STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 31, 2008
V	No. 273233 Berrien Circuit Court
GEORGE CALVIN PAYNE III, Defendant-Appellant.	LC No. 2005-412913-FH

Before: Wilder, P.J., and Saad, C.J., and Smolenski, J.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of armed robbery, MCL 750.529. The trial court sentenced defendant to concurrent sentences of 450 months to 50 years' imprisonment. Defendant appeals as of right his convictions and sentences. We affirm.

Defendant first claims on appeal that his convictions for armed robbery were not supported by sufficient evidence, because Ray Floyd, who pleaded guilty to committing the armed robberies, and who identified defendant as his accomplice, was not a credible witness. It is the province of the jury to assess the credibility of a witness, *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998), and in reviewing the sufficiency of the evidence to sustain a criminal conviction, we will not interfere with the jury's credibility determinations. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). Thus, while there may be some evidence to support defendant's assertion that Floyd lied about the name of his accomplice, we will not interfere with the jury's determination that Floyd was a credible witness. *Id.* Accordingly, we reject defendant's argument that his convictions were not supported by sufficient evidence because Floyd was not a credible witness.

Defendant also asserts that his conviction for armed robbery as to Christopher Opfer was not supported by sufficient evidence, because there was no evidence that any property or money was stolen from Opfer's person or in his presence. We disagree. Under MCL 750.529 as amended in 2004, the elements of armed robbery are:

> (1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person

> present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that or she was in possession of a dangerous weapon. *People v Chambers*, 277 Mich App 1, 8; __ NW2d __ (2007).

This 2004 legislative amendment to MCL 750.529 eliminated the previous requirement that the prosecutor establish, as an element of armed robbery, that the felonious taking of property was from "the complainant's person or in his presence."

It is undisputed that Opfer was present in the Hardee's restaurant while defendant and Floyd committed a larceny, and there was testimony that defendant possessed a six-inch steak knife during the course of the larceny. In addition, because Opfer testified that he was scared during the larceny, there was evidence that defendant's actions put Opfer in fear. Accordingly, defendant's argument that his conviction for armed robbery as to Opfer was unsupported by sufficient evidence, because no property was taken from Opfer's person or in his presence, is without merit.

Defendant next claims on appeal that the trial court erred in denying his motion to suppress evidence of the conversation Detectives James Millin and Richard Krueger, overheard while standing outside the front door to Belinda McMichael's trailer. According to defendant, the "eavesdropping" of Millin and Krueger violated his Fourth Amendment right against unreasonable searches and seizures, and MCL 750.539c, which prohibits eavesdropping on a private conversation. We review a trial court's ultimate decision on a motion to suppress de novo, but its factual findings are reviewed for clear error. *People v Wilkens*, 267 Mich App 728, 732; 705 NW2d 728 (2005).

The United States Constitution and the Michigan Constitution protect a person against unreasonable searches and seizures. US Const, AM IV; Const 1963, art 1, § 11; *People v Taylor*, 253 Mich App 399, 403; 655 NW2d 291 (2002). The Fourth Amendment protects oral statements. *People v Hoffa*, 385 US 293, 301; 87 S Ct 408; 17 L Ed 2d 374 (1966). However, not all seizures of oral statements implicate the Fourth Amendment. *Taylor, supra* at 404. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. *People v Cantania*, 427 Mich 447, 462; 398 NW3d 343 (1986). In *United States v Llanes*, 398 F2d 880, 884 (CA 2, 1968), the United States Court of Appeals held that, because a conversation carried-on in voices loud enough to be heard outside the home, is a conversation knowingly exposed to the public, the defendant had no reasonable expectation of privacy in the conversation. Based on *Llanes*, the trial court held that Millin and Krueger did not violate defendant's Fourth Amendment protection against unreasonable searches and seizures.

Defendant argues that the trial court erred in relying on *Llanes*, because, unlike the narcotics agents in *Llanes*, who were lawfully in the apartment building when they overheard the conversation, Millin and Krueger were trespassers when they overheard the conversation among defendant, Floyd, McMichael, and Tasha Grahl. According to defendant, Millin and Krueger became trespassers when they left the "trailer park roadway," to approach the trailer's front door. "A trespass is an unauthorized invasion upon the private property of another." See *American Transmission, Inc v Channel 7 of Detroit, Inc*, 239 Mich App 695, 705; 609 NW2d 607 (2000). Defendant has failed to cite any authority to support his assertion that, when police officers approach a private residence, and stand outside the front door of the residence, the officers made

an "unauthorized invasion" onto the private property of another. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment, with little or no citation of supporting authority. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Defendant has, therefore, abandoned the argument that Millin and Krueger were trespassers. See *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). Accordingly, we reject defendant's argument that Millin and Krueger were trespassers, and thus, the argument that the trial court erred in relying on *Llanes*. Because defendant has not established that the detectives were trespassers when they overheard the conversation in the mobile home from the approach to the mobile home's front door, we conclude that defendant's fourth amendment rights were not violated.

Even if this issue had been preserved, the evidence was that the detectives were merely approaching the mobile home to conduct an investigation. There appears to be no evidence that the detectives had any reason to believe either (1) that defendant (as he claims) "lived there as a guest",[1] or (2) that the owner objected to their approaching the home to knock on the door. We find no authority that police officers, conducting an investigation, may not enter private property, to approach a door in order to knock on it. However, although this issue has not been addressed in Michigan law, other state and federal jurisdictions have held that police officers do not violate any reasonable expectation of privacy when, in the course of conducting an investigation, they enter private property and approach a residence. In *State v Breuer*, 577 NW2d 41, 48-49 (Iowa,1998), for example, the Supreme Court of Iowa noted:

> [A] person does not have a right to be free from inquiries by law enforcement officers. In fact, the law is well-established in Iowa and other jurisdictions that law enforcement officers may go onto a person's private property, approach the residence, and knock on a door to speak with a person regarding a police investigation. *See State v. Dickerson*, 313 N.W.2d 526, 532 (Iowa 1981) (officers did not invade defendant's reasonable expectation of privacy by going to his door). We held in *Dickerson* that an officer's observations into an entryway while standing at an outer door did not constitute a search because the "visual observations through the window of the door were not an intrusion into a reasonable expectation of privacy," and thus the officer's observations did not constitute a search for purposes of the Fourth Amendment. *See id.; see also State v. Crea*, 305 Minn. 342, 233 N.W.2d 736, 739 (1975) (officers did not violate defendant/homeowner's expectation of privacy by walking onto driveway and observing items thought to be stolen property in plain view from driveway). FN7
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> FN7. *See also United States v. Garcia*, 997 F.2d 1273, 1279-80 (9th Cir.1993) (no search where undercover officers looked into defendant's apartment through window while standing on back porch which they

[1] We note that because defendant does not argue that he was an overnight guest, therefore, he could not have had a reasonable expectation of privacy. See, e.g., *Finsel v Cruppenick*, 326 F3d 903, 907 (CA 7, 2003).

> erroneously thought was the front door to apartment); *Anderson,* 552 F.2d at 1300 (exclusionary rule did not require suppression of evidence observed by federal agents through defendant's window when agents walked to rear of home after knocking on front door to determine if someone was with barking dog; and thus invasion of defendant's expectation of privacy justified); *United States v. Hersh,* 464 F.2d 228, 230 (9th Cir.1972) (no search when police officers looked through window while standing at front door in attempt to locate and interview defendant); *State v. Hornback,* 73 Wash.App. 738, 871 P.2d 1075, 1078 (1994) (entry by law enforcement officers onto areas of the curtilage, such as driveways, walkways or access routes leading to a residence, does not constitute a search implicating the Fourth Amendment).

Similarly, defendant also has not shown that he had a reasonable expectation of privacy concerning his conversations within the mobile home. The United States Supreme Court stated, relatively recently:

> "[U]nder our general Fourth Amendment approach" we "examin[e] the totality of the circumstances" to determine whether a search is reasonable within the meaning of the Fourth Amendment. . . . Whether a search is reasonable "is determined by assessing, on the one hand, *the degree to which it intrudes upon an individual's privacy* and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." [*Samson v California,* 547 US 843, 848; 126 S Ct 2193, 2197 (2006) (citations omitted; emphasis added).]

Thus, having a reasonable expectation of privacy is a sine qua non of a claim of a fourth amendment violation. *People v Jordan,* 187 Mich App 582, 589; 468 NW2d 294 (1991); see also *Hudson v Palmer,* 468 US 517, 530; 104 S Ct 3194; 82 L Ed 2d 393 (1984) (holding that convicted criminals, when prisoners, have no reasonable expectation of privacy).

Without such a reasonable expectation of privacy, the defendant has no standing to object to the "search" or the "seizure" of the conversation. *Jordan, supra* at 589. To have standing, a person "needs a special interest in the area searched or the article seized." *Id.* The test is whether "he had a reasonable expectation of privacy in the object or area of the intrusion." *Id*.

Defendant did not own the mobile home. And defendant has not, in his brief on appeal, analyzed the totality of the circumstances, nor presented facts suggesting that the trial court should have concluded that he had a reasonable expectation of privacy in conversations therein, or that he had a special interest in the area "searched." *Jordan, supra* at 589. Although defendant contends that he "was living there as a guest," he cites to no evidence in the record to that effect. Therefore, defendant lacks standing to object to the overhearing or "seizure" of the conversation.

Defendant also argues that *Llanes* is contrary to the pronouncements of the United States Supreme Court and our Supreme Court. Again, defendant has not cited any authority to support his assertion that the rule announced in *Llanes*—that a conversation carried on in voices loud enough to be heard outside a home is a conversation knowingly exposed to the public and, therefore, the defendant has no reasonable expectation of privacy in the conversation—is

contrary to any pronouncement by either Court. Defendant has, therefore, abandoned the issue. *Harris, supra*; *Kelly, supra*. The trial court did not err in concluding that Millin and Krueger did not violate defendant's constitutional protection against unreasonable searches and seizures.

Under MCL 750.539c, any person "who wilfully uses *any device* to eavesdrop upon [a private] conversation without the consent of all parties thereto" is guilty of a felony (emphasis added). Even if we assume that Millin and Krueger "eavesdropped" on defendant's conversation, see MCL 750.539a(2), eavesdropping did not violate MCL 750.539c, because Millin and Krueger heard what they heard with their ears, rather than with a device, as required under the statute. Device is defined as a "mechanical, electric, or electronic invention or contrivance," *Random House Webster's College Dictionary* (1997). Because there is no evidence that Millin and Kruger used a device to overhear the conversation, defendant's argument that Millin and Krueger violated MCL 750.539c is without merit. The trial court did not err in denying defendant's motion to suppress.

Defendant next claims on appeal that the trial court erred in allowing Officer Kevin Kosten to present improper expert testimony. We disagree with defendant's assertion, and review this unpreserved evidentiary issue for plain error affecting defendant's substantial rights, *People v Bauder*, 269 Mich App 174, 180; 712 NW2d 506 (2005).

Kosten testified that, upon seeing the pattern on the sole of McMichael's hiking boots, he immediately recognized the pattern as matching one of the sets of foot impressions left by the two armed robbers in the Hardee's parking lot. Kosten's testimony was not expert testimony. It was not based on any "scientific, technical, or other specialized knowledge." MRE 702. Rather, it was based solely on his visual perceptions, and his recognition was made immediately upon seeing the pattern on the soles of the hiking boots.

We also reject defendant's claim that Kosten's testimony was irrelevant. Because it was not uncommon for defendant to wear McMichael's hiking boots, Kosten's testimony made it more probable than not that defendant committed the armed robberies with Floyd. MRE 401. In addition, defendant's claim that Kosten's testimony was unfairly prejudicial, because jurors give "high credence" to experts, is baseless. Kosten did not testify as an expert, nor give expert testimony.

In addition, defendant claims the trial court erred when it sustained the prosecutor's objection to his statement, which he attempted to introduce through Deputy Dave Phillips, that he escaped from the van transporting him from the county jail to the courthouse, because, having not committed the armed robberies, he did not want to go to prison. According to defendant, his statement qualified under hearsay exceptions for a statement against penal interest, or an excited utterance. Because defendant did not assert either of these grounds when he argued for the admission of the statement, the issue is unpreserved. See *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993).

While statements admissible under MRE 804(b)(3) are not limited to direct confessions of guilt, the exception is "limited to statements which could have a deleterious effect on the declarant's own guilt." *People v Conte*, 152 Mich App 8, 12; 391 NW2d 763 (1986). Defendant's escape subjected him to criminal liability. See MCL 750.197(2). However, it was undisputed that defendant escaped, and therefore, it is not apparent that defendant's statement

explaining his escape could have a "deleterious effect" on his interests. Accordingly, the trial court did not plainly err when it failed to admit defendant's statement as a statement against penal interest.

To qualify as an excited utterance under MRE 803(2), the statement must have arisen from a "truly startling occasion." *People v Bowman*, 254 Mich App 142, 146; 656 NW2d 835 (2002). It is also not apparent that defendant's escape was a "truly startling occasion" for him. He freed himself from his handcuffs by using a paper clip and a staple that were in one of his clothing pockets, suggesting that defendant's escape was a planned event rather than a startling occasion. The trial court did not commit plain error when it failed to admit defendant's statement as an excited utterance.

Defendant also asserts that, because the trial court let the prosecutor present testimony regarding his escape, fundamental fairness and due process required the trial court to allow defendant to explain why he escaped. Defendant, however, has not cited any authority for the proposition that a hearsay statement, which fails to qualify for admission under any exception, is admissible for reasons of fairness. Defendant has abandoned the issue. *Harris, supra*; *Kelly, supra*.

Defendant further claims on appeal that the prosecutor denied him a fair trial, resulting in a deprivation of his liberty without due process of law. We review unpreserved claims of prosecutorial misconduct for plain error affecting the defendant's substantial rights. *People v Goodin*, 257 Mich App 425, 431; 668 NW2d 392 (2003).

Defendant first asserts that the prosecutor, in violation of her duty under *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), failed to inform the jury that Floyd, upon pleading guilty to armed robbery, and agreeing to testify truthfully against defendant, received a significant reduction in his minimum sentence. Under *Brady*, the prosecution must disclose to the defendant evidence in its possession that is exculpatory and material, regardless of whether the defendant requests the disclosure. *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007). The *Brady* requirement covers impeachment evidence, including the contents of pleas agreement with key government witnesses. *Giglio v United States*, 405 US 150, 153-155; 92 S Ct 763; 31 L Ed 2d 104 (1972); *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). Defendant has made no assertion that the prosecution failed to disclose to him the contents of Floyd's plea agreement. Accordingly, there was no *Brady* violation. See *id.* at 281. The prosecution informed the jury that Floyd was testifying pursuant to a plea deal. On cross-examination, defendant could have chosen to elicit the particulars of that deal for the jury, but he did not chose to do so.

Defendant also asserts that the prosecutor denied him a fair trial and caused a deprivation of his liberty without due process, by deliberately requesting the admission of irrelevant evidence, including the maroon sweatshirt found in defendant's bedroom, and the scissors found on McMichael kitchen counter, and eliciting the irrelevant and highly prejudicial testimony of Krueger, that all four persons inside the trailer were involved in the conversation overheard by officers.

However, a prosecutor's good faith effort to admit evidence does not constitute misconduct. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The maroon

sweatshirt and the scissors were relevant because the maroon sweatshirt matched the color of the sweatshirt worn by one of the armed robbers, and the scissors contained the same identifying mark as the knife used by one of the armed robbers. Accordingly, this evidence made it more probable that defendant committed the armed robberies with Floyd. MRE 401.

Similarly, Krueger's testimony was relevant. Krueger's conclusion, which was proper testimony from a lay witness, because it was based on Krueger's aural perceptions, MRE 701, made it less probable that Floyd was merely telling the other three occupants about the armed robberies. In addition, Krueger's testimony was not unfairly prejudicial because it did not inject considerations extraneous to the merits into defendant's trial. *People v Pickens*, 446 Mich 298, 337; 521 NW2d 797 (1994). Because the challenged evidence and testimony were admissible, we cannot say the prosecutor acted in bad faith, in either requesting the admission of the sweatshirt and scissors, or in eliciting Krueger's testimony. *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007).

Defendant further argues that the prosecutor engaged in misconduct when she assumed facts not in evidence in her closing statement. We disagree.

In a closing statement, a prosecutor may argue the evidence and all reasonable inferences arising therefrom, *Kelly, supra* at 641, but may not make a statement of fact unsupported by evidence. *People v Fisher*, 193 Mich App 284, 291; 483 NW2d 452 (1992).

Here, the prosecutor did not assume facts in evidence when she told the jury that Floyd did not receive a great plea agreement. Floyd testified that he pleaded guilty to armed robbery, and received a reduced sentence. The prosecutor was comparing Floyd's situation to a person who pleads guilty to a lesser crime, and receives no prison sentence. And, based on this comparison, Floyd did not get a great plea agreement. The prosecutor also did not assume facts in evidence when she told the jury that the witnesses were testifying to information that defendant did not want it to hear. Numerous witnesses, especially Floyd, provided testimony that incriminated defendant. Because defendant denied any participation in the armed robberies, it was reasonable to infer that defendant did not want the jury hearing the witnesses' testimony. In addition, contrary to defendant's assertion, the prosecutor never told the jury that Floyd was not smart enough to come up with a plan to incriminate defendant. Rather, the prosecutor argued that, based on the evidence, Floyd was a credible witness. A prosecutor may argue that a witness is credible. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997).

According to defendant, the prosecutor also assumed facts not in evidence on two occasions, when she argued to the jury that, before Millin and Krueger were able to knock on the door to McMichael's trailer, they overheard a conversation coming from inside the trailer, and when she also argued that Kosten found a set of hiking boots that matched one set of the foot impressions in the Hardee's parking lot. These statements were made in the prosecutor's opening statement, not her closing argument. "Opening [statements are] the appropriate time to state the facts to be proven at trial." *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). Based on a review of the record, the prosecutor's statements accurately forecasted the testimony elicited from Millin, Krueger, and Kosten. The prosecutor did not deny defendant a fair trial or cause a deprivation of his liberty without due process, either by assuming facts not in evidence or by misrepresenting the facts she planned to elicit at trial.

Defendant next claims on appeal that the trial court erred in scoring 15 points for offense variable (OV) 8, MCL 777.38, and ten points for OV 14, MCL 777.44. At the outset, we reject defendant's argument that the trial court improperly engaged in judicial factfinding, thus violating his Sixth Amendment right to a trial by a jury of his peers, as articulated by *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). *Blakely* does not affect Michigan's indeterminate sentencing scheme. *People v McCuller*, 479 Mich 672, 676-678; 739 NW2d 563 (2007).

Defendant asserts there was no evidence in the record to support the trial court's scoring of OV 8 and OV 14. We review a trial court's scoring decisions for an abuse of discretion. *People v Cox*, 268 Mich App 440, 453-454; 709 NW2d 152 (2005). We will uphold a scoring decision for which there is any evidence in support. *Id.*

A trial court may score 15 points for OV 8 "if a victim was asported to another place of greater danger or to a situation of greater danger." MCL 777.38(1)(a). A victim is asported to a place of greater danger when she is removed from a place of relative safety and taken to a place of greater isolation, even if the two places are in the building. See *People v Hack*, 219 Mich App 299, 313; 556 NW2d 187 (1996) (opinion by Sawyer, P.J.), disapproved on other grounds *People v Harmon*, 248 Mich App 522 (2001); *People v Piotrowski*, 211 Mich App 527, 529; 536 NW2d 293 (1995). Defendant and Floyd moved Vanarsdell from the "frontline," an area which could be seen by a person passing by outside, to the break room, a more isolated room, because it could not seen from the outside. Accordingly, there is evidence in the record to support the trial court's scoring of OV 8. We affirm the trial court's scoring of OV 8. *Cox, supra*.

Ten points may be scored for OV 14, if "[t]he offender was a leader in a multiple offender situation." MCL 777.44(1)(a). There is evidence in the record to support the trial court's finding that defendant was the leader. Floyd testified that it was defendant's idea to rob the restaurant; defendant took Vanarsdell's cellular telephone and keys; and defendant did most of the talking inside the restaurant. Accordingly, we affirm the trial court's scoring of OV 14. *Cox, supra*.

Defendant's last argument on appeal is that he was deprived of his constitutional right to counsel, because he did not receive effective assistance of appointed counsel. Because defendant did not move for a new trial or for a *Ginther*[2] hearing, our review of defendant's claims is limited to errors apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish a claim for ineffective assistance of counsel, a defendant must prove that his counsel's performance was deficient and that, under an objective standard of reasonableness, he was denied his Sixth Amendment right to counsel. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). He must also prove that his counsel's deficient performance was prejudicial to the extent that there is a reasonable probability that, but for counsel's errors, the outcome of

[2] *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973).

his trial would have been different. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant argues that his counsel was ineffective for failing to preserve the issues which we have reviewed for plain error. However, as analyzed above, defendant's arguments (regarding whether Kosten's testimony that he immediately recognized the pattern of the sole of McMichael's hiking boots to match one set of the foot impressions was irrelevant, unfairly prejudicial, and improper expert testimony; whether defendant's statement that he ran because, having not committed the armed robberies, he did not want to go to prison; and whether the prosecutor engaged in misconduct), are meritless. It was well established that counsel is not ineffective for failing to make a meritless or futile motion. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). In addition, defendant has failed to prove that, had counsel made the objections, the outcome of his trial would have been different. *Carbin, supra*.

Defendant also argues that counsel was ineffective for failing to object when detective Millin allegedly testified to out-of-court statements by Floyd. Detective Millin testified that he and detective Krueger interviewed Floyd after his arrest. We agree with the prosecution that Millin did not testify to out-of-court statements by Floyd. Rather, the prosecutor merely asked questions to determine whether the police had pressured Floyd into implicating defendant. Thus, any objection by defense counsel would have been futile.

Defendant also argues that his counsel was ineffective for failing to object when McMichael testified to Floyd's statements. We disagree. The testimony cited by defendant is McMichael's testimony that, immediately after the time of the crime, Floyd "comes in huffing and puffing saying he robbed it and knocked a dude over . . . ." Again, we agree with the prosecution's argument, in its well-prepared brief, that this hearsay was admissible under the excited utterance exception, MRE 803(3), and under the present sense impression exception, MRE 803(1). We also agree with the prosecution that this testimony was cumulative to Floyd's own testimony, since Floyd implicated himself in his testimony.

Also, because defendant has not shown that any objection to these out-of-court statements would have been sustained, we reject defendant's argument. As just stated, counsel is not ineffective for failing to make a meritless or futile motion. *Fike, supra*.

Finally, we reject defendant's claim that counsel was ineffective for failing to make an opening statement. The decision to waive an opening statement is a matter of trial strategy, *People v Calhoun*, 178 Mich App 517, 524; 444 NW2d 232 (1989), and we will not second-guess counsel on matters of trial strategy, *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Defendant was not denied the effective assistance of counsel.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Henry William Saad
/s/ Michael R. Smolenski