STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL REID HILLS,

Defendant-Appellant.

UNPUBLISHED
December 13, 2007

No. 269504
St. Clair Circuit Court
LC No. 05-001867-FC

Before: Wilder, P.J., and Cavanagh and Hood, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316, kidnapping, MCL 750.349, and conspiracy to commit kidnapping, MCL 750.157a. He was sentenced to life imprisonment for the murder conviction, and concurrent terms of 23 to 50 years' imprisonment for the kidnapping and conspiracy convictions. He appeals as of right. We vacate defendant's kidnapping conviction and sentence, but affirm his remaining convictions and sentences.

Defendant's convictions arise from the confinement and beating death of Ryan Rich at the hands of defendant and five codefendants: defendant's brother Robert Hills, Stewart Ginnetti, Nicholas Dobson, Michael Bowman, and James Cunningham.

I

Defendant first argues that there was insufficient evidence to support each of his convictions, and that jury's verdict is also against the great weight of the evidence with respect to each conviction. We disagree.

A sufficiency of the evidence claim is evaluated by reviewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find every element of the crime proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). The resolution of credibility disputes is within the exclusive province of the trier of fact, which may also draw reasonable inferences from the evidence. *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991); *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

In contrast to a sufficiency of the evidence claim, a new trial may be granted where the verdict is against the great weight of the evidence, but "only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *People v*

Lemmon, 456 Mich 625, 635, 642, 647; 576 NW2d 129 (1998). The trial court's decision whether to grant a new trial is reviewed for an abuse of discretion. *Id*. at 648 n 27.

A. Conspiracy to Kidnap

Defendant argues that there was no evidence that he was part of any agreement to kidnap the victim. We disagree.

"A conspiracy is a partnership in criminal purposes." *People v Blume*, 443 Mich 476, 481; 505 NW2d 843 (1993) (internal quotations and citations omitted). To create a conspiracy, "two or more individuals must have voluntarily agreed to effectuate the commission of a criminal offense." *People v Justice (After Remand)*, 454 Mich 334, 345; 562 NW2d 652 (1997). The gist of the offense of conspiracy lies in the unlawful agreement. *Blume*, *supra* at 481. Therefore, it is critical to show that the accused had the specific intent to "combine to pursue the criminal objective of their agreement." *Justice*, *supra* at 345.

"[D]irect proof of the conspiracy is not essential; instead, proof may be derived from the circumstances, acts, and conduct of the parties." *Id*. at 347. Reasonable inferences may be drawn from the evidence to establish the coconspirators' intentions. *Id*. at 347-348.

In the present case, defendant told the police that he knew that the victim had allegedly snitched on codefendant Ginnetti, and that he knew of the plan to tie up the victim, "smack him up and take him somewhere else." Defendant also admitted that he helped tackle the victim, obtained the tape that was used to bind the victim, helped tie the victim up, obtained a CD player to mask the noise, placed tape over a peephole in the garage to prevent anyone outside from looking in, and kept people away from the garage during the offense. Other witnesses corroborated defendant's participation in these activities. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant voluntarily agreed to effectuate the secret-confinement kidnapping of the victim. There was sufficient evidence to support defendant's conspiracy conviction, and the conviction is not against the great weight of the evidence.

B. Kidnapping

Defendant was convicted of the secret-confinement form of kidnapping. MCL 750.349 provides that a person is guilty of "secret confinement" kidnapping if he

> wilfully, maliciously, and without lawful authority shall . . . secretly confine or imprison any other person within this state against his will.

This form of kidnapping does not require proof of specific intent, or proof of asportation. *People v Jaffray*, 445 Mich 287, 297-299; 519 NW2d 108 (1994).

Defendant argues that because several people knew the victim's location, there was insufficient evidence to convict him of secret-confinement kidnapping. We disagree.

Defendant correctly observes that there was evidence that the victim's girlfriend, Nicole Fountain, and others knew of the victim's location, and that defendant's sister Heather (and

perhaps Sara Apsey and Damon Johnson) may have known of the victim's predicament. However, "mere awareness by a third party of the victim's plight is not dispositive" of whether the confinement was secret. *Jaffrey*, *supra* at 305-306. Rather,

> [s]ecret confinement . . . does not require proof of total concealment and complete isolation whereby the victim is rendered invisible to the entire world. It is sufficient to show that the person kidnapped has been effectively confined against his will in such a manner that he is prevented from communicating his situation to others and [the] accused's intention to keep the victim's predicament secret is made manifest. [*Id*. at 306 (internal quotations and citations omitted).]

The "proper focus is on the channels of communication available to the victim." *Id*. at 307. "Although a third person may have suspicions or even knowledge concerning a confinement, unless he is aware of the specific location of the victim, the victim may be deprived of the ability to communicate his plight to others." *Id*. The essence of secret confinement kidnapping "is the deprivation of the assistance of others by virtue of the victim's inability to communicate his predicament." *Id*. at 309.

Although there was evidence that Fountain and Karin Stebbins knew that the victim had gone to the Hills' home, there was no evidence that either knew of his predicament. The evidence also indicated that defendant's sister Heather may have vaguely known of the victim's predicament, but did not know the seriousness of the danger, or that he was still in the garage. Further, she was only 14 years old and was not in a position to assist the victim. Apsey heard Ginnetti ask about someone being placed in a trunk, and Johnson suspected that Ginnetti's detour was related to defendant, but neither Apsey nor Johnson knew the victim's location. Defendant's actions in taping the peephole on the garage, keeping people away from the garage, and playing loud music to mask the noise from inside, show an intent to keep the confinement secret, and to prevent the victim from obtaining assistance. Therefore, viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant was guilty of secret-confinement kidnapping, and the jury's verdict is not against the great weight of the evidence.

C. First-Degree Murder

The jury was instructed on both first-degree premeditated murder and first-degree felony murder. The evidence was sufficient to support a conviction under either of these theories.

In order to convict a defendant of first-degree premeditated murder, the prosecution must prove that the defendant acted with premeditation and deliberation. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). "To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or a problem." *People v Furman*, 158 Mich App 302, 308; 404 NW2d 246 (1987). Defendant was also charged under an aiding and abetting theory. To convict defendant of premeditated murder under an aiding and abetting theory, "the prosecutor was required to show that at the time of the [killing] the defendant either had the premeditated and deliberate intent to kill the victim or that [he] participated knowing that the principal possessed this specific intent." *People v Youngblood*, 165 Mich App 381, 387; 418 NW2d 472 (1988).

The evidence indicated that defendant rendered assistance knowing that the codefendants believed that the victim had been cooperating with the police. Although defendant claimed that he warned the others that he did not want anyone killed, the evidence supports an inference that he participated in the offense with knowledge that his codefendants had a premeditated intent to kill the victim. Thus, viewed in a light most favorable to the prosecution, there was sufficient evidence to enable the jury to find defendant guilty of first-degree premeditated murder.

"The elements of first-degree felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., with malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [MCL 750.316(1)(b)]." *People v Smith*, 478 Mich 292, 318-319; 733 NW2d 351 (2007) (citations and internal quotations omitted).

To be convicted of aiding and abetting felony murder, "[t]he requisite intent is that necessary to be convicted of the crime as a principal," that is, malice. *People v Kelly*, 423 Mich 261, 278; 378 NW2d 365 (1985). "[I]t therefore must be shown that the aider and abettor had the intent to kill, the intent to cause great bodily harm or wantonly and wilfully disregarded the likelihood of the natural tendency of his behavior to cause death or great bodily harm." *Id.*; see also *People v Barrera*, 451 Mich 261, 294; 547 NW2d 280 (1996). "[I]f the aider and abettor participates in a crime with knowledge of his principal's intent to kill or to cause great bodily harm, he is acting with 'wanton and willful disregard' sufficient to support a finding of malice . . . ." *Kelly*, *supra* at 278-279 (citation omitted).

The evidence that defendant participated in the offense with knowledge that his codefendants had a premeditated intent to kill the victim was sufficient to establish the requisite malice for first-degree felony murder. Malice was also show by the evidence that defendant admittedly knew that Bowman and Ginnetti were going to beat the victim up for snitching, and by defendant's conduct in helping to tackle the victim, obtaining tape that was used to bind the victim, helping to tie the victim up, and then covering the peephole, keeping others away from the garage, and masking the noise from the garage. Viewed in a light most favorable to the prosecution, this evidence shows that defendant participated in the offense in wanton and wilful disregard of the likelihood that the natural tendency of his behavior would be to cause death or great bodily harm.

Kidnapping is an enumerated felony in MCL 750.316(1)(b) and, as previously discussed, there was sufficient evidence that defendant participated in the kidnapping. Also, the evidence established that the victim was killed during the commission of the kidnapping offense.

For these reasons, the evidence was sufficient to support a conviction of first-degree felony murder.

Lastly, in light of the foregoing discussion, defendant's first-degree premeditated murder conviction is not against the great weight of the evidence.

II

Defendant next argues that the trial court erroneously denied his request for a specific unanimity instruction concerning a specific theory of first-degree murder, i.e., felony murder or premeditated murder. We disagree. Claims of instructional error are reviewed de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002).

Defendant relies on *People v Cooks*, 446 Mich 503, 512; 521 NW2d 275 (1994), but the Court in that case held that a specific unanimity instruction is not required in all cases in which more than one act is presented as evidence of an actus reus of a single criminal offense. "The critical inquiry is whether either party has presented evidence that materially distinguishes any of the alleged multiple acts from the others." *Id*. "In other words, where materially identical evidence is presented with respect to each act, and there is no juror confusion, a general unanimity instruction will suffice." *Id*. at 512-513.

Additionally, in *Schad v Arizona*, 501 US 624, 632; 111 S Ct 2491; 115 L Ed 2d 555 (1991), the United States Supreme Court indicated that "there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict." In *Schad*, the Supreme Court examined Arizona's first-degree murder statute, which, like Michigan's statute, defines first-degree murder in the alternative, as either premeditated murder or felony murder. *Id*. at 628 n 1. The Court Supreme Court concluded that felony murder and premeditated murder are, in effect, alternative means of satisfying the mens rea requirement of high culpability required for a first-degree murder conviction—not separate elements of the offense. *Id*. at 632, 636-637, 639. The Supreme Court therefore found that the jury was not required to agree on whether the defendant was guilty of felony murder or premeditated murder. *Id*. at 630-631, 636-637. The Court also upheld the constitutionality of the statute. *Id*. at 643-645.

In the present case, there were no distinct alternative factual scenarios from which the jury could choose in determining whether defendant was guilty of first-degree felony murder, or first-degree premeditated murder. Therefore, *Cooks* does not compel the giving of a unanimity instruction. Additionally, contrary to what defendant argues, because MCL 750.316 defines felony murder and premeditated murder as alternative means of committing first-degree murder, not as separate elements of the offense, a jury need not reach unanimity on the factual predicates of the conviction. Therefore, the trial court did not err in declining defendant's request for a specific unanimity instruction.

III

Defendant next argues that his dual convictions for both first-degree murder and kidnapping violate the double jeopardy protection against multiple punishments for the same offense. We agree. Double jeopardy issues are questions of law that we review de novo. *People v White*, 212 Mich App 298, 304-305; 536 NW2d 876 (1995).

Under the Double Jeopardy Clause, a defendant may not be convicted of, and sentenced for, both felony murder and its underlying felony. *People v Harding*, 443 Mich 693, 710-712, 714; 506 NW2d 482 (1993). Therefore, when a defendant is convicted and sentenced for both felony murder and the predicate felony, the underlying felony conviction and sentence must be vacated. *People v Bigelow*, 229 Mich App 218, 220-221; 581 NW2d 744 (1998). In this case, the jury was instructed on both theories of first-degree murder, premeditated murder and felony

murder, and found defendant guilty of first-degree murder, but did not specify the particular theory that served as the basis for that finding. But because it would be a double jeopardy violation to convict and sentence defendant for both first-degree felony murder and the underlying kidnapping felony, and because the jury's verdict does not eliminate the possibility that defendant's first-degree murder conviction was based on a felony-murder theory, the prosecutor asserts, and we agree, that it would be appropriate to vacate defendant's conviction and sentence for kidnapping. Accordingly, we vacate defendant's kidnapping conviction and sentence.

IV

Next, defendant argues that his Sixth Amendment right of confrontation was violated by the introduction of out-of-court statements allegedly made by several nontestifying codefendants. Because defendant did not raise a Confrontation Clause issue in the trial court, and did not move to redact the statements of the nontestifying codefendants, this issue is not preserved. Accordingly, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).). Even if there is plain error affecting substantial rights, reversal is not warranted unless the defendant is actually innocent or the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id*. at 763.

We begin, as always, with the text of the constitutional provision. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." US Const, Am VI. To preserve this "bedrock procedural guarantee," which applies to state and federal prosecutions, hearsay (a testimonial statement of a declarant absent from trial, offered for its truth) is inadmissible against a criminal defendant, unless the declarant is unavailable and there was a prior opportunity for cross-examination of the declarant. *Crawford v Washington*, 541 US 36, 38, 40, 42, 53-56, 58-59; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005).

Crawford applies only to substantive evidentiary use of testimonial hearsay. *Crawford, supra* at 59 n 9.[1] The confrontation clause does not bar the use of out-of-court statements, even testimonial ones, for purposes other than establishing the truth of the declarant's assertion. *People v McPherson*, 263 Mich App 124, 133; 687 NW2d 370 (2004) (citing *Crawford, supra*). In *McPherson*, this Court held that a testimonial out-of-court statement was admissible under the confrontation clause, because it was not admitted to prove the truth of the declarant's assertion. *McPherson, supra* at 133-134. Rather, the declarant's out-of-court statement to the police

[1] Where the hearsay is nontestimonial, the confrontation clause does not restrict state law in its determination of whether the hearsay is admissible. *Crawford, supra* at 68. "While the [*Crawford*] Court left for another day any effort to spell out a comprehensive definition of testimonial, it also stated that statements taken by police officers *in the course of interrogations* are . . . testimonial under even a narrow standard." *McPherson, supra* at 132 (internal quotation marks, brackets and citations omitted; italics added).

(stating that the defendant was the shooter) was admitted to impeach the defendant's trial testimony that the declarant was the shooter. *McPherson, supra* at 134.

Here, during their interrogation, the police presented defendant with statements allegedly made by other witnesses or suspects whom the police had allegedly interviewed. These statements were not offered for their truth, but only for observing defendant's reaction, and to place his answers in context. Considered in this context, there was no plain violation of defendant's right of confrontation. See *People v Johnson*, 100 Mich App 594, 596; 300 NW2d 332 (1980).

V

Defendant next argues that the trial court erred in denying his motion to suppress his first custodial statement on the ground that it was not voluntarily made, and therefore that its admission violated his constitutional rights because he was compelled to be a witness against himself. We disagree.

In reviewing the question whether there was a valid waiver of the privilege against self-incrimination, and whether a confession was properly admitted, an appellate court conducts a de novo review of the entire record. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000). But the trial court's findings of fact are reviewed for clear error. *Id*. at 629-630, 635.

"No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." US Const, Am V. When a defendant challenges the admissibility of a confession, the prosecution must prove by a preponderance of the evidence that there was a valid waiver of the privilege against self-incrimination. *Daoud*, *supra* at 634. A valid waiver must be voluntary, knowing and intelligent. *Id*. at 633. This is a bifurcated inquiry to be determined objectively upon the totality of the circumstances. *Id*. at 633-634, 639. Whether a waiver of *Miranda*[2] rights is voluntary depends on the absence of police coercion. *Id*. at 635.

The trial court conducted an evidentiary hearing on the issue of voluntariness. Although the evidence showed that defendant was injured during his arrest, he did not request medical treatment during the interview, despite an offer thereof by the police. Treatment was provided later, after defendant asked for it. Defendant does not claim that he was coerced into speaking by sheer pain, or that treatment was made contingent on his speaking to the police. The evidence also showed that defendant was under arrest, knew that he was under arrest, and was advised of his rights. Defendant had been arrested before, and had been advised of his rights before, and conceded that he understood his rights and voluntarily waived them. Defendant asserts that the officers told him, in essence, that if he did not tell them the truth, they were going to lock him up and then interview someone else. However, defendant concedes that the police never said anything that would reasonably lead him to believe that he would be released if he agreed to talk. Rather, defendant was, unrealistically, "hoping" to be released if he cooperated. The police did nothing to engender that belief.

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

The totality of the circumstance shows that the police did not coerce or intimidate defendant into making a statement. Therefore, the trial court did not err in finding that defendant's statement was voluntary, and denying his motion to suppress.

VI

Defendant next argues that misconduct by the prosecutor denied him a fair trial. In other words, defendant argues that he was deprived of his liberty without due process of law, in violation of the United States and Michigan Constitutions. We disagree.

Claims of prosecutorial misconduct are reviewed on a case-by-case basis, and the challenged remarks are reviewed in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267 and nn 5-7; 531 NW2d 659 (1995). Here, however, because defendant failed to object to alleged misconduct, "appellate review is precluded unless a curative instruction could not have eliminated possible prejudice or failure to consider the issue would result in a miscarriage of justice." *Noble, supra* at 660. As with other unpreserved issues, defendant must show a plain error affecting his substantial rights. *People v Schutte*, 240 Mich App 713, 722; 613 NW2d 370 (2000).

A. Drug Organization

Defendant first argues that the prosecutor referred to facts not in evidence when she stated that defendant had admitted to being part of Ginnetti's drug organization. We disagree.

As argued by defendant, "[a] prosecutor may not argue the effect of testimony that was not entered into evidence at trial." *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). But a prosecutor is free to comment on the evidence, to draw reasonable inferences therefrom, and to argue how the evidence relates to his theory of the case. *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989); see also *People v Cox*, 268 Mich App 440, 451; 709 NW2d 152 (2005).

Viewed in context, the prosecutor did not argue that defendant had admitted to being part of a drug organization. Rather, she accurately stated that defendant admitted using drugs, and then inferred, from the evidence presented at trial, that defendant was part of the codefendants' drug organization. Defendant had admitted that he had a good idea that Bowman and Ginnetti were dealing drugs. He also admitted knowing about the allegations of the victim's snitching, and knowing about the plan to scare the victim, and to smack him around and take him somewhere. Defendant also admitted having a role in that plan, knowing what that role was, and carrying it out. In light of this evidence, it was reasonable for the prosecutor to argue that defendant was part of Bowman's and Ginnetti's drug organization, and therefore, defendant had a motive to participate in the plan to teach the victim a lesson. The prosecutor did not commit misconduct by drawing that inference and relating it to her theory of the case.

B. Bloody Socks

Defendant argues that the prosecutor again referred to facts not in evidence when she stated that the bloody socks found in the tool box belonged to defendant. We disagree.

A "prosecutor's comments must be considered in light of the defenses counsel's comments." *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001). In this case, defense counsel argued that it defied common sense to think that defendant would have left the bloody socks behind if he had known that he was cleaning up the scene of a homicide. In response, the prosecutor argued that defendant and his codefendants were not very smart, and the fact that he left the socks behind, which were probably his own socks, was not exculpatory. The prosecutor's argument was a proper response to defense counsel's argument. Further, the evidence at trial showed that the garage belonged to defendant's mother. Bowman left at approximately 4:00 or 4:30 a.m., and Robert, Ginnetti, and Dobson were seen at a gas station at 4:49 and 5:25 a.m. Defendant remained behind and admittedly spread cat litter on the oil that was used to cover up the victim's blood. The victim was still wearing his socks when his body was found. Therefore, while the socks in the garage may have belonged to someone else, it was reasonable for the prosecutor to infer that the socks belonged to defendant. Therefore, the prosecutor's argument was not improper.

C. Codefendants' Statements

Defendant argues that, by using the codefendants' statements at trial, the prosecutor may have knowingly allowed false evidence to reach the jury.

Defendant correctly argues that a prosecutor may not knowingly use false testimony, and must report and correct perjury committed by a government witness when it occurs. *People v Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001); *People v Lester*, 232 Mich App 262, 276-278; 591 NW2d 267 (1998). In this case, however, the codefendants' statements were part of the officers' questions during defendant's interrogation. As previously indicated, they were not introduced for their truth, but only for the purpose of evaluating defendant's reaction and placing context to defendant's answers. Defendant does not content that the evidence at trial did not accurately reflect the statements that were presented to defendant during his interview. Accordingly, there was no plain error.

D. The Victim's Photograph

Defendant argues that, by displaying the victim's photograph during closing argument, the prosecutor made an impermissible appeal to the jurors for sympathy.

A prosecutor's role and duty are to seek justice, not merely to obtain a conviction. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Thus, a prosecutor may not appeal to the sympathies of the jurors in order to obtain a conviction. *Watson*, *supra* at 591. However, a prosecutor may use emotional and passionate language during closing argument. *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003); *People v Abraham*, 256 Mich App 265, 276-277; 662 NW2d 836 (2003).

Considered in context, it is apparent that by displaying the victim's picture, the prosecutor was seeking justice for the victim, not appealing to the jury for sympathy. The photograph was part of a passionate, emotional argument that defendant should be convicted based on the evidence. Additionally, the trial court instructed the jury not to allow sympathy or prejudice to influence its decision, and that the attorneys' statements and arguments are not

evidence. Jurors are presumed to follow instructions (unless the contrary is clearly shown, which defendant has not attempted to do). *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994); see also *Watson*, *supra* at 592. Therefore, defendant has failed to show a plain error that affected his substantial rights.

VII

Next, defendant argues that he was deprived of his constitutional right to counsel, specifically, of his right to the effective assistance of counsel. We disagree.

We begin, naturally, with the text of the constitutional provisions at issue. The United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." US Const, Am VI. Similarly, the Michigan Constitution provides: "In every criminal prosecution, the accused shall have the right . . . to have the assistance of counsel for his or her defense . . . ." Const 1963, art 1, § 20. It is well established that these provisions not only protect the right of an accused to hire counsel, but affirmatively require the government to provide counsel for the defense of an indigent accused. In addition, these provisions have been interpreted, under the common law of the constitution, to require that the attorney provided by the government must provide "effective" assistance. E.g., *Strickland v Washington*, 466 US 668; 104 S Ct 2052, 80 L Ed 2d 674 (1984); *Schriro v Landrigan*, ____ US ____; 127 S Ct 1933, 1939; 167 L Ed 2d 836 (2007).

A constitutional claim of ineffective assistance of counsel is reviewed under the standard established in *Strickland*, which requires the defendant to show that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney guaranteed under the Sixth Amendment. *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993). The right to counsel under the Michigan Constitution does not impose a more restrictive standard than that established in *Strickland*. *People v Pickens*, 446 Mich 298, 318-319; 521 NW2d 797 (1994).

Effective assistance of counsel is presumed and defendant bears the burden of proving otherwise. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To succeed on a claim of ineffective assistance of counsel, the defendant must show that, but for an error by counsel, the result of the proceedings would have been different and that the proceedings were fundamentally unfair or unreliable. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). The defendant bears a "heavy burden" on these points. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Garza, supra*, at 255.

A. Codefendants' Statements

Defendant argues that defense counsel was ineffective for not moving to redact the codefendants' statements that were presented to defendant during his first custodial statement. We disagree.

An attorney is not ineffective for failing to make a futile motion. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002). In this case, the only purpose of the codefendants' statements was to provide context to defendant's answers to the officers' questions. The statements were not offered or used for their truth. Therefore, they did not constitute inadmissible hearsay, and their use at trial did not violate defendant's rights under the Confrontation Clause. Therefore, defense counsel did not make a serious error by failing to make a futile motion to redact them.

B. Defendant's Second Custodial Statement

Defendant next argues that defense counsel erred in requesting that defendant's second custodial statement be admitted into evidence, when the prosecutor did not intend to use it. We disagree.

"Decisions concerning what evidence to present and whether to call or question a witness are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Regarding the substance of the crime, defendant admitted very little in the second interview that he had not already admitted in the first. Additionally, the second statement contained matters that defense counsel reasonably could use to defendant's advantage during closing argument. For example, in the second statement, the detectives repeatedly pressured defendant until he finally agreed to talk. Defendant also showed some empathy for the victim, and told the police that he felt that he should be "in the same condition that kid is . . . I should be where he's at."

Defendant has not overcome the presumption that defense counsel's decision to introduce defendant's second statement, after the trial court refused to suppress the first statement, was a matter of sound trial strategy. The fact that a particular strategy does not work, does not prove that counsel was ineffective. *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004).

C. Defendant's Prior Arrests

Defendant next argues that defense counsel was ineffective for failing to move to redact defendant's comment about his prior arrests during his interview. We again disagree.

A failure to object can be a serious error that results in prejudice. *People v Kimble*, 470 Mich 305, 314; 684 NW2d 669 (2004). But the decision whether to object to an alleged impropriety can also be a matter of trial strategy. *Matuszak*, *supra* at 58. Defendant's comment concerning prior arrests was made in the context of defendant's questions to the officers regarding whether he was under arrest. During closing argument, defense counsel argued that defendant's police statement was coerced, because, despite repeated questions, the interrogating officers never clearly told him whether he was under arrest. Defense counsel reasonably may have decided to forego challenging the comment about prior arrests, so that he could argue that the officers' failure to directly answer defendant's question whether he was presently under arrest demonstrated that the statement was coerced. Defendant has failed to overcome the presumption of sound trial strategy.

D. Prosecutorial Misconduct

Defendant argues that defense counsel was ineffective for failing to object to the prosecutor's comments concerning defendant's membership in a drug organization and the bloody socks. We disagree. As previously discussed in section VI, *supra*, the prosecutor's comments were not improper. Therefore, defense counsel was not ineffective for failing to make a meritless objection. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

VIII

Lastly, defendant argues that the cumulative effect of errors deprived him of a fair trial. We disagree.

"Although one error in a case may not necessarily provide a basis for reversal, it is possible that the cumulative effect of a number of errors may add up to error requiring reversal" if the defendant "was denied his right to a fair trial." *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). In this case, apart from the double jeopardy issue, which does not involve a trial error, none of defendant's claims of error has merit. Therefore, there was no cumulative effect of several errors that combined to deprive defendant of a fair trial. *Id.*

Defendant's kidnapping conviction is vacated. All other convictions and sentences are affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood