STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 3, 2009
v	No. 273369 Wayne Circuit Court
ROOSEVELT PATTERSON PETTIFORD, Defendant-Appellant.	LC No. 06-000343-01

Before: Talbot, P.J., and Bandstra and Gleicher, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), being a felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to life imprisonment without parole for his first-degree murder conviction, a concurrent term of 38 months' to 5 years' imprisonment for the felon in possession conviction, and a consecutive term of two years' imprisonment for the felony-firearm conviction. Defendant now appeals as of right. We affirm.

I. Underlying Facts

The victim, Vinson Lamont Ellington, was shot to death in Detroit on November 1, 2005. The shooting occurred between 11:30 a.m. and noon, at a gas station located near the intersection of Oakland Street and East Grand Boulevard. The victim was pumping gas when a lone assailant killed him with multiple gunshots. Chief Wayne County Medical Examiner Dr. Carl Schmidt testified that the victim endured 11 gunshot wounds, including two to his face, two in his neck, two to the back of his right shoulder, and one each to his upper chest, right lower back, right hip, right buttock, and left forearm. Schmidt opined that no evidence of close-range gunfire existed on the victim's body, and that "a high velocity weapon was used."[1]

[1] The prosecutor presented several police witnesses to document the facts that the police never recovered the weapon used by the assailant, the van driven away by the assailant, or any usable fingerprints on fired casings collected at the gas station on November 1, 2005.

Several eyewitnesses offered at trial their recollections of the November 1, 2005 shooting. Ninth-grade teacher LaDonna Morrow and one of her students, Taylor Hanserd, testified that while driving west on East Grand Boulevard toward a red traffic light, they heard three gunshots emanating from a gas station on the right side of the road. Morrow and Hanserd recounted that after Morrow stopped at the traffic light, they saw the victim pumping gas into a station wagon, and a dark green Cadillac Escalade parked on the opposite side of the gas pumps. Morrow and Hanserd similarly described that they also saw an African-American man wearing a black, hooded coat; they watched as the victim fell to the ground, the hooded man moved closer to the victim, within several feet, and continued shooting a gun at the victim,[2] then ran behind the gas station and into the passenger's seat of a green 1997 Chevrolet conversion van with tan or beige stripes. Neither Morrow nor Hanserd could describe the shooter's face because his hood obscured it, and neither heard any verbal exchange between the victim and the shooter. Both Morrow and Hanserd saw an African-American woman on a sidewalk across the street from the gas station running away from it, the Escalade pull away from the station, and a white Detroit police car that had been parked at or near the gas station drive away from the scene after the shots rang out. Morrow then drove away and she or the student called 911.

Evan James Nayfa testified that on November 1, 2005, he lived in a second-floor apartment across the street from, and "[j]ust east of," the East Grand Boulevard gas station where the shooting occurred. Nayfa recalled that within 15 minutes of noon, he heard three gunshots that prompted him to look out his window toward the gas station. From 30 or 40 feet away, Nayfa "saw a station wagon at the pump" nearest his vantage point, "the victim as he was falling to the ground," and "the shooter at the front of [the victim's] vehicle." According to Nayfa, the assailant, an African-American male who wore a black coat with its hood raised, "was running up towards [the victim], and he kind of stood in a stance at the front of the victim's car . . . . And I'd say from there he shot about six or seven more times" with a "very large" "automatic weapon."[3] Nayfa described that the shooter then fled behind the gas station and into the driver's side of "a green conversion van" with "tan decals and a raised roof"; Nayfa disbelieved that the van contained any other occupants.[4] "A couple minutes" later, Nayfa and his roommate ventured across the street, where the victim laid on the ground, silent and unmoving, and where many other people they did not know gathered around. Nayfa thereafter encountered the police and participated in a photographic lineup at the police station; Nayfa could not identify with certainty anyone as the shooter, but suggested that two of the photographs most resembled the shooter; a photograph of defendant was one of the two that Nayfa selected.[5]

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[2] Morrow estimated that "altogether I may have heard nine, maybe thirteen shots," while Hanserd guessed that she heard at least six or seven.

[3] Nayfa estimated that the assailant approached within 8 to 10 feet of the victim, and that in total he heard 13 gunshots.

[4] In Nayfa's estimation, the green van "was parked in behind the gas station in a way that was premeditated" because it "ha[d] been backed in behind the gas station."

[5] Nayfa's roommate, offered testimony similar to Nayfa's in most respects. Nayfa's roommate also attended a photographic lineup on November 1, 2005, but could not identify the shooter because he had worn a dark hood covering his head.

The prosecutor presented evidence that one eyewitness to the shooting had identified defendant as the victim's assailant. Yolanda Browning testified that she had grown up in the same area of Detroit as the victim and defendant, and had known them both for at least 20 years. Browning recounted that on November 1, 2005, she lived a couple of blocks away from the East Grand Boulevard gas station, and that she had started walking toward the gas station that morning intending to meet the victim, whom she had called requesting to purchase crack cocaine. Browning conceded at trial that she had heard some gunshots while walking toward the gas station, but insisted that she had not viewed any portion of the shooting, or any people or vehicles around the gas station, because the shots prompted her to "turn[] around and r[u]n" home.

At trial, however, Browning confirmed that in a statement recorded by the police on November 1, 2005, her initials appeared alongside the following details: "Roosevelt did it [the shooting]"; Roosevelt's last name was Pettiford; Browning replied affirmatively to the police question, "Did you actually see Roosevelt fire the gun?"; Browning described Roosevelt as a "[b]lack male, thirty, five nine, a hundred and seventy-five pounds, medium complexion, short Afro, light [mustache] with black marks on his face and a big ass head"; Browning had known defendant all her life, and believed he lived "[o]n Rosedale at Oakland about three or four houses off the corner with the white picket fence . . . south side of the street"; that she "saw [the victim] going back to his car from the gas station at Oakland and East Grand Boulevard"; "[t]hat's when I saw Roosevelt shoot [the victim]"; that defendant had shot the victim from "[c]lose range, he just walked up on him and started shooting"; that defendant had fired his first shot while pointing a gun "[a]t [the victim's] face. It looked like it could have been his eye"; and that she had an "open" view of the shooting from about 25 feet away because she "could see straight to the East Grand Boulevard."[6]

Scott Shea, a Detroit police homicide officer, testified that he participated in a November 7, 2005 follow-up interview of Browning, precipitated when a colleague of Shea's telephoned Browning to arrange the discussion. Shea recounted that he first asked Browning "if she knew the gentleman that she named in her prior statement," and that Browning responded affirmatively, without hesitation or qualification. Shea described that the officer-in-charge of the case then showed Browning a mug shot photograph of defendant and inquired (1) whether she knew "this person," to which Browning responded, "Yeah, that's Roosevelt," (2) how she knew defendant, which she answered, "We went to school together. I've been knowing him my whole life," (3) whether she saw defendant on November 1, 2005, to which she replied, "Yes," "I saw him at the gas station at Oakland and East Grand Boulevard," (4) "what did Roosevelt do[,]" which she answered, "When he shot [the victim]," (5) if she had witnessed the shooting, and Browning responded, "I saw the first shot and then I took off running," "Roosevelt was shooting and he shot [the victim]," (6) "did you see Roosevelt with a gun[,]" which she answered, "Yeah, but I don't know what type of gun it was," and (7) whether anyone had accompanied defendant at the gas station, to which she replied, "No." Shea added that Browning then reviewed the

[6] Detroit police homicide investigator Myron Love testified that he interviewed Browning in the early afternoon of November 1, 2005, and similarly described the contents of her statement that day.

statement he had handwritten and signed both pages. Shea denied that Browning ever had suggested to the police that she could not see the shooting clearly because she was not wearing her glasses, or that she had fabricated her summary of events to gain a measure of revenge against defendant for abusing her niece.

Detroit police homicide officer David Moore also testified about his interaction with Browning approximately a week after the shooting. Moore recalled that at police headquarters he talked for about 35 or 45 minutes with Browning, who had arrived alone and voiced concern regarding her participation in defendant's case, specifically "[t]hat she had heard conversations throughout the neighborhood that she was coming down to the police station and talking too much," felt "concerned about any kind of repercussions or anything like that." According to Moore, he and Browning also discussed the November 1, 2005 shooting at headquarters, then spent five or 10 minutes together revisiting the scene of the shooting. Moore described that Browning again recounted with specificity her unequivocal observations of the shooting, including that defendant had shot the victim near the gas pumps. Moore denied that Browning thereafter reported to police any qualifications of her shooting account.[7]

Thomas Hill testified that he had known both the victim and defendant for more than 20 years, that they all resided in the same neighborhood, and that he had dated defendant's sister. Hill conceded that he had criminal convictions and an addiction to crack cocaine, but denied that anyone had promised him any type of leniency in exchange for his trial testimony. While incarcerated on December 12, 2005, Hill wrote and sent a letter to homicide investigators inquiring whether the victim in fact had died, and suggesting that if so, Hill might have information relevant to a police investigation; Hill specifically mentioned in the letter that during a conversation with the potential suspect, he had "asked [Hill] to hit [shoot or kill]" the victim, that Hill knew the suspect to have "drugs and [a] gun," and that Hill could provide additional information.

[7] Multiple witnesses testified at trial concerning Browning's contact with defendant's girlfriend between her early November 2005 statements to the police and her detention as a material witness in March or April 2006. Browning repeatedly denied ever feeling influenced by defendant or his family or friends, or discussing her preliminary examination and trial testimony with defendant's girlfriend, Crystal Cowan. The prosecutor called Lora Baldwin, a 36th District Court security officer present at defendant's January 3, 2006 preliminary examination, who recounted her observations that after Browning left the witness stand at the examination, outside the courtroom she "met up with a light-skinned lady [Cowan]," who got "close to" Browning and spoke to Browning in "[a] little aggressive" tone of voice. The prosecutor also inquired of Baldwin, "And had you been in the courtroom when the Court admonished that there was to be no contact between friends and family members of the defendant and the witnesses[,]" to which Baldwin replied, "Yes, I was." The prosecutor additionally elicited testimony from Detroit police officer Anthony O'Rourke, who described that on March 22, 2006, he had gone to investigate potential witness tampering at 520 Smith Street in Detroit. O'Rourke recalled that at 520 Smith Street, he identified and spoke with Browning, who resided in the lower flat, and also identified and spoke with Cowan, who resided in the upper flat.

When a police sergeant came to interview Hill on December 15, 2005, he first advised him that someone had killed the victim, then asked what Hill knew about the victim's shooting. Hill testified that he related to the sergeant the following details about defendant: as defendant drove him around one day past a local barber shop, they passed the victim on the sidewalk and defendant became upset and announced "I'm going to get the M.F.," mentioning in explanation only that he and the victim "had some words" and that he "had a problem with all of [the victim's crew/friends]"; defendant inquired of Hill "what if I gave you some money to hit [the victim]"; defendant also expressed, "I'm going to have that mother fucker hit or I'm going to kill him myself"; when Hill expressed disinterest in killing the victim, defendant called him a "bitch" and "a coward, and . . . started telling [Hill] how easy it was to be able to do somebody"; defendant theorized, "All you have to do is hit the [crew] leader [the victim] and the rest of them will fall." Hill recalled that he additionally told the sergeant that he had seen guns at defendant's three Detroit houses and the residence of defendant's girlfriend.[8]

Defendant presented two alibi witnesses. Defendant's cousin, Gloria Pettiford, testified that she and her mother went to a Detroit residence on Rosedale Street around 11:30 a.m. on November 1, 2005. Pettiford recalled that she spoke with defendant at the Rosedale residence for about 20 minutes, then at about 12:00 p.m. or 12:10 p.m., she drove defendant to a Coney Island restaurant where they had lunch. According to Pettiford, she returned defendant to the Rosedale residence at around 1:40 p.m. Pettiford acknowledged that she had told no one about defendant's alibi until a couple weeks before his trial commenced.

Patricia Crenshaw, defendant's aunt, offered similar details regarding her November 1, 2005 trip to the Rosedale Street residence with her daughter, Gloria. Crenshaw specifically related that she and her daughter had spoken with defendant at the Rosedale residence for 15 or 20 minutes, that she then entered the house, and that around noon or shortly thereafter she observed out a window that her daughter drove away with defendant. Crenshaw conceded that she also failed to report her observances to either the police, prosecutor, or defense counsel until two or three weeks before trial.

II. Improper Impeachment with Out-of-Court Statement of Another

Defendant first contends that the trial court improperly permitted the prosecutor to question Crenshaw, defendant's aunt, about an out-of-court statement by a nontestifying witness that tended to undercut the alibi testimony of Gloria Pettiford, defendant's cousin. Defendant theorizes that the prosecutor's improper cross-examination of Crenshaw with an out-of-court

[8] The prosecutor also played for the jury portions of several recorded telephone calls that defendant had initiated from jail after his arrest. Defendant's brief on appeal challenged the court reporter's failure to transcribe the content of the recorded jail phone calls that the prosecutor played for the jury at trial. This Court remanded the case in April 2008 for an evidentiary hearing, and instructed the trial court to "settle the record with respect to the tape recordings that were played to the jury . . . [and] see that the recordings are included with the record to be transmitted to this Court." Because defendant's appellate counsel conceded on remand that he had deemed the recorded phone call issue settled, this issue has become moot. *People v Briseno*, 211 Mich App 11, 17; 535 NW2d 559 (1995).

statement by a third party occasioned several different types of error: (1) violation of defendant's due process protections and his constitutional right of confrontation because the letter's contents were testimonial, yet defendant had no opportunity to cross-examine the letter's author, Lakea Green; (2) introduction of inadmissible hearsay; and (3) the prosecutor's engagement in misconduct by questioning Crenshaw about the credibility of another witness, then employing Crenshaw's response to improperly interject Green's letter.

A. Standards of Review

During the prosecutor's cross-examination of Crenshaw, defense counsel initially objected to Green's letter as hearsay, and later lodged a relevance objection. This Court reviews for an abuse of discretion the trial court's rulings whether to admit evidence, but considers de novo the legal question "whether evidence is admissible under a particular rule of evidence." *People v Moorer*, 262 Mich App 64, 67; 683 NW2d 736 (2004).

However, defense counsel did not offer a timely objection on the basis that the prosecutor's questioning infringed on defendant's right of confrontation.

> This claim is therefore subject to review for plain error. To avoid forfeiture under the plain error rule, three requirements must be met: (1) an error must have occurred; (2) the error must have been plain error; (3) and the plain error must have affected substantial rights, i.e., the defendant was prejudiced (the defendant generally must show that the error affected the outcome of the lower court proceedings). An appellate court must then exercise its discretion in deciding whether to reverse a defendant's conviction. Reversal is warranted only when the plain error results in a conviction of an innocent defendant or seriously affects the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. [*Moorer*, *supra* at 68.]

Defendant also raises within this issue a prosecutorial misconduct assertion that he did not specifically and timely present at trial. This Court reviews properly preserved claims of prosecutorial misconduct according to the following standards:

> 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. Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. [*People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), criticized on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354, 1371; 158 L Ed 2d 177 (2004).]

This Court reviews alleged instances of prosecutorial misconduct in context to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). But appellate review of improper remarks by the prosecutor is generally precluded absent an objection by defense counsel because a failure to object deprives

the trial court of an opportunity to cure the alleged error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). This Court reviews unpreserved claims of prosecutorial misconduct only for plain error that affected the defendant's substantial rights. *Schutte, supra* at 720. No error requiring reversal exists if a timely instruction could have cured the prejudicial effect of the prosecutor's remarks. *Id.* at 721.

B. Hearsay Analysis

Our careful review of the prosecutor's cross-examination of Crenshaw reveals that no portion of the prosecutor's inquiries about Green's letter embodied inadmissible hearsay. The prosecutor posed two inquiries of Crenshaw in which she tried to summarize the gist of Green's letter. However, neither inquiry injected much, if any specific detail from the contents of Green's letter. The prosecutor's first inquiry ("[W]ould your opinion of your daughter's truthfulness change if you knew that someone else wrote a letter to the Judge and said that they were somewhere else during the crime?") reveals virtually no detail, and its use of the nonspecific pronoun "they" leaves somewhat unclear about whom Green and the prosecutor even intend to refer. The second inquiry ("So you don't know that nobody wrote a letter to the Judge and said that they were somewhere else than what your daughter said at the time of the crime?") more successfully conveys the thrust of Green's letter. However, irrespective of the specifics contained in the questions, they do not meet the definition of "hearsay" because the prosecutor offered them, and the trial court permitted them, to impeach defendant's proffered alibi testimony, specifically Crenshaw's declaration regarding her daughter's veracity, and not "to prove the truth of the matter asserted" by Green. MRE 801(c).

C. Relevance Analysis

With respect to relevance, the prosecutor's abbreviated references to Green's claim of an unspecified alibi tended to reveal the potential inaccuracy of Crenshaw's declarations in the veracity of her daughter's alibi testimony, a material issue in the case. MRE 401.[9] The prosecutor's inquiries premised on Green's letter thus constituted relevant evidence.

D. Confrontation Clause Analysis

We also find that defendant's right of confrontation claim lacks merit.

> A defendant has the right to be confronted with the witnesses against him or her. US Const, Am VI; Const 1963, art 1, § 20; *Crawford*[, *supra* 42]. The Confrontation Clause prohibits the admission of all out-of-court testimonial statements unless the declarant was unavailable at trial and the defendant had a prior opportunity for cross-examination. A statement by a confidential informant to the authorities generally constitutes a testimonial statement. *However, the Confrontation Clause does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted.* Thus, a

[9] Defendant does not assert that the prosecutor's questions about Green's letter violated MRE 403.

> statement offered to show the effect of the out-of-court statement on the hearer does not violate the Confrontation Clause. . . . [*People v Chambers*, 277 Mich App 1, 10-11; 742 NW2d 610 (2007) (emphasis added, some citations omitted).]

Even accepting defendant's contention that Green's out-of-court statements qualified as testimonial, the Confrontation Clause does not apply here because the trial court permitted the prosecutor to inquire about Green's letter solely for the purpose of impeaching Crenshaw's alibi testimony, not for the truth of any matters contained in Green's letter.

E. Prosecutorial Misconduct Analysis

Although Green's letter had relevance to Crenshaw's alibi testimony, we agree with defendant's contention that the prosecutor made Green's letter relevant by posing an inappropriate question to Crenshaw. "[I]t (is) improper for a witness to comment or provide an opinion on the credibility of another witness since matters of credibility are to be determined by the trier of fact." *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985), quoting *People v Buckey*, 133 Mich App 158, 167; 348 NW2d 53 (1984), rev'd on other grounds. Consequently, the prosecutor engaged in misconduct when she solicited Crenshaw's view that her daughter was "a truthful person."[10]

But any impropriety by the prosecutor qualifies as harmless. To the extent that the prosecutor improperly elicited a witness credibility opinion, which she then challenged by reference to Green's letter, the prosecutor did not compound this isolated instance by referring to Crenshaw's credibility testimony or the content of Green's letter during her closing or rebuttal arguments. As will be discussed next, the prosecutor presented ample admissible evidence proving defendant's guilt beyond a reasonable doubt. Furthermore, the trial court instructed the jurors that only they had the authority to make credibility determinations, and that the attorneys' statements and questions did not constitute evidence. See *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001) (characterizing as harmless error the prosecutor's inquiry of the defendant whether he believed a trial witness was "a liar" "[b]ecause any undue prejudice could have been cured by a timely objection and curative instruction.").

In summary, whether reviewed for plain error affecting substantial rights, or even as a preserved claim of improper impeachment by the prosecutor, we conclude that "after an examination of the entire cause, it [does not] affirmatively appear that the . . . [brief exchange between the prosecutor and Crenshaw] has resulted in a miscarriage of justice." MCL 769.26.

[10] We also question the propriety of the prosecutor's impeachment of Crenshaw with an out-of-court statement by a third party, who did not testify at trial. This method of impeachment does not comport with either MRE 608 or MRE 613, for example. For purposes of this analysis, we will presume that the prosecutor engaged in misconduct in her impeachment method as well.

III. Sufficiency of Evidence

Defendant complains on appeal that his first-degree murder conviction cannot stand because "not one witness swore under oath that he did it," no confession or physical evidence tended to prove his guilt, and "out of court statements repudiated by [Browning] are not competent or sufficient evidence that []he . . . is guilty." We review sufficiency of the evidence challenges de novo to determine whether the evidence, viewed in the light most favorable to the prosecution, warrants a rational trier of fact in finding that all the elements of the charged crime have been proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000).

To establish first-degree murder under MCL 750.316(1)(a), the prosecutor must prove "that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *People v Saunders*, 189 Mich App 494, 496; 473 NW2d 755 (1991). Premeditation and deliberation involve an "interval between the initial thought and ultimate action . . . long enough to afford a reasonable person time to take a 'second look.'" *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003). Premeditation and deliberation can be inferred from the circumstances surrounding the victim's death. *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2001); *Saunders*, *supra* at 496. Factors relevant in establishing premeditation and deliberation include evidence of 1) the parties' prior relationship; 2) the defendant's actions before the killing; 3) the circumstances of the killing itself, including the manner of the victim's death; and 4) the defendant's actions after the killing. *People v Bowman*, 254 Mich App 142, 152; 656 NW2d 835 (2002); *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992). Minimal circumstantial evidence suffices to prove a defendant's state of mind. *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004).

After reviewing the record, we find that the prosecutor presented ample evidence supporting the jury's rational conclusion beyond a reasonable doubt that defendant premeditated and deliberated his killing of the victim. Defendant's brief on appeal does not specifically contest the quantum of proof tending to establish the premeditated and deliberated nature of the victim's shooting, only his identity as the shooter. However, abundant admissible evidence showed that defendant committed the premeditated and deliberated murder of the victim.

Defendant had a prior relationship with the victim, as reflected in the trial testimony of Hill, who recounted that while driving around with defendant he became upset on seeing the victim and announced, "I'm going to get the M.F.," explaining only that he and the victim "had some words" and that he "had a problem with all of [the victim's crew/friends]"; defendant asked Hill, "[W]hat if I gave you some money to hit [the victim]"; defendant also expressed, "I'm going to have that mother fucker hit or I'm going to kill him myself"; and, "All you have to do is hit the [crew] leader [the victim] and the rest of them will fall." The circumstances of the killing, evidenced in the consistent testimony of several witnesses, also support a finding of premeditation and deliberation: defendant pulled a hood over his face; approached the victim unseen from the opposite side of the gas pump that the victim was using; as the victim pumped gas, defendant fired three shots from an AK-47 assault rifle; defendant then approached the victim and fired about 10 more shots into him from closer range, ultimately landing two shots through the victim's head, as well as 10 others. After the shooting, defendant fled the scene.

Defendant correctly observes that the only witness who ever reported seeing him fire the automatic weapon at the victim on November 1, 2005 was Browning, who testified to the contrary at trial. Defendant ignores, however, that the testimony of multiple witnesses concerning Browning's prior, out-of-court descriptions of defendant's shooting of the victim qualified as nonhearsay, and thus substantively admissible evidence, pursuant to MRE 801(d)(1), which provides as follows:

> A statement is not hearsay if—
>
> (1) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (C) one of identification of a person made after perceiving the person . . . .

Browning, whose testimony encompassed a full day of defendant's trial, unquestionably was "subject to cross-examination concerning" her November 1, 2005, November 7, 2005, and other early November 2005 statements to the police, all of which consistently described her personal observations of defendant killing the victim. Because Browning's descriptions of the shooting constitute nonhearsay under the plain language of MRE 801(d)(1)(C), the trial court properly admitted the out-of-court statements as substantive identification evidence.

IV. Counsel of Defendant's Choice & Related Due Process Contentions

Defendant maintains that the trial court failed to honor his constitutional right to proceed to trial defended by the counsel of his choice, and that the court infringed on his constitutional due process rights by neglecting "to make detailed inquiry into" his reasons for wishing to discharge his retained attorneys, by making a decision about who would defend him at trial "before hearing from . . . defendant," and "by simply employing an analysis of trusting that the attorneys were doing their jobs instead of determining whether that was actually so." This Court considers de novo these constitutional questions. *People v Harper*, 479 Mich 599, 610; 739 NW2d 523 (2007).

On July 13, 2006, after prior adjournments of trial, including for the purpose of allowing defendant to retain substitute counsel, the trial court heard defendant's concerns with his substitute counsel. David Cripps initially advised the court that he and "Miss [Gabi] Silver . . . are co-counsel representing [defendant]," that Cripps felt he was "trying to do the best I can in representing [defendant]," but that "it is pretty clear based on the conversations I had with him earlier that there are some issues here that I have been trying to resolve, but if he doesn't want us to represent him I want to find that out right now and not Monday when we come to court" for trial. When the court posed this question to defendant, he replied, "To my understanding I had hired Miss Silver and I have never seen her come [to jail]." The following, relevant colloquy then ensued:

> *The Court*: Okay. Well, the last time we checked she was intending on being here for trial.
>
> *Defendant*: Yes, but I haven't seen my counsel. I had an eighty day postponement and I ain't seen him until the sixty-ninth day so how could I prepare for trial?

The Court: Okay. Well, let me say this and I know I've said this to you before, Mr. Pettiford. First of all, the charges that you face are very serious.

Defendant: Yes, that's what I'm saying.

The Court: There's no question that you have a great deal of anxiety about this and this is what I said to you before. This is not an easy situation to have to sit in the cell waiting for your attorney to arrive because to you this is the only thing going on.

Defendant: Right.

The Court: Okay. But to these individuals that you have elected to hire—I might add, you have desired to hire these individuals—they're very busy. That doesn't mean that they're going to shirk their responsibility. It just says that they may not be as accessible to you as you might think they should be.

That being said, you have two of the finest attorneys that practice within this jurisdiction and you need to understand that they are doing a lot of things, even if they're not necessarily communicating that to you on your behalf. They're not going to do something to undermine you.

They're not going to do something that's going to cost you the case. If anything, they're out working diligently trying to get this case ready for trial and represent you to the fullest extent of the law, okay, and that's not easy. You're sitting back there pontificating about the situation that is in store for you, what the future holds and of course, . . . you probably have run into a few people in the jail that have given you some misguided advice.

Defendant: No, I was reading the professional conduct, your Honor.

The Court: Okay. The Professional Code of Conduct, okay, is a guideline that each and every one of us who practice in the State of Michigan is expected to abide by, . . . but it is subject . . . to one's interpretation, . . . so you might be reading a little bit more—and no disrespect—but you might be reading a little bit more into that than what it is that's really happening.

I'm not going to allow—and we had a side bar before you came out. I've made the Court's intention very clear. The Court is not going to allow Mr. Cripps or Miss Silver to withdraw from this case. We are going forward on this matter as of Monday.

This matter was adjourned in the past to allow you to hire counsel. The Court has a right and obligation and is dutybound to see that justice is not thwarted or in any way impeded because of deliberate attempts to stall the process.

Defendant: I did not deliberately attempt to stall . . . . I have all these messages, leaving messages—papers leaving messages for him and I haven't had access to talk to him one time. I know he's real busy, but to take one time out today and come talk to me, and I'm right across the street from the court, so I can tell him the things I did want and now he—waits 'til the last minute and now you said we can't have a continuance when it's not my fault.

* * *

The Court: . . . [T]he Court is . . . reasonably assured that you are going to be represented to the fullest extent of the law based on what this Court has heard from the parties, okay, and the Court asked Mr. Cripps, what have you been doing, and he told the Court what he's been doing, what Miss Silver has been doing to prepare for your case.

So you're going to have to trust them and maybe in your life you haven't trusted anybody, but if there's one person or persons you should trust, it's your attorneys—

* * *

—and there's nothing on this record that this Court is convinced, okay, that convinces this Court, the Court should say, that you are not being represented to the fullest extent of the law.

Defendant: I haven't seen my attorneys—

* * *

—since I hired them. I hired Gabi Silver.

* * *

Miss Silver, I haven't seen her to prepare for trial.

The Court: We're not going to adjourn this matter. You're going to go forward with counsel as planned, okay. The Court . . . and I told you this before, Mr. Pettiford, and this is coming from a Court where you really lodged some serious attacks against, okay, but given the fact that you lodged serious attacks, this Court can set all that aside because the Court . . . .

* * *

Excuse me. The Court recognizes, Mr. Pettiford, that if I were in your situation I'd be frightened, too, okay, but that being said, the Court is the keeper of justice. This Court does not have the horse—

Defendant: This is unfair.

The Court: Excuse me. The Court does not have a horse in the race and it is incumbent upon this Court to see that your rights are protected at every level.

Defendant: Well, they're not being protected.

The Court: You know what, that's your opinion and you're entitled to it.

* * *

Defendant: I'm not adequately prepared for trial because I haven't seen Miss Silver.

The Court: Anything further?

* * *

Mr. Cripps: . . . First of all, just to finish that, I have seen him at least three or four times on jail visit within the last two weeks getting ready for this trial.

With respect to defendant's contention that he did not receive the counsel of his choice to assist in his defense, a structural error that affected the entire proceedings, we find the claim without merit. As reflected in the extended transcript excerpt, defendant repeatedly declared that he had hired attorney Silver, and he never specifically expressed his desire to discharge her or attorney Cripps. As Cripps explained, he worked with Silver, and in this case was operating with Silver as cocounsel for defendant. Because defendant has failed to establish that he ever sought to replace Cripps and Silver with some other identified alternate counsel before his trial, his suggestion that he did not receive the counsel of his choice rings hollow.

The above-quoted transcript excerpt also belies defendant's additional argument that the trial court deprived him of due process in rejecting the motion he placed on the record on July 13, 2006, which appears more aptly characterized a request for an adjournment or continuance than a motion for substitute counsel. Although the trial court apparently had a side bar with counsel before going on the record, at which the court indicated its view of the request for adjournment or a continuance, no due process violation occurred because the trial court nonetheless entertained defendant's concerns in a solicitous fashion that afforded him the opportunity to air his concerns on the record. The trial court then placed on the record its decision to deny any further adjournment or continuance of trial, which already had been postponed to facilitate defendant's substitution of his then current, retained cocounsel and their preparation for trial.

In summary, we simply detect no hint that defendant either was forced to proceed to trial without the counsel that he had hired, or that the trial court deprived him of due process in any respect at the July 13, 2006 hearing.

V. Police Suppression of Evidence

Defendant next submits that the trial court should have granted him a new trial because the police suppressed evidence in two significant areas. First, the available police reports contain

no reference to "any statement of Sharon Nichols," despite that Browning's trial testimony suggested that she potentially was with Nichols at some point on the day of the shooting, although perhaps not at the precise time of the killing. Nichols has averred in an affidavit that "I told them [the police] I would be a witness to testify that [Browning] was not at the gas station when [the victim] was shot. The officers told me that they had no reason for me to be a witness." Second, in light of trial testimony by at least two witnesses that they saw a Detroit police vehicle parked at or near the gas station around noon on November 1, 2005, it becomes apparent that "[t]hose police officers, eyewitnesses to the shooting, ... would be in a position to say that Defendant did it, or that he didn't do it. They surely would have information about what they witnessed that could either solidify the case against Defendant, or weaken it." According to defendant, the police concealed the "identities of these important [police] witnesses."

Defendant preserved in a motion for new trial his complaints that the police suppressed evidence. *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005). "A determination regarding whether a party has received due process is a question of law reviewed de novo." *People v Odom*, 276 Mich App 407, 421; 740 NW2d 557 (2007). To the extent that defendant's new trial argument involves matters of court rule interpretation, this Court also considers de novo these legal questions. *People v Hawkins*, 468 Mich 488, 497; 668 NW2d 602 (2003). This Court reviews for an abuse of discretion a trial court's decision whether to grant a motion for a new trial. *People v Miller*, 482 Mich 540, 544; ___ NW2d ___ (2008). "An abuse of discretion occurs only when the trial court chooses an outcome falling outside the principled range of outcomes." *Id*. (internal quotation omitted).

> A criminal defendant has a due process right to obtain exculpatory evidence possessed by the prosecutor if it would raise a reasonable doubt about the defendant's guilt. In order to establish a *Brady*[11] violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceeding would have been different. [*Cox, supra* at 448.]

The *Brady* rule applies to exculpatory evidence and impeachment evidence. *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998).

With respect to impeachment evidence, this Court has offered the following elaboration:

> The failure to disclose impeachment evidence does not require automatic reversal, even where, as in the present situation, the prosecution's case depends largely on the credibility of a particular witness. The court must still find the evidence material. Undisclosed evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the

[11] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

> proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Accordingly, undisclosed evidence will be deemed material only if it could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. . . .
>
> In general, impeachment evidence has been found to be material where the witness at issue supplied the only evidence linking the defendant to the crime or where the likely effect on the witness' credibility would have undermined a critical element of the prosecutor's case. In contrast, *a new trial is generally not required* where the testimony of the witness is corroborated by other testimony or *where the suppressed impeachment evidence merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable*. [*Lester*, *supra* at 282-283 (emphasis added, internal quotation omitted).]

The May 26, 2007 affidavit of Sharon Nichols that defendant attached to his motion for new trial provided the following relevant information:

> My name is Sharon Nichols. I live at 7418 Beaubien in Detroit. On November 1, 2005, Yolanda Browning (aka Bonnie) and I were together at my house. My friend Penny Harper came by my house to take me to the bank so I could cash my check. We dropped Bonnie off at 444 Horton, then Penny and I went to the bank. When we returned from the bank, there were a lot of police driving behind our car. I saw Bonnie coming out of 444 Horton. I asked Bonnie what was happening, and she said she was going to the Marathon gas station to find out what happened. The Marathon station is on Oakland and the Boulevard. Bonnie walked toward the gas station, then Penny dropped me off at my house. I later found out that Lamont Ellington had been shot that day at the Marathon station.
>
> About a week after Lamont was shot, Officer Shea called my house looking for Bonnie. I answered the phone, and the officer asked for Bonnie to meet them at the Marathon station where Lamont was shot. Bonnie and I went to the station and met Officers Shea and Williams. I told the officers that Bonnie was lying. I told them I knew Bonnie was lying because she asked me what happened at the gas station on the day Lamont Ellington got shot. I told the officers that when I returned from the bank, Bonnie was walking to the Marathon gas station to try to find out what happened. I told them I would be a witness to testify that Bonnie was not at the gas station when Lamont Ellington was shot. The officers told me that they had no reason for me to be a witness.
>
> I was willing and able to testify concerning the events that occurred on November 1, 2005. I was never contacted by the police, prosecutor or a trial attorney. . . .

Browning testified at trial that as she approached the gas station just before the shooting took place on November 1, 2005, she believed that Nichols had remained at her residence on Beaubien in Detroit. Consequently, Nichols's averments to the contrary, that she and a friend

had dropped Browning off elsewhere on the day of the shooting, would have had some tendency to undercut Browning's somewhat different trial testimony that she was near the East Grand Boulevard gas station at the time of the shooting. And Browning constituted the only trial witness who testified about observing defendant shoot the victim, rendering Nichols's impeachment of Browning potentially material. *Lester*, *supra* at 282-283. But as referenced above, Browning's testimony spanned an entire day of the trial, during which the prosecutor and defense counsel cross-examined her vigorously; the prosecutor sought to demonstrate that Browning's initial and repeated positive identifications of defendant in the week or so after the shooting began to morph, including through contacts with and influence by defendant's girlfriend, into her story at the preliminary examination and trial, that she had not witnessed the shooting for a variety of reasons, including her missing spectacles, her distance from the gas station, her presence behind a building at the time of the shooting, and other reasons. Because the allegedly suppressed impeachment evidence supplied by Nichols "merely furnishe[d] an additional basis on which to impeach a witness whose credibility has already been shown to be questionable," we find that "a new trial is . . . not required." *Id.*

Concerning defendant's allegation that the police hid the identity of an officer or officers who likely witnessed the shooting, this contention springs from the testimony during the first day of trial, by the school teacher and one of her pupils who had stopped at a red light at the time of the shooting, that they recalled seeing a white Detroit police car at or near the East Grand Boulevard gas station when the shooting occurred, and that the car left the scene in the opposite direction that the shooter headed in his van. The prosecutor introduced in explanation evidence that a uniform store serving police, security and mail personnel was located next to the gas station, and testimony by officer-in-charge of the investigation Gerald Williams, who maintained that he had ascertained "[n]o record of a D.P.D. car being in that area at the time," even after speaking with the uniform store manager. On cross-examination, Williams elaborated as follows regarding the police ability to track squad cars:

> *Defense counsel*: How did you determine that [no cars were in the vicinity of the East Grand Boulevard gas station]?
>
> *Williams*: They can track where the vehicles are.
>
> *Defense counsel*: How can they track where the vehicles are?
>
> *Williams*: At dispatch they have locators.
>
> *Defense counsel*: So dispatch is able to go back and tell you if a car was at a given address at a given time?
>
> *Williams*: Yes.
>
> *Defense counsel*: How can they do that? What do you mean by they have locators?
>
> *Williams*: They have vehicle locators in most of the cars.
>
> * * *

And they show up on a screen kind of like Pac Man.

Defense counsel: And it stays on, you can go back and get that information?

Williams: I'm not sure how they get it, ma'am.

* * *

But I know also there weren't any runs there prior to the shooting.

* * *

Defense counsel: I mean, there's not always a record of where a police car went unless the officer makes that record?

Williams: I don't know how they file it, ma'am. I can't tell you. I don't work there.

Defense counsel: But you would agree with me that it would be impossible to know whether or not a police car was a [sic] given location at any given moment in time.

Williams: No.

* * *

. . . [D]epends on what it is. Right now they can look on screen and tell you who's where[.]

* * *

Defense counsel: But can they right now look and tell you where police cars were there three days ago, four days ago?

Williams: I don't know how they keep their records.

Defense counsel: Could they look—is that just squad cars or is it cars like Sergeant Moore drives also or you drive?

Williams: I don't believe they have locators now.

However potentially intriguing the not entirely explained police car testimony might be, defendant has supplied no supporting evidence tending to establish that any police officer was present at or near the gas station at the time of the shooting. We simply detect no indication that either the police or the prosecution maintained the secrecy of an official witness to the shooting, or any hint or suggestion whatsoever that observations of an official witness or witnesses would have had any tendency to exculpate defendant. Because defendant has failed to satisfy his burden to prove the material nature of the allegedly exculpatory evidence suppressed by the

police, instead offering only supposition and speculation, we reject his evidence suppression claim.

In summary, defendant failed to establish that the police deprived him of due process by suppressing any material exculpatory evidence.

VI. Trial Court Criticism of a Defense Alibi Witness

Defendant suggests that the trial court deprived him of a fair trial by interfering with the jury's prerogative to gauge Crenshaw's credibility; he specifically avers that the court twice unfairly criticized Crenshaw: once when she appropriately attempted to explain the highly relevant matter of her reason for remembering the date of November 1, 2005, namely her desire to visit Rosa Parks's body that day, and again later when Crenshaw purportedly attempted to "make speeches." Defendant notes that in ruling on his motion for a new trial, the trial court's feelings about Crenshaw became clear when the court labeled Crenshaw as a blatant liar.

> Michigan case law provides that a trial judge has wide discretion and power in matters of trial conduct. This power, however, is not unlimited. If the trial court's conduct pierces the veil of judicial impartiality, a defendant's conviction must be reversed. The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments "were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial." *People v Rogers*, 60 Mich App 652, 657; 233 NW2d 8 (1975). [*People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988) (citations omitted).]

The trial court's challenged remarks in this case appear in the following colloquy early during Crenshaw's direct examination:

> *Defense counsel*: Now, Miss Crenshaw, I'd like to direct your attention back to the date of November 1st, 2005. Do you have the ability to remember back anything special regarding that date?
>
> *Crenshaw*: Yes.
>
> *Defense counsel*: And what was that, ma'am?
>
> *Crenshaw*: Well, I woke up with the idea that I was going to get as many black people as I could to go see Rosa Parks.
>
> *The Court*: All right.
>
> *Prosecutor*: You know what, this is so inappropriate.
>
> *The Court*: Okay. Hold on. We're not going there, Mr. Cripps. Ask her exactly the date and time—
>
> *Defense counsel*: Judge, that's how she remembers the date—

The Court: I know, but she's going to go off on a—

Defense counsel: —because she was going—

The Court: Mr. Cripps—

Defense counsel: I'm trying to explain—

The Court: I see it long before it gets there. We're not going to go on that. Just say you went over to somebody's house to do something. Go forward.

Defense counsel: And what was your plan for that day?

Crenshaw: To go see Rosa Parks.

Defense counsel: Okay.

The Court: That's all she has to say.

Defense counsel: That's all I'm asking for. Excuse me, your Honor.

The Court: That's not—

Defense counsel: I'm just trying to do my job.

The Court: Mr. Cripps—

Defense counsel: Yes.

The Court: Mr. Cripps, please instruct your witness to answer the question without going onto the dialogue as to why she's doing—

Defense counsel: Judge, she specifically answered the question that I asked.

The Court: Move forward, please.

Defense counsel: Thank you, very much.

The next objection and discussion occurred within a few more inquiries of Crenshaw:

Defense counsel: So you went over to Ursula's house, is that right?

Crenshaw: Yes.

Defense counsel: With Gloria?

Crenshaw: Yes.

Defense counsel: For the reasons that you stated earlier, is that right?

Crenshaw: Yes.

Defense counsel: Okay. And when you arrived on Rosedale where specifically did you go with your vehicle? Where'd you go?

Crenshaw: Oh, well, when I arrived on Rosedale my nephew and my deceased sister's husband and another guy that I don't know his name were standing on the porch.

* * *

Prosecutor: Objection. This is not, where did you go on Rosedale. She's doing the same thing, just saying whatever she wants to say.

Defense counsel: Judge, I resent that comment. She's talking what she saw and heard, not what she wants to say.

The Court: You mean you object to the comment, not re[s]ent it?

Defense counsel: Yes, I do, because she's making speeches and that's not what an objection is for.

The Court: Well, and you know what, the witness is attempting to do just that as well and we've already been through this at side bar. We're going to go forward. Ask her specifically the date and the time and why she was over there and how it relates to this case.

Defense counsel: She just said she saw her nephew. I think that's pretty relevant for the Jury to hear.

The Court: Let's stick to her seeing Mr. Pettiford. Go ahead.

Defense counsel: That's who her nephew is, Judge.

The Court: You know, thank you, Mr. Cripps for pointing that out. Now move forward please.

No reasonable interpretation of the passages quoted above supports defendant's suggestion that the trial court injected the notion "a witness [wa]s lying or trying to do something improper." The trial court merely, and properly, exercised its broad discretion to control the trial proceedings by reminding defense counsel, in response to prosecutorial objections, to adhere to the relevant facts concerning Crenshaw's November 1, 2005 observances of defendant. Nothing we can glean from the transcripts suggests that the trial court intended to criticize or demean Crenshaw. Consequently, the trial court did not abuse its discretion by limiting the examination as set forth above, in a manner that shows no sign of piercing the veil of judicial impartiality.

VII. Ineffective Assistance of Counsel & Prosecutorial Misconduct

Defendant next raises many, occasionally interrelated, alleged instances of ineffective assistance by his trial counsel and prosecutorial misconduct. Because defendant filed a motion for, and the trial court held in June 2008, an evidentiary hearing to address his allegations of ineffective assistance of counsel, these contentions are preserved for appellate review. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge must first find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews for clear error a trial court's findings of fact, and considers de novo questions of constitutional law. *Id*.

To establish ineffective assistance of counsel, a defendant generally must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303, 308-327; 521 NW2d 797 (1994). With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate the reasonable probability that but for counsel's errors the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair and unreliable. *Id.* at 312, 326-327; *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). The defendant must overcome the strong presumptions that his counsel rendered effective assistance and that his counsel's actions represented sound trial strategy. *Id.* at 714-715. "A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses," which are those "that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 514, 526; 465 NW2d 569 (1990).[12]

We conclude that none of defendant's many complaints concerning the performance of his defense counsel amounted to objectively unreasonable conduct that affected the outcome of his trial, and that no actions of the prosecutor deprived him of fair trial. We address the multitude of alleged improprieties in the order defendant has presented them.

Defendant first criticizes his counsels' failure to interview, call as a witness, or "to take early steps to secure the appearance of, eyewitness Joyce Brenda Riley," who estimated the shooter's height at several inches shorter than defendant. The approximately one-paragraph handwritten statement to police from Joyce Brenda Riley contains the relevant observation, "Walking to gas station saw van parked behind gas station in alley. Saw a B/M 25-35, 5'7" avg build, drk complex. . . ." Defendant theorizes that because the jury could see that he stood several inches taller, his counsel unreasonably failed to present Riley's exculpatory testimony at trial. Riley's name appeared on the prosecutor's first amended witness list, dated March 23, 2006. Officer-in-charge Williams explained at trial that the police had unsuccessfully attempted to arrange for Riley's presence there, but that Riley had supplied a "bogus address," "the closest

[12] With respect to the prosecutorial misconduct allegations, the applicable standard of review appears *supra* at 12.

thing to which is the General Motors Building." The *Ginther*[13] hearing transcripts reflect that attorneys Silver and Cripps relied on the prosecution and police to secure Riley's testimony at trial, and averred that they would have cross-examined her to highlight her recollection of the gas station assailant's height. We find that defendant has failed to substantiate any objective failure by his defense counsel with respect to Riley because the record reflects that Silver and Cripps had awareness of Riley's potential testimony and reasonably relied on the prosecution, who had endorsed Riley as a trial witness, to work with the police in presenting Riley at trial.

Furthermore, even assuming some deficiency by defense counsel, it did not undermine the outcome of defendant's trial. Cripps astutely observed at the *Ginther* hearing that eyewitness discrepancies in weight, age and height routinely vary. Riley's description of the shooter as standing slightly shorter than some of the other eyewitnesses' descriptions of the shooter has no tendency to undermine the primary, properly admitted testimony in this case implicating defendant that Hill and Browning supplied.

Second, defendant complains that his counsel failed to call or "to take early steps to secure the appearance of . . . eyewitness Nneka Burns," who characterized the shooter's skin tone as "light," dissimilar to defendant's dark skin tone. Burns was another student passenger in the car driven down Grand Boulevard by her teacher, Morrow, at the time of the shooting. The prosecution placed Burns's name on its amended witness list, and Silver and Cripps similarly explained at the *Ginther* hearing that they communicated with and relied on the prosecutor and the police to facilitate Burns's appearance at trial. Not only had the prosecution endorsed Burns, but as with several other witnesses, the police had redacted her contact information because of concerns about witness tampering. At trial, the prosecutor elicited testimony by Sergeant Williams that the police had sought Burns at the address she and her mother had provided, but did not find them there; the police found no forwarding address, notwithstanding their efforts to locate one. We conclude that defense counsel cannot be characterized as having objectively and unreasonably relied on the prosecutor and police to ensure endorsed witness Burns's appearance at trial, especially in light of the fact that counsel had no contact information at their disposal.

And even assuming some unreasonable failure on the part of defense counsel, no reasonable probability exists that it would have altered the outcome of defendant's trial. Burns's skin tone observation constitutes a minor eyewitness discrepancy in the large pool of evidence introduced at trial, and, as noted above, no reasonable probability exists that the discrepancy would have tended to cast doubt on the most incriminating, and properly introduced, trial evidence against defendant.

Third, defendant criticizes the failure of his counsel to interview or facilitate trial testimony by Lorietta Robinson, who later supplied an affidavit attesting that immediately after the shooting she had phoned defendant, who was not at the scene of the shooting, and further that Browning had told Robinson that she did not view the shooting. Once again, the prosecutor endorsed Robinson on her witness list. At the *Ginther* hearing, Silver and Cripps denied any recollection that defendant had ever suggested that they could elicit alibi-related testimony from

[13] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Robinson; although defendant may have mentioned Robinson's name, Cripps denied that defendant had requested him to call Robinson as a trial witness for any purpose. The police attempted to serve Robinson with a subpoena to appear at trial, but did not succeed. Robinson's mother, Betty Fair, testified at trial, but Robinson did not appear. Fair provided an address for Robinson, which the police employed for service purposes (7843 Melrose), that did not match the address Robinson identified at the *Ginther* hearing as her address on November 1, 2005 (7832 Melrose).

Robinson's *Ginther* hearing testimony tracked her June 2007 affidavit, attached to defendant's August 2007 motion for a new trial. The affidavit summarized that around the time of the shooting Robinson had been driving past the gas station as she drove her mother home from the hospital. According to Robinson, she recognized the victim's car at the gas station and pulled in near it to talk to the victim, her friend. When Robinson approached the victim, "he was laying on the ground," having been shot. Robinson averred that she used her cell phone to call defendant to inquire about his well being and inform him of the victim's death; Robinson recalled that defendant expressed surprise and mentioned that he was "with [his] people" discussing "the Rosa Parks body viewing time," and Robinson purportedly heard defendant's cousin, Gloria, in the background. In the last brief paragraph of her lengthy affidavit, Robinson mentioned a conversation with Browning "[a] number of days after the shooting," which involved the following discussion: Browning "asked me what did I see on the day that [the victim] was shot. I immediately asked her what did she see . . . , and she said she did not see anything pertaining to the shooting."

We conclude that Robinson's recollections do not add up to a substantial defense for defendant. First and foremost, Robinson's version of events plainly reveals that she did not observe the shooting take place, and thus possessed limited knowledge of any relevant facts.[14] Second, even viewed in the light most favorable to defendant, her description of the phone call, during which she overheard at least arguably hearsay declarations of defendant concerning his whereabouts after the shooting, MRE 801(c), would have added minimal weight to the alibi testimony that Cripps and Silver presented at trial. Third, once again viewed most charitably in defendant's favor, Robinson's description of her subsequent phone conversation with Browning, again presumably hearsay, did not qualify as inconsistent with Browning's testimony at trial; moreover, it would have added little to nothing to the extensive impeachment of Browning already on the trial record. In summary, we detect no unreasonable deficiency in counsels' representation of defendant at trial concerning Robinson, and no reasonable likelihood that Robinson's testimony would have altered the outcome of the trial.[15]

Fourth, defendant attacks his counsels' failure to secure trial testimony by Nichols, whose affidavit reported that Browning had not been at the gas station at the time of the shooting. Silver and Cripps testified at the *Ginther* hearing that they first learned at trial that Nichols purportedly had some information useful to the defense. Nichols testified at the *Ginther* hearing in a fashion consistent with her affidavit, which defendant attached to his 2007 motion for a new

[14] Her mother similarly denied at trial having driven past the gas station during the shooting.

[15] The trial court at the *Ginther* hearing characterized Robinson as "less than candid."

trial. In summary, Nichols recounted that in the late morning of November 1, 2005, she and Browning had been driven to a home on Horton Street, not far from where Nichols and Browning resided together or the gas station where the shooting occurred. According to Nichols, a friend drove her to the bank around the same time that Browning headed directly across the street. On returning from the bank around 25 to 40 minutes later, Nichols, who had seen several police cars on Grand Boulevard, saw Browning leaving the Horton Street house she had entered earlier, and heard Browning ask what was happening. Nichols also described briefly that on a couple of occasions the police had arrived at her residence to speak with Browning, and Nichols told the police Browning had falsely identified defendant as the victim's shooter, insisting that Browning was not present when the shooting took place. Nichols conceded, however, that she did not have personal knowledge of Browning's whereabouts at the time of the shooting.

Any evidentiary value inherent in Nichols's recollections of November 1, 2005 diminishes substantially through her admission that she did not in fact know whether Browning had gone anywhere from the Horton Street address in the course of 25 or 40 minutes, including the time of the shooting. As alluded to above, Nichols's remembrances would not have constituted a substantial defense or otherwise affected the outcome of the trial. Viewed in the light most favorably to defendant, Nichols's recollections tended to undermine Browning's credibility to another slight degree, but Browning's credibility already was clearly and extensively placed into question at trial.

Fifth, defendant submits that his counsel failed to present at trial another potential witness, Amy Youngblood. Defendant attached to his motion for a new trial a one-paragraph handwritten letter dated August 15, 2007, which states in its entirety, "This is to state that on Nov[ember] 1, 2006 [sic] Bonnie (Yolanda) was in an apartment getting high. Therefore, there is no way she could have witnessed this crime. I was present at trial willing to testify." At the *Ginther* hearing, Cripps recalled attempting unsuccessfully to locate Youngblood in time for trial. The primary impediment inherent in Youngblood's usefulness to defendant is that she offers no specificity with respect to *when* on the day of the shooting she might have gotten high with Browning. We find that defendant has failed to establish that his defense counsel unreasonably failed to locate Youngblood, or that the failure deprived him of a substantial defense.

Ineffective assistance contentions six through eight relate to purported failures to highlight inconsistencies between Browning's observations and other trial evidence. We will briefly discuss together the related manners in which defendant maintains that his counsel insufficiently challenged Browning's credibility at trial. First, he simply incorrectly suggests that defense counsel did not highlight for the jury the inconsistency between Browning's out-of-court statements to the police that she had seen a white van and other witnesses' recollections of seeing a green van, and between Browning's characterization of the shooting as close range and the medical examiner's opinion to the contrary. Silver explained at the *Ginther* hearing that Browning "had made statements to the police implicating [defendant] and . . . as time went on she had recanted, which, in my opinion, made her a very difficult witness," and that because "she recanted everything that she initially told the police . . . I couldn't impeach her on that stuff because she didn't ever admit that she had said that." Additionally, during closing argument, Silver listed a litany of inconsistencies between Browning's various recollections and the other trial evidence:

> . . . And Yolanda Br[owning], yeah, she's a drug addict.
>
> I mean, she's a mess. Let's face it. The woman, according to the police officers, I think Myron Love, he told us that Yolanda Br[owning], he ran into her some five blocks away some time after the shooting and based on how they have a conversation about five blocks away from the shooting and she tells him that Roosevelt Pettiford did the shooting, that it was at close range and I think [the prosecutor] asked the medical examiner what does close range firing mean and he described that for you. He found no evidence of close range firing.
>
> That the person, Roosevelt, who did the shooting escaped in a white mini van; that Jermaine James was in the car, that she knew to be the car belonging to [the victim] and that she was going to meet [the victim], a meeting set up by her making some phone call to buy drugs.

Consequently, defendant has not established an unreasonable failure on the part of his counsel in impeaching Browning in these regards or highlighting the above inconsistencies at trial.

Even more importantly, none of the purported inconsistencies would have equated to a substantial defense, one that could have altered the outcome of the proceedings. The van color discrepancy amounts to a de minimus inconsistency at best, as does the alleged close-range firing discrepancy. The medical examiner expressed his view that a close range firing takes place when someone points a weapon within two to four feet of a victim, but it seems surely apparent to the jury's notions of common sense that a medical examiner's definition of "close range" might differ from a much impugned eyewitnesses observations of events from across the street. Lastly, the medical examiner expressly opined that he could not identify the order of the 12 gunshots that killed the victim; therefore, his testimony did not contradict anything that Browning's out-of-court statements had said about the gunshot sequence.

Ninth, defendant inaccurately maintains that his counsel failed to timely preserve objections to the prosecutor's questioning of Crenshaw regarding Green's letter on grounds of defendant's right against confrontation and improper impeachment "with someone else's statement." As already discussed earlier in this opinion, Cripps lodged hearsay and relevance objections to the prosecutor's references to Green's letter, and Cripps then added the objection "to [the prosecutor] impeaching with a letter unknown to her by an unknown person." The trial court overruled Cripps's objections, and whatever error the prosecutor's questioning injected, it did not affect the outcome of defendant's trial. To the extent that neither Cripps nor Silver voiced a confrontation-based objection, the Confrontation Clause does not apply to the prosecutor's references to Green's letter. Consequently, defense counsel need not have lodged a groundless objection. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Tenth, we reject defendant's assertions that his counsel were ineffective for failing to object to several instances of alleged prosecutorial misconduct.

(a) First, the prosecutor did not misrepresent the district court's warning at the conclusion of defendant's preliminary examination: "[A]nd also to the audience, we'll make it both ways, neither witnesses or friends or family from the decedent or the defendant, friends or family need to have any contact with this witness [Browning], here, you understand?" On appeal

defendant correctly notes the semantic observation that the district court employed the word "need to," instead of more prohibitive language. However, the import of the district court's instruction appears plain to us, and the prosecutor simply did not misrepresent the meaning of the district court's instruction to the extent she questioned Browning about whether she had disregarded the instruction by having contact with defendant's girlfriend. Even assuming some degree of negligent misrepresentation by the prosecutor, we find it unimaginable that any minor discrepancy in this regard could have adversely affected defendant's right to a fair trial, especially considering that the trial court instructed the jury that the prosecution's questions and statements did not constitute evidence. Because no prosecutorial misconduct occurred, defense counsel were not ineffective for failing to object to the prosecutor's references to the district court's witness contact instruction.

(b) Defense counsel did object to the next instance of prosecutorial misconduct alleged on appeal, which occurred during the prosecutor's rebuttal closing argument:

> *Prosecutor*: The last thing I want to leave you with is this. You never, ever, ever—speaking of this alibi defense you'll hear in those calls Mr. Pettiford say, that's not true. That can't be true. I wasn't there. I was with Gloria at the Coney Island and you didn't hear that cause it's a lie and it's a lie that was made up about two weeks ago—
>
> *Mr. Cripps*: Your Honor, there was an objection at that point. I don't remember hearing the Defendant say that. That's improper.
>
> *Prosecutor*: I'm not sure what the objection was. I didn't say anything about the Defendant.
>
> *The Court*: He said he never heard anything in the tapes when he said that he was—
>
> *Prosecutor*: Oh, yeah. And he doesn't. And he doesn't say—
>
> *Mr. Cripps*: That's an improper comment—
>
> * * *
>
> *Ms. Silver*: And the other part of that would be that we heard tapes that the prosecution chose to play, not all of the disks of the tapes, so it's an improper argument.
>
> *The Court*: Obviously we are arguing that he has a right to remain silent.
>
> *Prosecutor*: He does, absolutely. He does, absolutely.
>
> * * *
>
> He does have a right to remain silent. Unfortunately he didn't have the good sense to remain silent when he was talking on the phone and all those times

> he talked about getting that affidavit and to hear him say, I wasn't even there, I was at the Coney Island, that's not where he was.
>
> *Mr. Cripps*: Same objection.
>
> * * *
>
> *The Court*: Your objection is sustained.

We agree with the defense contention that the prosecutor's comment infringed on defendant's constitutional right to remain silent. Very shortly thereafter, however, the trial court instructed the jury as follows:

> Ladies and gentlemen, Mr. Pettiford has elected not to testify in this case and in every criminal case a Defendant has an absolute right not to testify and so when you decide this case you must not consider the fact that he chose not to testify. In other words, it may not effect [sic]—it must not effect [sic] your verdict in any way. Do you all understand that? Let me see a show of hands, please.
>
> Thank you. All fourteen jurors have raised their hand [sic].

In light of the trial court's instruction and the brief and isolated nature of the prosecutor's improper reference, we conclude that prosecutor's comment did not adversely affect defendant's right to a fair trial.

(c) Defendant also complains that the prosecutor improperly referred to facts not of record, specifically to the content of Green's letter and an unadmitted, out-of-court statement by Browning. For the reasons already discussed *supra* at 8-13, the prosecutor's improper, though vague and brief, questions of Crenshaw referencing Green's letter did not deprive defendant of a fair trial. Defendant additionally complains of the following italicized statement during the prosecutor's closing argument:

> Come on. That just doesn't make a lick of sense. Similarly, [Gloria Pettiford's] mother, she's so sure—even though she wasn't there—that he didn't do it. She knows. She knows her daughter always tells the truth. It's impossible. *It's impossible that anybody else wrote a letter and said something different because she knows*. [Emphasis added.]

The lone, vague, highlighted sentence does not inject anything beyond the record generated at trial. To the extent the lone, vague statement arguably may have emphasized the prosecutor's apparently improper impeachment of Crenshaw, we find that any inherent prejudice qualifies as minimal, especially in light of the trial court's instructions that the attorneys' arguments and statements do not constitute evidence. Because the prosecutor's one-sentence closing argument reference did not deprive defendant of a fair trial, defense counsel similarly could not have been ineffective for failing to object to the brief closing argument remark at trial; any failure to object did not reasonably alter the outcome of the trial.

In the course of the prosecutor's accurate closing argument summary of Browning's early, detailed and consistent out-of-court statements to the police, the prosecutor made the following remark now challenged by defendant: "She also gave, although it's not admitted into evidence. What the content of it is, but on that day she gave Investigator Love a very specific reason why she believed [defendant] did this to the victim." This remark tracked the trial testimony by investigator Love that Browning had informed him of the reason why she thought defendant might have shot the victim. The prosecutor had carefully phrased her question to investigator Love to make clear that she did not "want [Love] to tell [her] what [Browning] actually said," because such testimony would constitute hearsay as it did not relate to Browning's observations of the shooting. The prosecutor properly inquired of Love regarding the existence of a potential but unspecified motive in the case, and the prosecutor's closing argument accurately summarized the record without injecting any extraneous information. Accordingly, defense counsel need not have raised a meritless objection to the prosecutor's reference.

(d) Defendant next avers that the prosecutor's elicitation of the following testimony by Baldwin, the 36th District Court security guard, ignored a trial court order involving hearsay elicitation and qualified as misconduct that deprived him of a fair trial:

> *Prosecutor*: Do you recall on January 3rd of this year, did you observe something following the preliminary examination in this case that caused you to approach me, the prosecutor and report what you had seen?
>
> *Baldwin*: Yes, I did.
>
> *Prosecutor*: And what is it that you reported to me on that day?
>
> *Baldwin*: You had a female witness on the stand, and when you got through with her, she walked out of the courtroom. She met up with a light-skinned lady and the light-skinned lady asked her did she tell anything.
>
> *Mr. Cripps*: Objection. We can't get into hearsay, Your Honor.
>
> *The Court*: Sustained.
>
> *Prosecutor*: The lady that came up to the witness, did she—*don't tell me what she said*, but did she go up close to her?

The brief passage above reflects that the prosecutor did not improperly elicit Baldwin's hearsay testimony, rather Baldwin herself injected it into her response in a nonresponsive manner, before the prosecutor then expressly cautioned Baldwin not to disclose hearsay. Because defense counsel objected to Baldwin's hearsay testimony, they cannot be characterized as ineffective in any respect involving Baldwin.

Eleventh, defendant insists that his counsel failed to diligently and sufficiently investigate a defense before trial. The testimony of Silver and Cripps at the *Ginther* hearing agreed that with defendant's blessing they had commenced their representation of him in late April 2006, and that at no point thereafter had defendant expressed to them any concerns or advised either of them

that either should withdraw. Silver and Cripps divided the tasks involved in defendant's representation, but maintained regular contact regarding their progress; for example, Silver spent days listening to hundreds of 15-minute recorded phone conversations initiated by defendant while in jail, and in the meantime Cripps met with defendant on multiple occasions in jail, reviewed discovery materials, and hired an investigator to help seek out several witnesses that defendant desired to present. Cripps and Silver also read the preliminary examination transcript, met with defendant's cousin, a lawyer, and drove by the gas station where the shooting occurred. Cripps testified, "I'm sure [defendant] had a complete copy of discovery because of the fact—I mean, we made multiple copies of the discovery. A relative of [defendant's] I think was . . . [a lawyer] and he got repeated copies of discovery materials, some of which he said he was providing to his relative . . . ." Silver recounted that she, Cripps, and defendant had agreed to present an alibi defense on his behalf, and that they successfully filed the notice of alibi in early July 2006, which included Lakea Green's name and four others. Cripps and Silver recalled that they and defendant also discussed (1) testimony from many potential witnesses, several of whom the police ultimately could not locate, as well as "some contradictions of the witnesses that [defendant] wanted us to call as alibi witnesses which [Silver] though was problematic, but . . . he wanted the witnesses called and they were going to be called," and (2) other evidence strategies, like investigating whether defendant's cell phone records might place him elsewhere than at the gas station at the time of the shooting on November 1, 2005. Silver and Cripps agreed that they definitely had awareness of the eyewitness testimony that had mentioned a police car near the shooting at the time of the shooting, and that despite "extensive[]" discussions with the prosecutor and other consideration of a basis for the eyewitness testimony, they had never encountered any other information to substantiate that the police had engaged in some form of eyewitness or other evidence suppression.

Defendant testified at the *Ginther* hearing, generally denying much of what Silver and Cripps had just set forth describing their course of action leading to the commencement of trial; he disputed that either counsel visited him in jail enough times to have prepared for trial, that either counsel hired an investigator to assist trial preparation, that counsel ever arranged for the presence of his alibi witnesses at trial, and that either Cripps or Silver supplied him with discovery materials, some of which he possessed from his two prior attorneys. In issuing a lengthy bench ruling in June 2008, the trial court rejected defendant's allegations of the various shortcomings of Silver and Cripps, and summarized at some length as follows her findings with respect to both attorneys' general trial preparation and performance at trial:

> None of these issues in this Court's view, in conclusion, warrant, one a finding of this Court that Mr. Cripps or . . . Miss Silver . . . fell below the objective standards of providing effective assistance of counsel to the Defendant Mr. Pettiford.
>
> Since this Court had the benefit of hearing the trial, unlike the prosecution who appears before the Court this morning, unlike the defense attorney who is representing Mr. Pettiford as appellate counsel, I will tell you this Court observed zealous, absolutely zealous, arguments on behalf of both Mr. Cripps and Miss Silver in representing Mr. Pettiford.

In fact, I'll go so far as to say in Miss Silver's case she went above and beyond to try to assist Mr. Pettiford in any way, shape or form almost to the point, in this Court's view, beyond representing your client.

It's almost as if she had some sort of relationship with him that actually went above and beyond the client relationship. That's how this Court came out in all this. Why do I put this on the record, you say? Because she fought for him. There's no question Miss Silver fought for him.

Now, was the Court happy when the Court listened to the *Ginther* Hearing and Miss Silver was sort of illusive [sic] in some way? Was she vague in some way? Yeah, she was. Does that mean she was ineffective or provided ineffective assistance of counsel? No. And you know why? Because the Court reviewed the trial transcript.

The Court reviewed the pretrial hearing transcripts in this case and the Court found that in every step of the way she, along with Mr. Cripps, did what they could to try to help provide a defense for Mr. Pettiford and—I mean, she went in this Court's view well beyond what's considered—should be considered representing a Defendant in a criminal matter.

I mean, she personalized a lot of things, frankly, with this Court, because she wasn't happy with some of the rulings this Court made, okay, and I don't take it personal. She's just a very passionate attorney. She's a good attorney.

She's a hard working attorney and she works awfully hard and she worked awfully hard for Mr. Pettiford and Mr. Pettiford not only had the benefit of a woman representing him, as he said he wanted because there was a woman prosecutor and a woman judge—and I'm not sure what any of that has to do with anything, but maybe they know better than this Court does, but he also had the benefit of Mr. Cripps and this record is—you know, a number of references can be made throughout the continuing representation of Mr. Pettiford where Mr. Cripps is arguing on his client's behalf, objecting on his client's behalf and, you know, he did what he believed he needed to do to represent his client.

So the Court does not find that either . . . the representing of Mr. Pettiford of Miss Silver or the representation . . . or the assistance provided by Mr. Cripps was tantamount to ineffective assistance of counsel and, frankly, you got the benefit of two attorneys for the price of one. That's how this Court views it.

You know, I handle a lot of homicide cases in this jurisdiction and I'm telling you, it does matter the defense attorneys that you get and it does matter cause some of them do an awesome job and some of them do a minimal job, okay, but at the end of the day it's the burden of the defense to prove that their representation of Mr. Pettiford fell below acceptable standards and that but for more diligent efforts in locating witnesses, talking to witnesses, presenting witnesses, the outcome would have been different and that somehow he was prejudiced as a result of this is without merit.

> The Court does not find them to be ineffective and I share no personal relationship with any of these people. I'm just calling it like I see it and you might of had a different view of it, [appellate counsel], had you been here because the one thing that's clear to this Court is that whoever reviews the transcripts . . . . They don't have the emotion. They don't have the passion that Miss Silver, particularly, has in representing her client.

Our review of the voluminous record in this case does not reveal any clear error by the trial court in these findings rejecting defendant's general claim that his counsel did not adequately investigate, prepare or present a defense, and to the contrary finding that Silver and Cripps zealously represented defendant throughout the proceedings. *LeBlanc*, *supra* at 579. Thus, defendant's last appellate contention of ineffective assistance of counsel lacks merit.

VIII. Motion for New Trial or Motion for Relief from Judgment

Finally, defendant contends that the trial court mischaracterized his motion for a new trial as a motion for relief from judgment. We consider de novo this issue of court rule construction. *Hawkins*, *supra* at 497.

The plain language of MCR 6.431(A)(2) governs the relevant period for filing defendant's motion for a new trial because he timely filed a claim of appeal. The controlling court rule provision thus becomes MCR 7.208(B), which advises that a defendant may file a motion for new trial "[n]o later than 56 days after *the commencement* of the time for filing the defendant-appellant's brief as provided by MCR 7.212(A)(1)(a)(iii)." (Emphasis added). The language of MCR 7.212(A)(1)(a)(iii) applicable to this case states, "In a criminal case in which substitute counsel is appointed for the defendant, the time runs from the date substitute counsel is appointed or the transcript is filed, whichever is later."

The parties do not dispute that the latter event in this case constituted the appointment of substitute appellate counsel on June 13, 2007, as reflected in this Court's docket sheet for #273369 (entries 34 and 35). This Court subsequently entered an order granting defendant an extension in which to file his brief on appeal, and further directing as follows: "[T]he time for filing appellant's brief will be calculated under MCR 7.212(A)(1)(a)(iii) starting from June 25, 2007. The time for filing post-judgment motions under MCR 7.208 will also be calculated from June 25, 2007." *People v Pettiford*, unpublished order of the Court of Appeals, entered July 9, 2007 (Docket No. 273369). Defendant filed his motion for a new trial on August 20, 2007, 56 days from June 25, 2007, and thus in a timely fashion.

Accordingly, the trial court mischaracterized defendant's motion for a new trial as a motion for relief from judgment. But after our review of the entire record, it does not "affirmatively appear that the" trial court's erroneous characterization of defendant's motion for a new trial "has resulted in a miscarriage of justice," MCL 769.26, because the motion for a new trial raised the same claims of error we have addressed on appeal, none of which warrant appellate relief. The only other potential prejudice noted by defendant, that at some point "in the

future" the trial court may preclude him from filing a motion for relief from judgment, remains entirely speculative, and therefore, defendant has not satisfied his "burden . . . to demonstrate a miscarriage of justice." *People v Lukity*, 460 Mich 484, 494; 596 NW2d 607 (1999).

Affirmed.

/s/ Michael J. Talbot
/s/ Richard A. Bandstra
/s/ Elizabeth L. Gleicher