STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 29, 2007
v ROBERT LEE KING, Defendant-Appellant.	No. 273443 Wayne Circuit Court LC No. 06-003811-01

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v MARLON SCARBER, Defendant-Appellant.	No. 273543 Wayne Circuit Court LC No. 06-003811-02

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v ERIC TAYLOR, Defendant-Appellant.	No. 273955 Wayne Circuit Court LC No. 06-004613-01

Before: Zahra, P.J., and White and O'Connell, JJ.

PER CURIAM.

Defendants appeal as of right their convictions following their jury trial for the kidnapping and murder of a man named Fate Washington. A jury found defendant King guilty of second-degree murder, MCL 750.317; first-degree felony murder, MCL 750.316(1)(b); armed

robbery, MCL 750.529; kidnapping, MCL 750.349; and felony firearm, MCL 750.227b. The same jury found defendant Taylor guilty of second-degree murder, first-degree felony murder, kidnapping, and felony firearm. The jury found both these defendants not guilty of committing premeditated murder and also found defendant Taylor not guilty of armed robbery. The trial court sentenced defendant King to life imprisonment on the felony murder conviction; 25 to 80 years' imprisonment on the second-degree murder, armed robbery, and kidnapping convictions; and two years' imprisonment on the felony firearm conviction, to be served consecutively to the other sentences. The trial court vacated defendant Taylor's second-degree murder conviction, but sentenced him to life imprisonment on his first-degree murder conviction. The trial court also sentenced him to 25 to 80 years in prison for kidnapping and a consecutive two years in prison for felony firearm.

A separate jury heard defendant Scarber's case during the predominantly joint trial proceedings, and it returned a guilty verdict against defendant Scarber for first-degree premeditated murder, MCL 750.316(1)(b); felony murder; armed robbery; kidnapping; felony firearm; and felon in possession of a firearm, MCL 750.224f. At sentencing, the trial court vacated the felony murder conviction, and it also inexplicably dismissed the felon in possession conviction.[1] The trial court sentenced defendant Scarber to life imprisonment for premeditated murder and 35 to 80 years in prison for the armed robbery and kidnapping convictions. It also imposed a consecutive two-year term of imprisonment for felony firearm.

The victim, Fate Washington, was sitting in the driver's-side seat of his Ford Expedition on the street outside his house. He had just finished speaking with a neighbor when defendant Scarber and an unidentified man, both clad in black, approached the vehicle and forced Washington, at gunpoint, further into the vehicle. Both the neighbor and Washington's adult son, who was near a window inside the house, witnessed the scene. Washington scuffled with the men long enough that the neighbor was able to run home, retrieve a handgun, and open fire on the vehicle from his front porch. The eyewitnesses verified that Scarber climbed into the driver's seat while a second vehicle driven by defendant King, rolled up and opened fire on the neighbor with an automatic rifle. Other witnesses confirmed that the tandem of vehicles sped off through the streets after the shots were fired. Soon afterward, defendant King forced Washington to make a series of calls demanding ransom in return for his life.

A former friend of Scarber's and associate of all defendants, Troy Ervin, provided a detailed account of events after Washington was taken captive. The group took Washington to a house owned by Ervin's sister, and defendant King persuaded Ervin to trade cars with him for a while. When Ervin visited the house, he was initially denied access into the home. Scarber later called him and told him that he and the other defendants had kidnapped Washington and held him at the house. Scarber explained that Taylor had helped and that King had shot at the man's defenders. Scarber also admitted that he almost blew himself up burning the man's vehicle.

[1] The record does not contain the trial court's factual and legal basis for dismissing the felon-in-possession conviction, but neither does it contain any indication that the prosecutor ever objected or otherwise challenged the ruling. Moreover, the prosecution did not raise the issue or challenge the ruling in its appellate brief, so the dismissal's validity is simply not before us.

This information was confirmed at trial by a witness who heard a large explosion that night and saw a vehicle, later identified as Washington's Expedition, on fire outside her home. Ervin visited the house again and found Washington lying on the floor of a back room wearing nothing but a sheet. Taylor guarded the man with an automatic rifle like the one described by witnesses to Washington's capture, and King was armed with a handgun like the one Scarber had used. While Ervin was there, he heard Taylor deny Washington's request to use the phone again to make more ransom calls.

Ervin left, but returned again later after Scarber called and told him that King had shot Washington in the legs and he had bled to death. Ervin was agitated at finding that Washington was killed in his sister's house, because it associated him with the murder. He saw the dead body in the back room, and then he went to the hardware store for King and purchased tools for burying the body. After he dropped off the tools, he was again called and informed that the group had buried the body in the back yard of the property. Ervin was again agitated at the use of his sister's property, but Taylor assured him that the burial site was inconspicuously concealed by the doghouse and the body was secure under a layer of concrete. Searchers later found the body buried as Ervin described it. The body was found with two gunshot wounds, one through each leg.

Upon hearing that Ervin, who was not charged with a crime, had made a statement to police about Washington's murder, defendant Scarber also decided to make a statement. Except for Scarber's self-serving insistence that he participated in the crimes under duress and tried to care for Washington by bandaging his first gunshot wound and bringing him water, Scarber's statement to police was remarkably consistent with Ervin's. Scarber's statement confirmed the details of a successful ransom recovery that involved a peculiar delivery method, a particular mailbox, and a relatively small amount of money and drugs. Scarber's statement described defendant King as Washington's killer, and explained that, before he shot Washington a second time, King expressed a frustrated lack of concern with Washington's life and an unabashed willingness to kill him. Because the prosecutor wanted to place defendant Scarber's statement into evidence, Scarber received a separate jury for the purpose, isolating defendant King's and defendant Taylor's jury from Scarber's blame-shifting account of Washington's captivity.

As an initial matter, each defendant has double jeopardy issues that arise from their several convictions and sentences. Defendant King correctly argues that his punishments for both second-degree and first-degree murder violate double jeopardy. *People v Clark*, 243 Mich App 424, 429; 622 NW2d 344 (2000). In situations where one first-degree murder conviction and one second-degree murder conviction stem from the death of one victim, the proper procedure is to set aside the second-degree murder conviction and sentence. See *id*.

Defendant King also argues that retaining his conviction and sentence for first-degree felony murder necessitates the dismissal of his armed robbery and kidnapping felonies because they are the predicate felonies supporting his felony murder conviction. Although King is correct about the need to set aside one of the felonies, see *People v Williams*, 475 Mich 101, 104; 715 NW2d 24 (2006); *People v Bigelow*, 229 Mich App 218, 221-222; 581 NW2d 744 (1998),

his argument fails to acknowledge that the jury did not specify which felony predicated its verdict for felony murder. Instead, the jury simply found that defendant King committed both of the lesser felonies. In this case, Washington's murder most clearly occurred "in the perpetration of" his kidnapping. MCL 750.316(1)(b); MCL 750.349.[2] Therefore, setting aside King's conviction and sentence for kidnapping prevents him from being punished twice: once for the kidnapping alone and again for the same kidnapping in its capacity as the predicate for the felony murder conviction. Once defendant King's convictions are pared down so that he is only receiving one punishment for the kidnapping (specifically, the punishment he received by his conviction and sentence for felony murder) double jeopardy is satisfied. He may then receive a separate punishment for his separate, but factually interrelated, crime of armed robbery without any risk that he has been punished twice for that crime. See *People v Smith*, 478 Mich 292, 316-318; 733 NW2d 351 (2007). Therefore, we set aside defendant King's conviction and sentence for kidnapping, but leave defendant's armed robbery conviction and sentence intact.

Although defendant Taylor fails to raise the issue on appeal, his conviction and sentence for both kidnapping and felony murder, together with his acquittal for armed robbery, present a nearly identical double jeopardy problem. *Bigelow*, *supra*. In the interests of justice and consistency, we set aside defendant Taylor's kidnapping conviction and sentence as well. MCR 7.216(A)(7); *LME v ARS*, 261 Mich App 273, 287; 680 NW2d 902 (2004).

We reject the prosecution's appellate argument that we do not need to set aside any predicate felony convictions or sentences to affirm defendant King's punishment for felony murder. The prosecution's reliance on *Smith*, *supra*, is unavailing. In *Smith*, the Supreme Court ruled that it was unnecessary to dismiss a felony conviction. *Smith*, *supra* at 318. In this case, both the felony murder conviction and its predicate felony received punishment, so we are required to set aside the redundant punishment to satisfy double jeopardy. *Bigelow*, *supra*; *Williams*, *supra*.

We likewise reject the prosecution's improperly raised argument regarding the reinstatement of defendant Scarber's felony murder conviction. We agree that the trial court erroneously vacated defendant Scarber's felony murder conviction. There are two distinct legal aspects to the one crime of first-degree murder: premeditated murder and felony murder.[3] MCL 750.316(1)(a). These separate concepts, or theories, provide two different and independent legal grounds to support a defendant's prosecution and conviction for first-degree murder. *Bigelow*, *supra* at 220. In this case, the prosecutor proved that defendant Scarber's single conviction for first-degree murder was legally justified and factually valid under either legal theory. Therefore, the trial court's judgment should have upheld defendant's single first-degree murder conviction, noting that the one conviction was independently substantiated by the separate legal grounds of premeditated murder and felony murder. See *id*. at 220, 222. However, if we reinstated the

[2] We note that this statute was amended after the instant offense to allow separate punishments for kidnapping and any crime arising from the victim's confinement, but this amendment came too late to affect our double jeopardy analysis. *People v Sinistaj*, 184 Mich App 191, 202; 457 NW2d 36 (1990).

[3] A third distinct aspect, murder of a peace officer, is not relevant to this case.

felony murder aspect of defendant's first-degree murder conviction, then the Supreme Court's current double jeopardy jurisprudence would require us to set aside another one of the defendant Scarber's valid felony convictions as a predicate to the conviction's superfluous legal basis. See *id*.; *Williams*, *supra*. Justice is better served in this instance by leaving well enough alone. See *People v Farquharson*, 274 Mich App 268, 279; 731 NW2d 797 (2007); MCR 7.207; MCR 7.212(G); MCR 7.216(A)(7).

Next, defendants King and Scarber raise issues challenging Scarber's various out-of-court statements. Defendant King challenges Scarber's statements made to Ervin, which Ervin repeated to the juries. The statements implicated defendant King in the participation in the kidnapping and named him as the shooter in Washington's death. Defendant Scarber challenges the recitation of his custodial interview to his jury. We reject both challenges.

Defendant King argues that Scarber's descriptions to Ervin about how the group captured Washington and how King shot him were unadulterated hearsay statements that should have been excluded from trial. However, in *People v Washington*, 468 Mich 667, 671; 664 NW2d 203 (2003), our Supreme Court held that such statements fell within the hearsay exception of statements against the declarant's penal interest, so our evidentiary rules do not prevent the out-of-court statements' reiteration at trial. See also MRE 804(b)(3). Furthermore, because the statements at issue were provided in a narrative, both those portions that inculpated Scarber alone and those that inculpated his codefendants were admissible. See *People v Poole*, 444 Mich 151, 161; 506 NW2d 505 (1993).

Defendant King further argues that the trial court erred by failing to consider the reliability of defendant Scarber's out-of-court statements before holding that Ervin's recitation of the statements would not violate the confrontation clause, notwithstanding the fact that defendant King could not cross-examine Scarber about the statements. See *Washington*, *supra* at 671-672. Although the record does not indicate that the trial court analyzed the issue of the statements' inherent trustworthiness at length, the statements at issue clearly contain sufficient indicia of reliability, so any error in the trial court's decision is harmless.

Addressing the issue of reliability, our Supreme Court provided the following standards in *Poole*, *supra* at 165:

> In evaluating whether a statement against penal interest that inculpates a person in addition to the declarant bears sufficient indicia of reliability to allow it to be admitted as substantive evidence against the other person, courts must evaluate the circumstances surrounding the making of the statement as well as its content.
>
> The presence of the following factors would favor admission of such a statement: whether the statement was (1) voluntarily given, (2) made contemporaneously with the events referenced, (3) made to family, friends, colleagues, or confederates—that is, to someone to whom the declarant would likely speak the truth, and (4) uttered spontaneously at the initiation of the declarant and without prompting or inquiry by the listener.
>
> On the other hand, the presence of the following factors would favor a

> finding of inadmissibility: whether the statement (1) was made to law enforcement officers or at the prompting or inquiry of the listener, (2) minimizes the role or responsibility of the declarant or shifts blame to the accomplice, (3) was made to avenge the declarant or to curry favor, and (4) whether the declarant had a motive to lie or distort the truth.

Defendant Scarber's first statement regarding the group's participation in Washington's capture was freely offered to a friend and confederate who had de facto control over the house where Washington was confined and eventually buried. The statement did not equivocate about Scarber's role or shift any blame for the kidnapping, which was ongoing at the time of the statement, and nothing indicates that Scarber made the statement at Ervin's prompting. Therefore, the statement about the kidnapping contained all of the factors favoring admission and none of the factors warranting inadmissibility. *Id*. Furthermore, Scarber made the statement to a friend for personal and conspiratorial reasons, not to an interrogator or other official for the purposes of trial, so the statement was not testimonial. See *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Therefore, although the trial court did not analyze the first statement's indicia of reliability, it clearly does not offend the Confrontation Clause, and any analytical omission in the trial court's determination was harmless. MRE 103.

The second statement, however, requires a more extensive analysis. That statement shifted the blame of shooting Washington to defendant King. In a related vein, it is arguable that defendant Scarber's desire to disassociate himself from the murder provided him with a motive to lie about the identity of the individual (perhaps Scarber himself) who actually shot Washington. However, the statement was volunteered, contemporaneous with the shooting, spoken to a friend and confederate, spontaneously provided, and was not delivered to police or used to curry favor with Ervin. *Poole*, *supra* at 165. In context, the statement formed a pattern of impugning communications that Scarber made to Ervin without reservation and without any apparent secondary motivation other than the desire to maintain the benefits of the relationship's confidence and trust—and, according to the record, to brag. Therefore, Scarber's statements to Ervin constituted a "narrative of events," so the statements were admissible at trial in their entirety. *Id*. at 161. Again, because the statements clearly complied with the strictures of the confrontation clause, any failure by the trial court to scrutinize properly the various indicia of reliability was harmless. MRE 103.

Defendant Scarber challenges the use of his own statements against him by arguing that the trial court should have suppressed the custodial interview on constitutional grounds. Defendant Scarber argues that he did not voluntarily waive his right to remain silent, but was improperly threatened and induced to break his silence. We disagree. "When reviewing a trial court's determination of the voluntariness of inculpatory statements, this Court must examine the entire record and make an independent determination, but will not disturb the trial court's factual findings absent clear error." *People v Shipley*, 256 Mich App 367, 372-373; 662 NW2d 856 (2003). "[D]eference is given to the trial court's assessment of the weight of the evidence and credibility of the witnesses." *Id*. at 373.

In this case, the trial court held a *Walker*[4] hearing and, after listening to the different accounts of the police interview from defendant Scarber and the officers, the trial court reviewed the factors in *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988), and held that defendant voluntarily waived his right to remain silent. The trial court found that the interviewing officers were much more credible compared to defendant, and it discounted many of defendant's factual assertions regarding his claims of coercion and inducement. Although the officers admitted telling defendant Scarber that they did not want him—they wanted King, this fact is, at most, a vague promise of leniency, which is only one factor in determining whether a defendant's right to remain silent was voluntarily waived. *People v Givans*, 227 Mich App 113, 119-120; 575 NW2d 84 (1997). Scarber did not make any inculpating statements after police tried to assure him of their interest in a more desirable target, and instead he only opened up about his participation after he saw that Ervin had made the crime's detection and prosecution inevitable. Therefore, any argument that his will was overborne by a veiled promise of leniency is highly suspect. See *People v Conte*, 421 Mich 704; 365 NW2d 648 (1984). Moreover, the record otherwise reflects defendant Scarber's seasoned familiarity with the justice system, and the written statement contains a plea in Scarber's own hand imploring the future reader to refrain from using the statement against him. In the end, the trial court had an adequate basis to find that defendant, despite his protests to the contrary, was not sufficiently influenced by the officers' expression of disinterest in him that it undermined his previously unshakable determination to remain silent, and we defer to the trial court's superior ability to resolve such credibility questions. *Shipley*, *supra*.

Next, defendants Taylor and King raise several arguments regarding the sufficiency of the evidence presented at trial. However, all the arguments require us to revisit the jury's determination that Ervin truthfully testified about their involvement in the crime. We will not second-guess a jury's resolution of a credibility contest. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). In this case, eyewitnesses placed defendants Scarber and King at the scene of Washington's capture, and defendant Taylor's conviction for Washington's murder and kidnapping was supported by Ervin's eyewitness testimony that he stood guard and would not allow Washington to use his phone. Therefore, viewing the evidence in the light most favorable to the prosecution, the prosecutor presented sufficient evidence to sustain the convictions, and the great weight of the evidence does not militate against the guilty verdicts in these cases. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Lemmon*, 456 Mich 625, 643-647; 576 NW2d 129 (1998).

Defendant Scarber raises similar arguments, but stresses that the evidence did not support a finding of premeditated murder, so his conviction on that charge cannot stand. We disagree. Scarber correctly argues that the crime of premeditated murder requires that the defendant act with the intent to kill, rather than merely injure, the victim. *People v Dykhouse*, 418 Mich 488, 495-497; 345 NW2d 150 (1984); *People v Milton*, 81 Mich App 515; 265 NW2d 397, modified on other grounds 403 Mich 821 (1978). However, the evidence in this case, when viewed in a light most favorable to the prosecution, supported the jury's finding of deadly intent.

[4] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

Whether an individual specifically intended to kill a victim is determined by considering all the facts surrounding the crime, and as with other proof of mental state, intent to kill may be inferred from a minimal amount of evidence. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). According to one of the witnesses who received a ransom call, one of the kidnappers threatened to kill Washington if they did not receive money in an hour. In other calls Washington told his family that his captives were going to kill him. Scarber himself told police that defendant King shot a defenseless Washington, expressed his lack of care for Washington's life and a willingness to kill him, and then shot Washington again. Although defendant Scarber points to the evidence that Washington only received wounds in his legs, this evidence alone does not require reversal. Instead, the placement of the fatal injury is only one factor in determining intent. *People v Coddington*, 188 Mich App 584, 600; 470 NW2d 478 (1991). Moreover, the jury could have reasonably inferred that King shot Washington twice in the legs intending that he would die slowly enough that he would still be able to procure the ransom. This inference is supported by the fact that the kidnappers did not release Washington or provide him with any medical care even after some ransom arrangements were finally made. The power of the weapon used and the severity of the injuries strongly suggest that the shooter intended to kill Washington with the second shot. Viewing the evidence in the light most favorable to the prosecution, the evidence supported the jury's finding that the shooter specifically intended to kill Washington. *Wolfe*, *supra*. Because the jury properly found that Washington's killing was intentional, premeditated, and deliberate, and because the first-degree murder was undeniably a "natural and probable" consequence of taking Washington captive and holding him ransom at gunpoint, the jury's verdict on this charge was supported by sufficient evidence. *People v Robinson*, 475 Mich 1, 9, 15; 715 NW2d 44 (2006).

We next turn to issues raised by each defendant regarding Ervin's references to a polygraph examination during defendant Taylor's cross-examination of the witness. Although none of the defendants objected at the time the witness mentioned the polygraph test, they all joined in a motion for mistrial. We review for abuse of discretion a trial court's decision on a defendant's motion for mistrial. *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003). In *People v Rocha*, 110 Mich App 1, 9; 312 NW2d 657 (1981), the following factors were considered to determine whether the mention of a polygraph examination required a reversal:

> (1) whether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted.

In this case, no objection was immediately lodged, and the trial court correctly found that the three volunteered references were the inadvertent product of Taylor's defense counsel vaguely and confusingly prodding Ervin about different statements he had made to police. The statements were not the result of prosecutorial misconduct, and we find nothing to discredit the trial court's finding that they were not intended to bolster the witness, but instead sought to clarify defense counsel's inquiry. The second and last time Ervin mentioned the word "polygraph," the trial court sua sponte struck the testimony, admonished the witness to focus on the question asked, and told the jury to disregard Ervin's response. Defendants rejected the trial court's invitation to issue a curative instruction directly addressing the issue, and never moved to

introduce the fact that Ervin failed his polygraph examination. Applying the factors in *Rocha*, we are persuaded that the inadvertent references to the examination do not necessitate reversal, and the trial court did not abuse its discretion in denying defendants' motions for mistrial.

Defendant Scarber argues that the trial court erred by failing to provide a jury instruction regarding the prejudicial accomplice testimony provided by Ervin. We disagree. The record reflects that defense counsel waived any error in the jury instructions by expressly agreeing with their contents. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Moreover, we do not find that Scarber's trial attorney provided ineffective assistance by avoiding the instruction, because the decision to forego the instruction was most likely trial strategy. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). An accomplice instruction would have directed the jury to view statements made by accomplices with an additional measure of skepticism, especially those portions of a statement that tended to cast the accomplice in a favorable light. See CJI2d 5.6. In this case, Scarber, too, was an accomplice to the crime, and his statement to police painted him as a compassionate man who was coerced into participating in the kidnapping. Any instruction denigrating Ervin's accomplice testimony would necessarily have applied to Scarber's exculpatory statements to police. Therefore, defendant fails to persuade us that the decision to forego the instruction was anything other than a strategic attempt to persuade the jury that Scarber told the police the truth when he shifted the blame to the other defendants and denied any voluntary role in the crimes. *Riley, supra*.

Next, defendant Taylor raises a pair of issues that arise from the prosecutor's anticipated presentation of a witness, Craig Ellis, who would presumably testify that Taylor tried to hire him to kill Ervin. Taylor first argues that the trial court erred by holding that the evidence was admissible, because the evidence was not sufficiently similar to the charged crime to demonstrate a similar plan or scheme. This argument fails for two reasons. First, the evidence never was admitted because Ellis decided to exercise his privilege against self-incrimination. Therefore, the testimony was never presented to the jury. Second, MRE 404(b), on which defendant relies, does not exclude evidence of other acts that directly incriminate a defendant. The rule is that a court may allow evidence of threats against witnesses because they generally prove consciousness of guilt for the crime charged. *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996). Therefore, defendant's argument lacks factual and legal merit.

Defendant Taylor also argues that the prosecutor committed misconduct by mentioning that she would introduce Ellis's testimony about Taylor's solicitation of Ervin's murder. We disagree. Because defendant failed to raise a timely objection to the statement, "[n]o error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002). However, defendant Taylor raised the issue of the questionable evidence in a motion for mistrial the next day and renewed that motion at the end of trial. We will review for abuse of discretion the trial court's decision on that motion. *Coy*, *supra*.

The controlling case is *People v Wolverton*, 227 Mich App 72, 76-77; 574 NW2d 703 (1997), which holds that reversal on the basis of a prosecutor's unfulfilled promise to produce evidence at trial is not necessary unless the defendant demonstrates bad faith or so much prejudice to the defendant that he did not receive a fair trial. In this case, the trial court had preliminarily and correctly granted the prosecutor permission to call Ellis and elicit the

testimony. See *Sholl*, *supra*. Therefore, defendant fails to demonstrate any bad faith in the prosecutor's statements.

Regarding prejudice, a timely curative instruction explaining that the prosecutor's opening statements are not evidence would have gone a long way to minimize any innuendo stirring in the minds of the jurors. Moreover, the facts suggest that any prejudice from the opening statements was minimal anyway. The prosecutor's promise of proof in this case did not relate directly to an element of the charged crime, so this case is factually distinguishable from *Wolverton*. Instead, the testimony related to an indirect indication of defendant's knowledge of his guilt, so the facts of this case more closely resemble the poison-pen letter sent to the victim in *People v King*, 215 Mich App 301, 306; 544 NW2d 765 (1996). In *King* we found that the prosecutor's good-faith mention of the inadmissible letter in his opening statement did not prejudice the defendant enough that the fairness of the entire proceedings were cast into doubt. Moreover, in her closing arguments in this case, Taylor's defense counsel harped on the absence of the witness, the lack of testimony, and the prosecutor's broken promise to prove the egregious and incendiary accusation, so the failure to present the witness likely prejudiced the prosecutor as much as the defense. See *Wolverton*, *supra* at 76; *People v Swift*, 172 Mich 473, 483; 138 NW 662 (1912). Under the circumstances, defendant fails to demonstrate that he suffered so much incurable prejudice that his trial's fairness was hopelessly denigrated, and the trial court did not abuse its discretion when it accordingly denied defendant's motion for mistrial.

Finally, defendant Taylor argues that the trial court erred by preventing him from cross-examining a jailhouse informant about the informant's differing statements he made to police and his probation officers about his level of culpability for his own crimes. We disagree. "The decision whether evidence is admissible is within the trial court's discretion and should only be reversed where there is a clear abuse of discretion." *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). "A party is free to contradict the answers that he has elicited from his adversary or his adversary's witness on cross-examination regarding matters germane to the issue. As a general rule, a witness may not be contradicted regarding collateral, irrelevant, or immaterial matters." *People v Vasher*, 449 Mich 494, 504; 537 NW2d 168 (1995).

Ordinarily, a witness may not be impeached by extrinsic evidence and factual development of specific prior incidents of untruthfulness. MRE 608(b). This rule prevents a trial from devolving into a limitless series of mini-trials about the past truths and untruths told by each witness over the witness's lifetime. Instead, veracity may be tested directly by asking the witness if he or she lied on a particular occasion, see *People v Lester*, 232 Mich App 262, 274-276; 591 NW2d 267 (1998), or by introducing evidence of a witness's reputation through another witness. MRE 608(a). If a party seeks to impeach a witness directly with past untruthful words or deeds, then the party must take the witness's affirmation or denial without inquiring further into the facts of the specific event. See *Lester*, *supra* at 276. In this case, defendant Taylor's counsel elicited plenty of information on cross-examination regarding the informant's criminal past and his self-interest in providing incriminating information against defendant. While asking the informant about statements he had made in his own case, defendant Taylor did not follow the pattern in *Lester*. Instead, he first sought to delve into the specific account provided to police upon the informant's arrest, and then sought to inquire about the statement provided later to the informant's probation officer. Because defendant Taylor never directly questioned the witness about his veracity, but instead sought to circumvent a direct approach and

get more detail before the jury, the trial court properly exercised its discretion and precluded further inquiry into the collateral matter. MRE 608(b); *People v Crawford*, 232 Mich App 608, 620-621; 591 NW2d 669 (1998).

We set aside defendant King's convictions and sentences for second-degree murder and kidnapping. We likewise set aside defendant Taylor's conviction and sentence for kidnapping. We affirm all the other convictions and sentences in all other respects.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Peter D. O'Connell