STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 22, 2014
v DEVONTE DWAYNE REID, Defendant-Appellant.	No. 312091 Genesee Circuit Court LC No. 11-029465-FC
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v QUENTIN LAMAR GREEN, Defendant-Appellant.	No. 312492 Genesee Circuit Court LC No. 11-029464-FC
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v LATRELL DEMETRIUS WINDOM, Defendant-Appellant.	No. 312496 Genesee Circuit Court LC No. 11-029466-FC

Before: BORRELLO, P.J., and WHITBECK and K. F. KELLY, JJ.

PER CURIAM.

In this consolidated appeal, the three defendants were tried together, but in front of separate juries. In Docket No. 312091, a jury convicted Devonte Dwayne Reid of felony murder as to Tim Baker, MCL 750.316(b), two counts of assault with intent to murder as to Remecoe

Baker and Shadrekis Jackson, MCL 750.83, and felony-firearm, MCL 750.227b. He was sentenced to life imprisonment for the murder conviction, 285 months to 600 months' imprisonment for each of the assault convictions, and two years' imprisonment for the felony-firearm conviction.

In Docket No. 312492, a jury convicted Quentin Lamar Green of felony murder as to Tim Baker, two counts of assault with intent to murder as to Remecoe Baker and Shadrekis Jackson, and felony-firearm. He was sentenced to life imprisonment for the murder conviction, 225 months to 600 months' imprisonment for each of the assault convictions, and two years' imprisonment for the felony-firearm conviction.

In Docket No. 312496, a jury convicted Latrell Demetrius Windom of second-degree murder as to Tim Baker, MCL 750.317, two counts of assault with intent to murder as to Remecoe Baker and Shadrekis Jackson, and felony-firearm. He was sentenced to life imprisonment for the murder conviction, 396 months to 600 months' imprisonment for each of the assault convictions, and two years' imprisonment for the felony-firearm conviction.

Finding no errors requiring reversal, we affirm.

I. BASIC FACTS

This case arises out of a fatal shooting that occurred on December 12, 2010, at the home of Tim Baker (Baker) on West Ridgeway in Flint. Remecoe Baker (Remecoe), Baker's nephew, did not have to report to work at McDonald's that day because there was a snow storm. Remecoe picked up his girlfriend, Jackson, and took her to Baker's house. Remecoe and Jackson watched a movie on his uncle's couch and both fell asleep.

Remecoe was woken up by a knock at the door and heard "a bunch of footsteps just running – seem like running in the house." Remecoe was shot less than ten seconds later in the hand and arm. He passed out and then woke up again when he heard a gunshot outside. Jackson was lying on the floor and had also been shot. Remecoe could not say how many individuals came in and could only describe one as wearing a red hoodie.

Jackson was woken up when she heard Baker's cell phone ring. She fell back to sleep and then heard a knock on the door. Baker opened the door and let someone in. The two men were standing at the door when "some more people came . . .they just opened the door and walked in." A man said "don't move and they just started shooting." Jackson was shot in the leg and neck and rolled from the couch to the floor. The shooting moved to the outside of the house. Jackson could not move; she played dead so that they would not do something else to her. After the shooting outside stopped, several individuals came back into the house. Jackson thought there were four individuals. All of the individuals were dressed in black, except for one man who was in a red hoodie. She heard the man in the red hoodie say "I just killed this b****." She also heard them talking about looking for something. They rummaged through the house and they also checked the basement.

Remecoe had run for cover under the basement stairs. At least two individuals came back into the house and into the basement. One voice said to "go back upstairs and check, finish checking." The individual in the red hoodie was trying to get out the back door. Remecoe could

hear people upstairs "tearing stuff up and one saying I didn't try to shoot – shoot to kill this b****."

Shelly Conway lived next door to Baker. On the night of the shooting, she noticed a vehicle parked in front of Baker's house. She heard gunshots and then Baker crawled to her house. He had been shot multiple times. Once he was safely in her home, Conway called 911. At first Baker was able to talk, but then he lost consciousness. Conway testified that "[t]he only thing I seen was at that car it was a young fella, um getting in the driver side and he took off . . ." Conway saw the man get into the car, but was not sure whether she saw him shooting. He was wearing dark clothing – red or gray. In a statement to police, Conway stated that the man had a gun. The man was yelling something, but she could not discern what he was saying. Conway "can't put a face to – to no one in particular that night."

Benny Goodman testified that he lived across the street from Baker. On the night of the shooting, Goodman was playing video games when he heard gunshots. Shootings in the neighborhood were a matter of course, so he was not particularly alarmed. Goodman first looked out the window and then went outside to get a better view. Goodman observed Baker and three other individuals "exchanging gun fire." Baker was standing on his porch and the other individuals were in Baker's driveway. Goodman also observed a car that "took off when I first looked out the window." It appeared to be a black Grand Am and the driver was wearing dark clothing. The three other individuals were running from Baker's house to the driveway. They were also dressed in dark clothing and one was wearing a distinctive red hoodie. Goodman observed four guns – one in Baker's hands and one in each of the three men's hands. He could not say whether the driver of the vehicle also had a gun. Goodman watched as Baker fell to the ground and crawled to a neighbor's house. Two of the individuals went back into Baker's house and the one wearing the red hoodie ran around the side of the house. Goodman observed the individual in the red hoodie after he was taken into police custody.

Officers had received a dispatch to the home on Ridgeway in response to the shooting. Defendants Green and Windom were apprehended after a foot chase. Defendant Reid was found under an overhang approximately three houses down the street from Baker's home. None of the defendants had a gun in their possession at the time of their arrests.

Corey Bracey-Bradley testified that he was the driver that day and was testifying against his co-defendants as part of a plea agreement with the prosecutor. On the night in question, Bracey-Bradley met up with Green and Windom. Bracey-Bradley was driving his girlfriend's grandmother's navy blue Impala. All three men were wearing black. They drank some cough syrup and smoked "a couple blunts" of "weed." Green suggested they buy more weed so "we got to callin' people and see if we could find some weed." Green found someone "on Ridgeway."

Bracey-Bradley testified that, even though Green had money "our plans wasn't to buy no weed." Instead, they were planning to "rob the weed house." They stopped at the store where Green bought cigarettes and then picked up defendant Reid, who was wearing a red hoodie. "Everybody" was armed but Bracey-Bradley was not sure "who had what gun." Bracey-Bradley had his own gun – a .40 caliber – and Green had two guns, one of which he handed to Reid when they arrived at the weed house. Bracey-Bradley acknowledged that Reid got into the car *after*

the plans to rob Baker were finalized, but that Green handed Reid a gun and said "we're gonna go hit this lick."

Bracey-Bradley testified that once they got to the home on Ridgeway, the plan was to "get the door open." Bracey-Bradley and Reid went to the door first. The plan was for Windom and Green to come in behind them after the door was open. A man with dreadlocks answered the door. Bracey-Bradley explained that "after he seen the other people coming in behind us, he tried to grab me by the throat" and scratched Bracey-Bradley's neck. Bracey-Bradley "swiped [Baker's] hands down and took off." Windom and Green came in and shouted "nobody move." Bracey-Bradley heard gunshots as he was running back to the car, which was parked right in front of the house. He denied firing any shots.

In terms of physical evidence found while tracking the footprints in the snow, officers retrieved a black stocking knit cap, black ski mask, part of a sleeve or jacket cuff, and a .45 caliber gun. The physical evidence found in the home consisted of four bullets in the front door and eight spent .40 caliber shell casings from the living room floor. Clothes were scattered, dresser drawers were open, and the stove had been pulled away from the wall. Officers did not find shell casings outside because of the significant snowfall.

