STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 17, 2017
v	No. 333309 Wayne Circuit Court
SCOE WALTON, Defendant-Appellant.	LC No. 15-007067-01-FC

Before: SAAD, P.J., and CAVANAGH and CAMERON, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions of second-degree murder, MCL 750.317, carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.[1] Defendant was sentenced, as a second habitual offender, MCL 769.10, to 40 to 80 years' imprisonment for the second-degree murder conviction, three years and six months to seven years and six months' imprisonment, for both the felon in possession and carrying a concealed weapon convictions, and two years' imprisonment for the felony-firearm conviction. We affirm.

I. JURY INSTRUCTIONS

Defendant contends that the trial court erred when it failed to provide the jury with a requested instruction regarding voluntary manslaughter. Further, in his Standard 4 brief, defendant opines that the trial court erred when it provided a jury instruction on first-degree murder and that this error resulted in a compromise verdict of second-degree murder. Defendant also claims that his trial counsel was ineffective for failing to object to the first-degree murder instruction and that these cumulative errors necessitate reversal.

While defendant requested that the jury be provided a voluntary manslaughter instruction, thereby preserving that issue for appeal, he took no steps at the trial court to preserve the other issues. See *People v Pinkney*, 316 Mich App 450, 470; 891 NW2d 891 (2016); *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008); *People v Metamora Water Serv, Inc*, 276 Mich

[1] The jury acquitted defendant of two counts of assault with intent to murder, MCL 750.83.

App 376, 382; 741 NW2d 61 (2007); *People v Lugo*, 214 Mich App 699, 710-711; 542 NW2d 921 (1995).

With regard to defendant's challenge to the trial court's denial of his request to provide a voluntary manslaughter jury instruction, this Court

> review[s] de novo a claim of instructional error involving a question of law. However, a circuit court's decision regarding whether a requested lesser-included-offense instruction is applicable under the facts of a particular case will only be reversed upon a finding of an abuse of discretion. An abuse of discretion occurs when the circuit court chooses an outcome that falls outside the range of principled outcomes. [*People v Jones*, 497 Mich 155, 161; 860 NW2d 112 (2014) (citations omitted).]

However, we review defendant's other unpreserved issues for plain error affecting defendant's substantial rights. *Pinkney*, 316 Mich App at 470-471. Because the issue of ineffective counsel is not preserved, this Court's review is "limited to mistakes apparent on the record." *Petri*, 279 Mich App at 410.

"When a defendant is charged with murder, the trial court must give an instruction on voluntary manslaughter if the instruction is 'supported by a rational view of the evidence.' " *People v Mitchell*, 301 Mich App 282, 286; 835 NW2d 615 (2013), quoting *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). As discussed in *Mitchell*, 301 Mich App at 286-287:

> To prove that a defendant committed voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions. . . . [T]his Court held that the degree of provocation required to mitigate a killing from murder to manslaughter is that which causes the defendant to act out of passion rather than reason. Further, in order for the provocation to be adequate it must be that which would cause a reasonable person to lose control. Whether the provocation was reasonable is a question of fact; but if no reasonable jury could find that the provocation was adequate, the court may exclude evidence of the provocation. [Quotation marks, citations, and brackets omitted.]

When the trial court denied defendant's request for a voluntary manslaughter instruction, it indicated that the altercation alleged to have occurred between defendant and the victim was insufficient to rise to the level of provocation necessary for the instruction to be provided. The evidence here showed that defendant demanded money from the victim (that allegedly was owed), with the victim effectively ignoring most of defendant's statements or indicating an intention to pay defendant later. When defendant tried to forcibly remove money belonging to the victim, the victim pushed defendant against a wall and held him off with his left arm while continuing to retrieve his cash from nearby. In response, defendant withdrew a weapon and discharged seven bullets into the victim at close range. The relatively minor skirmish described by the witnesses is wholly insufficient to result in "a reasonable person to lose control." Thus,

the trial court did not err when it refused to give defendant's requested voluntary manslaughter instruction to the jury.

Defendant also contends the trial court erred when it provided the jury with an instruction on first-degree murder and that the resultant second-degree murder conviction was a compromise verdict. Here, defendant was charged with open murder. A charge of open murder has long been recognized as providing notice to a defendant of the need to defend against first-degree murder and second-degree murder. *People v Treichel*, 229 Mich 303, 307-308; 200 NW 950 (1924). As such, a charge of open murder is understood to include first-degree murder. *People v McKinney*, 65 Mich App 131, 135-136; 237 NW2d 215 (1975). "When a person charged with murder is convicted by a jury, MCL 750.318 requires the jury to 'ascertain in their verdict, whether it be murder of the first or second degree.' " *People v Watkins*, 247 Mich App 14, 20; 634 NW2d 370 (2001), aff'd but criticized on other grounds 468 Mich 233 (2003). As a result, the trial court had no alternative and indeed properly instructed the jury on the elements of both first-degree and second-degree murder.

We also note that, except for her prior objection related to the voluntary manslaughter instruction, defense counsel affirmatively approved the remainder of the trial court's instructions to the jury. "[B]ecause [defense] counsel '*expressly approved*' the trial court's instruction . . . , the approval constituted 'a waiver that *extinguishes* any error.' " *People v Tate*, 244 Mich App 553, 558; 624 NW2d 524 (2001) (citation omitted). Moreover, evidence existed to support the jury being instructed on first-degree murder.

> The elements of first-degree murder are (1) the intentional killing of a human (2) with premeditation and deliberation. To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem. Premeditation and deliberation may be inferred from all the facts and circumstances, but the inferences must have support in the record and cannot be arrived at by mere speculation. Though not exclusive, factors that may be considered to establish premeditation include the following: (1) the previous relationship between the defendant and the victim; (2) the defendant's actions before and after the crime; and (3) the circumstances of the killing itself, including the weapon used and the location of the wounds inflicted. [*People v Bass*, 317 Mich App 241, 265-266; 893 NW2d 140 (2016) (quotation marks and citations omitted).]

Here, the victim was killed as the result of seven bullets fired directly and at close range into the victim's side and back. There was no justification for the murder as the victim was unarmed. The dispute leading to the murder was primarily verbal in nature, with defendant asserting that the victim owed him money and the victim resisting defendant's attempts to take money from the gambling proceeds. The circumstances of the killing by use of a firearm and the discharge of seven shots quickly and in close proximity to the victim while the victim was picking up money from the ground could be construed to prove premeditation for first-degree murder. See *People v Tilley*, 405 Mich 38, 45; 273 NW2d 471 (1979); *People v Unger*, 278 Mich App 210, 231; 749 NW2d 272 (2008) ("[E]vidence that a victim sustained multiple violent blows may support an inference of premeditation and deliberation.").

Defendant also contends that the allegedly unsupported first-degree murder instruction resulted in an impermissible compromised verdict. In discussing compromised verdicts, our Supreme Court stated, "[W]e recognize[] that jurors, as people generally, often will compromise with regard to their differences." *People v Ramsey*, 422 Mich 500, 515; 375 NW2d 297 (1985). The Court explained that "the issue was not whether the jury had, in fact, compromised" but, rather, "whether allowing a greater charge not supported by the evidence to go to the jury constituted error requiring reversal of the defendants' convictions, even though the defendant in each case was convicted of the lesser charge." *Id.* But because the first-degree murder instruction here was proper, defendant's claim necessarily fails. See *People v Graves*, 458 Mich 476, 487-488; 581 NW2d 229 (1998) (stating that in order to reverse a conviction based on the theory of an impermissible compromised verdict, the jury must have been presented with an erroneous instruction in the first place); *Ramsey*, 422 Mich at 515.

Defendant further asserts that his trial counsel was ineffective for failing to object to the first-degree murder instruction. But defense counsel's failure to object to the trial court's provision of a jury instruction on first-degree murder cannot comprise ineffective assistance because of the propriety of the given instruction. See *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.").

Defendant additionally contends that the cumulative errors asserted above necessitate reversal. However, because defendant has not established that any errors occurred, there can be no cumulative effect of errors that would merit reversal. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

II. RIGHT TO COUNSEL

Defendant contends that when his retained counsel withdrew from his representation approximately two months before trial began, the trial court refused his request to be given time to retain alternative counsel and, instead, appointed counsel to represent defendant at trial. This Court reviews whether defendant was denied the constitutional right to counsel of his choice de novo. *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004).

In accordance with the Sixth Amendment, US Const, Am VI, criminal defendants have the right to retain counsel of their own selection. *United States v Gonzalez-Lopez*, 548 US 140, 144; 126 S Ct 2557; 165 L Ed 2d 409 (2006); *People v Akins*, 259 Mich App 545, 557; 675 NW2d 863 (2003). " 'However, the right to counsel of choice is not absolute.' " *Akins*, 259 Mich App at 557 (citation omitted). "A balancing of the accused's right to counsel of his choice and the public's interest in the prompt and efficient administration of justice is done in order to determine whether an accused's right to choose counsel has been violated." *Id.* (quotation marks and citations omitted). Specifically,

> [w]hen reviewing a trial court's decision to deny a defense attorney's motion to withdraw and a defendant's motion for a continuance to obtain another attorney, we consider the following factors: (1) whether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant

> was negligent in asserting his right, (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision. [*Id.* (quotation marks and citation omitted).]

The problem here for defendant is that he never requested a continuance to find another attorney of his choice. On February 11, 2016, a hearing was held on defense counsel's motion to withdraw. Defendant did not object to the withdrawal of his counsel. The trial court observed that defendant's trial was currently scheduled to initiate the following week. The trial court indicated it would seek to have counsel appointed for defendant quickly and set a new trial date of April 11, 2016, if possible; defendant offered no objection. On February 16, 2016, the date originally scheduled for trial to start, the trial court conducted a pretrial hearing, where it confirmed that it had appointed new counsel for defendant and confirmed a new trial date of April 11, 2016. Defendant did not object and, instead, only asked at the conclusion of the hearing, "Is there something I could do about the other lawyer burning me out of my money because I did pay him?" Notably, defendant expressed no concerns related to his representation until this appeal. In other words, contrary to his position on appeal, defendant never requested the opportunity to retain alternative counsel. Therefore, the trial court could not have denied a request that never occurred, and defendant has not proven how he is entitled to any relief.

III. PROSECUTORIAL MISCONDUCT AND INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that the prosecutor engaged in misconduct and his trial counsel was ineffective for indicating in closing arguments that a witness, Cecil Leonard, testified that he observed defendant "walking" to defendant's vehicle. Defendant asserts that the statements did not coincide with evidence produced at trial and that his defense counsel's inaccurate reference to this testimony led to the prosecutor compounding the error when he responded that defendant walking to his vehicle implied that he was the shooter because everyone else at the scene was running away.

"In order to preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object and request a curative instruction." *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Because the asserted statements were not objected to, a curative instruction was not requested, the issue related to the prosecutor's conduct is unpreserved. Likewise, the ineffective assistance of counsel claim also is not preserved because defendant never moved for a new trial or an evidentiary hearing. *Petri*, 279 Mich App at 410.

"Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Roscoe*, 303 Mich App 633, 648; 846 NW2d 402 (2014) (quotation marks and citation omitted). However, because the issue is not preserved, our review is for plain error affecting defendant's substantial rights. *Bennett*, 290 Mich App at 475. Thus, in the context of prosecutorial misconduct, we will not reverse unless a curative instruction would have been inadequate to alleviate any prejudicial effect. *Id.* at 476.

" 'Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context.' " *Roscoe*, 303 Mich

App at 648 (citation omitted). It is well established that attorneys during closing argument cannot argue facts not entered into evidence. See *People v Lee*, 212 Mich App 228, 255; 537 NW2d 233 (1995). During closing argument, defense counsel stated the following:

> I'm listening to this, and I'm thinking, if it's an automatic weapon that you say was used, where are the casings? Because [defendant] was not in that area from what they say. And how do we know that, because I believe it's Cecil Leonard that says he saw him walking back to his car, not running, not shooting, and he didn't see anything in this hand.
>
> Okay. So he's supposedly has his gun in his—I don't know where it went. But not one casing? Nowhere? Not any blood where you say it happened?

During the prosecutor's rebuttal argument, she stated, in relevant part:

> What else was interesting—and this kind of just struck me during [defense counsel's] closing, is that what was the testimony that Cecil Leonard said is that [defendant is] walking away. Everybody else is running away. There are shots going on. Why is [defendant] the only man walking to his car?
>
> I submit to you that also supports the fact that he's the one shooting. Everyone's running from the threat, except for the person that's the threat himself, [defendant]. He can afford to walk.

Shortly thereafter, during her rebuttal argument, the prosecutor also stated:

> Mr. Cecil Leonard's across the porch, sees his son running over, says, Hey, pop, I think I'm shot. They start to get up, go to the hospital. He sees [defendant] walking to the car at the same time they're loading up in their car. Doesn't see a gun, but doesn't see a telephone either. So Mr. Leonard's clearly not on his cell phone yet.

Although defendant contends the content of the closing arguments did not comport with the evidence, at trial the following exchange occurred between Cecil and the prosecutor:

> *Q*. When you hear those shots, where are they coming from?
>
> *A*. Across, the street, that's where everybody was running from.
>
> *Q*. When you see people running, where are they running away from?
>
> *A*. Well, they started—every—my son and them was running towards me. Well my son was running towards across the street where I was.
>
> * * *
>
> *Q*. After this shooting – hearing those shots, do you see [defendant]?

A. Yes.

Q. What do you see [defendant] doing?

A. Getting in his car.

On cross-examination by defense counsel, Cecil confirmed that he did not observe defendant with a gun or discharge a weapon while defendant proceeded to his vehicle.

The prosecutor did not impermissibly mischaracterize or misrepresent the testimony elicited from Cecil during trial. Cecil testified that he was across the street from the house where the shooting occurred and heard several gunshots. He observed his son, Antonio Leonard, and others running after shots were fired. But for defendant specifically, Cecil stated that he saw him "[g]etting in his car" and did not note that he was one of the people running. Thus, one possible inference from this testimony is that Cecil did not identify defendant as one of the people running after the shooting. As a result, the prosecutor's arguments to the jury were permissible and did not impermissibly inject facts that were not introduced into evidence. See *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Further, assuming the argument was improper, a curative instruction would have alleviated any prejudice by the comment. Accordingly, defendant is not entitled to any relief on his claim of prosecutorial misconduct.

Defendant also attempts to establish the ineffectiveness of his counsel for having raised Cecil's testimony in her closing argument, thereby leading to the prosecutor's challenged rebuttal argument. "To establish ineffective assistance of counsel, a defendant must show that (1) defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and (2) there is a reasonable probability that defense counsel's deficient performance prejudiced the defendant." *People v Putman*, 309 Mich App 240, 247-248; 870 NW2d 593 (2015) (quotation marks and citation omitted). "A 'defendant was prejudiced if, but for defense counsel's errors, the result of the proceeding would have been different.' " *Id*., quoting *People v Heft*, 299 Mich App 69, 81; 829 NW2d 266 (2012). In addition, "[e]ffective assistance of counsel is presumed, and a defendant bears a heavy burden of proving otherwise. Defendant also 'bears the burden of establishing the factual predicate for his claim.' " *Id.* at 248 (citations omitted). The review of unpreserved issues of ineffective counsel is "limited to mistakes apparent on the record." *Petri*, 279 Mich App at 410.

At the outset, defendant cannot establish the factual predicate for his claim, i.e., that his trial counsel made statements that were not supported by the record. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999) ("[D]efendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel[.]"). As noted already, a possible inference from Cecil's testimony was that defendant was *not* one of the people running after the incident. Thus, defense counsel did not state anything that was contrary to the record. Further, the emphasis of this scenario by defense counsel was reasonable in an effort to highlight that defendant was not armed immediately after the shots were fired, which suggested that he was not the shooter. Plus, counsel's argument could be viewed as an attempt to show that defendant walking afterward was inconsistent with one who just committed a violent crime in front of eyewitnesses. There is nothing unreasonable in suggesting that if one just committed such a

crime, one would be expected to make haste to get away as quickly as possible. As a result, we do not find that counsel's actions fell below an objective level of reasonableness.

Moreover, assuming counsel's performance fell below an objective level of reasonableness, defendant cannot establish the requisite prejudice. Here, there was overwhelming evidence presented through two eyewitnesses that defendant shot the victim; it is inconceivable that defendant was prejudiced or wrongly convicted due to his counsel's statement during closing argument. Consequently, defendant cannot establish ineffective assistance of counsel based on this statement by his counsel in closing argument.

IV. *BRADY*[2] VIOLATIONS

Defendant contends that his right to obtain exculpatory evidence was violated, which deprived him of information that could have been used to impeach witnesses at trial. Specifically, defendant claims that the prosecutor failed to timely provide copies of Tyrone Rogers's medical records, wherein Tyrone purportedly identified someone other than defendant as the perpetrator. Defendant also implicitly claims that the prosecution should have turned over evidence of Cecil's criminal record, which it did not do. Further, defendant claims that the prosecutor refused to provide him with the cellular telephone records obtained for defendant's phone.

To preserve an issue premised on the prosecution's suppression of evidence, a defendant is required to bring a motion for a new trial or for relief from judgment in the trial court. *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005). Because defendant did not bring a motion for new trial or a motion for relief from judgment in the trial court, the alleged *Brady* violation issues are not preserved. We review these unpreserved constitutional issues for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

"A criminal defendant has a due process right to obtain exculpatory evidence possessed by the prosecutor if it would raise a reasonable doubt about defendant's guilt." *Cox*, 268 Mich App at 448; see also *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). In order to establish such a due process violation, defendant must prove the following four elements:

> (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*Cox*, 268 Mich App at 448.]

[2] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

Initially, defendant claims that he was denied access to the medical records of Tyrone in which Tyrone made statements to treating medical personnel that called into question defendant's identification as the perpetrator. He asserts that although the prosecutor did turn over these records, it was too late because Tyrone had already testified by the time he received the medical records. Defendant appears confused. Although defendant refers to the medical records of Tyrone, who did receive treatment for a graze-type wound, the medical records defendant appears to be referring to actually pertain to Antonio. On the first day of testimony, defense counsel indicated to the trial court, "[I]t's my understanding there's some medical records that we do not have in our possession that I believe Mr. Leonard indicate his son had. If we could try to get a peek at some medical records[.]" The prosecutor indicated that Antonio's records had not been requested from the hospital but that an effort would be made to procure them for the next day. Antonio testified on both April 12 and 13, 2016. Defense counsel received Antonio's medical records, as promised, on the next day of trial and was given an opportunity to review them before cross-examining Antonio. Antonio acknowledged the medical records as his and acknowledged speaking with personnel at the hospital on the day of the shooting. Antonio admitted that his medical record indicated that he was wrestling with a friend when he was shot, but he asserted that the statement in the record was not accurate. Further, Antonio's medical records were admitted as an exhibit at trial by defendant's counsel. Because defendant had access to the medical records and in fact used them at trial, a *Brady* violation cannot be sustained.

To the extent that defendant may actually be referring to the medical records of Tyrone, he offers no proof of either suppression of the records by the prosecutor or the exculpatory nature of the records. "[D]ue process [does not] require that the prosecution seek and find exculpatory evidence." *Coy*, 258 Mich App at 21. In other words, "neither the prosecution nor the defense has an affirmative duty to search for evidence to aid in the other's case." *Id.* A distinction exists "between the failure to disclose evidence and the failure to develop evidence." *Id.* at 22. Defendant has not demonstrated that the prosecutor had Tyrone's medical records or that their content was exculpatory for defendant. Accordingly, any claim based on a *Brady* violation for Tyrone's medical records fails.

Defendant also asserts that he was unaware of Cecil's criminal record until the conclusion of trial and that, had he known of this record, he could have impeached Cecil. His implicit argument is that the prosecution had a duty to disclose Cecil's purported criminal record. Again, other than defendant's blatant assertion, he offers no proof that Cecil actually has a criminal record or that the record would have been relevant for impeachment purposes. Accordingly, defendant's claim necessarily fails. Moreover, it is important to note that Cecil did not witness the shooting and did not identify defendant as the perpetrator. Cecil's testimony merely confirmed that defendant was present at the home where the shooting occurred. Based on the limitations of Cecil's testimony, and the fact that two other eyewitnesses identified defendant as the shooter, it is highly dubious that the revelation of Cecil's alleged criminal record for purposes of impeachment would have altered the outcome of the proceedings. Hence, defendant cannot prove any plain error.

Defendant also contends that a *Brady* violation occurred because the prosecutor refused to provide copies of defendant's cellular phone records to defendant, while concomitantly asserting that defense counsel "did receive some phone records on the first day of trial." The

lower court record indicates that the prosecutor, in response to defense counsel's assertion that "some discovery issues" remained, indicated that she would provide "some phone records" on the date of the pretrial hearing, January 15, 2015. There is nothing in the lower court record to indicate that the prosecutor did not fulfill his promise. In addition, defendant has failed to demonstrate that the cellular telephone records contained information that would have been favorable to his defense, yet alone altered the outcome of his trial. The cellular phone records place defendant in the vicinity of the shooting and not, as asserted on appeal, "on the other side of town at the time of the shooting." In addition to demonstrating defendant's presence at the crime scene at the time of the shooting, they indicate defendant was traveling away from the scene and into Ohio following the shooting. As a result, a *Brady* violation has not been established with regard to defendant's allegation that the prosecutor wrongfully suppressed his cellular telephone records.[3]

Defendant contends that the cumulative effect of the alleged errors was outcome determinative. We reject this argument because there are no errors to cumulate. See *Mayhew*, 236 Mich App at 128.

V. OFFENSE VARIABLE (OV) SCORING

Defendant claims a multitude of scoring errors at sentencing. Specifically, defendant contends that the trial court wrongly scored OVs 3, 9, and 19 at 10 points each and that OV 6 was incorrectly scored at 25 points.

To preserve an issue with regard to the scoring of an offense variable, a defendant is required to object to the scoring at the time of sentencing or in a motion for resentencing or remand. *People v McChester*, 310 Mich App 354, 357; 873 NW2d 646 (2015); *People v Gibbs*, 299 Mich App 473, 491; 830 NW2d 821 (2013). At sentencing, defendant objected to the scoring of OVs 6 and 9 but did not object to the scoring of OV 19. Defense counsel concurred with the scoring of 10 points for OV 3. As such, the issue is preserved with regard to OVs 6 and 9, but unpreserved for OV 19. And any issue regarding the scoring of OV 3 is waived. See

[3] Although not a *Brady* allegation, defendant also alleges that Michael McGinnis, the individual at trial who presented and discussed the cellular phone records, "testified that he made them up and that they were not the original phone records." Defendant fails to identify where in the lower court record or transcripts such an assertion or statement occurred. " 'Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position.' " *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001) (citation omitted); see also MCR 7.212(C)(7) ("Facts stated must be supported by specific page references to the transcript, the pleadings, or other document or paper filed with the trial court."). Accordingly, this issue is abandoned. We further note that, assuming defendant is referring to the report and maps McGinnis created, those were admissible. Contrary to defendant's position, McGinnis did not "ma[k]e [the data] up"; he created a report and maps "based off of the call detail records that were provided" from the cell phone company. These types of summaries are permissible under MRE 1006.

People v Carter, 462 Mich 206, 216; 612 NW2d 144 (2000) (stating that counsel's express approval of an action extinguishes any error).

Generally, "the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). This Court reviews de novo as a question of law if the issue involves "a question of statutory interpretation[.]" *Id*. Where the challenge to the scoring of a specific OV is unpreserved, this Court's review is limited to plain error affecting defendant's substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

Starting with OV 3, this offense variable was originally assessed at 25 points, but with defense counsel's concurrence, it was lowered to 10 points. Hence, any claim of error is waived. See *Carter*, 462 Mich at 216.

Defendant also objects to the scoring of 25 points for OV 6, which pertains to an "offender's intent to kill or injure another individual." MCL 777.36(1). Pursuant to MCL 777.36(1)(b), 25 points is scored for OV 6 if "[t]he offender had unpremeditated intent to kill, the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result." A sentencing judge is mandated, under MCL 777.36(2)(a), to "score this variable consistent with a jury verdict unless the judge has information that was not presented to the jury." Here, defendant was convicted of second-degree murder, which includes an element of malice, which is defined as "the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). Therefore, the scoring of 25 points on this variable is consistent with defendant's jury conviction of second-degree murder and, thus, is not erroneous.

Defendant contends that the trial court erroneously assessed 10 points for OV 9, which pertains to the "number of victims." MCL 777.39(1). Ten points are assessed for OV 9 when "[t]here were 2 to 9 victims who were placed in danger of physical injury or death . . . ." MCL 777.39(1)(c). Defendant contends that, because he was convicted of second-degree murder but acquitted of the charges of assault with intent to murder, only one victim was involved in this event. Contrary to defendant's assertion, however, MCL 777.39(2)(a) specifically instructs the trial court to "[c]ount each person who was placed in danger of physical injury of loss of life or property as a victim" when scoring this variable. Two individuals, besides the victim, incurred wounds—Antonio and Tyrone. In addition, multiple other individuals were "placed in danger of physical injury" because of the discharge of a weapon where they were present. Thus, it is clear that the trial court did not err when it scored OV 9 at 10 points.

Defendant also challenges the scoring of 10 points for OV 19, "which requires the assignment of 10 points if '[t]he offender otherwise interfered with or attempted to interfere with the administration of justice.' " *People v Sours*, 315 Mich App 346, 349; 890 NW2d 401 (2016), quoting MCL 777.49(c). "[T]he plain and ordinary meaning of 'interfere with the administration of justice' for purposes of OV 19 is to oppose so as to hamper, hinder, or obstruct the act or process of administering judgment of individuals or causes by judicial process." *People v Hershey*, 303 Mich App 330, 343; 844 NW2d 127 (2013). "OV 19 is generally scored for

conduct that constitutes an attempt to avoid being caught and held accountable for the sentencing offense." *Sours*, 315 Mich App at 349.

The evidence at trial showed that defendant fled the crime scene and went to Ohio within hours of the shooting. The fact that defendant's residence was in Ohio is irrelevant, as ultimately, defendant was located in Texas, apprehended, and extradited to Michigan for trial. The trial court's scoring of 10 points for OV 19 did not comprise error because "[h]iding from the police constituted an interference with the administration of justice because it was done for the purpose of hindering or hampering the police investigation." *People v Smith*, 318 Mich App 281, 286; 897 NW2d 743 (2016).

Affirmed.

/s/ Henry William Saad
/s/ Mark J. Cavanagh
/s/ Thomas C. Cameron