

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER EUGENE JACKSON,

Defendant-Appellant.

UNPUBLISHED

June 28, 2007

No. 269071

Oakland Circuit Court

LC No. 05-204890-FC

Before: Whitbeck, C.J., and Wilder and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree felony murder, MCL 750.316(1)(b), first-degree premeditated murder, MCL 750.316(1)(a), carjacking, MCL 750.529a, armed robbery, MCL 750.529, and four counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to life in prison under two theories of first-degree murder for his first-degree felony murder and first-degree premeditated murder convictions, 225 months to 50 years in prison for his carjacking conviction, 225 months to 50 years in prison for his armed robbery conviction, and two years in prison for the felony-firearm convictions corresponding to his first-degree premeditated murder, carjacking, and armed robbery convictions (the felony-firearm conviction corresponding to first-degree felony murder was accounted for in the felony-firearm conviction corresponding to the first-degree premeditated murder conviction). For the reasons set forth in this opinion, we affirm the convictions and sentences of defendant.

This case arises from a shooting at a gas station in Pontiac, Michigan on July 5, 2006. At around 5:00 a.m. on that date, defendant and his codefendant, Cordarrell Landrum, approached David Bingham as he was pumping gas into his pick-up truck. Security cameras from the gas station revealed Bingham putting his hands in the air and walking away from the truck, and shortly thereafter showing defendant and Landrum driving off with Bingham's vehicle. Bingham then went into the gas station and told the cashier, Raae Alhussainy, to call 9-1-1 because someone had stolen his truck. Within minutes of Bingham entering the gas station, defendant returned and entered the gas station whereupon he shot Bingham multiple times. Bingham was transported to the hospital where he was pronounced dead. Alhussainy, who was behind bullet proof glass during the shooting, telephoned authorities and reported that defendant was wearing a light gray jacket and pants and a black tee shirt. A short time later, an individual reported seeing Bingham's truck parked alongside a road, when he asked defendant if he wanted assistance, defendant began to walk away as he heard sirens approaching. Shortly thereafter,

defendant was apprehended by the police whom found the keys to Bingham's truck in his pocket and a gun lying on the ground close to where defendant was standing. The gun was later identified as the gun used in the shooting of Bingham.

A little less than three hours after defendant's arrest, he was presented with a Miranda¹ waiver which he signed. Defendant then provided the police with two statements. In his first statement, defendant alleged that he met up with some individuals at the gas station whom he did not like and after one of them showed defendant a gun, defendant started to shoot. In his second written statement, defendant wrote that he took Bingham's money and truck and returned to the gas station where he shot a weapon without intending to harm anyone. The police officers whom interviewed defendant and took his oral and written statements contend that defendant did not appear to be under the influence of any narcotics or alcohol during their interrogations.

On appeal, defendant first argues that the trial court erred in denying his motion to suppress his confession to police. Defendant contends that his confession was not made knowingly and intelligently because he had smoked marijuana less than ten hours before the interview began. Additionally, the police violated defendant's right to remain silent because defendant contends that he twice informed the police he did not want to talk to them. Despite his assertion to remain silent, defendant contends on appeal that the detectives persisted in asking him if he wanted to talk to them. Defendant also asserts that the confessions were inadmissible because the detectives questioned him after he had asserted his right to counsel. The State argues that defendant's waiver was voluntary and knowingly made. The State also argues that defendant did not show sign of intoxication during the interview process and that his waiver of his right to remain silent and his requests for counsel were neither unequivocal nor unambiguous.

This Court reviews the trial court's factual findings on a motion to suppress evidence for clear error. *People v Farrow*, 461 Mich 202, 208-209; 600 NW2d 634 (1999). Clear error exists when, after reviewing the record, this Court "is left with a definite and firm conviction that a mistake has been made." *People v Swirles (After Remand)*, 218 Mich App 133, 136; 553 NW2d 357 (1996). However, this Court reviews de novo the trial court's conclusions of law and ultimate decision on a motion to suppress evidence. *People v Garvin*, 235 Mich App 90, 96-97; 597 NW2d 194 (1999).

Defendant first claims that he did not knowingly and intelligently waive his Miranda rights. "Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waives his Fifth Amendment rights." *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997), citing *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). "Whether a waiver of Miranda rights is voluntary and whether an otherwise voluntary waiver is knowing and intelligent are separate questions." *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997) (citations omitted). "Whether a suspect has knowingly and intelligently waived his Miranda rights depends in each case on the totality of the circumstances, including the defendant's intelligence and capacity to understand the warnings given." *Id.* (citations omitted).

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

The evidence presented from the videotape and statements of defendant indicate that he knowingly and intelligently waived his rights. Although defendant appeared tired when detectives transferred him from the holding cell to the interview room and told the detectives that he had smoked marijuana earlier in the morning, defendant did not appear to be under the influence of any drugs or alcohol and followed the detectives' commands without difficulty. Although defendant was not responsive when the detectives first entered the interview room, after leaving defendant alone for nearly 45 minutes, defendant was responsive to the questions asked of him once the interview began and one detective even described defendant as "actually very, very vibrant as we were talking to him." Indeed, defendant, who had completed the tenth grade, twice indicated that he understood his rights – both after they were read to him and after he reviewed the waiver form. Thus, there is no indication that defendant lacked the intelligence or capacity to understand his rights. *Howard, supra* at 538.

Defendant next argues that the detectives violated his right to remain silent. "[T]he admissibility of statements obtained after the person in custody has decided to remain silent depends on whether the right to cut off questioning was scrupulously honored by the police." *People v Adams*, 245 Mich App 226, 230-231; 627 NW2d 623 (2001), citing *Michigan v Mosley*, 423 US 96, 104; 96 S Ct 321; 46 L Ed 2d 313 (1975). However, police are only required to stop questioning when the defendant unequivocally invokes his right to remain silent. *People v Davis*, 191 Mich App 29, 36; 477 NW2d 438 (1991). If the defendant's assertion is equivocal, police are permitted to seek clarification. *People v Catey*, 135 Mich App 714, 726; 356 NW2d 241 (1984).

Again, the record refutes defendant's claim. Defendant's assertion of his right to remain silent was equivocal. Although defendant indicated that he understood his rights and did not want an attorney present, it appears defendant did not understand the portion of the waiver form pertaining to his right to remain silent. After the detectives explained to defendant that he could indicate whether he wanted to assert his right to remain silent, defendant asked, "What you mean put my answer [sic]?" Given this uncertainty, it was proper for detectives to seek clarification of defendant's answer – especially in light of the fact that defendant had just waived his right to have an attorney present. Thus, the objective of the detectives' clarifying questions was to make certain defendant understood what he was doing. Indeed, Detective Don Gracey even noted at the evidentiary hearing that he "didn't know what [defendant] was saying yes to." Further buttressing the propriety of the detectives' clarifying questions was defendant's initial reticence and response ("I don't know") to their questions. Therefore, the police properly sought clarification of defendant's initial indication on the waiver form that he did not want to waive his right to remain silent.

Even if defendant's assertion of his right to remain silent were unequivocal, the detectives "scrupulously honored" this right. Although courts have enumerated relevant considerations in determining whether questioning after an assertion of the right to remain silent is proper, the "scrupulously honored" standard does not require that any mandatory criteria be satisfied. *People v Slocum (On Remand)*, 219 Mich App 695, 701; 558 NW2d 4 (1996). Rather, "the ultimate inquiry is whether the police have 'scrupulously honored' a defendant's assertion of the 'right to cut off questioning.'" *Id.* at 704, quoting *Mosley, supra* at 103.

Here, the detectives' questions merely sought to make sure that defendant truly understood what the assertion of the right to silence entailed given that defendant had just

waived his right to counsel and had asked a question about his right to remain silent. As Gracey stated to defendant, “I want you to make sure that you understand . . . what we’re getting at[.]” Further, when the detectives’ comments are placed in their proper context, they cannot be reasonably construed as an attempt to “wear down [defendant’s] resistance to make him change his mind”, *Mosley, supra* at 105, or even as an attempt to “communicate to the defendant that [the detectives would] not honor his assertion of the privilege,” *Slocum, supra* at 706. Rather, as Gracey noted, the detectives “just wanted to be sure whether or not defendant wanted to talk to [them] or talk to a lawyer before [they] asked him any questions.” Thus, it cannot be said that the detectives did not “scrupulously honor” defendant’s assertion of his “right to cut off questioning.” *Id.* at 704.

Defendant next argues that the detectives improperly questioned him after he asserted his right to counsel. “[W]hen an accused invokes the right to have counsel present during a custodial interrogation, the accused is not subject to further interrogation by the police until counsel has been made available, unless the accused initiates further communication, exchanges, or conversations with the police.” *Adams, supra* at 230, citing *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981). Whether a defendant asserts the right to counsel is an objective inquiry. *Adams, supra* at 237, citing *Davis v United States*, 512 US 452; 114 S Ct 2350; 129 L Ed 2d 362 (1994). “Thus, invocation of the Miranda right to counsel requires a statement that can reasonably be construed to be an expression of a desire for the assistance of counsel. If the accused makes a reference to an attorney and the reference is ambiguous or equivocal in that a reasonable police officer in light of the circumstances would have understood only that the accused might be invoking the right to counsel, the cessation of questioning is not required.” *Adams, supra* at 237, citing *Davis, supra* at 459.

Defendant made numerous references to counsel after the initial waiver of his right to counsel. Specifically, when asked if he would take a polygraph test, defendant answered, “I got a lawyer. My lawyer tell me never – he told me never, I mean I can call my lawyer – my lawyer [sic].” When asked if he would pass a polygraph test, defendant answered, “I’m pretty sure I would but my lawyer gonna say no [sic].” When asked if he would provide a written statement, defendant answered, “Oh I normally call my lawyer before I write that stuff.”

With respect to these statements, none may be construed as a request for the assistance of counsel. Rather, each statement referenced defendant’s expectation of what his lawyer would advise him to do or referenced defendant’s offer to call a lawyer before providing police with specific information. Further, defendant’s assertion that he had a lawyer was irrelevant. Rather, the relevant inquiry in resolving this issue is whether defendant sought the assistance of a lawyer. Therefore, the detectives were not required to cease their questioning of defendant based on these comments. *Adams, supra* at 237.

However, later in the interview, defendant’s question, “Man, how come I can’t call my lawyer[?]” may reasonably be construed as an expression for the desire of the assistance of counsel. Once defendant made these comments, the interview ceased and only resumed after defendant motioned the detective back into the interview room and stated, “Let me talk.” Because defendant initiated further communication, defendant’s right to counsel was not violated. *Id.* at 230.

Defendant next argues that he was denied his right to have a jury selected by nondiscriminatory means. We review this issue de novo. *People v Bell*, 473 Mich 275, 282; 702 NW2d 128 (2005). The Equal Protection clause guarantees a defendant the right to a jury whose members are selected through nondiscriminatory methods. US Const, Am XIV, § 1; *Batson v Kentucky*, 476 US 79, 85-86; 106 S Ct 1712; 90 L Ed 2d 69 (1986). This guarantee prohibits a prosecutor from using peremptory challenges to strike a juror from a defendant's jury on the basis of race. *Id.* at 99; *Bell, supra* at 278. The determination of whether a prosecutor's challenge was discriminatory involves a three step process: (1) a defendant must initially establish a prima facie case of purposeful discrimination; (2) the prosecutor must then provide a race-neutral explanation for the challenge at issue; and (3) the trial court must then decide whether a defendant has proved discrimination. *Batson, supra* at 94-97, 100; *Bell, supra* at 278-279.

To establish a prima facie case, defendant must show that: "(1) he is a member of a cognizable racial group; (2) the proponent has exercised a peremptory challenge to exclude a member of a certain racial group from the jury pool; and (3) all the relevant circumstances raise an inference that the proponent of the challenge excluded the prospective juror on the basis of race." *People v Knight*, 473 Mich 324, 336; 701 NW2d 715 (2005). To determine whether defendant has established a prima facie case, this Court must consider all relevant circumstances, including the prosecutor's pattern of strikes against minority jurors and the prosecutor's questions and statements in exercising his challenges. *Batson, supra* at 97; *Bell, supra* at 278.

Defendant has failed to establish purposeful discrimination. Although defendant is black and the challenged jurors were also black, "[t]he mere fact that the prosecutor used one or more peremptory challenges to excuse blacks from the jury venire is insufficient to make a prima facie showing of discrimination." *Williams, supra* at 137. Moreover, the circumstances indicate that the jurors were not excluded on the basis of race. Indeed, at issue in this trial was whether defendant had a mental illness that exonerated him. Both challenged jurors admitted to suffering from mental illnesses. Finally, defendant's jury included one black member of the original jury venire. "That the prosecutor did not try to remove all blacks from the jury is strong evidence against a showing of discrimination." *Id.* Thus, defendant has failed to establish a prima facie case of purposeful discrimination in the selection process.

Even if defendant could have established a prima facie case, the prosecutor provided race neutral reasons for excusing the two potential jurors at issue. Not only did both potential jurors have mental illnesses, but one potential juror showed difficulty answering the questions the judge posed to her and seemed confused and disoriented, while the other potential juror, although he had not started taking medication, had only recently learned of his illness, which he noted was "substantial." The record supports these reasons, which are not inherently discriminatory. Therefore, defendant's claim fails.

Defendant asserts that the prosecutor's discriminatory intent is evidenced by the fact that he did not remove other non-black members of the venire who had been "touched" by mental illness. However, "[u]nless a discriminatory intent is inherent in the reason offered, which does not have to be persuasive or even plausible, the reason will be deemed race-neutral." *Purkett v Elem*, 514 US 765, 767-768; 115 S Ct 1769; 131 L Ed 2d 834 (1995) (citation omitted). Each example defendant provides of non-black jurors whom the prosecutor did not excuse only had

experience with others who suffered from mental illnesses. In contrast, the challenged jurors personally suffered from mental illnesses. Thus, defendant's claim fails.

Defendant next argues that defense counsel's failure to object to testimony elicited in violation of MCL 768.20a(5) and to request a limiting instruction, denied him the effective assistance of counsel. Claims of ineffective assistance of counsel involve a question of law, which this Court reviews de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because this issue is unpreserved, this Court limits its review to mistakes apparent on the existing record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004); *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 95 (2002). The United States and Michigan Constitutions guarantee a defendant the right to the effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. "To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

MCL 768.20a(5) provides:

Statements made by the defendant to personnel of the center for forensic psychiatry, to other qualified personnel, or to any independent examiner during an examination shall not be admissible or have probative value in court at the trial of the case on any issues other than his or her mental illness or insanity at the time of the alleged offense. [*People v Toma*, 462 Mich 281, 292-293; 613 NW2d 694 (2000).]

Defendant claims that his statements to Dr. Michael Abramsky who conducted an independent psychiatric examination of defendant regarding the incident were not probative of his mental health and therefore violated MCL 768.20a(5). Abramsky testified that defendant had indicated that he returned to the gas station, at the behest of his "friend," to shoot the potential witness (i.e., the victim) who was calling police and that he and his "friend" then decided to "dump" the victim's truck.

In context, it is clear that Abramsky provided this testimony to show the basis for his conclusion that defendant was not legally insane. Abramsky explained that knowledge of the facts of the crime were "extremely important" to his analysis of whether an individual suffered from a loss of control disorder and noted that one's behavior was "a major measure" in determining whether one acted rationally or under the control of a mental illness. In evaluating defendant's behavior during the incident, Abramsky noted that defendant's actions showed "planning, ability and thoughtfulness and that is the opposite of loss of control." Thus, Abramsky concluded that defendant was criminally responsible for the offenses at issue because at the time he committed the offenses, his actions signified "a reasonable measure of control." Therefore, the admission of Abramsky's testimony concerning defendant's behavior was proper under MCL 768.20a(5) because it specifically related to Abramsky's conclusion that defendant was not insane at the time he committed the offenses.

Defendant claims that the prosecutor's closing argument is proof that the testimony at issue was not offered on the issue of mental illness or insanity. Although the prosecutor stated

that the homicide was premeditated, in context, it is clear that the prosecutor was arguing that defendant was criminally responsible – an issue that directly contradicts the defense of insanity. As the prosecutor later noted, defendant was “taking care of business . . . [and] executing his plan.” In other words, by arguing how defendant’s intent may be inferred from his actions, the prosecutor was arguing that defendant could control his actions, which as Abramksy explained, was relevant in determining whether defendant was legally insane. Therefore, because this argument directly relates to the issue of defendant’s sanity, defendant’s claim fails.

Defendant contends that the trial court’s failure to instruct the jury that Abramksy’s testimony could only be used to determine defendant’s mental capacity at the time of the offenses was improper and violated his right against self-incrimination. A trial court is required to clearly present a case and instruct the jury on the applicable law. *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001). Although the applicable law provides that a defendant’s statements are not admissible on any issue other than a defendant’s mental illness or insanity at the time of the charged offenses, it does not require a limiting instruction. MCL 768.20a(5). Thus, the trial court was not required to provide a limiting instruction. *Katt, supra* at 310. Further, given that information used to determine a defendant’s criminal responsibility does not violate a defendant’s right against self-incrimination if the information obtained is admitted for that purpose only, *People v Wright*, 431 Mich 282, 286; 430 NW2d 133 (1988), defendant has failed to show how the failure to provide a limiting instruction violated his constitutional rights.

Because the admission of the testimony at issue did not violate MCL 768.20a(5) and no limiting instruction was required, any objection or request for special instructions would have been futile. Given that “[d]efense counsel is not required to make a meritless motion or a futile objection,” *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003), we cannot find that defense counsel’s performance fell “below an objective standard of reasonableness under prevailing professional norms,” *Effinger, supra* at 69. Even if the admission of the testimony at issue were improper and defense counsel’s failure to request a limiting instruction were erroneous, defendant has failed to show how defense counsel’s performance was outcome determinative. *Id.* Indeed, the gas station security cameras recorded the carjacking, armed robbery, and shooting, the gas station attendant identified defendant as the perpetrator, defendant was seen leaving the scene of an accident after hearing sirens, and the police subsequently found defendant near the scene of the accident with the keys to the victim’s truck in his possession and the murder weapon on the ground where defendant had been standing. Therefore, defendant was not denied the effective assistance of counsel.

Defendant next argues that the trial court erred in admitting evidence that Abramksy’s initial involvement in this case was due to defense counsel. We review a trial court’s evidentiary ruling for abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). However, we review preliminary questions of law pertaining to this issue de novo. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).²

² Defendant frames this issue as constitutional in his “statement of questions presented.” However, merely framing an issue as constitutional does not create such an issue. *People v Weathersby*, 204 Mich App 98, 113; 514 NW2d 493 (1994).

Generally, evidence is admissible if it is relevant and inadmissible if it is not. MRE 402; *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 562 (2002). Evidence is relevant if it has a tendency to make a fact of consequence more or less probable than it would be without the evidence. MRE 401; *People v Small*, 467 Mich 259, 264; 650 NW2d 328 (2002). “Under this broad definition, evidence is admissible if it is helpful in throwing light on any material point.” *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). The credibility of a witness is material and evidence supporting witness credibility or showing bias is always relevant. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909, mod and remanded on other grounds, 450 Mich 1212 (1995). However, relevant evidence “may be excluded if its probative value is substantially outweighed by danger of unfair prejudice[.]” MRE 403; see also *People v Layher*, 464 Mich 756, 769; 631 NW2d 281 (2001).

The determination of whether defendant was legally insane at the time he committed the offenses hinged on the credibility of the expert witnesses. Evidence that Abramsky was initially contacted by defense counsel was relevant to dispel any inference that Abramsky, as the prosecutor’s rebuttal expert witness, was not biased in favor of the prosecutor’s case. Moreover, even though the court eventually ordered Abramsky to conduct an independent examination of defendant, it cannot be said that the testimony at issue unfairly prejudiced defendant given that Abramsky admitted that, despite being appointed by the court, the prosecutor’s office was paying his fee for testifying. Even if the admission of this evidence were improper, any error was harmless given the overwhelming evidence presented against defendant in this case. See MCL 769.26; *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001).

Defendant next argues that he was denied a fair trial because the prosecutor appealed to the jury’s sympathy during closing argument. This Court reviews unpreserved issues of prosecutorial misconduct for plain error affecting substantial rights. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). If a curative instruction could have alleviated any prejudicial effect, there is no error requiring reversal. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003). Prosecutorial misconduct occurs if a defendant is denied a fair trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). In evaluating issues of prosecutorial misconduct, this Court must examine the prosecutor’s remarks in context, on a case-by-case basis. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). “[A] prosecutor may not appeal to the jury to sympathize with the victim.” *Watson*, *supra* at 591.

In *People v Siler*, 171 Mich App 246, 258; 429 NW2d 865 (1988), “[t]he prosecutor described the victim as a twenty-nine-year-old man who will never smell flowers, see his family, or do anything again because defendant snuffed out his life.” In rejecting the defendant’s argument that the prosecutor’s statement was meant to elicit sympathy from the jury, this Court ruled that the comments did not prejudice defendant because when considered in its entirety, the prosecutor’s argument “asked the jury to examine all of the evidence and convict only if the evidence indicated defendant’s guilt beyond a reasonable doubt.” *Id.*

The instant case is similar to *Siler*. Specifically, the prosecutor did not just recount the cost of defendant's actions on the victim and his family.³ Rather, in the context of the prosecutor's entire argument, it is clear that the prosecutor was arguing that the evidence proved defendant's guilt beyond a reasonable doubt. Indeed, the crux of the prosecutor's closing argument was his meticulous review of the elements of the offenses with which defendant was charged and the evidence presented that could satisfy those elements. Moreover, the portion of the argument defendant cites constituted only a brief part of the prosecutor's argument. In light of this, any possible prejudice was cured by the trial court's instruction to the jurors that they were not to be influenced by sympathy. Thus, defendant has failed to show plain error. *Ackerman, supra* at 448-449.

Defendant claims that defense counsel's failure to object to the prosecutor's comments denied him the effective assistance of counsel. However, as noted *supra*, the prosecutor's comments were proper. Consequently, any objection would have been futile. Given that defense counsel is not required to make a futile objection, *Goodin, supra* at 433, defense counsel's performance did not fall "below an objective standard of reasonableness under prevailing professional norms." *Effinger, supra* at 69. Moreover, given the overwhelming evidence against defendant, defense counsel's performance was not outcome determinative. *Id.* Therefore, defendant's claim fails.

Affirmed.

/s/ William C. Whitbeck, C.J.
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello

³ For example, the prosecutor noted during closing argument, "And when he fired those shots into [the victim's] heart he took everything [the victim] had and everything he would ever be. [The victim] fell down on the floor on the dirty gas station floor and he died screaming and in agony by himself away from everybody he loved and everybody who loved him because that's what the defendant chose."