STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 25, 2014
v	No. 310436 Wayne Circuit Court
BOBBY JAMARIO SMITH, Defendant-Appellant.	LC No. 11-009687-FC

Before: SERVITTO, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of one count of second degree murder, MCL 750.317; sixteen counts of assault with intent to do great bodily harm less than murder, MCL 750.84; one count of felon in possession of a firearm, MCL750.224f; and one count of felony firearm, MCL 750.227b. Defendant was sentenced as a second habitual offender, MCL 769.10, to 60-100 years' imprisonment for the second degree murder conviction, to be served concurrently with 10-15 years for each assault with intent to do great bodily harm conviction, and 4-7 ½ years for the felon in possession conviction and consecutive to 5 years for the felony firearm conviction. We affirm defendant's convictions, but remand for resentencing because the trial court did not articulate why the specific upward departure is more proportionate.

FACTS

Defendant's convictions stem from two incidents that occurred in the late evening hours of August 27, 2011, and the early morning hours of August 28, 2011, near the intersection of McGraw Street and Grand River Avenue in Detroit. On the evening of August 27, 2011, a group had gathered in that area to watch illegal drag racing, including Hussein Alwaily and several of his friends. While crossing McGraw Street, Alwaily and his friends got into a verbal altercation with defendant, who was driving an intoxicated female friend home in her vehicle. During the verbal confrontation, defendant exited the vehicle and fired several gunshots in the vicinity of Alwaily and his friends. No one was injured at that time.

Later the same evening, Alwaily and his friends were speaking with several people in front of the National Guard Armory, located in the same area, as they waited for the races to begin. Unbeknownst to Alwaily, the people with whom they were speaking were undercover Detroit Police and Wayne County Sheriff's Officers. Approximately 10 plain-clothed officers

were on an assignment in the area to investigate drag racing and possible narcotics activity. As Alwaily and some of his friends, along with all 10 undercover officers (and a crowd of other people) sat on concrete barriers outside the Armory or milled about on the sidewalk in front of the barriers, shots rang out and began striking the concrete barriers. Alwaily was struck with a bullet and ultimately died from the gunshot wound. A Wayne County Sheriff's Office Deputy was also struck and injured by a bullet. Witnesses identified defendant as the shooter, and defendant was seen on video surveillance of a nearby liquor store leaving a handgun with the store owner around the time of the shooting.

I. CHOICE OF COUNSEL

On appeal, defendant first asserts that the trial court violated his Sixth Amendment right to counsel of choice[1] by denying defense counsel's request to withdraw so that defendant's newly retained counsel could enter the case. We disagree.

"We review for an abuse of discretion a trial court's exercise of discretion affecting a defendant's right to counsel of choice." *People v Akins*, 259 Mich App 545, 556-557; 675 NW2d 863 (2003). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Strickland*, 293 Mich App 393, 397; 810 NW2d 660 (2011).

The constitutional right to counsel encompasses the right of a defendant to choose his own retained counsel. US Const, Am VI; US Const, Am XIV; 1963 Const, art 1, §§ 13 and 20; *Akins*, 259 Mich App at 557. The wrongful denial of a criminal defendant's right to counsel of choice constitutes structural constitutional error requiring reversal. *US v Gonzales-Lopez*, 548 US 140, 150; 126 S Ct 2557; 165 L Ed 2d 409 (2006). However, the right to counsel of choice is not absolute. *Akins*, 259 Mich App at 557. "A balancing of the accused's right to counsel of his choice and the public's interest in the prompt and efficient administration of justice is done in order to determine whether an accused's right to choose counsel has been violated." *People v Krysztopaniec*, 170 Mich App 588, 598; 429 NW2d 828 (1988).

Furthermore, a trial should not be adjourned except for good cause shown. *People v Sekoian*, 169 Mich App 609, 613; 426 NW2d 412 (1988). When reviewing a trial court's decision to deny a defense attorney's motion to withdraw and a defendant's motion for a continuance to obtain another attorney, we consider the following factors: (1) whether the

[1] Defendant also states that the trial court's action deprived him of the right to effective assistance of counsel. However, because defendant makes no argument in support of such a statement, we deem this claim abandoned and decline to address it. See, *People v Eisen*, 296 Mich App 326, 331-332; 820 NW2d 229 (2012)(declining to consider a sufficiency of the evidence claim "because defendant has provided no specific argument pertaining to that issue, thereby abandoning it.").

defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was negligent in asserting his right, (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision. *Akins*, 259 Mich App at 557; *People v Echavarria*, 233 Mich App 356, 369; 592 NW2d 737 (1999).

Defendant retained counsel for purposes of his trial. Defendant was arraigned in the circuit court on October 3, 2011, and on that date, trial was set for February 13, 2012. During the course of all lower court pre-trial proceedings, there was no indication that defendant and his retained counsel were experiencing any difficulties. It was only on the first scheduled date of trial, Monday, February 13, 2012, when a jury pool was already assembled, and witnesses were present, that defense counsel stated that he had been contacted by another attorney over the weekend and that defendant would like to hire a new attorney. Addressing the factors set forth in *Akins*, above, we are satisfied that the trial court did not abuse its discretion in denying defendant's motion for an adjournment for the purpose of hiring new counsel.

Defendant was asserting a constitutional right, satisfying factor (1) set forth in *Akins*, 259 Mich App at 557. However, while defense counsel indicated that his and defendant's relationship was "strained," there was no legitimate dispute between the two identified under factor (2). Defendant has also failed to specify any legitimate dispute in his appeal brief. Defendant was negligent in asserting his right under factor (3). The pre-trial procedures continued, without defendant having written any letter to the court or defense counsel having moved to withdraw until the very day of trial. Had defendant and defense counsel's relationship been strained to the point where withdrawal was necessary, the issue could have been addressed at any point prior to trial.

As to factor (4), the trial court found that defendant was engaging in a delay tactic. Though defendant had no history of attempting to delay the case, given the timing of the request and the lack of allegation of a specific fundamental difference between the two, we cannot conclude that the trial court's conclusion was erroneous. Finally, defendant has demonstrated no prejudice resulting from the trial court's decision under factor (5). Defendant has identified nothing that his requested substitute attorney would have done differently. While defense counsel also pointed out that defendant's family had now also obtained funds to hire a video expert to review the liquor store video evidence, the only issue with respect to the video surveillance was the time displayed on it showing when defendant arrived at and left from the party store. The gun used to kill Alwaily was never recovered. Thus, it is of questionable value whether the video showed defendant leaving a gun at the party store before or after the killing occurred. The gun defendant left at the store was never identified as the one used to kill Alwaily and defendant admitted to having a gun in his possession at some point on the night of the shooting. The trial court did not abuse its discretion in denying defendant's day of trial motion to adjourn for the purpose of retaining new counsel.

II. CONFRONTATION CLAUSE

Defendant next contends that the trial court violated the confrontation clause, as well as MRE 703, by admitting the testimonial hearsay statements of Dr. Sung at trial. While the admission of the statements was in error, the error did not affect defendant's substantial rights.

Defendant did not object to Dr. Sung's testimony at trial. We thus review this unpreserved claim of constitutional error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763–764; 597 NW2d 130 (1999).

In *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the United States Supreme Court held that the Sixth Amendment Confrontation Clause bars the admission of testimonial statements of a witness who does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. The Court left "for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Id*. In *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006), "another day" arrived and the Supreme Court held that a statement is testimonial if the circumstances objectively indicate that there is no ongoing emergency and the primary purpose is "to establish or prove past events potentially relevant to later criminal prosecution."

Further definition of what constituted testimonial statements was addressed in *Melendez-Diaz v Massachusetts*, 557 US 305; 129 S Ct 2527, 2530-2531; 174 L Ed 2d 314 (2009). In that case, the United States Supreme Court addressed whether certificates of analysis prepared by state health department laboratory analysts to show that bags seized from the defendant contained cocaine were testimonial and thus covered by the Confrontation Clause. The certificates were notarized statements from analysts, which the Court found were clearly affidavits offered in place of live testimony. *Id.* at 2531-2532. Under Massachusetts law, the sole purpose of the certificates was to provide prima facie evidence of the composition, weight, and quality of the analyzed substances. *Id.* The Court concluded that the certificates were thus testimonial statements from the analysts, who were witnesses for purposes of the Sixth Amendment, and that under *Crawford*, the defendant was entitled to confront the analysts at trial, unless they were unavailable and he had a prior opportunity to cross-examine them. *Id.* The Court further clarified that regardless of whether the analysts' statements qualify as business or official records, they were prepared specifically for use at the defendant's trial and, therefore, they were testimonial, and the analysts were subject to confrontation under the Sixth Amendment. *Id.* at 2539-2540.

More recently, in *Bullcoming v New Mexico*, the United State Supreme Court, __US __; 131 S Ct 2705; 180 L Ed 2d (2011), tackled the question of whether the Confrontation Clause permitted the prosecution to introduce a forensic laboratory report containing a testimonial certification, made in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification. The Court held that in line with controlling precedent, "[a]s a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness." Michigan follows this precedent and our Supreme Court has held it applicable to autopsy reports. See *People v Lewis*, 490 Mich 921; 806 NW2d 295 (2011).

In the instant case, the prosecutor did not assert that the person who performed the autopsy on Alwaily and prepared the file on the autopsy, Dr. Somerset, was unavailable. The record shows only that Dr. Somerset no longer worked for the county medical examiner's office. Nor did defendant have an opportunity to cross-examine Dr. Somerset. He or she did not testify

at the preliminary examination. As conceded by the prosecution, the admission of Dr. Sung's testimony concerning the autopsy performed by Dr. Somerset and the conclusions reached by Dr. Somerset regarding the autopsy was inadmissible and its admission violated defendant's right of confrontation.

Nevertheless, because this error is unpreserved, for a new trial to be granted, the error must have affected defendant's substantial rights. *Carines*, 460 Mich at 763–764. Defendant must demonstrate prejudice arising from the error, i.e., that the error affected the outcome of the lower court proceedings. *Id*. This, he cannot do because the cause of Alwaily's death was not at issue and defendant does not dispute that a crime occurred. Instead, defendant simply contends that he was not the shooter. Nothing in the autopsy or autopsy report included or excluded defendant as the killer. Although a .40 caliber bullet was removed from Alwaily's body, the only person who unequivocally identifies a gun in defendant's hand at any point in time as being a .40 caliber is defendant himself. Defendant is not entitled to a new trial based upon a denial of his right to confrontation.

