STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 22, 2005
v JEROME EDWIN MONTGOMERY, Defendant-Appellant.	No. 255641 Genesee Circuit Court LC No. 03-12258-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v REGINALD EUGENE MONTGOMERY, Defendant-Appellant.	No. 255689 Genesee Circuit Court LC No. 03-012257-FC

Before: Saad, P.J., and Jansen and Markey, JJ.

PER CURIAM.

In these consolidated appeals, defendant Jerome Montgomery appeals of right, in Docket No. 255641, from his jury trial convictions for three counts of kidnapping, MCL 750.349, conspiracy to kidnap, MCL 750.157(a) and MCL 750.349, first-degree home invasion, MCL 750.110a(2), and receiving and concealing stolen property having a value of $20,000 or more, MCL 750.535(2)(a). We affirm Jerome's conviction and sentence for receiving and concealing stolen property, but reverse the remainder of his convictions and sentences and remand for a new trial. In Docket No. 255689, defendant Reginald Montgomery appeals as of right from his jury trial convictions for two counts of armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.157a and MCL 750.529, three counts of kidnapping, MCL 750.349, conspiracy to kidnap, MCL 750.157(a) and MCL 750.349, first-degree home invasion, MCL 750.110a(2), felon in possession of a firearm, MCL 750.224f, possession of a firearm during the commission of a felony, MCL 750.227b, and carjacking, MCL 750.529a. We affirm Reginald's convictions and sentences.

I. Facts

Leonard Harrington and Deborah Harrington testified that on the evening of March 19, 2003, they entered their garage and were approached by two masked men who were armed. According to the Harringtons, the men threatened them, tied them up, and questioned Deborah about the jewelry store in Novi where she was the general manager. Leonard testified that Deborah was told to answer the questions and not lie or they would be killed. The Harringtons both testified that eventually a third man arrived, and Deborah testified that a woman also arrived. Deborah testified that the third man talked with her about plans to rob the Novi jewelry store. The men remained at the Harrington's home and in the early morning of March 20, 2003, Reid Adomat, Deborah's son, arrived and was apprehended by the armed men.

Deborah testified that in the early morning of March 20, 2003, she was instructed to accompany one of the men to her work, and was told that Leonard and Reid would be held at separate locations as hostages. Deborah further testified that the man threatened her and her family if she did not cooperate. Deborah drove to the jewelry store, where she unlocked the door and the safe. The man who accompanied her loaded up jewelry, bound her, and told her not to the call the police for ten to fifteen minutes. Deborah freed herself after ten to fifteen minutes, and called the police. At the Harrington home, Leonard and Reid claim that they were tied up and placed in the bathroom, but subsequently got loose and ran over to the neighbors' home. The neighbors called 911.

Novi Police Sergeant David Malloy testified that over $1 million in jewelry had been taken from the jewelry store. Jewelry, a fur coat, and other items were also taken from the Harrington's home. A confidential informant gave the police information that Jerome, Jerome's brother, and Yolanda Price were involved in the jewelry store robbery, which led to surveillance of Jerome. A search warrant was executed at a residence linked to Jerome, and approximately $500,000 worth of the jewelry was found as well as items that were missing from the Harrington's home. Subsequently, both Jerome and Reginald were brought in for questioning.

Detective Victor Lauria, from the Novi Police Department and Detective David Dwyre, from the Genesee County Sheriff's Department, took statements from Reginald and Jerome. Upon being brought in for questioning, Reginald was upset and indicated that he did not want his baby to grow up without a dad. Reginald stated that the robbery had been planned for a month, and indicated that Jerome, Yolanda Price, Lashawn Montgomery, and Darrell Shipman were involved. In his statement, Reginald further explained his involvement as follows: he had a black pistol, was wearing a black mask, approached the Harringtons in the garage and tied them up, later tied Reid up when he arrived, put Reid and Leonard in the bathroom, and did not go with Deborah to the jewelry store. Jerome also gave a statement in which he indicated the incident was not about the house, but was about the jewelry store. Jerome also said that he did not want to be a "snitch," but a male relative came up with the idea.

Leonard identified Reginald, at trial, as one of the men involved who had a gun. Deborah, at trial, identified Jerome as the man who accompanied her to the jewelry store.[1]

[1] Deborah did not recognize Jerome in a photographic lineup conducted by the Novi Police (continued…)

Jerome acknowledged that he received and concealed stolen property, but his defense was that the Harringtons were involved in the plan to rob the jewelry store.

II. Docket No. 255641

On appeal, Jerome argues that the trial court abused its discretion in denying his motion for a mistrial, which was brought after a juror informed the court that she had been provided information on a break from deliberations that co-defendant Reginald had been convicted on all counts and had confessed; information that was not admissible against Jerome and contrary to Jerome's testimony that Reginald was not involved. We agree, and find that Jerome was denied a fair trial.

We review a trial court's decision to deny a motion for a mistrial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) (citations omitted).

On March 26, 2004, the juries for both Jerome and Reginald began to deliberate. After less than three hours of deliberating, Reginald's jury reached a verdict, convicting him on all counts. Jerome's jury continued to deliberate and a decision was made to send them home for the weekend. Jerome's counsel requested that the jury be sequestered for the weekend, in light of the fact that information would be available through news sources regarding Reginald's convictions. The trial court denied counsel's request and allowed the jury to go home for the weekend after giving specific instructions.

On March 29, 2004, Jerome's jury returned to deliberate. Subsequently, the trial court received two notes: one wanting to know what would happen if a decision could not be reached and, shortly after, a second note from a juror stating "At this point I feel I've heard too much outside information outside these deliberations that have prevented me from making a fair decision." Jury deliberations were suspended and the trial court brought the juror in to discuss the note. The juror explained:

> When I went to work on Saturday, my boss is aware that I'd been on jury duty, and he's aware of the case just because it's been on the news and the newspapers and that. I've never went over any details. But he had - - when he come in, he says, so you guys have made a decision, thinking that I was the other juror - - jury. And he said wow, it only took you guys like two hours.

The juror further stated that her boss had told her that Reginald was found guilty on all charges and that there was a confession made. The juror indicated that she stopped him at that time. She explained:

(…continued)

Department.

> And it didn't - - it didn't really change my decision, it just confirmed it to a point where I wouldn't be able to discuss it, or - - because there are so many people with other opinions. And there's other things going on as well.

Upon further questioning, the juror indicated that she had not provided the information to the other jurors. The trial judge asked the juror if, recognizing the oath, she could separate the information she received from the evidence, and could "continue to deliberate based upon the information received in this only, and set that other information aside?" The juror responded "Personally, yes, but I feel there's other people that cannot." When the trial court further questioned this response, the juror indicated that she did not know if other jurors had outside information that she did, but that the jury was "breaking rules that [the trial court] implied." The juror then explained the jury was not following rules on sympathy and emotions, and that "they're not using common sense."

Jerome's counsel requested that the trial court declare a mistrial because it would be unfair for the jury to continue on with the information regarding Reginald. The trial court denied the request stating:

> I think the law presumes that jurors follow the instructions of the Court when it comes to out-of-court conduct. And I think what we learned from juror number nine confirms that, and that is she did not seek out this information. It came to her in an inadvertent way.
>
> She recognized the oath that she took to decide this case based solely upon the evidence presented in this case. She affirmed that even though this outside information had come to her, that her oath and the instructions compel her to honor her previous commitment, and to decide this case based upon the evidence presented in this trial and nothing else.
>
> I'm going to deny the motion for a mistrial. . . .

Subsequently, after a request from counsel, the trial court explained to the juror why information found in newspapers does not meet the evidentiary standards and again instructed her not to reveal the information to the other jurors. The jury resumed deliberations and eventually reached a verdict finding Jerome guilty on three counts of kidnapping, conspiracy to commit kidnapping, first-degree home invasion, and receiving and concealing stolen property; Jerome was found not guilty on three counts of armed robbery and one count of carjacking.

During deliberations, jurors may consider only the evidence presented in open court. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997), writ granted *Nevers v Killinger*, 990 F Supp 844 (ED Mich, 1997). "'It is perfectly plain that the jury room must be kept free of evidence not received during trial and that its presence, if prejudicial, will vitiate the verdict.'" *People v Keeth*, 63 Mich App 589, 593; 234 NW2d 717 (1975), quoting *Dallago v United States*, 138 US App DC 276; 427 F2d 546, 553 (1969). "Where the jury considers extraneous facts not introduced in evidence, this deprives a defendant of his [or her] rights of confrontation, cross-examination, and assistance of counsel embodied in the Sixth Amendment." *Budzyn*, *supra* at 88. In determining whether reversal is required when inadmissible evidence that was not introduced during trial appears in the jury room during deliberations, this Court must determine

"if the error might have operated to substantially injure the defendant's case." *People v Allen*, 94 Mich App 539, 543-544; 288 NW2d 451 (1980); see also *People v Clark*, 220 Mich App 240, 246; 559 NW2d 78 (1996). To establish that the extrinsic influence requires reversal, defendant must prove that the jury was exposed to an extraneous influence that created a "real and substantial possibility" that it could have affected the jury's verdict. *Budzyn*, *supra* at 88-89. To do so, defendant must show that the extraneous influence is "substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict." *Id.* at 89. The burden then shifts to the prosecution to establish that any error is harmless. *Id*.

We find that the jury, or in this a case a juror, was exposed to extraneous influence that created a "real and substantial possibility" that the verdict was adversely affected. *Id*. The fact that the jury received the extraneous information and could not be relied on to follow instructions substantially injured Jerome's case. It is clear from the record that the juror relied on this highly prejudicial, extraneous, information in reaching her decision with regard to defendant. The note from the juror revealed that the outside information she heard "prevented me from making a fair decision." At this point, the juror had already been instructed that the jury was to only consider evidence that was presented at trial, and her note reveals that she could no longer do this. The juror also responded that the information she had did not change her decision but "confirmed it." Clearly, the extraneous information influenced the juror's decision as it "confirmed" what she was already thinking.

The prosecution argues that mistrial motion was properly denied because jurors are presumed to follow the instructions when it comes to out of court conduct, and the fact that the juror recognized and affirmed the oath to only consider evidence presented in the case further supports that the instructions were followed. We have trouble believing that the juror would follow the trial court's instructions in this regard. The juror had already been provided the oath and the trial courts' instructions once, and she decided that what she knew prevented her from making a fair decision and "confirmed" what she was thinking. Also, the day before the juror received the information from her boss, the trial court had instructed "Don't let anybody come up to you and say, hey, I hear you're on the jury what's happening, or any of that. You need to be hermits for the weekend, but it's very important that you honor your commitment and those promises." The juror's statements to the court support that she heard more from her boss than she needed to, in that, she could have complied with the instructions and immediately told her boss that she was not supposed receive any information regarding the case. Although the juror claims she stopped her boss, her statements support that she could have stopped him before she did. We cannot now assume that the juror would follow the instructions given by the court to only consider evidence presented at trial. Thus, there was a substantial extrinsic influence on the juror that was not cured by the trial court's instruction and the oath.

The extraneous influence was also substantially related to a material aspect of the case. The fact that a juror was informed that the other jury had found Reginald guilty on all counts and that Reginald had made a confession was highly prejudicial. The case against Jerome was built using a conspiracy theory, which involved Reginald. It is clearly material to know that Reginald was convicted on all counts, when the cases where built on a conspiracy. Evidence of a co-conspirator's being found guilty and having made a confession is extremely prejudicial to a defendant on trial for the same conspiracy. See *United States v Maliszewski*, 161 F3d 992, 1004

(CA 6, 1998). And, even more related and prejudicial to Jerome's defense was that the information revealed that Reginald had a made a confession. Jerome's defense was that the jewelry store robbery was based on a plan that was executed by him, some people other than Reginald, and the Harringtons. Jerome's testimony and version of what happened did not include Reginald. This testimony informed the jury that Reginald had admitted to a crime, and contradicted Jerome's testimony. Thus, information regarding the confession significantly impaired Jerome's credibility. In addition, the trial court instructed the jury that if they concluded a witness deliberately lied about something important, it might choose not to accept anything the witness said. The information was related to the conspiracy and Jerome's credibility; both material aspects of the case. Lastly, the information was so prejudicial that the extrinsic material was directly connected to the adverse verdict. The unanimous verdict included the determination of the juror who indicated she could not come to a fair decision based on the outside information, and that this outside information "confirmed" what she was already thinking. As noted above, the juror in question could not be relied on to properly follow trial court instructions.

We further note that in *Bruton v United States*, 391 US 123, 135-136; 88 S Ct 1620; 20 L Ed 2d 476 (1968), the United States Supreme Court held that a defendant is deprived of his right to confrontation when his codefendant's incriminating confession is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant. See also *Cruz v New York*, 481 US 186, 187-188; 107 S Ct 1714; 95 L Ed 2d 162 (1987). The *Bruton* Court stated that "[a] defendant may be prejudiced by the admission in evidence against a co-defendant of a statement or confession made by that co-defendant," and that "this prejudice cannot be dispelled by cross-examination if the co-defendant does not take the stand." *Id*. at 132. The *Bruton* Court further stated:

> There are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. [*Id*. at 135-136 (citations omitted).]

Additionally, the United States Supreme Court has held that the rule from *Bruton* applies even in the situation where the defendant has also confessed and his statement is "interlocking" with the codefendant's statement because of the "devastating" practical effect of codefendant testimony without cross-examination referenced in *Bruton*. *Cruz, supra* at 191-194. Justice Scalia, writing for the majority in *Cruz*, reasoned that usually a defendant tries to negate or avoid the consequences of a confession and the admission of a codefendant's custodial account that corroborates that confession presents a serious obstacle to that strategy. *Id*. at 192. Thus, the Court held that "where a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant, the Confrontation Clause bars its admission at their

joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him." *Id*. at 193 (internal citation omitted).

We note that *Bruton* violations do not automatically require reversal of defendants' convictions. *People v Banks*, 438 Mich 408, 427; 475 NW2d 769 (1991). Even where the *Bruton* rule is violated, the error may be considered harmless in certain circumstances. *Banks*, *supra* at 427. Thus, a defendant's confession "may be considered on appeal in assessing whether any Confrontation Clause violation was harmless." *Cruz*, *supra* at 193-194, citing *Harrington v California*, 395 US 250; 89 S Ct 1726; 23 L Ed 2d 284 (1969). If the evidence properly admitted against the defendant is so overwhelming and the prejudicial effect of the codefendant's statement so insignificant by comparison, the improper admission of the statement is harmless beyond a reasonable doubt. *Banks*, *supra* at 427. See also *People v Harris*, 201 Mich App 147, 150; 505 NW2d 889 (1993).

In this case, a juror from Jerome's jury was made aware that Reginald had made a confession. Although not technically a *Bruton* violation, this irregularity has the same potential for prejudice as a *Bruton* violation does. The affect of a juror from Jerome's jury being made aware of Reginald's confession was "powerfully incriminating" because a confession Reginald was contrary to Jerome's testimony, thus, significantly diminished his credibility under these circumstances.[2] This irregularity is not harmless beyond a reasonable doubt. This is the type of situation where the risk that the juror did not follow the court's instructions was so great and the consequences were so vital to defendant, *Bruton, supra* at 135-136, that the error cannot be harmless beyond a reasonable doubt.

For the above reasons the trial court abused its discretion in denying Jerome's motion for a mistrial because the irregularity was prejudicial to defendant's rights and impaired his ability to get a fair trial. We find that this trial violated Jerome's Sixth Amendment rights, and he is entitled to a new trial.[3]

However, we find that any error was harmless with regard to the receiving and concealing stolen property conviction. Reginald was not charged with this crime, and this crime was not inconsistent with Jerome's defense. Jerome and his counsel basically acknowledge that he committed this crime, and the defense was that the Harringtons were in on the crime, thus, he did not commit the more serious crimes. The prosecution has not met its burden in establishing that the error was harmless with regard to any of the other convictions. See *Budzyn*, *supra* at 89.

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[2] The negative impact of Jerome's juror being made of aware of Reginald's confession, is further supported in the United States Supreme Court's recent decision in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), which examines barring the use of a nontestifying codefendant's statement in a joint trial. In *Crawford*, the Court held that out-of-court statements that are testimonial in nature are barred under the Confrontation Clause where the declarant is unavailable, unless the defendant had a prior opportunity to cross-examine the witness. See *People v Bell (On Second Remand)*, 264 Mich App 58, 61-63; 689 NW2d 732 (2004).

[3] Based on our resolution, it unnecessary to address the remainder of the issues Jerome raised on appeal.

As such, we affirm Jerome's conviction and sentence for receiving and concealing stolen property, but reverse the remainder of his sentences and convictions because the prejudicial information that entered the jury room vitiates the verdict with regard to these convictions. See *Keeth, supra* at 593.

III. Docket No. 255689

A. Venue

Reginald's first issue on appeal is that the venue, for his trial, should have been changed or at least there should have been a continuance. Basically, Reginald argues that he was denied a fair trial by an impartial jury because of pretrial publicity, and also argues that his trial counsel was ineffective in failing to move for a change of venue or a continuance. We disagree with both contentions.

1. Pretrial Publicity

Reginald claims that an impartial trial could not be held in Genesee County because of the pre-trial publicity. Most of the crimes, for which Reginald was charged, occurred in Genesee County. "It is the general rule that defendants must be tried in the county where the crime is committed. An exception to the rule provides that the court may, in special circumstances where justice demands or statute provides, change venue to another county." *People v Jendrzejweski*, 455 Mich 495, 499-500 (1997). MCR 2.221(A) provides that "[a] motion for change of venue must be filed before or at the time the defendant files an answer." Defendant did not request a change of venue or a continuance, and did not object to the impartiality of the impaneled jury at trial. Thus, we review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Jones*, 468 Mich 345, 355-356; 662 NW2d 376 (2003).

"A defendant who chooses a jury trial has an absolute right to a fair and impartial jury." *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994). The initial question is whether the effect of pretrial publicity on the jury pool was such "unrelenting prejudicial pretrial publicity [that] the entire community will be presumed both exposed to the publicity and prejudiced by it, entitling the defendant to a change of venue." *Mu'Min v Virginia*, 500 US 415, 442; 111 S Ct 1899; 114 L Ed 2d 493 (1991), citing *Irvin v Dowd*, 366 US 717, 727-728; 81 S Ct 1639; 6 L Ed 2d 751 (1961). "To resolve [such a] case," a reviewing court "must turn . . . to any indications in the totality of circumstances that petitioner's trial was not fundamentally fair." *Murphy v Florida*, 421 US 794, 799; 95 S Ct 2031; 44 L Ed 2d 589 (1975).

Here, Reginald has attached nothing to his appellate brief regarding the case - not a single newspaper story to support his contentions. There is no showing of any publicity that constituted unrelenting prejudicial pretrial publicity in Genesee County that is invidious or inflammatory. Regardless, the existence of pretrial publicity, standing alone, does not necessitate a change of venue. *People v Lee,* 212 Mich App 228, 253; 537 NW2d 233 (1995). Whether the jury was actually prejudiced by the publicity or whether there was an atmosphere that created a probability of prejudice must be considered. *Id.*

In *Tyburski, supra*, our Supreme Court held that when pretrial publicity creates a danger of prejudice, the trial court has several options to uncover potential juror bias and achieve the

goal of impaneling an impartial jury. *Id*. at 623. One of these options is that the trial court can permit the attorneys to participate in the voir dire. *Id*. at 624. Another option is that the trial court can question individual potential jurors or small groups away from the remaining veniremen. *Id*. Whatever option the lower court selects, it must "elicit enough information for the court to make its own assessment of bias." *Id*. at 623. The Supreme Court opined that trial courts "should be allowed wide discretion in the manner they employ to achieve the goal of an impartial jury." *Id*. (emphasis omitted).

In this case, the trial court attempted to achieve the goal of an impartial jury through voir dire. "The purpose of voir dire is to elicit enough information for development of a rational basis for excluding those who are not impartial from the jury." *Id.* "The trial court has discretion in both the scope and the conduct of voir dire." *Id*. at 619.

The record does not support defendant's claim that the trial court failed to ensure that the jury was impartial. To the contrary, the trial court was aware of the issue of pretrial publicity and took appropriate steps to impanel an impartial jury. Specifically, the trial court conducted individual, sequestered voir dire of the prospective jurors who had received some pretrial publicity and questioned them individually, to determine how much the potential jurors had heard or seen from the media and what impact that information would have on the jurors' ability to remain unbiased. In addition, apparently mindful of the fact that the "attorneys are more familiar with the complexities and nuances of the case" and "are in a better position than the trial court to ask in-depth questions designed to uncover hidden bias," the trial court also permitted the prosecutor and defense counsel to participate in the voir dire. *Id*. at 624.

The facts of this case are not similar to the facts in *Tyburski*, where the trial court did not sequester the prospective jurors to conduct individual voir dire and did not permit the attorneys to participate in the voir dire. *Id.* at 625-626. We conclude that the trial court, which was on notice of the likelihood of juror bias as a result of pretrial publicity, exercised caution in the manner it conducted voir dire. By conducting individual, sequestered voir dire and permitting the attorneys to ask questions about bias as a result of media exposure, the trial court's conduct went above and beyond what our Supreme Court required in *Tyburski*. The trial court satisfied its duty "to conduct a thorough and conscientious voir dire designed to elicit enough information for the court to make its own assessment of bias." *Id.* Voir dire functioned exactly as it should have. There is nothing on the record supporting Reginald's claim that the trial court should have sua sponte changed venue or continued the trial for a later date. Reginald has presented no plain error affecting his substantial rights with regard to venue and the trial court's failure to enter a continuance sua sponte.

2. Ineffective Assistance of Counsel

Reginald also contends that he was denied the effective assistance of counsel where his attorney failed to move for a change of venue or a continuance. Because there was no *Ginther*[4]

[4] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

hearing, our review is limited to mistakes apparent on the record. *People v Sabin*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Defendant must satisfy a two-pronged test to show ineffective assistance of counsel: (1) that counsel's performance was below an objective standard of reasonableness under professional norms, and that (2) there is a reasonable probability that but for counsel's errors, the result would have been different, and the result that did occur was fundamentally unfair or unreliable. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003), citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Further, defense counsel has wide discretion in matters of trial strategy, and "the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *Id.*; *People v Pickens*, 446 Mich 298, 325; 521 NW2d 797 (1994). An appellate court will not second-guess matters of strategy or use the benefit of hindsight when assessing counsel's competence. *Pickens, supra* at 330; *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Limiting our review to errors apparent from the record, Reginald has not established that his trial counsel was ineffective. As noted, there is nothing on the record supporting pervasive pretrial publicity or prejudice with regard to Reginald. Here, the prospective jurors who had learned of the case from media coverage were questioned separately by the trial court and the attorneys to uncover any possible bias. Some of these prospective jurors were excused for cause for reasons other than pretrial publicity, while the remaining jurors indicated that they would be fair and impartial. The record does not show that a change of venue or a continuance was justified.

Further, the decision whether or not to move for a change of venue constitutes a matter of trial strategy, *People v Anderson*, 112 Mich App 640, 646; 317 NW2d 205 (1981), which we do not second guess on appeal, *Pickens, supra* at 330; *Rockey, supra* at 76-77. Defense counsel participated in questioning the jurors, used his peremptory challenges, and some potential jurors were dismissed for cause. It is apparent that defense counsel adequately questioned the jurors and determined that he could address potential prejudice through the voir dire process. His decision not to move for a change of venue or a continuance was a matter of trial strategy and was not ineffective in light of his other efforts to alleviate prejudice. Moreover, there is no indication on record, in this case, that the pretrial publicity was inflammatorily prejudicial. See *Jendrzejweski*, *supra* at 506-509. As a result, we reject defendant's argument that he received ineffective assistance of counsel. See, generally, *id.* at 509-510.

B. Prosecutor’s Opening Statement

Reginald next argues that he was denied a fair and impartial trial when, during opening statement, the prosecutor offered his personal opinion, implied first hand knowledge of Reginald’s interrogation, and commented on Reginald’s refusal to answer questions. Reginald also contends that he was denied the effective assistance of counsel when his trial counsel failed to object to the prosecution’s opening statement. We disagree with both contentions.

1. Prosecutorial Misconduct

A claim of prosecutorial misconduct is a constitutional issue that is reviewed de novo. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). However, none of the

issues raised are preserved and, therefore, we review the issues for plain error affecting substantial rights. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *People v Walker*, 265 Mich App 530, 542; 697 NW2d 159 (2005). In addition, appellate relief is not warranted if a curative instruction could have eliminated any possible prejudice. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case-by-case basis and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

Reginald argues that the prosecutor offered his personal opinion of the facts in the case and vouched for Reginald's guilt by stating "It is my job to tell you the background." In addition, Reginald argues that the prosecution expressed first hand knowledge in using "I" and by stating that Reginald did not want to answer certain questions. Reginald's arguments lack merit.

Opening statement is the appropriate time to state the facts that will be proven at trial. *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). A prosecutor may not vouch for the credibility of a witness to the effect that he has some special knowledge that the witness is testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995); *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227, (2001). But a prosecutor may argue from the facts that the defendant or another witness is worthy or not worthy of belief. *Thomas, supra* at 455.

A review of the challenged comments, in context, supports that the prosecutor was advising the jury of what evidence was going to be presented at trial, not that he was vouching for Reginald's guilt. When the prosecutor was using the word "I," he was using it as Detective Dwyre speaking, and he made this clear to the jury. The prosecutor before going into the challenged statement stated that "this is Detective Dwyre speaking." In context, the prosecutor was explaining what the testimony would support regarding the statement given by Reginald. In addition, the trial court informed the jurors on more than one occasion that the statements of the attorneys are not evidence. Thus, with regard to the challenged statements, we find no plain error affecting Reginald's substantial rights.

Defendant further argues that it was error for the prosecutor to state that Reginald had refused to answer questions posed by the arresting officers. This contention is also without merit.

The constitutional privilege against self-incrimination and the right of due process restrict the use of a defendant's silence in a criminal trial. *People v Dennis*, 464 Mich 567, 573; 628

NW2d 502 (2001); *People v Sutton (After Remand)*, 436 Mich 575, 592; 464 NW2d 276 (1990). "Where a defendant's silence is attributable to an invocation of his Fifth Amendment right or a reliance on the *Miranda*[5] warnings, the use of his silence is error." *People v Schollaert*, 194 Mich App 158, 163; 486 NW2d 312 (1992). But a defendant who waived his rights during questioning may not preclude evidence of omissions in his statements as evidence of protected silence. *People v McReavy*, 436 Mich 197, 211-212; 462 NW2d 1 (1990); *People v Rice (On Remand)*, 235 Mich App 429, 436; 597 NW2d 843 (1999). When a defendant speaks, a failure to answer a question does not invoke the right to silence and evidence of his omissions is admissible at trial. *Id*.

The prosecutor, in his opening statement, discussed the statement Reginald gave and that he declined to answer some of the questions while he was giving the statement. Viewed in context there was nothing improper in the prosecutor's statement, as it was not discussing any silence by Reginald that was attributable to invocation of his Fifth Amendment right or a reliance on *Miranda*. Instead, Reginald had waived his right to silence and these were questions that Reginald just decided not answer. In addition, the trial court informed the jury on more than one occasion that the statements of the attorneys were not evidence. As such, with regard to the challenged statements by the prosecution, we find no plain error affecting defendant's substantial rights.

2. Ineffective Assistance of Counsel

As discussed, *supra*, there is no merit to Reginald's contentions that the prosecutor's opening statements were improper. Counsel is not required to advocate a meritless position. *Riley*, *supra* at 142; *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005). Accordingly, defendant has not established that he received ineffective assistance of counsel.

C. Personal Threat Evidence

Reginald next argues that he was denied a fair trial by the admission of testimony that a witness was afraid to testify when there was no evidence that defendant or anyone acting on his behalf caused her fear.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *Walker*, *supra* 533, or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000). Furthermore, reversal is only required based on an

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

evidentiary ruling if the error was prejudicial. *People v McLaughlin*, 258 Mich App 635, 650; 672 NW2d 860 (2003). However, if the court's decision involves a preliminary question of law, we review that decision de novo. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402; *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998); *People v Coy*, 258 Mich App 1, 13; 669 NW2d 831 (2003). Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998); *People v Gonzalez*, 256 Mich App 212, 218; 663 NW2d 499 (2003). Under this broad definition, evidence is admissible if it is helpful in throwing light on any material point, *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001), and all facts on which any reasonable presumption of the truth or the falsity of a charge can be founded are admissible, *People v Lewis*, 264 Mich 83, 88; 249 NW 451 (1933). The credibility of witnesses is a material issue and evidence that shows bias or prejudice of a witness is always relevant. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), modified on other grounds 450 Mich 1212 (1995). To be material, evidence need not relate to an element of the charged crime or an applicable defense. The relationship of the elements of the charge, the theories of admissibility, and the defenses asserted govern relevance and materiality. *People v Brooks*, 453 Mich 511, 518; 557 NW2d 106 (1996); *People v Kevorkian*, 248 Mich App 373, 442; 639 NW2d 291 (2001).

Beginning in his opening statement, Reginald's counsel attacked Deborah's credibility regarding her description information of Reginald, and discussed her leaving things out when talking to the police. Reginald's counsel also noted in opening that the jury would hear information that may even point in the direction of the Harringtons.

The threatening phones calls were not raised during the prosecution's direct examination of Deborah. Jerome's counsel cross-examined Deborah in front of both juries regarding her withholding information from the police. The prosecutor asked to admit testimony that Deborah had been threatened over the phone, and was afraid for her family. Counsel for both Jerome and Reginald objected. After listening to arguments, the trial court agreed to allow testimony regarding the phone calls, but only with an instruction that the calls were not made by either Jerome or Reginald. Subsequently, during cross-examination of Deborah, Reginald's counsel asked her about not providing evidence to the police regarding a female and specifically asked about her and Leonard's fear. Deborah answered that they feared for their lives because of the threats and were told not to give information. On redirect, the trial court allowed testimony to explain Deborah's reaction in that she had death threats over the telephone that made her reluctant to give the statements. Evidence of the threatening phone calls were significantly relevant to Deborah's credibility that had been attacked by Reginald's opening statement and on cross-examination.[6] This testimony was used to explain Deborah's reluctance to give further evidence to the police, thus, was relevant to her credibility.

[6] We note that the cross-examination may not have been as extensive if the trial court had not ruled to allow the testimony regarding the phone calls, but, regardless, the opening statement (continued…)

Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *Sabin (After Remand), supra* at 58; *People v Houston*, 261 Mich App 463, 467; 683 NW2d 192 (2004). Any relevant evidence will be damaging to some extent. Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002). The prejudicial effect of evidence is best determined by the trial court's contemporaneous assessment of the presentation, credibility and effect of the testimony. *Bahoda, supra* at 291.

The testimony was very probative because the case in large part was based on credibility, and this testimony was significant to Deborah's credibility, which Reginald's counsel made an issue of in opening statement. The trial court minimized the prejudice by instructing the jury to accept as fact that neither Reginald nor Jerome made the calls. In addition, the testimony was not that prejudicial because Deborah had already alluded to threats in her testimony. This testimony helped to alleviate confusion. Further, as noted, Reginald's counsel made the matter relevant by raising issue with Deborah's credibility in opening statement. A party may not seek appellate relief based upon an evidentiary error to which he contributed by plan or negligence. *Gonzalez, supra* at 224. Without the testimony there may have been confusion as to whether threats were made by Reginald and Jerome. We find that the trial court did not abuse its discretion.

D. Prosecutor's Closing Argument

Reginald's final issue on appeal is that the prosecutor engaged in misconduct and denied him a fair trial when, during closing arguments, he distorted the burden of proof, vouched for his own opinion of the credibility of witnesses when he called Reginald a liar and stated that the complaining witnesses were telling the truth. We disagree.

We review Reginald's unpreserved claims of prosecutorial misconduct for plain error affecting his substantial rights. *Carines, supra*.

Reginald argues that the prosecutor distorted the burden of proof and vouched for his own opinion of the credibility by calling Reginald a liar when he said the case was about credibility and "who you believe. . . . Because somebody's lying. That somebody is Reginald Montgomery." Basically, Reginald argues that the prosecutor improperly implied that the jurors had to decide whether to believe either defendant or the prosecution and invited the jury to disbelieve defendant's theory of the case, thus, forcing him to prove himself innocent and that this was also the prosecution vouching for Reginald's guilt and the credibility of the prosecution witnesses.

The prosecution is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *Bahoda, supra* at 282. He need not use the least

(…continued)

alone was enough to make the testimony relevant.

prejudicial evidence available to establish a fact at issue, nor must he state the inferences in the blandest possible terms. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001).

Reading the comments in context, the prosecution was not distorting the burden or vouching for his opinion, but instead arguing that the evidence supported that the prosecution witnesses were credible and the defense witnesses were not. Our Supreme Court has stated "although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof." *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). "When a defense makes an issue legally relevant, the prosecutor is not prohibited from commenting on the improbability of the defendant's theory or evidence." *Id*. at 116. In light of the fact that defendant's version of the incident was wholly different from the prosecution's version, the prosecutor's comments regarding the fact that some of the witnesses had to be lying did not improperly shift the burden of proof to defendant nor did the comments improperly vouch for Reginald's guilt. In addition, even if error, any prejudice was cured by the trial court instructing the jury on the burden and that the attorneys' statements are not evidence.

We affirm Reginald's convictions and sentences, affirm Jerome's conviction and sentence for receiving and concealing stolen property having a value of $20,000 or more, and reverse the remainder of Jerome's convictions and sentences and remand for a new trial.

/s/ Kathleen Jansen
/s/ Jane E. Markey