STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 6, 2009
v DEREK LYNN HARRIS, Defendant-Appellant.	No. 284312 Wayne Circuit Court LC No. 07-021385-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v DERONE HILL HARRIS, Defendant-Appellant.	No. 284645 Wayne Circuit Court LC No. 07-021385-FC

Before: Saad, C.J., and Sawyer and Borrello, JJ.

PER CURIAM.

In Docket No. 284312, defendant, Derek Lynn Harris, appeals as of right his jury trial convictions for two counts of assault with intent to murder, MCL 750.83, and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.[1] Derek was sentenced to 13 to 23 years' imprisonment for each of the two assault with intent to murder convictions, and two years' imprisonment for the felony-firearm conviction. For the reasons set forth in this opinion, we affirm.

In Docket No. 284645, defendant, Derone Hill Harris, appeals as of right his jury trial convictions for two counts of assault with intent to do great bodily harm less than murder, MCL

[1] Defendants Derek Harris and Derone Harris were codefendants in lower court case number 07-021385-FC.

750.84, one count of retaliating against a witness, MCL 750.122(8), and one count of felony-firearm, MCL 750.227b. Derone was sentenced, as a second habitual offender, MCL 769.10, to 4 to 15 years' imprisonment for each of the two assault with intent to do great bodily harm less than murder convictions, 4 to 15 years' imprisonment for the retaliating against a witness conviction, and two years' imprisonment for the felony-firearm conviction. For the reasons set forth in this opinion we affirm.

In Docket Nos. 284312 and 284645, defendants each argue that the trial court should have granted their motions for a new trial on the basis of the prosecution's failure to disclose a res gestae witness, which, according to defendants, constituted favorable evidence suppressed by the prosecution, and also was newly discovered evidence. This Court reviews a trial court's decision to deny a motion for a new trial for an abuse of discretion. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). "A trial court may be said to have abused its discretion only when its decision falls outside the principled range of outcomes." *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).

"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." *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005), citing *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994), citing *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). "In order to establish a *Brady* 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 proceedings would have been different." *Cox, supra* at 448, citing *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). The prosecution is not required to disclose evidence "whose utility lay only in helping a defendant contour a portion of his cross-examination of a key state witness." *People v Banks*, 249 Mich App 247, 254; 642 NW2d 351 (2002), quoting *Weatherford v Bursey*, 429 US 545, 559-561; 97 S Ct 837; 51 L Ed 2d 30 (1977). Further, the police and the prosecution are not required to seek out and find exculpatory evidence on a defendant's behalf. *People v Sawyer*, 222 Mich App 1, 6; 564 NW2d 62 (1997).

A new trial may be granted on the basis of newly discovered evidence if a defendant is able to satisfy a four part test: "(1) 'the evidence itself, not merely its materiality, was newly discovered'; (2) 'the newly discovered evidence was not merely 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), quoting *People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996); MCR 6.508(D).

MCL 767.40a provides, in pertinent parts:

> (1) The prosecuting attorney shall attach to the filed information a list of all witnesses known to the prosecuting attorney who might be called at trial and all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers.

> (2) The prosecuting attorney shall be under a continuing duty to disclose the names of any further res gestae witnesses as they become known.
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> * * *
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> (5) The prosecuting attorney or investigative law enforcement agency shall provide to the defendant, or defense counsel, upon request, reasonable assistance, including investigative assistance, as may be necessary to locate and serve process upon a witness. The request for assistance shall be made in writing by defendant or defense counsel not less than 10 days before the trial of the case or at such time as the court directs. If the prosecuting attorney objects to a request by the defendant on the grounds that it is unreasonable, the prosecuting attorney shall file a pretrial motion before the court to hold a hearing to determine the reasonableness of the request.

This Court has concluded that the Legislature, when it amended MCL 767.40a in 1986, intended to eliminate prosecutors' duties to "locate, endorse, and produce unknown persons who might be res gestae witnesses." *People v Cook*, 266 Mich App 290, 295; 702 NW2d 613 (2005), quoting *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995). "The prosecutor's duty to produce witnesses has been replaced with an obligation to provide notice of known witnesses and reasonable assistance to locate witnesses on defendant's request." *Cook, supra* at 295, quoting *Burwick, supra* at 289 (Emphasis deleted).

According to victim Robert Johnson, following an earlier altercation with defendant Derone Harris at a gas station, Robert, accompanied by his mother, victim Rosalind Johnson, drove slowly past the residence of Derone and Derone's brother, defendant Derek Harris. Robert and Rosalind each testified that Derone, Derek, and a third person, "Hardwick," were standing in the driveway outside of their residence, and Derek was armed with a rifle, and Derone carried a pistol. Robert testified that he observed Derek raise his weapon and fire it at the vehicle he occupied along with Rosalind. Rosalind testified that she observed both Derek and Derone fire their weapons at the vehicle. During trial, Rosalind Johnson testified on cross-examination that Thomas Goods, a Michigan State police officer, was an eyewitness to the shooting.

Since it is uncontested that the prosecution did not identify Goods as a res gestae witness, we begin our analysis of the factors set forth in *Cox, supra*, with the finding that defendants cannot demonstrate that the prosecutor knew that Goods was allegedly at the scene of the shooting. Rosalind testified at the hearing on defendants' motions for a new trial that the first time she mentioned that Goods was at the scene was on cross-examination at trial. Rosalind never told the prosecutor that Goods was at the scene of the shooting, and Detroit Police Officer Joseph Rocha, the officer in charge of investigating the case, denied that Rosalind provided him information concerning Goods's presence. Defendants offer no evidence to the contrary. Further, defendants fail to show how Goods's testimony, had Goods appeared, would have been exculpatory, beyond an invitation for this Court to speculate. Accordingly, defendants cannot establish the first element of a *Brady* violation by demonstrating that the prosecution possessed evidence favorable to defendant. *Cox, supra* at 448.

Further, because defendants fail to establish that the prosecution possessed the information relating to Goods' presence at the scene of the shooting, defendants cannot

demonstrate the third element of a *Brady* violation, and that the prosecution suppressed this information. *Cox*, *supra* at 448. Moreover, because defendants fail to show that Goods would have given testimony favorable to them, defendants cannot establish that the outcome of the trial would have been different if they had known that Goods was an eyewitness to the shooting. In the absence of an affidavit or any assertion as to what evidence Goods would have provided on behalf of defendant or the prosecution at trial, the trial court and similarly this Court are left to speculate as to Goods' testimony. Accordingly, we conclude that defendant's *Brady* arguments are without merit.

Defendants next argue that they were entitled to a new trial on the basis of newly discovered impeachment evidence. Although defendants cite federal authority for the proposition that newly discovered impeachment evidence is grounds for a new trial, this Court has specifically held that, "newly discovered evidence is not ground for a new trial where it would merely be used for impeachment purposes." *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993). Furthermore, we observe that defendants cannot otherwise establish the first element, that "the evidence itself, not merely its materiality, was newly discovered." *Cress*, *supra* at 692. Derone's counsel admitted during the hearing that he knew of Goods's existence, and considered calling Goods to testify regarding "some additional issues." Thus, although the significance of Goods's testimony, or, in other words, its materiality, was not discovered until Rosalind testified that Goods was present at the scene of the shooting, because Derone's counsel admitted that he was aware of Goods, Goods's testimony fails to satisfy the first element of newly discovered evidence. *Id*. In their briefs and arguments to the trial court and this Court, defendants failed to establish that a reasonable probability exists that Goods' testimony would have affected the outcome of the trial, or that the trial court abused its discretion in denying defendants' motion for a new trial on the basis of newly discovered evidence. *Id*. Accordingly, we reject the arguments of defendants that they are entitled to a new trial based on newly discovered evidence.

In Docket Nos. 284312 and 284645, defendants each argue that the prosecution committed misconduct by making improper remarks during her closing and rebuttal arguments. Defendants did not raise an objection to either of the instances of alleged prosecutorial misconduct; therefore, this issue is unpreserved on appeal. *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003). Unpreserved claims of prosecutorial misconduct are reviewed for plain error. *People v Carines*, 460 Mich 750, 752-753; 597 NW2d 130 (1999). To overcome forfeiture of an issue under the plain error rule, a defendant bears the burden of persuasion to demonstrate that: "(1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected a substantial right of the defendant." *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006). Even if a defendant can show that a plain error affected a substantial right, reversal is appropriate only where "the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Carines*, *supra* at 763.

As a general rule, "prosecutors are accorded great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Moreover, a prosecutor is "free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *Id*. A prosecutor is not required to present her arguments using only the blandest terms possible. *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d

342 (2004). Although a prosecutor may not vouch for the credibility of her witnesses by suggesting that she has special knowledge that the witnesses are testifying truthfully, a prosecutor may nevertheless comment on the credibility of her witness during the course of closing argument. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Further, a prosecutor may not comment during closing argument upon a defendant's failure to testify on his or her own behalf. *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996).

During closing argument, the prosecutor argued as follows:

> I am going to suggest to you ladies and gentlemen, that just because somebody may not have a big formal education and understand a lot of flowery language, that it doesn't make them dumb. It doesn't make them not know who shot at them.
>
> Some of the smartest people around can't read and write, and anybody, even a dog knows when they are being kicked on purpose, or tripped over accidentally. Do don't let somebody put in your mind that because Miss Johnson might not be sophisticated, she doesn't know who shot at her, or that she doesn't deserve justice because somebody shot at her. Keep that in mind.

Defendants contend that the prosecutor, in making this argument, improperly vouched for the credibility of the witnesses. However, the record demonstrates that the prosecutor argued that Rosalind's testimony was credible, and cautioned the jury not to discount Rosalind's credibility on the basis that Rosalind is unsophisticated or uneducated. *Thomas*, *supra* at 455. Conversely, the prosecutor did not argue that she knew, or had verified on the basis of information undisclosed to the jury, that Rosalind was testifying truthfully. *Id*. Accordingly, because defendants cannot demonstrate that the prosecutor committed misconduct when she commented on Rosalind's credibility; defendants cannot demonstrate plain error affecting their substantial rights. *Pipes*, *supra* at 279.

During the prosecution's closing rebuttal argument, the prosecution argued:

> What satisfaction does anybody get for blaming two people who had nothing to do with it? For what? So you have to move from your house, watch your back for the next year? It's ridiculous.
>
> Every one of you knows that today is the date for them to step up to the plate and be accountable for their behavior.

Defendants argue that this was an impermissible comment on defendants' failure to testify. Reviewing the prosecutor's remark in context, the prosecutor argued that the jury should reject defendants' contention that Robert, motivated by anger because Robert was later jailed for running over Hardwick's brother, falsely accused defendants of shooting at Robert and Rosalind.

Even if the prosecutor's argument during closing rebuttal did constitute a well-hidden comment on defendant's failure to testify, defendant cannot demonstrate that the comment affected the outcome of the trial, as required under the plain error rule. *Carines*, *supra* at 763. The trial court specifically instructed the jury that: "The lawyers' statements and their arguments

are not evidence. They are only meant to help you understand the evidence and each side's legal theories." The trial court further instructed the jury that: "Every defendant has the absolute right not to testify. When you decide this case, you must not consider the fact that the defendant did not testify. It must not affect your verdict in any way." Generally, jurors are presumed to have followed their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Because defendants cannot demonstrate that the prosecutor's remarks during closing and rebuttal arguments were improper, defendants cannot demonstrate that the prosecutor engaged in misconduct. Further, even if the remarks were improper, because defendants cannot show that the alleged misconduct affected the outcome of the case, defendants' argument lacks merit. *Carines*, *supra* at 763.

In Docket Nos. 284312 and 284645, defendants next argue that they received the ineffective assistance of counsel because their attorneys failed to seek a continuance when it was discovered that Goods may have witnessed the shooting, and failed to object to the prosecutor's allegedly improper comments during her closing and rebuttal arguments. Defendants did not bring motions for a new trial on the basis of ineffective assistance of counsel, and failed to request a *Ginther*[2] hearing before the trial court, although defendants did bring motions for a new trial premised upon their allegation that the prosecution failed to produce Goods to testify at trial. Accordingly, defendant's claim of ineffective assistance of counsel is not preserved on appeal. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

This Court's review of an unpreserved ineffective assistance of counsel claim is limited to mistakes apparent on the record. *Davis*, *supra* at 368. A defendant has waived the issue if the record on appeal does not support the defendant's assignments of error. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). An ineffective assistance of counsel claim is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact, if any, are reviewed for clear error, and the ultimate constitutional issue arising from an ineffective assistance of counsel claim is reviewed by this Court de novo. *Id*.

An ineffective assistance of counsel claim is established only where a defendant is able to demonstrate that trial counsel's performance "fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). A defendant is required to overcome a strong presumption that sound trial strategy motivated trial counsel's conduct. *Id*. Additionally, a defendant must demonstrate a reasonable probability that the result of the proceedings would have been different but for the counsel's errors in order to show prejudice. *Id*.

Counsel's performance is "measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Moreover, "this Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *Matuszak*, *supra* at 58.

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

Defendants argue that they received the ineffective assistance of counsel when counsel failed to request a continuance to investigate when Rosalind testified that Goods was present at the scene of the shooting. However, defendants cannot overcome the presumption that counsels' decision to proceed with the trial was a matter of sound trial strategy. During closing argument, Derek's counsel argued that Robert's credibility was suspect because Robert did not testify that Goods was at the scene of the shooting. Derek's counsel further argued that an off-duty police officer is obligated to respond to incidents such as shootings, and according to Rosalind's testimony, Goods did not respond. Derek's counsel also suggested that Goods could have provided further information regarding the shooting if Goods had been called to testify. Similarly, Derone's counsel argued that Robert never mentioned that Goods was at the scene of the shooting, Goods had a duty to respond but did not, and defendants, if they had known about Goods, would have called him to testify.

Thus, counsel made the strategic decision to forego a request for a continuance to locate Goods and compel him to testify as a witness, and, instead, use Goods's absence to impugn Robert's credibility during closing arguments. If defendants had requested a continuance, because the substance of Goods's testimony remains unknown, it is equally likely that Goods would have corroborated the testimony of Robert and Rosalind. In other words, Goods could have testified that he witnessed defendants discharge their firearms at the vehicle occupied by Robert and Rosalind, which would have further damaged defendants' positions. Thus, defense counsel could have decided to attempt to use Goods's absence to their advantage during closing argument. Accordingly, because defendants cannot rebut the presumption that sound trial strategy motivated counsels' decision not to request a continuance in order to attempt to locate Goods and compel him to testify, we conclude that defendants' ineffective assistance of counsel claim lacks merit. *Toma, supra* at 302.

Defendants next argue that they received the ineffective assistance of counsel when their attorneys failed to object to allegedly improper prosecutorial remarks made during the prosecutor's closing argument. As explained herein, the prosecutor did not commit misconduct by improperly vouching for the credibility of her witnesses, and did not comment on defendants' failure to testify. Because no misconduct occurred, had counsel raised an objection to the prosecutor's arguments, the objection would have properly been overruled. Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). We conclude that defendants' second ineffective assistance of counsel argument lacks merit; accordingly, defendant is not entitled to either a *Ginther* hearing or a new trial.

In Docket No. 284312, defendant Derek Harris next argues that the prosecution failed to present sufficient evidence for a rational trier of fact to conclude, beyond a reasonable doubt, that he was guilty of assault with intent to murder. This court reviews the record de novo when presented with a claim of insufficient evidence. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). Reviewing the evidence in a light most favorable to the prosecution, this Court determines whether a rational trier of fact could find that the elements of the crime were proven beyond a reasonable doubt. *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003). This Court will not interfere with the fact-finder's role in weighing the evidence and judging the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992). It is for the trier of fact to decide what inferences can be fairly

drawn from the evidence and to judge the weight it accords to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Conflicts in the evidence are resolved in the prosecution's favor. *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004).

The elements of assault with intent to commit murder are: "'(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.'" *People v Brown*, 267 Mich App 141, 147-148; 703 NW2d 230 (2005), quoting *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). "An assault may be established by showing either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). "The intent to kill may be proven by inference from any facts in evidence." *People v Abraham*, 234 Mich App 640, 658; 599 NW2d 736 (1999), quoting *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993). "A person may have that state of mind without directing it any particular victim." *Abraham*, *supra* at 658. "Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence of intent to kill is sufficient." *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

Viewing the evidence in a light most favorable to the prosecution, the record discloses that while Robert and Rosalind were driving slowly past Derek's residence, Derek was standing outside his house in the driveway, and was armed with a rifle. Derone and Hardwick stood alongside Derek, and Derone was armed with a handgun. Derek raised his firearm and discharged the rifle at the vehicle occupied by Robert and Rosalind. Robert actually observed Derek's gun as it discharged. Rosalind observed Derek and Derone fire their weapons at the vehicle she occupied with Robert. Robert sustained a minor gunshot wound, and four or five bullets hit the driver's side door. Robert and Rosalind each identified Derek at trial as one of the people who fired at their vehicle.

From this evidence, a rational trier of fact could conclude, beyond a reasonable doubt, that by raising and firing his rifle at the car occupied by Robert and Rosalind, Derek placed Robert and Rosalind in reasonable apprehension that they would receive an immediate battery. *Starks*, *supra* at 234. Thus, the prosecution presented sufficient evidence for a rational trier of fact to conclude, beyond a reasonable doubt, that Derek assaulted Robert and Rosalind. *Id*.

Further, a rational trier of fact could reasonably infer that Derek intended to kill both Robert and Rosalind when he used a firearm to discharge multiple rounds at the vehicle occupied by Robert and Rosalind. Had defendant been successful in killing Robert and Rosalind, the killings would have been murder, because nothing in the record indicates that Derek's act of shooting at the vehicle occupied by Robert and Rosalind was justified or excusable. Thus, a rational trier of fact could conclude, beyond a reasonable doubt, that defendant assaulted Robert and Rosalind with the actual intent to kill one or both of them, and had defendant been successful, the killing would have been murder. *Brown*, *supra* at 147-148; *Abraham*, *supra* at 658. Accordingly, we conclude that the prosecution presented sufficient evidence for a rational trier of fact to conclude that Derek committed two counts of assault with intent to murder.

In Docket No. 284645, defendant Derone Harris argues that the prosecution failed to present sufficient evidence for a rational trier of fact to conclude, beyond a reasonable doubt, that Derone committed assault with intent to do great bodily harm.

The elements of assault with intent to do great bodily harm less than murder are: "(1) an assault, i.e, 'an attempt or offer with force and violence to do corporal hurt to another' coupled with (2) a specific intent to do great bodily harm less than murder." *People v Bailey*, 451 Mich 657, 668-669; 549 NW2d 325 (1996), quoting *People v Smith*, 217 Mich 669, 673; 187 NW 304 (1922).

Viewing the evidence in light most favorable to the prosecution, the record discloses that Derone was standing in his driveway, and was armed with a nine millimeter caliber pistol when Robert and Rosalind drove slowly past the Harris residence. Although Robert did not see Derone fire his gun, Rosalind testified that she observed both Derek and Derone discharge their weapons at the vehicle. Robert testified that the gunshots did not sound the same; instead, according to Robert, the gunshots made two different sounds.

From this evidence, a rational trier of fact could conclude, beyond a reasonable doubt, that by firing his handgun at the vehicle occupied by Robert and Rosalind, Derone committed an unlawful act that put Robert and Rosalind in reasonable apprehension that they would receive an immediate battery. *Starks*, *supra* at 234. Thus, the prosecution presented sufficient evidence for a rational trier of fact to conclude, beyond a reasonable doubt, that Derone assaulted Robert and Rosalind. *Bailey*, *supra* at 668-669. Further, a rational trier of fact could infer, under the circumstances of this case, that Derone specifically intended to do great bodily harm to Robert, Rosalind, or both of them by firing his handgun in the direction of the vehicle occupied by Robert and Rosalind. *Abraham*, *supra* at 658. Accordingly, we conclude that the prosecution presented sufficient evidence for a rational trier of fact to conclude that Derone committed two counts of assault with intent to do great bodily harm less than murder.

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Stephen L. Borrello