STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALLEN MARION,

Defendant-Appellant.

UNPUBLISHED
January 11, 2011

No. 293440
Wayne Circuit Court
LC No. 09-003275-FC

Before: FORT HOOD, P.J., and MURRAY and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. Defendant was sentenced, as a third habitual offender, MCL 769.11, to 50 to 75 years' imprisonment for the second-degree murder conviction, two years' imprisonment for the felony-firearm conviction, and one to five years' imprisonment for the felon in possession of a firearm conviction. We affirm.

Defendant first argues that a new trial is warranted because the trial court erred in admitting hearsay testimony of the officer in charge of this case. We disagree. We review a trial court's ruling to admit or exclude evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Where a trial court's decision is within the principled range of outcomes, no abuse of discretion will be found, and the reviewing court may properly defer to the trial court's judgment. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). We review preliminary questions of law pertinent to the admission of evidence de novo. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003). A trial court necessarily abuses its discretion when it admits evidence that is inadmissible as a matter of law. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

"Hearsay is an unsworn, out-of-court statement that is offered to establish the truth of the matter asserted." *People v Stamper*, 480 Mich 1, 3; 742 NW2d 607 (2007). Such a statement "is generally inadmissible unless it falls under one of the hearsay exceptions set forth in the Michigan Rules of Evidence." *Id*. In this case, defendant challenges as hearsay the testimony of the officer in charge regarding the nickname of a possible suspect in the shooting that he learned from the victim's family members. In response to the prosecution's question regarding whether the victim's family members named a potential suspect, the officer stated that they told him a

possible suspect's nickname. Defense counsel objected on hearsay grounds and requested that the statement be stricken from the record. Although the trial court never explicitly ruled on the objection, it impliedly sustained it, instructing the officer to limit his testimony to what he did, yet it never ordered the statement stricken from the record. We agree with defendant that the statement constituted hearsay and that no exception or exclusion applied to make its admission permissible. Further, this is not a case in which defense counsel simply failed to make the request for the testimony to be stricken. See e.g., *People v Brown*, 21 Mich App 579, 580-581; 175 NW2d 782 (1970). As such, the trial court abused its discretion in failing to order the testimony stricken from the record.

This does not end our inquiry, however, as we must still determine whether the error requires reversal and a new trial. The Michigan Supreme Court, in *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999), set forth the harmless error standard applicable in cases involving preserved, nonconstitutional error. Reversal is proper only where the defendant shows that the error resulted in prejudice. *Id*. at 495. In approaching this inquiry, "the effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error." *Id*.

Defendant argues that the error resulted in prejudice because the prosecution reiterated the hearsay testimony in closing argument. In closing argument, the prosecution told the jury that the officer received information from the victim's family regarding a suspect and eventually ran defendant's name through the database. Yet defense counsel did not object to *this* argument by the prosecutor; the error at issue is the statement made during the officer's testimony, not during the prosecution's closing argument. With respect to this error, it cannot be concluded that it is more probable than not that a different outcome would have resulted without the error. When the officer narrowed his testimony to explain what he did, rather than what individuals told him, the jury received the same information—namely, that the officer, one way or another, learned the nickname of a suspect. The jury also learned that a key witness later identified defendant, whom he knew by this nickname, as the individual who shot the victim. Thus, defendant has not shown that it is more probable than not that the jury would have acquitted him absent the trial court's failure to order the hearsay testimony stricken from the record. Further, although defendant acknowledges that the key witness was the only individual able to identify defendant as the shooter and had a personal interest in cooperating with authorities, the jury knew of these circumstances independent of the officer's testimony. In light of the record, it does not follow that a different result would have been more probable than not had the court stricken the hearsay testimony.

Defendant's other hearsay challenges are not properly preserved, and our review is limited to plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Reversal is proper only where the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of the defendant's innocence. *Id*. Defendant challenges as hearsay the testimony of the officer in charge regarding the name of possible witnesses that he obtained from the victim's family, and his decision to run defendant's name through the database and acquire his photograph. We disagree. In this portion of the officer's testimony, the officer merely described what he did, not what anyone told him. We also disagree with defendant's assertion that the officer's testimony regarding information that he received from the victim's

family members about female drug mules and a possible motive for the shooting constituted hearsay. The officer deduced a possible motive for the shooting from the information that he gathered. In other words, the officer's statements described his action and thought processes; they were not recitations of what an out-of-court declarant told him.

In his last hearsay challenge, defendant argues that the trial court erred in allowing the officer to reference police reports of break-ins. We disagree. The officer's testimony that he reviewed the police reports and deduced that someone was snooping in one of the drug mule's homes did not contain any out-of-court statement offered to prove the truth of the matter asserted. Rather, following the trial court's instruction, the officer merely described the actions in which he engaged.

Even assuming that these statements constituted hearsay, moreover, defendant has not shown plain error affecting his substantial rights. *Carines*, 460 Mich at 763. Had the trial court excluded the alleged hearsay testimony, the jury would still have had the key witness's testimony implicating defendant in the shooting on which to rely. Defendant has not shown, therefore, that the alleged errors resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id*.

Defendant next argues these alleged instances of hearsay denied him his constitutional right to confront the witnesses against him. This claim, too, is not properly preserved, and our review is limited to plain error affecting substantial rights. *Carines*, 460 Mich at 763. Criminal defendants have a state and federal constitutional right to be confronted with the witnesses against them. *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007); US Const, Am VI; Const 1963, art 1, § 20. "The Confrontation Clause prohibits the admission of all out-of-court testimonial statements unless the declarant was unavailable at trial and the defendant had a prior opportunity for cross-examination." *Chambers*, 277 Mich App at 10. Statements made during a police interrogation are testimonial where the circumstances objectively indicate that the investigation's primary purpose is to establish past events potentially relevant to a later criminal prosecution, and not to meet an ongoing emergency. *People v Bryant*, 483 Mich 132, 139; 768 NW2d 65 (2009).

As mentioned above, most of the challenged testimony did not constitute hearsay, and thus, the Confrontation Clause is not implicated. "The Confrontation Clause . . . bars the admission of testimonial *hearsay* unless the declarant is unavailable and the defendant has had a prior opportunity for cross-examination." *People v Payne*, 285 Mich App 181, 197; 774 NW2d 714 (2009) (emphasis added). We agree with defendant, however, that it violated defendant's right to confront the witnesses against him when the officer testified regarding the nickname that the victim's family members told him. The testimony constituted hearsay, it was testimonial in nature, the family members offered the nickname during the course of a criminal investigation, and the information was not necessary to meet an ongoing emergency. Further, there is no indication that the victim's family members were unavailable, and defendant never had an opportunity to cross-examine them. Nonetheless, for the same reasons outlined above, defendant has not shown that the error affected his substantial rights.

Defendant next argues that the trial court erred in admitting evidence of a shooting that occurred at the home of the key witness's grandmother just two days before the preliminary

examination in this matter, overruling defense counsel's objection that the evidence was irrelevant and more prejudicial than probative. We review a trial court's ruling to admit or exclude evidence for an abuse of discretion, *Starr*, 457 Mich at 494, and preliminary questions of law pertinent to the admission of evidence de novo, *Washington*, 468 Mich at 670-671.

The Michigan Rules of Evidence define relevant evidence as evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; *People v Yost*, 278 Mich App 341, 355; 749 NW2d 753 (2008). Relevant evidence is generally admissible, but may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403; *People v McGhee*, 268 Mich App 600, 637; 709 NW2d 595 (2005).

Defendant emphasizes that, aside from the timing of the shooting, no evidence exists connecting defendant, who was incarcerated at the time, to the shooting that occurred at the home of the key witness's grandmother. Defendant also points out that, because the key witness was cooperating with authorities in other matters, individuals other than defendant had a motive to carry out the shooting, making the evidence irrelevant or overly prejudicial. We disagree that admitting the evidence was improper on these grounds.

The admissibility of evidence on relevancy grounds is a matter of judicial discretion. *People v Flores*, 92 Mich App 130, 134; 284 NW2d 510 (1979). Threats against witnesses are relevant and generally admissible to demonstrate the defendant's consciousness of guilt, and it is for the jury to determine the significance of a threat in conjunction with the other evidence presented. *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996). This is true, however, only where there is evidence connecting the defendant to such threats. *People v Walker*, 150 Mich App 597, 603; 389 NW2d 704 (1985). We agree with defendant that the timing of the shooting offers a rather tenuous connection between him and the shooting, particularly considering that defendant was incarcerated when it occurred. Nonetheless, even absent a sufficient connection, third-party threats are relevant and admissible to explain why a witness has provided inconsistent statements. *People v Clark*, 124 Mich App 410, 412-413; 335 NW2d 53 (1983).

Defendant points out that there is no evidence that the two witnesses who appeared fearful at trial knew that the shooting occurred. In addition, defendant argues, neither man testified at the preliminary examination, and they were never questioned regarding the shooting during their testimony at trial. Even considering these circumstances, however, in our view, the trial court reasonably determined that the shooting was relevant given its proximity to the preliminary examination and its observation of the witnesses' noticeably fearful demeanor at trial. Even from the trial transcript, it is clear that the witnesses were reluctant to testify. The circumstances that defendant highlights go to the weight of the evidence, not its admissibility, which is a matter properly reserved for the trier of fact. See *People v Wager*, 460 Mich 118, 126; 594 NW2d 487 (1999). Further, contrary to defendant's assertion, the evidence did help to explain inconsistencies in the witnesses' statements. For instance, one of the fearful witnesses previously provided a detailed statement to police, yet at trial insisted that he could not recall anything that took place on the day of the incident, denied ever making the earlier statement, and

maintained that he had never seen defendant before seeing him in the courtroom. The trial court, therefore, did not abuse its discretion.

Defendant next argues that a new trial is warranted because the trial court erred in failing to provide a limiting instruction regarding how the jury could consider the evidence of the shooting. We disagree. For unpreserved allegations of nonconstitutional error, as here, our review is limited to plain error affecting substantial rights. *People v Gonzalez*, 468 Mich 636, 643; 664 NW2d 159 (2003). As this Court held in *Lopez v GMC*, 224 Mich App 618, 635; 569 NW2d 861 (1997), where the party alleging an error related to the unlimited admission of evidence failed to request a limiting instruction in the trial court, and such instruction would have cured the error, the issue is considered waived on appeal. Here, a cautionary instruction would have corrected the alleged error. Moreover, the lack of an instruction did not prejudice defendant. Indeed, even without a limiting instruction, during closing argument, the prosecution urged the jury to consider the evidence only as an explanation for why the two fearful witnesses presented inconsistent testimony. In addition, even had the evidence of the shooting at the home of the key witness's grandmother never been presented to the jury, the jury would still have been permitted to rely on the key witness's testimony implicating defendant as the shooter to support his conviction. Accordingly, a new trial is not warranted.

Defendant next argues that statements made during the prosecution's closing argument denied him a fair trial. We disagree. Because this claim is not properly preserved, we review the alleged misconduct for plain error affecting substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

Prosecutors are permitted to argue the evidence and all reasonable inferences derived from that evidence as it relates to their theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). "[A] prosecutor's comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003). For claims of prosecutorial misconduct, the question for the court is whether the prosecution's statements deprived the defendant of a fair trial. *Bahoda*, 448 Mich at 263-264.

To support this claim, defendant first argues that the prosecution, during closing argument, improperly offered testimony of the officer in charge relating to police reports and what the victim's family members told him. With respect to the reports, they were not being offered to show that the individuals who reported break-ins to the police were telling the truth, but merely that reports of break ins were made, that the officer reviewed them, and that they tend to corroborate the key witness's story about a drug transaction gone bad. Similarly, with respect to the prosecution's reference to what family members told the officer, the prosecution did not make the reference in order to establish that the family's identification of a possible suspect was accurate, but only to explain why the officer decided to run defendant's name through the database. Because the prosecution did not offer any out-of-court statements for the truth of the matter asserted, on this ground, no misconduct occurred.

Defendant's second allegation of misconduct is that the prosecution improperly bolstered the key witness's credibility. Prosecutors may vouch for witnesses' credibility so long as they do not imply that they have special knowledge or support their voucher with the authority or

prestige of the prosecutor's office. *Bahoda*, 448 Mich at 276; *People v Smith*, 158 Mich App 220, 232; 405 NW2d 156 (1987). The alleged error relates to the following passage from the prosecution's closing argument:

> But in receiving that benefit, [the key witness] had to get on the stand and testify truthfully, ladies and gentlemen, not come up with some lie. And before agreements are made, there's [sic] processes at the U.S. Attorney's Office, the DEA, the Wayne County Prosecutor's Office, where we try to test the credibility of the witness. And so that happens before deals are made.

In reviewing this passage in context, we conclude that the prosecution's statement that the key witness had an incentive to tell the truth because his cooperation with authorities would ultimately benefit him did not constitute misconduct. A prosecutor does not imply that he or she has special knowledge simply by arguing that a witness has no reason to lie. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). The prosecution's second statement, however, presents a closer case.

In *Smith*, 158 Mich App at 231-232, this Court found error requiring reversal where the prosecutor argued that the prosecutor's office would never have offered the witness a plea bargain if the witness had perpetrated the crime. This Court held that the prosecutor improperly bolstered the witness's credibility by stating that the prosecutor's office and the police engage in a careful investigation of murder charges before cutting deals. *Id*. at 232. Although the statement here is arguably not as offensive as the one in *Smith*, we hold that the prosecutor's statement about how the prosecutor's office tests the credibility of witnesses before cutting deals amounted to misconduct.

Nonetheless, a curative instruction could have removed any risk of prejudice that the tainted statement created, yet defense counsel neglected to request one. "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Ackerman*, 257 Mich App at 449. Further, with respect to the impropriety created, the trial court's instruction, that arguments of attorneys are not evidence, worked to dispel any prejudice. *Bahoda*, 448 Mich at 281. For these reasons, defendant has not shown plain error affecting his substantial rights, and a new trial is unwarranted.

In his next argument on appeal, defendant claims that he is entitled to a new trial because he received ineffective assistance of counsel. We disagree. Whether a defendant received effective assistance from his trial counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review findings of fact for clear error, and questions of constitutional law de novo. *Id*. In reviewing an ineffective assistance of counsel claim, "[a] judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id*. For unpreserved claims, as here, however, our review is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

In *People v Pickens*, 446 Mich 298, 308-327; 521 NW2d 797 (1994), the Michigan Supreme Court adopted the federal standard for ineffective assistance of counsel set forth in *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), for which the

defendant must establish two requirements. First, the defendant must show that he received deficient assistance from counsel, meaning that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 US at 687-688. Second, the defendant must show that counsel's deficient performance resulted in prejudice, meaning that, but for counsel's errors, a reasonable probability exists that a different outcome would have resulted. *Id*. at 687, 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694.

Defendant argues that he received ineffective assistance with respect to all of the allegations of impropriety presented on appeal, either because defense counsel failed to object to the admission of impermissible evidence, failed to request a limiting instruction from the trial court regarding such evidence, or failed to object to improper prosecutorial statements during closing argument. As outlined above, however, many of the errors that defendant alleges are without merit. Trial counsel cannot be expected to argue meritless positions. *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995). Moreover, defendant offers no argument in his brief to overcome the strong presumption that counsel's failure to make objections or ask for limiting instructions constituted sound trial strategy, *e.g.*, to avoid emphasizing the tainted evidence or improper line of argumentation to the jury. *People v Lawless*, 136 Mich App 628, 635; 357 NW2d 724 (1984). Finally, for the same reasons previously mentioned, defendant has not shown that the alleged errors have caused him prejudice such that a reasonable probability exists that the result would have been different in their absence.

Defendant raises two additional issues in his supplemental brief on appeal. First, defendant argues that the prosecution presented insufficient evidence that he perpetrated the crimes. We review the record in a claim alleging insufficient evidence de novo to determine whether the evidence presented at trial, when viewed in the light most favorable to the prosecution, was sufficient to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

To support a conviction of second-degree murder, the prosecution must establish four elements: "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Identity of the defendant as the person who committed the alleged offense is an essential element in every criminal prosecution. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). "Identity may be shown by either direct testimony or circumstantial evidence . . . ." *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). Reasonable inferences arising from circumstantial evidence can provide sufficient proof for conviction. *Carines*, 460 Mich at 757.

Defendant argues that, other than inadmissible hearsay and innuendo offered during the testimony of the officer in charge and the key witness in this case, the prosecution presented no direct evidence connecting him to the crime. Defendant also contends that no circumstantial evidence exists to support an inference that he perpetrated the crime. We disagree. First, as previously discussed, the officer's testimony either did not constitute hearsay or resulted in harmless error. Second, the statements that defendant alleges amounted to mere innuendo relate to the suspected motive for the shooting, not the identification of defendant as the perpetrator. Motive, however, is not an element of murder. *People v Herndon*, 246 Mich App 371, 412-413;

633 NW2d 376 (2001). Although motive may be relevant to establish the requisite intent of the crime, it is not essential, and defendant does not challenge the element of malice as lacking, but only his identity as the perpetrator. *Id*. at 412. Here, the key witness identified defendant, at trial, as the shooter, another witness identified defendant as the shooter in his statement to the police, and the victim's family members provided defendant's nickname as a potential suspect to the officer in charge. Viewing the evidence in the light most favorable to the prosecution, we must take the statements of these witnesses as true. As such, sufficient evidence existed for a reasonable jury to find that defendant perpetrated the crime beyond a reasonable doubt.

In his final claim on appeal, raised in his supplemental brief, defendant argues that instances of prosecutorial misconduct entitle him to a new trial or an evidentiary hearing. For unpreserved claims, allegations of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *Ackerman*, 257 Mich App at 448. Under plain error review, this Court will reverse only where the complained misconduct "resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence," and where a curative instruction could not have alleviated the prejudicial effect. *Id.* at 448-449.

Defendant first argues that the prosecution suppressed testimony of the victim's family members, whom the officer in charge testified had identified defendant as a potential suspect in the shooting. A defendant's right to due process is offended where the prosecution suppresses material evidence that is favorable to him and may have affected the outcome of the trial. *People v Tracey*, 221 Mich App 321, 325; 561 NW2d 133 (1997); *People v Canter*, 197 Mich App 550, 568-569; 496 NW2d 336 (1992). Defendant's argument is unavailing given that the victim's family members implicated defendant in the crime. The evidence being inculpatory, rather than exculpatory, suppressing the testimony did not offend defendant's due process rights, and an evidentiary hearing is unwarranted. *Tracey*, 221 Mich App at 325.

Further, to support this claim, defendant simply alleges that the victim's family members would most likely offer exculpatory testimony. A defendant, however, must make some showing that the issue raised has enough merit to justify remanding the case for an evidentiary hearing. MCR 7.211(C)(1)(a); *People v LaPlaunt*, 217 Mich App 733, 735-737; 553 NW2d 692 (1996). Unsupported allegations, as here, are insufficient to warrant remand. Moreover, we conclude it nearly inconceivable that the murder victim's family members would profess in court that defendant, whom they previously identified as the shooter, is actually innocent. Defendant being the only suspect in this case, his conviction promises their only source of justice.

In his second allegation of prosecutorial misconduct, defendant argues that the prosecution intentionally delayed indicting him in order to gain a tactical advantage in the case, and that he suffered substantial prejudice thereby, entitling him to a new trial or an evidentiary hearing. The Supreme Court, in *United States v Lovasco*, 431 US 783, 791; 97 S Ct 2044; 52 L Ed 2d 752 (1997), found that prosecutors have no duty to file charges immediately upon finding probable cause of a suspect's guilt when they are not yet satisfied that they will be able establish proof beyond a reasonable doubt at trial. Unlike in cases where the prosecution intentionally delays indicting a suspect to gain a tactical advantage, "to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time." *Id*. at 796.

In *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000), overruled in part on other grounds *People v Miller*, 482 Mich 540; 759 NW2d 850 (2008), this Court stated the following regarding claims of prearrest delay:

> Before dismissal may be granted because of prearrest delay there must be actual and substantial prejudice to the defendant's right to a fair trial and an intent by the prosecution to gain a tactical advantage. To be substantial, the prejudice to the defendant must meaningfully impair his ability to defend against the charges against him in such a manner that the outcome of the proceedings will likely be affected. Proof of "actual and substantial" prejudice requires more than just generalized allegations. [Internal citations omitted.]

Here, defendant's only support for his claim of delay is that the prosecution took two and a half years to produce probable cause to arrest him. Defendant has shown neither actual prejudice nor an intent to gain a tactical advantage. Instead, it appears that defendant "rel[ies] solely on the real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence be lost," which is not alone enough to establish a due process violation. *United States v Marion*, 404 US 307, 325-236; 92 S Ct 455; 30 L Ed 2d 468 (1971). This Court acknowledged as much in *People v Patton*, 285 Mich App 229, 236-237; 775 NW2d 610 (2009), stating that "[m]ere delay between the time of the commission of an offense and arrest is not a denial of due process." Here, a mere delay in time is all that defendant sets forth in his brief to support his claim, and a new trial or evidentiary hearing is unwarranted.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Christopher M. Murray
/s/ Deborah A. Servitto