

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY LEVEAL JENKINS,

Defendant-Appellant.

UNPUBLISHED

September 14, 2006

Nos. 258581; 263154

Saginaw Circuit Court

LC No. 03-023264-FC

Before: Fort Hood, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of conspiracy to commit first-degree murder, MCL 750.157a and MCL 750.316, assault with intent to commit murder, MCL 750.83, discharging a firearm from a vehicle, MCL 750.234a, negligent homicide, MCL 750.234, felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court originally sentenced defendant as an habitual offender, fourth offense, to concurrent prison terms of 40 to 60 years each for the conspiracy and assault convictions, 10 to 15 years each for the discharging a firearm, negligent homicide, and felon-in-possession convictions, and 10 to 20 years for the CCW conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. The trial court subsequently granted the prosecutor's motion for resentencing and resentence defendant to life in prison for the conspiracy conviction. Defendant now appeals his convictions and original sentences as of right in Docket No. 258581, and appeals the trial court's order on resentencing as of right in Docket No. 263154. We affirm in part, vacate in part, and remand for entry of an amended judgment of sentence reflecting the mandatory sentence of life imprisonment for defendant's conspiracy conviction.

I

Defendant's convictions arise from his involvement in a drive-by shooting in Saginaw in which Rafael and Elisa Menchacas' Suburban vehicle was shot at from a Blazer that drove past them on Veterans Memorial Parkway. The Menchacas testified that a similar looking Suburban vehicle passed them shortly before the shooting. When the shooting began, they heard two different guns being fired, and one gun fired more rapidly than the other. Police recovered bullet casings for both .223-caliber bullets and nine millimeter bullets from inside the Blazer and at the roadway near the scene of the shooting. Police examiners determined that the nine-millimeter casings were fired from two different guns.

Defendant was the driver of the Blazer and his passenger was Ronnell Frazier, who fired a .223 rifle at the Suburban while leaning out the passenger-side window. Immediately after the shooting, the Blazer jumped the curb of a grassy median and hit a light pole. Frazier struck the pole and suffered a fatal head injury. Defendant abandoned Frazier and the vehicle and fled on foot. Frazier's rifle was found near his body. The police never recovered any weapons that matched the nine-millimeter casings found inside the Blazer and at the scene.

Defendant admitted to the police that Frazier fired at the Suburban because he mistook it for a similar vehicle occupied by members of a south-side gang. The south-side gang was targeting north-side residents in retaliation for the shooting death of a south-side gang member. Frazier was angry about a shooting that recently occurred at a store behind his house. Defendant denied possessing or firing a nine-millimeter handgun during the incident.

II

Defendant argues that the trial court erred in denying his motion for a directed verdict of the conspiracy and assault with intent to commit murder charges. "When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

Defendant contends that the prosecutor failed to prove that he and Frazier conspired to shoot the Menchacas' vehicle, or that he had any intent to murder a member of the Menchacas family. Conspiracy is defined at common law as a partnership in criminal purposes. *People v Justice*, 454 Mich 334, 345; 562 NW2d 652 (1997). Establishing a conspiracy requires evidence of specific intent to combine with others to accomplish an illegal objective. *People v Blume*, 443 Mich 476, 481; 505 NW2d 843 (1993). The individuals involved in the partnership "must have voluntarily agreed to effectuate the commission of a criminal offense." *Justice, supra* at 345. The prosecutor must establish that the individuals specifically intended to combine to pursue the criminal objective of their agreement. *Id.* Direct proof of the conspiracy is not essential, and proof of the offense may be inferred from the circumstances, acts, and the conduct of the parties. *Id.* at 347.

Because the prosecutor charged defendant with conspiracy to commit first-degree murder, the prosecutor was required to prove that defendant and Frazier agreed to commit an intentional, premeditated, and deliberate killing. *People v Marsack*, 231 Mich App 364, 370; 586 NW2d 234 (1998). In order to prove that defendant was guilty of assault with intent to commit murder, the prosecutor was required to prove: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996).

The evidence supported an inference that Frazier and at least one other person fired guns at the Menchacas' family's Suburban from defendant's Blazer. Police found two different kinds of ammunition casings at the crime scene and inside the Blazer, and Elisa and Rafael both testified that they could hear two different guns firing at the same time. There was no evidence that anyone other than defendant and Frazier were in the Blazer. The jury could have inferred

from this evidence that both defendant and Frazier were shooting guns, and that defendant lost control of the Blazer because he was shooting a gun while driving. Although police never recovered nine-millimeter weapons, the jury could have inferred that defendant purposefully took the guns when he abandoned the Blazer and Frazier at the scene. The evidence was also sufficient to support an inference that defendant and Frazier had a motive to shoot persons connected with the south-side gang. The jury could have found that defendant and Frazier believed south-side gang members occupied the Menchacas' Suburban and combined to commit a premeditated and deliberated drive-by shooting against the occupants, intending to kill them.

Defendant argues that he was entitled to a directed verdict for the assault charge because the prosecutor failed to prove that either he or Frazier intended to kill any member of the Menchacas family. Under the doctrine of transferred intent, however, it is sufficient for the prosecutor to show that defendant had the requisite state of mind to kill; he need not show that the defendant's state of mind was directed at a specific person or the eventual victim. *People v Abraham*, 256 Mich App 265, 270; 662 NW2d 836 (2003); *People v Youngblood*, 165 Mich App 381, 388; 418 NW2d 472 (1988). Thus, defendant could properly be convicted of assault with intent to commit murder even if he and Frazier were mistaken in identifying the Menchacas' vehicle as their intended target. Accordingly, the trial court properly denied defendant's motion for a directed verdict.

The evidence was also sufficient to support each of the weapons offense convictions. Contrary to defendant's arguments, the evidence that more than one gun was used during the offense was sufficient to prove that defendant both possessed and discharged a firearm during the offense.

III

Defendant raises two claims of evidentiary error. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002). Defendant first argues that the trial court erred in admitting DNA evidence that established that brain matter and other tissue found near Frazier's body matched defendant's DNA profile. Because defendant did not object to the DNA evidence at trial, this issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 597 NW2d 130 (1999).

Defendant argues that Jeffrey Nye's DNA testimony was inadmissible because the prosecutor failed to establish that Nye's and the state police's methods and equipment were reliable, and also failed to lay a foundation for the reliability of the statistical analysis. Defendant relies on *People v Coy*, 243 Mich App 283; 620 NW2d 888 (2000) ("*Coy I*"), and *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003) ("*Coy II*"), but this Court's decisions in those cases do not require the prosecution to establish that its methods and equipment were reliable as a prerequisite to admitting DNA evidence, or require the trial court to make a sua sponte inquiry into the foundation for DNA evidence. Here, defendant failed to challenge the reliability of the police's methodology and equipment, and there is no basis in the record for concluding that Nye's DNA analysis arose from unreliable or faulty methodology, laboratory equipment, or statistical analysis. Thus, defendant has not shown a plain error.

Defendant next argues that evidence of a gang war in Saginaw was irrelevant and unfairly prejudicial. Relevant evidence is evidence “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401; *Aldrich, supra* at 114. Generally, all relevant evidence is admissible, unless otherwise provided by law, and evidence which is not relevant is not admissible. *Id.*; MRE 402. Relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” MRE 403; *Aldrich, supra*.

Evidence of the ongoing gang feud was relevant to the issue of defendant’s motives for the drive-by shooting. Additionally, the relationship between the gang feud and the charged crimes was the focus of defendant’s statements to the police. Members of a south-side gang had been randomly targeting north-side residents in retaliation for an earlier shooting of a south-side gang member, Ritchie Rich. Two days before the crimes in this case, four north-side residents were shot at a market near Frazier’s home, and defendant admitted that Frazier was angry about the shooting. The evidence of the gang feud provided context for defendant’s police interview, in which the police elicited defendant’s admission that Frazier fired shots at the Suburban, and was relevant to a motive for the assault on the Menchacas’ vehicle. Defendant argues that the evidence was unfairly prejudicial because the evidence was likely to cause the jury to speculate that defendant belonged to a gang. However, when defendant and the detectives discussed the gang war, they agreed that the south-side gang was targeting all residents of the north side, regardless of gang affiliation. Under these circumstances, the trial court did not abuse its discretion in allowing the evidence.

Defendant also argues that Detective Robert Ruth’s statements describing defendant’s police interview were inadmissible hearsay. Hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” MRE 801(c). But defendant’s own statements to Detective Ruth were not hearsay under MRE 801(d)(2). Additionally, Detective Ruth did not repeat any statements made by other persons, and his own prior statements were not admitted for their truth, but to provide context for defendant’s statements. Thus, there is no merit to this issue.

IV

Defendant raises several claims of prosecutorial misconduct. This Court decides prosecutorial misconduct issues case by case, examining the pertinent portion of the record and evaluating the prosecutor’s remarks in context. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting the defendant’s substantial rights. *Carines, supra*; *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

Defendant challenges the following factual statements from the prosecutor’s closing argument, which defendant maintains were not supported by the evidence: (1) that defendant and Frazier were looking for south-side gang members; (2) that there had been a series of drive-by shootings in the preceding weeks; (3) that the south-side gang was retaliating against the entire north side for Rich’s death; (4) that there had been a recent shooting at a market near Frazier’s home; (5) that Frazier was upset about the market shooting; (6) that the drive-by shooting was an

act of gang violence and revenge; and (7) that defendant and Frazier were looking for anyone from the south side.

Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Here, the prosecutor's statements were based on the evidence and reasonable inferences arising therefrom. Defendant told the detectives that north-side residents were fearful because of shootings committed by south-side gang members, and that Frazier was upset about the shootings at the Farwell Market. There was evidence that defendant and Frazier were both carrying guns, and that both fired at the Suburban. The circumstances of the shooting permitted the jurors to infer that defendant and Frazier fired at the Suburban, without provocation, because they believed the occupants were associated with the south-side gang, and they wanted revenge for the Farwell Market shootings. This inference was permissible even without evidence that defendant was previously or actively involved in gang activity. Accordingly, the prosecutor's statements were not improper.

Defendant also contends that the prosecutor improperly shifted the burden of proof in his closing and rebuttal remarks by insinuating that defendant should have produced the nine-millimeter guns. The prosecutor merely commented in closing argument that defendant had abandoned Frazier and fled the scene with the guns. Defense counsel suggested in his closing argument that the police might have missed the guns in the tall grass, which the prosecutor argued in rebuttal was not a credible explanation.

A prosecutor may not comment on a defendant's failure to present evidence, or attempt to shift the burden of proof. *People v Reid*, 233 Mich App 457, 477-478; 592 NW2d 767 (1999). Additionally, a prosecutor may not imply that a defendant must prove something or present a reasonable explanation because this, too, shifts the burden of proof. *People v Guenther*, 188 Mich App 174, 180; 469 NW2d 59 (1991).

The prosecutor's statements about the guns did not improperly shift the burden to defendant to produce evidence. The prosecutor drew an inference, from the evidence, that defendant removed the nine-millimeter weapons before fleeing the scene because they could be used as evidence against him. These arguments were based on evidence that witnesses heard more than one gun being fired during the offense, and that police recovered both .223-caliber and nine-millimeter shell casings from the scene and from inside the Blazer, but that police did not find nine-millimeter guns in or near the Blazer after the police secured and searched the area soon after the shooting. The prosecutor did not challenge defendant to either produce the guns or explain their disappearance.

Additionally, the prosecutor's rebuttal argument properly responded to defense counsel's closing arguments. Once the defendant advances a theory, the prosecutor does not shift the burden of proof by highlighting the weaknesses in that theory. *People v Fields*, 450 Mich 94, 112; 538 NW2d 356 (1995). Although the prosecutor may not argue that a defendant's failure to produce evidence proves his guilt, he may argue that the defendant's explanation for missing evidence is unworthy of belief. Thus, the prosecutor was entitled to comment on the improbability of defense counsel's suggestion that the police missed the guns in the tall grass,

and to comment that it was more likely that defendant removed the guns because he had a strong incentive to hide evidence.

Defendant also argues that the prosecutor made an improper “civic duty” argument by commenting that gang wars are “a never ending saga, a tit for tat, or an eye for an eye, or a tooth for a tooth,” and that, “It has to end somewhere, some time.” Defendant asserts that the latter remark is an improper civic duty argument, in which the prosecutor urged the jurors to convict defendant in order to stop the gang shootings in Saginaw.

A prosecutor “should not resort to civic duty arguments that appeal to the fears and prejudices of jury members” *Bahoda, supra* at 282. To the extent that the prosecutor’s remark had a civic duty overtone, reversal is not warranted because the remark was brief and isolated, and the prosecutor made it in the context of an evidence-focused argument. Further, defendant never objected to the remark and a cautionary instruction could have cured any perceived prejudice upon request. See *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991). Accordingly, the remark did not constitute plain error affecting defendant’s substantial rights.

Defendant also argues that the prosecutor improperly aroused the jurors’ sympathies by prominently displaying photographs that depicted Frazier’s head and facial injuries. Defendant asserts that these photographs elicited emotional outbursts from Frazier’s family during the trial. Because defendant did not object to either the photographs or the prosecutor’s conduct at trial, this issue is not preserved. We therefore review this issue for plain error affecting defendant’s substantial rights. *Carines, supra* at 763; *Coy II, supra* at 12.

“Admission of gruesome photographs solely to arouse the sympathies or prejudices of the jury may be error requiring reversal.” *People v Ho*, 231 Mich App 178, 188; 585 NW2d 357 (1998). However, the gruesomeness of a photograph does not render it inadmissible if it is introduced for a proper purpose, such as to convey the extent and nature of a victim’s injuries. *Id.*; *People v Mills*, 450 Mich 61, 77, 79; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995).

Here, the trial court admitted the photographs for a proper purpose. They were relevant to show that Frazier’s death occurred when the Blazer, which defendant was driving, ran off the road and struck a light pole while driving very fast. This was relevant to the prosecution’s theory that defendant was driving erratically because he was shooting at the same time. Accordingly, the photographs were relevant to the issues at trial. *Ho, supra* at 188.

Further, the probative value of the photographs was not substantially outweighed by the danger of unfair prejudice. *Aldrich, supra* at 114; MRE 403. The photographs depicted the position of Frazier’s body when police found it. The close-ups of Frazier’s face are disturbing, but are not excessively gory or graphic. Viewing the photographs would not cause persons of ordinary sensibility to lose their capacity for rational judgment. Defendant also argues that the jury might have been swayed by Frazier’s family’s emotional outburst when the photographs were displayed in the courtroom, but there is no reason to believe that a family’s natural reaction to disturbing photographs would impair the jury’s ability to fairly judge the evidence.

Moreover, the photographs were principally relevant to the original charge of second-degree murder arising from Frazier’s death. The jurors acquitted defendant of second-degree

murder, and also the lesser offense of involuntary manslaughter slaughter, and instead convicted defendant of only negligent homicide in connection with Frazier's death. The jury's verdict demonstrates that the jury was not unduly or unfairly prejudiced by emotion from viewing the photographs or from observing the family's outburst. Accordingly, defendant has not demonstrated a plain error affecting his substantial rights.

Defendant also contends that the prosecutor's description of how defendant abandoned Frazier in the median was intended to arouse sympathy for Frazier and portray defendant as cold-hearted. This Court has held that "[a]ppeals to the jury to sympathize with the victim constitute improper argument." *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). A prosecutor also "must refrain from denigrating a defendant with intemperate and prejudicial remarks." *Bahoda, supra* at 283.

Here, the prosecutor's remarks did not violate these principles. The argument was relevant to the prosecution's theory that defendant abandoned Frazier because he had committed a drive-by shooting and wanted to escape detection by removing incriminating evidence and fleeing the scene. Although the statements tended to portray defendant as heartless and indifferent, a prosecutor is not obligated to confine arguments to "the blandest of all possible terms." *Aldrich, supra* at 112. In any event, the trial court instructed the jury that it could not convict based on sympathy, and the jury's rejection of the higher charges arising from Frazier's death belie defendant's claim that they were swayed by sympathy. Therefore, we reject this claim of error.

Defendant also argues that the prosecutor improperly vouched for testimony by stating that a firearms expert had confirmed the truth of the Menchacas' testimony. Elisa and Rafael Menchacas both testified that they heard more than one person firing from the Blazer, and were sure of this because they heard one gun firing more rapidly than the other. Sergeant Ronald Ainslee, a firearms expert, testified that the location of the spent cartridges was consistent with one person firing from the driver's seat, and the other person firing from the passenger's seat. The prosecutor stated in his closing argument that the presence of two sets of casings "confirms the testimony of the Menchacas about two guns being fired simultaneously and they also said one sounded faster than the other."

A prosecutor may not vouch for a witness's credibility or suggest that the government has some special knowledge that a witness's testimony is truthful. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). A prosecutor may, however, argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Here, the prosecutor did not suggest that Ainslee personally believed that the Menchacas were credible witnesses. Rather, the crux of his argument was that Ainslee's analysis of the physical evidence was consistent with the Menchacas' testimony that they heard two guns being fired. The prosecutor's arguments were proper commentary on the evidence.

V

Next, defendant raises several claims of ineffective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the

attorney's error or errors, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002).

Defendant argues that defense counsel was ineffective for failing to object to the prosecutor's conduct. As previously discussed, apart from one isolated remark that arguably could be characterized as an improper civic-duty argument, defendant has not demonstrated that the prosecutor's conduct was improper. Therefore, defense counsel was not ineffective for failing to object to that conduct. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Because the isolated civic-duty remark could not have affected the outcome of defendant's trial, it does not establish the requisite prejudice to prevail on a claim of ineffective assistance of counsel. *Pickens, supra*.

Defendant also claims that counsel was ineffective for failing to locate and present a witness. Defendant has submitted an affidavit in which he asserts that he told defense counsel about a cell phone call between Frazier and William Johnson occurred just before the shooting. During the cell phone call Johnson allegedly warned Frazier that persons in a blue and gray truck on Veterans Memorial Parkway had just shot at him. Defendant contends that Johnson may have been a helpful defense witness at trial. However, where, as here, a defendant claiming ineffective assistance of counsel fails to move for a new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), this Court's review is limited to mistakes apparent from the record. *Rodriguez, supra* at 38. Here, there is no record evidence of Johnson's proposed testimony in order to determine whether it could aid defendant.

Furthermore, defendant has not demonstrated that a remand is warranted.¹ Even if we were to credit defendant's averment that he informed defense counsel of the alleged phone call between Johnson and Frazier, defendant does not explain how this evidence would have been helpful to his case. Decisions regarding what evidence to present and whether to call or question witnesses are matters of trial strategy, which this Court will not second-guess. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Failure to call a witness does not constitute ineffective assistance of counsel unless the defendant is deprived of a substantial defense, i.e., one that might have altered the outcome of the trial. *Id.*; *People v Kelly*, 186 Mich App 524, 526-527; 465 NW2d 569 (1990).

Defendant seems to suggest that Johnson could help show that he and Frazier acted in self-defense. A person is justified in using deadly force against another in self-defense if he is free from fault and, under all the circumstances, he honestly and reasonably believes that he is in imminent danger of death or great bodily harm and that it is necessary for him to exercise deadly force. *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002). Here, however, Johnson allegedly related a shooting incident that already occurred, and which involved Johnson, not

¹ This Court previously denied defendant's motion to remand.

defendant or Frazier. Further, there was no evidence that defendant and Frazier were in immediate danger at the time they began firing at the Menchacas' vehicle. Therefore, counsel's failure to call Johnson did not deprive defendant of a valid defense. Indeed, Johnson's testimony could have actually bolstered the prosecution's theory that Frazier and defendant went searching for a vehicle that matched the vehicle that allegedly shot at Johnson, with the intent of shooting at it, but opened fire on the Menchacas' vehicle by mistake. Thus, even if defendant could establish factual support for the statements in his affidavit, he has not demonstrated that Johnson's testimony could provide a basis for relief. Accordingly, remand is not warranted.

VI

Defendant argues that the trial court failed to protect his right to adequate voir dire of the prospective jurors, and that defense counsel was ineffective for failing to remove a biased juror. Defendant contends that one of the jurors was related to a man who was a victim of a drive-by shooting allegedly committed by defendant's associates.

Defendant's claim is not supported by the record. The record discloses that the trial court questioned the prospective jurors about whether they or their family members were victims of crimes, or whether they knew defendant, his family, or any of the witnesses. The court excluded any persons who indicated that their personal experiences might prevent them from evaluating the evidence fairly and objectively. This voir dire was sufficient to protect defendant's right to a fair trial. *People v Sawyer*, 215 Mich App 183, 187; 545 NW2d 6 (1996). Although defendant asserts that one juror knew his family and that the juror's cousin was killed in a drive-by shooting, he does not identify any factual support for this assertion, nor have we found any in the record. We therefore reject this claim of error.

VII

Defendant argues that the cumulative effect of several errors denied him a fair trial. Although the cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not, *Knapp, supra* at 387-388, defendant here has not established the occurrence of multiple errors. Hence, there is no cumulative effect.

VIII

Defendant argues that the trial court lacked jurisdiction to grant the prosecutor's motion for resentencing, and that the amended judgment of sentence should therefore be reversed. Resolution of this issue involves the interpretation of the court rules, which we review de novo as a question of law. *People v Walters*, 266 Mich App 341, 346; 700 NW2d 424 (2005). The same principles of statutory interpretation govern the interpretation of a court rule. *Id.* "The fundamental rule of statutory construction is to discern and give effect to the intent of the Legislature." *People v Venticinque*, 459 Mich 90, 99; 586 NW2d 732 (1998). If the statute's language is clear and unambiguous, this Court must enforce the language as written. *Id.* at 99-100.

The clear language of the applicable court rules establish that the trial court lacked jurisdiction to modify defendant's conspiracy sentence, on the prosecutor's motion, after defendant filed his claim of appeal. MCR 6.429(B)(1) permits either party to file a motion to

correct an invalid sentence before the filing of a timely claim of appeal. After a claim of appeal is filed, “a motion to correct an invalid sentence may only be filed in accordance with the procedure set forth in MCR 7.208(B) or the remand procedure set forth in MCR 7.211(C)(1).” MCR 6.429(B)(2). See also MCR 7.208(A) (“[a]fter a claim of appeal is filed . . . the trial court . . . may not set aside or amend the judgment or order appealed,” subject to certain exceptions, including the procedure prescribed in MCR 7.208[B]).

MCR 7.208(B) provides a procedure for defendants, but not prosecutors, to file a motion for resentencing in the trial court after a claim of appeal is filed. Similarly, MCR 7.211(C)(1) provides a procedure for appellants, but not appellees, to file a motion to remand to the trial court. The plain language of these court rules indicates that a prosecutor is not permitted to move for resentencing in the trial court after a defendant has filed a claim of appeal. Accordingly, once a defendant files a claim of appeal, the prosecution’s only avenue of relief from what it believes is an improper sentence is to file its own appeal. In the instant case, the prosecution failed to move for resentencing in the trial court before defendant filed his claim of appeal, and did not file its own claim of appeal. Accordingly, the trial court lacked jurisdiction to modify defendant’s sentence for conspiracy on the prosecutor’s motion.

Nonetheless, the trial court correctly concluded that its original sentence was invalid and that a conviction of conspiracy to commit first-degree murder carried a mandatory penalty of life imprisonment. The conspiracy statute, MCL 750.157a(a) provides:

Except as provided in paragraphs (b), (c) and (d) if commission of the offense prohibited by law is punishable by imprisonment for 1 year or more, the person convicted under this section shall be punished by a penalty equal to that which could be imposed if he had been convicted of committing the crime he conspired to commit and in the discretion of the court an additional penalty of a fine of \$10,000.00 may be imposed.

First-degree murder is punishable by imprisonment for life. MCL 750.316(1). Accordingly, a conviction for conspiracy to commit first-degree murder carries a mandatory sentence of life in prison, although the defendant is subject to parole consideration pursuant to MCL 791.234(6). *People v Jahner*, 433 Mich 490, 497-498, 504; 446 NW2d 151 (1989); *People v Fernandez*, 427 Mich 321, 343, 398 NW2d 311 (1986). Thus, the term-of-years sentence imposed by the trial court was contrary to law.

Although the trial court lacked jurisdiction to modify defendant’s conspiracy sentence after defendant filed his claim of appeal, the trial court properly recognized that its original sentence was invalid and that a sentence of life imprisonment was mandatory. Under the circumstances, pursuant to our authority to “enter any judgment or order or grant further or different relief as the case may require,” MCR 7.216(A)(7), we direct that an amended judgment of sentence be issued on remand from this Court to reflect the statutory sentence of life imprisonment for defendant’s conspiracy conviction.

Contrary to what defendant argues, the Double Jeopardy Clauses of the United States and Michigan Constitutions, US Const, Am V; Const 1963, art 1, § 15, do not prohibit correction of defendant’s conspiracy sentence where the original term-of-years sentence was invalid. *People v Mapp*, 224 Mich App 431, 433; 569 NW2d 523 (1997).

IX

Defendant also argues that his original sentences are impermissibly severe. To the extent that defendant challenges his original 40 to 60-year sentence for conspiracy, this issue is moot in light of our conclusion that a mandatory sentence of life imprisonment was required for this offense. Further, defendant's 40-year minimum sentence for assault with intent to commit murder is within the sentencing guidelines range, as adjusted to reflect defendant's status as a fourth habitual offender. Because defendant does not challenge the scoring of the guidelines or the accuracy of the information relied on by the trial court, we are required to affirm his sentences. MCL 769.34(10); *People v Lerversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000).

Defendant also argues that his sentences are improperly based on facts not found by the jury, contrary to *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000). In these cases, the United States Supreme Court held that a sentencing court may not increase a defendant's *maximum* sentence based on facts not found by a jury. The Supreme Court determined that such sentencing schemes violate a defendant's Sixth Amendment right to a jury trial. However, our Supreme Court recently held in *People v Drohan*, 475 Mich 140, 159-160; 715 NW2d 778 (2006), that these decisions do not apply to Michigan's indeterminate sentencing scheme, in which a defendant's maximum sentence is fixed by statute, and the sentencing guidelines affect only the minimum sentence. Thus, we reject this claim of sentencing error.

We vacate the trial court's order modifying defendant's conspiracy sentence, but affirm defendant's convictions and remaining sentences in all other respects and remand for entry of an amended judgment of sentence reflecting a sentence of life imprisonment for defendant's conspiracy conviction. We do not retain jurisdiction.

/s/ Karen M. Fort Hood

/s/ Richard A. Bandstra

/s/ Pat M. Donofrio