STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 23, 2007
v	No. 269717 Berrien Circuit Court
ADAM ROBERT O'CONNOR, Defendant-Appellant.	LC No. 05-405286-FH

Before: Hoekstra, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree home invasion, MCL 750.110a(3). The trial court sentenced defendant to 5 to 30 years' imprisonment. We affirm.

Defendant was convicted of invading a house located on Browntown Road in Chikaming Township, Michigan. At trial, defendant's friend and co-worker, Michael Fryback, testified that he and defendant were both involved in the home invasion. Fryback indicated that he entered into a plea agreement in exchange for testifying truthfully in this case. Defendant denied invading the Browntown Road house, and both his mother and fiancé testified that he was at home at the time of the invasion.

Defendant first argues on appeal that the prosecutor committed misconduct by questioning Fryback about his plea agreement and promise to testify truthfully in this case. We review defendant's unpreserved claim of prosecutorial misconduct for plain error affecting his substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Reversal is warranted only if plain error resulted in the conviction of an innocent defendant or "seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence." *Id*. at 448-449. Reversal is not warranted where a curative instruction could have alleviated any prejudicial effect. *Id*. at 449.

The test for prosecutorial misconduct is whether the prosecutor's statements denied defendant a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 29; 650 NW2d 96 (2002). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 267

Mich App 141, 152; 703 NW2d 230 (2005). 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). However, a prosecutor's simple reference to a plea agreement containing a promise of truthfulness is not error, unless the reference is used to suggest that the prosecutor had some special knowledge, unknown to the jury, concerning the witness' truthfulness. *Id*.

Considered in context, the prosecutor's references to Fryback's plea agreement did not imply that he had some special knowledge of the truthfulness of Fryback's testimony. The prosecutor questioned Fryback very briefly about his plea agreement and then referenced the agreement during his closing argument. The prosecutor made no comments at all about his personal knowledge or belief regarding Fryback's truthfulness and, in fact, actually asked the jury to evaluate Fryback's credibility carefully in light of the plea agreement. The prosecutor further argued that Fryback's testimony was worthy of belief because it was corroborated by additional evidence presented at trial. See *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Because the prosecutor did not suggest that he had some special knowledge regarding Fryback's truthfulness, his references to the plea agreement were proper. *Bahoda*, *supra* at 276. Furthermore, the trial court alleviated any potential for prejudice by instructing the jury to consider Fryback's credibility carefully. Therefore, defendant cannot establish that the outcome of his case would have been different, but for the prosecutor's references to the plea agreement. *Ackerman*, *supra* at 449. Reversal based on prosecutorial misconduct is not warranted.

Alternatively, defendant argues that his trial counsel rendered ineffective assistance of counsel by failing to object to the prosecutor's alleged misconduct. To establish ineffective assistance of counsel, defendant must show that defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and denied him a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). Furthermore, defendant must show that, but for defense counsel's error, it is likely that the proceeding's outcome would have been different. *Id*. at 146. Considering that the prosecutor committed no misconduct, any objection by defense counsel would have been futile. "Counsel is not ineffective for failing to make a futile objection." *Thomas*, *supra* at 457. Defendant cannot demonstrate that his counsel's failure to object fell below an objective standard of reasonableness or that, but for the failure to object, the outcome of trial would have been different.

Defendant next argues on appeal that the trial court violated his due process right to a fair and impartial jury by referring to the jurors by numbers only. See US Const, Am VI and Am XIV. We review defendant's unpreserved constitutional claim for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). "[A]n 'anonymous jury' is an extreme measure, in which 'certain biographical information about potential jurors' is withheld, even from the parties." *People v Williams*, 241 Mich App 519, 523; 616 NW2d 710 (2000), citing *United States v Branch*, 91 F3d 699, 723 (CA 5, 1996). "[T]he use of an 'anonymous jury' may promote the safety of prospective jurors, but at a potential expense to two interests of the defendant: (1) the defendant's interest in being able to conduct a meaningful examination of the jury and (2) the defendant's interest in maintaining the presumption of innocence." *Williams*, *supra* at 522-523. "In order to successfully challenge the

use of an 'anonymous jury,' the record must reflect that the parties have had information withheld from them, thus preventing meaningful voir dire, or that the presumption of innocence has been compromised." *Id.* at 523.

Here, the jurors were merely referred to by numbers rather than by names. The record does not indicate that any information about the jurors was actually withheld from the parties. Moreover, we find that there is nothing in the record to indicate that the trial court's use of numbers compromised defendant's ability to examine the venire or that it undermined the presumption of innocence. Review of the voir dire demonstrates, and defendant admits, that his trial counsel had access to the jurors' personal history questionnaires. Further, there is no indication in the record that the jury understood the trial court's use of numbers to be out of the ordinary or that the jurors interpreted the practice as a sign that defendant was particularly dangerous or guilty of the charged offense. *Id*. at 524. Therefore, we find that defendant's due process rights were not violated by the trial court's use of numbers rather than names. See also *People v Hanks*, ___ Mich App ___; ___ NW2d ___ (No. 266086, issued June 19, 2007).

Defendant finally argues on appeal that the trial court violated his due process right to a fair and impartial jury by allowing jurors to submit questions for the witnesses during trial. This issue is unpreserved and will be reviewed for plain error affecting defendant's substantial rights. *Carines, supra* at 764. In *People v Heard*, 388 Mich 182, 188; 200 NW2d 73 (1972), our Supreme Court held "that the questioning of witnesses by jurors, and the method of submission of such questions, rests in the sound discretion of the trial court." Defendant does not assert that the trial court abused its discretion. Rather, defendant claims that the practice of permitting jurors to question witnesses constitutes structural error and should be abolished by this Court as a matter of law reform. Citing *State v Costello*, 646 NW2d 204 (Minn, 2002), defendant argues that this Court should find the practice improper because it allows the jury to seek out facts and deliberate before the conclusion of the trial. However, this Court is bound by the Supreme Court's decision in *Heard* that the questioning of witnesses by jurors is within the discretion of the trial court. See *Boyd v WG Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993), overruled on other grounds *Karaczewski v Farbman Stein & Co*, 478 Mich 28; 732 NW2d 56 (2007) ("it is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until this Court takes such action, the Court of Appeals and all lower courts are bound by that authority").

Furthermore, defendant has failed to demonstrate that plain error occurred in this case. The jury submitted questions for several of the witnesses. We note that the trial court implemented an appropriate procedure for the jury to submit these questions. The jurors submitted their questions in writing to the judge, they were reviewed for admissibility by the judge off the record before being presented to the witnesses, and the judge allowed counsel to ask questions of the witnesses after each of the jurors' questions were asked. There is no evidence that the substance of the questions posed to the witnesses was prejudicial to defendant. *People v Stout*, 116 Mich App 726, 733; 323 NW2d 532 (1982). A trial court may permit juror questions "which could help unravel otherwise confusing testimony" or aid in the fact-finding process. *Heard, supra* at 188. Furthermore, we presume that the jury followed the trial court's preliminary instruction "to keep an open mind and not make a decision about anything in the

case until you go to the jury room to decide the case." See *People v Mette*, 243 Mich App 318, 330-331; 621 NW2d 713 (2000).

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Christopher M. Murray