STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 12, 2008
v COREY DEMARION MCCULLOUGH, Defendant-Appellant.	No. 260592 Kent Circuit Court LC No. 04-00946-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v ERNEST GORDON, III, Defendant-Appellant.	No. 261724 Kent Circuit Court LC No. 03-007771-FC

Before: White, P.J., and Zahra and Kelly, JJ.

PER CURIAM.

Following a consolidated trial, a jury convicted defendant Corey Demarion McCullough (McCullough) of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant McCullough to sixty to ninety-nine years' imprisonment for his second-degree murder conviction, to be served consecutively to 2 years' imprisonment for his felony-firearm conviction and the remainder of a 2 to twenty years' imprisonment sentence for a previous conviction for which he was on parole when he committed the instant offenses. McCullough appeals as of right.

In regard to defendant Ernest Gordon, III, (Gordon), a jury failed to reach a verdict and the trial court ordered a mistrial. After retrial, a jury convicted Gordon of second-degree murder. The trial court sentenced him, as a habitual offender, third offense, MCL 769.11, to sixty to ninety-nine years' imprisonment, to be served consecutive to the remainder of a 2 year' term of imprisonment and a 1 to twenty year' term of imprisonment for previous convictions for which he was on parole when he committed the instant offense. He also appeals as of right.

I. Basic Facts

This case arose from the shooting death of Ean French (French), who died in his home from twelve gunshots from two different caliber weapons sometime between the late hours of February 3, 2003 and early hours of February 4, 2003.

French was a distributor of high-grade marijuana. He also used other drugs, particularly heroin. On January 30, 2003, French asked Damien Johnson (Johnson) and James Schultz (Schultz) to travel from Grand Rapids to Detroit to obtain heroin for French. Johnson and Schultz complied with French's request. Upon returning to Grand Rapids, Johnson then arranged for Gordon to drive Schultz and him to French's home where Gordon first met French. French told Gordon that he trafficked marijuana.

On February 3, 2003, at approximately 2:00 a.m., Gordon called Johnson and asked for French's phone number because Gordon wanted to "'highlight' [French] about some business." Johnson gave Gordon the phone number. Later that day, around 8:00 p.m., French called Johnson and asked and was provided Gordon's phone number.

In the early morning hours of February 3, 2003, McCullough called Edward Johnigan (Johnigan) from Grand Rapids and asked if he was interested in trading a half-ounce of heroin for a half-pound of high-grade marijuana. Johnigan obtained a half-ounce of heroin in Detroit. Johnigan left Detroit for Grand Rapids at around 2:00 p.m. on February 3, driving his sister's white Grand Am.

Later that day, at around 8:00 p.m. or 9:00 p.m., Christian Burke (Burke), a friend of French, stopped by French's house and purchased $200 of marijuana. Burke testified that French had told him that he had recently received $70,000 worth of high-grade marijuana. He also noticed a large stack of Viagra samples. Around 9:30 p.m., French told Burke to leave because he had some "buddies" stopping over.

When Johnigan arrived in Grand Rapids, McCullough directed him over his cell phone to McCullough's girlfriend, Yvonne Thompson's (Thompson), home. Thompson is also Gordon's sister. Johnigan stayed at Thompson's home until around 8:00 p.m. or 9:00 p.m., and then drove McCullough to a nearby Marathon station where they met Gordon. Johnigan had never before met Gordon. McCullough got into Gordon's white minivan, and Johnigan followed Gordon to a Meijer's store. Gordon and McCullough went into the store and came out together, but Johnigan claimed he did not know if they made a purchase. Johnigan followed Gordon and McCullough to French's home. Gordon went into French's house, and McCullough and Johnigan waited together in Gordon's van. Gordon then called McCullough, and Johnigan went inside French's house with the heroin. Johnigan claimed to have had two guns in his possession, a .38 caliber, and a .40 caliber pistol that he was holding for McCullough, who owed him money.

At trial, Johnigan testified on behalf of Gordon and with no objection from McCullough. Johnigan basically testified that Gordon and McCullough set up a drug deal between he and French, and that after the drug deal, he alone robbed and murdered French. At the time Johnigan testified, a jury had already convicted him of murdering French, but he had not yet been sentenced. Also, Johnigan had previously been convicted of murder-for-hire in an unrelated

case; See *People v Johnigan*, 265 Mich App 463, 696 NW2d 724 (2005) (this Court indicating that Johnigan is a "hardened contract killer").

Johnigan testified that, inside the house, he gave Gordon the heroin, and Gordon and French went into the kitchen to sample and weigh it. Afterwards, French gave Johnigan a half-pound of marijuana, and French told Johnigan that he wanted more heroin. Johnigan and French began to talk about Johnigan's heroin connection. After McCullough honked the car horn, Gordon went outside, leaving Johnigan and French to talk about Johnigan's heroin connection.

Johnigan testified that he became frustrated that French would not show him a larger quantity of marijuana. Johnigan then asked to use the bathroom and when French stood to show him where it was, Johnigan struck him in the head with a gun. By gunpoint, Johnigan ordered French not to move and retrieved a roll of tape from the kitchen counter, which he then used to bind French. Johnigan stabbed French in the arm and demanded French tell him where his marijuana was located, but French consistently told him it was not in the home. Johnigan claimed that he searched the home but did not find a large amount of marijuana. He again tried to force French to tell him where the marijuana was located, but French did not tell him. Johnigan then shot French several times with a .38 caliber pistol. French was not dead, however, and Johnigan shot him several more times with his .40 caliber pistol.

Johnigan testified that after he killed French, he went directly home to Detroit. He stated that he did not see Gordon or McCullough after Gordon left French's home. In Detroit, he sold his guns to a friend, though he later borrowed back the .40 caliber pistol. Police later raided Johnigan's home and found the .40 caliber pistol, along with a large cache of weapons, including two bulletproof vests, three assault rifles and a flash suppressor. Johnigan also testified that he did not intend to rob French until he was in his home, and that he did not tell Gordon or McCullough about his intent to rob French. He also maintained that McCullough never entered the house.

The prosecution established that the following calls were made between defendants' and Johnigan's phones around the time of the offense. Between January 24, 2003 and February 2, 2003, there were 17 phone calls between McCullough and Gordon. On February 3, 2003, there were 17 phone calls between McCullough and Gordon. After February 3, 2003, to March 4, 2003, there were 13 phone calls between McCullough and Gordon. Between January 20, 2003 and January 29, 2003, there were eight phone calls between McCullough and Johnigan. From January 30, 2003 to February 2, 2003, there were no phone calls between McCullough and Johnigan, but on February 3, 2003, there were 24 phone calls between McCullough and Johnigan. After February 3, 2003, there were 11 phone calls between McCullough and Johnigan.

These phone calls, which would bounce off nearby cellular phone towers, tended to establish Johnigan's and defendants' movements. Although their movements were largely consistent with Johnigan's testimony, the prosecution emphasized that from February 3, 2003 at 11:58 p.m. until February 4, 2003 at 1:57 a.m., the time Johnigan indicated he was at French's home, defendants and Johnigan did not make or accept any calls. From this evidence, the prosecution maintained that defendants and Johnigan searched French's home for drugs and money.

The prosecution also presented evidence that Gordon was at Thompson's house in the evening of February 3, 2003. Thompson reluctantly testified that, later in the evening of February 3, 2003, she saw a white car in her driveway she believed was Johnigan's car. She observed two or three people standing near the open trunk of the car. She testified that she wired money to McCullough in Detroit on February 4, 2003. She testified that, on February 5, 2004, she observed McCullough with marijuana that he previously did not have. Her description of the marijuana matched the description of the marijuana sold by French. She testified that McCullough had Viagra after February 3, 2003. Notably, Johnigan testified that he did not give McCullough any marijuana that he took from French's home and that he did not remove Viagra from French's home. Thompson also testified that McCullough had previously possessed the .40 caliber pistol recovered from Johnigan's home.

In May and July 2003, felony complaints were issued against Gordon, McCullough and Johnigan as co-defendants, generally alleging that they conspired and murdered French. The trial court granted Johnigan's motion for a separate trial. As mentioned, Johnigan was tried first, and a jury convicted him of murdering French. At the initial consolidated trial, the Gordon jury began deliberating on September 20, 2004, and the McCullough jury began deliberations the next day. On September 23, 2004, the trial court received a note from the Gordon jury indicating it was deadlocked and requested that the trial court "side bar" with the jury foreperson. The trial court read a standard deadlock instruction[1] to the Gordon jury and did not meet with the jury foreperson. Also on September 23, 2004, the McCullough jury sent the trial court a note, which provided that, "We are at an impasse. What do we do? What can be discussed when everyone is not in the room?" The trial court stated, "[s]tarting with the second question first, 'What can be discussed when everyone is not in the room,' the answer is nothing. This is a twelve-member jury panel, and no discussions can be had without all twelve members participating. Everybody has to participate in all discussions pertaining to this case. It is strictly forbidden to discuss it in separate context." In response to the first question, the trial court gave a standard deadlock jury instruction. Following this instruction, the jury foreman, Juror 14, of the McCullough jury stated:

> Your Honor, I think we all agreed before we came in here that we have to get everybody that's on this jury to take their blinders off and we have to have an open mind.
>
> We have a situation here—and we all agreed we're going to speak freely here—if you go into that jury room the first day and you make a comment about what your decision is already and it's not going to change, no matter what we do and no matter what logic we try to apply in the jury room, if an individual or more than one individual has blinders on so much that they will not—and is just dead set on, "This is how I am and nothing that you can say is going to change," and, in

[1] We note that the several deadlock jury instructions given in this case were consistent with CJI2d 3.12, and that there was no objection to any of the deadlock instructions.

> fact, people may have made the comment, "I'll even tell the judge that," I think that it's important that anybody on this jury that's not willing take their blinders off needs to address that right now with you, so when we go back to the jury room we don't go back and deal with what we have been dealing with in the last two days, because we're not going to get anywhere.

The trial court then stated:

> I appreciate that, and I have to say that the jurors have taken a solemn oath and obligation to deliberate this case honestly and in good faith, which means, as I said earlier, not only expressing views, but also explaining what facts in evidence and what logical analysis those facts are based on so that other people can then say, "Oh, I agree with that," or, "No, I believe there's an error in your thinking with regard to this point and here's why." That's how deliberations are conducted.
>
> If persons refuse to participate in that process and refuse to deliberate with a view toward reaching an agreement, then they are not following their juror's oath, and if there's anyone here that will not do that, then we need to know about it, because that clearly is a violation of the oath they have taken and potentially makes that person unsuitable as a juror.
>
> People have to participate in the process, they have to deliberate, and going into a room and folding one's hands and saying, "I don't want to be confused by the facts, I don't want to be confused by the law, I don't want to be confused by logic, this is my position and I'm not moving," that's not participating in the deliberative process. That's a violation of the juror's oath. That's against the law. It's contrary to everything we're trying to achieve here.
>
> You've got to be open-minded and you've got to approach the process with a view that it's a logical exercise and an exercise in which reasonable adults can participate and exchange views if they become convinced they're wrong.

There was no objection to the trial court's instruction, and McCullough's counsel expressed that:

> I have no problem with the colloquy that took place with the individual juror, whether he's in fact the foreman or not, because I think that obviated the need to have them leave and send you a note in a couple minutes.
>
> However, my one observation is there's a very fine line between saying, 'You have an oath to deliberate,' versus the instructions that are given saying, 'If you have a firm conviction, you ought not change that conviction if it's based on logic,' et cetera. It was a close line there.

The trial court then stated:

> I agree with you completely, and I reiterated that very line I think at least once and maybe twice in my discussion, because I agree with you, there is a fine line. No one has to surrender their honest conviction.
>
> On the other hand, everyone has to explain the rational basis for their opinions, and deliberate and discuss the case with a view toward reaching an agreement if they can without violating their own conscience, and that was the burden of what I was trying to achieve, and if I did it badly I apologize. If anyone thinks I need to amplify it, I certainly will.

McCullough's counsel replied, "No, your Honor."

The next day, September 24, 2004, in regard to the McCullough case, the trial court indicated that there had been some "interesting developments overnight and this morning."

> First, we had a phone call on the answering machine when we came to work here this morning at 8:00. There was a message from . . . [(Juror 13)]. [Juror 13] sounded rather weak and frail and said that she and her children were ill. She didn't specify what the problem was, although she did say that she didn't see how they could manage because they were running to the bathroom at regular intervals, which allows us to draw certain conclusions. She said she would not be coming in.
>
> Gail, the jury clerk, apparently reached her by phone and found that she was on her way to the doctor and she is apparently, I don't know, going to secure appropriate treatment.

The trial court also indicated that it had received a note from the McCullough jury foreman, which stated:

> As foreman for the McCullough jury I need to point out the problems we are having. One of our jurors (Seat #13) from day one has stated and maintains the position that we will not be able to convict Mr. McCullough because she is going to vote not guilty on all counts. It doesn't matter what any of the other jurors have to say. She maintains . . . [that] nothing (I believe) any of us has to say is going to change her mind.
>
> Yesterday when confronted by another juror about her stand, her response was, 'You shut up.' She has on at least two occasions stated, 'You will not get a conviction because I vote not guilty on all counts . . . .'
>
> Her attitude in the jury room is what caused us to be brought into your chambers yesterday.
>
> It is my feeling that unless this issue is addressed, we will end up in a hung jury, no matter how long we will deliberate. So unless you want us to be at the courtroom Christmas party, you must intervene.

The trial court contacted an alternate juror to replace Juror 13. The prosecution agreed to the alternate, but McCullough's counsel objected, stating:

> I would object to this in any form. It's very apparent that she is being removed from the jury because she has a firm moral conviction that Mr. McCullough's not guilty. I don't think that's a proper reason for removing her from the jury.
>
> This Court, and we talked about this yesterday, has instructed the jury that if you have a firm moral conviction, don't give in and stick with it, and that's apparently what she is doing, and she's being removed as a result of that.
>
> Now, she's called in sick and said that she's sick today. There's no reason to believe that this won't carry over until Monday. It may be unfortunate and inconvenient, but there's no reason to believe that she would not show up Monday if told to come back Monday. And taking her off the jury because she refuses to find Mr. McCullough guilty I don't think is an appropriate reason.

The trial court then questioned Juror 14 in more particularity in regard to Juror 13's failure to deliberate. Afterwards, the trial court held that:

> . . . it seems to me that we do have an extraordinary circumstance, where we have a juror, [Juror 13], who has not deliberated but indeed announced before deliberation commenced that she had made up her mind and was not about to change it. She thumbs through magazines when jurors are discussing the case, and when jurors address her in order to try and draw out the basis of her opinion, she tells them to shut up.
>
> To make matters worse, she has apparently suffered some kind of illness, and indeed Michelle Vidro, my clerk, advises that she mentioned during the trial that she had not been feeling well and was having difficulty sleeping, which is perhaps not unusual . . . .
>
> She has indicated this morning that by way of a call-on message that she's suffering what apparently is some sort of, apparently some sort of intestinal problem, which may or may not have been exacerbated by nerves or whatever else is involved.
>
> It seems to me our choices are to go into limbo for several days to await some outcome here, and then perhaps question her about this whole matter, or simply to mercifully replace her, as she requested on the answering machine tape this morning, and proceed with deliberations with [an alternate juror] in her place.
>
> I am inclined, I think bearing in mind the length of the trial that we've engaged in thus far, to opt for a replacement, simply because we have a very good opportunity to proceed with a juror who is evidently untainted and even represents the same demographic as the replaced juror, and even the same neighborhood as

> the replaced juror, and I think can fill in, even though we have to start deliberations again.
>
> * * *
>
> But based on what we've heard, I'm going to direct that [Juror 13] be removed from the jury and allowed to recuperate from her maladies and [an alternate Juror] be substituted in her stead.

The following Monday, September 27, 2004, at around 11:35 a.m., the McCullough jury returned a verdict finding McCullough guilty of second-degree murder. Also on September 27, 2004, at around 12:39 p.m., the trial court indicated it had received a note from the Gordon jury. The note requested the trial court remove a juror claimed to be refusing to deliberate. The note then specified reasons supporting its request, including the juror's close-mindedness, inability to explain conclusions, outbursts and use of foul language and contact with Gordon's girlfriend and glances toward Gordon. The trial court found no legal basis to reconstitute the jury and later ordered a mistrial.

The evidence presented at Gordon's second trial substantially tracked the evidence presented in the initial consolidated trial. Following the presentation of the evidence, the trial court instructed the jury and it began its deliberations on November 3, 2004. On November 5, 2004, the jury sent the trial court a note indicating it could not reach agreement. The trial court without objection issued a standard deadlock instruction to the jury. The following Monday, November 8, 2004, the jury in this case, during deliberations, wrote a note indicating a "[n]eed to break until 1 p.m. The trial court excused the jury, and at 2:00 p.m., indicated the jury had returned except for Juror 9. According the trial court:

> Looks like juror in Seat #9 evidently took off her juror badge and turned it in at the jury clerk's office and more or less seceded from the jury. She called the Court over the noon hour and left a recorded message which counsel and I have listened to. In the message she essentially says it's been a long, hard trial and it's been very stressful, that it's ruining her health and that she's sorry, but she just can't go on, that she can't come back, that she can't do this anymore. And I think in three different ways she reiterated that she's not coming back.

The trial court discussed the matter on the record with all counsel present. The prosecution suggested that an alternate be seated, finding significant that Juror 9 had not indicated her vote. Defense counsel objected, again requesting that the Juror 9 be brought before the trial court for questioning. The trial court held:

> Well, I guess I'm of the opinion that to bring [Juror 9] back would simply be counterproductive. If I thought by bringing her back and holding hands with her we could woo her back to the process, I'd say let's do it. But if we bring her in here by force and against her will, I just don't see her as being a productive deliberating participant in the process. I think she seceded from the panel, lawfully or not, and I think we have to accept that as a fete accompli. So to the extent that you want us to go round her up and drag her back, I'm disinclined to do that.

The trial court seated one of the alternates.

The jury reached a verdict the following day, November 8, 2004, at 11:00 a.m., finding Gordon guilty of second-degree murder.

II. Docket No. 260592

A. Juror Misconduct

1. Juror's Conversation with Mechanic

McCullough first argues that the trial court erred in not excusing Juror 14 from the jury. Because there was no objection to the trial court's decision, this Court reviews unpreserved claims of appeal for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). On the third day of trial, the trial court entertained Juror 14's concern over a discussion he had with his mechanic. The juror explained:

> What happened, your Honor, is on Tuesday—I have some folks out in Ada that are rebuilding a pick-up truck for me, and I went out to tell the guys I wouldn't be around for a couple of weeks because I was on a jury duty and I had a trial. And they just asked what it was, and I said, "Well, it's a murder trial. Something happened in Rockford."
>
> Well, come to find out, the one guy that was there knew the girlfriend of the fellow that was murdered, and he just started blurting stuff out.
>
> So yesterday after opening statements I called V. Klavins, and Mr. Klavins told me that I probably should talk to you this morning, and—he's the magistrate in the 63rd District Court up in Rockford.

Juror 14 further stated that, "There were specifics, because the deceased girlfriend [sic] had relayed this to one of the gentlemen that were working on my truck." McCullough's lawyer then asked, "[a]nd did they specify any names . . ." Juror 14 replied,

> No. The only thing that was ever said about names is, if you gave me the names of the guys, one of 'em I guess was from Ada. I don't know exactly what the deal was. But I didn't even know the names at that point, who the defendants were, other than the fact that I was here, but I couldn't remember Mr. McCullough's name at that point.

The trial court did not find prejudice arising from Juror 14's concern, and there was no objection to the juror continuing to serve on the jury

In *People v Budzyn*, 456 Mich 77, 88-89; 566 NW2d 229 (1977) our Supreme Court stated:

> A defendant tried by jury has a right to a fair and impartial jury. . . . [J]urors may only consider the evidence that is presented to them in open court. Where the jury considers extraneous facts not introduced in evidence, this

> deprives a defendant of his rights of confrontation, cross-examination, and assistance of counsel embodied in the Sixth Amendment.
>
> In order to establish that the extrinsic influence constitutes error requiring reversal, the defendant must initially prove two points. First, the defendant must prove that the jury was exposed to extraneous influences. Second, the defendant must establish that these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict. [(Citations omitted).]

We conclude that McCullough failed to establish that Juror 14's conversation with his mechanic created a real and substantial possibility that extraneous facts not introduced in evidence could have affected the jury's verdict. The trial court conducted an examination by questioning Juror 14 in regard to his conversation with his mechanic. Defense counsel's concern was that the mechanic mentioned names in attempting to discuss the case with Juror 14. However, Juror 14 indicated that the mechanic did not use names to reference the offender(s), but indicated that the mechanic stated that one of the alleged offenders was from Ada. However, as the trial court noted, none of the defendants or Johnigan was from Ada. Significantly, Juror 14 expressed that nothing transpired that would influence his judgment or prevent him from rendering a fair and impartial verdict. Accordingly, McCullough failed to establish plain error affecting his substantial rights

2. Coercive Instruction

McCullough next argues that trial court erred in giving a coercive deadlock jury instruction during the second day of deliberations. The intentional relinquishment of a known right constitutes a waiver, which extinguishes the error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). We conclude McCullough waived this issue.

The jury sent the trial court a note, which provided that, "We are at an impasse. What do we do? What can be discussed when everyone is not in the room?" The trial court stated, "[s]tarting with the second question first, 'What can be discussed when everyone is not in the room,' the answer is nothing. This is a twelve-member jury panel, and no discussions can be had without all twelve members participating. Everybody body has to participate in all discussions pertaining to this case. It is strictly forbidden to discuss it in separate context." In response to the first question, the trial court gave standard deadlock jury instruction.

Here, the trial court discussed the note, his charge and the colloquy it had with Juror 14 after giving the jury the deadlock instruction. The trial court expressly asked defense counsel if more was needed and defense counsel declined. In fact, defense counsel plainly expressed satisfaction with the instruction. "Because defense counsel approved the trial court's response, defendant has waived this issue on appeal." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

McCullough next claims that the instruction "accused the hold-out juror of violating the law by adamantly sticking to her personal belief that McCullough was not guilty." However, as expressed by defense counsel, the trial court properly explained that although, "[n]o one has to surrender their honest conviction," . . . "everyone has to explain the rational basis for their opinions, and deliberate and discuss the case with a view toward reaching an agreement if they

can without violating their own conscience." Further, contrary to McCullough's claim on appeal, the trial court's instruction did not relate to a particular juror, it applied to all the jurors. The instruction was not coercive, and there is no error.

3. Trial Court's Communication with Juror 14

McCullough next argues that trial court erred in having direct communication with Juror 14. McCullough specifically claims that "[w]hen the Judge communicated to defense counsel about the jury's foreperson's note, he indicated that the foreperson had approached him directly: 'There's no name on it, but it's generically signed, 'Foreman McCullough jury,' And I have no reason to doubt that's where it came from, since it came directly from the individual to my hand.' While the Judge read the note from the Foreperson to all counsel on record, it will never be known what was discussed off the record." There was no objection to the trial court's decision on this issue. This Court reviews unpreserved claims of appeal for plain error affecting defendant's substantial rights. *Carines, supra*.

McCullough's claim must be rejected because, as he admits above, there is no evidence of a communication between Juror 14 and the trial court. The record only indicates that Juror 14 gave the trial court the note, and that the trial court read the note into the record with all counsel present. There was no allegation of improper conduct in the lower court, and thus, the record cannot support McCullough's claim that he was prejudiced by the trial court's alleged communication with Juror 14. Accordingly, McCullough has failed to establish plain error affecting his substantial rights.

4. Replacement of Deliberating Juror

McCullough next argues that the trial court erred in replacing Juror 13, who had been identified as a holdout for acquittal, when Juror 13 failed to appear on the third day of deliberations. This Court, relying on MCL 768.18, has previously addressed the replacement of a deliberating juror with an alternate juror. *People v Tate*, 244 Mich App 553, 562; 624 NW2d 524 (2001); *People v Dry Land Marina, Inc*, 175 Mich App 322, 325; 437 NW2d 391 (1989).

MCL 768.18, provides that:

> Any judge of a court of record in this state about to try a felony case which is likely to be protracted, may order a jury impaneled of not to exceed 14 members, who shall have the same qualifications and shall be impaneled in the same manner as is, or may be, provided by law for impaneling juries in such courts. All of those jurors shall sit and hear the cause. Should any condition arise during the trial of the cause which in the opinion of the trial court justifies the excusal of any of the jurors so impaneled from further service, he may do so and the trial shall proceed, unless the number of jurors be reduced to less than 12. In the event that more than 12 jurors are left on the jury after the charge of the court, the clerk of the court in the presence of the trial judge shall place the names of all of the jurors on slips, folded so as to conceal the names thereon, in a suitable box provided for that purpose, and shall draw therefrom the names of a sufficient number to reduce the jury to 12 members who shall then proceed to determine the issue presented in the manner provided by law.

Relying solely on MCL 768.18, *Tate* and *Dry Land Marina* addressed the replacement of a deliberating juror with an alternate juror. *Dry Land Marina* noted, and *Tate* reiterated that, "while a defendant has a fundamental interest in retaining the composition of the jury as originally chosen, he has an equally fundamental right to have a fair and impartial jury made up of persons able and willing to cooperate, a right that is protected by removing a juror unable or unwilling to cooperate." *Tate, supra* at 562. Thus, "[r]emoval of a juror under Michigan law is therefore at the discretion of the trial court, weighing a defendant's fundamental right to a fair and impartial jury with his right to retain the jury originally chosen to decide his fate." *Tate, supra* at 562. *Tate* also distinguished the defendant's claim that "a 'just cause' requirement is mandated by a defendant's constitutional right to have the jury originally impaneled to hear his case," as primarily concerning the Double Jeopardy Clause. *Id*.

Defendant McCullough maintains that the trial court must find "just cause" to replace a deliberating juror with an alternate. We conclude there is no merit to McCullough's claim. We agree with *Tate* that there is no "just cause" requirement. MCL 768.18 merely provides that, "[s]hould any condition arise during the trial of the cause which in the opinion of the trial court justifies the excusal of any of the jurors so impaneled from further service, he may do so and the trial shall proceed, unless the number of jurors be reduced to less than 12." A trial court has discretion to replace a deliberating juror with an alternate juror. *Tate*, *supra*. A trial court abuses its discretion when it fails to select from a range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), cert den ___ US ___; 127 S Ct 1261; 167 L Ed 2d 76 (2007); *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). We conclude the trial court did not abuse its discretion in this matter.

Admittedly, the present case may be distinguished from *Tate* and *Dry Land Marina*, because the trial court here did not question Juror 13 before removing her from the jury. Nonetheless, it is significant that Juror 13 refused to return to court to fulfill her duties as a juror. The trial court properly concluded that she was no longer able or willing to serve on the jury, and thus removed her from the jury.

Further, at the time *Tate* and *Dry Land Marina* were decided, MCR 6.411 provided that:

> The court may impanel more than 12 jurors. If more than the number of jurors required to decide the case are left on the jury before deliberations are to begin, the names of the jurors must be placed in a container and names drawn from it to reduce the number of jurors to the number required to decide the case. The jurors eliminated by this process are to be discharged after the jury retires to deliberate.

Effective September 1, 2001, MCR 6.411 was amended and expressly expanded the trial court's power to replace jurors with alternates, including deliberating jurors:

> The court may impanel more than 12 jurors. If more than the number of jurors required to decide the case are left on the jury before deliberations are to begin, the names of the jurors must be placed in a container and names drawn from it to reduce the number of jurors to the number required to decide the case. The court may retain the alternate jurors during deliberations. If the court does so, it shall instruct the alternate jurors not to discuss the case with any other

> person until the jury completes its deliberations and is discharged. If an alternate juror replaces a juror after the jury retires to consider its verdict, the court shall instruct the jury to begin its deliberations anew.[2]

Thus, there is no doubt that the trial court had legal authority to replace a juror during deliberations.

While *Tate* and *Dry Land Marina* address replacement of deliberating jurors, they did not address jurors unwilling to serve. Juror 13, and not the trial court, requested an alternate replace her, and thus, it cannot be said that the trial court removed a willing juror. Indeed, the trial court here protected the parties' right a fair and impartial jury by " by removing a juror unable or unwilling to cooperate." *Tate, supra* at 562. Also important is that *Tate* and *Dry Land Marina* did not rely on a court rule expressly proving for the replacement of deliberating jurors. The court rule applicable here sanctions the replacement of deliberating jurors, and attempts to marginalize prejudice by requiring the trial court to "instruct the jury to begin its deliberations anew" as does MCR 6.411. Because juries are presumed to follow the trial court's instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), MCR 6.411 effectively preserves defendant's right to a unanimous verdict.

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[2] The amendments to MCR 6.411 are similar to the 1999 amendments to FR Crim P 24(c), which provided, in pertinent part:

> The court may direct that not more than 6 jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.

Current FR Crim P 24(c), amended on April 29, 1999 and effective December 1, 1999, provides in pertinent part:

> Retention of Alternate Jurors. When the jury retires to consider the verdict, the court in its discretion may retain the alternate jurors during deliberations. If the court decides to retain the alternate jurors, it shall ensure that they do not discuss the case with any other person unless and until they replace a regular juror during deliberations. If the alternate replaces a juror after deliberations have begun, the court shall instruct the jury to begin its deliberations anew.

McCullough further maintains that the trial court should have had summoned Juror 13 and conducted a hearing in regard to her claimed illness and refusal to deliberate. In support of this option, McCullough notes that several federal cases have indicated that, "[w]hen possible juror misconduct is brought to the trial judge's attention he has a duty to investigate and to determine whether there may have been a violation of the sixth amendment." *US v Shackelford,* 777 F2d 1141, 1145 (CA 6, 1985). However, the cases cited by McCullough involve extrinsic influences on a juror, such as threatening phone calls, conversing with a defendant and reading news articles. *Id*. Here, McCullough has not alleged that Juror 13 was exposed to any extrinsic influence; rather, personal reasons underlie her inability or unwillingness to rejoin the deliberating jury.

Nonetheless, there is some support for McCullough's claim that the trial court was required to conduct an evidentiary hearing. In *Riggs v State*, 809 NE2d 322 (Ind 2004), the Indiana Supreme Court addressed the replacement of deliberating jurors under a Indiana court rule similar to MCR 2.114.[3] In *Riggs*, the jury had deliberated for four hours when the trial court received a note from the foreman, indicating, "'We have a juror that's become belligerent, not willing to discuss the issues onhand [sic] pertaining to the case. Do we have any recourse?'" *Id*. at 324. The trial court then, on the record, questioned the jury foreman about the note and essentially learned "that the [allegedly belligerent juror] has reached an opinion and refuses now to budge from that." *Id*. at 325. The trial court excused the jury foreman, discussing the matter with counsel, and re-called the jury foreman, who indicated that, the "particular juror is not willing to work with any of the other jurors to talk out the various different charges." *Id*. "The State then reiterated its request that the juror be replaced, and [the defendant] responded that the record was not sufficiently clear to warrant the removal of a juror."

The trial court then received another note from the allegedly belligerent juror requesting he see the trial court. *Riggs, supra* at 326. Before the trial court the juror indicated that "[t]he head juror accused me of trying to defend the defendant and I'm not going to take that." *Id*. Further, that "I'm trying to give a fair and impartial determination to this evidence and to this Court." *Id*. The trial court dismissed the juror, holding:

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[3] In St Trial P Rule 47(B), provides:

> (B) Alternate Jurors. The Court may direct that no more than three (3) jurors in addition to the regular jury be called and empanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury returns its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury brings in its verdict. If alternate jurors are permitted to attend deliberations, they shall be instructed not to participate.

> First of all the Court did in fact observe the demeanor of the juror and listened to his words to the point that the Court is troubled if it sends this juror back to deliberate . . . . I am fearful of the events that would occur back there. . . . The Court will also . . . allow any party to examine the witnesses . . . including the bailiff . . . [that] delivered this note and appeared to be in somewhat of a panic, that they were screaming at each other.

The Indiana Supreme Court reversed, holding that the "record is not sufficient to support removal of a juror after deliberations have begun." *Riggs*, *supra* at 327. The Indiana Supreme Court specifically mentioned that, "there was no interview of [the juror] regarding the alleged threats, and no interview of other jurors to establish fear of violence."

There are several important differences between *Riggs* and the instant case. Most important, Juror 13, and not the trial court, requested an alternate replace her, and thus, the trial court did not remove a willing juror. Further, the applicable Indiana court rule, In St Trial P Rule 47(B), does not require the trial court to "instruct the jury to begin its deliberations anew" as does MCR 6.411. Thus, under the circumstances, McCullough has failed to show any basis to conduct an evidentiary hearing.

Several options were available to the trial court to address Juror 13's apparent inability or unwillingness to continue serving as a juror. The trial court accepted Juror 13's claim that she and her children had taken ill. The trial court noted that Juror 13 sounded weak and frail, and was later informed that Juror 13 indicated she was going to see a doctor. The trial court considered its options and elected to replace Juror 13 with an alternate juror. We cannot conclude that the trial court's decision to replace Juror 13 was an abuse its discretion. MCR 6.411 expressly sanctions replacement of a deliberating juror with an alternate, and thus, replacement of Juror 13 was not unprincipled. And while we can readily imagine instances in which MCR 6.411 can be abused, we cannot conclude under the facts presented in this case that the trial court abused its discretion in replacing Juror 13.

5. Improperly Instructed Alternate Juror

McCullough next claims that the trial court "abused its discretion by seating an alternate juror who had been excused three days earlier without being properly preserved from taint." Defense counsel specifically objected to the alternate juror, stating:

> Finally, the court rules require that alternate jurors can be replaced or the court can replace jurors if it's an appropriate reason. Again, as I said, I don't think it's appropriate, and secondly, [MCR 6.411] says if the jurors have been retained. These jurors have not been retained. They were released from service last Tuesday, which was four days ago, three days ago.

The trial court excused the alternate juror and failed to instruct her not to "discuss the case with any other person until the jury completes its deliberations and is discharged." Rather, the trial court indicated that she could "go about [her] business." Thus, the trial court did not comply with MCR 6.411.

Any error in failing to comply with MCR 6.411 is plainly harmless. Upon recalling the alternate juror, the trial court conducted voir dire to determine if the alternate juror had discussed the case with anyone. McCullough's counsel was present at the hearing, and did not elicit evidence suggesting that the alternate juror discussed the case since being excused. Accordingly, no harm can be attributed to the trial court's failure to properly instruct the alternate juror, and McCullough is not entitled to relief.

B. Prosecutorial Misconduct

McCullough claims several instances of misconduct by the prosecutor that require reversal. This Court reviews de novo a claim of prosecutorial misconduct. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). There being no timely objection to the claimed misconduct, this Court's review is limited to plain error which affected substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002).

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).

1. Examination of Thompson

McCullough argues that the prosecution committed misconduct during the direct examination of Thompson. McCullough first specifically claims that the prosecution improperly asked Thompson leading questions. As previously mentioned, Thompson is Gordon's sister, and Thompson dated McCullough off and on for eight years.

Before trial, Thompson and the prosecution had entered into an agreement, which the prosecution explained as:

> That we are to dismiss the embezzlement charges against you. You are to make restitution for the embezzlement, which I think is around four thousand dollars. That your probation hearing, which has been set for January 2004, is moved to December of 2004. That you are to testify truthfully in all proceedings connected with this case. And that you were to try to help us locate Corey McCullough, who was then at large.

When asked by the prosecution, "[i]s all that true," Thompson replied:

> It's not as cut and dry as you say. I have been harassed all the time, arrested, gave tickets at my house, arrested in front of my boys, picked up on – when they came to arrest me they said is was a ten thousand dollar bond.
>
> They got me to the Sheriff's Department, interrogated me for a few hours, made my bond 20,000, arrested my mom. Then when I got into trouble, came and told me that they'd put me in front of the same judge that [McCullough] and [Gordon] had, and that, you know, I was going to go to prison and all that.

Thompson continued this tone throughout her direct examination.

She also maintained that she could not answer certain questions posed by the prosecution. In one instance, shortly after she began testifying, the following colloquy occurred:

> *Prosecution* Ms. Thompson, did it become apparent to you that Mr. McCullough was talking to Mr. Johnigan and that Mr. Johnigan was lost?
>
> *Thompson.* No, I really can't say that because I wasn't on the other end of the phone, so I just can't say that and be, you know, and be certain about it, because I'm not sure.
>
> *Prosecution* All right. Why are you doing this?
>
> *Thompson.* Excuse me? Doing what?
>
> *Prosecution* Why are you denying the obvious? Why are you doing this?
>
> *Thompson.* I mean, I'm not going to sit up here and – just because of an assumption and sit up here and say that's true and it's not. I mean, when you guys questioned me I told you that, you know, I didn't know for sure and, you know, I assumed and stuff like that, but I don't know because I wasn't on the phone and I didn't answer any calls. So, I just can't say yes because I didn't answer the phone.

At this point, the trial court interjected, stating that "[the prosecution] may treat the witness as a hostile witness for purposes of perhaps focusing in with leading questions, which may get us through this a little faster." The prosecution then quoted the transcript of Thompson's interview with police, in which she stated:

> When he called for directions, he was already I guess real close to Grand Rapids. He just needed to know where to get off at. I guess, but that's when I found out he was coming, because Corey was like, something about. 'He can't even get here,' or something. I don't know.

Thus, Thompson at least knew that Johnigan "needed to know where to get off at," and was clearly attempting to avoid directly answering the prosecution's question.

