

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
January 22, 2013

v

ROBERT LEE GAINES,
Defendant-Appellant.

No. 308378
Kent Circuit Court
LC No. 11-003875-FC

Before: GLEICHER, P.J., and O'CONNELL and MURRAY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317. The trial court sentenced defendant to 30 to 60 years' imprisonment. Defendant appeals by right. We affirm.

Defendant's conviction arose from the 1993 shooting death of eight-year-old Latavia Johnson. Near Christmas of that year, a shot came through Latavia's kitchen window and struck her head. Latavia's aunt ran into the kitchen and found Latavia on the floor. An autopsy revealed shotgun shell components in Latavia's brain.

The police conducted an investigation, but did not arrest defendant until 2011, after they received a confession from an accomplice, Robert Brown. In addition, the police had listened to controlled telephone calls between defendant and his former girlfriend, Jennifer Tabor, who was cooperating with the police. Both Brown and Tabor testified at defendant's trial. Also testifying was Eric Nabors, whom defendant had called from jail.

On appeal, defendant first argues that the trial court erred when it prohibited him from asking Nabors about his life circumstances. We review preserved challenges to a trial court's evidentiary rulings for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). An abuse of discretion occurs when a trial court's decision falls outside the range of reasonable and principled outcomes. *Id.* at 217. However, to the extent that defendant is arguing that the trial court's limitation on his recross-examination of Nabors violated his right of confrontation, the issue is unpreserved. Defendant never argued below that his right of confrontation was violated. See *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007) ("For an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court."). We review unpreserved claims of constitutional

error for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A defendant has a constitutional right to confront the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20; *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). One of the primary interests protected by the Confrontation Clause is the right of cross-examination. *People v Adamski*, 198 Mich App 133, 139; 497 NW2d 546 (1993). A limitation on cross-examination that prevents a defendant from placing facts before the jury from which a witness's bias, prejudice, or lack of credibility may be inferred constitutes a denial of the right of confrontation. *People v Cunningham*, 215 Mich App 652, 657; 546 NW2d 715 (1996). However, the right of cross-examination has limits. *Adamski*, 198 Mich App at 138. The right does not encompass cross-examination on irrelevant or collateral issues. *Id.*; *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992). A trial court has discretionary authority to limit the scope of cross-examination. *Canter*, 197 Mich App at 564. The court may impose reasonable limits on cross-examination to avoid confusion of the issues or to bar repetitive or marginally relevant interrogation. *Adamski*, 198 Mich App at 138.

To determine whether the trial court erred in limiting defendant's recross-examination of Nabors, this Court considers defendant's offer of proof. See *Detroit v Detroit Plaza Ltd Partnership*, 273 Mich App 260, 291; 730 NW2d 523 (2006) (an offer of proof "serves the dual purpose of informing the trial court of the nature and purpose of the evidence sought to be introduced, and of providing a basis for the appellate court to decide whether to sustain the trial court's ruling."). Much of the testimony from Nabors that defendant elicited during the offer of proof was repetitive of trial testimony that the jury had already heard from Nabors. For example, on redirect examination, when the prosecutor asked Nabors about his answers to defense counsel's questions, Nabors had testified that he had not changed his testimony about what defendant told him outside a liquor store because he had not understood the prosecutor's questions. In addition, Nabors had testified that he knew the telephone call with defendant was recorded, that he had previously been in jail, and that it was common knowledge, based on what he knew from the street and his experience with the system, that a person should not incriminate himself or speak to the police until the person is represented by a lawyer. Because a trial court has discretion to limit cross-examination to avoid repetitive interrogation, *Adamski*, 198 Mich App at 138, the trial court did not err in limiting defendant's recross-examination of Nabors to the extent that the testimony in the offer of proof was repetitive of his trial testimony.

The only testimony that Nabors provided in the offer of proof that was not repetitive of his trial testimony was that his previous involvement with the legal system influenced the way he answered questions. Assuming that this testimony was relevant—and defendant has provided no argument explaining how it was relevant—the elicitation of this testimony was not precluded by the trial court's ruling. The trial court allowed defendant to ask Nabors whether he provided inconsistent answers to the prosecutor and defendant about what defendant told him outside a liquor store and, if he did, why he provided the inconsistent answers. This testimony by Nabors would be a further explanation for why he testified differently when questioned by the prosecutor and defendant. Defendant chose not to ask Nabors if he provided inconsistent testimony and why. Error requiring reversal cannot be error to which the appealing party contributed by plan or negligence. *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999), overruled in part on other grounds *People v Thompson*, 477 Mich 146; 730 NW2d 708 (2007).

Even if the trial court erred in preventing defendant from asking Nabors whether his involvement in the legal system influenced his trial testimony, the error was harmless. Nabors' testimony was prejudicial to defendant. His testimony regarding what defendant told him outside a liquor store suggested that defendant was involved in Latavia's murder. Moreover, there was significant evidence, aside from Nabors' testimony, to conclude that defendant committed the murder. This evidence included the testimony of Brown and Tabor and the recordings of the two controlled telephone calls between Tabor and defendant. Given this evidence, the trial court's decision to prohibit defendant from asking Nabors whether his involvement in the legal system influenced his trial testimony was harmless under the standard for preserved, nonconstitutional error, see *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999), and the standard for unpreserved, constitutional error, see *Carines*, 460 Mich at 763-764.

Defendant next argues that the trial court erred when it allowed the admission of his statement to Tabor during a controlled telephone call that she should say "[h]ell, no" if asked to take a polygraph examination. We review this evidentiary decision for an abuse of discretion. *Unger*, 278 Mich App at 216.

Evidence concerning the results of a polygraph examination is not admissible at trial. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). Defendant relies on this bright-line rule in arguing that the trial court erred in admitting his statement to Tabor. However, no evidence was presented that defendant or any witness was offered or had taken a polygraph examination.

Evidence of a defendant's efforts to influence a witness is admissible if the evidence demonstrates consciousness of guilt. *People v Schaw*, 288 Mich App 231, 237; 791 NW2d 743 (2010). Defendant's statement to Tabor that she should say "[h]ell, no" to any request to take a polygraph examination demonstrates a consciousness of guilt, especially where Tabor testified that defendant told her the night of Latavia's murder that, after he and Brown chased the people with whom they had been in an altercation to a house, Brown shot into the house and "someone small" fell. See *Schaw*, 288 Mich App at 237-238 (the defendant's efforts to manipulate his wife into lying to the police were highly probative of a consciousness of guilt). In addition, defendant's statement to Tabor impeached his testimony that he never asked Tabor to lie for him in the controlled telephone call. Further, the trial court's cautionary instruction prevented the jury from considering defendant's statement for any purpose other than determining what was said during the controlled telephone call. Jurors are presumed to follow their instructions. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Under these circumstances, the trial court's decision to admit defendant's statement to Tabor that she should say "[h]ell, no" to any request to take a polygraph examination fell within the range of reasonable and principled outcomes.

Defendant also claims that the trial court erred when it admitted into evidence two gruesome photographs of Latavia's body on the kitchen floor. According to defendant, the photographs were inadmissible because he never challenged the evidence of the brutal manner in which Latavia was killed. Rather, he challenged only the evidence that he was involved in the murder. We review the trial court's evidentiary decision for an abuse of discretion. *Unger*, 278 Mich App at 216.

When a defendant pleads not guilty to the charged crime, all the elements of the crime are at issue. *People v Mills*, 450 Mich 61, 69; 537 NW2d 909 (1995). The prosecution carries the burden to prove each element of the crime beyond a reasonable doubt, regardless whether the defendant specifically disputes an element. *Id.* at 69-70. Thus, regardless whether defendant contested the manner in which Latavia was killed, the prosecutor was not only required to prove defendant's involvement in the murder, but also that Latavia was murdered and that the requisite intent element was present.

The photographs were clearly relevant. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. First, because the photographs showed the nature of Latavia's injuries, they were helpful in proving the shooter's intent. See *People v Gayheart*, 285 Mich App 202, 227; 776 NW2d 330 (2009). Second, the photographs corroborated the testimony of witnesses. Photographs may be used to corroborate a witness's testimony. *Mills*, 450 Mich at 76. Officer Mark Smalla, who was one of the first officers at the house, testified that, based on the condition of Latavia, it was obvious that Latavia was deceased. The two photographs, which showed how Latavia's body was found, corroborated Smalla's testimony. In addition, Officer Brian Reed, a crime scene technician, testified that wadding from a shotgun shell was found near Latavia's body. He drew a circle on one of the photographs around the wadding. Further, one of the photographs showed that Latavia's body was found near the refrigerator and that the refrigerator door was open. The photograph, therefore, provided support to Tabor's testimony that defendant told her that Brown shot into the house after a light went on inside the house. Because the photographs were relevant, the trial court did not abuse its discretion in admitting them. *Unger*, 278 Mich App at 216.

Defendant claims that the prosecutor, by arguing during closing arguments that defendant never said he was innocent during the investigation, shifted the burden of proof. Because defendant did not make a contemporaneous objection to the prosecutor's alleged improper argument, the claim of prosecutorial misconduct is not preserved. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). We review unpreserved claims of prosecutorial misconduct for plain error affecting the defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

The test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial. *People v Mesik (On Reconsideration)*, 285 Mich App 535, 541; 775 NW2d 857 (2009). We review claims of prosecutorial misconduct on a case-by-case basis, examining the prosecutor's challenged remarks in context. *People v McLaughlin*, 258 Mich App 635, 644; 672 NW2d 860 (2003).

A prosecutor may not attempt to shift the burden of proof. *Abraham*, 256 Mich App at 273. When a prosecutor implies that a defendant must prove something or present a reasonable explanation for damaging evidence or when a prosecutor comments on the defendant's failure to present evidence, such arguments tend to shift the burden of proof. *People v Fyda*, 288 Mich App 446, 463-464; 793 NW2d 712 (2010). Here, in the challenged remarks, the prosecutor did not attempt to shift the burden of proof to defendant. The prosecutor did not imply that defendant needed to prove anything or present a reasonable explanation for certain evidence, nor

did the prosecutor comment on defendant's failure to present evidence. Rather, the prosecutor argued that defendant's statements at an investigative interview, as well as his statements to Tabor in the two controlled telephone calls and to Nabors in his telephone call from jail, were inconsistent with his claim of innocence. A prosecutor is free to argue the evidence and all reasonable inferences from it as they relate to the prosecutor's theory of the case. *People v Parker*, 288 Mich App 500, 510; 795 NW2d 596 (2010).

However, the essence of defendant's argument is not that the prosecutor attempted to shift the burden of proof, but that the prosecutor improperly commented on defendant's prearrest silence. Defendant relies on *Combs v Coyle*, 205 F3d 269, 283 (CA 6, 2000), wherein the Sixth Circuit held that the use of a defendant's prearrest silence as substantive evidence of guilt violates the defendant's Fifth Amendment right against self-incrimination. Contrary to defendant's claim, the present case does not involve any prearrest silence by defendant. Here, no evidence was presented that defendant chose not to speak to a police officer, or that defendant stated that he wished to remain silent, or that he wished to remain silent until an attorney was appointed for him. Defendant makes no argument that the admission of his statements from the investigative interview, or from any of the recorded telephone calls, violated his constitutional rights. As already stated, the prosecutor, in the challenged remarks, argued that defendant's statements at the investigative interview, in the two controlled telephone calls by Tabor, and in his telephone call to Nabors from jail, were not consistent with defendant's claim of innocence. Because the prosecutor was merely arguing the evidence as it pertained to her theory of the case, the remarks were proper. *Parker*, 288 Mich App at 510. There was no prosecutorial misconduct.

Defendant next claims that he is entitled to be resentenced because the trial court departed from the recommended minimum sentence range and failed to articulate proper reasons for the departure. Because defendant was convicted of a 1993 murder, the applicable guidelines are the judicial sentencing guidelines. MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 254; 611 NW2d 316 (2000). We review a sentence imposed under the judicial sentencing guidelines for an abuse of discretion. *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000). A sentence is an abuse of discretion if it violates the principal of proportionality. *People v Moorer*, 246 Mich App 680, 684; 635 NW2d 47 (2001). The principal of proportionality requires that a sentence "be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

We conclude that defendant has abandoned the issue. In support of his argument, defendant cites one case, *People v Fields*, 448 Mich 58; 528 NW2d 176 (1995). He cites *Fields* for the proposition that reasons for a departure must be substantial and compelling. However, *Fields* did not involve the judicial sentencing guidelines. *Fields* concerned MCL 333.7401, which prescribed a minimum ten-year sentence for certain drug offenses, but allowed the trial court to depart from the minimum term if there were substantial and compelling reasons for departure. *Fields*, 448 Mich at 62. The Supreme Court held that substantial and compelling reasons must, in part, be objective and verifiable. *Id.* at 68. Although the legislative sentencing guidelines prohibit a trial court from departing from the recommended minimum sentence range absent substantial and compelling reasons for departure, see MCL 769.34(3); *People v Babcock*, 469 Mich 247, 255; 666 NW2d 231 (2003), this requirement is not part of the judicial sentencing guidelines, see *Babcock*, 469 Mich at 255-256. Because defendant has not cited any case law

concerning the judicial sentencing guidelines, he has left it to this Court to discover and rationalize the basis for his claim. He has, therefore, abandoned the issue. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Regardless, the “key test” is not whether an imposed sentence departs from or adheres to the recommended minimum sentence range under the judicial sentencing guidelines, but whether the sentence is proportionate to the seriousness of the matter. *Milbourn*, 435 Mich at 661. Here, defendant’s minimum sentence of 30 years was proportionate. The facts of the murder were heinous. Defendant and Brown deliberately shot a gun into a house because Brown was upset that he had been assaulted and robbed. They shot into the house after a light from the refrigerator came on, and the gunshot instantly and horrifically killed an innocent eight-year-old girl. The actions of defendant and Brown evinced a complete and utter disregard for the lives of the persons inside the house. Our conclusion that defendant’s sentence is proportionate is buttressed by the fact that defendant’s minimum sentence of 30 years would fall within the recommended minimum sentence range under the legislative sentencing guidelines. The trial court scored the prior record variables and offense variables under the legislative sentencing guidelines and concluded that, under the legislative sentencing guidelines, the recommended minimum sentence range would have been 225 to 375 months or life imprisonment. The judicial sentencing guidelines, while in effect, were to reflect actual sentencing practice. *Milbourn*, 435 Mich at 657. Where defendant received a sentence that was similar to what a person would receive for a similar murder committed in 2010 or 2011, defendant’s sentence reflects current sentencing practice.

We reject defendant’s argument that he is entitled to be resentenced because the trial court failed to complete the Departure Reason section of the sentencing information report (SIR). The judicial sentencing guidelines instruct, in part, (1) that when a trial court imposes a sentence outside the recommended minimum sentence range, the court must explain on the record and on the SIR the aspects of the case that persuaded it to impose the sentence, and (2) that if the trial court imposes a sentence outside the recommended range and no reason is given for the departure, the SIR will be returned to the trial court. Although the trial court explained on the record the aspects of the case that persuaded it to impose a sentence outside the recommended minimum sentence range, it did not explain those reasons on the SIR. The remedy contemplated by the judicial sentencing guidelines, if the trial court fails to explain the reasons for departure on the SIR, is a return of the SIR to the trial court for completion. However, defendant does not request that the SIR be returned to the trial court; he only requests resentencing. Because the judicial sentencing guidelines do not contemplate the remedy of resentencing where a trial court fails to explain the reasons for departure on the SIR, defendant is not entitled to be resentenced.

Finally, defendant argues that he received ineffective assistance of counsel. Because no *Ginther*¹ hearing has been held on defendant’s ineffective assistance claims, our review is limited to mistakes apparent on the record. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). To establish a claim for ineffective assistance of counsel, a defendant must show that

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

counsel's performance fell below objective standards of reasonableness and that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Noble*, 238 Mich App 647, 661-662; 608 NW2d 123 (1999).

Defendant asserts that he received ineffective assistance of counsel as it related to counsel being unable to ask Nabors whether he grew up on the street. However, defendant fails to explain how counsel's performance was deficient. Notably, the trial court sustained the prosecutor's objection to counsel's question to Nabors, counsel made an offer of proof of Nabors's testimony, and defendant agreed with counsel's decision not to ask Nabors whether Nabors provided different answers to the prosecutor and defense counsel and, if so, why. Defendant has not shown that counsel's performance was deficient in regard to the cross-examination of Nabors. *Uphaus (On Remand)*, 278 Mich App at 185.

Defendant also asserts that he received ineffective assistance of counsel as it related to the trial court admitting defendant's statement to Tabor in the second controlled telephone call that she should say "[h]ell, no" to any request to take a polygraph examination. Defendant does not explain how counsel's performance was deficient. We assume, however, that defendant is arguing that defense counsel was ineffective because counsel asked defendant whether he ever told Tabor to lie in the second controlled telephone call, which was the question that led the trial court to grant the prosecutor's request to admit defendant's statement to Tabor. The argument is without merit. "The questioning of a witness is presumed to be a matter of trial strategy." *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008). Defense counsel believed that his examination of defendant had "stayed away" from the polygraph issue. Counsel is not ineffective simply because a chosen strategy does not work. *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004). Moreover, we will not assess counsel's competence with the benefit of hindsight. *Petri*, 279 Mich App at 411. Accordingly, defendant has not overcome the presumption that counsel's performance in asking defendant whether he told Tabor in the second controlled telephone call to lie for him fell below an objective standard of reasonableness.

Defendant further asserts that he received ineffective assistance of counsel as it related to the prosecutor's argument that defendant's statements in the investigative interview and in telephone calls with Tabor and Nabors were inconsistent with his claim of innocence. Again, defendant does not specify how counsel's performance was deficient, but we assume that defendant is arguing that counsel should have objected to the prosecutor's argument. However, because the prosecutor's argument did not shift the burden of proof and, contrary to defendant's assertion, there was no comment on any prearrest silence by defendant, any objection would have been futile. Counsel is not ineffective for failing to make a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Defendant was not denied the effective assistance of counsel.

Affirmed.

/s/ Elizabeth L. Gleicher

/s/ Peter D. O'Connell

/s/ Christopher M. Murray