STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CEDELL VIRGIES III,

Defendant-Appellant.

UNPUBLISHED
December 16, 2021

No. 350475
Saginaw Circuit Court
LC No. 18-045330-FC

Before: STEPHENS, P.J., and BORRELLO and O'BRIEN, JJ.

PER CURIAM.

Defendant, Cedell Virgies III, appeals as of right his convictions by a jury of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was also a fourth-offense habitual offender, MCL 769.12. The trial court sentenced him to life imprisonment, without the possibility of parole, for murder and to two years in prison for felony-firearm. For the reasons set forth in this opinion, we affirm the convictions and sentences of the defendant.

I. BACKGROUND

Defendant's convictions arose from the shooting death of Jermaine Boose in the early morning hours of May 5, 2018, at the Birch Park apartment complex in Saginaw, Michigan. Jermaine suffered one gunshot wound to his neck, and according to the medical examiner, this gunshot wound proved fatal. Jermaine's girlfriend, Antoinette Jones, and one other eyewitness, Harry Staves, testified that defendant shot Jermaine. Testimony of those witnesses as well as police officers portrayed a chaotic scene where Jermaine was murdered. Testimony revealed that just prior to the shooting, there were numerous fights and people screaming and yelling at one another. Estimates of the size of the crowd varied with some witnesses testifying there were as many as 40 to 50 people at or near the scene of the shooting.

Jones testified that a person in or near a black truck fired shots that evening, but that the fatal shot came from someone else, i.e., defendant. Despite the number of people that had been present, several of those at the scene either refused to speak to the police or the police were unable to contact for an interview.

One of the people who refused to speak to the police was defendant's ex-girlfriend, Imari West. However, at trial, West testified that defendant was in bed with her at the time shots were fired. When asked by the prosecutor why she did not go to the police with this information when afforded an opportunity to do so by police, her response was seemingly two-fold. First, West testified that she did not have enough money for an attorney and she had been warned to never speak to police without having an attorney present. Second, she asserted: "I mean, if the justice system is right, he'll be proven innocent."

Following conviction by the jury as outlined above, defendant filed a motion for a new trial. The trial court rejected defendant's argument that the verdict was against the great weight of the evidence, concluding that defendant's argument went to credibility and that the jury was the arbiter of credibility. The trial court also rejected defendant's argument that insufficient evidence supported the first-degree-murder element of premeditation, emphasizing that both Jones and Staves testified that the brawl had dissipated at the time of the killing. The trial court noted the testimony evidence that the victim had been walking backward, that defendant had crept toward him, and that the victim was shot at extremely close range.

As to defendant's argument that the prosecutor committed error by arguing in closing that there had been additional people at the scene who refused to testify out of the fear of being labeled "snitches," the trial court stated that the prosecutor's statement corresponded with the evidence produced at trial and noted that the prosecutor did not indicate whether these witnesses' testimonies would have supported defendant or the prosecution. Regardless, the trial court also stated that the prosecutor had been attempting to explain why so few eyewitnesses testified, despite the large crowd that had been gathered that night.

With regard to defendant's argument about Morgan Crawford,[1] the trial court noted that defendant had provided no affidavit or offer of proof to demonstrate that she had anything helpful to offer at trial, stating that defendant had "no idea" how Crawford would actually testify. On these grounds, the court declined to order an evidentiary hearing on the basis of ineffective assistance of counsel.

Following the trial court sentencing of defendant as indicated above, defendant filed in this Court a motion for a remand for a new trial or an evidentiary hearing,[2] arguing that defense counsel had failed to adequately investigate the information known by four witnesses, Garianna Hunt, Drevon Long, Vito McCullough, and Davonta Anderson. He also argued that the issue of possible testimony by LaToya Young and Demetrius Hogg needed to be explored. This Court denied the motion and this appeal ensued.

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[1] Counsel had asked for an investigator to determine what information Morgan Crawford, the alleged roommate of West, knew about the shooting.

[2] *People v Virgies*, unpublished order of the Court of Appeals, entered March 29, 2021 (Docket No. 350475).

II. ANALYSIS

On appeal, defendant raises numerous issues both in his appellate counsel's submissions and in his Standard 4[3] appeal.

A. GREAT WEIGHT AND SUFFICIENCY OF EVIDENCE

Defendant first argues that the trial court should have granted his motion for a new trial because the verdict was against the great weight of the evidence. He also contends that the prosecutor presented insufficient evidence of the first-degree-murder element of premeditation.

This Court reviews for an abuse of discretion a trial court's decision regarding a motion for a new trial brought on the basis of the great weight of the evidence. *People v Gadomski*, 232 Mich App 24, 27; 592 NW2d 75 (1998). We review "de novo a defendant's challenge to the sufficiency of the evidence supporting his or her conviction." *People v Lane*, 308 Mich App 38, 57; 862 NW2d 446 (2014).

"The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Lopez*, 305 Mich App 686, 696; 854 NW2d 205 (2014). In the absence of rare exceptions, issues of witness credibility are for the jury. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). Exceptions are when "testimony is patently incredible or defies physical realities," when "a witness's testimony . . . is so inherently implausible that it could not be believed by a reasonable juror," or when "the . . . testimony has been seriously impeached and the case marked by uncertainties and discrepancies." *Id*. at 643-644 (quotation marks and citations omitted).

In *Lemmon*, *id*. at 634-635, the Court stated, "Under statute, as well as the court rule[s], the operative principles regarding new trial motions are that the court may, in the interest of justice or to prevent a miscarriage of justice, grant the defendant's motion for a new trial." (Quotation marks and citations omitted.) The *Lemmon* Court analyzed whether the evidence "establish[ed] that an innocent person had been found guilty, or [whether] the evidence preponderate[d] heavily against the verdict so that it would be a serious miscarriage of justice to permit the verdict to stand." *Id*. at 648; see also *id*. at 644-645.

Defendant's argument rests on his assertion that the testimony of Jones and Staves was not credible. Such an argument as correctly pointed out by the trial court rests on a credibility determination by the reviewing Court. Rather than the trial court or this Court being tasked with credibility determinations, it was up to the jury to decide whether to believe these witnesses. *Id*. at 642. As with most cases, while there may have been reasons to call into question the credibility of Jones and Staves, their testimony was not so impeached as to be unbelievable to a reasonable juror. While there was evidence that the victim's mother had shown Jones a photograph of defendant before Jones spoke with the police, both Jones and Denise Boose, the victim's mother, denied this at trial. And while Jones said that defendant had been wearing a hoodie, she also stated

[3]Standard 4 of Michigan Supreme Court Administrative Order 2004-6, 471 Mich c, cii (2004).

that when defendant walked past her, she got a "good look at him" and was "100 percent sure, on my kids, my life" that it was defendant who shot the victim. As for Staves, while he admitted to consuming alcohol and marijuana that night and admitted to having been hit by an object, he said that he "knew exactly what was going on" despite these factors and stated that his ability to see and hear was intact. He also said that he was testifying on the basis of what actually happened that night, not on the basis of what he heard at the preliminary examination. And he explained why it had taken him so long to come forward, stating that he had been afraid of coming to physical harm because of his testimony as a "snitch."

Defendant implies that Staves's testimony defied physical reality because his testimony about the angle of the gunshot was inconsistent with the autopsy. Staves testified that defendant "stood over" Jermaine because defendant was a bit taller than Jermaine, and then pulled the trigger. Staves said, "He was arm reach to where he could punch him in the face. That's how close he was." The prosecutor asked, "And so you were showing us kind of how the defendant's hand was, and you had your wrist kind of cocked . . . downward; is that accurate?" Staves said, "Yeah." The pathologist, Dr. Kanu Virani, stated that the entrance wound of the bullet was "located just left of the midline of the front of the neck." He said, "There was a wound where the bullet entered. And then it came out on the left side at the same level but on the lateral side." Dr. Virani stated that, given the presence of soot, the barrel of the gun had been within "about an inch or so from the skin."

We conclude that Staves's testimony was not so incredible as to defy physical reality. His testimony about the proximity between defendant and Jermaine at the time of the shooting matched the testimony by Dr. Virani. Also, Staves did not indicate whether Jermaine altered his head and neck position at the time of the shooting, when confronted with the gun. Staves was not testifying with mathematical precision but was recounting his observations. Nothing demonstrates that Staves's recollection of his observations that night were in defiance of physical reality.

Given the principles set forth in *Lemmon*, the trial court did not abuse its discretion by denying defendant's motion for a new trial.

Defendant contends that the prosecutor presented insufficient evidence to support the premeditation element of first-degree premeditated murder. In reviewing a sufficiency-of-the-evidence claim, this Court "review[s] the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the prosecution had proved the crime's elements beyond a reasonable doubt." *Lane*, 308 Mich App at 57. Direct and circumstantial evidence can be considered in determining whether the prosecution offered sufficient evidence to support a conviction. See *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Moreover, "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *Id.*

MCL 750.316 states, in pertinent part:

> (1) Except as provided in sections 25 and 25a of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.25 and 769.25a, a person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life without eligibility for parole:

(a) Murder perpetrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing

In *People v Oros*, 502 Mich 229, 242-243; 917 NW2d 559 (2018), the Court stated:

> Premeditation and deliberation may be established by an interval of time between the initial homicidal thought and ultimate action, which would allow a reasonable person time to subject the nature of his or her action to a second look. That is, some time span between the initial homicidal intent and ultimate action is necessary to establish premeditation and deliberation, but it is within the province of the fact-finder to determine whether there was sufficient time for a reasonable person to subject his or her action to a second look. While the minimum time necessary to exercise this process is incapable of exact determination, it is often said that premeditation and deliberation require only a brief moment of thought or a matter of seconds[.] By the weight of authority the deliberation essential to establish murder in the first degree need not have existed for any particular length of time before the killing. The time within which a wicked purpose is formed is immaterial, provided it is formed without disturbing excitement. The question of deliberation, when all the circumstances appear, is one of plain common sense; and an intelligent jury can seldom be at a loss to determine it. [Quotation marks, citations, and brackets omitted.]

The Court added:

> The requisite state of mind may be inferred from defendant's conduct judged in light of the circumstances. In other words, what constitutes sufficient evidence to support the elements of premeditation and deliberation may vary from case to case because the factual circumstances will vary, but the ultimate answer may be resolved in determining whether reasonable inferences may be made to support the fact-finder's verdict. [*Id*. at 243-244 (quotation marks and citation omitted.]

Evidence of a struggle can demonstrate the opportunity for a "second look," as can manual strangulation. See *id*. at 244.

Jones testified that the brawl had begun dissipating before the shooting, and that the victim "was walking backwards with his hands up" when defendant walked toward him. Staves also said that defendant was walking backward with his hands up and that he went from a potential fighting stance to this "hands up" stance. Staves said that after he saw a gun he ran, then turned around:

> And that's when I seen [defendant] come through the side, like creeping, right here, backing my mans [i.e., Jermaine] up, pushed him out the crowd, pulled him out the crowd, and shot him right here.

Staves testified that defendant was "creeping, . . . like stalking [Jermaine]." Staves also testified that Jermaine was not physically fighting anyone that night.

This testimony was sufficient to show that defendant had sufficient time to take a "second look" or time for reflection before killing Jermaine. *Id*. at 244, 247. As set forth in *Oros*, "[t]he time within which a wicked purpose is formed is immaterial, provided it is formed without disturbing excitement. The question of deliberation, when all the circumstances appear, is one of plain common sense; and an intelligent jury can seldom be at a loss to determine it." *Oros*, 502 Mich at 242. Hence, when examining the record presented in this case it is clear that the evidence presented at trial fairly supported an inference of premeditation and deliberation. *Id*. 242. Accordingly, defendant is not entitled to relief on this issue.

B. PROSECUTORIAL ERROR

Defendant also argues that the prosecutor committed error requiring reversal by stating during closing arguments that there were several additional witnesses who did not testify because they were afraid of retaliation for being "snitches." Defendant did not object to the closing-argument statement with which he takes issue on appeal. While defendant raised the issue in a motion for a new trial, "[i]n 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). Accordingly, this argument is not preserved.

In general, this Court reviews claims of prosecutorial error to determine whether "the prosecutor committed errors during the course of trial that deprived [the] defendant of a fair and impartial trial." *People v Cooper*, 309 Mich App 74, 88; 867 NW2d 452 (2015). However, this Court reviews unpreserved issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); see also *Cooper*, 309 Mich App at 88. Under the plain-error doctrine, reversal is warranted if a "clear or obvious" error occurred that "affected the outcome of the lower court proceedings." *Carines*, 460 Mich at 763. And even if this standard is satisfied,

> an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. [*Id*. at 763-764 (citation, quotation marks, and brackets omitted).]

Defendant takes issue with the following statement by the prosecutor in her closing argument:

> There were a lot of people that were interviewed in this case, ladies and gentlemen, people that did not take that witness stand. And I asked Detective Jacobs while he was testifying if this was a common occurrence, people not coming forward. And he explained the prohibition on snitching, and that people were often afraid to come forward. And so, not many people were willing to talk during this investigation.

Defendant contends that the prosecutor, in making this statement, was arguing facts not in evidence. It is true that a prosecutor is not to argue facts not in evidence. See, e.g., *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). But the fact that witnesses were afraid to

talk to the police because of the fear of being a "snitch" was in evidence at trial. It must be remembered that there was a crowd of people at the scene on the night in question. A detective stated that there was "a large crowd" and that officers were having problems controlling the crowd. The prosecutor needed to explain to the jury why, given all of those people present at the time of the shooting, only two eyewitnesses testified at trial. Reviewing the prosecutor's argument in this context, the prosecutor was explaining to the jury that the police found the only witnesses that would testify. Defendant contends that the effect of the prosecutor's statement was an implication that the missing witnesses would have testified in favor of the prosecution, but the record does not support a conclusion that the prosecutor indicated what the testimony might be of any other potential witnesses. Rather, the prosecutor stated that people were not willing to talk at all and that the police "talked to everybody that they could."

Defendant contends that the prosecutor also made an improper comment during her opening statement, but defendant completely fails to indicate what this statement was and fails to provide any record citation in support of the contention. A party may not leave it up to this Court to unravel his arguments for him. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

Defendant also contends that the police officers should not have testified in the first place that there were witnesses who had witnessed some of the incident but did not want to speak about it. This argument is not raised in the questions presented for appeal and has therefore been abandoned.[4] *People v McMiller*, 202 Mich App 82, 83 n 1; 507 NW2d 812 (1993). In addition, defendant provides no legal authority for why this testimony was improper. *Wilson*, 457 Mich at 243. Finally, contrary to defendant's implication, the police, like the prosecutor, did not indicate that the witnesses who were not willing to come forward had information favorable to the prosecution. Consequently, on this record, we conclude that defendant is not entitled to relief on this issue.

C. EFFECTIVE ASSISTANCE OF COUNSEL—ALIBI WITNESS

Defendant contends that his trial counsel rendered ineffective assistance by failing to investigate the possible testimony of Morgan Crawford, who, as previously mentioned, had been a roommate of Imari West at the Birch Park apartment complex.

In *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000), this Court stated:

> In order to preserve the issue of effective assistance of counsel for appellate review, the defendant should make a motion in the trial court for a new trial or for an evidentiary hearing. Failure to move for a new trial or for a *Ginther*[5] hearing ordinarily precludes review of the issue unless the appellate record contains sufficient detail to support the defendant's claim. If review of the record does not

[4] The question presented speaks to the prosecutor's argument, not to the prosecutor's elicitation of testimony.

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

> support the defendant's claims, he has effectively waived the issue of effective assistance of counsel. Defendant failed to move for a new trial or file a motion for a *Ginther* hearing. Therefore, our review is limited to the appellate record. If the appellate record does not support defendant's assertions, he has waived the issue. [Citations omitted.]

Defendant sought an evidentiary hearing in the trial court on this issue, but the trial court *denied* the request. This Court's review is limited to the existing record (including whatever might have been submitted in connection with the request below).

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge must first find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A court's findings of fact are reviewed for clear error, and questions of constitutional law are reviewed de novo. *Id*.

To obtain relief on the basis of ineffective assistance of counsel, a party "must show that counsel's performance fell short of [an] . . . objective standard of reasonableness and that, but for counsel's deficient performance, there is a reasonable probability that the outcome of the . . . trial would have been different." *People v Ackley*, 497 Mich 381, 389; 870 NW2d 858 (2015) (quotation marks, citation, and brackets omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. (quotation marks and citation omitted).

At trial, West testified that when she lived at the Birch Park apartment complex, she had a roommate named Morgan Crawford. Defendant contends that Crawford could have supported the same alibi defense presented by West. But there is nothing in the record to show that Crawford was home at her Birch Park apartment on the night in question. West stated that she was in bed with defendant at the time of the incident, but she said nothing about Crawford's whereabouts. As was the case in the trial court, here, defendant has not submitted either an affidavit or an offer of demonstrating that Crawford was present on the night in question, witnessed the shooting, and would testify in defendant's favor. While defendant additionally argues that the trial court should have granted additional time for exploration of this issue or possibly appointed an investigator, again, defendant provides no basis on which such relief could be considered. As a consequence, no relief is available. See *People v Johnson*, 245 Mich App 243, 260; 631 NW2d 1 (2001) (opinion of O'CONNELL, P.J.).[6]

D. ALLOWANCE OF TESTIMONY BY HARRY STAVES

[6] See also *People v Chapman*, unpublished per curiam opinion of the Court of Appeals, issued July 31, 2007 (Docket Nos. 265064 and 266736), pp 4-5 (request for court-appointed investigator was based on pure conjecture). Unpublished opinions may be followed if persuasive. *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 42 n 10; 761 NW2d 151 (2008). We find *Chapman* persuasive.

Defendant submits that the trial court erred by allowing Staves to testify at trial even though he was endorsed as a witness late by the prosecutor.

We review this issue for an abuse of discretion. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995) ("Endorsement or deletion from this [witness] list is within the discretion of the trial court, reversible only for abuse.").

On Wednesday, June 19, 2019, the date scheduled for trial, the prosecutor informed the trial court that she had become aware of Staves the prior morning. She noted that Staves was a res gestae witness and would provide critical information at trial. She stated that, upon becoming aware of Staves, she had a detective go to interview him. She said:

> I was not aware of this particular individual because of the fact he did not come forward until yesterday, and he had indicated his reason for doing so was he feared retaliation, and that he was afraid to come forward.
>
> And then, when he spoke with the detective yesterday, he did give his own reasons for coming forward, and he wants to do the right thing and tell the jury what he saw on the night in question.

Defense counsel objected to having Staves testify because he had taken so long to come forward and because he had attended the preliminary examination. Defense counsel said that if the trial court were to allow Staves's testimony, then the defense wanted a continuance in order to prepare. Counsel averred that he had been provided with an audio recording that morning of Staves's police interview.

The court concluded that the prosecutor had shown good cause to amend the witness list. It said that it would not "adjourn the trial outright" but would "set it over till Friday morning to begin selection of a jury and opening statements." Trial began with jury selection and opening statements on Friday, June 21, 2019. Witness presentation commenced on Tuesday, June 25, and Staves testified on Wednesday, June 26.

MCL 767.40a states, in part:

> (1) The prosecuting attorney shall attach to the filed information a list of all witnesses known to the prosecuting attorney who might be called at trial and all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers.
>
> (2) The prosecuting attorney shall be under a continuing duty to disclose the names of any further res gestae witnesses as they become known.
>
> (3) Not less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial.

(4) *The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown* or by stipulation of the parties. [Emphasis added.]

Here, the record reveals that the prosecutor filed a written motion to add Staves as witness on the day she found out about his willingness to testify. This case is similar to the situation in *Burwick*, 450 Mich at 285, where the prosecutor had not known about the existence of a witness and moved to add the witness on the second day of trial. The trial court stated: "The witness . . . was not known to the prosecutor, or to the police. The prosecutor had no legal duty to discover, endorse, or produce her. Her belated discovery was for good cause shown." *Id*. at 289. In light of *Burwick*, the lower court did not err by finding good cause. Defendant contends that he should have been granted a continuance. The trial court did grant a continuance, albeit not as long as defendant would have desired. The record reveals that Staves was allowed to testify by the trial court on Wednesday, June 19, 2019. The trial court granted two more days until the trial began, and Staves did not testify until Wednesday, June 26, 2019. Accordingly, defense counsel had a week to prepare to cross-examine Staves, and he makes no argument on appeal that his opening statement on Friday, June 21, would have been different had he been afforded additional time to prepare. See, e.g., *Burwick*, *id*. at 295 ("there is no colorable claim that defendant would have proceeded any differently had advance notice been given"). Under the circumstances, no abuse of discretion is apparent in the record.

Defendant also claims that Staves should not have been allowed to testify because he attended the preliminary examination. He frames this issue as one of a violation of a sequestration order issued at the preliminary examination. At the preliminary examination, the prosecutor requested "mutual sequestration." Defense counsel also requested "sequestration of witnesses." But the transcript does not indicate that sequestration was ever ordered. Also, there is no allegation that Staves violated any sequestration order entered at the jury trial. The foundation of defendant's appellate argument is therefore faulty.

Moreover, in *People v Roberts*, 292 Mich App 492, 502; 808 NW2d 290 (2011), this Court stated:

> Defendant also contends that Sergeant Michael Kasher and Officer Jim Davis of the Norton Shores police department admitted violating the sequestration order at the suppression hearing by speaking with each other about the case and asserts on that basis that the trial court should have excluded their testimony.

The Court then stated:

> With regard to the sequestration of witnesses, one of the purposes of the sequestration of a witness is to prevent him from coloring his testimony to conform with the testimony of another. *Officer Davis and Sergeant Kasher each clearly testified that their testimony was not colored to conform with the testimony of the other. In light of this record evidence, we conclude that the trial court's decision to not exclude the testimony of Officer Davis and Sergeant Kasher was not outside the range of reasonable and principled outcomes*. As a result, the trial court did

> not abuse its discretion. [*Id*. at 505 (quotation marks and citations omitted; emphasis added).]

Further, in *People v Meconi*, 277 Mich App 651, 654; 746 NW2d 881 (2008), this Court stated:

> Additionally, the United States Supreme Court has recognized three sanctions that are available to a trial court to remedy a violation of a sequestration order: (1) holding the offending witness in contempt; (2) *permitting cross-examination concerning the violation*; and (3) precluding the witness from testifying. Although usually stated in the context of a defense witness's exclusion in a criminal case, courts have routinely held that exclusion of a witness's testimony is an extreme remedy that should be sparingly used. [Quotation marks and citation omitted; emphasis added.]

Here, the prosecutor asked Staves if he had listened to the testimony at the preliminary hearing, and Staves replied, "I vaguely remember it, but yeah, I did." The prosecutor asked, "Is what you're telling us today what you recall and what you personally observed, or did it come from the testimony you heard at that hearing." He said, "No, ma'am." The prosecutor then asked, "Everything you're telling us is what you personally saw with your own eyes on May 5th of 2018?" He replied, "Yes, ma'am. It's what happened." Staves stated that there was "no doubt in [his] mind" that defendant shot Jermaine.

After reviewing the record in this matter, we conclude that defendant has not established an entitlement to relief on the basis of Staves's attendance at the preliminary hearing.

E. NEWLY DISCOVERED EVIDENCE

Defendant contends that a person named LaToya Young has evidence that supports defendant's innocence and that a new trial or remand must be ordered. Defendant did not raise this issue in the trial court and therefore, it is not preserved. *Scott v Jones & Laughlin Steel Corp (On Remand)*, 202 Mich App 408, 416; 509 NW2d 841 (1993). As noted, this Court reviews unpreserved issues for plain error affecting substantial rights. *Carines*, 460 Mich at 763.

Defendant attaches to his supplemental brief on appeal an affidavit from LaToya Young, dated August 20, 2020. In the affidavit, Young states:

> On May 5, 2008, sometime after 2:00 a.m., there was a whole bunch of people partying and hanging out in front of where I lived at the time, in Birch Park. I was sitting on my porch and I seen [sic] two guys start to fight, and out of the crowd a light-colored man with long braids[7] started shooting in the direction of the two guys that were fighting. He fired about 9 or 10 shots. He looked as if was

[7] As discussed *infra*, defendant was bald.

> in [sic] his early 20's. After he shot, he said "come on Dre, we out," and he ran and jumped into a black truck and sped off. When he ran off I noted a limp. . . .
>
> In the summer of this year I spoke to a few people about what I had seen. Although I didn't want to be involved, I was told that it was best for me to perform my civic duty and come forward with what I witnessed.
>
> Earlier this year I found out Mr. Virgies had been convicted for the shooting and I could not believe what I learned. I use [sic] to have faith in the justice system, but now I see that they get a lot of things wrong and sometimes innocent people suffer as a result.

This first problem with defendant's reliance on this affidavit is that he is introducing evidence (the affidavit) that was not part of the record below. "It is impermissible to expand the record on appeal." *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999). Second, defendant is, at least at one point, asking this Court to determine, in the first instance, that a new trial is warranted. Our Supreme Court has stated that, for a new trial to be warranted on the basis of newly discovered evidence, a defendant must show that

> (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial. [*People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012) (quotation marks and citations omitted.]

The *Rao* Court also stated, "It is . . . well established that motions for a new trial on the ground of newly-discovered evidence are looked upon with disfavor, and the cases where [the Michigan Supreme Court] has held that there was an abuse of discretion in denying a motion based on such grounds are few and far between." *Id*. at 279-280 (quotation marks and citation omitted). "In order to determine whether newly discovered evidence makes a different result probable on retrial, a trial court must first determine whether the evidence is credible." *People v Johnson*, 502 Mich 541, 566-567; 918 NW2d 676 (2018). "[A] trial court's credibility determination is concerned with whether a *reasonable juror* could find the testimony credible on retrial." *Id*. at 567 (citation omitted). "If a witness's lack of credibility is such that *no* reasonable juror would consciously entertain a reasonable belief in the witness's veracity, then the trial court should deny a defendant's motion for relief[.]" *Id*. at 568. This Court reviews the trial court's factual findings for clear error. *People v Rogers*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 336000); slip op at 8-9. In *Rogers*, *id*. at ___; slip op at 9, this Court had remanded the case so that the defendant could file a motion for a new trial in the trial court on the basis of newly discovered evidence.

The outcome necessitated by the above-cited case law is that the trial court needs to initially address whether a new trial is warranted on the basis of newly discovered evidence. For this

reason, defendant's apparent contention that this Court should simply order a new trial is not tenable.[8]

Defendant makes the alternative argument that this Court should remand the case to the trial court for an evidentiary hearing.[9]

However, given that Young's affidavit is not at all convincing in terms of demonstrating the probability of a different outcome on retrial, we conclude that a revisiting of the earlier remand denial is not warranted. Young never states that she saw someone else kill Jermaine. She speaks about a man shooting toward two other men, but it was never in dispute that there was another shooter, aside from defendant, on the night in question. Jones testified that "shots came from someone in a truck as we were on the ground after [Jermaine] got shot." Jones later testified: "The person that was shooting in the air got in the truck and took off." She clarified that the person who shot Jermaine and the person who shot into the air and got into a black truck were two different people. Most importantly, Dr. Virani testified that "there was soot inside of the entrance [wound] and around the entrance [wound]." Because of this soot, he concluded that the shooter had been "very close" to Jermaine, i.e., the barrel had been "within about an inch or so from the skin." Young's affidavit—to the extent defendant is interpreting it as an assertion that the shooter referred to by Young killed Jermaine—is not consistent with this physical finding. Under the circumstances, we decline to order a remand.

F. ADDITONAL WITNESSES

Defendant contends that his trial attorney rendered ineffective assistance of counsel in connection with possible testimony by Demetrius Hogg, Davonta Anderson, Vito McCullough, Garianna Hunt, and Drevon Long.

In *Sabin*, 242 Mich App at 658-659, this Court stated:

> In order to preserve the issue of effective assistance of counsel for appellate review, the defendant should make a motion in the trial court for a new trial or for an evidentiary hearing. Failure to move for a new trial or for a *Ginther* hearing ordinarily precludes review of the issue unless the appellate record contains sufficient detail to support the defendant's claim. If review of the record does not support the defendant's claims, he has effectively waived the issue of effective assistance of counsel. Defendant failed to move for a new trial or file a motion for

[8] Alternatively, if this Court were to address this issue head-on and decide for itself whether a new trial is warranted, we would find that no plain error has been established in light of the deficiencies in Young's affidavit, as discussed *infra*.

[9] Defendant raised the issue of newly discovered evidence in a motion to remand in this Court. This Court denied the motion but stated that "[d]enial of remand is without prejudice to a case call panel of this Court determining that remand is necessary once the case is submitted on a session calendar." *People v Virgies*, unpublished order of the Court of Appeals, entered March 29, 2021 (Docket No. 350475).

> a *Ginther* hearing. Therefore, our review is limited to the appellate record. If the appellate record does not support defendant's assertions, he has waived the issue. [Citations omitted.]

Defendant sought a remand in this Court on the basis of the present issues. This Court denied the request, stating:

> The Court orders that the motion to remand and the motion to conduct an evidentiary/Ginther hearing are DENIED for failure to persuade the Court of the necessity of a remand or an evidentiary hearing at this time. Denial of remand is without prejudice to a case call panel of this Court determining that remand is necessary once the case is submitted on a session calendar. [*People v Virgies*, unpublished order of the Court of Appeals, entered March 29, 2021 (Docket No. 350475).]

This Court's review is limited to the existing record unless we decide to revisit the denial of the remand request.

In a police report submitted in connection with defendant's supplemental appellate brief, it was set forth that Hogg stated to the police that he was related to the victim. He also stated that he knew that Jermaine had a " 'beef' " with someone named Joshua Walcott or Joshua Wallet. There is no indication from the report that Hogg witnessed the shooting or saw "Joshua" at the scene. The mere fact that Jermaine had a "beef" with someone—and specifically, someone not even alleged to have been at the scene—does not show that, but for counsel's allegedly deficient performance in failing to have Hogg testify at trial, there is a reasonable probability that the outcome of the trial would have been different. *Ackley*, 497 Mich at 389.

In another police report, it was reported that Anderson stated that she saw an unidentified person with a gun that night. She stated that Jermaine and another "guy" were fighting each other. She then stated that the man Jermaine was fighting asked another man for a gun and came back and shot Jermaine "again, and again." Anderson said, "He just stood on top of him and kept shooting." Once again, defense counsel's allegedly deficient performance in failing to have Anderson testify at trial did not result in a reasonable probability that the outcome of the trial would have been different. *Id*. Most importantly, Anderson did not state *who* was doing the shooting. It is true that her testimony, if it was in accordance with her statement to police, would have impeached Staves's testimony that Jermaine did not fight anyone that night. She specifically said that the shooter "shot Jermaine, and he shot him again, and again." However, there is no indication as to the shooter was and in what context this "fight" occurred. On this record, we conclude that defendant has not overcome the presumption that the failure to call Anderson as a witness was a matter of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). "[T]his Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *Id*.

In another police report, it was reported that McCullough stated that he did not see "the victim fighting anyone" and that "the victim never starts anything with anyone, he was just a good guy." McCullough reported that he saw a Black male with long dreadlocks and light skin shooting a gun. He stated that he did not see who was shooting "[o]nce the shooting started" and was simply

"trying to get out [of] the way." Defendant has not established any ineffective assistance of counsel in connection with McCullough's statement. McCullough saw one man—apparently not defendant—shooting a gun, but he did not indicate that this man shot the victim. His statement is again, consistent with Jones's testimony that a man other than defendant was shooting a gun, but not at the victim. In addition, McCullough had positive things to say about Jermaine, and if McCullough had testified, the prosecutor surely would have attempted to elicit them. Defendant has not overcome the presumption that the failure to call McCullough as a witness was a matter of trial strategy. *Id*.

In another police report, it was reported that Hunt stated that Jermaine had been fighting with someone and that Jermaine got shot by a different person. This was largely consistent with Jones's testimony, and defense counsel would not have wanted to corroborate Jones's testimony. Hunt also reported that a man standing by a black Dodge Ram was shooting a gun in the air. She stated that a light-skinned Black male with dreadlocks was shooting a gun from inside the Dodge Ram. These statements largely corroborated Jones's testimony about shots coming from a dark truck. Hunt did not indicate that she saw who shot Jermaine. And again, the autopsy revealed that Jermaine was shot at extremely close range, meaning that Hunt's testimony about the man with the dreadlocks was not particularly important. Hunt's testimony would have corroborated the testimony of Jones, and defendant has not overcome the presumption that the failure to call Hunt as a witness was a matter of trial strategy. *Id*.

In yet another police report, it was reported that Long was standing next to the victim when the victim was shot. The report reads, "Long stated he observed the guy with the dreads had a gun and did the shooting, but everyone else said it was the bald guy who did the shooting." The officer conducting the interview then comments: "From our investigation, this is the truth. The subject with the dreads, Lindsey, was seen firing a gun in the air. The other subject, Virgies [defendant] who is bald, was the person who shot the victim." Long further stated that the "guy with the dreads" fired his gun three times, the gun then jammed, the man cleared the jam, and then he fired the gun five more times. Importantly, Long also stated that he thought his brother, who was standing by Long, had been hit[10] by "the guy with the dreads," but the brother said that it was "the bald guy" who hit him. Long's clarity regarding the event was, therefore, in question. He also referred to one person doing "the shooting," but evidence and testimony showed that multiple guns had been used on the night in question. In addition, Long never clearly stated that "the guy with the dreads" actually *shot the victim* as opposed to just doing some "shooting." Under all these circumstances, we conclude that defendant has not overcome the presumption that the failure to call Long as a witness was a matter of trial strategy. *Id*. We note that the police described Long as very uncooperative, lessening the probability that defense counsel could have gotten him to testify. Finally, we note that calling Long would have been extremely risky because of Long's apparent reference to "the bald guy," i.e., defendant.

For Hogg, Anderson, McCullough, Hunt, and Long, defendant does not provide any evidence that these witness would have been willing to testify. In addition, their statements are extraneous to the existing record. Again, "[i]t is impermissible to expand the record on appeal."

[10] It is not clear whether this "hit" was referring to a hit with a bullet or some other type of hit.

Powell, 235 Mich App at 561 n 4. This is further support for a finding that defendant has not established his claim of ineffective assistance of counsel. Defendant is arguing that counsel's performance in connection with these people requires a new trial. In other words, he does not appear to be not renewing, by way of his brief, his argument that a *Ginther* hearing must be held concerning Hogg, Anderson, McCullough, Hunt, and Long.

It could be argued, however, that his general request for an evidentiary at the conclusion of his brief encompasses the statements by Hogg, Anderson, McCullough, Hunt, and Long. As noted, this Court stated that "[d]enial of remand is without prejudice to a case call panel of this Court determining that remand is necessary once the case is submitted on a session calendar." *People v Virgies*, unpublished order of the Court of Appeals, entered March 29, 2021 (Docket No. 350475). However, we conclude that, in light of the limited value of the statements set forth in the police reports, defendant has failed to establish that a revisiting of the remand denial is necessitated.

G. NEW TRIAL AND ACTUAL INNOCENCE

Defendant makes a general argument that this trial did not result in a just verdict, or that justice has not been done. He states that a new trial under MCR 6.431 and also under MCL 770.1 must be granted, even if no particular law in support of reversal could be invoked. He avers that he is actually innocent and that, therefore, constitutional principles mandate a reversal of his convictions.

Defendant raised below his argument about a new trial under MCL 770.1, and he also mentioned MCR 6.431(B). The argument about a new trial is preserved. Cf. *Scott*, 202 Mich App at 416. However, he did not raise an actual-innocence argument. That argument is not preserved. *Id*.

This Court reviews for an abuse of discretion a court's decision regarding a motion for a new trial. See *Gadomski*, 232 Mich App at 27.

In general, constitutional issues are reviewed de novo. *People v Wiley*, 324 Mich App 130, 150; 919 NW2d 802 (2018). However, unpreserved issues are reviewed under the plain-error doctrine. *Carines*, 460 Mich at 763.

Defendant appears to be arguing that this Court should invoke federal law to hold that a showing of actual innocence renders a conviction unconstitutional. See, e.g., *Herrera v Collins*, 506 US 390, 417; 113 S Ct 853; 122 L Ed 2d 203 (1993) ("We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim."). In *People v Swain*, 288 Mich App 609, 638; 794 NW2d 92 (2010), this Court discussed a claim of "actual innocence" and stated that to make a threshold showing of such a claim, a defendant must establish that it is more likely than not that no reasonable juror would have found him or her guilty beyond a reasonable doubt. Defendant has not made such a showing. Like in *Swain*, *id*. at 642, the case rested on credibility determinations. Defendant has not established actual innocence and no basis for reversal is apparent.

Defendant also cites and relies heavily on MCL 770.1. In *Rogers*, ___ Mich App at ___; slip op at 9, this Court stated:

> Under MCL 770.1, a trial court "may grant a new trial to the defendant, for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done, and on the terms or conditions as the court directs." Although MCL 770.1 allows a trial court to grant a new trial "when it appears to the court that justice has not been done," this Court previously interpreted the trial court's authority under that statute to be limited to "those circumstances where the defendant has been denied a fair trial." *Wayne Co Prosecutor v Recorder's Court Judge*, 148 Mich App 320, 324; 384 NW2d 47 (1985), remanded 429 Mich 893 (1988). This Court explained that a trial court cannot use MCL 770.1 to accomplish indirectly what it could not accomplish directly. *Id*. at 325. Additionally, this Court has held that our Supreme Court superseded MCL 770.1 with the adoption of MCR 6.431. See *People v McEwan*, 214 Mich App 690, 693 n 1; 543 NW2d 367 (1995). Under MCR 6.431(B), a trial court may grant a defendant's motion for a new trial "on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." Consequently, *the proper inquiry is whether the trial court abused its discretion when it denied defendant's motion for a new trial* under MCR 6.431(B) . . . . [Emphasis added.]

In light of the evidence supporting defendant's convictions and in light of the fairness of the trial, we again conclude that the trial court did not abuse its discretion by denying a new trial. No appellate relief is warranted.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Stephen L. Borrello
/s/ Colleen A. O'Brien