STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 1, 2007
V	No. 262115 Saginaw Circuit Court
NORMAN WILLIAM RIVERS, Defendant-Appellant.	LC No. 04-024458-FC

Before: Hoekstra, C.J., and Markey and Wilder, JJ.

PER CURIAM.

Defendant, Norman William Rivers, appeals as of right from his February 4, 2005, jury trial convictions for assault with intent to murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, carrying a dangerous weapon with unlawful intent, MCL 750.226, possession of a firearm during the commission of a felony, MCL 750.227b, and being a second habitual offender, MCL 769.11. Defendant was sentenced to 356 months to 60 years for the assault with intent to murder conviction, 42 months to 7 years for the felon in possession of a firearm conviction, 42 months to 7 years for the carrying a dangerous weapon with unlawful intent conviction, and 2 years for the felony-firearm conviction. We affirm.

Defendant's convictions arise out of the shooting of Remulas Burns on March 20, 2004. Defendant first argues that his convictions should be overturned because there was insufficient credible evidence at trial to prove him guilty. We disagree.

When reviewing a claim of insufficient evidence, this Court reviews the record de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). This Court reviews the evidence in the light most favorable to the prosecutor and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004). The Court should not interfere with the jury's role of determining the weight and credibility of witnesses, but must draw all reasonable inferences and resolve credibility choices in support of the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

"The elements of assault with intent to murder are: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995) (citation omitted). "Circumstantial evidence and

reasonable inferences arising therefrom may constitute satisfactory proof of the elements of the offense. The intent to kill may be proven by inference from any facts in evidence." *Id*. For instance, the specific intent may be inferred from evidence of the use of a dangerous weapon. *Id*. The actor's intent to kill may be proved by minimal circumstantial evidence. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

Taking the evidence in a light most favorable to the prosecution, we find that there was sufficient evidence to sustain defendant's conviction. Although, defendant contends that he was not the one who assaulted Burns, Burns himself testified that defendant was the one who shot him. Burns knew defendant and therefore had a basis on which to recognize him. Although defendant challenges Burns's credibility, that is for the trier of fact to decide. *Nowack*, *supra* at 400. Burns was absolutely certain at trial that it was defendant who shot him, and never gave any statement indicating that anyone but defendant was the shooter.

Burns's identification of defendant was supported by other witnesses' testimony. Dreffs described to the police what she saw: "when [defendant] came out that's when he pulled out the gun when he was running after [Burns.]" The gun was long with brown grips. "He just pulled it [the gun] out and then after that he went after" Burns. Dreffs saw Burns inside a car and saw defendant near the car. Dreffs saw defendant open the door to the car and start shooting Burns.

Naomi Bernal also witnessed the shooting. Bernal saw defendant standing by the wall with a gun. Defendant then went outside and started shooting at the man in a burgundy color car. Defendant shot the man about six times according to Bernal. Bernal saw defendant standing in front of the burgundy car and then heard the shots and saw the light from the shots, and then saw Burns's feet go up in the air (a fact confirmed by Burns's testimony). After the shooting, Bernal saw defendant jump into a white car and leave.

Additionally, Burns testified that defendant called his house several times after the shooting, identifying himself by his nickname, Rock, and telling Burns that he was sorry and that Burns should not appear in court. An investigating police officer, Timothy Fink, testified that he listened to telephone conversations at the jail involving defendant and in one of them defendant asked the other person on the phone what he had done with the 30 caliber (the type of rifle used to shoot Burns). One of defendant's calls was to witness Rachael Dreffs's house, and Dreffs was subsequently unable to be located to accept service to appear at trial. There was also a call by defendant to Willie Deontia Lytle, a witness and defendant's cousin. Lytle also failed to appear to testify at trial in response to the prosecution's subpoena and the trial court issued a bench warrant.

Other evidence supported defendant's conviction. Burns testified to being shot by defendant six times, and a neighbor, Willie Jackson, testified he heard five shots. Burns had numerous bullet wounds and there were several bullet holes in the car Burns occupied. Evidence that there were five or six shots directed at Burns from a rifle at close range is sufficient evidence for a reasonable jury to conclude that the shooter had the specific intent to kill Burns.

In light of all of the foregoing evidence, a rational jury could conclude that defendant, and not someone else, assaulted Burns, and that defendant had the specific intent to kill Burns.

Defendant next argues that his convictions must be reversed because they are against the great weight of the evidence or involve a miscarriage of justice. We disagree.

"This Court reviews for an abuse of discretion the trial court's denial of a motion for a new trial on the ground that the verdict is against the great weight of the evidence." *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). An abuse of discretion exists if an unprejudiced person would find no justification for the court's ruling. *People v Ford*, 262 Mich App 443, 460; 687 NW2d 119 (2004).

"The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *McCray, supra* at 637. A motion for a new trial does not authorize a court to assess witnesses' credibility, and conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998); *McCray, supra* at 638. This Court will not substitute its judgment for that of the trier of fact, and will grant a new trial only if the evidence cannot support a finding of guilt beyond a reasonable doubt. *People v Jackson*, 171 Mich App 191, 199; 429 NW2d 849 (1988).

Here, the evidence does not preponderate against the verdict. Burns was absolutely certain at trial that defendant shot him, and Burns's identification was corroborated by Dreffs and Bernal. Additionally, the evidence indicates that defendant shot Burns some five or six times. Burns had numerous bullet wounds and there were several bullet holes in the car Burns occupied. The preponderance of the evidence supported the jury's conclusion the defendant had the specific intent to kill Burns.

In light of all of the foregoing evidence, the conclusions that defendant, and not someone else, shot Burns, and that defendant had the intent to kill Burns, are not against the great weight of the evidence.

Defendant next contends that he was denied his right to confrontation guaranteed by the United States (US Const, Am VI and Am XIV) and Michigan constitutions (Const 1963, art 1, § 20[1]). We disagree.

Admissibility issues involving questions of law are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). This Court also reviews de novo claims of constitutional error. *People v McPherson*, 263 Mich App 124, 133; 687 NW2d 370 (2004).

A party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001); MRE 103(a)(1). Assertion of an evidentiary objection does not preserve a constitutional objection based on the confrontation clause. *People v Moorer*, 262 Mich App 64, 67; 683 NW2d 736 (2004); *People v Geno*, 261 Mich App 624, 629-630; 683 NW2d 687 (2004).

[1] The Michigan constitution provides: "In every criminal prosecution, the accused shall have the right . . . to be confronted with the witnesses against him or her . . . ." (Const 1963, art 1, § 20.)

Admissibility issues involving questions of law are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). This Court also reviews de novo claims of constitutional error. *People v McPherson*, 263 Mich App 124, 133; 687 NW2d 370 (2004).

Here, defendant stipulated to the reading of Dreffs's preliminary examination testimony, and by doing so affirmatively waived any confrontation clause objection to Dreffs's preliminary examination testimony. *People v Pipes*, 475 Mich 267, 278 n 38, 715 NW2d 290 (2006) (waiver requires the intentional relinquishment of a known right). Here, defendant knew that he had confrontation rights, because he asserted them elsewhere. Thus, with regard to Dreffs's preliminary examination testimony, defendant's affirmative statement that he had no objection waived any confrontation clause objection thereto.

Defendant *did* assert a confrontation clause objection to the reading of the preliminary examination testimony of Bernal. Therefore, the objection to Bernal's testimony is preserved on confrontation clause grounds.

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." US Const, Am VI. To preserve this right, testimonial hearsay is inadmissible against a criminal defendant unless the declarant is unavailable and there was a prior opportunity for cross-examination of the declarant. *Crawford, supra* at 58; *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005). *Crawford* held: "*Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination*." *Crawford, supra* at 68 (emphasis added). Further, by operation of the Fourteenth Amendment, "[t]his bedrock procedural guaranty applies to both federal and state prosecutions." *Crawford, supra* at 58. Thus, *Crawford* articulated a bright-line rule against admission of statements by a nontestifying declarant against a criminal defendant, unless the declarant is unavailable for trial and there was a prior opportunity for cross-examination. *Id*. at 68.

Here, although the prosecution represented evidence of Bernal's unavailability, the trial court admitted Bernal's preliminary examination testimony without addressing the confrontation clause issue.

We conclude that the admission of Bernal's preliminary examination testimony was not error. Substantial evidence indicated that Bernal was unavailable for trial. Thus, the first requirement for satisfying the confrontation clause (unavailability of the declarant) is met. The second requirement for satisfying the confrontation clause (prior opportunity to cross-examine the declarant) is also met. At the preliminary examination, defendant was represented by counsel, who not only had an opportunity to cross-examine Bernal, but did in fact cross-examine Bernal.

Defendant next argues that the trial court erroneously admitted irrelevant and unfairly prejudicial prior consistent statements. Specifically, defendant objects to the admission into evidence of (1) Burns's statement to his mother, after the shooting, that defendant was the shooter, and (2) Burns's statement to a police officer, Officer Vasquez, after the shooting, that defendant was the shooter. Again, we disagree.

This Court reviews for an abuse of discretion a trial court's decision to admit or exclude evidence. *People v Herndon*, 246 Mich App 371, 406; 633 NW2d 376 (2001). "[A]n abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Babcock (On Remand)*, 469 Mich 247, 269; 666 NW2d 231 (2003). "When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." *Id*.

MRE 401 provides: "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Michigan Courts utilize a "sliding scale" approach to MRE 403 analysis. See *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995), mod 450 Mich 1212; 539 NW2d 504 (1995). "[T]he idea of prejudice denotes a situation in which there exists a danger that marginally probative evidence will be given undue or pre-emptive weight by the jury." *Id*. at 75

The prior consistent statements were relevant. Burns's prior identifications of defendant as the shooter had some tendency to show that it was defendant who shot Burns. MRE 401.

The prior consistent statements were not more unfairly prejudicial than probative. Under MRE 403, the probative value of the statements is strong, since they corroborate Burns's in-court identification of defendant as the shooter, and the identity of the shooter was the key issue at trial. Finally, defendant has not shown in what respect the admission of the prior consistent statements is unfairly prejudicial. While the prior consistent statements are prejudicial to defendant, defendant has not shown that they are unfairly prejudicial; there is no reason to believe that the jury would give Burns's prior consistent statements undue or preemptive weight. Any shortcomings in the probity of Burns's prior consistent statements would go to their weight, not their admissibility under MRE 403. See generally *People v White*, 208 Mich App 126, 130, 132-133; 527 NW2d 34 (1994).

The prior consistent statements are also not barred as hearsay. Admission of prior consistent statements is governed by MRE 801(d)(1)(B), which provides:

> (d) **Statements Which Are Not Hearsay**. A statement is not hearsay if –
>
> (1) *Prior Statement of Witness.* The declarant testifies at trial and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive . . . .

See *People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000).

Here, the declarant, Burns, testified at trial. Burns was subject to cross-examination concerning the prior consistent statements. Further, Burns's prior consistent statements were consistent with his trial testimony, because in both Burns identified defendant as the shooter. Finally, Burns's prior consistent statements were offered to rebut charges of recent fabrication and improper influence. In cross-examining Burns, the defense suggested that the police were "making this up" and that Burns was "covering" for a man named "Mondo." Accordingly, there was an express or implied charge of recent fabrication and improper influence by the police. The prior consistent statements were offered to rebut that charge, and were therefore "not hearsay" under MRE 801(d)(1)(B).

Defendant next argues that the trial court erred in giving a flight instruction, since defendant merely left the scene, and did not flee from it. The trial court instructed the jury using the standard jury instruction, CJI2d 4.4, stating:

> There has been some evidence that the defendant ran away/hid after the alleged crime.
>
> This evidence does not prove guilt. A person may run or hide for innocent reasons, such as panic, mistake, or fear. However, a person may also run or hide because of consciousness of guilt.

Defendant admits that he did not object to the flight instruction. Because counsel did not object to the instructions, this Court's review is limited to plain error that affected substantial rights, and this Court will reverse only if the unpreserved error resulted in the conviction of an actually innocent defendant or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Gonzalez,* 256 Mich App 212, 225; 663 NW2d 499 (2003).

In determining whether error has occurred, jury instructions are to be read as a whole rather than piecemeal. *People v Aldrich,* 246 Mich App 101, 124; 631 NW2d 67 (2001). Even if somewhat imperfect, jury instructions are not erroneous if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *Id.*

Here, there was some evidence of conduct by defendant that could be found by the jury to be flight from the scene. Burns testified that he saw defendant leave the scene of the shooting on foot, through a driveway. Bernal testified that after the shooting was done, defendant jumped into a white car and left the scene. Under these circumstances we find no plain error by the trial court in giving the jury instruction regarding flight.

Defendant next argues that the prosecutor committed misconduct and that the trial court had a duty to "take corrective action such as interposing an objection of his own or giving cautionary instructions to the jury." We disagree.

Not only must counsel object to an allegedly improper line of questioning or argument, *People v Ackerman,* 257 Mich App 434, 449; 669 NW2d 818 (2003), the objection must "timely and specifically" identify the allegedly improper conduct. *People v Rodriguez,* 251 Mich App 10, 30; 650 NW2d 95 (2002). "Generally, a claim of prosecutorial misconduct is a constitutional claim reviewed de novo." *People v Abraham,* 256 Mich App 265, 272; 662 NW2d 836 (2003).

Where no objection is made, this Court reviews for plain error affecting the defendant's substantial rights, and will only reverse if the "error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence." *Ackerman, supra* at 448-449, citing *People v Carines,* 460 Mich 750, 763; 597 NW2d 130 (1999). Appellate review of unpreserved objections to alleged misconduct 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." *Rodriguez, supra* at 30. "[W]here a curative instruction could have alleviated any prejudicial effect," this Court "will not find error requiring reversal." *Ackerman, supra* at 449 (internal citations omitted). Issues of prosecutorial misconduct are considered "on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of the defendant's argument." *People v Thomas,* 260 Mich App 450, 454; 678 NW2d 631 (2004).

"Generally, prosecutors are accorded great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (internal quotes and citation omitted). The prosecution may respond to the defense's arguments. *Rodriguez, supra* at 32. Prosecutors may not make statements of fact to the jury that are unsupported by evidence, but prosecutors are "free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case." *Bahoda, supra* at 282 (internal quotes and citation omitted). The prosecution may argue, based on the evidence, that a witness is believable or not believable. *Thomas, supra* at 455. But the prosecution is not permitted to vouch for the credibility of a witness by arguing that the prosecutor has some special knowledge that the witness is testifying truthfully. *Bahoda, supra* at 276.

A prosecutor's role is to seek justice, and not merely to obtain a conviction. *People v Pfaffle*, 246 Mich App 282, 291; 632 NW2d 162 (2001). But a "prosecutor's good faith effort to admit evidence does not constitute misconduct." *Ackerman, supra* at 448. In *Ackerman*, this Court held that the matter the prosecution sought to admit constituted evidence, and was in response to cross-examination by the defense, and therefore, in the absence of evidence of bad faith, did not constitute misconduct. *Id*.

Defendant argues that the prosecutor committed misconduct by introducing Burns's prior consistent statements identifying defendant as the shooter. As concluded above, Burns's prior consistent statements were admissible under MRE 801(d)(1)(B) and MRE 403. It is not misconduct to make a good faith effort to admit evidence. *Ackerman, supra* at 448. Defendant does not argue that the prosecutor acted in bad faith in presenting Burns's prior consistent statements. Therefore, the prosecutor's presentation of Burns's prior consistent statements could not be misconduct. *Ackerman, supra* at 448.

Defendant next argues that the prosecution deliberately brought out hearsay information. Defendant objects to the use as substantive evidence of Dreffs's statement to the police under MRE 804(b)(6), which provides:

> (b) **Hearsay Exceptions**. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * *

> (6) *Statement by declarant made unavailable by opponent*. A statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

Defendant challenges the trial court's conclusion that Dreffs was unavailable because of defendant's actions. However, this conclusion was supported by evidence. Fink reviewed telephone calls from the Saginaw County jail by defendant to various people. Fink had a transcript of one such conversation in which defendant asked another person to tell Dreffs not to go to court. This phone call occurred shortly before one of the trial dates. Defendant also called Dreffs's house, and Fink confirmed the number he called was Dreffs's.

Fink testified that Dreffs and Bernal were cooperative with his investigation until the time of defendant's telephone calls, in late October 2004, before a late October 2004 trial date. Because Fink's testimony amply and specifically supports the trial court's conclusion that Dreffs was unavailable as a witness because of defendant's efforts to procure her unavailability, Dreffs's statement to Fink was admissible under MRE 804(b)(6). Because Dreffs's statement was admissible hearsay, it was not misconduct for the prosecution to proffer it. *Ackerman, supra* at 448.

Defendant also argues that the admission of Dreffs's statement to Fink violated defendant's constitutional right of confrontation. Defendant failed to preserve this issue at trial.

For purposes of the confrontation clause, *Davis v Washington*, ___ US ____; 126 S Ct 2266; 165 L Ed 2d 224 (2006), further defined "testimonial statements":

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. [*Davis, supra* at 2273-2274.]

Accordingly, a recording of the early parts of conversation between a victim of domestic abuse and a 911 operator, in which the victim mainly described her present state of distress and need for assistance, was nontestimonial, and therefore not absolutely excluded by the confrontation clause, and thus was subject to admission in accordance with applicable hearsay exceptions. See *id.* at 2271, 2277; *People v Walker (On Remand)*, ___ Mich App ___; ___ NW2d ___ (Docket No. 250006, 2006), slip op, p 3. Conversely, where the police responded to a report of a domestic disturbance, separated a woman from her suspected aggressor, extracted an account of violence from the woman, then had the woman fill out and sign a "battery affidavit," a police officer's account of what the woman had told him on that occasion presented testimonial statements which were absolutely excluded by the confrontation clause, notwithstanding hearsay exceptions for excited utterances and present-sense impressions. *Davis, supra* at 2272-2273, 2278; *Walker (On Remand), supra*, slip op, p 3.

Here, the statement by Dreffs to Fink was testimonial. There is no evidence that there was any emergency, and Dreffs was not the victim of a crime making a statement to assuage an emergency. *Davis, supra* at 2273-2274. Testimonial hearsay is inadmissible against a criminal defendant unless the declarant is unavailable and there was a prior opportunity for cross-examination of the declarant. *Crawford, supra* at 58; *Shepherd, supra* at 347. Here, the declarant (Dreffs) was unavailable at trial, and defendant had received an opportunity to cross-examine the declarant Dreffs at the preliminary examination. Therefore, admission of Dreffs's statement to Fink did not violate defendant's constitutional right to confront the witnesses against him.

In addition, a defendant who procures the witness's absence at trial thereby forfeits confrontation clause objections. *Davis, supra* at 2280. Here, the trial court concluded, with much evidentiary support, that defendant procured Dreffs's unavailability as a witness at trial. Therefore, defendant forfeits any objection on confrontation clause grounds to admission at trial of Dreffs's s statement to Fink. *Davis, supra* at 2280.

Defendant next argues that the prosecutor "incorrectly misstated" the law, and attempted to shift the burden of proof by suggesting that defendant could have subpoenaed a witness to show certain facts.

"[A] party is entitled to fairly respond to issues raised by the other party." *People v Jones*, 468 Mich 345, 352 n 6; 662 NW2de 376 (2003). Here, the prosecutor merely commented on the defendant's failure to corroborate testimony that defendant and witnesses presented at trial. This action does not shift the burden of proof; a prosecutor is permitted to comment on a defendant's failure to corroborate testimony presented at trial, and does not shift the burden of proof by doing so. *People v Fields*, 450 Mich 94, 115 n 24; 538 NW2d 356 (1995).

Here, the prosecutor's argument was that the defense could have subpoenaed videotape evidence that defense counsel argued was important and should have been presented by the prosecution:

> Mr. Bovill also attacks Detective Fink [as to] why he didn't go to the hospital and follow up and get videotapes of these suspects that there in the hospital. Mr. Bovill introduced some testimony through I believe Officer Vasquez that St. Mary's does have some cameras, but there has been no evidence that there are any cameras in this particular area where Remulas Burns was that would show these two individuals. And if it was that important, why didn't Mr. Bovill subpoena the hospital person to show you that there were in fact cameras in that location?

This argument was an appropriate response to the defendant's argument, since a prosecutor may properly comment on a defendant's failure to corroborate testimony presented at trial. *Fields, supra*. In addition, the court cautioned the jury to follow the instructions that the court would be giving. Juries are presumed to follow instructions, and instructions are presumed to cure most errors. *People v Hana,* 447 Mich 325, 351; 524 NW2d 682 (1994). Here, the prosecutor did not shift the burden of proof or commit misconduct in responding to the defense's argument and in commenting on the defense's failure to corroborate testimony.

Defendant next argues that the prosecutor denigrated the defendant and the defense. A prosecutor must refrain from denigrating a defendant. *Bahoda, supra* at 283, 293. But a prosecutor need not couch his arguments in bland terms. *People v Aldrich,* 246 Mich App 101, 112; 631 NW2d 67 (2001). A prosecutor has wide latitude and is free to argue the evidence and all reasonable inferences therefrom as it relates to the prosecution's theory of the case. *Id*.; *Bahoda, supra* at 282.

Here, the prosecutor stated:

> Mr. Bovill wants to get you to chase rabbits based on some medical records that this unknown person or people that showed up at the hospital are the real shooter. The hospital nurse indicated that the patient said I'm scared. Shawn is going to come and kill me. But when you read the record, you're going to notice that there is in fact a question mark next to the name Shawn, as if the nurse isn't sure of the name.

This argument was not misconduct. The prosecutor was not denigrating the defense but arguing a reasonable inference that could be drawn from the evidence in the medical chart concerning the identity of the shooter, the key issue at trial. *Bahoda, supra* at 282.

The prosecutor also argued in his closing: "[H]e [i.e., defense counsel] also says that Detective Fink was lying about the fingerprints when he questioned the defendant to get a conviction. That's not what he was doing . . . . Detective Fink testified that he's trained to use that type of tactic to get a suspect to tell the truth during the interview." This argument was not misconduct, but was an argument based on Fink's testimony that he was trained to use this type of tactic. Because the prosecutor was arguing regarding the testimony in evidence, his argument did not rise to the level of prosecutorial misconduct. *Bahoda, supra* at 282.

Defendant next argues that the prosecutor committed misconduct by asking for a civic duty verdict, or a verdict based on sympathy. It is improper for the prosecutor to appeal to the jury's civic duty, but the prosecutor "is given great latitude to argue the evidence and all inferences relating to his theory of the case." *Thomas, supra* at 455-456. "[A]n otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *People v Kennebrew,* 220 Mich App 601, 608; 560 NW2d 354 (1996).

Here, in response to the defense's emphasis on the fact that Burns regularly used marijuana and had purchased marijuana just before the shooting, the prosecutor asked the jury if someone should be killed for buying marijuana. This was an appropriate response to the defendant's argument. The prosecution was not attempting to persuade the jury to convict based on the notion of a civic duty, but to get the jury to keep its focus on the charges and the evidence (the fact that Burns was shot, not what he was doing before he was shot). On the record before us, we therefore conclude that the prosecution's argument did not rise to the level of misconduct.

Defendant next argues that the prosecutor argued facts not in evidence. Although a prosecutor may not argue facts not in evidence or mischaracterize the evidence presented, the prosecutor may argue reasonable inferences from the evidence. *People v Watson,* 245 Mich App 572, 588; 629 NW2d 411 (2001). As noted above, a prosecutor need not confine argument to

bland terms and has wide latitude to argue all reasonable inferences from the evidence. *Aldrich, supra* at 112.

Here, defendant argues that prosecutor argued facts not in evidence by arguing that Burns's state of mind was the reason he did not know which way the shooter ran, that defendant made a three-way call so that caller ID would not work, that defendant was not aware that preliminary examination testimony jury could be read to the jury if a witness did not come to court, and suggesting that Bernal had not identified defendant at the photo lineup because she was afraid of defendant.

The prosecution argued reasonable inferences from the facts in evidence. It is a reasonable inference from that evidence that a person being shot multiple times may not be able to determine to where and in what manner the shooter fled the scene. It is also reasonable to infer from Fink's testimony that defendant had called a third party who then called witnesses on defendant's behalf to discourage their attendance at trial, and that defendant's direct actions resulted in Dreffs and Bernal's unavailability for trial. Finally, it is a reasonable inference from the evidence that defendant influenced Bernal's misidentification of defendant at the photo lineup, which occurred despite the fact that Bernal identified defendant as the shooter at the preliminary examination. Because the prosecutor's arguments were based on reasonable inferences from the evidence, we conclude, on the record before us, that the prosecutor did not commit misconduct in making these arguments.

Defendant next argues that the sum total of alleged errors resulted in an unfair trial, even if any error considered by itself would not lead to that conclusion. Because defendant has failed to establish any errors, this argument also lacks merit.

Defendant next argues that his sentence is invalid because it was based on inaccurate information, i.e., improper scoring of the legislatively imposed sentencing guidelines, and use of an incorrect burden of proof, and that, therefore, his due process rights were violated, requiring resentencing. We disagree.

"This Court reviews for clear error a trial court's factual findings at sentencing." *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). "The existence or nonexistence of a particular sentencing factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error." *People v Babcock*, 469 Mich 247, 273; 666 NW2d 231 (2003) (internal quotation marks, brackets and citations omitted). A sentencing court's scoring of points under the sentencing guidelines is reviewed for an abuse of discretion. *People v Hornsby,* 251 Mich App 462, 468; 650 NW2d 700 (2002). As long as there is some evidence of record in support, a scoring decision will be upheld. *Id*. The sentencing guidelines act applies to felonies committed on or after January 1, 1999. MCL 769.34(2); *People v Hendrick*, 472 Mich 555, 560; 697 NW2d 511 (2005).

The crime of assault with intent to murder, MCL 750.83, is a class A offense. MCL 777.16d. For class A offenses, MCL 777.62 provides the minimum sentence ranges. MCL 777.62 provides that where the prior record variable level is D and the offense variable level is VI, the recommended minimum sentence is between 171 and 285 months. MCL 777.62. However, defendant was sentenced as a second habitual offender under MCL 769.11(1)(b).

The minimum guidelines range for defendant, as a second habitual offender, is determined by MCL 777.21 MCL 777.21(3) provides: "If the offender is being sentenced under section 10, 11, or 12 of chapter IX, determine the offense category, offense class, offense variable level, and prior record variable level based on the underlying offense." In this case, defendant was being sentenced under MCL 769.11, which is section 11 of chapter IX. For defendant's underlying offense, his prior record level was D and his offense level VI. Using that range, subsection (3) of MCL 777.21 then states:

> To determine the recommended minimum sentence range, increase the upper limit of the recommended minimum sentence range determined . . . as follows:
>
> (a) If the offender is being sentenced for a second felony, 25%.

Thus, under MCL 777.21(3)(c), the upper limit of the recommended minimum range, 285, is increased 25% percent, to 356. Thus, the recommended minimum range for defendant, as a second habitual offender, was 171 to 356 months for the assault with intent to murder conviction.

Defendant argues that under *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *United States v Booker*, 543 US 220 125 S Ct 738, 746, 749-750, 756; 160 L Ed 2d 621 (2005), the jury was required to make the findings of fact supporting the sentence imposed by the trial court. However, indeterminate sentencing systems are not subject to the requirements imposed by *Apprendi, Blakely* , and *Booker*. *People v Drohan*, 475 Mich 140, 159-161; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730 n 14, 684 NW2d 278 (2004); *People v Martin*, 271 Mich App 280, 330; 721 NW2d 815 (2006). Therefore, defendant's argument fails.

Defendant next argues that the trial court erred in scoring OV 3.[2] Defendant did not object below to the scoring of OV 3. Therefore, this Court reviews for plain error affecting defendant's substantial rights. *Carines, supra* at 763.

MCL 777.33 governs the scoring of OV 3, and subsection (1) provides:

> (1) Offense variable 3 is physical injury to a victim. Score offense variable 3 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> | | |
> |---|---|
> | (a) A victim was killed | 100 points |
> | (b) A victim was killed | 50 points |
> | (c) Life threatening or permanent incapacitating injury occurred to a victim | 25 points |

[2] OV3 refers to offense variable 3.

(d) Bodily injury requiring medical treatment occurred to a victim 10 points

Here, the trial court concluded that the injury to Burns was life threatening or permanently incapacitating. There was evidence to support this conclusion. After being shot numerous times, Burns was rushed to the hospital where he had surgery on his lung, had his knee put back together and had his finger put back on. Burns testified that he has a metal plate in his leg and his knee and his finger will never be "right." Burns testified that he cannot run, walks with a limp, lost his job and is disabled. This testimony was sufficient to support the conclusion that the shooting of Burns numerous times was life threatening and/or permanently incapacitating.

In addition, emergency room doctor, Brian Heeringa, testified that Burns presented with bleeding in his chest and shortness of breath, and that during examination it was discovered that Burns had suffered a collapsed lung because of one of the gunshot wounds. The trial court could reasonably conclude that a collapsed lung, caused by a gunshot wound, was a life-threatening injury. Accordingly, based on all the evidence, the trial court did not clearly err in finding that there was a life-threatening or permanently incapacitating injury, and did not abuse its discretion in scoring OV 3 at 25 points.

Defendant next argues that the trial court erred in scoring OV 4, for psychological injury. We disagree. Burns testified that he "stay[s] hidden, suffering from paranoia, always thinking someone is going to harm" him, and that he has had continuous nightmares and is afraid to go out in public.

MCL 777.34 provides:

> (1) Offense variable 4 is psychological injury to a victim. Score offense variable 4 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) Serious psychological injury requiring professional treatment occurred to a victim 10 points
>
> (b)No serious psychological injury requiring professional treatment occurred to a victim 0 points
>
> (2) Score 10 points if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive.

Because the scoring of points under OV 4 is appropriate where there is psychological injury that "*may* require professional treatment" (emphasis added), the fact that such treatment has not yet been sought is not conclusive. MCL 777.34(2). For these reasons, the trial court did not clearly err in concluding that Burns suffered serious psychological injury, and did not abuse its discretion in scoring 10 points for OV 4.

Defendant next argues that the trial court erred in scoring OV 19, for interference with the administration of justice. We disagree. MCL 777.49 provides:

> Offense variable 19 is threat to the security of a penal institution or court or interference with the administration of justice. Score offense variable 19 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points.
>
> ***
>
> (b) The offender used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice . . . . 15 points
>
> (c) The offender otherwise interfered with or attempted to interfere with the administration of justice 10 points

In *People v Endres*, 269 Mich App 414, 420-422; 711 NW2d 398 (2006), this Court held that defendant's threat to kill the victim warranted the assessment of 15 points under OV 19 where the defendant knew the victim would be the primary witness against him, and the discovery and prosecution of defendant's crimes would have been prevented if victim had been dissuaded from coming forward with accusations and testimony. *Endress* relied on *People v Barbee*, 470 Mich 283; 681 NW2d 348 (2004), and summarized *Barbee* as follows:

> In *Barbee*, the trial court scored OV 19 at ten points because the defendant gave a police officer a false name during a traffic stop. *Id.* at 285, 681 N.W.2d 348. Our Supreme Court reasoned that conduct occurring before criminal charges are filed can form the basis for "interference, or attempted interference, with the administration of justice" because that is "a broad phrase that *can* include acts that constitute 'obstruction of justice,'" but is not limited to those acts. *Id.* at 284, 286, 681 N.W.2d 348 (emphasis in original). The Court held that the phrase "interfered with or attempted to interfere with the administration of justice" applies to "more than just the actual judicial process" and includes providing false information to law enforcement officers in the process of investigating a crime. *Id.* at 287-288, 681 N.W.2d 348. [*Endress, supra* at 421.]

Thus, procuring or attempting to procure the unavailability of a witness includes, but is broader than, obstruction of justice. *Barbee, supra* at 287-288.

Here, the trial court concluded that defendant procured or attempted to procure the unavailability of witnesses. This conclusion is not clearly erroneous because it is supported by testimony, and therefore, the trial court did not abuse its discretion in scoring 10 points for OV 19.

Defendant next argues that he should receive a new trial because of ineffective assistance of counsel. We disagree.

The trial court held an evidentiary hearing and concluded that defendant was not denied the effective assistance of counsel. The questions presented by a claim of ineffective assistance of counsel are mixed questions of law and fact; findings of fact by the lower court are reviewed

for clear error, and questions of law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

A constitutional claim of ineffective assistance of counsel is reviewed under the standard established in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), which requires the defendant to show that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney guaranteed under the Sixth Amendment. *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993). The right to counsel under the Michigan constitution does not impose a more restrictive standard than that established in *Strickland*. *People v Pickens*, 446 Mich 298, 318-319; 521 NW2d 797 (1994).

Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To succeed on a claim of ineffective assistance of counsel, the defendant must show that, but for an error by counsel, the result of the proceedings would have been different and that the proceedings were fundamentally unfair or unreliable. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). The defendant bears a "heavy burden" on these points. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Garza, supra* at 255.

Here, defense counsel's failure to object to the issues argued above was not ineffective assistance of counsel. As noted above, defendant's positions (regarding evidentiary issues, the confrontation clause, and prosecutorial misconduct) were lacking in merit. Defense counsel is not required to make futile objections. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).

Defense counsel's decisions not to call as witnesses Rachael Pittman, Christina Cline and Antion Moore, did not deprive defendant of a substantial defense. Defendant himself testified that he was not at the scene of the shooting at the time of the shooting, and his alibi was supported by witness Louis Thomas. Therefore, because the failure to present the testimony of Pittman, Cline and Moore did not deprive defendant of a substantial defense, the failure to present such testimony did not amount to ineffective assistance of counsel. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The decision of what witnesses and evidence to present, therefore, were matters of trial strategy. *Id*.

Finally, defendant also fails to establish that defense counsel's argument at sentencing constituted ineffective assistance, since defendant has not established that had defense counsel made a different argument, a different outcome would have resulted at sentencing. The trial court sentenced defendant within the sentencing guidelines range, and specifically noted that it chose the highest figure within the guidelines recommended range for the minimum sentence because of factors that had not been taken into account by the guidelines – the 31 offenses defendant had previously committed while in prison, and the offenses that caused him to be ejected from the juvenile camp. Thus, defense counsel's argument was not outcome determinative. *Garza, supra* at 255.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Kurtis T. Wilder