STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 6, 2007
v	No. 268943 Kent Circuit Court
MICHAEL EARL PATTERSON, Defendant-Appellant.	LC No. 04-006362-FH

Before: Bandstra, P.J., and Cavanagh and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree felony murder, MCL 750.316(1)(b), and possession of a firearm during the commission of a felony, MCL 750.227b(1). We affirm.

Defendant first asserts on appeal that prosecutorial misconduct deprived him of his due process right to a fair trial. We disagree.

Generally, we review claims of prosecutorial misconduct de novo, on a case by case basis, examining the prosecutor's remarks in context to determine whether defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). However, because defendant's allegations of misconduct were not preserved by contemporaneous objections and requests for curative instructions, appellate review is for plain error. *Id.* To avoid forfeiture under the plain error rule, defendant must establish that (1) an error occurred; (2) the error was plain; and (3) the error affected defendant's substantial rights, that is, it affected the outcome of lower court proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is warranted only when plain error caused the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 774. This Court will not find error requiring reversal where a curative instruction could have prevented any prejudicial effect. *Watson*, *supra* at 586; *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003); *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

Defendant argues that the prosecutor committed misconduct by serving as an attorney in a case where she was a necessary witness. The Michigan Rules of Professional Conduct prohibit an attorney from acting as an advocate at a trial in which the attorney is likely to be a necessary

witness.[1] Defendant asserts that during her opening statement and closing argument, the prosecutor described her involvement in the investigation of the case and, thus, could have been called as a witness at any time during trial. However, defendant did not attempt to call the prosecutor as a witness or move for her disqualification during the trial. More importantly, most of the information in the prosecutor's opening statement and closing argument was testified to by other witnesses at trial. Therefore, there is no basis for defendant to assert that the prosecutor was a *necessary* witness. Additionally, the purpose of an opening statement is to inform the jury about the facts a party intends to elicit at trial. *People v Moss,* 70 Mich App 18, 32; 245 NW2d 389 (1976). Here, the prosecutor's opening statement was proper in that it informed the jury what the prosecutor intended to, and did, establish through the testimony of others, regarding the investigation. Likewise, the prosecutor's closing argument did not constitute testimony, but rather a summary of the evidence and reasonable inferences from the evidence, which was proper. *Bahoda, supra* at 282.

Furthermore, while defendant implies on appeal that the prosecutor's witnesses were untruthful, he does not dispute any of the events surrounding the investigation of the case that were mentioned in the prosecutor's opening statement and closing argument. In addition, the trial court informed the jury that the attorneys' statements and arguments were not evidence to be considered in the case. Jurors are assumed to follow a court's instructions; therefore, any prejudicial effect of the prosecutor's remarks would likely have been cured by the trial court's jury instructions. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004); *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998).

Defendant also argues that the prosecutor committed misconduct by improperly vouching for the credibility of prosecution witnesses. While a prosecutor is allowed to comment on her own witnesses' credibility, especially in cases where the jury's verdict will likely depend on which witnesses the jury believes, *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004), a prosecutor is not allowed to vouch for the credibility of a witness by asserting special knowledge that the witness is testifying truthfully. *Bahoda*, *supra* at 276; *Thomas*, *supra*. In addition, a prosecutor may not introduce facts that are not in evidence. *People v McCain*, 84 Mich App 210, 215; 269 NW2d 528 (1978). But, a prosecutor is allowed to argue the evidence and all reasonable inferences arising from it as they pertain to the prosecutor's theory of the case. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). Here, during both opening

[1] Specifically, MRPC 3.7 provides;

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.

statement and closing argument, the prosecutor used first-person pronouns. We agree that her decision to use the pronouns "I," "we," and "us" when outlining and summarizing the testimony and evidence could give the misimpression that she was vouching for her witnesses' credibility by placing the prestige of herself, her office, or the police behind her statements. However, where a prosecutor's argument is based on the evidence, and does not impermissibly propose that the jury make its decision based on the prosecutor's personal belief or the authority of the prosecutor's office, the use of first-person pronouns is not cause for reversal. *People v Swartz*, 171 Mich App 364, 370-371; 429 NW2d 905 (1988). Defendant does not cite any prosecutorial statements that were statements of personal belief or special knowledge of the guilt of defendant, or personal belief or special knowledge of the veracity of the prosecution's witnesses. The prosecutor did not impermissibly urge the jury to suspend its judgment out of deference to the judgment of the prosecutor or police. *People v Whitfield*, 214 Mich App 348, 352-353; 543 NW2d 347 (1995). Further, any error in this regard was cured by the trial court's instruction that "the lawyers' statements and arguments are not evidence. They are only meant to help you understand the evidence and each side's legal theories." Jurors are assumed to follow a court's instructions; therefore, any prejudicial effect of the prosecutor's closing argument would likely have been cured by the trial court's jury instructions. *Matuszak, supra*; *Green, supra*.

Defendant next argues that the prosecutor committed misconduct by eliciting hearsay testimony from Detective Gregory Griffin, which violated defendant's right to confront the witnesses against him. Specifically, defendant argues that Griffin based portions of his testimony on the reports and conclusions of other people and that the prosecutor intentionally introduced this inadmissible evidence. Certainly, a prosecutor may not knowingly offer or attempt to elicit inadmissible evidence**.** *People v Dyer*, 425 Mich 572, 576; 390 NW2d 645 (1986). However, contrary to defendant's assertions, Griffin did not testify about the substance of any out-of-court statements by himself or others; he merely testified about his personal knowledge of and findings in the case. Therefore, his testimony was not hearsay, MRE 801(c). Consequently, there is no basis for defendant's assertion that the prosecutor intentionally introduced inadmissible evidence in this regard.

Additionally, defendant asserts that Griffin impermissibly testified as to his opinion of a witness's credibility. "It is generally improper for a witness to comment or provide an opinion on the credibility of another witness, since matters of credibility are to be determined by the trier of fact." *People v Smith*, 158 Mich App 220, 230; 405 NW2d 156 (1987). We agree that it was improper for Griffin to testify that a prosecution witness was credible because the evidence confirmed that witness's story. However, Griffin's testimony was not directly responsive to the question asked by the prosecutor, and we have previously held that unresponsive testimony does not require reversal if the prosecutor does not conspire with or encourage the witness to give such testimony. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). Further, the prosecutor did not engage in deliberate and repeated attempts to elicit improper testimony from the detective. Thus, there again is no basis for defendant's assertion that the prosecutor intentionally introduced inadmissible evidence in this regard and therefore, Griffin's isolated and unsolicited testimony does not constitute prosecutorial misconduct. *People v Wallen*, 47 Mich App 612, 613; 209 NW2d 608 (1973).

Defendant next asserts that the prosecutor committed misconduct by introducing evidence that defendant failed to present an alibi. The prosecutor asked Griffin whether he

located other witnesses or evidence to put defendant anywhere other than at the scene of the murder, whether he found any evidence that anyone other than defendant and his accomplices were at the murder, and whether he found any evidence linking anyone other than defendant and his two accomplices to the murder. Griffin answered, "no" to each of these challenged questions. We find the questions improper, not because they improperly commented on a lack of alibi, but because they improperly vouched for defendant's guilt. A prosecutor may not vouch for a defendant's guilt. *People v Weatherspoon*, 171 Mich App 549, 558; 431 NW2d 75 (1988). Nevertheless, defendant has not established that the error affected the outcome of his trial. Defendant's accomplices testified against him at trial, and there was evidence to support their credibility aside from the police investigation. For example, one of defendant's accomplices was aware of "hidden details" of the crime when he first approached police. There was also strong evidence connecting defendant to a weapon like that used in the crime. Thus, although there was plain error, it did not affect the outcome of defendant's case such that reversal is required. *Carines, supra.*

Defendant also argues that the prosecutor impermissibly argued facts not in evidence when she stated during her closing argument that, "if we had tested the gun, you'd know it's the murder weapon without a doubt." Prosecutors may not introduce facts that are not in evidence. *McCain, supra* at 215. Nevertheless, on the record before us, the prosecutor's argument was not improper. It is proper to argue reasonable inferences derived from the evidence. *Bahoda, supra* at 282. Here, the prosecutor was asserting that it was reasonable to infer, based upon the opinion testimony of the medical examiner and a firearms expert, that a gun confiscated from defendant after an April 5, 1988 incident was the same gun used to kill the victim. Further, read in context, it is clear that the prosecutor was also reminding the jury that the issue before them was not whether a particular weapon was used, but rather who fired that weapon and that a definitive test on a particular weapon would not have yielded any additional evidence pertinent to that issue. The prosecutor's argument was based on the evidence introduced at trial, in the context of the issues for the jury and was not improper.

In addition, defendant argues that the prosecutor impermissibly appealed to the jurors' civic duty by asserting that "the only reason Michael Birch [a victim of a separate crime in which defendant was involved] is alive probably from the second shooting is . . . either the police got there quick enough, . . . or [the perpetrators] could tell that Michael Birch had some problems and" would not likely identify them. A prosecutor may not tell the jury that they should convict a defendant as part of their "civic duty." *Matuszak, supra* at 56. An improper civic duty argument is one that injects issues broader than defendant's guilt or innocence on the charges before the jury or encourages the jurors to suspend their powers of judgment. *People v Truong (After Remand)*, 218 Mich App 325, 340; 553 NW2d 692 (1996). Even if the prosecutor's statement regarding Birch injected issues beyond guilt or innocence into the trial, an issue we do not necessarily decide, any prejudice stemming from the argument was dispelled by the trial court's instructions. *Matuszak, supra*; *Green, supra*. Thus, there was no prosecutorial misconduct requiring reversal.

Defendant argues further that the prosecutor impermissibly inflamed the passions of the jury by referring to defendant's "alias" of "Hitman," by injecting race into the case, and by introducing evidence of the victim's identity through the testimony of the victim's widow. Generally, prosecutors are not allowed to introduce evidence of defendant's use of an alias,

unless it is relevant to impeach defendant's credibility, or because it is part of a prosecution's case, such as in a matter alleging false pretenses. *People v Thompson*, 101 Mich App 609, 613-614; 300 NW2d 645 (1980). Here, the prosecutor's reference to "Hitman" to refer to defendant was relevant to Birch's identification of the person who attempted to choke him during a separate criminal incident and to the identity of defendant as the shooter in the instant case, given that an accomplice testified that after the victim's death, defendant was referred to as "Hitman," while before the victim's death, defendant was referred to as "Binky." Thus, we conclude that the prosecutor's reference to defendant's alias was not plain error.

With respect to the allegation that the prosecutor inflamed the jury by injecting race into her closing argument, we similarly find no plain error. During her closing argument, the prosecutor stated,

> What else does the [April 5, 1988] incident show you? It corroborates what [the accomplices] said about it being an armed robbery, just like the murder, just like the murder. The three of them with the sawed-off shotgun robbing people, white guys.

A prosecutor may not inject racial or ethnic remarks into any trial, nor appeal to the fears and prejudices of the jury. *Bahoda, supra* at 266; *People v Cooper*, 236 Mich App 643, 651; 601 NW2d 409 (1999). However, when potentially inflammatory remarks are not intentionally injected with the apparent purpose of arousing prejudice, they are subject to harmless error review. *Bahoda, supra* at 266, 272-273. In this case, the prosecutor's remark did not deny defendant a fair trial. The prosecutor was attempting to highlight the similarities between the crime for which defendant was being tried and evidence of a similar crime admitted under MRE 404b. She was not attempting to appeal to any potential racist sentiments of the jury. Furthermore, the primary evidence against defendant came from his accomplices, who also participated in the separate crimes. Any attempt to attack defendant for the racial identification of his victims would also undermine the credibility the prosecution's primary witnesses. In addition, any prejudice stemming from these remarks was dispelled by the trial court's instructions. *Matuszak, supra* at 58; *Green, supra*. Thus, the prosecutor's reference to the race of the victims in her closing argument did not constitute plain error.

Finally, we disagree that the prosecutor impermissibly appealed to the sympathy of the jury by introducing the testimony of the victim's widow that the victim was killed on the night of their fourth wedding anniversary. An appeal to the jury to sympathize with the victim may constitute an improper argument. *Watson, supra* at 591. However, prosecutors are not required to use the least prejudicial evidence available to establish a fact at issue. *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995). Defendant did not object to the testimony of the victim's widow at trial, and prosecutors do not commit misconduct through good faith attempts to introduce evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The evidence established the victim's identity. Therefore, defendant was not denied his due process right to a fair trial by prosecutorial misconduct.

Defendant next asserts on appeal that he was deprived of his right to confront the witnesses against him by the prosecutor's "unsworn testimony" during her opening statement and closing argument and by Griffin's hearsay testimony that no evidence or witnesses connected anyone, other than defendant and his two accomplices, to the crime. We disagree.

The Confrontation Clause of the Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." US Const, Am VI. The Confrontation Clause prohibits the use of hearsay evidence against criminal defendants unless such evidence conforms to a firmly rooted hearsay exception or has particularized guarantees of trustworthiness. *People v Lee,* 243 Mich App 163, 173-174; 622 NW2d 71 (2000).

Defendant argues that the prosecutor's "unsworn testimony" during her opening statement and closing arguments detailing the investigation into the instant crimes provided the jury with information about the investigation of the crime and the veracity of the witnesses and constituted substantive evidence. While the prosecutor regrettably used the first person pronouns "we," "us," and "our" during her opening statement and closing argument, all of the information she referred to was testified to at trial by other witnesses who were subject to cross-examination by defense counsel. As discussed above, the prosecutor properly used her opening statement to outline the facts she intended to establish, which, for the most part, were elicited at trial. In addition, the prosecutor's closing argument was based upon the evidence and reasonable inferences. Moreover, it was made clear for the jury that the prosecutor's statements were not evidence. Confrontation clause issues do not arise where a witness does not provide any substantive testimony. *People v Gearns,* 457 Mich 170, 185-186; 577 NW2d 422 (1998), overruled on other grounds *People v Lukity,* 460 Mich 484, 494; 596 NW2d 607 (1999). Thus, where no testimony was given by the prosecutor on which defendant could have cross-examined her, no confrontation clause violation can be found. Therefore, defendant was not denied his right of confrontation by the prosecutor's opening statement and closing argument.

Defendant's confrontation clause argument related to Griffin's testimony is similarly without merit. At trial, Griffin was asked whether he located other witnesses; whether he located evidence that defendant was somewhere else on the night in question; whether he found evidence that anyone other than defendant and his alleged accomplices were at the scene of the murder; and whether he found evidence to link anyone else to the murder. This testimony pertained to the detective's personal knowledge. Nothing in the record before us establishes that Griffin's conclusions or knowledge was based on the out-of-court statements of others. His personal testimony at trial was not hearsay. MRE 801(c). And, defendant had the opportunity to fully cross-examine Griffin. Thus, the challenged testimony did not implicate defendant's Sixth Amendment confrontation rights.

Defendant next asserts that he was denied the effective assistance of counsel, because his trial counsel failed to object to the allegedly impermissible remarks of the prosecutor, failed to cross-examine one of defendant's accomplices concerning the consideration he received for his testimony against defendant, failed to sufficiently investigate the case, failed to adequately prepare for trial and failed to call certain witnesses requested by defendant. We disagree.

The right to the effective assistance of counsel is substantive and focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). To establish a claim of ineffective assistance of counsel, defendant must demonstrate: (1) that his counsel's performance fell below an objective standard of reasonableness under current professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of defendant's trial would have been different, and (3) the resulting trial was fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Mack*, 265

Mich App 122, 129; 695 NW2d 342 (2005). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

As we previously concluded, while some of the prosecutor's challenged conduct was, perhaps, improper, it does not merit reversal because defendant has not established that the objectionable conduct affected the outcome of the trial. For that reason, we also find that defendant cannot meet the burden of demonstrating that, but for counsel's failure to object to this conduct, the outcome of his trial would have been different. Therefore, defendant cannot establish that his counsel's failure to object to the prosecutor's conduct constitutes ineffective assistance of counsel. *Toma, supra*. Moreover, with respect to the alleged misconduct that we find unobjectionable, counsel will not be deemed ineffective for failing to make a futile objection. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

Defendant also argues that his trial counsel was ineffective for failing to cross-examine one of defendant's accomplices about the consideration he received for testifying against defendant at trial. Contrary to defendant's assertion, however, the consideration given to that accomplice was adduced through direct-examination and was referred to during cross-examination, in response to questions posed by defendant's trial counsel. Defendant's trial counsel also mentioned during closing argument that the accomplice "only had to do twelve months in the Kent County Jail, five years' probation" in return for testifying against defendant. Furthermore, we have previously determined that cross-examination of witnesses is a matter of trial strategy entrusted to counsel's professional judgment. *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). On the record, there is no merit to defendant's claim that trial counsel was ineffective for failing to adequately cross-examine one of defendant's accomplices regarding his motive for testifying at trial.

Next, defendant argues that his trial counsel was ineffective for failing to adequately prepare for trial, for failing to call several witnesses requested by defendant, and for failing to conduct a reasonable investigation into several matters raised by defendant. An attorney's failure to conduct a reasonable investigation can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). It is counsel's duty to make an independent examination of the facts, laws, pleadings, and circumstances involved in the matter and pursue all leads relevant to the issues. *People v Grant*, 470 Mich 477, 486-487; 684 NW2d 686 (2004). Failure to call witnesses only constitutes ineffective assistance of counsel, however, if it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Defendant claims that his trial counsel failed to adequately prepare for trial, and thus deprived him of a substantive defense, by failing to obtain transcripts of sworn statements by one of defendant's accomplices. However, defendant does not describe which sworn statement or statements by the accomplice his trial counsel failed to obtain. Furthermore, the prosecutor stated on the record that she had fully complied with all discovery requests and did not possess any material relevant to the case that had not been provided to defendant. Defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Defendant did not do so with regard to this claim. Thus, we cannot conclude that defendant's trial counsel was ineffective for failing to properly investigate the case.

Defendant also claims that his trial counsel was ineffective for failing to "identify and interview police witnesses who would have testified that the shotgun seized in [the separate April 5, 1988 incident involving Birch] had been destroyed only after it had been eliminated as the murder weapon." However, the evidence produced at trial belied the existence of any such witnesses. Testimony established that, in 1988, there was no way for the Grand Rapids Police Department to trace gunshots to particular shotguns, that the Grand Rapids Police Department did not submit the confiscated shotgun to the Michigan State Police for examination, and that the shotgun was destroyed after the charges arising from the April 1988 incident "had been dispositioned properly." Thus, there was no evidence adduced at trial to even suggest that the shotgun confiscated from defendant in connection with the April 1988 incident was ever "eliminated as the murder weapon" in this case, and defendant's trial counsel was not ineffective for failing to find such evidence.

Finally, while defendant's trial counsel did not call the officers who originally investigated the victim's death, the decision not to call witnesses is presumed to be trial strategy, and defendant is unable to overcome the strong presumption that defense counsel's decision constituted sound trial strategy. *People v Carbin*, 463 Mich 590, 601; 623 NW2d 884 (2001). Defendant has not established that the original investigating officers had any relevant evidence that would have changed the outcome of the case. Thus, he cannot establish that, but for counsel's failure to call these witnesses, the outcome of the trial would have been different.

Lastly, defendant asserts on appeal that the trial court abused its discretion by denying his motion for a new trial, because the verdict was against the great weight of the evidence. We disagree.

A new trial may be granted, on some or all of the issues, if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e); *Domako v Rowe*, 184 Mich App 137, 144; 457 NW2d 107 (1990). Such a motion should be granted only when the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result. *People v Lemmon*, 456 Mich 625, 639, 642; 576 NW2d 129 (1998).

The elements of first-degree felony murder are 1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of the enumerated felonies found in MCL 750.316. *Carines*, *supra* at 759. Robbery is an enumerated felony for felony murder. MCL 750.316(1)(b). The facts and circumstances of the victim's death may give rise to an inference of the requisite intent. *Carines*, *supra* at 759. A jury is allowed to infer the requisite level of intent from evidence that the defendant intentionally initiated a force likely to cause death or great bodily harm. *Id.* A jury may also infer the requisite level of intent from the use of a deadly weapon. *Id.* The elements of felony firearm**,** MCL 750.227b, are that 1) defendant possessed a firearm, 2) during the commission of, or the attempt to commit, a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

At trial, defendant's accomplices testified that defendant intentionally shot the victim with a short-barreled 16-gauge shotgun during the course of an armed robbery of the victim's convenience store. One of defendant's accomplices testified that he observed defendant carry the shotgun in the past, by concealing it in his sleeve. The accomplices knew of "hidden case

facts," such as the use of a shotgun to kill the victim and the location of the gunshot wounds, which were not publicly released by the police. And, the evidence confirmed that defendant was arrested roughly one month after the victim's death after firing a short-barreled 16-gauge shotgun in a park, during an attempted robbery.

Defendant is correct that there were some inconsistencies in the versions of events testified to by the accomplices and that both accomplices had incentives to falsely implicate him in the crimes. However, conflicting or self-interested testimony, even when impeached by defendant at trial, is an insufficient ground for granting a new trial. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). Unless testimony was so deleteriously impeached that "it was deprived of all probative value or that the jury could not believe it, or [it] contradicted indisputable facts or defied physical realities, the trial court must defer to the jury's determination." *People v Musser*, 259 Mich App 215, 219; 673 NW2d 800 (2003), quoting *Lemmon, supra* at 645-646. While the accomplices were both impeached to some extent by defendant's trial counsel, their versions of the murder were sufficiently similar for their testimony to contain some probative value. The credibility of an accomplice is a jury question. *People v Sharbnow*, 174 Mich App 94, 105; 435 NW2d 772 (1989); *People v Sullivan*, 97 Mich App 488, 492; 296 NW2d 81 (1980). '"[T]he hurdle a judge must clear to overrule a jury is unquestionably among the highest in our law. It is to be approached by the court with great trepidation and reserve, with all presumptions running against its invocation."' *Lemmon, supra* at 639, quoting *People v Bart*, 220 Mich App 1, 13; 558 NW2d 449 (1996) (Taylor, J.). Thus, the trial court did not abuse its discretion by denying defendant a new trial.

We affirm.

/s/ Richard A. Bandstra
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen