STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 12, 2010
v	No. 282533 Wayne Circuit Court
WILSHAUN KING, Defendant-Appellant.	LC No. 06-013764-FC

Before: Davis, P.J., and Fort Hood and Servitto, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), assault with intent to commit murder, MCL 750.83, and assault with intent to do great bodily harm less than murder, MCL 750.84. He was sentenced to life imprisonment for the murder conviction, and concurrent prison terms of 10 to 50 years for the assault with intent to commit murder conviction and 35 months to 10 years for the assault with intent to do great bodily harm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from a series of fights that led to the death of Tyree Jones, who allegedly was killed when he was struck by a motor vehicle that defendant was driving. Defendant was also convicted of assault with intent to commit murder for striking Frank Sanders, Jr., with his vehicle, and assault with intent to do great bodily harm less than murder for striking Marcellus Smith on the head with a brick. At trial, defendant admitted interceding in a fight between his cousin and Smith, and punching Smith one time to get him off his cousin, but denied ever striking Smith with a brick. Although several witnesses identified defendant as the driver of a Ford Explorer that later drove through a field and allegedly struck Jones and Sanders, defendant claimed that he left the area after the fight with Smith and went to Belle Isle with his son, and that he had no knowledge of the events that occurred afterward.

I. Dr. Cheryl Lowe's Testimony

Defendant first argues that his Sixth Amendment right of confrontation was violated when Dr. Cheryl Lowe, a deputy medical examiner, was permitted to testify regarding the cause of Jones's death, relying in part on the results of an autopsy performed by a different medical examiner who was not available at trial and whom defendant did not have a prior opportunity to cross-examine.

The record discloses that defendant did not contest the admissibility of the factual data in the autopsy report, but rather challenged only the admissibility of the "opinions and any statements that seem to project opinions" of the examiner who performed the autopsy. The trial court did not allow the autopsy report or any of the opinions or conclusions of the author of the report to be admitted, but allowed Dr. Lowe to offer her own opinions and conclusions regarding the cause of Jones's death. Under these circumstances, we find no error requiring reversal.

Whether Dr. Lowe's testimony violated defendant's Sixth Amendment right of confrontation is a question of constitutional law that we review de novo. *People v Bryant*, 483 Mich 132, 138; 768 NW2d 65 (2008), cert pending. 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. Although the Court in *Crawford* left for further development what statements qualify as "testimonial," the Court later stated in *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006), 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."

In *Melendez-Diaz v Massachusetts*, ___ US ___; 129 S Ct 2527, 2530-2531; 174 L Ed 2d 314 (2009), 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. The certificates were notarized statements from analysts, which the Court found were clearly affidavits that were 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 testimonial statements from the analysts, who were witnesses for purposes of the Sixth Amendment. *Id*. The Court held 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*. Further, the Court clarified that the admissibility of a statement under the Confrontation Clause is not dependent on whether it qualifies under a particular hearsay exception, such as for business or public records, but rather whether it is testimonial. The Court concluded 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 testimony, and the analysts were subject to confrontation under the Sixth Amendment. *Id*. at 2539-2540. The Court suggested in its decision that its analysis would apply to "other types of forensic evidence commonly used in criminal prosecutions," including autopsy reports. *Id*. at 2538.

Since *Melendez-Diaz* was decided, other jurisdictions have applied it to bar the admission of autopsy reports where the defendant is not afforded an opportunity to cross-examine the preparer of the report. See *State v Locklear*, 363 NC 438; 681 SE2d 293, 304-305 (2009) (holding that references in *Melendez-Diaz* to autopsy examinations extends that decision to autopsy reports, but concluding that the error in admitting the opinion testimony of a nontestifying pathologist was harmless beyond a reasonable doubt); *Commonwealth v Avila*, 454 Mass 744, 761-763; 912 NE2d 1014 (2009) (while a medical examiner who did not conduct the autopsy could testify as an expert witness at trial about his own opinions, he could not testify

regarding any findings made by the examiner who conducted the autopsy and prepared the report because the report was inadmissible hearsay and admission of those findings violates the Confrontation Clause); *Wood v State*, ___ SW2d ___ (Tex App, decided October 7, 2009) (autopsy report was testimonial in nature and the use of the report through a witness other than the author of the report violated the defendant's right of confrontation, but the error was harmless beyond a reasonable doubt).

Despite the foregoing, we conclude that reversal is not required in this case because no opinions or conclusions of the preparer of the autopsy report were admitted at trial. Significantly, the certificates at issue in *Melendez-Diaz* were purely "bare-bones" conclusory statements that the substances were found to contain cocaine; they did not include any underlying information whatsoever from which that conclusion could be drawn. *Melendez-Diaz*, *supra* at 2537. The Court did not actually state that autopsy reports would necessarily violate the Confrontation Clause, and in context, we find it clear that the problem with "other types of forensic evidence commonly used in criminal prosecutions" was with any *conclusions* contained therein that could not be subjected to cross-examination as to how those conclusions were drawn. *Id*. at 2537-2538. In contrast, here Dr. Lowe testified regarding her *own* opinions and conclusions, and, although Dr. Lowe based her opinions in part on facts obtained during the autopsy performed by another doctor, defendant did not challenge the admissibility of those facts and specifically agreed that "pure facts" contained in the autopsy report could be offered at trial.

We find this case similar to *United States v Richardson*, 537 F3d 951 (CA 8, 2008), in which Alyssa Bance, a forensic scientist with the Minnesota Bureau of Criminal Apprehension, testified about DNA evidence linking the defendant to a firearm, relying in part on testing performed by another scientist, Jacquelyn Kuriger. *Id*. at 955. Although Bance had reviewed Kuriger's notes and test results, Bance also conducted her own peer review, which consisted of going through all of the notes and documentation to ensure that everything was done properly. She also performed a second independent analysis of the DNA data to compare it to Kuriger's review. *Id*. at 955-956. The court analyzed whether the admission of Bance's testimony describing the DNA tests and the results violated the Sixth Amendment Confrontation Clause. *Id*. at 959. The court stated:

> [T]he admission of Bance's testimony that Richardson's DNA evidence matched the DNA evidence found on the gun was not in error. Richardson argues that the tests and conclusions performed by Kuriger are testimonial; therefore Bance could not testify as to these without violating the Confrontation Clause. Bance, however, testified as to her own conclusions and was subject to cross-examination. Although she did not actually perform the tests, she had an independent responsibility to do the peer review. Her testimony concerned her independent conclusions derived from another scientist's tests results and did not violate the Confrontation Clause. *See Moon*, 512 F.3d at 362 (holding the reviewing scientist "was entitled to analyze the data that [the first scientist] had obtained"). "[T]he Sixth Amendment does not demand that a chemist or other testifying expert have done the lab work himself." *Id*. Thus, Bance's testimony did not violate the Confrontation Clause. Because there was no error, the admission of the testimony was not plainly erroneous. *See Olano*, 507 U.S. at 732-33, 113 S.Ct. 1770. [*Richardson*, 537 F3d at 960.]

More on point with this case is *United States v De La Cruz,* 514 F3d 121, 132-134 (CA 1, 2008), in which the court held that even if *Crawford* was applicable to autopsy reports, it did not preclude a medical examiner from offering testimony based on reports prepared by others. The court explained:

> Defendant next contends that the district court abused its discretion when it allowed the government's medical examiner to give an expert opinion regarding the cause of Wallace's death based on toxicological and autopsy reports that were not prepared by the examiner. Relying on *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), Defendant maintains that he was denied his right of cross-examination. *Id.* at 42, 124 S.Ct. 1354 (holding that the Confrontation Clause prohibits the admission of out-of-court statements that are testimonial in nature unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant concerning the statements).
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> Dr. Thomas A. Andrew, M.D. ("Dr. Andrew"), Chief Medical Examiner for the State of New Hampshire, testified as an expert regarding the cause of Wallace's death. Dr. Andrew did not himself perform the autopsy on Wallace's body or conduct any toxicological tests or investigate at the scene where Wallace's body was found. In forming his opinion as to the cause of death, Dr. Andrew instead relied on police reports, crime scene photographs, and autopsy and toxicology reports, all of which were prepared by other individuals. Dr. Andrew explained that such materials are routinely relied on by experts in his field. Dr. Andrew also explained that autopsies are required by law in cases involving sudden, unexpected, or violent deaths, that autopsy reports contain objective fact-only descriptions of the observations made by the examining physician at the time of the autopsy, and that autopsy reports are intended to provide a permanent record of findings relevant to the cause of death.
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> Defendant objected to Dr. Andrew's testimony on Confrontation Clause grounds. Citing *Crawford,* Defendant argued that the autopsy report upon which Dr. Andrew relied constituted testimonial evidence prepared by someone whom Defendant could not cross-examine. The district court overruled Defendant's objection at trial, holding that Dr. Andrew's testimony was not based on testimonial hearsay but was, instead, properly based on his review of a record, the preparation of which was required by law. For the same reasons, the district court on remand found that Defendant's *Crawford* argument did not entitle him to a new trial.
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> We review de novo a claim that evidence has been admitted in violation of the Confrontation Clause. *United States v. Walter,* 434 F.3d 30, 33 (1st Cir.2006); *United States v. Brito,* 427 F.3d 53, 59 (1st Cir.2005).
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> In his appellate brief, Defendant's discussion of his Confrontation Clause claim is perfunctory at best. In essence, he argues that "[b]y allowing the medical examiner to testify concerning reports which he had no part in testing or producing, the defendant was denied his right of confrontation." Defendant's Br. at 13. Other than citing *Crawford* for the general proposition that the introduction

of testimonial hearsay runs afoul of the Confrontation Clause, Defendant cites no cases to support his argument. We reject Defendant's argument, in part because his claim is "unaccompanied by some effort at developed argumentation." *Casas,* 425 F.3d at 30 n. 2.

In addition, we reject Defendant's argument on the merits. An autopsy report is made in the ordinary course of business by a medical examiner who is required by law to memorialize what he or she saw and did during an autopsy. An autopsy report thus involves, in principal part, a careful and contemporaneous reporting of a series of steps taken and facts found by a medical examiner during an autopsy. Such a report is, we conclude, in the nature of a business record, and business records are expressly excluded from the reach of *Crawford. See Crawford,* 541 U.S. at 56, 124 S.Ct. 1354 (noting that business records are not testimonial by nature); *see also id.* at 76, 124 S.Ct. 1354 (Rehnquist, C.J., concurring) (praising the Court's exclusion of business records from the definition of testimonial evidence falling within the ambit of the Confrontation Clause); *United States v. Feliz,* 467 F.3d 227, 236-37 (2d Cir.2006) (noting that autopsy reports are kept in the course of a regularly conducted business activity and are nontestimonial under *Crawford*); *Manocchio v. Moran,* 919 F.2d 770, 778 (1st Cir.1990) (recognizing that autopsy reports are business records akin to medical records, prepared routinely and contemporaneously according to "statutorily regularized procedures and established medical standards" and "in a laboratory environment by trained individuals with specialized qualifications").

In *People v. Durio,* 7 Misc.3d 729, 794 N.Y.S.2d 863 (N.Y.Sup.Ct.2005), the court held that the admission of both the routine findings recited in an autopsy report as well as the accompanying testimony of an assistant medical examiner who neither conducted the autopsy nor prepared the report was proper under *Crawford.* Concluding that the autopsy report was a nontestimonial business record, the *Durio* court described the practical implications that would follow from treating autopsy reports as inadmissible testimonial hearsay under *Crawford*:

"Years may pass between the performance of the autopsy and the apprehension of the perpetrator. This passage of time can easily lead to the unavailability of the examiner who prepared the autopsy report. Moreover, medical examiners who regularly perform hundreds of autopsies are unlikely to have any independent recollection of the autopsy at issue in a particular case and in testifying invariably rely entirely on the autopsy report. Unlike other forensic tests, an autopsy cannot be replicated by another pathologist. Certainly it would be against society's interests to permit the unavailability of the medical examiner who prepared the report to preclude the prosecution of a homicide case."

Id. at 869.

Like the court in *Durio,* we are unpersuaded that a medical examiner is precluded under *Crawford* from either (1) testifying about the facts contained in an autopsy report prepared by another, or (2) expressing an opinion about the cause of death based on factual reports-particularly an autopsy report-prepared by

another.[5] Because, in this case, we find that Dr. Andrew's testimony was proper under *Crawford,* we find no error in the district court's decisions (at trial and on remand) regarding Dr. Andrew's opinion as to the cause of Wallace's death.

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[5] We add that, as a matter of expert opinion testimony, a physician's reliance on reports prepared by other medical professionals is "plainly justified in light of the custom and practice of the medical profession. Doctors routinely rely on observations reported by other doctors, and it is unrealistic to expect a physician, as a condition precedent to offering opinion testimony . . . , to have performed every test, procedure, and examination himself." *Crowe v. Marchand,* 506 F.3d 13, 17-18 (1st Cir.2007) (internal citations omitted).

In this case, defendant did not contest the admissibility of the factual data from the autopsy report, and Dr. Lowe testified at trial about her own opinions and conclusions based on that data; the opinions and conclusions of the nontestifying examiner who conducted the autopsy were not admitted. Because defendant had the opportunity to confront Dr. Lowe and cross-examine her regarding her opinions, defendant's Sixth Amendment right of confrontation was not violated.

This case is also distinguishable from *People v Lonsby,* 268 Mich App 375; 707 NW2d 610 (2005), because here Dr. Lowe testified that she independently reviewed the case file and she was examined about her own opinions and conclusions, not those of the medical examiner who performed the autopsy.

Defendant also argues that Dr. Lowe's use of an anatomical sketch that was prepared by the nontestifying medical examiner to document Jones's injuries violated defendant's Sixth Amendment right of confrontation. Because defendant did not object to the use of this sketch at trial, this issue is not preserved. Therefore, defendant has the burden of demonstrating a plain error affecting his substantial rights. *People v Carines,* 460 Mich 750, 763; 597 NW2d 130 (1999). Dr. Lowe testified that she independently reviewed the sketch and compared it to other evidence from the autopsy, including photographs of the victim's injuries, and concluded that the diagram was an accurate representation of the victim's injuries. Because Dr. Lowe independently verified the accuracy of the sketch, and was present at trial and subject to cross-examination concerning the sketch, defendant has not established a plain error under the Confrontation Clause.

II. Effective Assistance of Counsel

Defendant next argues that he is entitled to a new trial because trial counsel was ineffective. Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc,* 465 Mich 575, 579; 640 NW2d 246 (2002). Any findings of fact made by the trial court are reviewed for clear error, and whether those findings establish a claim of ineffective assistance of counsel is reviewed de novo as a question of law. *Id.* In this case, the trial court denied defendant's motion for a new trial on this issue, but declined defendant's request for an evidentiary hearing. Therefore, the trial court did

not make any findings of fact. Accordingly, we review this issue de novo based on the existing record.

To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino,* 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr,* 451 Mich 115, 124; 545 NW2d 637 (1996).

First, we find no merit to defendant's argument that defense counsel was ineffective for failing to call Shante Lunsford to testify. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Marcus Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). In this case, defendant has not overcome the presumption that counsel did not call Lunsford as a matter of trial strategy, nor has he shown that he was prejudiced by the absence of her testimony. Defendant argues that Lunsford should have been called as a witness because she indicated in her police statement that she saw a man driving a Ford Explorer, whom she described as bald, whereas witnesses described defendant's hair as short. However, Lunsford's statement indicated that she saw the driver between 8:00 and 8:30 a.m., whereas the trial testimony established that the offenses occurred after 10:00 a.m. Thus, even if Lunsford had testified consistently with her police statement, her testimony would not have been helpful in refuting defendant's identity as the driver of the Explorer at the time of the offenses. The failure to call Lunsford did not deprive defendant of a substantial defense.

We also disagree with defendant's claim that defense counsel was ineffective for not filing a notice of alibi or requesting an alibi defense jury instruction. Defendant was able to fully present his claim that he was not present when the charged offenses were committed. Further, the trial court's jury instructions made it clear that the jury could not convict defendant of the charged crimes unless his identification as the perpetrator of the crimes was proven beyond a reasonable doubt. Under the court's instructions, the jury would have been required to find defendant not guilty if it believed his testimony that he was not present when the charged crimes were committed. The court's instructions were sufficient to protect defendant's rights. Accordingly, defendant has not shown that he was prejudiced by defense counsel's failure to further request an instruction on alibi.

Defendant lastly argues that defense counsel was ineffective for not objecting to a witness's testimony that she had received threats from defendant's family members. First, contrary to what a defendant argues, evidence of a defendant's threats against a witness is generally admissible because it can demonstrate consciousness of guilt. *People v Sholl,* 453 Mich 730, 740; 556 NW2d 851 (1996). Evidence of threats is also relevant to the credibility of a witness's testimony. See CJI2d 3.6(3)(f) (in judging the credibility of a witness, the jury may consider whether there were any promises, threats, suggestions, or other influences that affected how the witness testified). In this case, defense counsel reasonably may have declined to object or further pursue the matter because he realized that such evidence was generally admissible, and

because the witness admitted that the threats were not directly made by defendant, thereby minimizing the potential for prejudice. Counsel also may have realized that, had this issue been pursued or an objection made, a record might have been developed that would have either highlighted the testimony or established a more direct connection to defendant. Accordingly, defendant has not shown that counsel's decision not to object was objectively unreasonable.

Furthermore, because defendant has not offered any reasons why further development of the record may support his arguments, we reject his request to remand this case for an evidentiary hearing on this issue.

III. Cause of Death

Defendant next argues that the trial court's jury instructions were deficient because they did not inform the jury that the prosecution was required to prove beyond a reasonable doubt that he deliberately drove his motor vehicle into Jones, and thereby caused Jones's fatal injuries. Not only was there no objection to the trial court's jury instructions, but defense counsel affirmatively approved the instructions as given. Therefore, this alleged error has been waived. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004); *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

Even if we were to consider this issue under the plain error standard applicable to unpreserved issues, *People v Gonzalez*, 468 Mich 636, 643; 664 NW2d 159 (2003), reversal would not be warranted. The trial court's instructions informed the jury that in order to convict defendant of first-degree premeditated murder, it was required to find that defendant caused Jones's death, that defendant intended to kill Jones, and that the intent to kill was premeditated. Although defendant observes that there was evidence that Jones was involved in fights with others before he was struck by a motor vehicle, under the trial court's instructions as given, the jury could not convict defendant of first-degree murder unless it found beyond a reasonable doubt that it was defendant who caused Jones's death. Accordingly, there was no plain error.

IV. Motion for Mistrial

After jury selection, but before opening statements, codefendant Jermaine King entered a guilty plea. Defendant now argues that the trial court erred in denying his motion for a mistrial. Defendant argues that a mistrial was required because his jury was likely to view codefendant King's absence in a "negative light" and it most likely attributed his absence to a guilty plea.

The grant or denial of a motion for a mistrial is within the sound discretion of the trial court. There must a showing of prejudice to the defendant's rights in order for there to be error requiring reversal. The trial court's ruling must be so grossly in error as to deprive the defendant of a fair trial or amount to a miscarriage of justice. *People v McAlister*, 203 Mich App 495, 503; 513 NW2d 431 (1994).

To be entitled to relief for this issue, defendant must show that his codefendant's absence resulted in actual prejudice that deprived him of a fair trial. *People v Kenneth Smith*, 63 Mich App 35, 36; 233 NW2d 883 (1975). Defendant has not made this necessary showing. After codefendant King pleaded guilty, the trial court appropriately instructed the jury that it would be considering only the case as it relates to defendant, and that it was "not to read anything into any

other thing, other than you're going to base your decision solely on the evidence that's being presented here." The court's instruction reinforced that the jury was not to consider codefendant Kings's absence from trial, or possible reasons for that absence, and instead was to consider defendant's case solely on the basis of the evidence admitted at trial. This instruction was sufficient to cure any possible prejudice arising from codefendant King's absence. *Id.*; see also *United State v Earley*, 482 F2d 53, 58 (CA 10, 1973).

We also reject defendant's argument that his Sixth Amendment right to a jury trial was compromised because, before codefendant King pleaded guilty, he had peremptorily excused three jurors, whom defendant may have wished to remain on the jury panel. Defendant does not claim that the jury actually chosen was unfair, or that King was not entitled to exercise the peremptory challenges when he did. Accordingly, he has not established actual prejudice. See *People v Coles*, 79 Mich App 255, 264; 261 NW2d 280 (1977), aff'd and remanded on other grounds 417 Mich 523, 553 (1983).

For these reasons, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

V. Transferred Intent

Next, defendant argues that the trial court erred in instructing the jury on transferred intent, consistent with CJI2d 16.22. Defendant argues that the instruction should not have been given because it relieved the prosecution of its duty to prove that Jones's death resulted from a premeditated and deliberate intent to kill. We disagree.

An instruction on transferred intent is appropriate if a defendant intended to kill one person, but by mistake or accident killed another person. The doctrine recognizes that "[i]t is only necessary that the state of mind exist, not that it be directed at a particular person." *People v Lovett*, 90 Mich App 169, 172; 283 NW2d 357 (1979). In this case, it was the prosecution's theory that defendant drove his vehicle after Frank Sanders, intending to kill him, but lost control of the vehicle and struck Jones instead. If defendant acted with a premeditated intent to kill Sanders, but by mistake or accident killed Jones instead, he properly could be convicted of first-degree murder under a theory of transferred intent. The court's instruction did not lessen the prosecution's burden of proving the elements of first-degree murder because the prosecution was still required to prove that defendant possessed the requisite intent for first-degree premeditated murder when he directed his conduct at Sanders. Accordingly, there was no error.

VI. Right to Present a Defense

Defendant argues that the trial court denied him his constitutional right to present a defense when it sustained the prosecutor's objection to defense counsel's cross-examination of a witness regarding the height of another man who had been involved in an earlier fight with Jones. This Court reviews de novo whether a defendant was deprived of his constitutional right to present a defense. *People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009).

In *People v Unger*, 278 Mich App 210, 249-251; 749 NW2d 272 (2008), this Court explained:

> Few rights are more fundamental than that of an accused to present evidence in his or her own defense. *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Holmes v South Carolina*, 547 US 319, 324; 126 S Ct 1727; 164 L Ed 2d 503 (2006) (internal quotation marks and citations omitted). This Court has similarly recognized that "[a] criminal defendant has a state and federal constitutional right to present a defense." *Kurr*, *supra* at 326.
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> However, an accused's right to present evidence in his defense is not absolute. *United States v Scheffer*, 523 US 303, 308; 118 S Ct 1261; 140 L Ed 2d 413 (1998); *Crane v Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636 (1986). "A defendant's interest in presenting . . . evidence may thus '"bow to accommodate other legitimate interests in the criminal trial process."'" *Scheffer*, *supra* at 308 (citations omitted). States have been traditionally afforded the power under the constitution to establish and implement their own criminal trial rules and procedures. *Chambers*, *supra* at 302-303.
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> Like other states, Michigan has a legitimate interest in promulgating and implementing its own rules concerning the conduct of trials. Our state has "broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Scheffer*, *supra* at 308, quoting *Rock v Arkansas*, 483 US 44, 56; 107 S Ct 2704; 97 L Ed 2d 37 (1987). MRE 703, which requires expert witnesses to base their opinions on facts in evidence, does not infringe on a criminal defendant's right to present a full defense. Instead, it merely serves to ensure that the expert opinions presented in the courts of this state are relevant and reliable. Nor is a criminal defendant's constitutional right to present a defense infringed by MRE 402, which simply bars the admission of irrelevant evidence. These rules of evidence help to ensure the integrity of criminal trials and are neither "arbitrary" nor "disproportionate to the purposes they are designed to serve."

In this case, the trial court did not preclude defendant from presenting his defense theory that the man who was involved in the earlier fight with Jones may have caused Jones's death. The witness testified regarding the roles of the other man in the earlier fight with Jones, and defendant's role in later driving the SUV into the field. The witness did not express confusion regarding the respective roles of each man in the case. Any uncertainty the witness may have had about the first man's height was not relevant to discredit her testimony that defendant was the person who drove the SUV that struck the victims. MRE 401. The trial court's ruling did not deprive defendant of his right to present his defense theory that the other man who initially fought with Jones caused his death.

VII. Supplemental Jury Instructions

Defendant lastly argues that the trial court erroneously responded to the jury's request to review certain testimony. Defense counsel's expression of satisfaction with the trial court's supplemental instruction waived any claim of error. *Matuszak,* 263 Mich App at 57; *Lueth,* 253 Mich App at 688. Even if this issue was not waived, we would find no error. The trial court advised the jury that a transcript was not available and that the jurors should rely on their collective memories of the witnesses' testimony. The court did not foreclose the possibility of having the testimony reviewed at a later time. Indeed, the court advised the jury that the testimony was available on audiotape, and that if the jury was unable to come to a consensus, one alternative would be "to do a read back." Accordingly, there was no error. *People v John L Davis, Jr,* 216 Mich App 47, 56-57; 549 NW2d 1 (1996).

We also reject defendant's argument that it was improper for the trial court to provide the jury with a written copy of its instructions concerning the elements of the charged offenses when responding to the jury's request to review certain testimony. At trial, when instructing the jury on the elements of the offenses, the trial court stated:

> *I don't want you writing anything down at this point. We're going to give you the substantive instructions that the Court's about ready to give you.* I want your undivided attention because if you're writing you're not going to be able to comprehend exactly what the Court's saying, okay.
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> If at any time you don't understand what the Court is saying, please do not be embarrassed. Just raise your hands and the Court will give you the instruction again. So I'm going to give you these instructions in written format, okay, ladies and gentlemen, so don't be too terribly concerned, okay.

When the trial court was responding to the jury's request to review certain testimony, it realized that it had neglected to provide the written instructions it previously promised. It was not improper for the trial court to provide those instructions in accordance with its earlier promise.

Affirmed.

/s/ Alton T. Davis
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto