

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY LEE VANDURMEN,

Defendant-Appellant.

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UNPUBLISHED

July 14, 2009

No. 282172

Berrien Circuit Court

LC No. 1987-001308-FH

Before: Sawyer, P.J., and Murray and Stephens, JJ.

PER CURIAM.

Defendant was found guilty by a jury on July 16, 1987, of first-degree premeditated murder, MCL 750.316; first-degree felony murder, MCL 750.316; and armed robbery, MCL 750.529. Defendant was sentenced to life imprisonment without parole for the murder charges and life imprisonment for the armed robbery charge. He now appeals and we affirm.

I

Emma McNulty and her husband Thomas McNulty lived in Niles, Michigan. Mrs. McNulty's adult child from a previous marriage owed defendant \$120 for marijuana. After making prior threats to get his money one way or another, on December 23, 1986, defendant, accompanied by David Vail and Jeremy Sisk, broke into the McNulty's home. Mrs. McNulty was the only one home and David Vail testified that she was brutally attacked and killed by defendant. Defendant and his accomplices left the McNulty home stealing valuable coins and jewelry.

II

Defendant first argues that his constitutional rights of equal protection, due process, and effective assistance of counsel were violated by the delay in his appeal caused primarily by prior appellate attorneys. We disagree. We initially note that the trial court carefully analyzed this issue in deciding defendant's motion for new trial. The trial court concluded that the 20-year delay in perfecting the appeal did not prejudice defendant because it did not affect the outcome of the appeal. We agree with the trial court.

This Court reviews constitutional questions de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997). Further, this Court reviews a defendant's claim that he was denied

the effective assistance of counsel as a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's findings of fact are reviewed for clear error and questions of constitutional law are reviewed de novo. *Id.*

The equal protection guarantee is a measure of our constitution's tolerance of government classification schemes, not a source of substantive rights or liberties. *Doe v Dep't of Social Services*, 439 Mich 650, 661; 487 NW2d 166 (1992). In this case, defendant did not provide any evidence that he was being treated differently based on any government classification. Therefore, there is no equal protection claim.

A delay in appellate review does not automatically entitle a defendant to a new trial. *People v Gorka*, 381 Mich 515, 520; 164 NW2d 30 (1969); *People v LaTeur*, 39 Mich App 700, 705; 198 NW2d 727 (1972). Due process is only violated when a defendant is prejudiced by the delay, not simply because a delay occurred. *People v McNamee*, 67 Mich App 198, 205; 240 NW2d 758 (1976). Michigan courts have not directly addressed the issue whether mere passage of time could result in prejudice, but have held that consideration of the merits of a defendant's appeal can negate any claim of prejudice arising out of the delay. *People v Missouri*, 100 Mich App 310, 325; 299 NW2d 346 (1980); *McNamee*, *supra*. Courts outside Michigan have recognized three interests to consider when evaluating whether prejudice occurred by a delay in an appeal: oppressive incarceration pending appeal, anxiety and concern while awaiting the outcome of the appeal, and the likely impairment of grounds for appeal or viability of defenses in cases of a retrial. *United States v Smith*, 94 F3d 204, 211 (CA 6, 1996); *United States v Antoine*, 904 F2d 1379, 1382 (CA 9, 1990); see also, *People v White*, 54 Mich App 342, 351; 220 NW2d 789 (1974). The most important of these factors is the possible impairment of appellate grounds or defense on retrial. *United States v Mohawk*, 20 F3d 1480 (CA 9, 1994); *White*, *supra*. Further, no oppressive incarceration exists when the defendant was rightly convicted in the first place. See *United States v Tucker*, 8 F3d 673, 676 (CA 9, 1993); *Muwwakkil v Hoke*, 968 F2d 284, 285 (CA 2, 1992).

The recantation letters of the prosecution's key witnesses do not show that defendant was exposed to oppressive incarceration. Courts should be reluctant to grant new trials based on recantation testimony because it is suspect and untrustworthy, and a trial court's decision regarding recantation testimony should only be reversed for an abuse of discretion. *People v Canter*, 197 Mich App 550, 559; 496 NW2d 336 (1992). The trial court concluded that the recanting letters written by Vail and Sisk lacked veracity. The court further concluded the letters proved that defendant threatened any witness who testified against him because Vail recanted his original recantation letter giving defendant's threats as the reason for the original recantation. Finally, the trial court determined that there was ample evidence to rightfully convict defendant despite the recantation letters. Thus, after evaluating the merits of defendant's case, the delay in defendant's appeal does not support his claim that his appeal or his defenses were impaired. *Missouri*, *supra*. Because defendant did not show that he was prejudiced by the delay in his appeal, his right to due process was not violated, and the remedy in this case is the appellate review itself. *Id.*

For defendant to establish his ineffective assistance of counsel claim, he must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the resultant proceedings were

fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843, 1850; 152 L Ed 2d 914, 927 (2002); *United States v Cronin*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Further, a criminal defendant's rights to appeal and to counsel on appeal include the right to effective assistance of counsel on appeal. *People v Pauli*, 138 Mich App 530, 534; 361 NW2d 359 (1984). However, the trial court determined a large part of the delay was a result of defendant's own decision to keep as counsel someone that was determined to be inadequately handling appeals. The court further concluded that even if defendant showed his appellate counsel was completely responsible for the delays, he cannot show that there is a reasonable probability that the result would be different. Thus, defendant did not prove that he was denied effective assistance of counsel in his appeal.

### III

Defendant next argues that the trial court improperly denied defendant's motion for a new trial because newly discovered evidence shows that the prosecution's key witnesses committed perjury, which can be a basis for a new trial. *People v Barbara*, 400 Mich 352, 363; 664 NW2d 174 (2003). We disagree. This Court reviews a trial court's denial of a motion for a new trial for an abuse of discretion. *People v Brown*, 279 Mich App 116, 144; 755 NW2d 664 (2008). A trial court abuses its discretion when its decision falls outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). To receive a new trial on the basis of newly discovered evidence, a defendant must show that "(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) (internal quotations omitted).

However, the trial court determined that the letters from Vail to his attorney, Vail to defendant, Sisk to defendant, and Becker to defendant were suspect and unreliable. The court further determined that the jury had ample evidence to convict despite the letters such as testimony from other witnesses regarding defendant's tennis shoes, defendant lying about his whereabouts, and trying to pay someone for an alibi. Thus, because defendant's newly discovered evidence would not make a different result probable, the trial court did not abuse its discretion by denying defendant's motion for new trial.

### IV

Defendant argues that the trial court denied defendant a fair trial by admitting improper evidence and by giving improper jury instructions. We disagree. Defendant objected to Becker's statement as hearsay at the time of admission; therefore, the issue is preserved. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). This Court reviews a trial court's admission of evidence for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). Defendant argues that the trial court statement by Edward Becker, an inmate at the Berrien County jail with defendant, was improperly admitted as hearsay. In his statement, Becker explained that he wrote an exculpatory letter after defendant's preliminary examination because of threats to his family. A declarant's out-of-court statement relating to his or her then-existing state of mind is an exception to the hearsay rule, and if relevant, can be admitted. MRE 803(3);

MRE 402; See also *People v Fisher*, 449 Mich 441, 449-450; 537 NW2d 577 (1995). Further, MRE 801(d)(1) provides in pertinent part:

(d) Statements Which Are Not Hearsay. A statement is not hearsay if—

(1) *Prior Statement of Witnesses*. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant’s testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition . . . . [Emphasis in original.]

Because Becker’s statement related to his state of mind for the reason he wrote the letter, and because the issue was relevant as to why he made a prior inconsistent statement, the trial court did not abuse its discretion by admitting the statement.

Next, defendant argues that he was denied a fair trial because the trial court gave jury instructions that made him look “foolish” because the instructions contradicted defendant’s testimony by stating defendant said he was not guilty of receiving and concealing stolen property. However, defendant did not object to or request any jury instructions before the jury deliberated; therefore, the issue is not preserved for review. *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000); MCR 2.516(C). This Court reviews unpreserved issues regarding jury instructions for plain error affecting the defendant’s substantial rights and will not reverse a conviction if the instructions fairly presented the issues to be tried and sufficiently protected the defendant’s rights. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). Reversal is only warranted when the error resulted in the conviction of a defendant who is actually innocent or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra* at 774. To establish that a plain error affected substantial rights, there must be a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. *Grant, supra* at 549. In this case, the verdict did not involve any determination of defendant’s guilt of receiving and concealing stolen property. Thus, the jury instructions did not affect the fairness, integrity, or public reputation of the trial, and defendant suffered no prejudice. Therefore, there was no plain error affecting defendant’s substantial rights and defendant’s right to a fair trial was not violated.

## V

Defendant next argues he was denied a fair and impartial trial because of prosecutorial misconduct. Defendant did not object to the prosecutor’s comments or introduction of evidence at the time of trial, therefore the error is not preserved. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Because defendant did not preserve this issue, it is reviewed for plain error affecting his substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Further, a prosecutor’s good-faith effort to admit evidence does not constitute misconduct. *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007). In this case, defendant did not show any evidence that he was innocent, or that the fairness, integrity, or public reputation was seriously affected by the prosecutor’s comments and introduction of evidence. The prosecutor’s actions complained of either comported with the evidence, stated what the evidence would show, was introduced by the prosecutor’s good faith effort, or was

cured by the trial court's instructions to the jury. Thus, the prosecutor's conduct did not amount to misconduct, and defendant received a fair and impartial trial.

## VI

Defendant argues that there was insufficient evidence to prove premeditation and deliberation, thus defendant's conviction for first-degree murder cannot stand. Defendant further argues there was also insufficient evidence to prove that he committed armed robbery, and that the prosecution's key witnesses were incredible and their testimony provided insufficient evidence to prove his guilt. We disagree.

Defendant did not move for a new trial on this basis, therefore the issue is not preserved. *People v Strong*, 143 Mich App 442, 450; 372 NW2d 335 (1985). However, a claim of insufficiency of the evidence invokes a defendant's constitutional right to due process of law, which this Court reviews de novo on appeal. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201; 489 NW2d 748 (1992). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

As to defendant's first claim, premeditation and deliberation require sufficient time to permit a defendant to reconsider his actions. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). Although the length of time needed is incapable of precise determination, it need only be long enough "to allow the defendant to take a second look." *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1991); *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992). Premeditation may be inferred from all the facts and circumstances surrounding the incident, including the parties' prior relationship, the defendant's actions before and after the crime, and the circumstances of the killing. *People v Haywood*, 209 Mich App 217, 229; 530 NW2d 497 (1995). Finally, minimal circumstantial evidence is sufficient to prove an actor's state of mind. *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2001).

In this case, there was sufficient evidence to support the contention that defendant had an opportunity to reconsider his actions before killing Mrs. McNulty based on his threats, repeated blows to her head with a patio stone, continued pursuit to resume attacking her as she locked herself in a bathroom and climbed out the window, and infliction of multiple stab wounds as she tried to escape. He also attempted to destroy the evidence by burning his clothing and hiding the items he stole. Thus, there was sufficient evidence to show that defendant premeditated and deliberated Mrs. McNulty's murder.

Defendant's theory to explain why there was insufficient evidence to support his conviction for armed robbery was that weapons were used against Mrs. McNulty to get her to reveal the location of the property and later to kill her, but not to actually separate the property

from her. However, an assault that occurred before the taking of the property can be used for the basis of an armed robbery conviction. *People v Scruggs*, 256 Mich App 303, 310; 662 NW2d 849 (2003). Thus, the evidence sufficiently supported defendant's conviction for armed robbery.

As to defendant's challenges to the credibility of the witnesses who testified against him, he was able to cross-examine all of the witnesses and the jury was able to determine the credibility of the witnesses. "It is the province of the jury to determine questions of fact and assess the credibility of witnesses." *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998). Further, this Court affords deference to the jury's "special opportunity to . . . assess the credibility of the witnesses." *Unger, supra* at 228-229. Because there was sufficient evidence to support defendant's convictions, his convictions and sentence should be affirmed.

## VII

Defendant next argues that the trial court erred when it denied defendant's motion for a new trial when the prosecutor failed to introduce that the autopsy report mentioned wounds to Mrs. McNulty's abdomen. We disagree. The autopsy report did not have any consequential effect on the trial court's denial of defendant's motion for new trial. First, the superficial abdominal wounds had no effect on the trial court's decision because Jerry Spence's letter claiming Sisk admitted that he stabbed Mrs. McNulty twice in the chest was unreliable. Secondly, the abdominal wounds described in the autopsy report do not contradict the trial court's decision. Therefore, the trial court did not abuse its discretion by denying defendant's motion for a new trial.

## VIII

Defendant's final argument is that the trial court erred when it relied on evidence where it misstated Mrs. McNulty's blood type, considered various threats by defendant, and considered certain jewelry from the McNulty's home in denying defendant's motion for a new trial. We disagree. Defendant did not object on the basis of these claims during trial, therefore the issue is not preserved. *People v McDaniel, supra*. This Court reviews an unpreserved non-constitutional error for plain error affecting substantial rights. *Carines, supra*. An unpreserved non-constitutional error is presumed harmless and does not warrant reversal unless it is more probable than not that the error was outcome determinative. MCL 769.26; *Lukity, supra*.

The trial court found "ample evidence at the trial that [d]efendant was guilty." Thus, the trial court did not rely entirely on the misstated difference between Mrs. McNulty's blood type and defendant's blood type. As such, the error was harmless. *Id.* The trial court sustained defense counsel's objections to a witness's testimony regarding threats to the Niles Township Police Chief on relevancy grounds, struck the statement, and instructed the jury not to regard the testimony. Because jurors are presumed to have followed the trial court's instructions, the error was harmless. *People v Hana*, 447 Mich 325, 351; 524 NW2d 682 (1994). In addition, the court and the parties agreed that the substance of threats would not be mentioned if they would refer to going back to prison or to defendant's prior convictions. Thus, the admission of the witness's testimony even though defendant could not cross examine the statement because it would open the door to the fact he had previously been in prison did not amount to plain error affecting defendant's substantial rights.

Finally, defendant argues that the jewels introduced at trial, found in his possession or in places he hid them, were not sufficiently proven to have come from the McNultys' home. MRE 901(a) states:

The requirement of authenticity or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

In addition, where the witnesses identify items as being identical or similar to items involved in the crime, the condition is satisfied. *People v Gunter*, 76 Mich App 483, 493-494; 257 NW2d 133 (1977). In this case, there were witnesses who identified the jewels sufficiently, thus the trial court's evidentiary rulings must be affirmed.

Affirmed.

/s/ David H. Sawyer  
/s/ Christopher M. Murray  
/s/ Cynthia Diane Stephens