STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 19, 2009
v	No. 279551 Genesee Circuit Court
ANDRAUS ALDE MCCLOUD, Defendant-Appellant.	LC No. 06-018520-FC

Before: Donofrio, P.J., and K. F. Kelly and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, armed robbery, MCL 750.529, and first-degree home invasion, MCL 750.110a(2). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to concurrent terms of 960 to 1500 months' imprisonment for second-degree murder, 320 to 700 months' imprisonment for armed robbery, and 320 to 700 months' imprisonment for first-degree home invasion. We affirm.

I. Basic Facts and Procedural History

Around three a.m. on April 13, 2006, defendant, Tiequan Riley, Charity Mosley, and Christopher Jones traveled in a burgundy sport utility vehicle (SUV) to the house of Benjamin Clemons, who is allegedly known to sell drugs. After arriving at the house, defendant and Riley exited the SUV and went up the house's back steps. Defendant and Riley had each put on plastic facemasks and they proceeded to break into Clemons's home through the back door. Once inside, defendant and Riley searched for drugs and money. According to Riley, an altercation ensued between Clemons and defendant, which led to defendant shooting Clemons. Subsequently, Clemons died. Riley and defendant then returned to the SUV. When back in the car, Riley held up a bag of cocaine and said he "didn't even get a lot from him." Riley had also taken $100 from the house of which he gave defendant $40 and Jones $20, keeping the remainder for himself. While these events transpired, Clemons's girlfriend, who had escaped to the home's lower apartment before Riley and defendant entered the house, had called the police.

As a result, the SUV was almost immediately pulled over by police. Both Riley and defendant, who were sitting in the back passenger seats, got out and fled on foot. Riley was apprehended that same night. A gun and a facemask were recovered along the path upon which Riley fled. Defendant was not apprehended at this time, although Mosley identified defendant in

a photograph for the police. The police eventually learned that defendant was in jail on unrelated charges. DNA on a facemask found in the SUV's back passenger seat matched defendant's DNA. In connection with these events, defendant was charged with open murder, felony murder, armed robbery, first-degree home invasion, felon in possession of a firearm, carrying a concealed weapon, and felony firearm.

Before trial, defendant moved to suppress a statement he had given on the grounds that defendant was coerced into providing a confession. The trial court conducted a Walker[1] hearing. According to detective Shanlian, after defendant's arrest detectives discovered a murder-for-hire plot, in which defendant had made phone calls to Alesha Hawkins, allegedly defendant's girlfriend, and George Pouncy, to get rid of a witness. On February 15, 2007, Hawkins went to the jail to visit defendant and she was arrested. Detective Shanlian testified that the next day defendant was questioned and was told that both Hawkins and Pouncy were in custody and had made statements. Detective Shanlian testified that when defendant stated that he did not want to talk, he did not pursue any questioning and promptly left the room; defendant did not ask for an attorney at that time. Fifteen minutes later, defendant decided he wanted to speak with detective Shanlian. Detective Shanlian then returned with a recorder, read defendant his Miranda rights, and defendant made a statement. Detective Shanlian further testified that defendant also requested that he be able to speak with Hawkins, so that he could "make her tell the truth because he got her into this mess." Detective Shanlian told defendant that he would be able to speak with Hawkins and permitted defendant to see Hawkins after the interview. The detective denied making any threats to defendant.

Contrary to detective Shanlian's testimony, defendant testified that he had been in the "hole" for nearly 24 hours before detective Shanlian brought him in for questioning and that he had not been able to bath or eat before the meeting. When defendant indicated that he did not want to answer any questions, detective Shanlian, according to defendant, showed defendant a photo of Hawkins and threatened defendant by telling him that both he and Hawkins would get life sentences. Detective Shanlian then allegedly indicated that defendant would have to go back to the "hole" because he was not cooperating.[2] Detective Shanlian also allegedly told defendant that he was "less than a man . . . for not making a statement to get [Hawkins] out of trouble." Defendant testified that he became very emotional because Hawkins was "basically all I got." Defendant testified that he then signed the Miranda form presented to him and made a statement because he did not want to go back to the "hole" and because he was told Hawkins would be released. After the Walker hearing, the trial court denied defendant's motion to suppress reasoning that, under the totality of the circumstances, defendant did not give a statement under duress, coercion, or undue influence.

The matter proceeded to trial. During jury selection, the trial court referred to the prospective jurors by number. Once the trial court seated the 14 jurors, which included two alternates, it continued to refer to the jurors by number. Then, before opening statements, the

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

[2] The detective testified, however, that the jail did not have a solitary confinement area.

court disclosed defendant's underlying felony charge for the charge of felon in possession when it provided the jury with preliminary instructions. The court stated:

> Count V is Possession of a Firearm by a Felon. It is alleged that on or about April 13th of 2006 in the City of Flint, County of Genesee, that Andraus McCloud did possess or use or carry a firearm when ineligible to do so because he or she had been convicted of Fleeing and Eluding a Police Officer in the Third Degree, a felony punishable by imprisonment of four or more years. That the requirements for gaining eligibility have not been met.

The parties had previously stipulated not to disclose the underlying charge. Defense counsel did not object.

After the trial testimony, two jurors were excused—one on the day before deliberations and the second right before deliberations began. Subsequently, defendant was convicted of second-degree murder, armed robbery, and first-degree home invasion. When the jury was polled, 12 jurors acknowledged the verdict.

At the sentencing hearing, the trial court noted the history of the case, the fact that defendant was on parole during the commission of the crimes, and that defendant was a fourth habitual offender. The trial court also referenced defendant's lack of remorse. The court then sentenced defendant to concurrent terms on each count.

Upon preparation for appeal, appellate counsel discovered a 31-minute gap during the May 2, 2007, proceedings where the cross-examination of prosecution witness Valerie Bowman, a forensic scientist, was not transcribed. Appellate counsel also found that the digital recording stopped for the remainder of the May 3, 2007, proceedings, when Charity Mosley was testifying. This appeal followed.

II. Motion to Suppress

Defendant first argues that his statement was not voluntarily given and the trial court erred by denying his motion to suppress. We disagree. We review the trial court's decision on a motion to suppress de novo. *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003). While we review the entirety of the record independently, we defer to the trial court's assessment of the evidence and the credibility of the witnesses, and we will not disturb factual findings absent clear error. *People v Shipley*, 256 Mich App 367, 372-373; 662 NW2d 856 (2003); *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997). A finding is clearly erroneous if we are left with a definite and firm conviction that a mistake has been made. *Givans*, *supra* at 119.

A defendant's statement obtained during a custodial interrogation is admissible only if defendant knowingly, intelligently, and voluntarily waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). In determining whether a statement was voluntarily made, we must consider the totality of the circumstances and whether those circumstances indicate that the statement was voluntarily and freely given. *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). "A confession or waiver of constitutional rights must be made without intimidation, coercion, or deception . . . and must be

the product of an essentially free and unconstrained choice by its maker." *Akins*, *supra* at 564 (citation omitted). In *Cipriano*, *supra*, our Supreme Court indicated a non-exhaustive list of factors to consider, including:

> The age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Id.* at 334.]

In the present matter, detective Shanlian asked defendant whether he would submit to questioning and when defendant indicated that he would not, detective Shanlian left the room. About 15 minutes later, defendant indicated that he wanted to speak with the detective. Detective Shanlian returned, provided defendant with his Miranda rights, and defendant made a statement. During this time, defendant asked to speak with his girlfriend and he was permitted to do so after the interview. Defendant's testimony, however, directly contradicted detective Shanlian's testimony. Defendant testified that the detective threatened him before the interview and that he gave a statement involuntarily because of this threat and because he feared going back to the "hole." The trial court, however, found no suggestion that defendant's statement was the result of threats. The court stated:

> In my opinion there is nothing about this circumstance involving the Alesha Hawkins aspect of it that would be considered duress or coercion or undo [sic] influence towards the Defendant when looked at the totality of the circumstances. The reason for that is that the Defendant's rights were read to him. He waived those rights by initialing his name beside it. And then it wasn't until they had gotten towards the end of the discussion about the Miranda that the issue involving Alesha Hawkins had come up.

The trial court also noted the fact that defendant was in restrictive housing, but that he was not being denied the "normal comforts" of inmates in his position, and that there was no indication that defendant had been denied food, water, sleep, or any necessary medical treatment. We agree with the trial court, that under the totality of the circumstances, defendant's statement was not the product of coercion or duress. And while the trial court agreed with the detective's version of events, we are bound to defer to the trial court's assessment of the witnesses' credibility absent a finding of clear error. *Shipley*, *supra* at 372-373. After our review of the record we cannot conclude that the trial court's findings were clearly erroneous. We thus find that the trial court did not err by finding that defendant's statement was voluntarily and freely made.

III. Anonymous Jury

Defendant next argues that his due process rights were violated when the trial court referred to the jurors by number, rather than by name, throughout the proceedings. We disagree.

A trial court's decision to empanel an anonymous jury is reviewed for an abuse of discretion. *People v Williams*, 241 Mich App 519, 522; 616 NW2d 710 (2000). Further, because defendant did not object below, we review this unpreserved constitutional issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Defendant must show that "1) [an] error . . . occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id.* at 763.

"An 'anonymous jury' is one in which certain information is withheld from the parties, presumably for the safety of the jurors or to prevent harassment by the public." *Williams*, *supra* at 522. The use of an anonymous jury implicates: "(1) the defendant's interest in being able to conduct a meaningful examination of the jury and (2) the defendant's interest in maintaining the presumption of innocence." *Id.* at 522-523. Thus, to successfully challenge the empanelling of an anonymous jury, "the record must reflect that the parties have had information withheld from them, thus preventing meaningful voir dire, or that the presumption of innocence has been compromised." *Id*. at 523; see also *People v Hanks*, 276 Mich App 91, 93-95; 740 NW2d 530 (2007).

Here, the jurors were only anonymous in the literal sense. The parties were not deprived of meaningful voir dire—rather, they engaged in extensive voir dire at the outset of trial. Nothing in the record shows that any of the jurors' biographical information was withheld from the parties during this process. Nor has defendant shown that the trial court's reference to the jurors by number undermined defendant's presumption of innocence. As in *Williams*, *supra* at 524, there is nothing to suggest that the jurors viewed the court's decision to refer to them by number to be anything out of the ordinary. Defendant's argument that the trial court's decision created an inference that the court had already concluded that defendant was "guilty of murder and dangerous" is without factual support in the record. We will not presume prejudice based on mere speculation. Thus, the trial court's decision to refer to the jurors by number did not violate defendant's due process rights and, accordingly, we conclude that defendant has failed to show plain error affecting substantial rights.

IV. Ineffective Assistance of Counsel

Defendant also contends that trial counsel rendered ineffective assistance in violation of his Sixth Amendment right to counsel. Whether a defendant has been deprived of effective assistance presents a mixed question of fact and law, which is reviewed for clear error and de novo respectively. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). However, where there has been no evidentiary hearing on the matter below, as is the case here, our review is limited to errors apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

"To establish ineffective assistance of counsel, [a] defendant must first show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). In other words, the defendant must show prejudice such that he was deprived of a fair trial. *People v Powell*, 278 Mich App 318, 324; 750 NW2d 607 (2008). A defendant must overcome a strong presumption that counsel's actions may

have constituted sound trial strategy. *People v Brown*, 279 Mich App 116, 140; 755 NW2d 664 (2008).

A. Prior Felony Conviction and Unrelated Arrest

Defendant first asserts that he was denied effective assistance because counsel failed to object when the trial court informed the jury of defendant's previous felony conviction, the predicate offense for the felon in possession charge. Although the parties had previously stipulated that the underlying charge would not be disclosed to the jury, the trial court, nonetheless, read the charge to the jury during preliminary instructions before the prosecution's case-in-chief. The trial court stated:

> Count V is Possession of a Firearm by a Felon. It is alleged that on or about April 13th of 2006 in the City of Flint, County of Genesee, that Andraus McCloud did possess or use or carry a firearm when ineligible to do so because he or she had been convicted of Fleeing and Eluding a Police Officer in the Third Degree, a felony punishable by imprisonment of four or more years. That the requirements for gaining eligibility have not been met.

We cannot conclude that trial counsel's failure to object at this point in the proceedings fell below an objective standard of reasonableness under prevailing professional norms. Counsel may have chosen not to object as a matter of sound trial strategy. Arguably, had counsel objected he would have unnecessarily drawn the jury's attention to defendant's prior conviction. *People v Horn*, 279 Mich App 31, 40; ___ NW2d ___ (2008). Moreover, assuming counsel's failure to object to the disclosure of the relatively minor and non-violent nature of defendant's prior conviction was not sound trial strategy, defendant has failed to show a reasonable probability that the result of the proceedings would have been different. *Uphaus (On Remand)*, *supra* at 185. We cannot conclude that counsel was ineffective for failing to object to the court's preliminary instructions that disclosed the prior conviction. *Brown*, *supra* at 140.

For the same reason, we must reject defendant's argument regarding the testimony elicited from detective Bigelow regarding an unrelated charge. During direct examination, the prosecution asked the detective whether "there [came] a time where you found the fourth subject [defendant]?" In response, detective Bigelow stated:

> We did. I received information from . . . the Mount Morris Township Police Department that they had arrested a subject on another charge at their department and he was lodged in the County Jail. He informed me that he believed that it was the suspect that we were looking for from my [sic] murder.

Assuming, without deciding, that this was inadmissible other acts evidence, defense counsel's decision not to object was arguably a matter of trial strategy. Again, had counsel objected, counsel's objection could have unnecessarily drawn the jury's attention to defendant's prior arrest and unrelated charge. *Horn*, *supra* at 40. It cannot be said that counsel, in this capacity, acted below an objective standard of reasonableness under prevailing professional norms. Because defendant has failed to overcome the strong presumption that counsel's actions were a matter of trial strategy, this argument also fails. *Brown*, *supra* at 140.

B. Prosecutorial Misconduct

Defendant next argues that counsel was ineffective because he failed to object when the prosecutor allegedly vouched for the credibility of accomplice witness, Riley. Specifically, defendant contends that the disclosure of the fact that Riley had already pleaded guilty before defendant's trial sent the jury "a message" that the prosecutor had verified the truth of Riley's testimony. The prosecutor elicited the following testimony:

Q. Mr. Riley . . . . You were charged in this case, is that correct?

A. Yes.

* * *

Q. And you pled guilty in this case, correct?

A. Yes.

* * *

Q. You've also agreed to testify truthfully in this matter, is that correct?

A. Yes.

We agree that it is improper for a prosecutor to vouch for a witness's credibility such that he indicates a special knowledge with respect to the witness's truthfulness. *Rodriguez*, *supra* at 31. However, "by calling a witness who testifies pursuant to an agreement requiring him to testify truthfully, the Government does not insinuate possession of information not heard by the jury and the prosecutor cannot be taken as having expressed his personal opinion on a witness' veracity." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995) (quotation marks and citation omitted).

There is nothing in the record, and defendant has not pointed us to any additional facts, which indicates that the prosecutor used the plea agreement to suggest that she knew Riley was testifying truthfully. Simply disclosing that Riley promised to testify truthfully does not by itself constitute misconduct. *Id*. at 276-277. Because the prosecutor did not engage in misconduct, it cannot be said that defense counsel was ineffective for failing to object. Counsel is not ineffective for failing to raise a futile objection. *People v Unger*, 278 Mich App 210, 256; 749 NW2d 272 (2008).

C. Witness in Jailhouse Clothing

Defendant also contends that counsel was ineffective for permitting a defense witness to testify while wearing jailhouse clothing. In defendant's view, the jury likely discounted the witness's credibility because he was wearing prison garb. We cannot agree.

The witness, Sherman Buggs, provided exculpatory testimony because he testified that Riley told him that Riley, rather than defendant, shot and killed decedent while defendant stood and waited in the hallway. However, even assuming that defense counsel should have objected to Buggs's prison outfit, defendant must still show that the error prejudiced the outcome of the case. Defendant has failed to do so here. Buggs's testimony was comparatively limited when

viewed in light of the overwhelming evidence that defendant committed the crimes charged. The trial testimony established that two masked individuals arrived at Clemons's house in a burgundy SUV type vehicle and then broke into Clemons's house, robbed, and shot him. The victim's girlfriend quickly called the police to the scene and the police apprehended the suspect vehicle. Defendant escaped that night while Riley was apprehended. A mask found in the SUV's backseat contained DNA matching defendant's DNA. Buggs was not an eyewitness to any of these events. Thus, even if Buggs's had been wearing different clothing, the testimony itself was unlikely to be a substantial defense in the eyes of the jury.

Further, counsel's decision not to object may have been part of his trial strategy. During closing argument, counsel capitalized upon the fact that Buggs's was wearing prison clothes in an attempt to discredit prosecution witness Charity Mosley. Counsel argued that Mosley was the "schemer" of the events that occurred and that she, unlike Buggs, "didn't come in here in an orange outfit . . . ." This statement drew sympathy for both Buggs and defendant, see *Estelle v Williams*, 425 US 501, 507-508; 96 S Ct 169; 48 L Ed 2d 126 (1976), and may have indirectly bolstered Buggs's credibility. Because defendant has not shown that counsel's actions prejudiced him or that counsel's decision was a matter of sound trial strategy, we cannot conclude that defendant was denied effective assistance for this reason. *Brown*, *supra* at 140.

D. Jury Verdict

Lastly, defendant asserts that his due process rights were violated and that counsel was ineffective for failing to object when 13 rather than 12 jurors deliberated on the verdict. However, defendant's assertion is mistaken. Our review of the record shows that the trial court originally sat 14 jurors and dismissed two of them before deliberations began. In addition, the amended verdict transcript indicates that only 12 jurors deliberated on the verdict, as only 12 jurors answered when the court polled the jury. Because there was no error, it would have been futile for defense counsel to object. Counsel cannot be ineffective for raising a meritless objection. *Unger*, *supra* at 256. For all of the foregoing reasons, defendant was not denied effective assistance of counsel in violation of the Sixth Amendment.

V. Missing Transcripts

Defendant further argues that missing portions of the transcript have deprived him of his constitutional right to meaningful appellate review. Specifically, defendant asserts that these gaps have made it impossible for him to "discover potentially meritorious appeal issues." We disagree. This issue presents a question of constitutional law that we review de novo. *Rodriguez*, *supra* at 25.

A new trial must be ordered where the unavailability of transcripts impedes a defendant's constitutional right to an appeal. *People v Audison*, 126 Mich App 829, 834-835; 338 NW2d 235 (1983). A new trial is necessary if "it is impossible to review the regularity of the proceedings due to the lack of transcripts." *People v Horton (After Remand)*, 105 Mich App 329, 331; 306 NW2d 500 (1981). "If the surviving record is sufficient to allow evaluation of [the] defendant's claims on appeal, [then the] defendant's right is satisfied . . . ." *Audison*, *supra* at 835. A defendant must show prejudice as a result of the missing transcripts; a defendant "must present something more than gross speculation that the transcripts were requisite to a fair appeal." *Bransford v Brown*, 806 F2d 83, 86 (CA 6, 1986).

Here, the missing transcripts include a 31-minute gap in the testimony of prosecution witness Valerie Bowman, a forensic scientist, and a gap of unknown duration in the afternoon session of Charity Mosley's testimony. These missing portions occurred over the course of a nine-day jury trial. In our view, the surviving record is sufficient to allow meaningful evaluation of defendant's appellate claims. *Audison, supra* at 835. Further, defendant has failed to show that he has suffered prejudice as a result of the missing transcripts. Rather, defendant merely speculates that some issues may have been contained in those portions of the missing testimony. *Bransford, supra* at 86. Because defendant has failed to show that he was deprived of his right to appellate review, a new trial is not necessary.

VI. Sentencing

Lastly, defendant argues that he is entitled to resentencing because the trial court referenced his lack of "remorse" during sentencing. According to defendant, the trial court's statement was tantamount to basing defendant's sentence on defendant's refusal to admit guilt. We cannot agree. We review a trial court's imposition of a sentence for an abuse of discretion and its application of the statutory sentencing guidelines de novo. *People v Underwood*, 278 Mich App 334, 337; 750 NW2d 612 (2008).

During sentencing, the trial court made the following statement:

> And to watch you even in this courtroom this morning and to watch when Mrs. Clemons approached the podium and talked, to watch your attitude of her. You didn't seem to have any remorse what—you didn't show any remorse whatsoever. And even when you got up and you spoke, you showed no remorse whatsoever for this victim in this case.

We are of the view that defendant has mischaracterized the trial court's statement. The trial court's statement considers defendant's attitude toward the victim's mother. It does not reference defendant's position that he maintains his innocence despite the jury's verdict. It is true that a sentencing court cannot base its sentence in whole, or in part, on a defendant's refusal to admit guilt, *People v Jackson*, 474 Mich 996, 996; 707 NW2d 597 (2006), as indicated if the court, for example, asks the defendant to admit guilt or offers a lesser sentence in exchange for such an admission. *People v Spanke*, 254 Mich App 642, 650; 658 NW2d 504 (2003). There is no such indication here. Rather, the trial court properly considered, as it may, defendant's lack of remorse. See *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995). Defendant is not entitled to resentencing.

Affirmed.

/s/ Pat M. Donofrio
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering