STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 29, 2011
v	No. 295146 Wayne Circuit Court
THOMAS ANTHONY MUNGAR, Defendant-Appellant.	LC No. 08-010646-FC

Before: MARKEY, P.J., and SAAD and GLEICHER, JJ.

PER CURIAM.

In the early morning hours of March 22, 2007, defendant became embroiled in an argument with Anthony McCurdy, Harry Phillips, and Michell White. Following a chaotic sequence of events, defendant and McCurdy found themselves alone on a dark residential street. It is undisputed that defendant shot and killed McCurdy. Defendant claims the shooting was accidental. Ultimately, a jury acquitted defendant of the charged offense of first-degree premeditated murder, MCL 750.316(1)(a), but convicted him of the lesser included offense of second-degree murder, MCL 750.317, as well as possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The court sentenced defendant to consecutive terms of 15 to 30 years' imprisonment for the murder conviction and two years' imprisonment for the felony-firearm conviction.

Contrary to defendant's many complaints on appeal, defendant was fairly prosecuted and received a fair trial. Accordingly, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

At approximately 2:30 a.m. on March 22, 2007, Anthony McCurdy, Harry Phillips and Michell White were spending time together at a home on Sanders Street in Detroit. The three decided to steal scrap metal from a nearby industrial yard, which they could then sell for a profit. McCurdy and Phillips made multiple trips between the industrial yard and the Sanders Street house to accomplish their goal. On their final trip back to the house, McCurdy and Phillips encountered defendant. Defendant contends that he unwittingly witnessed McCurdy's and Phillips's illegal conduct and the men forced him to accompany them to the Sanders Street house. The prosecution contends that defendant approached Phillips and McCurdy on the street and followed them uninvited into the residence. During these events, defendant admittedly was carrying a double barrel shotgun inside a black nylon bag.

The witnesses disagree regarding what occurred inside the Sanders Street home. Defendant claims that McCurdy and Phillips held him captive inside the home by threatening him with a steak knife. Phillips claims that defendant was the captor. At some point, White left the home out of fear for her safety. Phillips was able to take the shotgun from defendant and left the home to hide the weapon in an adjacent alley. Yet, McCurdy and Phillips inexplicably decided to return the shotgun to defendant.

What occurred next is even more unclear. White apparently became so frightened that she ran several blocks to her brother's home. Phillips followed her. White told her brother and her brother's neighbor about her encounter with the armed defendant. White's brother drove her back to the Sanders Street home. As their vehicle turned onto Sanders, White saw defendant chasing McCurdy in circles in the street. She then saw defendant shoot McCurdy one time. Defendant claims that McCurdy continued to threaten him with a knife after White and Phillips left. After chasing defendant into the street, McCurdy threw the knife at defendant. Defendant claims that he ran away from McCurdy and was forced to turn around when McCurdy "caught up with" him. While trying to maintain his balance, defendant claims he tripped and raised his arms into the air. Defendant was holding the shotgun in one hand. He asserts that the "swing factor" against the weapon as defendant raised it into the air caused the trigger to pull, firing the shotgun. Defendant then ran from the scene.

Defendant was arrested on March 25, 2007. On the date originally scheduled for defendant's preliminary examination, the district court adjourned the proceedings and referred defendant to the Forensic Center to determine whether he was competent to stand trial. Defendant was found incompetent to stand trial. He was committed to the care of the Michigan Department of Community Health until August 1, 2008, when he was deemed competent to stand trial. Within ten days, the district court proceeded to conduct a preliminary examination and bound defendant over for trial on first-degree murder and felony-firearm charges. On November 10, 2008, however, the circuit court referred defendant for another evaluation of his competency to stand trial and to determine whether defendant could have been legally insane at the time of the offense. Ultimately, the court found defendant competent to stand trial on August 7, 2009, and defendant opted not to raise an insanity defense. Following a three-day jury trial in October 2009, defendant was convicted of second-degree murder and felony-firearm.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Both through appellate counsel and a Standard 4 appellate brief, defendant raises several challenges to the performance of appointed trial counsel. He challenges trial counsel's failure to more pervasively impeach the trial testimony of White and Phillips with their statements to the police following the shooting. Defendant contends that trial counsel should have interviewed various individuals whom the prosecutor had removed from her witness list. Defendant challenges counsel's failure to object to the admission of certain evidence. Finally, defendant complains about trial counsel's disagreement with him, outside the hearing of the jury, regarding the admissibility of certain evidence. We reject all of these theories.

This Court denied defendant's motion to remand and, therefore, no evidentiary hearing was conducted. See *People v Mungar*, unpublished order of the Court of Appeals, entered July 23, 2010 (Docket No. 295146). As such, our review is limited to mistakes apparent on the

record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). A claim of ineffective assistance of counsel "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). This Court reviews the trial court's findings of fact 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 actually deprived the defendant of the right to counsel. We presume, however, that counsel employed sound trial strategy. The defendant must 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).

Through his appellate counsel, defendant argues that trial counsel insufficiently impeached the trial testimony of White, the only eyewitness to the shooting. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Trial counsel did impeach White's testimony as inconsistent with her statement to the police, just not to the extent desired by defendant. At trial, White testified that she heard McCurdy say, "you're just going to have to shoot me" immediately before defendant actually shot him. On cross-examination, trial counsel impeached White's testimony by referencing White's omission of that fact in her statement to the police. Defendant now contends that White made several other statements at trial that were inconsistent with her statement to the police given one hour after the incident. However, White's earlier statement is not part of the lower court record, and we are unable to compare that statement to White's trial testimony. Accordingly, it is not apparent on this record that counsel was deficient in this regard. *Rodriguez*, 251 Mich App at 38.[1]

In his Standard 4 brief, defendant raises four additional challenges to trial counsel's performance. Defendant first claims that trial counsel should have interviewed various witnesses whom the prosecutor ultimately declined to call at trial. Defendant assumes that the prosecutor trimmed these individuals from her witness list because they revealed evidence that could have exculpated defendant. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v Washington*, 466 US 668, 691; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The failure to call a witness, however, amounts to ineffective assistance only where the omission costs defendant a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

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[1] Defendant attempts to fill the void in the record by attaching White's statement to his Standard 4 appellate brief. Defendant may not expand the record on appeal without this Court's permission. *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999). See also MCR 7.216(A)(4) ("The Court of Appeals may . . . in its discretion . . . permit . . . additions to the transcript or record."). Even so, nothing in White's statement affects the key contested issue in this case: whether defendant intentionally or accidentally shot McCurdy.

Defendant identifies the "key witnesses" that trial counsel should have investigated as Ronnie Taylor, John Paul Taylor, Kelvin Kelsey and Rodney Miracle. While defendant attempts to expand the record on appeal by attaching Kelsey's statement to the police to his appellate brief, defendant never actually indicates how any of these witnesses could have provided a substantial defense.[2] Defendant's blanket statement, that "the jury never heard the whole transaction" absent the testimony of these witnesses, is simply insufficient to establish prejudice or to overcome the presumption that counsel employed sound trial strategy.

Defendant challenges trial counsel's decision not to cross-examine Phillips at trial. Again, we presume that counsel's decision "to call or question witnesses" amounts to sound trial strategy. *Davis*, 250 Mich App at 368. Defendant specifically argues that trial counsel should have impeached Phillips's trial testimony with his prior inconsistent statements to the police. Phillips's statement to the police is not part of the lower court record. Therefore, it cannot be apparent on the record that counsel committed error by failing to impeach Phillips. *Rodriguez*, 251 Mich App at 38. In any event, Phillips did not actually witness the shooting. Therefore, defense counsel could not have clarified whether defendant accidentally shot McCurdy through further impeachment of this witness.

Defendant challenges trial counsel's failure to object to the admission of a photograph of a black nylon bag discovered in the alley near the Sanders Street home. Defendant asserts that the investigating officers should have tested the bag for gunshot residue to determine if that particular bag had previously sheathed defendant's shotgun. The prosecutor presented the photograph into evidence during the trial testimony of Michell White. White testified that she followed Phillips into the alley when he hid defendant's shotgun. White observed Phillips attempt to unzip the bag, unintentionally firing the gun in the process. Defendant appears to argue that the presence of gunshot residue on the bag would confirm White's testimony about the sequence of events while the lack thereof would be further cause for impeachment.

However, defendant misconstrues the evidentiary relevance of the nylon bag. Detroit Police Officer Todd Push testified that he discovered a black nylon bag in the alley adjacent to the Sanders Street home. Officer Push then identified the bag depicted in the photograph as the bag he discovered. The location of this discovery is relevant to corroborate the testimony of White and Phillips that Phillips tried to hide the shotgun in the alley. It is irrelevant whether the shotgun actually fired while in the bag. As relevant evidence (evidence that has any tendency to make the existence of any material fact or issue at trial more or less probable), the photograph was admissible. MRE 401, 402; *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

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[2] Although not part of the record properly before us, we note that Kelsey's statement to the police merely indicates that he drove down Sanders Street and saw a body in the road with an unidentified person standing next to it. Defendant admits that he shot McCurdy, but argues that his actions were accidental or justified. Kelsey's after-the-fact account has no bearing on the contested issue.

Therefore, any objection to its admission would have lacked merit. Counsel is not ineffective for failing to raise meritless or futile objections. *Payne*, 285 Mich App at 191.

Defendant challenges trial counsel's disagreement with his attempts to present various documents into evidence when he testified on his own behalf. Defendant specifically wanted to present White's preliminary examination testimony and various witness statements to the police in order to establish that the witnesses perjured themselves at trial. Outside the presence of the jury, both trial counsel and the court informed defendant that the proffered evidence would be inadmissible hearsay if admitted through defendant's testimony. The court advised defendant that the proper use of a witness's prior statement is to impeach that witness's testimony while that witness is on the stand and explained the process of cross-examination and impeachment. The advice given by trial counsel and the court was correct. The witness statements to the police and White's preliminary examination testimony were out-of-court statements, which defendant offered to prove the truth of the matter asserted. This is hearsay. MRE 801. To the extent defendant attempted to proffer prior sworn testimony that was inconsistent with a witness's trial testimony, those statements could only be used if the declarant was subject to cross-examination. MRE 801(d)(1); see *People v Malone*, 445 Mich 369, 375-378; 518 NW2d 418 (1994). Thus, any statements would only have been admissible while the declarant was actually testifying. It simply is not error for counsel to correctly advise his client on the state of the law.

III. JURY INSTRUCTIONS

Defendant argues that the trial court erred when it failed to provide a legal definition for "great bodily harm" in connection with the second-degree murder instructions. Defendant waived this challenge by expressly approving the jury instructions as given. Moreover, even if defendant had not waived the purported error, we would affirm the jury instructions as given.

> A criminal defendant has a constitutional right to have a jury determine his or her guilt from its consideration of every essential element of the charged offense. A defendant is thus entitled to have all the elements of the crime submitted to the jury in a charge which is neither erroneous nor misleading . . . . Instructional errors that omit an element of an offense, or otherwise misinform the jury of an offense's elements, do not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. Accordingly, an imperfect instruction is not grounds for setting aside a conviction if the instruction fairly presented the issues to be tried and adequately protected the defendant's rights. [*People v Kowalski*, ___ Mich ___; ___ NW2d ___ (Docket No. 141695, issued July 26, 2011), slip op at 12-13 (internal quotation omitted) (ellipses in original).]

The court instructed the jury as follows regarding the elements of second-degree murder:

> To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> First, that the defendant caused the death of Anthony McCurdy. That is that Anthony McCurdy died as a result of the gunshot to his chest.

> Second, that the defendant had one of these three states of mind: He intended to kill or he intended to do great bodily harm to Anthony McCurdy.
>
> Or he knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of his actions.
>
> Third, that the killing was not justified, excused or done under circumstances that reduced it to a lesser crime.

Before instructing the jury, the trial judge indicated on the record that he met with the attorneys in chambers to review the jury instructions and that defense counsel "agreed" on the instructions to be given. The court allowed the attorneys to place any objections on the record as well. Defense counsel specifically stated, "No complaints, sir." Following the jury instructions, defense counsel affirmatively stated that he was satisfied with the instructions as given.

Waiver, the "intentional relinquishment or abandonment of a known right," extinguishes any error related to the waived issue. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). In *Carter*, the trial court asked defense counsel whether he had any objections to the court's ruling on a particular instructional issue. Defense counsel replied, "Satisfaction with that part of it, Judge." *Id.* at 212. The *Carter* Court held that the defendant waived any purported error in the jury instructions as defense counsel "expressed satisfaction with the trial court's decision." *Id.* at 215. Defense counsel in the present case similarly expressed satisfaction with the jury instructions on two separate occasions, which waived any claim of error.

In any event, the instructions given to the jury are not infirm. We review jury instructions in their entirety to determine whether the court fairly, accurately and adequately presented the law. *People v Kelly*, 423 Mich 261, 270-271; 378 NW2d 365 (1985). The trial court delineated every element necessary to prove second-degree murder. The court's failure to specifically define "great bodily harm" is not fatal. This phrase "is generally familiar to lay persons and is susceptible of ordinary comprehension." *People v Martin*, 271 Mich App 280, 352; 721 NW2d 815 (2006). Accordingly, the court's failure to provide a legal definition for the term is not reversible error.

IV. PROSECUTORIAL MISCONDUCT

Defendant argues that the prosecutor impermissibly vouched for the credibility of her witnesses during closing argument. In relation to White's testimony, the prosecutor argued:

> Michell White told you from the witness stand she barely knew the defendant. She had no axe to grind. She had no bad blood against him. Quite frankly, she had no reason to lie.
>
> * * *
>
> . . . This is what she saw. Miss White has no axe to grind. No reason to lie quite frankly.

The prosecutor made similar arguments in relation to Phillips:

> Again, this is an issue of who has reason to not be truthful and who doesn't. Again, if [Phillips] wanted to be untruthful as [defendant] suggests they [sic] are, he would have made himself a more important witness in this case. He would have indicated he saw the shooting. But he didn't. He was honest. . . .

The prosecutor highlighted that White and Phillips immediately and voluntarily advised the police of what they had witnessed:

> And, again, these individuals came forward not really knowing anybody. They told the police what they saw right after. Just like they told you here.

Generally, claims of prosecutorial misconduct are reviewed de novo. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). A prosecutor's remarks are evaluated in the context of the evidence presented and in light of defense arguments. *Rodriguez*, 251 Mich App at 30. Defendant failed to preserve this issue for appellate review by objecting to the challenged remarks. *People v Williams*, 265 Mich App 68, 70-71; 692 NW2d 722 (2005). Unpreserved challenges to a prosecutor's conduct are reviewed for plain error, which means defendant must show that (1) an error occurred, (2) the error is plain or obvious, and (3) the error affected a substantial right. *People v Cross*, 281 Mich App 737, 738; 760 NW2d 314 (2008). Reversal is warranted only "if the defendant is actually innocent or the error seriously undermined the fairness, integrity, or public reputation of the trial." *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006). Thus, reversal is necessary only if a timely instruction would have been inadequate to cure any defect. *Ackerman*, 257 Mich App at 449.

It is well established that a prosecutor may not vouch for the credibility of witnesses by implying she has some special knowledge of the witnesses' truthfulness. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Nor may a prosecutor place the prestige of her office behind the testimony of witnesses. *People v McGhee*, 268 Mich App 600, 633; 709 NW2d 595 (2005). However, this case was squarely a credibility contest; the prosecution and defense provided conflicting versions of events. Defendant specifically testified before the jury that White and Phillips fabricated their version of events. For example, defendant testified:

> The gun never left my possession. They're lying. They never took it down an alley. Never had it at anytime. I wouldn't give it to them.

In this regard, this case is akin to *Thomas*. In *Thomas*, 260 Mich App at 452, the defendant and two defense witnesses testified that the police officers who executed the search warrant at the witnesses' home lied about the manner of the search and the type and location of the evidence uncovered. The theory of the defense was that defendant was "set up" and was the victim of a police conspiracy. *Id.* at 454-455. In closing arguments, the prosecutor countered that the search warrant was issued only after a magistrate made a probable cause determination and noted that the officer who swore out the search warrant affidavit worked "for the Executive Protection Unit that was responsible for the mayor's safety." *Id.* at 453.

The *Thomas* Court held that "a prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *Id.* at 455. In

the context of that case, the prosecutor did not imply "that he had some special knowledge of the truthfulness of the police officer." Rather, the prosecutor "merely argued that the officers had no reason to lie," and "that lying on the stand would cost the officer his career and his position with the Executive Protection Unit." *Id.*

As in *Thomas*, the current prosecutor did not imply that she had special knowledge regarding the witnesses' veracity. Instead, she responded to defendant's accusations that the witnesses conspired to falsely accuse defendant of instigating the situation. The prosecutor argued, based on the witnesses' actual testimony, that White and Phillips did not know defendant before the night in question. The prosecutor merely paraphrased the witness testimony regarding their lack of motive to lie. The prosecutor also tied the physical evidence to the varying versions of events to argue that the story presented by the prosecution witnesses was more credible.[3]

V. RIGHT TO SPEEDY TRIAL

Defendant argues that he was denied his constitutional right to a speedy trial where 933 days elapsed between defendant's arrest and the start of his trial. While this delay appears extreme, we reject defendant's contention that this invalidates his jury trial conviction.

"The determination whether a defendant was denied a speedy trial is a mixed question of fact and law." *People v Waclawski*, 286 Mich App 634, 664; 780 NW2d 321 (2009). "The factual findings are reviewed for clear error, while the constitutional issue is a question of law subject to de novo review." *Id.*, citing *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). However, defendant failed to preserve this issue for appellate review by making "a formal demand on the record" to initiate trial proceedings. *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999). Such unpreserved constitutional issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999).

The right to a speedy trial is guaranteed to criminal defendants by the federal and Michigan constitutions. US Const, Am VI; Const 1963, art 1, § 20; *Williams*, 475 Mich at 261. In determining whether a defendant has been denied his constitutional right to a speedy trial, a court must balance four factors: (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) prejudice to the defendant from the delay. *Vermont v Brillon*, 556 US 81; 129 S Ct 1283, 1290; 173 L Ed 2d 231, 239-240 (2009); *Williams*, 475 Mich at 261-262.

The "timer" on a defendant's right to a speedy trial is set when the defendant is arrested. *Williams*, 475 Mich at 261. "[T]here is no set number of days between a defendant's arrest and trial that is determinative of a speedy trial claim." *Waclawski*, 286 Mich App at 665. However, "a delay of six months is necessary to trigger an investigation into" a claim that a defendant has

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[3] Defendant also challenges trial counsel's failure to object to the prosecutor's statements during closing argument. However, counsel was not ineffective for failing to raise meritless objections. *Payne*, 285 Mich App at 191.

been denied a speedy trial. *People v Walker*, 276 Mich App 528, 541; 741 NW2d 843 (2007), vac'd in part on other grounds 480 Mich 1059 (2008). The defendant must prove prejudice when the delay is less than 18 months. *Waclawski*, 286 Mich App at 665. But a delay of more than 18 months is presumptively prejudicial to the defendant, and shifts the burden of proving lack of prejudice to the prosecution. *Williams*, 475 Mich at 262.

Defendant was arrested on March 25, 2007, and was in custody continuously until his trial started on October 13, 2009. The pretrial delay was over 30 months and, therefore, was presumptively prejudicial. When considering the reasons for the delay, a court must determine the extent to which the prosecutor or the defendant caused the delay. *Walker*, 276 Mich App at 542. "Unexpected delays," "scheduling delays and docket congestion" are charged against the prosecutor. *Id.* "[D]elays inherent in the court system" are "given a neutral tint and . . . only minimal weight in determining whether a defendant was denied a speedy trial." *Waclawski*, 286 Mich App at 666.

In this case, much of the delay was a result of defendant's incompetency to stand trial. A mere ten days after his arrest, the court referred defendant to the Forensic Center to evaluate his competency to stand trial. Nearly 16 months passed while defendant received mental health treatment to enable him to participate in his defense.[4] The case then proceeded on track until the circuit court referred defendant to the Forensic Center for another evaluation on November 10, 2008. Defendant's trial proceedings were subsequently delayed for more than six months while the circuit court adjourned four pretrial hearings on its own motion. There is no record indication that defendant was deemed incompetent to stand trial during that period. However, the six-month delay may be partially explained by the court's appointment of substitute defense counsel in November 2008. Moreover, then-Circuit Court Judge Diane Hathaway originally presided over the case and the matter had to be reassigned following her January 1, 2009 ascension to the Michigan Supreme Court. On May 19, 2009, the circuit court ultimately entered another order for a competency evaluation, which was treated with more expediency. On August 7, 2009, defendant was found competent to stand trial and the proceedings quickly progressed.

Out of the 30 months that defendant waited before his trial, only six are arguably attributable to court or prosecutor delays. The need to reassign a case when a judge leaves the bench is a "delay[] inherent in the court system," which counts only minimally against the prosecutor. *Id.* Moreover, had the court allowed the criminal prosecution to proceed in the face of defendant's incompetency, we would be facing a more serious constitutional violation.

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[4] We reject defendant's contention that "the unwarranted commitment to have competency determined was a pretext." First, defendant does not identify who unjustifiably questioned his competency to stand trial. Second, the Forensic Center actually found defendant incompetent enough to require extensive psychiatric or psychological treatment. Given the independent findings of the Forensic Center, we fail to see how the court erred in ordering defendant's evaluation.

Ultimately, we find that the reasons supporting the delay in this case are stacked in the prosecution's favor.

As already noted, defendant failed to make a formal demand or otherwise assert his right to a speedy trial in the lower court. And, defendant's general contention that the delay "caused the destruction of physical evidence [and] the loss of critical counterveiling [sic] testimony for defense" is insufficient to find an error of constitutional magnitude. Specifically, there is no physical evidence that defendant could present to prove that he accidentally, rather than intentionally, fired the shotgun at McCurdy. Further, defendant testified that he and McCurdy were alone at the time of the shooting. Thus, by defendant's own admission, no other witness could be called to support his defense.

We therefore conclude that defendant failed to establish a violation of his constitutional right to a speedy trial. While the delay between his arrest and trial was lengthy, the delay was mostly attributable to defendant's incompetency to stand trial and did not prejudice his ability to receive a fair trial.[5]

VI. POLICE AND PROSECUTOR CONSPIRACY

In his Standard 4 brief, defendant suggests that the prosecution and police acted in concert to direct the criminal investigation toward him while ignoring the illegal actions of various state witnesses. Defendant asserts that he was denied his due process right to a fair trial as a result. As defendant failed to raise this issue in the trial court, it is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 764-765.

Defendant first accuses the prosecutor of "minimizing" the criminal conduct of White, Phillips, and McCurdy on the night of the incident. However, the prosecution clearly asked White if they were *stealing* scrap metal from the industrial facility that evening, and she answered, "Yes."

Defendant also claims that the prosecutor suborned perjury from both White and Phillips. The prosecution deprives a criminal defendant of his right to due process when it deliberately presents perjured testimony and false evidence to establish guilt. See *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009), lv den 488 Mich 978 (2010), citing *Mooney v Holohan*, 294 US 103, 112-113; 55 S Ct 340; 79 L Ed 791 (1935). To support his contention that White and Phillips committed perjury, defendant relies solely on the fact that White's and Phillips's testimony at trial was inconsistent with defendant's trial testimony and the inadmissible, out-of-

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[5] We reject defendant's reliance on the 180-day rule of MCL 780.131 and MCR 6.004(D). The 180-day rule applies when a prison inmate is awaiting trial on additional charges. The purpose of the rule is to protect a defendant's right to serve his various sentences concurrently. *Williams*, 475 Mich at 252. As defendant was not imprisoned or serving a sentence for a separate charge during the period of delay, the 180-day rule is simply inapplicable.

court statements of various individuals who did not testify at trial. This is insufficient to establish that White and Phillips were untruthful. Further, assuming arguendo that White and Phillips lied on the stand about the March 2007 events, defendant has not established that the prosecutor knew their testimony was false.

Finally, defendant claims that the prosecutor had a duty to conduct further investigation before filing claims against him. Specifically, defendant claims that the prosecutor should have ordered gunshot residue testing on the bodies and clothes of White and Phillips, and on the black nylon bag found in the alley. Defendant argues that the prosecutor should have ordered a drug screen on McCurdy's body, and should have administered polygraph examinations to the witnesses in preparing for trial.

Contrary to defendant's argument, "[a]bsent a showing of suppression of evidence, intentional misconduct, or bad faith, the prosecutor and the police are not required to test evidence to accord a defendant due process." *People v Coy*, 258 Mich App 1, 21; 669 NW2d 831 (2003). Defendant has not shown, and the record does not reflect, that the prosecution or the police suppressed evidence, engaged in intentional misconduct, or acted in bad faith. Further, defendant's reliance on *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), is misplaced because there is no allegation that the prosecutor suppressed any exculpatory evidence. Defendant's reliance on *People v Jordan*, 23 Mich App 375, 385-389; 178 NW2d 659 (1970), is equally misplaced. The issue in *Jordan* was whether evidence must be forensically tested before a proper foundation can be established to admit the evidence at trial, not whether the prosecutor has a de facto duty to forensically test all potentially inculpatory evidence. *Id*. at 385-389.

Moreover, defendant provides no support for his assertion that due process demands subjecting all trial witnesses, including the defendant, to polygraph examinations. To the extent that defendant wants to now order White and Phillips to submit to polygraph testing, presumably to support his motion for a new trial, the case law does not support defendant's arguments. *People v Mechura*, 205 Mich App 481, 484; 517 NW2d 797 (1994), citing *People v Barbara*, 400 Mich 352, 412-413; 255 NW2d 171 (1977), states that, when deciding a motion for a new trial, a court may only consider the results of polygraph examinations if the tests were *voluntarily* taken. Defendant cites no authority supporting his claim that witnesses can or should be compelled to submit to a polygraph examination. Furthermore, defendant's reliance on MCL 776.21 is misplaced. MCL 776.21(5) states that a defendant, in a criminal sexual conduct case, shall be given a polygraph examination if he requests one. Here, defendant was not accused of any criminal sexual conduct, and there is nothing on the record to indicate that defendant requested a polygraph examination before trial. Accordingly, defendant cannot establish any plain error, and his claim fails.

VII. CUMULATIVE ERROR

Defendant argues, both through appellate counsel and his Standard 4 brief, that the prejudicial effect of the cumulative errors requires reversal. We disagree. As noted throughout,

defendant failed to establish any errors committed in his prosecution and trial. Because there are no errors to cumulate, "a cumulative effect of errors is incapable of being found." *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Elizabeth L. Gleicher