

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUAN CARLOS NUNEZ,

Defendant-Appellant.

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UNPUBLISHED

October 22, 2020

No. 349035

Ottawa Circuit Court

LC No. 97-021297-FC

Before: LETICA, P.J., and K. F. KELLY and REDFORD, JJ.

PER CURIAM.

Defendant, Juan Carlos Nunez, appeals his sentence of life without parole (LWOP) for his first-degree murder conviction following a resentencing hearing pursuant to the United States Supreme Court’s *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012) and *Montgomery v Louisiana*, 577 US \_\_\_; 136 S Ct 718; 193 L Ed 2d 599 (2016) decisions, and MCL 769.25 and MCL 769.25a, which address LWOP sentences for juveniles and the option of imprisonment for a term of years. We affirm.

**I. FACTUAL BACKGROUND**

In 1998, a jury convicted defendant when a juvenile of first-degree murder committed in perpetration of a robbery (first-degree felony murder), MCL 750.316(1)(b); armed robbery, MCL 750.529; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b(1). The trial court sentenced defendant to a sentence of mandatory LWOP for his first-degree felony-murder conviction and 20 to 40 years’ imprisonment for the armed robbery conviction, to be served consecutively to a term of two years’ imprisonment for the felony-firearm conviction.<sup>1</sup>

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<sup>1</sup> Defendant appealed his convictions, and this Court affirmed his first-degree felony-murder, armed robbery, and felony-firearm convictions and sentences. See *People v Nunez*, unpublished per curiam opinion of the Court of Appeals, issued February 23, 2001 (Docket Nos. 218647 and

In defendant's previous appeal, this Court stated the facts as follows:

On September 17, 1997, the Pereddies restaurant in Holland, Michigan was robbed. At the time of the robbery, the restaurant manager, the kitchen manager, a line cook and two dishwashers were in the restaurant. Two armed robbers entered through the back door. Codefendant Ramiro Zamudio, who was carrying a knife, took control of the two dishwashers and the line cook. Defendant, who was armed with a sawed-off shotgun, went to the office to rob the restaurant manager, Lisa Richardson. After Richardson gave defendant money and her purse, defendant led her to the kitchen area. When they got there, the kitchen manager, James Scott Anderson, came around a corner and called Richardson's name. Defendant turned, stepped toward Anderson and shot him in the left eye, killing him instantly. Defendant then led Richardson to where Zamudio was holding the other employees. The robbers forced the employees to remain in a bathroom while making their escape.

Fourteen years after defendant began serving his sentence, the United States Supreme Court decided *Miller*, 567 US 460, 465, in which it held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments." Following the *Miller* decision, the Michigan Legislature enacted MCL 769.25 and MCL 769.25a, to address juvenile LWOP sentences and the option of imposing imprisonment for a term of years. See *People v Meadows*, 319 Mich App 187, 189; 899 NW2d 806 (2017). In *Meadows*, this Court explained that

MCL 769.25 applied to future convictions and certain past convictions with matters still pending or pending when *Miller* was issued. On the other hand, MCL 769.25a applied to closed cases for which appeals had been exhausted or were no longer available, but only if the Michigan or United States Supreme Court were to hold in the future that *Miller* was retroactively applicable. [*Id.*]

In 2016, the United States Supreme Court decided *Montgomery*, 136 S Ct 718, 732, 736, in which it concluded that its holding in *Miller* constituted a substantive rule of constitutional law that required retroactive application.

On the basis of *Miller*, *Montgomery*, and MCL 769.25a(3) and (4)(a), the Ottawa County Prosecuting Attorney moved to resentence defendant and requested that the sentencing court again impose an LWOP sentence for defendant's first-degree felony-murder conviction. Defendant opposed the motion and argued in favor of imposition of a term-of-years sentence. Following briefing by the parties to address the factors for the sentencing court's consideration, the sentencing court resented defendant to LWOP.

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218648). Defendant does not challenge his sentences for the armed robbery and felony-firearm convictions on appeal.

## II. STANDARD OF REVIEW

We review for an abuse of discretion a trial court’s sentencing decision. *People v Skinner*, 502 Mich 89, 131; 917 NW2d 292 (2018). “The trial court abuses its discretion when its decision falls outside the range of principled outcomes or when it erroneously interprets or applies the law.” *People v Lane*, 308 Mich App 38, 51; 862 NW2d 446 (2014) (citation omitted). A sentence constitutes an abuse of discretion when the sentence violates the principle of proportionality, which requires that a sentence be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Skinner*, 502 Mich at 131-132.

## III. ANALYSIS

Defendant first argues that the sentencing court abused its discretion by resentencing him to LWOP. Additionally, defendant argues that the trial court improperly applied the law regarding the resentencing. We disagree.

In *Miller*, 567 US at 465, the United States Supreme Court held that “mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment’s prohibition on ‘cruel and unusual punishments.’”. The *Miller* Court recognized that youthful attributes diminished the penological justifications for imposing life imprisonment without parole on juvenile offenders. *Id.* at 472. As described by the Michigan Supreme Court in *Skinner*,

[t]he following are the factors listed in *Miller*: (1) “his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences”; (2) “the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional”; (3) “the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him”; (4) whether “he might have been charged [with] and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys”; and (5) “the possibility of rehabilitation . . . .” [*Skinner*, 502 Mich at 114-115, quoting *Miller*, 567 US at 477-478.]

The *Miller* factors describe circumstances that mitigate the proportionality of a sentence of life imprisonment without parole for a juvenile offender. See *Miller*, 567 US at 489. The *Miller* Court noted that a difference exists between the crime of a juvenile offender that demonstrated the juvenile’s transient immaturity and the crime of the “rare juvenile offender whose crime reflects irreparable corruption.” *Id.* at 479-480. The *Miller* Court held that trial courts must consider how children are different and how those differences weigh against irrevocably sentencing them to a term of life imprisonment. *Id.*

In this case, the record reflects that the sentencing court considered defendant’s age and the features of defendant’s age, defendant’s family and home environment, the circumstances of the homicide offense, defendant’s ability to interact with police officers and attorneys, and the

possibility of rehabilitation. The sentencing court found that defendant's immaturity constituted a mitigating factor at the time of the offense on the basis of defendant's age and youth. The sentencing court found that evidence demonstrated that defendant was impulsive and unable to delay gratification impulses. Further, defendant placed and maintained the placement of his finger on the trigger of the loaded gun, which was consistent with the inability to appreciate the risks and consequences of conduct. The sentencing court also found that evidence established that defendant's ability to appreciate risks was not compromised at the time of the offense.

The sentencing court determined that defendant's home environment, while perhaps not ideal, was not a mitigating factor because his parents maintained a stable household and provided for the family's necessities. Further, the sentencing court found that defendant's home was not unfit, harmful, or abusive and that defendant chose to engage in unlawful behaviors in spite of a "healthy and happy home environment."

Regarding the offense, the sentencing court found that defendant planned the armed robbery including the use of a lethal weapon, and that defendant aimed the shotgun at Richardson's head, forced Richardson to remove items from the restaurant safe while Richardson begged for her life, shot Anderson, continued to aim the gun at Richardson, barricaded Richardson and the restaurant employees in a bathroom, and eventually fled from the restaurant. Defendant "methodically executed his plan." The sentencing court found that defendant did not intend to kill Anderson but that he had the ability and willingness to kill an individual if the situation arose. It determined that the circumstances of the offense were not a mitigating factor.

Regarding defendant's criminal history, the sentencing court found that defendant had several juvenile convictions and failed to participate in probation services. Defendant's behavior escalated over time, including his behavior before and during his incarceration. The sentencing court also weighed defendant's participation in classes, training, and work assignments during his incarceration and found that defendant had been generally positive and a hard worker.

Regarding rehabilitation, the sentencing court indicated that the characteristics of defendant's diagnosis of antisocial personality disorder were pervasive and involved a disregard for and violation of the rights of others. The court found that, although the expression of antisocial personality disorder traits often decreased as a person aged, defendant continued to display antisocial personality disorder traits and became involved in inmate disputes, rather than avoiding disputes. The sentencing court recognized that expert witness, Dr. Elissa Benedek, opined that defendant's behavior demonstrated that he was impulsive and continued to act impulsively. Further, the court found that defendant did not show empathy toward Richardson or Anderson's family and never expressed regret for killing Anderson. The sentencing court considered such behavior consistent with antisocial personality disorder.

The evidence and testimony presented at the resentencing hearing supported the trial court's LWOP sentence. Regarding mitigating factors, at the time of the commission of the murder, defendant was a 16-year-old minor with a criminal history of theft and drug-related offenses which evidenced defendant's impulsiveness, failure to appreciate consequences, and desire for instant gratification, all of which are attributes of youth. The record, however, also indicates that defendant wanted to participate in classes, training, and programs for rehabilitation. Further, he attempted to advise his family members to make good life decisions, he indicated a

desire to contribute positively to society, and a desire to apologize to Anderson's family and Richardson.

The record, however, reflects that defendant did not demonstrate empathy for either Richardson or Anderson's family. He expressed regret for his situation and the impact on his family rather than regretting that he took Anderson's life. Although defendant participated in classes and trainings during his incarceration, he committed many misconduct offenses, acted with violence, and made weapons. Such behavior during his incarceration is indicative that defendant's violent conduct and antisocial behaviors at the time of the commission of the offenses were not related to defendant's youth.

Additionally, the evidence and testimony presented during the resentencing hearing showed that defendant was diagnosed with antisocial personality disorder, a psychological disorder that existed at the time of the incident and continued to exist at the time of defendant's resentencing. The diagnosis was based on defendant's conduct before, during, and after the incident. Defendant demonstrated violent and aggressive tendencies, which, according to expert witness Dr. Jeffrey Kieliszewski, showed that defendant presented with antisocial personality disorder. Evidence did not establish that defendant's psychological state and responses to situations as an adult varied from his behaviors and psychological state when he was 16 years old, nor that his behaviors at the time of the offense were related to the attributes of his youth, rather than his antisocial personality disorder.

The record reflects that defendant's home environment was not ideal. Defendant's parents were absent from his life and did not provide parental guidance or supervision. Nevertheless, evidence indicates that defendant's parents appeared to meet his needs, provided defendant a stable home, and defendant's siblings cared for each other. To the extent that defendant's home environment was dysfunctional or detrimental to him, defendant extricated himself from that environment by living with his friends. Those friends, however, were allegedly gang members. Defendant's history of drug and alcohol use could have influenced his decision-making process at the time he decided to commit the crimes. However, his juvenile criminal history demonstrated that defendant had a pattern of unlawful behavior irrespective of his substance abuse.

The circumstances of the crime supported the sentence imposed by the sentencing court. Defendant actively planned the armed robbery, carried a loaded lethal weapon, led the armed robbery by directing Richardson to give him money, caused Richardson to beg for her life, killed Anderson, barricaded the restaurant employees in the restaurant bathroom, and left the restaurant without regard for Anderson. Defendant demonstrated a complete lack of regard for the consequences of his conduct including the death of another human being. The evidence does not establish that defendant's age and youth affected or mitigated his role in the armed robbery and first-degree felony murder. No evidence suggests that defendant acted because of peer pressure or familial pressure to commit the crime in this case. The evidence does not establish that defendant's age or incompetency of youth rendered him unable to interact with police officers or the prosecution or to assist in his defense. Further, defendant's criminal history and history of misconducts during his incarceration demonstrated that defendant's behavior and criminal activity escalated and weighed against the possibility of his rehabilitation.

The evidence and testimony regarding defendant's age, defendant's family and home environment, the circumstances of the homicide offense, defendant's ability to interact with police officers and attorneys, and the possibility of rehabilitation do not support concluding that defendant's crime reflected his transient immaturity. See *Miller*, 567 US at 479-480. The sentencing court properly considered all of the *Miller* factors and correctly applied the law to the facts of the case before imposing an LWOP sentence. We conclude that the trial court did not abuse its discretion in resentencing defendant to LWOP because its decision falls well within the range of principled outcomes. See *Miller*, 567 US at 477-478; *Skinner*, 502 Mich at 131, 133; *Lane*, 308 Mich App at 51.

Defendant next argues that defense counsel provided ineffective assistance by presenting the expert witness testimony of Dr. Kieliszewski. We disagree.

Generally, “[t]he question whether defense counsel performed ineffectively is a mixed question of law and fact; this Court reviews for clear error the trial court’s findings of fact and reviews de novo questions of constitutional law.” *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012). However, because defendant did not move the sentencing court for a new trial or for an evidentiary hearing, our review is limited to mistakes apparent on the lower court record. See *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012).

“Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). To overcome this presumption, a defendant must show that: (1) defense counsel’s performance did not meet an objective standard of reasonableness under the circumstances and according to prevailing professional norms, and (2) that a reasonable probability exists that, but for defense counsel’s unprofessional errors, the outcome of the proceeding would be different. *Id.* at 663-664. Additionally, a defendant must show that the result that occurred was fundamentally unfair or unreliable. *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012).

“Defense counsel must be afforded broad discretion in the handling of cases.” *People v Pickens*, 446 Mich 298, 325; 521 NW2d 797 (1994). Defense counsel’s decisions regarding what evidence he or she presents on behalf of the defense is presumed to be a matter of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Further, how defense counsel questions a witness is also presumed to be a matter of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008).

It is not apparent from the record in this case that defense counsel erred. Defendant has failed to establish that defense counsel’s performance fell below an objective standard of reasonableness. Defendant introduced the testimony of Dr. Kieliszewski during the resentencing hearing. Dr. Kieliszewski testified regarding several facts that weighed in defendant’s favor; including that, generally, 16-year-olds are impetuous or egocentric by nature. Dr. Kieliszewski testified that defendant reported that his parents could not control or supervise him and that his family had to adjust in Michigan as a result of their Mexican heritage. Dr. Kieliszewski testified further that defendant did not plan to kill Anderson during the armed robbery and that defendant did not understand or have experience with the consequences of carrying a gun. Further, Dr. Kieliszewski did not observe any psychiatric conditions that prevented defendant from being rehabilitated. Regarding antisocial personality disorder, Dr. Kieliszewski testified that the disorder

was associated with criminal activity and that an individual generally had less propensity to commit unlawful or aggressive acts as the person aged.

Dr. Kieliszewski also testified that some facts and *Miller* factors did not weigh in defendant's favor. Dr. Kieliszewski testified that defendant had tendencies of aberrant behavior, did not show gross immaturity or an inability to care for himself, demonstrated a lack of impetuosity because the armed robbery was planned, was able to appreciate the risks and consequences of his action of shooting a gun, planned to commit the armed robbery and carried a lethal weapon, and exhibited deceitfulness in his description of his criminal history and the incident. Dr. Kieliszewski testified that defendant appeared to minimize the organization of the group of individuals and their criminal gang activities and minimized any potentially negative characteristics or circumstances. Dr. Kieliszewski concluded that defendant had a poor prognosis for rehabilitation, in part, because of defendant's antisocial personality disorder. Defense counsel, however, questioned Dr. Kieliszewski regarding his conclusions and ultimately presented expert testimony from Dr. Kieliszewski that weighed in defendant's favor. The record reflects that Dr. Kieliszewski's testimony did not directly oppose the defense and in many aspects supported it.

Defendant has not established that an expert could have provided more favorable testimony for the defense. The record reflects that both Dr. Kieliszewski and Dr. Benedek diagnosed defendant with antisocial personality disorder and provided testimony regarding the common attributes and behaviors of a person with antisocial personality disorder and the lack of successful treatment options. Defendant has not overcome the presumption that defense counsel's decisions regarding selection and use of Dr. Kieliszewski as an expert were matters of trial strategy. Further, defendant has failed to establish that defense counsel failed to conduct a thorough investigation of the law and the facts of the case before selecting Dr. Kieliszewski as an expert witness. See *People v Ackely*, 497 Mich 381, 390; 870 NW2d 858 (2015) (explaining that an attorney's selection of an expert witness is a paradigmatic example of trial strategy after the attorney completes a thorough investigation of the law and the facts of the case).

Moreover, defendant has failed to demonstrate that the results of the proceedings would have been different had defense counsel not introduced the testimony of Dr. Kieliszewski. The record reflects that, although some evidence supported mitigating factors, ample evidence weighed against defendant, supporting the sentencing court's decision irrespective of Dr. Kieliszewski's testimony. Defendant has failed and cannot establish that, but for defense counsel's decision to call Dr. Kieliszewski to testify, the outcome of the proceedings would have been different. Accordingly, defendant has failed to establish that defense counsel provided him ineffective assistance. Defendant failed to show that defense counsel erred and that a different result was reasonably probable. *Solmonson*, 261 Mich App at 663.

Finally, defendant argues that our Supreme Court's decision in *Skinner* was wrongly decided. We disagree.

We are bound by stare decisis to follow the decisions of our Supreme Court. *People v Crockran*, 292 Mich App 253, 256-257; 808 NW2d 499 (2011). Only the Supreme Court may overrule its decisions. See *id.* Therefore, we must follow *Skinner* because it has binding precedential effect under the doctrine of stare decisis. See *id.*

Additionally, we note that defendant does not request this Court to overrule *Skinner* or otherwise address or interpret the *Skinner* decision. Rather, defendant summarily argues that the holding in *Skinner* that a life sentence is justified on the basis of the offense alone was contrary to *Miller*. Defendant did not provide any legal basis to argue that this Court had authority to overrule binding Michigan Supreme Court precedent. Additionally, defendant failed to provide any legal basis to argue that the *Skinner* decision was wrongly decided. Defendant failed to provide any legal basis for his argument, failed to sufficiently brief this issue on appeal, and did not demonstrate a plain error. See *People v Van Tubbergen*, 249 Mich App 354, 365; 642 NW2d 368 (2002) (explaining that insufficiently briefed issues are deemed abandoned on appeal); *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) (“An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority.”). Accordingly, we find no merit to defendant’s argument in this regard.

Affirmed.

/s/ Anica Leticia

/s/ Kirsten Frank Kelly

/s/ James Robert Redford