III. ACCOMPLICE JURY INSTRUCTION

Defendant next argues that the trial court erred in failing to give an accomplice jury instruction with respect to William Hansard and that this outcome-determinative error requires reversal. We disagree.

Generally, this Court applies a de novo standard of review when it reviews jury instructions that involve questions of law and reviews a trial court's determination of whether an instruction is applicable to the facts of a case for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). However, this Court reviews unpreserved issues for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763–764. And where, as here, counsel expresses approval of the jury instructions, this approval constitutes a waiver that extinguishes any error regarding the instructions. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000).

A trial court is required to instruct the jury concerning the law applicable to the case and to present the case fully and fairly to the jury in an understandable manner. MCL 768.29; *People v Henry*, 239 Mich App 140, 151; 607 NW2d 767 (1999). A criminal defendant has the right to have a properly instructed jury consider the evidence against him. *People v Rodriguez*, 463 Mich 466, 472; 620 NW2d 13 (2000). Jury instructions must therefore include all the elements of the charged offenses and any material issues, defenses, and theories which are supported by the evidence. *People v Hawthorne*, 265 Mich App 47, 57; 692 NW2d 879 (2005), r'vsed on other grounds, 474 Mich 174; 713 NW2d 724 (2006). To give a particular instruction to the jury, there must be evidence to support it. *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988). Jury instructions are reviewed in their entirety and even if the instructions were somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Henry*, 239 Mich App at 151.

After the trial court had instructed the jury in this case, the judge asked each counsel whether there was anything about the instructions, as given, that either wanted to bring to his attention. Both answered in the negative. Because defense counsel expressed satisfaction with

the instructions as given, defendant has waived any error with respect to the jury instructions. *Carter*, 462 Mich 216.

Notwithstanding defendant's waiver, the trial court did not plainly error in failing to sua sponte give an instruction regarding accomplice credibility. Defendant asserts that cautionary instructions concerning the unreliability of accomplice testimony with regard to Hansard should have been given, specifically, CJI2d 5.4, 5.5, and 5.6. Hansard followed defendant as he drove his intoxicated female friend, in her vehicle, home. Hansard witnessed defendant shoot a gun in the first incident and then continued to follow defendant to the female friend's home, where the female was dropped off and defendant got into Hansard's vehicle. Hansard then dropped defendant off at the liquor store and testified that he saw defendant commit the second shooting that killed Alwaily and injured the Wayne County Sheriff's Deputy. According to defendant, Hansard was a pivotal witness and, because he was the mode of transportation for defendant and did not report either shooting, a jury could find Hansard an accomplice.

CJI2d 5.4 is to be given "where the witness has admitted his guilt or has been convicted of the crime, or where the evidence clearly indicates his complicity." Hansard did not admit to being defendant's accomplice, nor was he convicted of any crime associated with the incidents that took place on August 27, 2011. For the instruction to be given, the evidence thus must have clearly indicated Hansard's complicity in the shootings that killed Alwaily, injured Landrum, and placed others in jeopardy.

Hansard testified that he saw defendant get out of a vehicle that Hansard was following, then fire a gun the first time toward a crowd. Hansard was unaware if anyone was injured. Hansard testified that he then continued to follow defendant in the car to complete their errand, and allowed defendant to get into his van. Hansard further testified that he dropped defendant off near the liquor store and saw defendant then walk down the street and begin shooting again. Hansard's testimony is consistent with other witnesses and there is no indication that Hansard knew the first or second time that defendant was going to shoot. Defendant testified that Hansard gave him the gun prior to the first shooting incident, but defendant also testified that during this shooting incident, he shot only in the air. It is undisputed that no one was injured during the first shooting incident. Defendant denies being involved in the second shooting incident and testified that when he was dropped off by Hansard in front of the liquor store, he entered the store and the owner took the gun from him. Where defendant denied being involved in the second shooting, Hansard could not be compliant with defendant in the same. The evidence did not warrant the jury being given CJI2d 5.4.

CJI2d 5.5 and CJI2d 5.6 are used together and read as follows:

> (1) Before you may consider what [name witness] said in court, you must decide whether [he/she] took part in the crime that defendant is charged with committing. [Name witness] has not admitted taking part in the crime, but there is evidence that could lead you to think that [he/she] did.
>
> (2) A person who knowingly and willingly helps or cooperates with someone else in committing a crime is called an accomplice.

(3) When you think about [name witness]'s testimony, first decide if [he/she] was an accomplice. If, after thinking about all the evidence, you decide that [he/she] did not take part in this crime, judge [his/her] testimony as you judge that of any other witness. But, if you decide that [name witness] was an accomplice, then you must consider [his/her] testimony in the following way:

[CJI2d 5.5]

(1) You should examine an accomplice's testimony closely and be very careful about accepting it.

(2) You may think about whether the accomplice's testimony is supported by other evidence, because then it may be more reliable. However, there is nothing wrong with the prosecutor's using an accomplice as a witness. You may convict the defendant based only on an accomplice's testimony if you believe the testimony and it proves the defendant's guilt beyond a reasonable doubt.

(3) When you decide whether you believe an accomplice, consider the following:

(a) Was the accomplice's testimony falsely slanted to make the defendant seem guilty because of the accomplice's own interests, biases, or for some other reason?

(b) Has the accomplice been offered a reward or been promised anything that might lead [him/her] to give false testimony? [State what the evidence has shown. Enumerate or define reward.]

(c) Has the accomplice been promised that [he/she] will not be prosecuted, or promised a lighter sentence or allowed to plead guilty to a less serious charge? If so, could this have influenced [his/her] testimony?

[(d) Does the accomplice have a criminal record?]

(4) In general, you should consider an accomplice's testimony more cautiously than you would that of an ordinary witness. You should be sure you have examined it closely before you base a conviction on it.

[CJI2d 5.6]

Defendant bases his claim that these jury instructions should have been given on his testimony that Hansard gave him the gun and was present when defendant committed the first shooting, then allowed defendant to get in his van with the gun, and Hansard's testimony that he allegedly saw defendant commit the second shooting. These facts were all brought to the jury's attention throughout the trial and during the defendant's closing argument. However, defendant also testified that he only shot in the air during the first shooting and was not involved in or present during any second shooting that occurred. And, Hansard testified that after defendant completed his errand, he asked Hansard to drop him off at the liquor store, which Hansard did. Hansard

testified that he saw defendant start shooting a second time, but there was no testimony or indication that Hansard dropped off defendant with the knowledge that he was going to engage in a second shooting or in order to help him accomplish the second shooting. Defendant did not offer any testimony that he and Hansard planned to participate in the first or second shooting or that the same were discussed. In fact, by defendant's testimony, Hansard dropped him off at the party store so that he could simply resupply Hansard with the ammunition he had used, at which point no further incidents took place, as the gun was taken by the party store owner. There was no testimony or evidence that would warrant a sua sponte accomplice instruction such as that found in CJI2d 5.5 and 5.6.

IV. COERCED JURY VERDICT

Defendant next asserts that the jury's verdict was coerced by the trial court's warning to jurors that they would have to return for further deliberations if they did not reach a verdict by the end of the day. We disagree.

Defendant did not object to the trial court's statements now challenged on appeal. To avoid forfeiture of this unpreserved, nonconstitutional plain error, defendant bears the burden of establishing that: (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected his substantial rights. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

A criminal defendant has a right to be tried by a fair and impartial jury. US Const, Am VI; Const 1963, art 1, § 20; *People v Daoust*, 228 Mich App 1, 7; 577 NW2d 179 (1998), overruled on other grounds, *People v Miller*, 482 Mich 540; 759 NW2d 850 (2008). A trial court "should not give instructions having a tendency to coerce the jury into agreeing on a verdict. While the court may reasonably urge an agreement, its discretion does not extend to the limit of coercion." *People v Malone*, 180 Mich App 347, 352–353; 447 NW2d 157 (1989) (citations omitted). Claims of a coerced verdict are reviewed on a case-by-case basis, and all of the facts and circumstances, as well as the particular language used by the trial judge, are considered. *Id.* at 352.

Here, the trial concluded on Thursday, February 16, 2012. The jury began its deliberations that day and was excused for the day around 4:15 p.m. The jury reconvened for deliberations on Friday, February 17, 2012. The jury sent out a note with respect to a videotape and entered the courtroom around 11:21 a.m. for the court to play the videotape for them. During discussions, after the videotape concluded, the trial court stated:

> Just to give you an idea where we are with this, if you have not reached a decision by 12:30, quarter to one, thereabouts, have the deputy excuse you for your lunch break for at least an hour, they will give you instructions and so forth, and then you will return after that lunch break and continue on until, again, fourish. If you have not reached a decision at that time, we would return next week, but on Tuesday. The courts are closed on Monday. So if you have not reached a decision by the end of the day today, you return Tuesday at 9:00. You may be excused.

The jury then left the courtroom to continue with deliberations. At 3:10 p.m. on Friday, February 17, 2012, the jury returned its verdict.

There is nothing even marginally coercive in the trial court's telling the jury what the deliberation schedule would be. It is clear that the trial court was merely telling the jury that if they did not reached verdict on Friday, they were to return to the court not on Monday, as it would likely be presumed, but on Tuesday, because the court would be closed on Monday. There was nothing in the trial court's language suggesting that the jury must or should reach a verdict by the end of the day on Friday. See, *People v Vettese*, 195 Mich App 235, 245; 489 NW2d 514 (1992). The record does not show that the court's comments were strategically intended to coerce the jury to reach a hasty verdict and defendant's argument otherwise is without merit.

V. PROSECUTORIAL MISCONDUCT

Defendant next contends that the prosecutor engaged in misconduct during its cross-examination of defendant and during closing argument which violated defendant's right to a fair trial. While the prosecutor improperly asked defendant to comment on the credibility of other witnesses, this plain error did not affect defendant's substantial rights. Defendant is thus not entitled to a new trial on this basis.

We review this unpreserved claim of prosecutorial misconduct for plain error affecting the defendant's substantial rights. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003). Claims of prosecutorial misconduct are decided case by case, and the prosecutor's remarks are evaluated in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Prosecutors are given great latitude when making their arguments. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

"[I]t is improper for a prosecutor to ask a defendant to comment on the credibility of prosecution witnesses since a defendant's opinion on such a matter is not probative and credibility determinations are to be made by the trier of fact." *People v Loyer*, 169 Mich App 105, 117; 425 NW2d 714 (1988); *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). It is not improper, however, for a prosecutor to ask a defendant whether he or she had a different version of the facts in an effort to ascertain which facts are in dispute. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

In several instances, the prosecutor asked defendant if prosecution witnesses were being truthful. For example:

> Prosecutor: Did you tell Mark, the party store employee, that the windows of your sister's vehicle were shot out?
>
> Defendant: No.
>
> Prosecutor: So, when he testified to that, that wasn't truthful on his part?

Defendant: No.

The above does not suggest that defendant simply had a different version of the events, but directly asks defendant to answer as to whether "Mark" was lying. This type of questioning is improper. However, because defendant did not object to the questioning, to warrant reversal, he must establish that the improper questioning affected his substantial rights; i.e., the fairness, integrity, or public reputation of judicial proceedings. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), overruled on other grounds, *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Of the improper questioning identified, most concerned how defendant was holding the gun during the first shooting. Defendant's answers in this case reiterated that during the first shooting, he fired the gun in the air. There is no indication that his answers that the witnesses who stated otherwise were inaccurate affected the outcome of the proceedings. Similarly, there is no indication that defendant's testimony that Mark was untruthful when he told the police that when defendant came into the store requesting bullets he had said that someone shot the window out of his sister's car and that he had shot back, affected the outcome of the proceedings in any way. It is undisputed that after he entered the store requesting bullets, defendant did not obtain the bullets and, in fact, left the gun at the store. Moreover, a curative instruction could have cured any possible prejudice stemming from the improper questioning. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001).

Defendant further asserts that the prosecutor engaged in misconduct when, during closing argument, he commented that the victims' wounds were consistent with the shots coming from a few feet away from Von's party store, on the same side of Grand River as where the victims were standing. According to defendant, these "facts" were not in evidence. The prosecutor stated:

> Physically the bullets are hitting them and going left to right in their bodies. Landrum is hit left to right through and through in the right leg. You heard the doctor's testimony, it's left to right through his hip and comes to rest on this side.

The prosecutor acknowledged that Mortadah Algarawi's testimony as to where the shooting came from was different, but stated:

> Mortadah's testimony is the shots are going diagonally, this way. First of all, the people sitting on the[] barriers wouldn't get hit by the[] shots because there's vehicles in between, intermedia[te] targets. Secondly, if they're coming from this direction, and that's why you can't believe Mortadah as to this shooting sequence, then Hussein gets hit on an angle, not side to side. And the officer, Deputy Landrum, gets hit more front ways instead of interior right thigh, left to right.

Defendant is correct that there was no testimony that Landrum was hit left to right or his injury was through and through. A prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but is free to argue the evidence and any reasonable inferences that may arise from the evidence. *Bahoda*, 448 Mich at 282. Despite that the prosecutor argued a fact not in evidence, however, there is no reason to believe that the statement that Landrum's

injury was hit left to right or that the injury was a "through and through" injury affected the outcome of the proceedings. Landrum testified that the shots appeared to be coming from his left. Several other witnesses testified consistent with this statement. There was no question that Landrum was, in fact, shot in the thigh, and the extent of the injury (i.e., whether the bullet remained in his leg or exited) was immaterial to the jury's finding defendant guilty of assault with intent as to Landrum.

Concerning the prosecutor's statements about Algarawi's testimony, the prosecutor was arguing reasonable inferences arising from the testimony. The prosecutor accurately stated Algarawi's testimony and argued why the testimony would not be consistent with Alwaily's injuries. This did not amount to misconduct.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that trial counsel was ineffective. Again, we disagree.

Because defendant did not move for a new trial or *Ginther* hearing below to create an evidentiary record, his claim of ineffective counsel is unpreserved. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). Unpreserved claims of ineffective assistance of counsel are reviewed on a limited basis; with review being only for errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

In *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court held that a convicted defendant's claim of ineffective assistance of counsel includes two components: "First, the defendant must show that counsel's performance was deficient. Second, the defendant must show that the deficient performance prejudiced the defense." The first prong requires the defendant to show that counsel's performance fell below objective standards of reasonableness, and the second prong requires defendant to show that it is reasonably probable that the results of the proceeding would have been different had it not been for counsel's error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

Defendant asserts that counsel was ineffective for failing to object to the prejudicial hearsay testimony of Dr. Sung, for failing to request accomplice jury instructions, for failing to object to instances of prosecutorial misconduct, and for failing to petition the court for allocated funds to secure an expert witness. As indicated above, the testimony of Dr. Sung was inadmissible and thus should have been objected to. However, as also indicated above, the admission of Dr. Sung's testimony concerning the nature of Alwaily's injuries and the cause of his death did not affect the outcome of the proceedings. Thus, though the error was apparent on the record, had counsel objected and had the testimony been kept out, there is no reasonable probability that the outcome of the trial would have been different. Thus, counsel was not ineffective for failing to object to Dr. Sung's testimony.

Counsel was also not ineffective for failing to request an accomplice instruction. As previously indicated, an accomplice instruction was not warranted from the evidence presented. And, the determination whether a jury instruction is applicable to the facts of a case is within the sound discretion of the trial court. *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254

(2003). Defendant has provided nothing to establish that had counsel requested the accomplice instructions, the trial court would have given them.

Counsel was also not ineffective for failing to object to instances of prosecutorial misconduct. As addressed above, at least one of the complained-of acts did not amount to prosecutorial misconduct. Relative to that act, ineffective assistance of counsel cannot be predicated on the failure to make a meritless objection. *People v Erickson*, 288 Mich App 192, 201; 793 NW2d 120 (2010). With reference to the acts that did constitute prosecutorial misconduct, none of them affected the outcome of trial. In the same token, then, the results of the proceedings would not have been different, absent counsel's error.

With respect to counsel's failure to request funds to secure an expert, defendant asserts that his primary defense was that he was not the shooter in the second instance and that the videotape evidence, specifically the time showed on the video was key in his case. Defendant thus contends that an expert was necessary to refute the prosecutor's expert testimony that the time reflected on the videotape was incorrect. Trial counsel's decision whether to call a witness, including an expert, is presumed to be a strategic one for which this Court will not substitute its judgment. *Ackerman*, 257 Mich App at 455. "Ineffective assistance of counsel may be established by the failure to call witnesses only if the failure deprives defendant of a substantial defense." *People v Julian*, 171 Mich App 153, 159; 429 NW2d 615 (1988). "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).

The prosecution's expert, Detective Lance Sullivan, testified that he set his department-issued cell phone next to a live screen shot of the liquor store video system where the system was telling him what time it was and compared the two. In this particular case, Sullivan noticed that the Von's Liquor store system was 53 minutes and 16 seconds slower than the actual time. The store owner, Fadi Ayar, further testified that because the video was from August when we observe daylight savings time, the time displayed on the video would be an hour behind the actual time. We first note that counsel was retained and that defendant did not assert status as an indigent, precluding entitlement to a court-appointed expert witness. MCL 775.15. Second, there is nothing in the record to suggest, and defendant has offered no evidence to show, that another expert would have testified contrary to plaintiff's expert and the store owner; i.e., that the time reflected on the party store videotape was correct. Thus, counsel was not ineffective for failing to petition the court for allocated funds to secure an expert witness.

VII. FIFTH AMENDMENT

Defendant next asserts that his Fifth Amendment rights were violated when his parole officer effectively interrogated him without advising him of his *Miranda*[2] rights. We disagree.

[2] *Miranda v Arizona*, 384 US 436, 444–445; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

We review de novo a trial court's ultimate decision on a motion to suppress evidence. *People v Chowdhury*, 285 Mich App 509, 514; 775 NW2d 845 (2009). The trial court's factual findings, however, are reviewed for clear error. *Id*.

The right against self-incrimination is guaranteed by both the federal and state constitutions. US Const, Am V; Const 1963, art 1, § 17. To protect a defendant's privilege against self-incrimination, a suspect must be informed of certain rights before he is subjected to a custodial interrogation. *Miranda v Arizona*, 384 US 436, 444–445; 86 S Ct 1602; 16 L Ed 2d 694 (1966). A custodial interrogation is "'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" *People v Elliott*, 494 Mich 292, 305; 833 NW2d 284 (2013), quoting *Miranda*, 384 US at 444. Statements made by a defendant during custodial interrogation are inadmissible unless the accused knowingly, voluntarily, and intelligently waived his or her Fifth Amendment rights. *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005).

A suspect's constitutional rights are not violated when the police, for whatever reason, fail to inform him of the *Miranda* warnings. *United States v Patane*, 542 US 630, 641; 124 S Ct 2620; 159 L Ed 2d 667 (2004) (plurality opinion). Rather, the Fifth Amendment is implicated only when the suspect's unwarned statement is introduced into evidence at trial. *Id.* However, the failure to administer *Miranda* rights is not in itself a violation of the Fifth Amendment and evidence obtained as a result of an unwarned statement is not automatically inadmissible as "fruit of the poisonous tree." *Patane*, 542 US at 641–643. Admission of such evidence violates the Fifth Amendment only if the evidence is the fruit of an actually coerced statement. *Patane*, 542 US at 644; *Oregon v Elstad*, 470 US 298, 309; 105 S Ct 1285; 84 L Ed 2d 222 (1985). An "actually coerced statement" is one that is accompanied by "actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will." *Elstad*, 470 US at 309.

According to defendant's parole agent, Ms. Swan, when she went to serve defendant with papers in jail, he said to her, "I'm fucked, Ms. Swan, aren't I?" The statement was introduced at trial. Defendant does not dispute the nature of the statement. While defendant was undoubtedly in jail when this statement was made, the statement was not made during a custodial interrogation. In *People v Elliott*, 494 Mich 292, 306; 833 NW2d 284 (2013), a parolee was incarcerated for a parole violation when his parole officer appeared at the jail to serve him with notices of his parole violations. While there, the defendant gave incriminating statements to the parole officer about a robbery the defendant had committed. The defendant was eventually charged with the robbery and defendant sought to have the parole officer's statements suppressed arguing that said statements were improperly obtained without the benefit of *Miranda* warnings. Our Supreme Court found that the statements were properly admitted. It opined:

> 'Custodial' means more than just the normal restrictions that exist as a result of the incarceration. Indeed, the United States Supreme Court has held that imprisonment alone is not enough to create a custodial situation within the meaning of *Miranda*. Instead, whether incarceration constitutes custody for *Miranda* purposes . . . depends upon whether it exerts the coercive pressure that *Miranda* was designed to guard against—the danger of coercion [that] results

> from the *interaction* of custody and official interrogation. (internal citations omitted).

The *Elliott* Court further determined that a reasonable person in defendant's position, i.e., a parolee, would be aware that a parole officer is acting independently of the police who placed him in custody and has no control over the jail, its staff, or the individuals incarcerated there. The parolee would know, then, that his "freedom of movement" was not "curtailed" during a meeting with the parole agent and he would have felt free to terminate the interview and leave.

As in *Elliott*, the defendant here was a parolee being held in jail and was well aware that the parole agent was separate from the police or jail personnel. There is no reason to conclude that defendant was being subject to a custodial interrogation when he made the challenged statement. And, as in *Elliot*, there is no evidence of coercion or any other manner of psychological intimidation. *Id*. at 311. The parole officer visited defendant as part of her job as a parole officer and it appears that defendant *volunteered* this statement when he saw Ms. Swan. Defendant cannot show inherently coercive pressures that caused him to discuss anything with the parole officer, let alone make the challenged statement. Moreover, as indicated by defendant, the statement is not necessarily an admission of guilt. The meaning of the statement was left to the province of the jury. The admission of the statement thus raises no Fifth Amendment implications.

VIII. SUFFICIENCY OF THE EVIDENCE

Next, defendant argues that his conviction for second degree murder was against the great weight of the evidence. We disagree.

This Court reviews "de novo a challenge on appeal to the sufficiency of the evidence." *Ericksen*, 288 Mich App at 195. "In determining whether the prosecutor has presented sufficient evidence to sustain a conviction, an appellate court is required to take the evidence in the light most favorable to the prosecutor" to ascertain "whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010)(internal quotations and citations omitted).

Defendant's challenge to the sufficiency of the evidence is based on his assertion that witnesses presented conflicting stories of what occurred on the night of August 27, 2011, and the morning of August 28, 2011, and a miscarriage of justice will occur if his conviction is allowed to stand based on conflicting stories. Specifically, defendant contends that while Hansard testified that he saw defendant shooting a second time into the crowd, Mortadah Algarawi testified that the shooter that caused Alwaily's injuries was driving by in a van and had dreadlocks. Defendant disregards, however, that Wayne County Deputy Landrum, who was also shot, testified that immediately prior to being shot, he heard gunshots coming from his left, in the area of the party store, where Hansard testified that he had dropped defendant off and the area from where he saw defendant begin shooting. Several other witnesses testified that they, too, heard gunshots coming from that area. And, the jury was free to believe Landrum, Hansard, and any other witness, and was free to disbelieve Algarawi. "All conflicts in the evidence must be resolved in favor of the prosecution and we will not interfere with the jury's determinations regarding the weight of the evidence and the credibility of the witnesses." *People v Unger*, 278

Mich App 210, 222; 749 NW2d 272 (2008). Testimony was also presented placing defendant in the area prior to the shooting, having a confrontation with Alwaily and his friends and shooting in their direction ten to fifteen minutes prior to the second shooting. In addition, Hansard testified to seeing defendant shoot the second time and according to Detective Sullivan, the party store video showed defendant exiting Hansard's van and walk down Grand River out of sight. Sufficient circumstantial evidence was thus presented to convict defendant.

IX. RESENTENCING

Defendant also argues that resentencing is required where the trial court departed from the sentencing guidelines without substantial and compelling reasons to do so and/or where the trial court failed to justify the length of the departure. Because the trial court failed to articulate how the specific departure was more proportionate, we agree that remand is necessary for resentencing.

In reviewing a departure from the sentencing guidelines range, we review for clear error the existence of a particular factor supporting the departure, we review de novo whether the factor is objective and verifiable, and we review for an abuse of discretion whether the reason is substantial and compelling. *People v Babcock*, 469 Mich 247, 264–265; 666 NW2d 231 (2003). We also review for an abuse of discretion the extent of the departure imposed. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). "A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes." *Id.* "For a departure to be justified, the minimum sentence imposed must be proportionate to the defendant's conduct and prior criminal history." *Id.*

A trial court must impose a minimum sentence within the guidelines range unless it has substantial and compelling reasons to depart and states the reasons for the departure on the record. MCL 769.34(2),(3); see also *People v Hegwood*, 465 Mich 432; 636 NW2d 127 (2001). Substantial and compelling reasons only exist in exceptional circumstances, and the reasons justifying departure should keenly or irresistibly grab the court's attention and be recognized as having considerable worth in determining the length of a sentence. *Babcock*, 469 Mich at 256-257 (quotation omitted). In addition, the trial court's reasons for departing from the guidelines must be objective and verifiable. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

The trial court may generally not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range, unless the court finds from the facts contained in the court record that the characteristic has been given inadequate or disproportionate weight. MCL 769.34(3)(b). The court may also depart from the guidelines for nondiscriminatory reasons where there are legitimate factors not considered by the guidelines. *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001), citing MCL 769.34(3)(a), (b).

At sentencing, the parties agreed that defendant's minimum sentencing guidelines range was 315-656 months, or 26.25 years to 54.6 years. The trial judge imposed a sentence of 60-100 years, exceeding the upper end of defendant's minimum guidelines range by at least 5.4 years and at most, 45.4 years. In imposing sentence, the trial court highlighted several factors that

compelled it to exceed the guidelines. First, the trial court noted that the sentencing guidelines did not adequately take into account the potential number of victims, given that defendant shot into a crowd of people.

OV 9 is to be scored for the number of victims involved in the sentencing crime. MCL 777.39. Under this statute, unless multiple deaths occurred, the maximum number of victims that defendant placed in danger of physical injury by his actions who are accounted for are 10. The statute provides for 25 points to be scored where "there were 10 or more victims who were placed in danger of physical injury or death, or 20 or more victims who were placed in danger of property loss." This shooting took place at a location where a crowd had gathered to watch drag races. By all accounts, there were many more than 10 people gathered to watch the races. The undercover officers and the deceased victim and his friends numbered 16 between them alone. As pointed out by the trial judge, when defendant shot numerous times into a crowd of people, he placed far more people in danger than the sentencing guidelines could account for. This was a fact that keenly and irresistibly grabbed the attention of the court and was given inadequate and disproportionate consideration by the sentencing guidelines.

The trial judge also noted as a consideration in his departure the facts that defendant had several misconduct violations while previously imprisoned and had been released from prison on parole less than a year before he committed the instant offenses. The court acknowledged that the general fact that defendant was on parole was taken into account in the guidelines, but asserted that the short amount of time between his parole and the instant offenses was not.

The fact that defendant was on parole at the time of these incidents was taken into account in the scoring of the sentencing guidelines. See PRV 6. However, it is true that the short amount of time that defendant had been on parole when the instant offenses took place is not. And, the accumulation of prison misconduct tickets has been found to be a substantial and compelling reason to justify an upward departure. See *People v Watkins*, 209 Mich App 1, 5; 530 NW2d 111 (1995).

Even if defendant's parole status and conduct while in prison were not viewed as substantial and compelling reasons to justify the trial court's departure, the first cited reason, addressed above, was. And, the trial court's language made clear that it would have departed from the guidelines based on the first reasoning alone. The trial court stated, ". . . your whole history here is one of somebody who has no regard for law, no regard for life . . . I think you need to certainly pay the price for that." The trial court further engaged in a lengthy soliloquy about the danger defendant posed to the undercover police and the crowd in general and concluded, and that "I would hope and think that this Defendant would never ever be paroled . . . I hope you don't get back out at least." "We may uphold a sentence that departs from the guidelines where some of the reasons given are substantial and compelling while others are not, provided that we are able to determine that the trial court would have departed to the same extent on the basis of the permissible factors alone." *People v Johnigan*, 265 Mich App 463, 469; 696 NW2d 724 (2005). We are satisfied that the trial court stated at least one substantial and compelling reason for departing from the guidelines and its comments clearly indicated that it would have departed from the guidelines based upon the one reason alone.

"However, the statutory guidelines require more than an articulation of reasons for *a* departure; they require justification for the *particular* departure made." *Smith*, 482 Mich at 303. To complete an analysis of whether a trial judge articulated substantial and compelling reasons for a departure, we must thus engage in a proportionality review. "Such a review considers whether the sentence is proportionate to the seriousness of the defendant's conduct and to the defendant in light of his criminal record . . . ." *Id*. at 304-305. The trial court here opined that the sentence it imposed was proportionate based on the reasons it cited as substantial and compelling for the departure. However, the reasons cited were not related to defendant's criminal record, aside from the acknowledgement that he was on parole. The trial court merely stated that defendant had no regard for law or human life and his conduct demonstrated that he does not deserve to deal with an orderly society. The trial court did not place the specific facts of defendant's crime in the sentencing grid, explain the similarity between the facts justifying the departure and the facts describing a crime meriting the same sentence under the guidelines, or compare defendant's characteristics and those of a hypothetical defendant whose recommended sentence is comparable to the departure sentence. *Smith*, 482 Mich 292, at 306, 310. Having not explained why the specific departure was warranted, resentencing is necessary.

We therefore affirm defendant's convictions and remand for resentencing because the trial court did not articulate why the specific upward departure is more proportionate. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Christopher M. Murray
/s/ Mark T. Boonstra