Testing of the .45 caliber gun found in the snow revealed that there were eleven live rounds and one bullet was missing. No usable fingerprints were recovered from the gun, but DNA evidence was compared to those of all the defendants. Baker and Reid were excluded as donors, but the known reference samples of Green, Windom and Bracey-Bradley could not be excluded as possible donors to the DNA. A .45 caliber bullet was taken from Baker's body in the autopsy, but it was not clear whether it came from the gun that was found. Another bullet from the victim came from a .40 caliber gun. Based on testing, the medical examiner concluded that over three handguns were used – at least one .45 caliber and at least two .40 caliber.

The officer in charge of the case, Sergeant Mike Angus, had the opportunity to interview each of the three defendants. Each of the defendants' stories changed numerous times. Green gave a written statement admitting that they went to the home on Ridgeway to buy weed. Green denied knowing that the plan was to rob Baker, though he knew that Reid was armed with a .40 caliber gun. Green initially stayed in the car, but then went to the front door to see what was taking so long. He got part way there when he heard gunshots. After the shooting, Green went back into the house with Reid and Windom. Reid nudged Jackson and said "I just shot this b****." Green ran in the backyard when police arrived. He denied ever having a weapon that day.

Like Green, Reid changed his story during the interviews. Initially, Reid denied knowing anything about the shooting. Later, Reid revised his statement. He could not remember who was driving, but described an Impala. The men were originally planning to buy a pound of marijuana, which would have cost approximately $1,000. Reid told Angus that he, Bracey-Bradley and Windom approached the house. Reid went to use the bathroom and when he came out the homeowner got into a "tussle" with the driver. Gunfire ensued and they all ran out the front door. Angus testified about a letter that Reid wrote to Windom while awaiting trial. It suggested that Windom change his statement.

In Windom's statement to Angus, he indicated that he was with Green on foot at the time of the shooting. They were going to "get some weed." At some point, an individual wearing red joined them, whom he identified as "Tayo" (Reid). They were on Ridgeway when Baker yelled out to them from his porch, asking if they wanted to buy some weed. When they said "no," Baker became belligerent and began to shoot at them. Initially, Windom told Angus that only Reid had a gun. Windom later admitted that he had a .45 caliber handgun. In a different version, Windom told Angus that while Green was planning on buying marijuana, Reid said he was going to "take" it. Windom was not sure if Reid was serious. The plan was for Reid and Green to approach the homeowner and Windom would wait outside. Reid and the homeowner started arguing once inside the house. Windom stepped into the house to see what was going on. The homeowner fired a gun and Reid fired back. Windom admitted to shooting one round out of his .45. They went back into the house after the shooting to look for people or weed in the basement. Angus told Windom that a gun was recovered near the scene. Windom admitted it was his and also indicated that Green's DNA might be found on it because Green also handled the gun. At no time in any versions of events did Windom mention Bracey-Bradley, although he did reference an Impala.

Defendants were convicted and sentenced as outlined above. They now appeal as of right.

II. DOCKET NO. 312091 (DEFENDANT REID)

A. "SHACKLING"

Reid argues that he was denied his due process rights when he was forced to appear in court in shackles without a finding by the trial court that he was likely to escape or disrupt the proceedings. Reid's theory of the case was that he was merely present when the shooting occurred. He argues that because there was no forensic evidence or eyewitness testimony linking him to the crime, the shackles may have contributed to the guilty verdict. Alternatively, Reid argues that trial counsel was ineffective for failing to raise the issue.

Generally, this Court reviews for an abuse of discretion the trial court's decision to shackle a defendant at trial. *People v Payne*, 285 Mich App 181, 186; 774 NW2d 714 (2009). However, trial counsel did not object to shackling and the trial court was not asked to exercise any discretion. Reid filed a motion in this Court to remand for an evidentiary hearing on the issue, but the motion was denied "for failure to persuade the Court of the necessity of remand at this time." *People v Reid*, unpublished order of the Court of Appeals, entered May 29, 2013 (Docket No. 312091). As such, we review the issue for plain error that affected the defendants' substantial rights. *People v Carines*, 460 Mich 750, 763; 59 NW2d 130 (1999). "[R]eversal is warranted only if the error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings regardless of the guilt or innocence of the accused." *People v King*, 297 Mich App 465, 473; 824 NW2d 258 (2012).

As to Reid's ineffective assistance of counsel claim based on counsel's failure to object to shackling, there was no *Ginther*[1] hearing and this Court's review is limited to errors apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

The federal constitution prohibits the use of visible shackles during trial unless the use is justified by an essential state interest, such as courtroom security, which is specific to the defendant on trial. *Deck v Missouri*, 544 US 622, 624; 125 S Ct 2007; 161 L Ed 2d 953 (2005), abrogated in part on other grounds in *Fry v Pliler*, 551 US 112; 127 S Ct 2321; 168 L Ed 2d 16 (2007). A defendant may be shackled in court only on a finding supported by record evidence that shackling is necessary to prevent escape, to prevent injury to persons in the court, or to maintain order. *People v Dunn*, 446 Mich 409, 425; 521 NW2d 255 (1994). A defendant should not be subject to restraint unless the court, for reasons entered on the record, finds that restraint is reasonably necessary to maintain order. *Id*. at 426. However, even where a trial court abuses its discretion in shackling a defendant, the defendant must show prejudice as a result of the use of restraints in order to be entitled to relief. *People v Payne*, 285 Mich App 181, 186; 774 NW2d 714 (2009)("[A] defendant is not prejudiced if the jury was unable to see the shackles on the defendant.")

Here, although the trial court did not give a specific reason why Reid needed to wear restraints, the reason may be gleaned from the unusual circumstances of this particular case wherein three different defendants were tried together in front of three different juries. The crowded courtroom posed a logistical problem at times during trial. The conditions created an inherent safety issue and, had the trial court stated as much on the record, such a reason would have amounted to an essential state interest – maintaining courtroom security and order. *Deck*, 544 US at 624; *Dunn*, 446 Mich at 425.

It is also obvious from our review of the record that Reid's trial counsel and the trial court took great pains to ensure that Reid's restraints could not been seen by the jurors. Thus, even if the trial court abused its discretion in requiring Reid to be shackled, there is nothing on the record to suggest that he was prejudiced. Reid cannot show prejudice as a result of the use of restraints and, therefore, is not entitled to relief. *Payne*, 285 Mich App at 186.

In order for Reid "[t]o prevail on a claim of ineffective assistance of counsel, [he] must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) the resultant proceedings were fundamentally unfair or unreliable." *People v Brown*, 294 Mich App 377, 387-388; 811 NW2d 531 (2011). Reid's claim must fail because, as previously stated, there is absolutely nothing in the record to suggest that any of the jurors observed the restraints and, therefore, there was no resultant prejudice.

B. JURY QUESTIONS

[1] *People v Ginther*, 390 Mich 436, 442–443; 212 NW2d 922 (1973).

Reid argues that the trial court abused its discretion when it permitted the jurors to submit questions to the witnesses pursuant to MCR 2.513(I). We disagree.

A trial court's decision to allow juror questions is reviewed for an abuse of discretion. *People v Heard*, 388 Mich 182, 188; 200 NW2d 73 (1972). Reid's claim that allowing the jury to participate in questioning witnesses resulted in a denial of due process is a constitutional question that this Court reviews de novo. *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999).

MCR 2.513(I) provides:

> Juror Questions. The court may permit the jurors to ask questions of witnesses. If the court permits jurors to ask questions, it must employ a procedure that ensures that such questions are addressed to the witnesses by the court itself, that inappropriate questions are not asked, and that the parties have an opportunity outside the hearing of the jury to object to the questions. The court shall inform the jurors of the procedures to be followed for submitting questions to witnesses.

The parties and the trial court acknowledged that the juries were asking a number of questions. In fact, Reid's trial court moved "for a mistrial based on the fact that we've gone into areas with answers that either Sergeant Angus or questions that were answered by other witnesses that go beyond what is really fair for an even playing field for this trial." Nevertheless, this practice was sanctioned by *People v Heard*, 388 Mich 182; 200 NW2d 73 (1972):

> The practice of permitting questions to witnesses propounded by jurors should rest in the sound discretion of the trial court. It would appear that in certain circumstances, a juror might have a question which could help unravel otherwise confusing testimony. In such a situation, it would aid the fact-finding process if a juror were permitted to ask such a question. We hold that the questioning of witnesses by jurors, and the method of submission of such questions, rests in the sound discretion of the trial court. The trial judge may permit such questioning if he wishes, and we hold that it was error for the judge to rule that under no circumstances might a juror ask any questions. [*Id.* at 187-188.]

The court rule embodies *Heard's* holding and we see no reason to disturb it. We reject Reid's suggestion to follow the Minnesota Supreme Court's decision in *State v Costello*, 646 NW2d 204, 215 (Minn, 2002). We are not bound by the decisions of courts of other states; rather, we are bound by our Supreme Court's holding in *Heard* and the court rule. *People v Jackson*, 292 Mich App 583, 595 n 3; 808 NW2d 541 (2011).

C. RIGHT TO PRESENT A DEFENSE

Reid argues that the trial court abused its discretion in excluding Shakayla Eaton as a witness as a discovery sanction for failing to include her in the witness list. Reid further argues that the trial court abused its discretion when it limited the questions the attorneys could ask Bracey-Bradley on cross-examination.

"A trial court's decision to permit or deny the late endorsement of a witness is reviewed for an abuse of discretion. A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

Whether a defendant was denied the constitutional right to present a defense is reviewed de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

1. LATE-ENDORSED WITNESS

MCR 6.201(a)(1) requires parties to disclose their witness lists no later than 28 days before trial. In contravention of this requirement, at the start of the third day of trial, counsel for defendant Green, Kenneth Scott, moved to file a second amended witness list to include Green's sister, Eaton, as a witness. The prosecutor objected because the amendment did not come within 28 days of trial. As an offer of proof, Scott indicated "my understanding is that she will testify is that she picked up Mr. Bradley and his girlfriend that night. And that Mr. Bradley indicated to her his involvement in this particular crime. In fact he even admits that he's the shooter. But he says this in front of Mrs. Eaton . . ." Upon inquiry from the court, Angus testified that he remembered receiving a "tip" that Eaton may have had information on the case. However, when Angus received this information, he was not in a position to write the information down. He asked her to call again later when he could discuss the matter in further depth. The trial court denied Green's late endorsement, stating: "We cannot use that witness because she's family. She knew about all of this. She could have come forward along [sic] time ago. Her name was provided by family to Sergeant Angus. They could well have provided her name to Mr. Scott. So it's a surprise witness and we're not going to use her." However, as to defendants Reid and Windom, the trial court took the matter under advisement to see "whether she can be used in your two cases. I think before that happens Sergeant Angus needs to interview her extensively, and the People. And then we'll talk about it again."

Eaton was allowed to testify in Windom's case. In that case, Eaton testified that Bracey-Bradley told her he and Reid "got to light his [Baker's] ass up." Eaton explained that she tried to talk to Angus about what happened, but he told her that he was in the middle of something and would talk to her later. She did not talk to him again until their June 9, 2012 interview. She did not try to communicate sooner with Angus because she was pregnant and had been told to avoid stress. She did not call immediately after her son's birth in August 2011 because he needed surgery and she was busy.

On appeal, Reid complains that the trial court's refusal to allow Eaton to be added as a witness deprived him of his constitutional right to present a defense. A defendant has a constitutionally guaranteed right to present a defense, which includes the right to call witnesses. US Const, Am VI; Const 1963, art 1, § 20; see also *People v Hayes*, 421 Mich 271, 278–279; 364 NW2d 635 (1984) (noting that an accused has the right to present his or her own witnesses to establish a defense).

Here, the record does not support Reid's contention that the trial court prevented him from calling Eaton as a witness. Although the trial court denied Green's motion to add Eaton, the trial court took the issue of adding Eaton as a witness in Reid's and Windom's cases under

advisement. Unlike Windom, who successfully moved to call Eaton as a witness in his trial, the record is silent as to a renewed request by Reid. In all likelihood, counsel for Reid consciously abandoned the attempt to call Eaton. Such a decision was sound strategy, especially where Eaton's testimony would have damaged Reid's "mere presence" defense. At Windom's trial, Eaton testified that Bracey-Bradley told her he and Reid "got to light his [Baker's] ass up." Her testimony in Reid's case would have done more harm than good. Given the absence of record evidence that Reid renewed his request to call Eaton as a witness, the trial court was never asked to exercise its discretion and there was no error.

2. LIMIT ON CROSS-EXAMINATION

Reid further argues that the trial court abused its discretion when it limited cross-examination of the alleged accomplice based on the fact that the questions delved into privileged communications.

Communications between an attorney and his client are "privileged and confidential when they are necessary to enable an attorney to serve as an attorney. The purpose of the privilege is to enable a client to confide in an attorney, secure in the knowledge that the communication will not be disclosed. The privilege is the client's alone and may be waived only by the client." *People v Johnson*, 203 Mich App 579, 584-585; 513 NW2d 824 (1994). However, a defendant may waive the attorney-client privilege "by referring to an otherwise privileged conversation on the record . . ." *People v Bragg*, 296 Mich App 433, 466; 824 NW2d 170 (2012).

On re-direct examination, Bracey-Bradley was asked whether he and the prosecutor had entered into a sentencing agreement, in light of his testimony that he "expected" to be sentenced to 13 years. The prosecutor asked whether Bracey-Bradley had spoken with his attorney about the sentencing guidelines. Counsel for defendant Green objected on privilege grounds, but the objection was overruled because he lacked standing to raise the issue. Bracey-Bradley "understood" the guidelines to be 11 to 18 years, plus two years for the felony-firearm. Once the jury was excused for the day, counsel for Green argued that Bracey-Bradley had waived his attorney/client privilege and that the defense attorneys should be able to ask Bracey-Bradley about *all* of his communications with his attorney. The trial court asked Green's counsel to find some law on the issue and "we can talk about it some more."

The following day, counsel explained his position:

> What I'm interested in, Judge, is that his attorney shared with him the fact that Quentin Green is the one that gave him up, you know, identified him as being part of this scenario. So that gave him the motive to lie against Quentin Green.
>
> In addition to that, Judge, he indicated to the Court is that he was going to get thirteen years. And that is something that he had discussed with his attorney. And it is my understanding, Judge, is that he knew that he had a deal so he can come here and say whatever he want [sic] to say because that would not affect his deal. And therefore, Judge, he's already admitted on the stand is that he's a liar and that he will say anything to protect the deal.

> And so all I'm trying to show or at least on behalf of Mr. Green, Judge, is that he had a discussion with his attorney surrounding the plea agreement, which he believed that he was going to get thirteen years and he could come here and say anything including the motive to implicate Mr. Green in this offense.

Attorneys for Reid and Windom joined in the motion. The trial court concluded that defense counsel could question Bracey-Bradley about the sentence agreement, effectively rejecting counsel's argument that Bracey-Bradley had "opened the door" as to *all* discussions.

On appeal, Reid writes "where a witness testified under a plea agreement, the witness may not invoke the attorney-client confidential communications privilege to avoid cross-examination about the circumstances of the agreement." Reid then cites *People v Bortnik*, 28 Mich App 198; 184 NW2d 275 (1971), for the proposition that "[w]hen an accomplice testifies on behalf of the state and implicates a third person he waives any and all privileges. He cannot testify to those facts supporting his story and then claim privilege to defeat cross-examination." *Id.* at 200. Reid concludes that the trial court abused its discretion when it limited Green's counsel's request to delve into communications between Bracey-Bradley and his counsel, such as whether Bracey-Bradley could simply come in and testify to "whatever he wanted" and whether counsel told Bracey-Bradley that Green was the one that told police Bracey-Bradley was involved.

However, both of these areas were explored during the trial. On cross-examination, Bracey-Bradley denied that his attorney told him he could "come in here and say anything because you had your deal." He also admitted that he knew Green was the individual that told police that Bracey-Bradley was involved in the incident. Bracey-Bradley denied putting the blame on Green as retribution. Thus, it is unclear about what Reid is complaining. Inadequately briefed issues are deemed abandoned on appeal. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006).

D. PERJURED TESTIMONY

Reid argues that he was denied his due process rights when the prosecutor allegedly allowed Angus to give perjured testimony.

Whether the prosecutor acquiesced to the presentation of perjured testimony thereby denying defendant his right to due process is a question of law that is reviewed de novo on appeal. *People v Aceval (On Remand)*, 282 Mich App 379, 389; 764 NW2d 285 (2009) reversed on other grounds *Aceval v MacLaren*, ___ F Supp 2d ___ (ED Mich, 2013).

Because there was no *Ginther* hearing, Reid's ineffective assistance of counsel claim is limited to errors apparent on the record. *Jordan*, 275 Mich App at 667.

Following Angus's testimony in Reid's case, the jury, through the trial judge, asked if Reid ever said "if he or the others intended to shoot anyone when they went to the house?" Angus answered that it was "[j]ust to rob – rob and take the weed." In fact, at no time did Reid admit to being part of a scheme to rob Baker. Reid gave two separate statements to Angus and changed his story during the interviews. Initially, Reid denied knowing why he was even arrested. He then changed his story and said that he heard shots and went to the area where the

shots were coming from. He saw two men in black hoodies and ran away from people he did not know when the police arrested him. Reid denied knowing anyone had been shot but after Angus suggested that Reid's DNA might be found, Reid said "I didn't know the guy." Reid explained that they were planning to buy a pound of marijuana. Reid told Angus that he, Bracey-Bradley, and Windom approached the house. Reid went to use the bathroom and when he came out the homeowner got into a "tussle" with Bracey-Bradley. Gunfire ensued and they all ran out the front door.

On appeal, Reid argues that the prosecutor knowingly allowed Angus to give perjured testimony or the prosecutor failed to correct the perjured testimony. Alternatively, Reid argues that his trial counsel was ineffective for not impeaching Angus on his false testimony. Reid claims that he never mentioned a robbery in either of his statements to Angus and, therefore, Angus falsely testified that there was a plan to rob Baker. On this basis, defendant claims that the prosecutor violated his right to due process.

After reviewing both of Reid's statements to Angus, it is apparent that Reid never admitted to being involved in a plan to rob Baker, but that he and the others only went to Baker's house to purchase marijuana. Even if the other men were involved in a plan to rob Baker, Reid did not admit to having prior knowledge of that plan. However, although Angus was inaccurate in testifying that Reid was aware of the plan to rob Baker, it did not amount to perjured testimony. Angus took multiple statements from multiple defendants. He testified that he had difficulty keeping each of the statements straight, especially when all of the defendants changed their statements throughout the interviews. More than likely, Angus simply mixed the details of Reid's statement with those of his codefendants. In any event, it cannot be said that Reid's conviction was obtained through the *knowing* use of perjured testimony. There was considerable evidence that Reid was involved in the plan and the jury was provided with Reid's actual statements. Moreover, Reid has failed to make an offer of proof that supports his claim that the prosecutor knew that Angus had committed perjury.

Reid alternatively argues that his attorney was ineffective in not bringing Angus's error up at trial. However, Reid's claim must fail where the record reveals that counsel did seek a sidebar, and sought a correction of Reid's testimony.

E. CRIME VICTIM RIGHTS FUND ASSESSMENT

Reid committed the offenses on December 12, 2010. At that time, MCL 780.905(1)(a) required the trial court to assess a $60 fee to convicted felons under the Crime Victim Rights Fund Assessment Act (CVRA), MCL 780.751 *et seq*. MCL 780.905(1)(a) was subsequently amended to increase the CVRA assessment to $130. The amendment took effect on December 16, 2010. Reid was sentenced on July 31, 2012 and the trial court ordered him to pay a CVRA assessment of $130. On appeal, defendant initially argued that this violated the Ex Post Facto Clauses of both the federal and state constitutions. However, he has recognized that our Supreme Court's recent decision in *People v Earl*, ___ Mich ___; ___ NW2d ___ (Docket No. 145677, decided March 26, 2014) is dispositive and that the assessment is not violative of the Ex Post Facto Clauses of either the federal or state constitutions.

III. DOCKET NO. 312492 (DEFENDANT GREEN)

A. PROSECUTORIAL MISCONDUCT AND INEFFECTIVE ASSISTANCE OF COUNSEL IN THE HANDLING OF WITNESS JALEN WALKER

Defendant Green first argues that the prosecutor engaged in misconduct when she failed to reveal that a witness called by Green's defense counsel intended to invoke his Fifth Amendment privilege not to testify, causing the jury to draw a negative inference against Green. Alternatively, Green argues that defense counsel was ineffective in even calling the witness because it was a "strategy that was full of risk and devoid of reward."

After filing his claim of appeal, Green moved to remand for an evidentiary hearing in order to develop a record as to prosecutorial misconduct and ineffective assistance of counsel. This Court granted the motion "so that defendant-appellant may move for a new trial based on the prosecution's role in a witness's decision to refuse to testify and ineffective assistance of counsel." *People v Green*, unpublished order of the Court of Appeals, entered April 11, 2013 (Docket No. 312492). On remand, the trial court denied Green's motion for new trial based on prosecutorial misconduct.

> We review for an abuse of discretion a trial court's decision to grant or deny a new trial. An abuse of discretion occurs when the trial court's decision is outside the range of principled outcomes. Underlying questions of law are reviewed de novo, while a trial court's factual findings are reviewed for clear error. A trial court may grant a new trial to a criminal defendant on the basis of any ground that would support reversal on appeal or because it believes that the verdict has resulted in a miscarriage of justice. [*People v Terrell*, 289 Mich App 553, 558-559; 797 NW2d 684 (2010) (internal quotation marks and citations omitted).]

Additionally, the trial court denied Green's motion for new trial based on ineffective assistance of counsel. "A claim of ineffective assistance of counsel presents a mixed question of law and fact. This Court reviews a trial court's findings of fact, if any, for clear error, and reviews de novo the ultimate constitutional issue arising from an ineffective assistance of counsel claim." *Brown*, 294 Mich App at 387 (citation omitted).

At trial, Green's counsel called Jalen Walker as a witness. However, after Walker provided his name, he refused to answer any further questions, invoking his right against self-incrimination under the Fifth Amendment. Green's counsel attempted to question Walker about whether Bracey-Bradley wanted Walker to purchase some marijuana for him. The trial court refused to order Walker to answer the defense's questions.

Defendant moved for a mistrial on the grounds that (1) the prosecutor engaged in misconduct by failing to disclose to the defense that Walker intended to invoke his Fifth Amendment rights if called as a witness, (2) the court should have conducted a hearing to determine if Walker could properly invoke his right not to testify, and (3) the trial court should have instructed the jury that it should not have drawn any inferences from Walker's decision to invoke his Fifth Amendment rights.

This Court granted Green's motion to remand for an evidentiary hearing to further explore his claims of prosecutorial misconduct and ineffective assistance of counsel. At the

hearing, prosecutor Jonathan Poulos testified he did not know what Walker would have testified to substantively. Defense counsel indicated that Walker's testimony was going to be used to impeach Bracey-Bradley's testimony, but Poulos could not remember how. At no time did Poulos speak to Walker prior to Walker taking the stand. Poulos asked Angus to interview Walker "just find out what is he gonna say, because this isn't someone we had contact with yet." Angus interviewed Walker and then told Poulos that Walker planned to take the Fifth. This occurred approximately 10 to 20 minutes prior to him taking the stand. Poulos said nothing to defense counsel because he suspected that Walker was bluffing. "[B]etween the fact that he was being called by the defense and the fact that I presumed Mr. Scott kn[e]w what he was doing he's a very competent attorney. I didn't wholly believe that he was taking the Fifth."

Attorney Scott testified that, in calling Walker, he hoped to impeach Bracey-Bradley's testimony that Bracey-Bradley had tried calling Walker about getting marijuana the night of the shooting. "I wanted to call Walker to be able to establish that Bradley never called him. And therefore Bradley was the one that made the call to the victim's house in order to set up this marijuana buy." The jury could infer from the fact that Bracey-Bradley did not call Walker, he must have been the one to call the victim, which would also make sense because the victim opened the door for Bracey-Bradley. Scott admitted that Walker would not talk to him before trial. "I said look I called you as a – I'm the one who subpoenaed you as a witness. I need to talk with you just to find out as to what you're gonna testify to. I have a few questions for you. And he wouldn't talk with me." But Walker did not indicate that he would take the Fifth. Scott was displeased with the prosecutors because Walker spoke with Angus and Angus spoke with Poulos, but no one told Scott that Walker was going to invoke his Fifth Amendment right. If they had, Scott would have requested a hearing with the judge. However, Scott did not believe that a trial court could compel the prosecution to grant immunity to a witness. Scott believed that Walker's actions resulted in the jury making the assumption that Bracey-Bradley's testimony was accurate. He rejected the prosecutor's suggestion that Walker may have invoked the Fifth because he did not want to be tied to the gun, which Bracey-Bradley testified he sold to Walker after the shooting.

Prosecutor Gladys Christopherson testified that, during the investigation of the case, Angus tracked Walker down in hopes of finding the gun that Bracey-Bradley sold Walker after the shooting. Walker was originally on the prosecution's witness list, but they decided not to use him because he was relevant only against Bracey-Bradley, who had taken a plea. Christopherson saw Walker in the courtroom and did not know who he was, so she had Angus go over and talk to him. She thought he was a spectator and might have to move to accommodate the jury. She did not speak with Angus after that. "I came back into the courtroom and Mr. Scott was calling him to the witness stand. And that's when Jon [Poulos] leaned over and said Angus just told me he might take the Fifth. But he was already walking up to the witness stand at that point." Christopherson believed that Walker's testimony would surround the gun.

Angus testified that he made contact with Walker as part of his original investigation. Walker admitted that Bracey-Bradley gave him a gun to sell after the shooting. Walker sold the gun to a third party and Angus was unable to track it. Angus served Walker with a subpoena and Walker did not want to appear. Angus was happy to see him in the courtroom and was "surprised he had actually shown up." They had a conversation, but Angus could not recall about what. Although Angus admitted that "the substance was that he was not gonna testify. He

did not want to get up in front of the public and testify." Angus "probably reassured him that at this point he was not charged with anything and that was not the intent." Angus "brought the idea [that Walker would not testify] up to a prosecutor so they were aware of it."

After hearing the foregoing evidence, the trial court denied defendant's motion for new trial, finding:

> there was no evidence Walker was associated with defendant Green on this incident. There was no evidence the prosecutor made a conscious and flagrant attempt to build its case out of inferences arising from the use of the testimonial privilege. The prosecutor did not call Walker as a witness, did not question him, and did not mention Walker in closing. It appears they were uncertain of his testimony and could only guess about how reluctant a witness Walker might become. The prosecutor did not create prejudice.

In *People v Poma*, 96 Mich App 726; 294 NW2d 221 (1980), this Court examined the potential prejudice that might result to a defendant when a witness refuses to testify:

> "If there is some connection between the defendant and the witness, often a jury will illogically infer guilt of the defendant because of the refusal of the witness, with knowledge of the facts, to testify." [*Id.* at 731, quoting *People v McNary*, 43 Mich App 134, 140; 203 NW2d 919 (1973).].
>
> * * *
>
> We hold that it is inherently prejudicial to place a witness on the stand who is intimately related to the criminal episode at issue, when the judge and prosecutor know that he will assert the Fifth Amendment privilege. When a judge determines at the evidentiary hearing that the intimate witness will either properly or improperly claim the protection against self-incrimination, he must not allow this witness to be called to the stand. [*Poma*, 96 Mich App at 733.]

An "intimate witness" has been described as "a person (co-defendant, accomplice, associate, etc.) likely to be thought by the jury to be associated with the defendant in the incident or transaction out of which the criminal charges arose." *People v Gearns*, 457 Mich 170, 197; 577 NW2d 422 (1998), overruled on other grounds in *People v Lukity*, 460 Mich 484, 494; 596 NW2d 607 (1999). The rule prohibiting calling witnesses who will invoke the right against self-incrimination applies equally to defense attorneys, not just prosecutors. *People v Dyer*, 425 Mich 572, 575-577; 390 NW2d 645 (1986).

The trial court did not abuse its discretion in denying Green's motion for a new trial. There is no indication that Walker was an "intimate witness" that a jury would associate with the incident. Nor is there any indication of wrong-doing on the part of the prosecutor. In fact, the prosecutor believed that Walker was called as a witness to testify about what happened with the gun after the shooting and had no reason to suspect that defense counsel would focus on whether Bracey-Bradley called Walker about purchasing marijuana.

Finding no evidence of prosecutorial misconduct, the issue becomes whether Green's trial court was ineffective in calling Walker in the first place. An appellate court "will not substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence." *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008).

Following the evidentiary hearing, the trial court rejected Green's claim that defense counsel's handling of Walker constituted ineffective assistance of counsel:

> To establish ineffective assistance of counsel defendant must show the counsel's performance fell below an objective standard of reasonableness and so prejudiced him that he was denied a fair trial. Here everyone was surprised when Walker refused to testify. But in the history of judicature witnesses have often surprised trial counsel. Surprise by itself is not prejudice. Further, Attorney Scott was still able to argue inferences about the co-defendant so there is no showing a reasonable probability that, but for counsel's error the result of the proceeding would have been different.

The trial court did not abuse its discretion in reaching such a conclusion. In calling Walker as a witness, defense counsel hoped to impeach Bracey-Bradley's testimony that Bracey-Bradley had tried calling Walker about getting marijuana the night of the shooting. That the strategy was unsuccessful does not require a finding that counsel was ineffective. Moreover, even if counsel was ineffective for calling Walker as a witness, Green cannot show that the proceedings were fundamentally unfair or unreliable, especially in light of the other evidence presented at trial, including Green's admission to Angus about his participation.

B. RIGHT TO PRESENT A DEFENSE

Like Reid, Green argues that the trial court effectively deprived him of his right to present a defense when it refused to allow Green to call Eaton as a witness.

As we have previously stated, a defendant has a constitutionally guaranteed right to present a defense, which includes the right to call witnesses. But this right is not absolute: the "accused must still comply with 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *Id*. at 279, 364 NW2d 635, quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973).

It cannot be said that the trial court's refusal to allow Eaton to testify fell outside the range of reasonable and principled outcomes. Eaton was Green's older sister. There is no indication that she was previously unavailable. Nor is this a situation involving the unavoidable late discovery of a witness. "The closer to the date of trial the evidence is offered, the more this factor suggests willful misconduct designed to create a tactical advantage and weighs in favor of exclusion." *People v Lucas*, 193 Mich App 298, 303;484 NW2d 685 (1992). Therefore, trial court did not abuse its discretion in refusing to allow Eaton to be added to Green's witness list.

C. "SHACKLING"

Like Reid, Green argues that he was denied the right to a fair trial when the trial court permitted his legs to be restrained for trial without first finding that the restraints were justified by an essential state interest.

Green's trial counsel did not object to shackling. Green filed a motion to remand for an evidentiary hearing pursuant to *Deck v Missouri*, but the motion was denied. *People v Green*, unpublished order of the Court of Appeals, entered April 26, 2013 (Docket No. 312492). As such, we review the issue for plain error that affected the defendants' substantial rights. *Carines*, 460 Mich at 763.

At Green's trial and before the jury venire was brought into the courtroom the trial court and defense counsel determined what position Green would be seated so that the restraints could not be seen by the jury. We conclude that Green was not denied the right to a fair trial for the same reasons set forth in Section II(A) of this opinion.

D. JURY QUESTIONS

Green argues that, although defense counsel did not object to the questions during trial, the issue is of constitutional significance and that the court rule "has the practical effect of luring jurors into a role that is inconsistent with their responsibility to be impartial arbiters of justice."

We conclude that Green is not entitled to relief for the same reasons set forth in Section II(B) of this opinion.

E. DNA TESTIMONY

Finally, Green argues that the trial court erred when it permitted the state's DNA expert to testify that Green could not be excluded as the source of DNA that was obtained from the gun police found in the snow.

Generally, a trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v Jones*, 270 Mich App 208, 211; 714 NW2d 362 (2006). However, because Green failed to object to the testimony and the trial court was never asked to exercise its discretion, the issue is reviewed for plain error that affected Green's substantial rights. *Carines*, 460 Mich at 763. "[R]eversal is warranted only if the error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings regardless of the guilt or innocence of the accused." *King*, 297 Mich App at 473.

The state's DNA expert, Lauren Lu, testified.

> *Q.* [by prosecutor] Ultimately, what was your conclusion regarding the processing of the Springfield gun samples you received versus the known samples?
>
> *A.* The swabs of the Springfield pistol yielded a mixture of DNA types that indicated to me that at least four people were contributing DNA to this particular sample. The known reference samples of Timothy Baker and Devonte Reid were excluded as donors to this sample. The known reference samples of

Quentin Green, Latrell Windom and Bracey-Bradley could not be excluded as possible donors to the DNA types I obtained from that sample.

Q. And the term "could not be excluded", would you explain that in English?

A. The term "could not be excluded" means that I can't definitively say who is there, but I can't say that they're not there either. Their DNA types are present in the mixture. Now some mixtures of more than one person are indicative of one person contributing a lot more DNA to a sample than anyone else. And in cases like that, I am able to look at all of the DNA types and figure out, okay, this person that's contributing a lot of DNA I can pick out all of their DNA types and I can pull a DNA profile out of the mixture. This particular case was not like that. There were a number of people contributing to this sample. I could not tell that any one person was contributing a lot more DNA to it than anyone else. But the individuals that could not be excluded, I can say that their DNA types were present in the mixture but I cannot definitively say that they were there.

Q. Is it fair to say "cannot be excluded" is the same as "yes, they are included."

A. Uh, it's a bit of semantics. For me to say that someone is included in the mixture implies that I definitively know that they're there and I can't say that. So the best that I can say in this particular instance is that those individuals, their DNA types, are present in the mixture. I can't exclude them from being part of the mixture, but I can't definitively say that – that those individuals are absolutely there.

Relevant evidence is "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 Watkins*, 491 Mich. 450, 470; 818 NW2d 296 (2012). Green consistently denied ever handling a weapon that day. The only gun recovered was a .45 caliber in the snow outside the home, which defendant Windom admitted was his. The fact that Green could not be excluded as a DNA donor was highly relevant at trial because there was evidence that numerous guns were involved and the codefendants may have handled more than one weapon. MRE 403 provides "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . ." Green cites *United States v Natson*, 469 F Supp 2d 1253 (MD Ga, 2007) wherein the federal court concluded that a DNA expert should not have been allowed to testify that the defendant could not be excluded as the father of a baby because such testimony "does not rise to any reasonable level of scientific certainty," especially where the "DNA scientific community, [] requires over a 99% probability result to conclude that a DNA test establishes paternity." *Id.* at 1258. The expert in *Natson* testified that "the odds are 26 to 1 that Defendant is the father and that he has a 96.30% statistical chance of being the father," which the court found "could easily be misled and confused into concluding that these 'probabilities' are significantly high, whereas the undisputed scientific evidence is that they are

significantly low." *Id.* In contrast, Lu did not offer any probability measures and simply testified that Green could not be excluded as a donor. Such testimony, especially where Green does not contest the reliability of Lu's testing or findings, was not unduly prejudicial and the trial court did not plainly err in allowing the testimony.

IV. DOCKET NO. 312496 (DEFENDANT WINDOM)

A. WINDOM'S LETTER TO THE TRIAL COURT JUDGE

Defendant Windom first argues that the trial court abused its discretion when it denied Windom's motion for a mistrial, which was based on the admission of inadmissible and prejudicial evidence. He claims that the letter he wrote to the judge was clearly inadmissible under MRE 408 (inadmissibility of compromise and offers to compromise) and 410 (inadmissibility of plea discussions) because the purpose of the letter was to negotiate a sentence agreement.

"The denial of a motion for a mistrial is reviewed for an abuse of discretion. A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). "This Court will find an abuse of discretion if the trial court chose an outcome that is outside the range of principled outcomes." *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010).

This Court reviews de novo the interpretation of the rules of evidence. *People v Duncan*, 494 Mich 713, 723; 835 NW2d 399 (2013).

Angus read into the record a letter that Windom wrote to Judge Neithercutt:

> Dear Honorable Judge Neithercut. First off, I would like to introduce myself. My name is Latrell Windom. I am eighteen years old, born in the City of Flint. I was previously attending Northwestern High School before I got incarcerated into the Genesee County Jail. But at this present time I am pursuing my GED and attending church services faithfully. I was raised in a single-parent home with three siblings; two brothers, one sister. To be honest, I never knew or knew of my father. My mother always had been a supporting parent at all times, very active in my life. I'm not a bad child, just made a bad decision in life. It could cost me my life. My mother always had a good quote that she would tell me, (inaudible), the truth shall set you free. And I am not justifying my behavior that I was wrong. I plea for your mercy that you would grace upon me. I already asked the Lord to forgive me and I plead, your Honor, that you will forgive me as well for the one bad decision that I have made in my life. Sorry for the role I played in committing this crime. I beg you for a sentence that will allow me to see my mother and streets once again. While inside this County Jail I was told that you are a good-hearted, fair Judge. The Prosecutor will not work with me, but, yes, I am willing to do the right thing. Your Honor, please, can you have mercy up on me? Sincere[ly], Latrell Windom.

On appeal, Windom argues that the trial court should have granted his motion for a mistrial because the letter's admission violated MRE 408 and 410. MRE 408 provides, in relevant part:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

MRE 410 provides, in relevant part:

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
>
> ***
>
> (4) Any statement made in the course of plea discussion with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

Our Supreme Court has explained that the same principles applicable to the construction of statutes apply to evidentiary rules. *Duncan*, 494 Mich at 404. "Accordingly, we begin with the rule's plain language. When the language of the rule is unambiguous, we enforce the plain meaning without further judicial construction." *Id.* at 404-405 (footnotes omitted). A plain reading of both rules reveals that they are inapplicable to Windom's case.

Because MRE 410 specifically governs when "statement[s] made in the course of plea discussions" are admissible against a defendant, it is unlikely that MRE 408, with its references to "compromis[ing] a claim," applies to a statement by a criminal defendant requesting a plea bargain. Additionally, several federal courts of appeals have concluded that the rule applies only in the context of civil litigation. *United States v Logan*, 250 F3d 350, 367 (CA 6, 2001); *United States v Prewitt*, 34 F3d 436, 439 (CA 7, 1994); *United States v Baker*, 926 F.2d 179, 180 (CA 2, 1991). We find the reasoning of the above federal cases persuasive, and conclude that MRE 408 only governs the admission of evidence relating to compromise or negotiations made in the context of civil litigation. MRE 408 does not govern the admission of evidence relating to a defendant's attempts to plead guilty in a criminal matter.

Moreover, Windom did not make an "offer." At most, he was simply pleading for leniency. "One of the tests of a compromise is that the offeror offers something less than the offeree claims or might fairly otherwise obtain by rejecting the offer and suing away. The notion of mutual concession is implicit." *Thirlby v Mandeloff*, 352 Mich 501, 505-506; 90 NW2d 476 (1958). Windom did not offer to do anything. Therefore, MRE 408 was inapplicable.

Defendant's claim that MRE 410 should have prevented the letter's admission is similarly unavailing. The plain language of MRE 410 clearly requires that "statement[s] made in

the course of plea discussions" take place "with an attorney for the prosecuting authority." It cannot be said that direct communication with the trial court amounted to a discussion with an attorney for the prosecutor. To the contrary, a trial court judge is neutral and detached and, while in a position to approve and enforce a plea bargain, a trial court judge has no authority to bargain with a criminal defendant. Moreover, as previously stated, there were no negotiations; Windom merely pleaded for leniency from the trial court. Consequently MRE 410 did not bar admission of Windom's letter to the trial court judge. There was no basis to exclude the letter, and the trial court did not abuse its discretion when it denied Windom's motion for mistrial.

B. INEFFECTIVE ASSISTANCE OF COUNSEL DURING PLEA NEGOTIATIONS

Windom argues that he would have accepted a plea agreement of "11 years plus 2 years" but for his counsel's inaction.

The trial court denied defendant's motion for new trial after a *Ginther* hearing. "We review for an abuse of discretion a trial court's decision to grant or deny a new trial. An abuse of discretion occurs when the trial court's decision is outside the range of principled outcomes. Underlying questions of law are reviewed de novo, while a trial court's factual findings are reviewed for clear error." *Terrell*, 289 Mich App at 558-559 (internal quotation marks and citations omitted).

"A claim of ineffective assistance of counsel presents a mixed question of law and fact. This Court reviews a trial court's findings of fact, if any, for clear error, and reviews de novo the ultimate constitutional issue arising from an ineffective assistance of counsel claim." *Brown*, 294 Mich App at 387.

Criminal defendants have a Sixth Amendment right to effective assistance of counsel during plea negotiations. *Lafler v Cooper*, ___ US ___; 132 S Ct 1376, 1384; 182 L Ed 2d 398 (2012); *Missouri v Frye*, ___ US ___; 132 S Ct 1399, 1405; 182 L Ed 2d 379 (2012).

> To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time. [*Frye*, 132 S Ct 1409.]

At a May 30, 2012, court date to select the juries, the following exchange took place:

> MR. POULOS: [prosecutor] Your Honor, at this time this is the date and time set for trial. The People are ready to proceed today. . . .

I just want to place on the record right now the offers as they stand for these 3 defendants. As for Mr. Windom and Mr. Reid, the People have offered to let them plead guilty to murder two, with agreements that they serve 20 years on the minimum plus the two that comes consecutive with felony firearm. Those offers have as yet been rejected. As it pertains to Mr. Green – did I say 20 plus 2, I meant 22 plus 2 for those two individuals; but be that as it may. Mr. Green, in consideration for information he gave to Sergeant Mike Angus, we've offered to let [him] plead guilty to the very minimum on the guidelines which is 18 and change plus 2. All three of those offers have been rejected.

***

MR SCOTT: [counsel for Green] Judge, if I might. I believe that we as the defense, we made a counter offer to the Prosecutors. And I believe that our counter offer was that ah, manslaughter plus 2. And we have not heard as to whether or not they have rejected that offer.

MR. POULOS: Well, Your Honor, at this time the People in making our counter offer of 18 and 22 respectively plus 2, that served as a rejection. Although at this time I wouldn't want to hold myself to that before I check on the status of the conversations that are going on downstairs.

MR. SCOTT: Then we're prepared to go [to]trial, Judge.

THE COURT: Okay.

MR. FEASTER: [counsel for Windom] Your Honor, if I might, I want to make sure I have a clear record in regard to Mr. Windom. Mr. Windom, I have communicated that offer to you, have I not?

DEFENDANT WINDOM: Yes.

MR. FEASTER: And you have thought about that offer?

DEFENDANT WINDOM: Yes.

MR. FEASTER: And we are rejecting that offer at this time. Is that correct?

DEFENDANT WINDOM: Yes.

During trial, plea discussions were brought up again in the context of background information regarding Bracey-Bradley's plea agreement:

MS. CHRISTOPHERSON [prosecutor]: I was the one who did the plea agreement in District Court and Mr. Feaster will agree, that we spoke and I said, "This is the deal going to be offered to [Bracey-Bradley] if your guy does not agree to plead." And I still have the text messages on my phone downstairs in the

office where Mr. Feaster, "We're going to get a deal. I just can't work it out. We'll get it worked out next weekend."

I also spoke with Mr. Karasick. And Mr. Karasick told me that Mr. Reid was also going to testify. And then I said, "Okay, let's get it in writing. Let's get it in writing." And nobody came to me. So –

THE COURT: What's that got to do with this?

MS. CHRISTOPHERSON: Because that's why this man Bracey-Bradley agreed to testify. He took the deal, not on a sentence agreement, but he took it because he thought the others were going to turn on him.

After filing his claim of appeal, Windom moved to remand for an evidentiary hearing in order to develop a record on his claim that he received ineffective assistance of counsel, which resulted in the failure to strike a plea bargain. This Court granted the motion "so that defendant-appellant may file a motion involving ineffective assistance of counsel with regard to a plea agreement." *People v Windom*, unpublished order of the Court of Appeals, June 6, 2013 (Docket No. 312496).

The evidentiary hearing was held on July 12, 2013. Christopherson testified that the prosecutor's office made plea offers to all four individuals involved in the shooting, but only one agreement was reached and accepted. Bracey-Bradley agreed to plead guilty to conspiracy to commit armed robbery, two counts of assault with intent to murder, and felony firearm, in exchange for his truthful testimony. There was no sentencing agreement. Christopherson denied that any of the defendants were offered 18 or 22 year minimums. If Poulos made Windom any offers, Christopherson was unaware. When Bracey-Bradley was arrested, Christopherson knew she would need one of the other three to convict Bracey-Bradley, "so an offer was extended to all three; second degree murder, two counts of assault with intent to murder, felony firearm, with truthful testimony. Whoever took it first got it . . ." In her communications with Windom's attorney, Torchio Feaster, the primary problem was that Windom did not want to testify. Thus, "[t]here had been an offer, he refused. The information I had was that he was not going to testify, therefore the offer's removed." If Christopherson had heard from Feaster that Windom was willing to accept a deal "we would have made a deal," but "I heard the exact opposite." The offer was open until trial started. It did not include a sentencing agreement. At no time was Windom offered "11 plus 2" and none of the defendants were made any offers until Bracey-Bradley was arrested.

THE COURT: What was the offer madam?

THE WITNESS: The offer to Quentin Green, Devonte Reid and Latrell Windom, the same offer to all three initially, because I was unaware that Jon Poulos made a recommendation of the sentence guideline minimum on the morning of trial. The only offer I ever extended was second degree murder, two counts of assault with intent to murder, felony firearm, with truthful testimony against all co-defendants.

The guidelines range would have been 270 months, which was 22 ½ years, plus 2 years for felony-firearm.

Feaster testified that he discussed a possible plea agreement with Windom that involved "22 plus 2." Windom did not want to testify, "but if he could get the number he wanted then he would testify . . .. He was not gonna testify and accept a 20 year plus sentence." Feaster was unable to get the same deal as Bracey-Bradley. Feaster testified that "[i]t's my understanding that Mr. Windom was only willing to testify if he could get an offer that would have been somewhere around 10, 11, 12 years, in that range."

Windom testified that after he rejected a plea on May 30th, he told his defense counsel Feaster that he wanted to accept a deal. "I told Attorney Feaster I wanted to – he told me anything between 10 to 15 years when he first told me about that cop, I said if you can get that back for me I'll take it." Windom wrote the letter to the judge "[s]o I could get a plea." He was told that "they came in with a deal between 10 and 15 years" but that was back when he in was in district court. Windom admitted that he would not have accepted any plea of over 13 years. Windom would have testified if he could have received the same deal as Bracey-Bradley. "[A]nywhere between 10 to 15 years. I said if I could get the 11 plus 2 I would testify."

The trial court denied Windom's motion for new trial, stating:

> This court cannot find that there was ineffective assistance of counsel because no eleven plus two year offer was made and because Attorney Feaster testified that he notified defendant of any known offers. Further the only information about immediate written proposals is that at the District Court level defendant Windom did not want an offer because he thought he could win the trial. If the claimed offer was never made, then no prejudice is shown. This court makes no finding of ineffective assistance of counsel and denies defendant Latrell Demetrius Windom's motion.

The trial court did not abuse its discretion in denying Windom's motion for a new trial where the record shows that the plea Windom desired was never extended.

C. INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO SEEK SUPPRESSION OF WINDOM'S STATEMENT TO POLICE

Windom argues that trial counsel was ineffective for failing to pursue a course of action that would have resulted in the suppression of Windom's statement to Angus.

Although this Court granted defendant's motion to remand for a *Ginther* hearing to determine whether Windom received the effective assistance of counsel during plea negotiations, the "[p]roceedings on remand are limited to the issue as raised in the motion to remand. The motion to remand on the remaining ground is DENIED for failure to show that that issue should be addressed by the trial court at this time." *People v Windom*, unpublished order of the Court of Appeals, entered June 6, 2013 (Docket No. 312496). Therefore, the *Ginther* hearing did not explore Windom's claims regarding the suppression of his statement to police. Because there was no *Ginther* hearing on this particular issue, Windom's ineffective assistance of counsel claim is limited to errors apparent on the record. *Jordan*, 275 Mich App at 667.

"A statement obtained from a defendant during a custodial interrogation is admissible only if the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights." *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003).

> The test of voluntariness should be whether, considering the totality of all the surrounding circumstances, the confession is the product of an essentially free and unconstrained choice by its maker, or whether the accused's will has been overborne and his capacity for self-determination critically impaired. The line of demarcation is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession.
>
> In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.
>
> The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made. [*People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988) (internal quotation marks and citations omitted).]

At the outset of Angus's testimony in Windom's case, defense counsel objected to the testimony based on Windom's "intoxication" at the time the statement was taken. Out of the presence of the jury, Angus testified that he interrogated Windom on December 13, 2012. He read Windom his Miranda rights. It did not appear that Windom was "high or drunk" at the time. Windom had a chance to "nap" before the interrogation. The trial court denied Windom's motion to suppress. During his testimony before the jury, Angus admitted that Windom was cold during the interview. He advised Windom to take off his damp clothing and rub his hands together for friction. Windom subsequently indicated that he was fine.

There is absolutely nothing from the record which would lead to the exclusion of Windom's statement to police. Windom appeared to be sober. He had a chance to rest between the time of his arrest and the interrogation. Although he may have been cold at the start of the interview, he later indicated that he was fine. There is nothing to suggest that Windom's statement was involuntary. As such, trial counsel was not ineffective for failing to pursue a meritless position. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) ("Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.")

D. SENTENCING

Windom argues that he is entitled to be resentenced because the trial court failed to recognize that it had the discretion to sentence Windom to less than a life term.

If a minimum sentence is within the appropriate sentencing guidelines range, this Court must affirm the sentence and may not remand for resentencing absent an error in the scoring of the guidelines or inaccurate information relied upon in determining the sentence. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003); *People v Jackson*, 487 Mich 783, 791; 790 NW2d 340 (2010).

Unlike his codefendants, Windom was not convicted of felony murder; instead, he was convicted of second-degree murder. The trial court recognized this, but concluded that "you have to take the ultimate penalty for having caused the ultimate consequence to Timothy Baker. On count one, the second degree murder charge you will be remanded to the custody of the Michigan Department of Corrections for the rest of your life." The second-degree murder statute provides that the crime is punishable "by imprisonment in the state prison for life, or any term of years, in the discretion of the court trying the same." MCL 750.317. Furthermore, the guidelines for Windom's case was "270 to 450 or life." As the prosecutor notes, Windom does not object to any of the scoring. Instead, it appears that Windom argues the trial court considered the life term to be mandatory. That is a distortion of the record. The trial court's statement that Windom had to "take the ultimate penalty" in no way indicates that the trial court believed it lacked discretion in sentencing Windom.

E. INADEQUACY OF THE TRIAL COURT RECORD

Finally, Windom argues that he was denied his right to appeal given the many courtroom deficiencies and inadequate records, which hindered the review process.

This issue is deemed waived as not properly briefed. *Martin*, 271 Mich App at 315. Although Windom cites general case law regarding a defendant's right to a proper recording of the lower court record to facilitate appeal, Windom makes no attempt to cite any instances in which his appellate counsel was hampered by a lack of record. We found the record adequate and did not find any deficiencies.

Affirmed.

/s/ Stephen L. Borrello
/s/ William C. Whitbeck
/s/ Kirsten Frank Kelly