No. 20-

In The
SUPREME COURT OF THE UNITED STATES
October Term 2020

Ihab Masalmani,
***Petitioner*,**

v.

State of Michigan,
***Respondent*.**

On Petition for Writ of Certiorari to the Supreme Court of the State of Michigan

APPENDIX

Tina N. Olson*
Erin Van Campen
Assistant Defenders
State Appellate Defender Office
200 North Washington, Suite 250
Lansing, MI 48913
(313) 256-9833
tolson@Sado.org

*Counsel of Record

APPENDICES

Order

Michigan Supreme Court
Lansing, Michigan

May 29, 2020

Bridget M. McCormack,
Chief Justice

154773

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 154773
COA: 325662
Macomb CC: 2009-005244-FC

IHAB MASALMANI,
Defendant-Appellant.

_____/

On order of the Court, leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we VACATE our order of April 5, 2019. The application for leave to appeal the September 22, 2016 judgment of the Court of Appeals is DENIED, because we are no longer persuaded that the questions presented should be reviewed by this Court.

MCCORMACK, C.J. (*dissenting*).

I respectfully dissent from the Court's determination that leave to appeal was improvidently granted in this case. The trial court's sentencing decision reveals the critical flaw in this Court's opinion in *People v Skinner*, 502 Mich 89 (2018): by reading the Sixth Amendment out of MCL 769.25 we have permitted life-without-parole sentences that violate the Eighth Amendment. I would overrule *Skinner*. Short of that, I would vacate the decision below and remand to the trial court for resentencing, because the trial court abused its discretion when it treated the mitigating factors as aggravating factors to justify its sentence of life imprisonment without the possibility of parole.

The defendant, Ihab Masalmani, was 17 years old when he and 16-year-old Robert Taylor committed the offense for which Masalmani was sentenced to life without parole (LWOP). The two juveniles abducted a 21-year-old man in the parking lot of a fast-food restaurant and took the victim to a vacant home, where Masalmani shot and killed him.

Masalmani was charged with multiple felonies, including first-degree felony murder.[1] Masalmani was convicted, and the trial court imposed the then statutorily mandated sentence of LWOP for the murder conviction. At Masalmani's original

[1] At the time of his crimes, Michigan law treated all 17-year-olds charged with crimes as adults, regardless of their offense. See MCL 712A.1(1)(i), amended effective October 1, 2021, by 2019 PA 109.

sentencing proceeding the trial court did not consider (and, given the date of his conviction and sentencing, could not have considered) whether Masalmani was one of the "the rare juvenile offender[s] whose crime reflects irreparable corruption" such that his LWOP sentence was constitutional under the Eighth Amendment. *Miller v Alabama*, 567 US 460, 479-480 (2012) (quotation marks and citations omitted).

Miller was decided while Masalmani's appeal of right was pending. The Court of Appeals affirmed Masalmani's convictions but, in light of *Miller*'s prohibition on mandatory LWOP sentences for juvenile (homicide)[2] offenders, the panel vacated his murder sentence and remanded to the trial court for resentencing. *People v Masalmani*, unpublished per curiam opinion of the Court of Appeals, issued March 19, 2013 (Docket Nos. 301376 through 301378), p 7.

On remand, the trial court resentenced Masalmani pursuant to MCL 769.25,[3] our state's legislative response to *Miller*. The trial court heard expert and lay witness testimony. The former included testimony on adolescent brain development—the same science that the Supreme Court discussed in *Miller* to explain why juvenile offenders' "transient rashness, proclivity for risk, and inability to assess consequences" reduces their culpability and "diminish[es] the penological justifications for imposing the harshest sentences . . . even when they commit terrible crimes." *Miller*, 567 US at 472. The latter included testimony about Masalmani's behavior while incarcerated and his family background and upbringing, including descriptions of the physical and sexual abuse he experienced as a child.

At the conclusion of the hearing, the trial court again sentenced Masalmani to LWOP. Addressing the "*Miller* factors" individually,[4] the trial court concluded that all of

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[2] See *Graham v Florida*, 560 US 48 (2010) (holding that the Eighth Amendment prohibits the imposition of a LWOP sentence on a juvenile offender for a nonhomicide offense).

[3] Under MCL 769.25, a trial court must conduct a "*Miller* hearing" in any case in which the prosecutor timely moves for a sentence of LWOP for a defendant who, while less than 18 years of age, commits a crime the penalty for which is mandatory LWOP (but for the defendant's youthfulness). At that hearing, the trial court must "consider the factors listed in [*Miller*] . . . and may consider any other criteria relevant to its decision, including the individual's record while incarcerated." MCL 769.25(6). The court must "specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed." MCL 769.25(7).

[4] As *Miller* explained, a sentencing scheme that mandates LWOP for juvenile offenders violates the Eighth Amendment because such a scheme "mak[es] youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence" and "poses too great a risk of disproportionate punishment." *Miller*, 567 US at 479. In so holding,

the factors save one (Masalmani's family and home environment) weighed against a term-of-years sentence and favored life without the possibility of parole. The Court of Appeals affirmed the sentence, finding no error or abuse of discretion in the trial court's sentencing decision. *People v Masalmani*, unpublished per curiam opinion of the Court of Appeals, issued September 22, 2016 (Docket No. 325662).

We issued our decision in *Skinner* while Masalmani's application for leave to appeal was pending in this Court. *Skinner* raised a constitutional challenge to the sentencing process set forth in MCL 769.25; specifically, whether this process violates the Sixth Amendment right to have (almost) any fact that increases a defendant's punishment beyond the prescribed statutory maximum submitted to a jury and proven beyond a reasonable doubt. See *Apprendi v New Jersey*, 530 US 466 (2000). I thought the answer was yes. That is, the "most natural reading [of MCL 769.25] requires a trial court to make factual findings beyond those found by the jury before it can impose an LWOP sentence on a juvenile," because the statute requires a statement of aggravated and mitigating circumstances considered by the sentencing court, as well as reasons supporting the court's sentencing decision, before the court may impose life imprisonment without the possibility of parole. *Skinner*, 502 Mich at 152-153 (MCCORMACK, J., dissenting).

But my view did not prevail. This Court avoided the Sixth Amendment issue and held that MCL 769.25 does not require a trial court to make *any* additional findings (beyond the offender's guilt) before sentencing a juvenile offender to LWOP. *Skinner*, 502 Mich at 117-119 (opinion of the Court). That is, there is no judicial fact-finding problem, because there is no fact-finding requirement. The Court reasoned that such a result is consistent with *Miller* (and *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718 (2016)),[5] because those decisions do not impose a presumption against LWOP for juvenile offenders. *Skinner*, 502 Mich at 131. Instead, the statute "merely requires" the trial court to consider the *Miller* factors and explain its decision. *Id*. at 114-117; see

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Miller outlined several mitigating factors unique to juvenile offenders that are given no weight in a mandatory sentencing regime. These "*Miller* factors" include: "chronological age and its hallmark features," including "immaturity, impetuosity, and failure to appreciate risks and consequences"; the juvenile's family and home environment; the circumstances of the offense, including susceptibility to familial and peer pressures; the "incompetencies associated with youth," including an inability to deal with police officers, prosecutors, or defense counsel; and reduced culpability due to age and capacity for change. *Miller*, 567 US at 477-478; see also *Skinner*, 502 Mich at 113 (stating that "[MCL 769.25] requires the court to conduct a hearing to consider the *Miller* factors").

[5] *Montgomery* held that *Miller*'s prohibition on mandatory LWOP for juvenile offenders is a substantive rule that must be applied retroactively to cases in which direct appellate review ended before *Miller* was decided.

MCL 769.25(6) and (7). If this is done, the trial court's sentencing decision will not be disturbed on appeal absent an abuse of discretion. *Skinner*, 502 Mich at 131-137.

I remain unconvinced that this approach taken avoids constitutional infirmity.[6] But my disagreement with the Court's constitutional holdings aside, a trial court's decision to sentence a juvenile offender to LWOP is subject to abuse-of-discretion review. See *Skinner*, 502 Mich at 131-137. In my view the trial court abused its discretion here.

"It is undisputed that all of [the *Miller*] factors are mitigating factors." *Skinner*, 502 Mich at 115, citing *Miller*, 567 US at 489. But the trial court's treatment of these factors shows that the court did not treat them as mitigating. That is, the court did not consider them for what they are—circumstances and features common to juvenile offenders generally, consideration of which would lead to reasons *not* to impose the maximum sentence allowed by our federal constitution. See note 4 of this statement. For example, in weighing Masalmani's "chronological age and its hallmark characteristics," *Miller*, 567 US at 477, the trial court concluded that "this factor *favors* imposing [a] sentence of life without the possibility of parole." (Emphasis added). This was not simply unartful phrasing; that is, the court was not finding the *absence* of a general feature of youth to conclude that Masalmani's crime was not mitigated. Rather, the court explained that had Masalmani been several months older at the time of his crime, he would not have benefited from *Miller*'s prohibition on mandatory LWOP sentencing. The court acknowledged that the scientific evidence presented at the *Miller* hearing "established that the prefrontal cortex continues to develop into one's mid-20s," but proceeded to disregard this evidence because "the Court is not free to take this developmental disconnect into consideration when a criminal defendant is over 18." This was a clear abuse of discretion. *Miller* did not suggest that 18-year-olds are, as a class, equipped with the decision-making faculties that 17-year-olds lack. Nor did *Miller* suggest that a sentencer should disregard the expanding body of scientific knowledge on

[6] As I explained, I think the majority's approach "renders meaningless the individualized sentencing required by *Miller* by allowing LWOP effectively to serve as the default sentence as long as the prosecutor files [a] motion [seeking a sentence of LWOP]." *Skinner*, 502 Mich at 148 (MCCORMACK, J., dissenting). A sentencing scheme that does not begin with a presumption against LWOP for juvenile offenders violates the Eighth Amendment, at least under current United States Supreme Court jurisprudence. *Id*. at 150. And reading the statute to require no fact-finding requirement at all before a LWOP sentence may be imposed violates *Miller* and *Montgomery*. See *id*. at 145-148. The Supreme Court may resolve these questions next term. See *Jones v State*, 285 So 3d 626 (Miss Ct App, 2017), cert gtd 250 So 3d 1269 (Miss, 2018), cert dis by unpublished order of the Mississippi Supreme Court, entered November 27, 2018 (Docket No. 2015-CT-00899-SCT), cert gtd ___ US ___; 140 S Ct 1293 (2020).

adolescent brain development merely because an older offender who, although developmentally similar, may be subject to mandatory LWOP sentencing. To the extent *Miller* drew a bright line at the legal age of majority, the Court was not suggesting that the adolescent development period ends at the age of 18. See *Roper v Simmons*, 543 US 551, 574 (2005) ("Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. *The qualities that distinguish juveniles from adults do not disappear when an individual turns 18*.") (emphasis added). The testimony in this case, which the trial court appeared to accept, suggested that 18-year-old offenders too should *not* be sentenced as adults, for the reasons explained in *Miller*. That is, while the law does not require that categorically, the facts might well in most cases. The court's treatment of this factor invoked the scientific evidence for the precise opposite of what it showed. In doing so, the court upended *Miller*'s foundational principle—that the "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Miller*, 567 US at 474.[7]

The trial court's treatment of the other *Miller* factors (with the exception of Masalmani's family and home environment, which the court acknowledged was mitigating) did not rehabilitate the court's sentencing decision. The court's evaluation of the "incompetencies associated with youth," *Miller*, 567 US at 477, is short enough to quote in full: "[T]here was no evidence that the incapacities of youth caused defendant to be unable to participate in his defense. Nor is there any evidence that he implicated himself due to youthful incapacities. As such, this factor favors sentencing defendant to [LWOP]." Here again, I believe the trial court treated as aggravating circumstances factors that are exclusively mitigating (or, at most, neutral). *Miller* did not suggest that a juvenile offender is more deserving of LWOP if the offender is better able to participate in their defense; *Miller* discussed this factor in explaining how features of our criminal system may lead to disproportionate outcomes between juveniles and adults. See *Miller*, 567 US at 477-478 (explaining that a juvenile offender "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for

[7] The trial court provided similar reasoning when it resentenced codefendant Taylor. Like Masalmani, Taylor was convicted of first-degree felony murder (in a separate trial), received resentencing relief under *Miller* in his appeal of right, and was resentenced to LWOP. Addressing this factor in Taylor's case, the trial court stated:

> Defendant [Taylor] was a mere 14 months shy of his 18th birthday at the time of his offense, suggesting that this developmental disconnect between his prefrontal cortex and his limbic system was not much more pronounced than that of an 18 year old. In short, while this factor does not weigh as heavily against [Taylor] as it did against [Masalmani], the Court is not convinced that this factor mitigates against a sentence of life without the possibility of parole.

example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys").

Most troublesome is the trial court's treatment of Masalmani's potential for rehabilitation. See *Miller*, 567 US at 478 (stating that mandatory LWOP "disregards the possibility of rehabilitation even when the circumstances most suggest it"). After acknowledging that Masalmani's troubled upbringing was a mitigating consideration, the court cited this same upbringing to conclude that Masalmani's potential for rehabilitation was "minimal." In so finding, the court did *not* assert that Masalmani was "irreparably corrupt," but that his rehabilitation would require the type of professional treatment that "he is very unlikely to receive in prison." In other words, the trial court cited the state's inability to provide Masalmani with rehabilitative treatment—a fact completely out of Masalmani's control—as a justification for his lifelong incarceration. The trial court did not evaluate Masalmani's potential for rehabilitation but rather the state's inability to facilitate such rehabilitation.[8]

The "circumstances of the homicide offense," *Miller*, 567 US at 477, weighed heavily in the trial court's decision to impose LWOP, and there is no doubt that Masalmani's crime was vicious. But the individualized inquiry that *Miller* demands, and the sentencing decision that results from it, will always and only occur where a juvenile stands convicted of a homicide. See *Graham v Florida*, 560 US 48 (2010). Our review of the trial court's work must, therefore, always go beyond the trial court's evaluation of this factor. As the Supreme Court explained in *Miller*, "[t]hat Miller deserved severe punishment for killing [his victim] is beyond question. But once again, a sentencer needed to examine all these circumstances before concluding that life without any possibility of parole was the appropriate penalty." *Id*. at 479.

Concluding there was no abuse of discretion in this case underscores my concern that our decision in *Skinner* allows for LWOP sentences that violate the Eighth Amendment. *Skinner*, 502 Mich at 148 (MCCORMACK, J., dissenting) ("I cannot see how *Miller*'s dictates are satisfied by the hollow formality to which the majority's holding would reduce the hearing mandated by MCL 769.25(6)."). Abuse of discretion is a

[8] Or rather, the court's *perception* of the state's inability. The trial court did not identify any evidence in the record to support its suspicion that Masalmani would be "very unlikely" to receive rehabilitative services while incarcerated. And evaluating the potential for rehabilitative services in our prison system in the decades to come—time that Masalmani would remain incarcerated had the court declined to impose LWOP—is, at most, an exercise in educated guesswork.

deferential standard. But even so, the trial court's sentencing decision must be a reasonable and principled outcome based on "case-specific detailed factual circumstances." *Skinner*, 502 Mich at 134 (opinion of the Court) (quotation marks and citations omitted). That did not occur here.

For these reasons, I respectfully dissent.

BERNSTEIN and CAVANAGH, JJ., join the statement of MCCORMACK, C.J.

Order

Michigan Supreme Court
Lansing, Michigan

July 15, 2020

Bridget M. McCormack,
Chief Justice

154773 (92)

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 154773
COA: 325662
Macomb CC: 2009-005244-FC

IHAB MASALMANI,
Defendant-Appellant.

_____/

On order of the Court, the motion for reconsideration of this Court's May 29, 2020 order is considered, and it is DENIED, because we are not persuaded that reconsideration of our previous order is warranted. MCR 7.311(G).

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 15, 2020

Clerk

p0715

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 19, 2013
v IHAB MASALMANI, Defendant-Appellant.	No. 301376 Macomb Circuit Court LC No. 09-004832-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v IHAB MASALMANI, Defendant-Appellant.	No. 301377 Macomb Circuit Court LC No. 09-005144-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v IHAB MASALMANI, Defendant-Appellant.	No. 301378 Macomb Circuit Court LC No. 09-005244-FC

Before: JANSEN, P.J., and FITZGERALD and K. F. KELLY, JJ.

PER CURIAM.

A jury convicted defendant of 18 total charges, arising from three separate cases that were consolidated for trial. In LC No. 09-004832-FC, the jury convicted defendant of two counts of armed robbery, MCL 750.529, kidnapping, MCL 750.349, bank robbery, MCL

750.531a, and four counts of possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to concurrent prison terms of 15 to 50 years each for the bank robbery, armed robbery, and kidnapping convictions, to be served consecutive to four concurrent two-year terms of imprisonment for the felony-firearm convictions. In LC No. 09-005144-FC, the jury convicted defendant of carjacking, MCL 750.529a, receiving or concealing firearms, MCL 750.535b, and felony-firearm. The trial court sentenced defendant to concurrent prison terms of 15 to 50 years for the carjacking conviction, and 5 to 10 years for the receiving or concealing conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. In LC No. 09-005244-FC, the jury convicted defendant of first-degree felony murder, MCL 750.316(1)(b), carjacking, conspiracy to commit carjacking, MCL 750.529a and MCL 750.529, kidnapping, conspiracy to commit kidnapping, MCL 750.349 and MCL 750.529, larceny from a person, MCL 750.357, and felony-firearm. The trial court sentenced defendant to concurrent prison terms of mandatory life without parole for the murder conviction, 25 to 50 years each for the carjacking, kidnapping, and conspiracy convictions, and 5 to 10 years for the larceny conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right in all three cases, and the appeals have been consolidated for this Court's consideration. We affirm defendant's convictions in all three cases, but vacate his mandatory life sentence for first-degree felony murder in Docket No. 301378 and remand for resentencing on that offense.

Defendant's convictions arise from three criminal episodes that occurred during a three-day crime spree from August 9, 2009, until defendant's arrest on August 11, 2009. The prosecutor's theory was that on the afternoon of August 9, 2009, defendant, acting in concert with codefendant Robert Taylor, both of whom were juveniles, carjacked and abducted Matt Landry from outside an Eastpointe restaurant, held Landry captive for several hours, stole his money by using his ATM card, and later murdered him by shooting him in the head and leaving his body at an abandoned burnt-out house in a drug-infested neighborhood. The next day, defendant, using Landry's vehicle and now acting alone, robbed a Flagstar Bank, during which he pointed a gun and threatened several people inside the bank, temporarily abducted customer Sarah Maynard, and stole money from both the bank and a customer before fleeing in Landry's vehicle. Defendant continued his crime spree on August 11, 2009, by carjacking David Hassroune at gunpoint in a Walmart parking lot before being arrested. Surveillance videotape from several locations depicted defendant committing many of the offenses. At trial, the defense focused on contesting the charges that defendant shot Landry and kidnapped Maynard.

I. SUFFICIENCY OF THE EVIDENCE

Defendant argues that his conviction for first-degree felony murder must be vacated because the evidence failed to establish that he was the person who shot and killed Landry and also failed to establish the necessary element of malice beyond a reasonable doubt. When ascertaining whether sufficient evidence was presented at trial to support a conviction, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

A. IDENTITY

First-degree felony murder requires proof that the defendant killed the victim with malice while committing, attempting to commit, or assisting in the commission of a felony specifically enumerated in MCL 750.316(1)(b). *People v Gayheart*, 285 Mich App 202, 210; 776 NW2d 330 (2009). Identity is also an essential element in a criminal prosecution, *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976), and the prosecution must prove the identity of the defendant as the perpetrator of a charged offense beyond a reasonable doubt. *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967).

Defendant asserts that the prosecution failed to present credible evidence that he was the person who killed Landry. We disagree. Although there were no witnesses to the actual shooting, defendant's identity as the killer properly could be established through circumstantial evidence. The deferential standard of review "is the same whether the evidence is direct or circumstantial," and it is well established that "circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *Nowack*, 462 Mich at 400 (citation omitted); see also *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). The credibility of identification testimony is for the trier of fact to resolve and this Court will not resolve it anew. *Nowack*, 462 Mich at 400.

The defense did not dispute the evidence that defendant carjacked and kidnapped Landry outside a Quiznos restaurant in Eastpointe on the afternoon of August 9, 2009. Two witnesses, Lawrence Wata and Carol Santangelo, observed defendant and codefendant Taylor acting aggressively toward Landry during the initial contact. While Taylor, who Wata believed was armed with a weapon, acted as a lookout, defendant grabbed Landry by the neck, dragged him to the rear of his vehicle, and attempted to push Landry in the trunk. Defendant then forced Landry back inside the car, punched Landry, who had his hands up, and signaled for Taylor to join them. Defendant drove away in Landry's vehicle with both Landry and Taylor inside. Evidence was presented that over the next several hours defendant continued to drive Landry's vehicle, hold Landry captive, and steal money from Landry's bank account.

About an hour after defendant abducted Landry, defendant was captured on videotape using Landry's ATM card at a gas station on the east side of Detroit, making three separate withdrawals, totaling more than $300. Soon thereafter, in a Detroit neighborhood near the gas station, a resident viewed defendant and another male standing behind Landry's Honda and looking into the trunk. There was no sign of Landry. However, a cigarette butt later found in the truck revealed the presence of Landry's DNA. Defendant was thereafter captured on another Detroit area gas station security video, still driving Landry's green Honda, with Taylor and two women, and no sighting of Landry. Defendant was also captured on an Eastland mall clothing store's videotape, shopping with two other men and spending a large sum of money.

Seven hours after Landry was abducted, defendant and Taylor drove Landry's Honda to a heavily drug-infested area in Detroit where they parked outside a vacant, burnt-out drug house at 14703 Maddelein. According to Frederick Singleton, Taylor was driving the vehicle and defendant was in the back seat with Landry. Through Singleton, defendant arranged to purchase crack cocaine, after which defendant, Taylor, and Landry went inside the drug house. As defendant smoked the crack cocaine inside the house, Landry, who Singleton described as silent

and "out of place," sat motionless on the couch next to Taylor. When Singleton spoke to Landry, defendant referred to Landry as his "home boy" and stated, "He doesn't get high, don't worry about him." Defendant purchased and smoked another round of crack cocaine and, at one point, two males came to the house and gave defendant a gas can. According to Singleton, after defendant smoked the second round of crack cocaine, he began to "tweak," which Singleton described as becoming "very paranoid," "antsy," and "amped up." Landry was last seen alive at about 10:00 p.m. inside the vacant house with defendant and Taylor. The next day, defendant used Landry's Honda to commit a bank robbery. Defendant was armed during that offense, attempted to kidnap a patron, and threatened to kill the people inside the bank. Two days later, Landry's significantly decomposed body was found inside a vacant, burnt-out house at 14711 Maddelein, only a few houses from the location where Landry was last seen alive with defendant and Taylor. Landry had been shot in the back of the head and the bullet path was consistent with Landry having been shot while kneeling.

Viewed in a light most favorable to the prosecution, the evidence that (1) defendant, in conjunction with Taylor, brazenly and forcibly carjacked and kidnapped Landry, (2) defendant held Landry captive for at least seven hours, during which time he dragged Landry by the neck, punched Landry, stole money from Landry's bank account, and took Landry to a drug house where defendant smoked cracked cocaine to the point of becoming paranoid and amped up, (3) Landry was last seen alive with defendant and Taylor at the drug house, (4) Landry was shot in the back of the head, (5) Landry's body was found on the same street just a few houses from the location where he was last seen alive with defendant and Taylor, at which time defendant was described as "antsy," "paranoid," and "amped up," and (6) that the day after Landry was last seen alive, defendant was still in possession of Landry's car, which he used to commit another violent crime while armed with a firearm, was sufficient to enable a rational trier of fact to determine beyond a reasonable doubt that defendant was the person who killed Landry during the criminal episode.

Although defendant argues that there were other people at the vacant house who could have killed Landry, and that Singleton's testimony was not credible, these challenges are related to the weight of the evidence rather than its sufficiency. *People v Scotts*, 80 Mich App 1, 9; 263 NW2d 272 (1977). These same challenges were presented to the jury during opening statement, cross-examination, and closing argument. This Court may not interfere with the jury's role of determining issues of weight and credibility. *Wolfe*, 440 Mich at 514.

B. MALICIOUS INTENT

Defendant also argues that, even if his identity as the shooter was established, there was insufficient evidence that he acted with malice. "Malice is defined as 'the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.'" *People v Werner*, 254 Mich App 528, 531; 659 NW2d 688 (2002) (citation omitted). Malice may be inferred from facts in evidence, including the use of a dangerous weapon. *People v Bulls*, 262 Mich App 618, 627; 687 NW2d 159 (2004). "[M]inimal circumstantial evidence will suffice to establish the defendant's state of mind[.]" *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008).

Viewed in a light most favorable to the prosecution, the evidence that Landry was forcibly abducted, held captive for several hours, and shot in the back of his head in a manner consistent with an execution, after which his body was left inside a vacant, burnt-out house in a highly drug-infested area, was sufficient to permit a rational trier of fact to infer beyond a reasonable doubt that defendant possessed the requisite malicious intent for felony murder. Thus, the evidence was sufficient to support defendant's conviction of first-degree felony murder.

II. THE PROSECUTOR'S CONDUCT

Defendant next argues that misconduct by the prosecutor during closing and rebuttal arguments denied him a fair trial. Because defendant did not object to the prosecutor's conduct 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). This Court will not reverse if the alleged prejudicial effect of the prosecutor's conduct could have been cured by a timely instruction upon request. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

A. DENIGRATED DEFENDANT'S CHARACTER

Defendant argues that the prosecutor denigrated his character during closing and rebuttal arguments by comparing him to the gangster character "Tony Montana" from the movie *Scarface*. A prosecutor may not denigrate a defendant with prejudicial or intemperate comments. *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995). However, prosecutors have great latitude when arguing at trial. *People v Fyda*, 288 Mich App 446, 461; 793 NW2d 712 (2010). They may argue the evidence and all reasonable inferences that arise from the evidence in relationship to their theory of the case, and they need not state their inferences in the blandest possible language. *Bahoda*, 448 Mich at 282; *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007).

Relying on *Bahoda*, 448 Mich at 267, defendant asserts that the prosecutor injected the inflammatory references to Tony Montana with no apparent justification except to arouse prejudice. We disagree. During trial, Hassroune, the Walmart carjacking victim, testified that he observed several tattoos on defendant's hands while observing defendant holding a gun. Defendant had the word "Bad" tattooed on his left hand, and the word "Guy" tattooed on his right hand, and the number "5" was tattooed on each of his ten knuckles. The jury was shown photographs of defendant's hands depicting the tattoos. Police Detective Brian McKenzie testified that he asked defendant about the tattoos as he was photographing defendant's hands. Defendant stated that the tattoos "were a reference to the movie Scarface." Thus, the connection to "bad guy" Tony Montana from the movie *Scarface* originated from defendant himself, as opposed to the prosecutor making a baseless reference. Viewed in this context, the prosecutor's remarks do not rise to the level of plain error.

Moreover, a timely objection to the challenged remarks could have cured any perceived prejudice by obtaining an appropriate cautionary instruction. See *Watson*, 245 Mich App at 586. And even though defendant did not object, the trial court instructed the jury that the lawyers' statements and arguments are not evidence, that the jury was to decide the case based only on the

properly admitted evidence, and that the jury was to follow the court's instructions. These instructions were sufficient to dispel any possible prejudice and to protect defendant's substantial rights. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). It is well established that jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

B. VOUCHING FOR FREDERICK SINGLETON'S CREDIBILITY

Defendant next argues that the prosecutor improperly vouched for the credibility of Frederick Singleton by stating that "Singleton is a very credible witness." As defendant correctly notes, a prosecutor may not vouch for the credibility of a witness by conveying that he has some special knowledge that the witness is testifying truthfully. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). But a prosecutor is free to argue from the facts and testimony that a witness is credible or worthy of belief. *Dobek*, 274 Mich App 66.

Here, the prosecutor did not suggest that he had some special knowledge that Singleton was credible. Rather, the prosecutor's remark was made in the context of providing reasons, grounded in the evidence, why Singleton should be believed. Defense counsel repeatedly asserted throughout the trial that Singleton was untrustworthy and not credible. In his closing argument, the prosecutor urged the jury to evaluate Singleton's testimony and demeanor, discussed the reliability of his testimony, and argued that there were reasons from the evidence to conclude that Singleton was credible. The prosecutor noted that Singleton made no effort to conceal his criminal and drug-related history. He further noted that Singleton could have exaggerated defendant's actions by stating that he observed him with a gun and observed him beating Landry, which clearly would have been more detrimental to the defense. Throughout closing and rebuttal arguments, the prosecutor explained several connecting events involving defendant, Landry, and Landry's vehicle, which supported Singleton's testimony. Because the prosecutor's remark was based on the evidence at trial, there was no plain error. Moreover, in its final instructions, the trial court instructed the jury that it was the sole judge of witness credibility, thereby protecting defendant's substantial rights. *Long*, 246 Mich App 582, 588; *Graves*, 458 Mich at 486.

For these reasons, defendant has not established any basis for relief based on the prosecutor's conduct at trial.

III. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant alternatively argues that defense counsel was ineffective for failing to object to the prosecutor's comments. Because defendant did not raise an ineffective assistance of counsel claim in the trial court, our review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant first must show that counsel's performance was below an objective standard of reasonableness. In doing so, defendant must overcome the strong presumption that counsel's assistance was sound trial

strategy. Second, defendant must show that, but for counsel's deficient performance, it is reasonably probable that the result of the proceeding would have been different. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011).

Because the prosecutor's remarks were not improper, defense counsel's failure to object was not objectively unreasonable. Further, because the trial court's jury instructions were sufficient to dispel any possible prejudice, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different. Consequently, defendant cannot establish a claim of ineffective assistance of counsel.

IV. DEFENDANT'S SUPPLEMENTAL BRIEF

Defendant has filed a supplemental brief in which he seeks relief from his mandatory life sentence for his first-degree murder conviction. Defendant was a juvenile at the time he committed the felony-murder offense. Under *Miller v Alabama*, 567 US ___; 132 S Ct 2455; 183 L Ed 2d 407 (2012), and *People v Carp*, ___ Mich App ___; ___NW2d ___ (Docket No. 307758, issued November 15, 2012), lv pending, defendant's sentence of mandatory life imprisonment without parole violates the Eighth Amendment ban on "cruel and unusual" punishment. US Const, Amend VIII. Accordingly, we vacate defendant's mandatory life sentence for first-degree murder and remand for resentencing on that offense consistent with *Miller* and *Carp*.[1] See *Carp*, slip op at 24, 40.

Affirmed in part, vacated in part, and remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly

[1] In *Carp*, slip op at 31-41, this Court provided guidelines for trial courts to follow until the Legislature adopts new sentencing standards for juvenile offenders. The trial court shall reconsider defendant's sentence for first-degree felony murder under those guidelines, rather than wait until the Legislature acts. *Carp*, slip op at 31.

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs. Case No. 2009-5244-FC

IHAB MASALMANI,

Defendant.

_____/

OPINION AND ORDER

This matter is before the Court following a resentencing hearing.

I. Factual and Procedural Background

Following a jury trial, defendant was convicted of 18 total charges in three consolidated cases. Pertinent to the pending matter, the jury convicted defendant of one count of first-degree felony murder, contrary to MCL 750.316(1)(b). The Court sentenced defendant to what was – at the time – a mandatory sentence of life without parole on his murder conviction. After the trial and sentencing, but before his appeal was final, the United States Supreme Court issued *Miller v Alabama*, 576 US ____; 132 S Ct 2455; 183 L Ed 2d 407 (2012), holding that a *mandatory* life sentence cannot be imposed on a juvenile defendant and that a trial court must instead consider several factors in deciding whether to sentence a juvenile to life or to some term of years. Given the holding in *Miller*, the Court of Appeals remanded this case for resentencing.

This Court conducted a resentencing hearing on October 21 and 24, 2014. The Court has carefully considered the arguments presented at this hearing. The Court indicated that if the

parties wished to submit sentencing memoranda or briefs, they would be due on December 12, 2014. Defendant submitted an additional sentencing brief, which this Court has reviewed.

II. Law

As a preliminary matter, the Court finds that it is expedient to quote the Supreme Court's decision in *Miller* at some length, in order to clarify the factors which must be considered by a trial court in sentencing a juvenile convicted of first degree murder:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

Miller, 132 S Ct at 2468 (emphasis added).[1]

Ultimately, the United States Supreme Court concluded that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders. *Id.* The Court declined to consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical ban on life without parole for juveniles or at least for those 14 years and younger. *Id.* That said, the Court opined that appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. *Id.* While the Supreme Court did not foreclose a sentencer's ability to make that

[1] It is worth noting that the Michigan Supreme Court's decision in *People v Carp*, 496 Mich 440, 465; ___ NW2d ___ (2014), lists the factors to be considered under *Miller* by block quoting this portion of *Miller*. See *supra*.

judgment in homicide cases, the Court required the sentencer to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison. *Id.*

III. Analysis

A. Chronological Age and Hallmark Features

With the relevant law in mind, the Court shall now discuss each of the factors set forth in *Miller* in turn, as they apply to the facts of this case. The first factor is defendant's chronological age and its hallmark features. Defendant was 17 years and eight months old at the time of his offense. Had he committed his offense four months later, life without parole would be mandatory and resentencing would be impermissible. Defendant's own expert witness, Dr. Daniel Keating, a neuroscientist and expert in adolescent brain development, testified that "there would be no known reasons to assume significant difference between the rehabilitative prospects between 17 and 18." Trans. of 10/21/14 at 43 (Keating).

The Court must also consider the "hallmark features" of the defendant's age, including immaturity, impetuosity, and failure to appreciate risks. Dr. Keating testified that the limbic system – which serves as "an arousal system, . . . an incentive system, and a reward system" – is much more active during one's teenage years than as an adult. *Id.* at 20-21 (Keating). Dr. Keating further testified that the prefrontal cortex governs "executive function" and "is designed as a brake on the [limbic] system but it develops much more slowly than the limbic system." *Id.* at 23 (Keating). He explained that there is a "developmental maturity mismatch" between the limbic system and the prefrontal cortex. *Id.* at 24-25 (Keating). He explained that "[t]he prefrontal cortex . . . doesn't reach full maturity until the mid-20s." *Id.* at 23 (Keating). As a result, teenagers tend to engage in "generally reckless behavior." *Id.* at 28 (Keating).

Defendant's guardian ad litem opined that in terms of maturity, defendant "was probably in the middle" out of the 5,000 to 8,000 children he had represented over the years. *Id.* at 108-109 (Ladd). However, the guardian ad litem opined that "[t]hat's not very mature compared to the general population." *Id.* at 109 (Ladd).

In light of the foregoing, the Court finds that defendant's chronological age and its hallmark features do not justify sentencing defendant differently than an 18 year old criminal defendant. *Miller* dealt with juvenile defendants who were a mere 14 years old at the time of their offenses – a far cry from this case. Defendant was only 4 months away from being an adult. Moreover, while the testimony established that the prefrontal cortex continues to develop into one's mid-twenties, the Court is not free to take this developmental disconnect into consideration when a criminal defendant is over 18. To the contrary, the Court is *required* to impose mandatory life without parole in first degree murder cases for defendants who are only 4 months older than defendant was when he committed his crimes. There was nothing in the testimony or evidence presented which suggests that treating defendant differently from an 18 year old would be warranted in this case. Upon careful consideration, the Court finds that this factor favors imposing a sentence of life without the possibility of parole.

B. Family and Home Environment

There was essentially uncontroverted evidence that defendant's family and home environment was terrible. Defendant came to the United States from Lebanon as a child and initially lived with relatives in California, but "there were problems with mistreatment there and the relatives no longer wanted to or should care for [him]." See Trans. of 10/21/14 at 105 (Ladd). He and his sister were staying with an aunt in Dearborn and "there were allegations of physical abuse and sexual abuse and neglect involving both of the children." *Id.* at 104 (Ladd).

Defendant first came into the foster care system based on an abuse and neglect case. *Id.* at 103 (Ladd). According to his case worker, "there was definitely a language barrier. . . ." *Id.* at 83 (Keller). However, child-placing agencies do not consider the cultural and language needs of the child, and are "oftentimes prohibited from doing that under the federal law." Trans. of 10/24/14 at 26 (Vandervort).

Defendant's guardian ad litem estimated that he was in at least ten different foster homes, and opined that "progressively it made it worse and worse for him." Trans. of 10/21/14 at 112 (Ladd). Defendant "was smoking marijuana" with one foster mother, and "witnessing the foster mother having inappropriate sexual actions in front of him." *Id.* at 87 (Keller). At some point, defendant stopped developing attachments to others. Trans. of 10/24/14 at 23 (Vandervort).

Defendant was "aggressive towards peers and towards teachers. He would walk out of class. Fight." Trans. of 10/21/14 at 90 (Keller). His involvement with the juvenile justice system began in 2008, with assault and battery and a drug offense. *Id.* at 113 (Ladd). Defendant's guardian ad litem estimated that there were at least five juvenile petitions concerning defendant during periods that he was AWOL from his placements. *Id.* at 132 (Ladd). His guardian ad litem opined that defendant "became more and more oriented towards being with kids on the street and [that was] the only place . . . where he felt that he belonged." *Id.* at 112 (Ladd). It is also worth noting that defendant was diagnosed with ADHD, depression, and pediatric seizures. *Id.* at 85 (Keller). There was also testimony that defendant was diagnosed with epilepsy. Trans. of 10/24/14 at 18 (Vandervort).

Given this testimony, there is no question that defendant's "family and home environment" was terrible. Defendant lacked stability, was abused, and eventually stopped

forming attachments with others altogether. As such, this factor likely weighs in defendant's favor.

C. Circumstances of the Homicide Offense,

Extent of Participation, and Familial and Peer Pressure

The next factor concerns the circumstances of the homicide offense, the extent of defendant's participation, and familial and peer pressure. Although testimony regarding the homicide offense was not specifically presented during the resentencing hearing, the circumstances of the offense were established during the trial in this matter. Defendant and his co-defendant, Robert Taylor, abducted Matthew Landry at gunpoint outside a sandwich shop in Eastpointe around 2:30 p.m. on August 9, 2009. Defendant used Landry's debit card to make over $300 in withdrawals, drove to a gas station on the east side of Detroit, and went shopping for clothes at Eastland Mall. Around 9:30 p.m., Taylor drove defendant and Landry to a drug house in Detroit. Defendant purchased crack cocaine, and smoked it on the couch next to Landry. Landry was last seen alive at 10:00 p.m. Sometime thereafter, defendant shot Landry in the back of the head in a vacant house. Over the next several days, defendant committed additional violent crimes, employing Landry's vehicle as a getaway car. There was no evidence that any of defendant's criminal activity was precipitated by peer or family pressure.

Accordingly, this factor weighs heavily in favor of finding that a sentence of life without the possibility of parole is appropriate. Defendant had numerous opportunities to abandon his plan, and instead drove with his co-defendant and Matthew Landry around town for hours before killing Landry in cold blood. There is nothing in the facts and circumstances of the crime which would warrant anything less than life in prison without the possibility of parole.

D. Incapacities of Youth

Next, there was no evidence that the incapacities of youth caused defendant to be unable to participate in his defense. Nor is there any evidence that defendant implicated himself due to youthful incapacities. As such, this factor favors sentencing defendant to life without the possibility of parole.

E. Possibility of Rehabilitation

The final factor to consider is the possibility of rehabilitation. Dr. Keating testified that "it is very difficult to predict from this point in time out to the distant future whether there's a zero or non-zero prospect of rehabilitation." Trans. of 10/21/14 at 70 (Keating). Nevertheless, he acknowledged that "the rehabilitation challenges are certainly higher" in the case of a juvenile who "is capable of pulling a trigger." *Id.* at 65 (Keating). Moreover, "patterns of behavior are predictive." *Id.* at 55 (Keating). In short, "the worse the circumstances, the more likely it is for . . . nonresilience [i.e., no rehabilitation] to be the case." *Id.* at 56 (Keating).

Dr. Danuloff, a clinical psychologist who evaluated defendant, testified that he cannot predict a future outcome with respect to defendant. Trans. of 10/24/14 at 55 (Danuloff). He acknowledged that defendant was basically "unsocialized, unattached, unattached in any kind of substantial way human relationships," and viewed other people as "objects to meet his needs or not" at the time of his offense. *Id.* at 47 (Danuloff). He opined that defendant "may have been irreparably corrupt, but got lucky." *Id.* at 57 (Danuloff). He testified that defendant had many misconducts towards the beginning of his incarceration, but that the last misconduct was in August of 2013. *Id.* at 51 (Danuloff). He testified that circumstances since defendant's incarceration – specifically, solitary confinement and the *Miller* decision – have caused defendant to begin "to conceive of the idea of hope." *Id.* at 48-49 (Danuloff). This has led to his

reading books and beginning "to have the capacity to self-explore," although Dr. Danuloff stressed that "[t]his is very primitive. This is embryonic. . . ." *Id.* at 50 (Danuloff).

Dr. Danuloff also testified concerning several conversations he has had with defendant since his incarceration. For instance, he testified that defendant told him that "[e]ven a Godly person can punish people who bring harm to them. Even God did this." *Id.* at 53 (Danuloff). Danuloff further testified that he asked defendant whether his crime was "righteous or evil," and defendant responded "well, it was a little bit of both. . . . And what he said was, well, I didn't have any choice." *Id.* at 54 (Danuloff).

Having carefully reviewed all of the testimony and exhibits in this matter, the Court finds that this factor favors a sentence of life without the possibility of parole. The very difficulty of defendant's upbringing – the only factor which could be said to weigh in favor of an indeterminate sentence – also suggests that defendant's prospects for rehabilitation are minimal. None of the experts presented by defendant were ready to testify that defendant has undergone anything more than the first "embryonic" stirrings of moral sensibility. The Court finds it rather telling that defendant only began to avoid misconducts once the possibility of parole became a reality with the Supreme Court's decision in *Miller*. Moreover, the Court finds it incredibly troubling that defendant continues to believe that his cold-blooded murder of Matthew Landry was partially "righteous." Finally, the Court notes that even if defendant is experiencing the embryonic development of a rudimentary moral sensibility, it is implausible that he will experience full rehabilitation without intensive professional assistance – assistance which he is very unlikely to receive in prison. For all of these reasons, the Court concludes that defendant's prospects for rehabilitation are negligible.

IV. Summary of the Court's Decision

The Court has carefully considered the various factors set forth in Supreme Court's decision in *Miller*. The Court has reviewed the testimony presented at the resentencing hearing, and the exhibits presented. Having done so, the Court is satisfied that defendant's case presents precisely what the Supreme Court characterized as the "rare juvenile offender whose crime reflects irreparable corruption." *Roper v Simmons*, 543 US 551, 573; 125 S Ct 1183; 161 L Ed 2d 1 (2004). Based on the foregoing, the Court finds that defendant is properly sentenced to life in prison without the possibility of parole.

V. Conclusion

For the reasons set forth above, the Court finds that defendant is properly sentenced to life without the possibility of parole. Pursuant to MCR 2.602(A)(3), this Opinion and Order resolves the last pending claim and closes this case.

IT IS SO ORDERED.

Hon. Diane M. Druzinski, Circuit Court Judge

Date: January 6, 2015

DMD/ac

cc: William L. Cataldo, Asst. Prosecuting Attorney
Joshua D. Abbott, Asst. Prosecuting Attorney
Valerie R. Newman, Esq.

DIANE M. DRUZINSKI
CIRCUIT JUDGE
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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 22, 2016
v	No. 325662 Macomb Circuit Court
IHAB MASALMANI, Defendant-Appellant.	LC No. 2009-005244-FC

Before: BORRELLO, P.J., and MARKEY and RIORDAN, JJ.

PER CURIAM.

Defendant was convicted at a jury trial of first-degree felony murder, MCL 750.316(1)(b), carjacking, MCL 750.529a, conspiracy to commit carjacking, MCL 750.529a; MCL 750.157a, kidnapping, MCL 750.349, conspiracy to commit kidnapping, MCL 750.349; MCL 750.157a, larceny from the person, MCL 750.357, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was originally sentenced to mandatory life imprisonment without the possibility of parole for the first-degree felony murder conviction, 25 to 50 years' imprisonment each for the carjacking, conspiracy to commit carjacking, kidnapping, and conspiracy to commit kidnapping convictions, 5 to 10 years' imprisonment for the larceny from the person conviction, and two years' imprisonment for the felony-firearm conviction.[1] On defendant's appeal by right, this Court affirmed defendant's convictions but vacated his mandatory sentence of life imprisonment without the possibility of parole for the first-degree felony murder conviction and remanded for resentencing on that offense in accordance with *Miller v Alabama*, 567 US ___; 132 S Ct 2455; 183 L Ed 2d 407 (2012). *People v Masalmani*, unpublished opinion per curiam of the Court of Appeals, issued March 19, 2013 (Docket Nos. 301376, 301377, 301378), p 7. The trial court on remand resentenced defendant to life imprisonment without the possibility of parole for the first-degree

[1] Defendant was also convicted of and sentenced for numerous other charges in two other cases that were consolidated for trial with the instant case, and this Court affirmed those convictions and sentences. See *People v Masalmani*, unpublished opinion per curiam of the Court of Appeals, issued March 19, 2013 (Docket Nos. 301376, 301377, 301378), pp 1-2. Those two cases that were consolidated with the instant case are not presently before this Court, and we therefore do not list those convictions and sentences.

felony murder conviction. Defendant now appeals by right the sentence imposed on remand. We affirm.

Defendant argues that the trial court erred in imposing a life without parole sentence on remand. We disagree. "[T]he appropriate standard of review in cases where a judge imposes a sentence of life without parole on a juvenile defendant is a common three-fold standard . . . ." *People v Hyatt*, ___ Mich App ___, ___; ___ NW2d ___ (2016) (Docket No. 325741); slip op at 25. The trial court's findings of fact are reviewed for clear error, questions of law are reviewed de novo, and the court's ultimate determination as to an appropriate sentence is reviewed for an abuse of discretion. *Id*.

In *Miller*, 132 S Ct at 2460, the United States Supreme Court held that a sentence of "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' "

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. . . . And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it. [*Id*. at 2468.]

"By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." *Id*. at 2469. The Supreme Court declined to consider the defendants' arguments for a categorical prohibition of life without parole sentences for juveniles but stated that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id*. The Supreme Court noted that it was difficult to distinguish "at this early age between the juvenile offender whose crimes reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id*. (quotation marks and citations omitted). "Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id*.

Following the issuance of *Miller*, our Legislature enacted MCL 769.25, which became effective on March 4, 2014. See 2014 PA 22. The statute applies to a defendant who was less than 18 years old at the time he or she committed the offense. MCL 769.25(1). The prosecutor may file a motion to sentence a defendant convicted of first-degree murder to life without parole. MCL 769.25(2) and (3). If the prosecutor files such a motion in conformance with the statutory requirements, the trial court must conduct a hearing at which the court considers the factors listed

in *Miller* and any other relevant criteria, including the defendant's prison record. MCL 769.25(6). At the hearing, the trial court must specify the aggravating and mitigating circumstances and the reasons for the sentence imposed; the court may consider evidence presented at trial and evidence presented at the sentencing hearing. MCL 769.25(7). If the trial court declines to impose a life without parole sentence, the court must impose a sentence in which the maximum term is at least 60 years and the minimum term is between 25 and 40 years. MCL 769.25(9).

Although the trial court's ultimate determination of the appropriate sentence is reviewed for an abuse of discretion, "the imposition of a juvenile life-without-parole sentence requires a heightened degree of scrutiny regarding whether a life-without-parole sentence is proportionate to a particular juvenile offender, and even under this deferential standard, an appellate court should view such a sentence as inherently suspect." *Hyatt*, ___ Mich App at ___; slip op at 26. "[A]ppellate review of a juvenile life-without-parole sentence cannot be a mere rubber-stamping of the penalty handed out by the sentencing court." *Id*. Although such a sentence is not presumed to be unconstitutional, a searching inquiry into the record must be undertaken with "the understanding that, more likely than not, the sentence imposed is disproportionate." *Id*. A sentencing court abuses its discretion if it " 'fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case.' " *Id*. at 27, quoting *United States v Haack*, 403 F3d 997, 1004 (CA 8, 2005).

In *Hyatt*, ___ Mich App at ___; slip op at 27-28, this Court concluded that the trial court had failed to adhere to the directives in *Miller* and its progeny "about the rarity with which a life-without-parole sentence should be imposed." Although the trial court in *Hyatt* focused on the *Miller* factors, "the court gave no credence to *Miller*'s repeated warnings that a life-without-parole sentence should only be imposed on the rare or uncommon juvenile offender." *Hyatt*, ___ Mich App at ___; slip op at 28. Moreover, the trial court in *Hyatt* had emphasized a psychologist's opinion that the defendant's prognosis for change *in the next five years* was poor; the focus on a five-year period was inconsistent with the holding in *Miller* "that a life-without-parole sentence will be proportionate for the juvenile who is irreparably corrupt and incapable of change – not one who is incapable of change within the next five years." *Id*. This Court therefore remanded the case for resentencing and directed the trial court "to not only consider the *Miller* factors, but to decide whether this individual is the truly rare juvenile mentioned in *Miller* who is incorrigible and incapable of reform." *Id*.

In the present case, the trial court did not err in analyzing each of the *Miller* factors and finding that defendant is the rare juvenile offender who is irreparably corrupt. The trial court expressed full appreciation of the rarity of the circumstances in which a juvenile offender will be deemed incapable of reformation. The court quoted and discussed relevant portions of the holding and analysis in *Miller,* and noted the admonition in *Miller* that appropriate occasions to sentence juveniles to life without parole will be uncommon. Then, after analyzing the *Miller* factors, the trial court concluded "that defendant's case presents precisely what the Supreme Court characterized as the 'rare juvenile offender whose crime reflects irreparable corruption.' " Accordingly, the trial court accorded appropriate recognition and made pertinent findings

regarding the rarity of circumstances warranting a life without parole sentence for a juvenile offender.

Moreover, the trial court's conclusion that defendant is the rare juvenile offender for whom a life without parole sentence is warranted was supported by the court's accurate analysis of the *Miller* factors. We will now discuss each of the *Miller* factors.

The first factor concerns defendant's age and its hallmark features. *Miller*, 132 S Ct at 2468. Defendant was 17 years and 8 months old when he committed the offenses (in marked contrast to the 14-year-old defendants in *Miller*, 132 S Ct at 2460[2]). The record refutes any claim that the hallmark features of adolescence identified in *Miller*, 132 S Ct at 2468, including immaturity, impetuosity, and a failure to appreciate risks and consequences, played any role in defendant's crimes. This was not, as in *Miller*, 132 S Ct at 2465, a mere botched robbery that turned into a killing. Defendant engaged in an unusually horrific, disturbing, and violent crime spree that extended over a three-day period. Defendant, aided by codefendant Robert Taylor, brazenly and forcibly kidnapped and carjacked Matt Landry in broad daylight outside a restaurant, punched and dragged him by the neck, drove his car, held him captive for at least seven hours, used his ATM card to steal his money and buy numerous items. He then took Landry to a drug house where defendant bought and consumed crack cocaine. Finally, defendant took Landry to a nearby vacant house where he killed him in a brutal execution style by shooting him in the back of the head. Defendant then committed additional violent crimes over the next two days, including robbing a bank and its customers, kidnapping a bank customer, and another carjacking. Landry's significantly decomposed body was found two days later inside the vacant burned out house where he had been shot in the back of the head. From the position of the body, it appeared that Landry had been kneeling at the time of his murder. Defendant's criminal actions over an extended period of time are not reflective of a merely immature or impetuous adolescent who fails to appreciate risks and consequences.

Defendant relies on testimony by Dr. Daniel P. Keating, defendant's expert in cognitive and brain development in adolescents, about a developmental maturity mismatch in which an adolescent's limbic system matures more quickly than the prefrontal cortex. This testimony has minimal bearing on these facts, and Dr. Keating did not meet or interview defendant. He was

[2] The Supreme Court in *Miller* indicated that it is appropriate to take into account the differences between juveniles of different ages. In particular, when explaining the flaws of a scheme of mandatory life imprisonment without parole for juveniles, the *Miller* Court said: "Under these schemes, every juvenile will receive the same sentence as every other—the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one." *Miller*, 132 S Ct at 2467-2468. The *Miller* majority criticized the dissents in *Miller* for repeatedly referring to 17-year-olds who have committed heinous offenses and comparing those defendants to the 14-year-old defendants in *Miller*. The *Miller* majority explained: "Our holding requires factfinders to attend to exactly such circumstances – to take into account the differences among defendants and crimes. By contrast, the sentencing schemes that the dissents find permissible altogether preclude considering these factors." *Id*. at 2469 n 8.

only addressing generic brain science. Defendant's reliance on Dr. Keating's testimony that the prefrontal cortex is not fully developed until a person reaches his or her middle twenties fails to consider that an offender who is only four months older than defendant is subject to a *mandatory* life without parole sentence. Dr. Keating acknowledged that a person who is 17 years and 8 months old is not significantly different in brain development from an 18-year-old person. Also, William Ladd, who was defendant's lawyer guardian ad litem (LGAL) for many years, testified that defendant fell within the middle range in terms of maturity of the 5,000 to 8,000 children with whom Ladd had worked in his 30 years of experience. In sum, defendant's chronological age and its hallmark features do not weigh in favor of mitigation.

The next factor concerns defendant's family and home environment. *Miller*, 132 S Ct at 2468. The trial court correctly noted that there was uncontroverted testimony that defendant had a terrible family and home environment, having been subjected to abuse and neglect by relatives in the United States after having been sent here from Lebanon as a child. Defendant was placed in at least 10 foster homes. He was diagnosed with ADHD, depression, and pediatric seizures. Services meant to address his special needs were not continuously provided. Further, cultural and linguistic considerations were not adequately taken into account. As defendant was moved from one foster care placement to another, he lost the ability to form attachments with parental figures and became more oriented toward being out on the streets, eventually becoming involved in gangs. In school, defendant struggled academically and began getting into fights and exhibiting disrespect to his teachers. Defendant had juvenile delinquency cases for assault and drug offenses; he pleaded guilty to misdemeanors and became a delinquent court ward. In light of the terrible circumstances of defendant's family and home environment, the trial court properly weighed this factor in favor of defendant and against a life without parole sentence.

The next factor is "the circumstances of the homicide offense, including the extent of [defendant's] participation in the conduct and the way familial and peer pressures may have affected him." *Miller*, 132 S Ct at 2468. As discussed, defendant actively participated in the crimes. There is no indication that any family or peer pressure led defendant to commit the crimes. Defendant held Landry captive for at least seven hours, used his ATM card to obtain Landry's money, purchased multiple items with that money, took Landry to a drug house where defendant consumed crack cocaine, and then took Landry to a nearby vacant house where defendant shot Landry in the back of the head in a cold-blooded execution-style murder. Defendant then committed additional violent crimes over the next two days and used Landry's vehicle as a getaway car. Defendant had more than ample opportunity to abandon his criminal acts during the many hours that he held Landry captive and used his money before killing him in a brutal fashion. Given defendant's extensive participation in these disturbing criminal acts and the absence of any family or peer pressure on defendant, the trial court did not err in heavily weighing this factor against defendant and concluding that it did not favor mitigation.

The next *Miller* factor is whether defendant "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys." *Miller*, 132 S Ct at 2468. The trial court correctly noted that there is no evidence of any incapacities of youth that rendered defendant unable to participate in his defense or that led him to implicate himself. This factor therefore did not weigh in favor of mitigation.

The final factor is the possibility of rehabilitation suggested by the circumstances. *Miller*, 132 S Ct at 2468. Dr. Keating explained that a person's prospects for rehabilitation are associated with his or her developmental history. Negative experiences and behaviors during a person's developmental period increase the probability that the person will not succeed in rising above difficulties. Some people do not change; the worse the circumstances, the more likely that the person will not overcome their circumstances. Greater rehabilitation challenges exist for someone who purposely shot another.

Dr. Lyle Danuloff, a clinical psychologist who met with defendant for more than four hours over three different visits, explained that when defendant committed the crimes in this case, he was unattached in human relationships, living on the streets, and living an amoral life "with the sense of what do I need and what do I need to do to get my needs met. He lived in the moment and did not live with any sense of right and wrong." When defendant committed the crimes, he was AWOL from his last placement, running the streets with other young people, consuming marijuana, selling drugs, and lacking any personhood in terms of relating to other people as fellow human beings rather than objects to meet his needs. Dr. Danuloff thinks that defendant has experienced turning points in his development. Defendant "got lucky" because he was placed in segregation where he is alone in his cell 23 hours a day and because he learned about the *Miller* decision, so he now has a hope of someday obtaining a parole hearing. While alone in his cell, defendant began to read the Bible and other books to learn how people treat one another and the difference between righteousness and evil. Dr. Danuloff opined that the possibility of a parole hearing motivated defendant to begin to explore himself and try to understand who he is, what he did, and why he did it. In Dr. Danuloff's view, defendant is beginning to have a very primitive and embryonic capacity to explore himself and ask questions about himself. Defendant stopped getting misconduct tickets in prison. Defendant also became a prison barber and a representative of his prison housing unit.

Dr. Danuloff testified that defendant said that "[e]ven a Godly person can punish people who bring harm to them. Even God did this." When asked whether what he did in this case was righteous or evil, defendant said that "it was a little bit of both." Defendant explained, "[W]ell, I didn't have any choice. It's how I was, it's how I lived, it's how I behaved." Defendant said, "I couldn't think of anything else to do. I was in a situation and I had to get—and I had to take care of the situation I was in." When asked how his actions were evil, defendant said that he hurt people badly, which indicates to Dr. Danuloff "the embryonic development of personhood." Dr. Danuloff thinks defendant is in the rudimentary stages of growing up by using people like Jesus and Muhammad as teachers and internalizing what he reads. Dr. Danuloff indicated that there is no way for a psychologist to predict how a person will behave in the future.

On cross-examination, Dr. Danuloff acknowledged that people normally cannot fix psychological problems by themselves and that psychotherapy is needed. Psychotherapy requires introspection and a willingness to work on oneself. Dr. Danuloff agreed that he saw defendant in the structured prison setting years after the crimes were committed and that he cannot say what defendant would be like if released.

The trial court correctly concluded that this factor did not favor mitigation. Although the difficulty of defendant's upbringing weighs in his favor, it also indicates that he faces significant challenges in improving himself, as reflected in the testimony of Dr. Keating and Dr. Danuloff.

We share the trial court's concern about defendant's comments to Dr. Danuloff reflecting that defendant thinks his actions in this case were partially righteous and that he did not have a choice. As discussed, defendant had more than ample opportunity to abandon his criminal activity in the many hours that he held Landry captive before brutally killing him. Hence, defendant's abhorrent belief that his actions were partially righteous and that he had no choice but to behave as he did, despite the horrific nature of his criminal acts committed over an extended period of time, indicates that defendant's prospects for rehabilitation are extremely remote or nonexistent. Defendant continued engaging in assaultive behavior after being incarcerated for the present offenses. He assaulted or attempted to assault staff personnel at the Macomb County Jail several times. After being transferred to prison, defendant incurred 23 misconduct tickets. Four of the tickets were for fighting, two were for engaging in threatening behavior, two were for possessing a weapon, one was for assault and battery of another prisoner, and another one was for assault resulting in serious physical injury to another prisoner. The fact that defendant stopped misbehaving in prison after learning of *Miller* does not necessarily reflect a rudimentary moral awakening, as Dr. Danuloff claimed. Defendant's improved behavior is just as, if not more, likely to reflect manipulation designed to obtain a lesser sentence, as the trial court found. This conclusion is also consistent with defendant's earlier diagnosis of antisocial personality disorder and the manipulative behaviors associated with that condition. Dr. Danuloff testified that persons diagnosed with antisocial personality disorder do not generally participate in psychotherapy unless mandated to do so and that the prognosis for such mandatory treatment is not positive. Moreover, even if defendant is beginning to exhibit a very rudimentary or embryonic capacity for self-exploration, we note Dr. Danuloff's testimony supports the trial court's conclusion that defendant is unlikely to make significant progress without intensive professional assistance, and no basis exists to conclude that he will receive intensive professional assistance in prison and achieve full rehabilitation. The trial court properly concluded that defendant's prospects for rehabilitation are negligible.

Overall, our review of the record indicates that the trial court accurately analyzed each of the *Miller* factors and correctly concluded that defendant is the rare juvenile offender whose crime reflects irreparable corruption. The trial court therefore did not abuse its discretion in determining that defendant should be sentenced to life imprisonment without parole.

Defendant next argues that the trial court erred in failing to empanel a jury at the *Miller* resentencing hearing. We disagree. This issue presents a question of law, which is reviewed de novo. *Hyatt*, ___ Mich App at ___; slip op at 2. Because defendant failed to preserve this issue by raising it below, *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007), our review is for plain error affecting substantial rights, *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

In *People v Skinner*, 312 Mich App 15, 20; 877 NW2d 482 (2015), rejected by *Hyatt*, ___ Mich App at ___; slip op at 21, the majority of a panel of this Court held "that the Sixth Amendment mandates that juveniles convicted of homicide who face the possibility of a sentence of life without the possibility of parole have a right to have their sentences determined by a jury." In *People v Perkins*, ___ Mich App ___, ___; ___ NW2d ___ (2016) (Docket Nos. 323454, 323876, 325741); vacated in part by *People v Perkins*, unpublished order of the Court of Appeals, entered February 12, 2016 (Docket Nos. 323454, 323876, 325741), and superseded in part by *Hyatt*, ___ Mich App at ___; slip op at 1, 21, another panel of this Court followed

Skinner only because it was obligated to do so, MCR 7.215(J)(2), and stated its opinion that *Skinner* was wrongly decided. In *Hyatt*, ___ Mich App at ___; slip op at 21, a conflict panel of this Court[3] rejected the analysis in *Skinner* and expressed agreement with the original panel in *Perkins*. The *Hyatt* conflict panel summarized its analysis as follows:

> In sum, we find that *Miller*'s individualized sentencing mandate, as incorporated by MCL 769.25, does not run afoul of Sixth Amendment precedent. A judge, not a jury, is to make the determination of whether to impose a life-without-parole sentence or a term-of-years sentence under MCL 769.25. Accordingly, we reject the result reached in *Skinner* and conclude that the prior panel in this case was correct in its analysis. [*Hyatt*, ___ Mich App at ___; slip op at 21.]

Therefore, the trial court in this case did not err by failing to empanel a jury at the *Miller* hearing because the conflict panel in *Hyatt* rejected the portion of *Skinner* on which defendant relies.

We affirm.

/s/ Jane E. Markey
/s/ Michael J. Riordan

[3] Before the issuance of the conflict panel's opinion in *Hyatt*, the conflict panel issued an order vacating an earlier order that had consolidated *Perkins*, *Hyatt*, and another case, so that only *Hyatt* proceeded before the conflict panel. See *People v Perkins*, unpublished order of the Court of Appeals, issued April 26, 2016 (Docket Nos. 323454, 323876, 325741). That is why the conflict panel's opinion was decided under a different case name.

Order

Michigan Supreme Court
Lansing, Michigan

April 5, 2019

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

154773 & (64)

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 154773
COA: 325662
Macomb CC: 2009-005244-FC

IHAB MASALMANI,
Defendant-Appellant.
_____/

By order of May 2, 2017, the application for leave to appeal the September 22, 2016 judgment of the Court of Appeals was held in abeyance pending the decisions in *People v Skinner* (Docket No. 152448) and *People v Hyatt* (Docket No. 153081). On order of the Court, the cases having been decided on June 20, 2018, 502 Mich 89 (2018), the application is again considered, and it is GRANTED, limited to the issue whether, in exercising its discretion to impose a sentence of life without parole (LWOP), the trial court properly considered the "factors listed in *Miller v Alabama*, [567 US 460] (2012)" as potentially mitigating circumstances. MCL 769.25(6). See also *Skinner*, 502 Mich at 113-116. In particular, the parties shall address: (1) which party, if any, bears the burden of proof of showing that a *Miller* factor does or does not suggest a LWOP sentence; (2) whether the sentencing court gave proper consideration to the defendant's "chronological age and its hallmark features," *Miller*, 567 US at 477-478, by focusing on his proximity to the bright line age of 18 rather than his individual characteristics; and (3) whether the court properly considered the defendant's family and home environment, which the court characterized as "terrible," and the lack of available treatment programs in the Department of Corrections as weighing against his potential for rehabilitation. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1). The motion to remand is DENIED.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 5, 2019

Clerk

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