STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 1, 2011
v	No. 286097 Wayne Circuit Court
TERRANCE JAMAL WILLIAMS, Defendant-Appellant.	LC No. 07-010617-02-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v	No. 291335 Wayne Circuit Court
JOSEPH MICHAEL GREEN, Defendant-Appellant.	LC No. 07-010617-01-FC

Before: K. F. KELLY, P.J., and METER and GLEICHER, JJ.

PER CURIAM.

Defendants Terrance Jamal Williams and Joseph Michael Green are brothers who were convicted and sentenced to life imprisonment for their roles in a drive-by shooting during which Carl Hairston was killed and Jerrance Lewis received life-threatening injuries. Defendants jointly stood trial before separate juries over a three-month period in 2008. Green received an 11-day retrial after his original jury deadlocked. Both defendants received post-conviction evidentiary hearings to determine the necessity for a new trial. After these long and tortured proceedings, the trial court allowed defendants' convictions and sentences to stand. We affirm.

In Docket No. 286097, we reject Williams' pursuit of a new trial based on newly discovered evidence. Although the ballistic evidence presented at Williams' trial has since been debunked, the prosecution presented significant independent evidence to support Williams' convictions. We also reject Williams' Sixth Amendment public trial challenge as the court cited compelling reasons to close the courtroom during a portion of the trial. We agree with Williams that the trial court should have made case-specific findings before repositioning Lewis on the

witness stand so he could avoid the gaze of defendants and their attorneys. However, any resultant violation of Williams' right to confront Lewis is harmless in light of the remaining evidence. As neither the public trial nor confrontation challenges merit relief, Williams' challenge to counsel's failure to object also must fail.

In Docket No. 291335, we reject Green's challenge to the admission on retrial of Lewis's testimony from the original trial. Lewis adamantly asserted his Fifth Amendment privilege against self-incrimination, rendering him "unavailable" to testify on retrial and triggering this hearsay exception. We also reject Green's challenge to the performance of counsel on retrial. Counsel simply was not ineffective in failing to call potential defense witnesses who provided completely incredible or unhelpful testimony.

I. BACKGROUND

In the early morning hours of May 15, 2007, Hairston drove his mother's Chevy Tahoe to pick up Lewis and Thomas Cook. Although Hairston and Lewis were under 21, the trio travelled to the Perfect Beat nightclub near the corner of Fort Street and Schaefer Road in southwest Detroit. They left the club shortly before closing, reentered their vehicle and traversed Fort Street in front of the club for several minutes while listening to loud music. Williams (then age 20) approached the Tahoe from behind while driving a light blue minivan. Williams pulled parallel to the driver's side of the Tahoe. The rear, passenger-side sliding door of the minivan opened and Green (then age 22) fired more than 20 shots from an AK-47 at the Tahoe. The minivan collided with the Tahoe and the minivan's door was torn off in the fray. Hairston was struck with several bullets and was pronounced dead on arrival at the hospital. Lewis was shot numerous times in the abdomen and side, required three surgeries to repair internal damage, and was hospitalized for a month. Cook escaped unharmed. He fled the scene and was only secured as a trial witness through the significant efforts of the prosecutor and law enforcement officers.

Investigating officers soon received an anonymous tip that "Joe Green" was involved in the shooting, but they were unable to locate any suspects on that information alone. Investigators then discovered a burned minivan, missing its sliding rear door, abandoned in a field. The door recovered on Fort Street perfectly matched the minivan. The officers traced the vehicle's identification number and learned that it was registered to Juanita Williams, the mother of defendant Williams and defendant "Joe Green." When Lewis recovered sufficiently to speak to the officers, he specifically identified defendants by name as his attackers. Lewis indicated that he had seen defendants driving the minivan in the past and clearly saw their faces during the shooting. Lewis then confirmed defendants' identities through a photographic line-up.

Green and Williams had a long-standing feud with Hairston and Lewis. Lewis admitted that the two groups fought each time they met, sometimes with weapons. The parties stipulated that Williams had previously shot Lewis in the hand. Cornelius Wade, a jailhouse informant, testified that Williams confessed to the drive-by shooting while housed in the Wayne County Jail. According to Wade, a man name Armond hired Williams and Green to kill Lewis and Hairston to avenge the robbery of Armond's carwash (which served as a front for a drug-dealing and gambling operation). Wade alleged that a man named Aaron Campbell was at the Perfect Beat on the night of the shooting and contacted defendants by telephone to alert them of Hairston's and Lewis's presence. The prosecution also presented evidence that someone threw a

firebomb into and fired a barrage of bullets at Lewis's home the night before defendants' preliminary examination.

Defendants asserted alibis in support of their defenses. Williams also presented evidence from his friends Jamaal and Jameel Croft, who claimed to have been standing outside the Perfect Beat at the time of the shooting, and asserted that the minivan's occupants were heavy-set Mexican or Caucasian men. Defendants attempted to establish that their minivan had been stolen earlier that evening from an apartment complex in Lincoln Park.[1] Williams' jury did not believe his defense theory and convicted him of first-degree premeditated murder, MCL 750.316, and assault with intent to murder, MCL 750.83. The court sentenced Williams to life without parole for the murder conviction and 20 to 30 years' imprisonment for the assault charge.

After the original trial, the Michigan State Police Forensic Laboratory retested the shell casings found outside the Perfect Beat and Lewis's home. The state lab could neither confirm nor deny whether any of the casings were fired from a single weapon. The investigator testified that AK-47s are loosely tooled resulting in discrepancies between shells fired from a single gun. Accordingly, it remained possible that the shell casings had been fired from a single weapon.

Green proceeded to retrial after which the jury convicted him of first-degree premeditated murder, assault with intent to murder and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The court sentenced Green to concurrent terms of life without parole and 15 to 30 years' imprisonment for his murder and assault convictions to be served consecutive to a two-year term for felony-firearm.

In the meantime, Williams had appealed his convictions as of right. We held Williams' appeal in abeyance pending the State Lab's analysis of the ballistic evidence. *People v Williams*, unpublished order of the Court of Appeals, entered April 1, 2009 (Docket No. 286097). We then remanded for the trial court to consider whether Williams was entitled to a new trial based on newly discovered evidence. *People v Williams*, unpublished order of the Court of Appeals, entered January 15, 2010 (Docket No. 286097). The trial court concluded that the exchange of ballistic evidence would not make a different result probable on retrial and therefore denied Williams' motion for a new trial.

Green also sought a new trial, but based on the ineffective assistance of counsel at his second trial. The trial court rejected Green's claim and this consolidated appeal followed.

[1] Defendant's maternal aunt, Tracey George, initially told police that she was in the basement on the night of the shooting. She asserted that she looked through the basement window facing the driveway and saw the minivan pull out. George told the officers that she assumed one of the defendants was driving. George later attempted to file a vehicle theft report with the Lincoln Park Police Department, but the officer found her story too incredible to register on LIEN.

II. DEFENDANT WILLIAMS—DOCKET NO. 286097

A. Newly Discovered Evidence

Williams challenges the trial court's denial of his motion for a new trial based on newly discovered evidence. We review the trial court's decision for an abuse of discretion. *People v Terrell*, 289 Mich App 553, 558-559; 797 NW2d 684 (2010).

> For a new trial to be granted 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 Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996); MCR 6.508(D). [*People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003).]

At the first trial, Detroit Police Officer David Pauch, who was assigned to the Crime Lab Firearms and Tool Mark Identification Unit, testified as an expert in firearms and tool mark identification. He examined spent casings found at the Perfect Beat crime scene and casings found at Lewis's home after the firebombing. The ammunition was categorized as 7.62x39 caliber bullets with identical lot identification numbers that are used in assault rifles such as AK-47s. Pauch testified that five of the casings found at the Perfect Beat were fired from the same weapon and that the same weapon had fired the five casings found at Lewis's home.

During closing argument, Prosecutor Kam Towns argued:

> [Y]ou recall there were seven casings found in the street, seven, 7.62 by 39 casings.
>
> Now, why did those become important . . . ? They become important because . . . five of those seven casings take us to the hideous morning when they tried to finish what they started. And that was firebomb Jerrance Lewis's house and shot [sic] it up.
>
> * * *
>
> Those five casings [from Lewis's house] were then compared to five of the seven casings found on Fort. And the five casings that were found at the scene of the firebombing and . . . five of seven that were found in the street were all fired from the same gun.
>
> Not only were they caliber compatible, but the weapon that was used to fire into that Tahoe and kill Carl Hairston and try to kill Jerrance Lewis, was the same weapon that was used to attempt to silence Jerrance Lewis.

At the onset of Williams' post-conviction evidentiary hearing, the parties stipulated that "the Detroit Police Department Crime Lab Firearms Unit was suspended from analyzing any firearms evidence in April 2008, after it was discovered that the crime lab was producing results

that were potentially unreliable." They further stipulated that the Lab was permanently closed in September 2008 "due to the unacceptable error rate in ballistics evidence analysis."

The ballistics evidence had been reexamined by Michigan State Police Sergeant Reinhard Pope, a firearms and tool marks examiner at the State Police Forensic Laboratory. He testified that he could not conclusively prove or disprove that the five casings from the Perfect Beat crime scene were fired from the same weapon as the five casings from Lewis's home. Moreover, with respect to the casings found near the Perfect Beat, he identified only three of the seven casings as having been fired from the same gun, contrary to Pauch's previous conclusion. Pope explained that the shell casings might have been fired from a single weapon, but the inconsistencies were too great to be certain.

We agree with the trial court's conclusion that the reanalysis of the ballistic evidence was newly discovered, noncumulative evidence that could not have been discovered before the first trial. See *Cress*, 468 Mich at 692. We also agree with the trial court that the new ballistic evidence would not make "a different result probable on retrial." *Id.*

Williams inaccurately argues that the debunked ballistics evidence was a cornerstone of the prosecutor's closing argument. In reality, the prosecutor's reference to the shell casings' commonality was a brief portion of her 47-page closing argument. The thrust of the prosecutor's argument was that the witnesses supporting the prosecution theory testified consistently regarding the details of the crime and their testimonies were corroborated by the physical evidence. The physical evidence was not limited to the debunked ballistic analysis; it included the location and number of shell casings found at the scene, the trajectory of the bullets compared to the position of the victims' bodies, the minivan door left in the middle of Fort Street, and defendants' mother's burned minivan found abandoned in a field. The witnesses supporting the defense theory, on the other hand, could not agree on the details surrounding the shooting and gave incredible, fluctuating accounts.

Moreover, the prosecution did not need to conclusively prove that the shell casings found at the Perfect Beat and Lewis's home were fired from a single weapon to make its point. The jury could reasonably infer that the timing of the firebombing was not a coincidence and was orchestrated to prevent Lewis from testifying at the preliminary examination. Given Lewis's consistent identification of defendants as the perpetrators from the moment he awoke after surgery, Ware's testimony regarding Williams' jailhouse confession, defendants' undeniable connection to the van, the timing of the firebombing, and the incredibility of the testimony given by Tracey George and the Croft brothers, a different result on retrial is improbable. Therefore, the trial court did not abuse its discretion in denying Williams' motion.

B. Right to a Public Trial

Williams argues that the trial court violated his Sixth Amendment right to a public trial by closing the courtroom during the testimony of Lewis and Ware. Generally, we review such constitutional claims de novo. *People v Vaughn*, 291 Mich App 183, 195; ___ NW2d ___ (2010). As Williams and his attorney (Terry Price) failed to raise a contemporaneous objection, this challenge is unpreserved and our review is limited to plain error affecting Williams' substantial rights. *People v Kowalski*, 489 Mich 488, 505-506; 803 NW2d 200 (2011).

"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." *People v Carines*, 460 Mich 750, 761; 597 NW2d 130 (1999) (internal quotations and alterations omitted).

The right to a public trial is guaranteed by the Sixth Amendment to the United States Constitution and by Mich Const 1963, art 1, § 20. A courtroom open to public scrutiny helps insure that a criminal defendant will be given a fair trial. *Waller v Georgia*, 467 US 39, 46; 104 S Ct 2210; 81 L Ed 2d 31 (1984). "[T]he presence of interested spectators may keep [the jurors] keenly alive to a sense of their responsibility and to the importance of their functions." *Id.* The United States Supreme Court has also observed that "a public trial encourages witnesses to come forward and discourages perjury." *Id.*

Yet, the right to a public trial is not absolute. As noted in *Waller*, 467 US at 45:

> [T]he right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information. Such circumstances will be rare, however, and the balance of interests must be struck with special care. We stated the applicable rules in *Press-Enterprise* [*Co v Superior Court of California*, 464 US 501, 510; 104 S Ct 819; 78 L Ed 2d 629 (1984)]:
>
> "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."

Here, the trial court closed the courtroom midway into Lewis's testimony after several requests by the prosecutor and Green's attorney (Bertram Johnson) to eject certain spectators. The courtroom remained closed throughout Lewis's testimony and also through the testimony of witness Ware. Williams did not object to the trial court's decision. As noted in *Vaughn*, 291 Mich App at 196, a defendant must timely assert his right to a public trial or forfeit his right to future relief. As Williams failed to object, he has waived his right to a public trial during the testimony of these witnesses. *People v Orlewicz*, ___ Mich App ___; ___ NW2d ___ (Docket No. 285672, issued June 14, 2011), slip op at 8.

In any event, the trial court's decision was supported by "an overriding interest based on findings that closure [was] essential to preserve higher values and [was] narrowly tailored to serve that interest," *Waller*, 467 US at 45, namely court security and prevention of witness intimidation. Throughout the proceedings "emotions ran high." The attorneys squabbled and threatened each other and showed disrespect to the trial judge. The courtroom was filled with antagonistic spectators with rivalries of their own. On the second day of witness testimony, the prosecutor indicated that Cook was frightened of certain spectators in the courtroom and did not want to testify. The court declined the prosecutor's request to clear the courtroom because Cook declined to identify the specific spectators that caused his fear and the court observed no "overt attempt to influence" his testimony.

The prosecutor renewed her request the following day, explaining, "In the witness room, I spoke with [Cook] about his concern testifying in this courtroom. He indicated that he did not want to testify. He has to go back to that neighborhood, and he knows the people in the courtroom . . . ." Cook then took the stand and altered his testimony from the statements he had previously made to the police. Specifically, Cook suddenly denied seeing the blue minivan during the shooting. The prosecutor opined, "The only thing that I can garnish from that is that the people in the back row are the people he knows from that neighborhood. . . . The back row was the individuals that Mr. Cook indicated were people he didn't want to testify in front of."

That same day, the prosecutor observed defendants' step-grandfather (G. Johnson) coaching Tracey George regarding her demeanor on the stand and the content of her testimony. The prosecutor summarized the conversation she overheard as follows:

> I then hear him saying to her, you need to say this. You didn't sign this. And she called you a liar, and you need to say, this man is seated in the courtroom telling the witness what to say on a break. That's tantamount to witness tampering.

The court instructed G. Johnson not to tamper with the witnesses.

Two days later, G. Johnson violated the court's instructions and coached Juanita Williams regarding her testimony. A member of Hairston's family, later identified as E. Smith, overheard G. Johnson instruct Juanita regarding her demeanor and tone on the witness stand. In response, attorney Price informed the court that E. Smith was Hairston's brother and that he had been "shooting nasty glances" at another spectator in the courtroom.

Another four days later, attorney Price informed the court that a specific spectator had been "making gestures and mouthing words" to a witness who was testifying on the stand. Attorney Price further accused the spectator of "being too demonstrative to the jury."

The following day, the court finally had enough. As the jurors were exiting for a break, Lewis queried to prosecutor Towns, "You see that?" The following heated discussion occurred:

> *Ms. Towns.* I did see that. Yeah, I did see that with Mr. Price looking at the witness.
>
> *[Lewis].* Telling me I'm dead and all this.
>
> *Ms. Towns.* Wait a minute.
>
> I've been watching him during the trial. These witnesses –
>
> *Mr. Green.* They just making that little n***** lying.
>
> *[Attorney] Johnson.* Hey. Hey. Hey.
>
> *[Lewis].* Get the f*** on. What you talking about, boy? Get on.
>
> *Court Officer.* Have a seat. Have a seat. Have a seat.

Ms. Towns. Mr. Lewis, you're all right, don't let these people get to you.

You should be ashamed of yourself.

Mr. Price. You should be ashamed of yourself. You don't know what you talking about.

[Lewis]. I know you 'bout to get - -

Mr. Price. How you gonna play me? He ain't no boss of nothing.

The court then forced a break to reduce the tension in the courtroom.

Upon reconvening, the prosecutor indicated that she spoke with the then 16-year-old Lewis that morning regarding his demeanor on the stand.

He asked me, "Why is that guy griming me?"[2]

* * *

And he pointed right at Mr. Price . . . .

* * *

And again, he pointed right at Mr. Price. I said, "Don't look at him, just look where you need to look, testify, tell the truth, end of story."

That sort of keyed me on to watch Mr. Price's expressions towards this witness during his testimony. There were at least three times I can count where I almost objected to approach the bench to draw the Court's attention to it. But I thought you know what, I'm just gonna wait for a while.

At one point while he was testifying, my victim's family in the back started saying things to me[.] I could hear them saying, "Look at him, look at him."

At that point, I just turned my head and I watched Mr. Price. And I have been doing this going on 16 years, and I know what a quote/unquote "grim" look looks like. I'm telling the Court I watched him engage in witness intimidation with a 16 old [sic] witness on the stand. He was staring him down. He was cocking his head sideways. He was looking him up and down. He was griming my 16-year-old witness.

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[2] From other references in the transcript, we assume the prosecutor accused attorney Price of "grimming" Lewis, not "griming." To "grim" means "to get smart with or show attitude." <http://www.urbandictionary.com/define.php?term=grim> (accessed November 15, 2011).

> Now, it's painful enough that the Court has to admonish people in the audience to not engage in witness intimidation, but when the lawyers are sitting here doing it, it's offensive and reprehensible.

Attorney Price denied any nefarious intent and asserted his "right to study a witness while that witness testifies." Yet, he stated, "I can have any kind of look on my face I want." Even after the court chastised Price, he indicated, "I'm gonna continue to scrutinize this guy here . . . and I'm gonna continue to look at him and I don't see why I can't look at him."

The court ultimately indicated that "passions" amongst the lawyers were "running much higher than almost any other case I've had . . . they have to get under control." The court continued:

> The emotions are high in this case. I have had to admonish two people in the back row already. I have had to admonish one person in the second row. And I do believe that these people have been separate [sic] by – I guess, you know, their support for who they are, I have no idea.
>
> * * *
>
> But at the time I did the admonishment, which was last week, okay, and now we just had another outburst and I have been approached for security reasons that this is getting much too intense. . . . [W]e're having to refer to people who are watching this as opposed to just based upon the witnesses here in the courtroom and the legal arguments of the attorney. We're dragging these people into it all the time as to whether or not someone's talked to someone else and this has to stop. It has to absolutely stop.
>
> And for the rest of this day, this courtroom is going to be cleared for security reasons. It was chaos when I left here. I don't know if I'm going to do this for the remainder of the entire trial, but I know I'm doing it for today. And it is solely for security. Emotions are flying way out there and there's reactions to what happens here between witnesses, defendants – I mean, I hear the defendants, they're upset. I heard the witness, he's upset. And I saw people in the back row upset.
>
> So that's the rule for the rest of this day and we'll revisit the issue when it comes up for the next day of trial.

The courtroom remained closed throughout the rest of Lewis's testimony. Ware testified immediately after Lewis and the court officer refused the public entrance into the courtroom at that time. The trial judge was not initially aware of the situation. However, she later learned from the court officer that the courtroom had remained clear of spectators because Ware was a convicted felon who had been transferred on writ from prison to the courtroom. The trial judge agreed with her court officer that the courtroom should remain closed during Ware's testimony for this security reason.

This record represents "findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Waller*, 467 US at 45. The combined hostility of the attorneys, witnesses, defendants and spectators in the courtroom created a significant security concern for the court. The court made a record of several outbursts and incidents leading up to her decision to close the courtroom. Given the heightened hostility during witness Lewis's testimony, the court wisely balanced defendants' rights to a public trial with the need for courtroom security. See *United States v Brazel*, 102 F3d 1120, 1155-1156 (CA 11, 1997) (holding that the defendant was not denied his right to public trial when the court implemented spectator screening procedures in response to spectators using "fixed stares" to intimidate the witnesses); *United States ex rel Bruno v Herold*, 408 F2d 125, 127-128 (CA 2, 1969) (upholding closure of courtroom during sole eyewitness's testimony where spectators "leaned forward and grinned and grimaced" at the witness, creating "an unusual and unexpected courtroom situation"). And Williams' right to a public trial properly gave way to the court's need for security during Ware's testimony. Given the recent courtroom tension, the court reasonably determined that reopening the courtroom while a convicted felon "snitched" on Williams posed a security threat. Moreover, the court narrowly tailored the closure by excluding spectators only during the remainder of Lewis's testimony and the testimony of Ware. *Waller*, 467 US at 48. Based on this record, we find no error requiring reversal.

C. Right of Confrontation

Williams further asserts that the trial court violated his Sixth Amendment right of confrontation by ordering witness Lewis to turn his chair to face the jury midway through his testimony. As Williams failed to object to the trial court's ruling, our review is limited to plain error affecting substantial rights. *Carines*, 467 Mich at 761.

Immediately after the court closed the courtroom, attorney Johnson indicated that he would prohibit Green from looking at Lewis on the witness stand. The court then *sua sponte* ordered Lewis to turn the witness chair to face the juries, stating, "He is clearly observable to any other person that wants to observe him from the side, but he is to turn that way." The court stated its intent to continue this practice for future lay witnesses, but there is no record indication that she did so.

US Const, Am VI and Mich Const 1963, art 1, § 20 provide that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Historically, the United States Supreme Court has recognized that a defendant has a right to literally look upon a witness as that witness testifies to the facts necessary for conviction. *Coy v Iowa*, 487 US 1012, 1017; 108 S Ct 2798; 101 L Ed 2d 857 (1988). A defendant's right to look upon his accuser, however, does not come with a complimentary duty for the accuser to look upon him. The accused "may studiously look elsewhere, but the trier of fact will draw its own conclusions." *Id.* at 1019. The principle behind literal face-to-face confrontation is that an accuser, forced to face the accused, will feel a greater sense of humanity and will be less likely to make false accusations. *Id.* After all, "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'" *Id.*

The opportunity to literally meet one's accuser face-to-face is an important, but not indispensable, element of a defendant's confrontation right. *Maryland v Craig*, 497 US 836,

844; 110 S Ct 3157; 111 L Ed 2d 666 (1990). The Supreme Court has noted that face-to-face confrontation "is not the *sine qua non* of the confrontation right." *Id.* at 847 (internal quotations omitted). "[I]n certain narrow circumstances, competing interests, if closely examined, may warrant dispensing with confrontation at trial." *Id.* at 848 (internal quotations omitted). Ultimately, face-to-face confrontation is a "preference," rather than an absolute right, and "must occasionally give way to considerations of public policy and the necessities of the case." *Id.* at 849 (internal quotations omitted).

A court may only dispense of a defendant's right to face-to-face confrontation after making case-specific findings to support its decision. *Id.* at 855. As noted by this Court, a trial court must hear evidence to determine whether a limitation on the right of confrontation "is necessary to further an important state interest." *People v Buie*, 285 Mich App 401, 410; 775 NW2d 817 (2009), lv gtd following rem 489 Mich 938 (2011).

> In order to warrant the use of a procedure that limits a defendant's right to confront his accusers face to face, the trial court must first determine that the procedure is necessary to further an important state interest. The trial court must then hear evidence and determine whether the use of the procedure is necessary to protect the witness. In order to find that the procedure is necessary, the court must find that the witness would be traumatized by the presence of the defendant and that the emotional distress would be more than *de minimis*. [*People v Rose*, 289 Mich App 499, 516; ___ NW2d ___ (2010), lv gtd 488 Mich 1034 (2011) (internal citations omitted).]

The trial court in this case made no record inquiry into whether turning Lewis to face the jury was "necessary to further an important state interest" or "to protect the witness." *Id.* We further question the need to protect Lewis from the trauma of testifying before defendants and their attorneys. The court was well aware that Lewis was accustomed to violence and then had carjacking charges pending against him. Although young, Lewis was not a delicate child victim susceptible to trauma. The court made this decision *sua sponte* and did not cite any grounds for turning Lewis away from defendants.[3] The trial court's unsupported decision disregarded the constitutional requirements outlined in *Coy*, *Craig*, *Buie*, and *Rose*.

However, the violation of a defendant's right to literally meet his accuser "face-to-face" is subject to harmless error review.

> An assessment of harmlessness cannot include consideration of whether the witness'[s] testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve

[3] We presume the court wanted to prevent any future attempt by attorney Price to intimidate the witness, especially in light of Price's promise to continue to look at Lewis in whatever manner he wanted. We can only speculate regarding the court's reasoning, however, as the trial judge failed to articulate a rationale for its ruling on the record.

pure speculation, and harmlessness must therefore be determined on the basis of the remaining evidence. [*Coy*, 487 US at 1021-1022.]

Here, "the remaining evidence" is more than sufficient to support Williams' convictions and overcome any error in turning Lewis to face the jury. Investigating officers matched the minivan door found outside the Perfect Beat to the burned minivan and then connected the minivan to defendants. The lead investigating officer testified regarding Lewis's unwavering identification of defendants by name as his assailants. Ware testified that Williams confessed his role in the shooting and firebombing while incarcerated in the Wayne County Jail. Based on this evidence, any violation of Williams' right to literally confront Lewis face-to-face was harmless.

D. Ineffective Assistance of Counsel

Williams argues that attorney Price was ineffective for failing to raise the public trial and confrontation issues at trial. Williams made no request for a hearing on his claim of ineffective assistance. Accordingly, it is unpreserved and can be reviewed only to the extent that errors are apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

An ineffective assistance claim "is a mixed question of fact and constitutional law. A judge must first find the facts, then must decide whether those facts establish a violation of the defendant's constitutional right to the effective assistance of counsel." *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). We review the trial court's factual findings for clear error and constitutional determinations de novo. *Id.* at 484-485. To establish that counsel was ineffective, a defendant must show that counsel's performance was so deficient that it deprived him of the right to counsel. We must presume that counsel employed sound trial strategy and the defendant is required to show "that, but for counsel's error, the result of the proceeding would have been different." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

As already noted, the court cited valid security concerns for closing the courtroom during a portion of Lewis's testimony and throughout Ware's testimony. It is unlikely that attorney Price could have swayed the court's decision by raising an objection at trial. Counsel is not ineffective for failing to raise a futile objection. *People v Payne*, 285 Mich App 181, 191; 774 NW2d 714 (2009).

Yet, attorney Price's unprofessional conduct fueled the court's decision to reposition Lewis on the witness stand. As the cause of a potential deprivation of his client's constitutional rights, Price cannot be deemed effective in this regard. However, even if Price had not "grimed" the witness or had successfully raised a contemporaneous objection based on the court's interference with Williams' right of confrontation, "the result of the proceeding would [not] have been different." *Carbin*, 463 Mich at 600. The prosecution presented significant evidence that both directly and indirectly linked Williams to the shooting and firebombing. Accordingly, Williams was not prejudiced by any error in this regard and a new trial is unwarranted.

III. DEFENDANT GREEN-DOCKET NO. 291335

A. Former Testimony of Unavailable Witness

Several months before Green's second trial, Lewis informed the court, prosecutor and defense counsel through his own attorney that he would not testify. At that point, Lewis faced an unrelated murder charge. He refused to testify at Green's retrial, on the advice of counsel, to avoid making any statements that could be used against him in his own trial. It appears from the record that the court spoke to Lewis in chambers at some point and Lewis reiterated his intent to invoke his Fifth Amendment privilege against self-incrimination. Ultimately, Lewis was not convicted of murder, but our record is silent regarding the exact fate of those charges. Lewis was instead convicted of felony-firearm and delivery of cocaine. As he refused to testify at Green's retrial, the court permitted the prosecution to read into the record the transcript of Lewis's testimony from the first trial.

We review a trial court's evidentiary rulings for an abuse of discretion and underlying legal questions regarding the rules of evidence de novo. *People v Farquharson*, 274 Mich App 268, 271; 731 NW2d 797 (2007).[4] Pursuant to MRE 804(b)(1), if a witness is "unavailable," a party may avoid the hearsay rule and proffer:

> Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.[5]

Relevant to Green's appeal, a declarant is "unavailable" if he "is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement." MRE 804(a).

It is well-established that a witness who invokes his Fifth Amendment privilege against self-incrimination is "unavailable" as defined in MRE 804(a). *People v Meredith*, 459 Mich 62, 66; 586 NW2d 538 (1998), citing *People v Fields*, 450 Mich 94, 107; 538 NW2d 356 (1995),

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[4] Green also claims that he was denied his constitutional right to present a defense, specifically to show that Lewis later recanted his accusation. However, Green has not established that Lewis would have recanted. Green attached a handwritten statement to his appellate brief and claims that it was penned by Lewis. That statement is neither an affidavit nor is it notarized. And Green never presented that statement to the trial court.

[5] MCL 768.26 similarly allows for the admission of a declarant's prior testimony:

> Testimony taken at an examination, preliminary hearing, or at a former trial of the case, or taken by deposition at the instance of the defendant, may be used by the prosecution whenever the witness giving such testimony can not, for any reason, be produced at the trial, or whenever the witness has, since giving such testimony become insane or otherwise mentally incapacitated to testify.

and *People v Underwood*, 447 Mich 695, 702, 708; 526 NW2d 903 (1994). See also *United States v Salerno*, 505 US 317, 321; 112 S Ct 2503; 120 L Ed 2d 255 (1992). Green now contends that the court was first required to conduct a hearing to determine whether Lewis validly asserted his Fifth Amendment privilege. Green's reliance on *People v Poma*, 96 Mich App 726; 294 NW2d 221 (1980), to support this position is misplaced.

In *Poma*, this Court approved a trial court's decision to conduct an evidentiary hearing to determine whether a particular witness validly asserted his Fifth Amendment privilege. *Id.* at 732. The trial court had determined that the witness had not validly asserted his privilege and ordered him to testify. The witness then invoked his privilege on the stand in front of the jury and otherwise claimed not to remember any details of the crime. *Id.* at 729-730. The question in *Poma* was whether the defendant was prejudiced by the witness's assertion of his privilege at trial, not whether a separate hearing was a required step in deeming a witness "unavailable" to testify. The purpose of such a hearing is to prevent prejudice to a defendant by a witness who invokes his Fifth Amendment privilege before the jury, thereby creating a negative inference against the defendant. *Id.* at 732-733. That danger was avoided here as Lewis was not placed on the stand. Moreover, a hearing was necessary in *Poma* because the witness was a co-participant in the drug trafficking activity for which the defendant was on trial. *Id.* at 729, 732. The witness in this case is a victim. Accordingly, *Poma* is inapplicable and the dangers it sought to prevent were not present in this case.

We agree with Green that Lewis likely did not have a valid reason to invoke his Fifth Amendment privilege. Nothing he said about the current shooting, in which Lewis was a victim, likely would have incriminated him. The court theoretically could have precluded reference to Lewis's pending charges and limited the scope of examination to Green's charged offenses. Yet, Lewis had already expressed his adamant refusal to testify knowing the potential consequences of that decision. The court "was not obligated to threaten [Lewis] with contempt" before declaring him "unavailable." *People v Burgess*, 96 Mich App 390, 401; 292 NW2d 209 (1980). Lewis was already facing life imprisonment on his pending murder charge. As such, any threat of contempt and its relatively minor punishment "would probably have been an exercise in futility." *Id.*

The transcript of Lewis's testimony also comports with the requirements for admissibility in MRE 804(b)(1). Green faced the same charges in the original trial and on retrial. He clearly had "an opportunity . . . to develop [Lewis's] testimony" in the original trial and actually made good use of that opportunity. Green had a "similar motive to develop [Lewis's] testimony" at both the original trial and retrial—to avoid conviction for an offense in which Lewis was the victim. Accordingly, we find no error warranting relief in the admission of Lewis's former testimony at Green's retrial.

We also reject Green's challenge to the court's refusal to allow defense counsel to argue in closing that Lewis did not testify because he would have perjured himself. There simply was no evidence on the record that Lewis intended to perjure himself on the stand. Counsel may not make arguments in closing without any support in the record. *People v Buckey*, 424 Mich 1, 28-29; 378 NW2d 432 (1985). In any event, counsel actually noted the inconsistencies between Lewis's transcribed testimony and his earlier statements to the police in closing, essentially arguing that Lewis had not testified truthfully at the first trial.

B. Ineffective Assistance of Counsel

Green claims that attorney Wyatt Harris was ineffective on retrial because he did not adequately investigate and then call Jamaal and Jameel Croft as witnesses. The Croft brothers had testified at the first trial but only before Williams' jury. At that trial, Jamaal claimed that the driver of the van was a heavy-set Mexican or Caucasian male with a red bandanna over his face. Jamaal claimed there were two men in the back of the van—one sitting down and a Caucasian or Mexican shooter with black spiky hair. Jameel testified that a heavy-set Caucasian or Mexican man was driving the van but admitted that he did not see the people in the backseat. Williams' jury clearly disbelieved the Croft brothers' version of events as they convicted Williams of murder and assault.

Green's challenge is fully preserved for appellate review because he asked for and received a *Ginther*[6] hearing. In relation to a claim of ineffective assistance of counsel, we review the trial court's factual findings for clear error and constitutional determinations de novo. *Grant*, 470 Mich at 484-485. To merit relief, Green must show that counsel's performance was so deficient that it actually deprived him of the right to counsel. We presume, however, that Harris employed sound trial strategy and Green must show "that, but for counsel's error, the result of the proceeding would have been different." *Carbin*, 463 Mich at 600. "Failure to make a reasonable investigation can constitute ineffective assistance of counsel." *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). However, "[t]he decision whether to call witnesses is a matter of trial strategy which can constitute ineffective assistance of counsel only when the failure to do so deprives the defendant of a substantial defense." *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990).

At the *Ginther* hearing, Harris testified that his defense theory was that Williams perpetrated the crime with someone other than Green. He was aware of the Croft brothers' testimony ahead of retrial because he read the transcripts from the first trial and was informed about these witnesses by attorney Johnson. Harris noted that the Croft brothers' testimony contradicted the defense theory that Williams was the driver. Moreover, Williams had been convicted despite the Croft brothers' testimonies, indicating that the jury found them incredible. Harris opined that Jamaal's version of events was incredible and Jameel's potential testimony would be unhelpful. Harris was concerned that their testimony would be undermined by cross-examination on even slight errors in the details, further jeopardizing their credibility. This proved to be true when the prosecutor questioned Jamaal at the *Ginther* hearing.

We agree with the trial court's conclusion that Jameel's testimony would be irrelevant because he testified, both at the first trial and at the *Ginther* hearing, that he did not see the shooter. Therefore, he could not exculpate Green. We further agree with the trial court and Harris that Jamaal's original trial testimony was incredible, supporting Harris's strategic decision not to call him as a witness. Moreover, the court noted that Jamaal's *Ginther* hearing testimony was inconsistent with his own testimony in the first trial, and that his claims were inconsistent with all other testimony. The court concluded that "there is absolutely nothing to be offered by

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

the testimony of either of the witnesses that shows there is even a remote possibility – let alone a reasonable likelihood, that the outcome would have been different."

As Jameel could not exculpate Green and Jamaal was unable to keep his story straight, Harris reasonably chose to omit them from his witness list on retrial. Green was not denied a substantial defense by their absence. Accordingly, we affirm Green's convictions and sentences and the trial court's denial of his motion for a new trial.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher