degree murder conviction. The trial court sentenced defendant to life in prison. Although Grizzard was acquitted of first-degree murder, the trial court permissibly considered the evidence admitted at trial indicating that the shootings, which resulted in the death of an innocent bystander, were a planned retaliation arising out of a drug dispute. *People v Compagnari*, 233 Mich App 233; 236; ___ NW2d ___ (1998). The trial court also permissibly considered that, in light of this conduct, the protection of society warranted the imposition of life sentences. *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972). Although the trial court departed from the guidelines in sentencing Grizzard, the life sentences reflect the seriousness of this matter and were, therefore, proportional. *People v Lemons*, 454 Mich 234, 260; 562 NW2d 447 (1997); *People v McIntire*, 232 Mich App 71, 117; __ NW2d __ (1998). Thus, the imposition of life sentences for defendant Grizzard's second-degree murder and assault with intent to commit murder convictions did not constitute an abuse of discretion.

Next, defendant Grizzard claims that the trial court's "state of mind" instruction improperly shifted the burden of proof to defendant. We disagree. Because defendant Grizzard failed to object to the instruction at trial, appellate review is precluded absent manifest injustice. *People v Swint*, 225 Mich App 353, 376; 572 NW2d 666 (1997).

Jury instructions must be considered as a whole rather than extracted piecemeal to establish error. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). Even if the instructions are somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.* We have reviewed the instruction at issue and conclude that it did not mandate that the jury imply malice from the use of a deadly weapon. *People v Martin*, 392 Mich 553, 561; 221 NW2d 336 (1974). Thus, the trial court's instruction did not result in manifest injustice.

Finally, defendant Grizzard claims that the prosecutor improperly expressed a personal belief in his guilt. We disagree. Because defendant did not object to the prosecutor's conduct at trial, appellate review is precluded unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

A prosecutor may not place the prestige of his office behind an assertion that a defendant is guilty. *People v Swartz*, 171 Mich App 364, 370; 429 NW2d 905 (1988). However, the prosecutor may argue that the evidence established the defendant's guilt. *Id.* Here, although the prosecutor used the phrases "I believe" and "I don't believe" during her closing argument, her arguments were based on the evidence and did not suggest that the jury decide the case on the basis of the authority of the prosecutor's office. Thus, the remarks were not improper. *Id.* at 370-371.

Docket No. 203766

Defendant Orr first argues that the trial court committed error requiring reversal by allowing the prosecutor to impeach Jackson with his prior convictions for felony firearm, carjacking, and armed robbery, in violation of MRE 609, and with his prison sentences for those convictions.[1] We agree that the trial court erred in admitting evidence of the felony firearm conviction, but find that the error was harmless. We review issues regarding the admission or exclusion of evidence for an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995).

A witness may be impeached with a prior conviction if 1) the crime contained an element of dishonesty or false statement, or 2) the crime contained an element of theft, the crime was punishable by imprisonment for more than one year, and the court determines that the evidence has significant probative value on the issue of credibility. MRE 609(a); *People v Allen*, 429 Mich 558; 420 NW2d 499 (1988). Evidence of a conviction of a non-theft crime that does not contain an element of dishonesty or false statement should not be admitted into evidence. *Id.* at 596. Here, the trial court erred in admitting evidence that Jackson had been convicted of felony firearm because that offense does not contain an element of theft, dishonesty, or false statement. However, the trial court did not err in admitting evidence of the carjacking conviction. The offense of carjacking requires the unlawful taking of a motor vehicle from another person, *People v Green*, 228 Mich App 684, 694; 580 NW2d 444 (1998), and, thus, contains an element of theft. Furthermore, although the trial court failed to determine on the record the probative value of the prior armed robbery and carjacking convictions, MRE 609(b), and abused its discretion in admitting the felony firearm conviction, any error in the admission of the evidence was harmless. Jackson testified that Shelton told him that he [Shelton]

thought he shot Patton. However, Shelton denied having a gun on the day of the shooting and defendant Orr himself testified that he never saw Shelton fire a gun. Furthermore, defendant Orr never argued as his theory of the case that Shelton shot Patton. Thus, because of the minimal impact Jackson's testimony had on Orr's defense, any improper impeachment of Jackson with his prior convictions was harmless. For the same reasons, although evidence of Jackson's prison sentences was irrelevant, *People v Lindberg*, 162 Mich App 226, 234; 412 NW2d 272 (1987), the error in admitting the evidence was harmless.

Defendant Orr next argues that the prosecutor was improperly allowed to elicit evidence that Jackson was involved in a shootout three days after Patton's death and that Jackson failed to report to the police his knowledge that Shelton confessed to shooting Patton.[2] However, defendant failed to preserve these issues for review by objecting to the admission of the evidence at trial. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 545; 520 NW2d 123 (1994). Absent an objection, this Court may take notice of plain errors affecting substantial justice. MRE 103(d); *Grant, supra*. Because we are persuaded that the alleged errors were not plain errors affecting substantial justice, we decline to review this issue.

Defendant Orr next argues that the trial court erred in limiting defense counsel's cross-examination of Anton Ali. We disagree. We review a trial court's limitation of cross-examination for an abuse of discretion. *People v Mumford*, 183 Mich App 149, 154; 455 NW2d 51 (1990); *People v Minor*, 213 Mich App 682, 684; 541 NW2d 576 (1995)(Markman, J.)

Defendant Orr asserts that the trial court's refusal to allow further re-cross examination of Ali prevented defense counsel from demonstrating that defendant Orr did not shoot in Patton's direction. However, the cross-examination conducted by defense counsel elicited testimony from Ali that he had previously testified at codefendant Grizzard's trial that Orr, who he referred to as the "little guy," never fired in Patton's direction, but had only fired in Shelton's direction. Additional re-cross examination on this point would have been cumulative and defendant does not indicate on appeal any further testimony he would have liked to elicit from Ali. Accordingly, the trial court did not abuse its discretion in limiting defense counsel's re-cross examination of Ali. *Mumford, supra*.

Defendant Orr next argues that the trial court erred in precluding defense counsel from eliciting testimony from Deandre Burnett that complainant Sims had prevented defendant Orr from picking up his belongings from Orr's residence. We disagree. We review a trial court's decisions regarding the order and mode of presentation of evidence for an abuse of discretion. MRE 611; *People v Stevens*, 230 Mich App 502, 507; 584 NW2d 369 (1998).

Defendant argues that the trial court prevented defense counsel from eliciting evidence on direct examination that would have shown that defendant Orr went to the scene of the shooting to get his belongings and that the "jury was entitled to know that Wallace Sims and his gang had not only threatened defendant and run him out of the neighborhood, but would not even let him pick up his furniture." However, before the trial court limited defense counsel's questioning of Burnett, Burnett had already testified that Sims had prevented him from picking up furniture from Orr's home. Furthermore, Orr subsequently testified that the reason he went to the scene of the shooting was to retrieve his

belongings. Further questioning regarding the issue would have been cumulative. Accordingly, the trial court did not abuse its discretion in limiting defense counsel's questioning. *Mumford, supra*.

Defendant next argues that the trial court erred in ruling that defendant's statement to the police was voluntary. We disagree. When reviewing a trial court's ruling regarding the voluntariness of a statement, we review the entire record de novo and make an independent determination of voluntariness, but will not reverse the trial court's findings unless they were clearly erroneous. *People v Etheridge*, 196 Mich App 43, 57; 492 NW2d 490 (1992).

Defendant Orr argues that "[t]he trial court's decision on voluntariness was clearly erroneous because the central premise on which it rests – defendant's supposed willingness to talk on August 14, 1996 – is manifestly a police fabrication." However, this Court must give deference to the trial court's unique opportunity to observe the witnesses and its superior ability to judge their credibility. *Etheridge, supra* at 57. Here, defendant Orr's testimony conflicted with that of Officers Fields and Mitchell regarding the circumstances surrounding defendant Orr's statement to the police. After reviewing the record, we cannot conclude that the trial court clearly erred in believing the testimony of Officers Fields and Mitchell over that of defendant Orr. Thus, we find no clear error in the trial court's determination that defendant Orr's statement was voluntary.

Defendant Orr next asserts that the trial court committed numerous errors in its instructions to the jury that require reversal of his convictions. We disagree. A trial court is required to instruct the jury concerning the law applicable to the case and to fully and fairly present the case to the jury in an understandable manner. *People v Daoust*, 228 Mich App 1, 14; 577 NW2d 179 (1998). Jury instructions should be considered as a whole rather than extracted piecemeal to establish error. *Id.* Even if the instructions are somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.*

First, defendant Orr argues that the trial court erred in instructing the jury on the concept of reasonable doubt. Defendant did not object to the instruction at trial. Failure to object to an instructional error at trial waives the error unless relief is necessary to avoid manifest injustice. *Swint, supra* at 376. Defendant argues that the reasonable doubt instruction was erroneous because the instruction did not contain "moral certainty language" and because the instruction stated that reasonable doubt required that the jurors have "a reason for the doubt." The failure to incorporate "moral certainty" language into a reasonable doubt instruction does not constitute error requiring reversal where the instruction as a whole properly explains the concept of reasonable doubt to the jury. *People v Jackson*, 167 Mich App 388, 390-391; 421 NW2d 697 (1988). Here, the instruction characterized reasonable doubt as a doubt based on reason and common sense and "the kind of doubt that would make you hesitate before making an important decision." Thus, the instruction correctly conveyed the meaning of reasonable doubt to the jury. *Id.* at 392. Furthermore, while the trial court improperly stated that the jurors must have a reason to doubt the defendant's guilt, *id.* at 391, when that statement is considered along with the proper definitions of reasonable doubt, the instruction did not improperly shift the burden to defendant and did not result in manifest injustice.

Defendant Orr next argues that the trial court's instructions regarding transferred intent and aiding and abetting did not effectively convey to the jury the intent required to convict defendant Orr of first-degree murder. We disagree. Because defendant did not object to the transferred intent and aiding and abetting instructions below, we review the issue only to determine if manifest injustice resulted. *Swint, supra* at 376.

Defendant Orr argues that the aiding and abetting instructions failed to inform the jury that an aider and abettor must intend to commit the offense or know that the others involved intended to commit the offense. Defendant Orr properly argues that, to establish the intent requirement for aiding and abetting, the prosecution must show that the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time the defendant gave the aid or assistance. *People v Jones (On Rehearing)*, 201 Mich App 449, 451; 506 NW2d 542 (1993); *People v Buck*, 197 Mich App 404, 426; 496 NW2d 321 (1992), modified on other grounds 444 Mich 853 (1993). However, after reviewing the trial court's instructions regarding first-degree murder and aiding and abetting, including the examples given by the court with respect to acting in concert and the court's instruction that the jury could infer the intent to kill from the use of a gun, we conclude that the instructions fairly presented the issues to be tried with respect to Orr's culpability as an aider and abettor. Orr's theory of the case was that he and Grizzard shot at Shelton and Sims, respectively, in self-defense and, because Patton was standing near Sims, it must have been Grizzard that shot Patton. The prosecutor's theory was that Orr and Grizzard were acting in concert and had a common plan to do a shooting. Therefore, the jury was called upon to decide whether Orr and Grizzard were acting in concert to do a shooting or were justified in shooting in self-defense. Under either version of the case, the intent to kill was never in dispute. The jury obviously found that Orr and Grizzard were acting in concert to do a shooting. Although the aiding and abetting instructions did not specifically inform the jury that it had to find either that Orr intended to kill or that Orr had knowledge that Grizzard intended to kill, the facts of the case gave rise to no doubt that Orr and Grizzard each possessed, and knew the other possessed, the intent to kill. Furthermore, because there was testimony that both shooters shot at Shelton before turning their guns on Sims, there was evidence from which the jury could have concluded that defendant Orr was actually the principal in Patton's murder. Under these circumstances, we cannot conclude that the trial court's aiding and abetting instruction resulted in manifest injustice.

Defendant Orr next argues that the trial court erred in instructing the jury with respect to first-degree murder because the instruction failed to inform the jury that a killing is not first-degree murder if it was the result of a sudden impulse, without thought or reflection. We disagree. While the court did not specifically inform the jury that the killing could not be the result of a sudden impulse, the jury was instructed that the killing must have been premeditated. Thus, we find no error in the instruction.

Defendant Orr next argues that, when instructing the jury regarding first-degree murder, second-degree murder, and assault with intent to commit murder, the trial court erred in failing to instruct the jury that the killing or the assault must be done without justification or excuse. We disagree. Because defendant did not object to the instructions below, we review the issue only to determine if manifest injustice resulted. *Swint, supra* at 376. Manifest injustice did not result from the trial court's failure to

instruct the jury that the killing or assault must be done without justification or excuse where the jury was instructed regarding self-defense.

Defendant Orr next argues that the trial court's self-defense instruction was improper because it instructed the jury to determine the reasonableness of defendant's conduct according to how the circumstances appeared to the jury, in addition to how the circumstances appeared to defendant Orr. We disagree. A self-defense instruction, when read as a whole, should make it clear that the defendant's conduct is to be judged from the circumstances as they appeared to the defendant rather than as they would appear to a third party. *People v Kerley,* 95 Mich App 74, 81; 289 NW2d 883 (1980). Here, while the self-defense instruction was not perfect, when read as whole, it adequately expressed that the jury was to determine, based on the evidence, whether defendant Orr acted reasonably under the circumstances. Accordingly, we find no error requiring reversal.

Defendant Orr next argues that the trial court's self-defense instruction was erroneous because its statement that "it must appear that defendant was without fault" could have been interpreted by the jury as meaning that, in order to find that defendant acted in self-defense, the jury must find that defendant Orr's assessment that deadly force was necessary was correct. We disagree. Defendant failed to object on the basis of this issue at trial, and we find no error resulting in manifest injustice.

Defendant Orr next argues that the trial court erred in refusing to instruct the jury on the cognate lesser included offense of voluntary manslaughter on the basis of a theory of imperfect self-defense. We disagree. First, the trial court did not err in refusing to instruct the jury on the theory of imperfect self-defense where there was no evidence that defendant Orr was the initial aggressor. *People v Vicuna,* 141 Mich App 486, 493; 367 NW2d 887 (1985). Furthermore, the trial court did not err in failing to instruct the jury on the lesser offense of voluntary manslaughter. Where, as in this case, the jury is instructed on first-degree murder and second-degree murder and the defendant is convicted of first-degree murder, any error in failing to instruct on a lesser included offense is harmless. *People v Zak,* 184 Mich App 1, 16; 457 NW2d 59 (1990). On this same basis, we reject defendant Orr's arguments that the trial court erred in refusing to instruct the jury on the lesser offenses of involuntary manslaughter, statutory manslaughter, reckless discharge of a firearm and negligent discharge of a firearm.

Defendant next argues that the trial court erred in refusing to instruct the jury regarding the defense of accident. We disagree on the basis that there was no evidence in the record to support the giving of an accident instruction.

Defendant next argues that the trial court's instruction regarding assault with intent to commit great bodily harm less than murder was inadequate because it did not sufficiently define great bodily harm. Defendant did not object to the instruction at trial. We conclude that the instruction sufficiently presented the issue to the jury and that no manifest injustice resulted from the instruction.

Defendant next argues that the trial court erred in instructing the jury regarding felonious assault because the trial court instructed the jury that a felonious assault could only occur if no shots were fired from the gun. We agree that the instruction was erroneous. However, because the jury was also instructed regarding the higher offense of assault with intent to commit murder and the intermediate

offense of assault with intent to do great bodily harm less than murder, and the jury found defendant guilty of the higher offense, the instructional error with respect to the felonious assault charge was harmless. *Zak, supra* at 16.

Defendant Orr next argues that the trial court erred in giving the jury written instructions regarding first-degree murder and second-degree murder. We disagree.

A trial court may provide the jury with a partial set of written instructions "if the parties agree that a partial set may be provided and agree on the portions to be provided." MCR 6.414(G). Here, defense counsel initially requested that the court give the jury "all the law," arguing that giving the jury only the first-degree murder and second-degree murder instructions emphasized those charges. When the court then asked defense counsel whether he wanted the jury to have a full set of written instruction, he responded that he wanted the jury to have written instructions regarding defendant's theory of the case. The trial court denied defendant's request. However, the only oral instructions given in conjunction with count one were first-degree murder and second-degree murder and the verdict form gave the jury a choice of finding defendant Orr not guilty. Furthermore, the oral instructions regarding defendant's theory of the case adequately presented those issues to the jury. Under these circumstances, we find no error requiring reversal.

Defendant Orr next argues that, because the doctrine of transferred intent did not apply to the facts of the instant case, the evidence presented at trial was insufficient to support his conviction of first-degree murder on the basis of transferred intent. We disagree. Whether the doctrine of transferred intent applied to the facts of the instant case is a question of law, which we review de novo. *People v Medlyn,* 215 Mich App 338, 340; 544 NW2d 759 (1996).

We disagree with defendant's argument that *People v Youngblood,* 165 Mich App 381; 418 NW2d 472 (1988) stands for the proposition that transferred intent is not applicable to first-degree murder. Rather, *Youngblood* merely held that the evidence in that case did not support a finding that the killing was done with the requisite intent. *Id.* at 388. Contrary to defendant's argument, under the doctrine of transferred intent, the defendant need not have intended to kill the victim. *People v Lovett*, 90 Mich App 169, 172; 283 NW2d 357 (1979). Thus, the evidence in the instant case was not insufficient because it did not demonstrate that defendant Orr had the premeditated intent to kill Patton.

Defendant Orr next argues that he was denied the effective assistance of counsel. We disagree. To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that, but for counsel's error, the result of the proceeding would have been different. *Stanaway, supra* at 687. The defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy. *Id.*

Defendant first argues that he was denied the effective assistance of counsel because defense counsel failed to request that the reasonable doubt instruction contain the "moral certainty" language, and "failed to seek other proper instructions." However, because we have concluded that none of the instructional errors require reversal, defendant cannot show that, but for counsel's error, the result of the

proceeding would have been different. Thus, he has failed to demonstrate that defense counsel's failure to request proper instructions constituted ineffective assistance of counsel. *Stanaway, supra* at 687.

Defendant next argues that he was denied the effective assistance of counsel because defense counsel failed to move to suppress his statement to the police on the ground that it was involuntary and stemmed from a warrantless non-consensual entry into his home to make an arrest. We disagree. First, defense counsel did move to suppress defendant's statement on the ground that it was involuntary, and a *Walker*[3] hearing was held regarding the issue before trial. Furthermore, where the argument regarding the warrantless arrest was raised before, and rejected by, the trial court in motion for a new trial, defendant has not shown that the failure to raise the issue earlier constituted ineffective assistance of counsel.

Defendant Orr next argues that he was denied the effective assistance of counsel because defense counsel failed to effectively impeach Officer Fields' *Walker* hearing testimony with evidence that the timing of the other witnesses' statements would not have prevented Officer Fields from taking defendant Orr's statement soon after he arrived at the station. We disagree.

Officer Fields testified that, when defendant Orr was brought to the station she was busy interviewing other witnesses involved in the instant case and then had to respond to another crime scene. Thus, evidence that Officer Fields took the statements of certain other witnesses after she took that of defendant Orr does not necessarily impeach Fields' testimony that she was interviewing witnesses and responding to a crime scene at the time defendant Orr first desired to give a statement. Accordingly, defendant has not overcome the presumption that counsel's failure to impeach Fields with such evidence was sound trial strategy, and he has not demonstrated that he was denied the effective assistance of counsel on this basis.

Defendant Orr next argues that he was denied the effective assistance of counsel by defense counsel's failure to elicit evidence that the complaining witnesses were also firing weapons. We disagree.

Defendant asserts that defense counsel should have impeached Officer McDonald's testimony that he found four shell casings near the alley where defendants Orr and Grizzard were shooting with a document indicating that he also took shell casings from "scene F/O 19960 Hawthrone [sic]." However, defendant has not shown who created the document, the accuracy of the information contained in the document, or the exact location where the shell casings were found. We cannot conclude from the information presented that defense counsel's failure to use the document to show that Shelton and Sims were firing weapons was improper or that the outcome of the trial could have been different had defense counsel done so. Similarly, we reject defendant's claim that he was denied the effective assistance of counsel because defense counsel failed to seek to admit into evidence a shotgun seized from Sims' wife two weeks after the shooting incident. Defendant has not shown that the seized shotgun was tied to the shooting incident, or given any other reason to believe that the shotgun would have been admitted into evidence. Accordingly, defendant has not demonstrated that he was denied the effective assistance of counsel on these bases.

Defendant Orr next argues that he was denied the effective assistance of counsel because defense counsel failed to seek to admit evidence that Patton's last words were, "Junior shot me." We disagree.

"Junior" was apparently the nickname of Stanley Cook. Thus, evidence that Junior shot Patton would have contradicted defendant Orr's testimony that defendant Grizzard was the other shooter. Furthermore, even assuming that Patton was referring to defendant Grizzard, the evidence was sufficient to convict defendant Orr as an aider and abettor of defendant Grizzard. In any event, there is no reasonable probability that the result of the proceeding would have been different had the statement been admitted into evidence. Thus, defendant has not demonstrated that he was denied the effective assistance of counsel.

Defendant Orr next argues that he was denied his right to a fair trial by the cumulative effect of the alleged errors. We disagree. The test to determine whether reversal is required for cumulative error is not whether there are some irregularities, but whether the defendant has had a fair trial. *People v Duff*, 165 Mich App 530, 539; 419 NW2d 600 (1987). Here, while defendant Orr alleged numerous errors on appeal, many of the allegations were meritless and the remainder of the alleged errors were harmless. Therefore, we conclude that cumulative errors did not deny defendant Orr a fair trial.

Finally, defendant Orr argues that a mandatory life sentence without the possibility of parole is a determinate sentence and is, therefore, unconstitutional. We disagree. This issue presents a question of law, which we review de novo. *Medlyn, supra* at 340.

Const 1963, art 4, § 45 provides:

> The legislature may provide for indeterminate sentences as punishment for a crime and for the detention and release of persons imprisoned or detained under such sentences.

Defendant Orr reads this provision as a prohibition against determinate sentences. However, the plain language of the provision simply provides the legislature with the authority to allow indeterminate sentences, but does not mandate indeterminate sentences. Therefore, defendant's life sentence was not unconstitutional.

Defendant Grizzard's convictions are affirmed, but his case is remanded for resentencing with respect to the felonious assault conviction. We do not retain jurisdiction. Defendant Orr's convictions and sentences are affirmed.

/s/ Michael R. Smolenski
/s/ Gary R. McDonald
/s/ Martin M. Doctoroff

[1] On appeal, defendant Orr characterizes this issue as one of prosecutorial misconduct. However, because the essence of defendant's argument is that the challenged evidence was not admissible under MRE 609, we will consider this issue as alleging an error in the admission of evidence.

[2] Again, although defendant characterizes these issues as issues of prosecutorial misconduct, because defendant essentially argues that the trial court erred in admitting the challenged evidence, we will review the issues as allegations of error in admitting the challenged evidence.

[3] *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).