Within an hour after Thompson took the stand, the trial court indicated "I think this is a good point for a mercy break and suggest that Ms. Thompson go home and take some Gingko pills or something." Thompson replied, "[g]o see my therapist or something, I'm nervous." The trial court then stated,

> Ms. Thompson, you're rambling again. We need just for you to answer the questions to the best of your ability and we can get in and out of here. We could have been done with you by now, but we're going to have to start this all over again after the holiday.
>
> Now, my hope is that you can have a restful weekend. Put on your thinking cap, get plenty of sleep, eat properly and rest properly, and perhaps with your memory focused on these events you can come back, answer the questions

> crisply, and we'll get through this and have you out of here in no time. But if we're going to continue this exercise, we'll be at this for days

We conclude the prosecution did not improperly question Thompson. A finding of misconduct may not be based upon a prosecutor's good faith effort to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Although Thompson agreed to testify for the prosecution, she was argumentative and clearly attempted to evade the prosecution's answers. The prosecution noted that she had answered "I don't know," over sixty times in one hour of testimony. When considering Thompson's other unresponsive answers, including "I'm not sure," I'm not certain," and "I don't remember," we conclude that the prosecution did not commit misconduct by attempting to elicit testimony from an uncooperative witness.

2. Improper Hearsay

McCullough next argues that the prosecution improperly elicited hearsay evidence when using a videotape of Thompson's interview with police. However, the videotape was clearly used to impeach Thompson's testimony at trial, which, as explained, was argumentative and evasive to the extent that it was misleading. "The credibility of a witness may be attacked by any party, including the party calling the witness." MRE 607. McCullough's claim of improper use of hearsay testimony to commit prosecutorial misconduct is without merit.

Last, McCullough argues that the prosecution improperly asked police officer Charles DeWitt whether a person could say "I'm in the house, every thing is under control," within a ten second phone call. Although the prosecution did improperly suggest the content of the phone call, the trial court remedied the problem, explaining that:

> I think what we have here a time frame, and we can all do a little experiment as to how many words you can get into three seconds or four seconds of conversation. And depending on how clever we are, we can probably get part of the Gettysburg address in. Go ahead Mr. Schieber. I think we get the point.

McCullough has not shown prejudice in this regard and reversal is not required.

C. Ineffective Assistance of Counsel

McCullough argues that defense counsel was ineffective in failing to object and failing to challenge the sufficiency of the evidence. Because a *Ginther*[4] hearing was not held, this Court's review is limited to mistakes that are apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. . . . [A] trial court's findings of fact are reviewed for clear error. . . . Questions of constitutional law are reviewed . . . de novo." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246, 249 (2002).

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

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc*, *supra* at 578. To establish ineffective assistance, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that he was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). With respect to the prejudice aspect of the test, the defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair and unreliable. *Id*. at 312, 326-327; *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). A defendant must overcome the strong presumption that counsel's performance was sound trial strategy. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

1. Failure to Object

McCullough claims "trial counsel repeatedly failed to register appropriate objections to inadmissible evidence offered by the prosecution." However, in regard to this issue, McCullough fails to identify any instances in which defense counsel failed to object. A party may not leave it to this Court to search for the factual basis to sustain or reject his position, but must support factual statements with specific references to the record. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). Moreover, we rejected McCullough's individual claims of prosecutorial misconduct and find no error. Thus, McCullough's claim that counsel's failure to object to misconduct by the prosecutor is without merit.

2. Failure to Challenge Sufficiency of Evidence

McCullough next claims that "defense counsel failed to challenge the sufficiency of the evidence introduced at trial." This claim is without merit. As McCullough notes, "the issue of sufficiency of the evidence would have been properly preserved for appellate review even if the trial court summarily denied both motions." Because McCullough can challenge the sufficiency of evidence on appeal, though he does not, defense counsel's failure to challenge the sufficiency of evidence at trial cannot not considered prejudicial.

3. Failure to Object to Juror 14

McCullough next claims that "defense counsel did not object to Juror [14] remaining on the jury, even after his initial misconduct was disclosed." Defendant "must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair and unreliable. *Pickens*, *supra* at 312. Here, McCullough speculates that Juror 14 received misinformation from his mechanic, but fails to identify the content of the misinformation. McCullough again has failed to establish prejudice.

4. Evidentiary Hearing

McCullough next claims that, "in the alternative, this case should be remanded for an evidentiary hearing." However, considering the above claims of ineffective assistance of counsel, McCullough has not established a factual basis to further explore the ineffectiveness of defense counsel's performance. Thus, remand is unnecessary.

D. Evidentiary Decisions

"The decision whether to admit evidence is within a trial court's discretion." *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An evidentiary error does not merit reversal in a criminal case unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Smith*, 243 Mich App 657, 680; 625 NW2d 46 (2000).

1. Admission of the Weapon Cache

McCullough argues that the evidence of assault weapons found in Johnigan's home was improperly admitted because none of the assault weapons were used to kill French.

"Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible." MRE 402. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403.

The trial court properly admitted the assault weapons found at Johnigan's home because it tended to establish McCullough's involvement in the robbery and murder of French. Testimony at trial showed that Gordon had recently met French, and that Gordon knew French had a large quantity of marijuana. Gordon and McCullough talked more frequently after Gordon met French. On February 3, 2003, Johnson gave Gordon French's phone number to "highlight" a business deal. Shortly after, McCullough called Johnigan and requested that he travel from Grand Rapids to Detroit to acquire heroin for French, who McCullough did not know. In Grand Rapids, Johnigan followed McCullough and Gordon to French's house, where Johnigan admittedly shot and killed French. One of the guns used to kill French was found in Johnigan's home. The trial court properly found that Johnigan's large cache of weapons tended to show that McCullough recruited Johnigan, a hitman, to kill French, or at least, to help him rob French through threat of deadly force.

2. Testimony that Drug Dealers Ransacked French's House

The trial court did not commit error requiring reversal in admitting testimony that drug dealers searched French's home.

This Court reviews for an abuse of discretion the decision whether to admit evidence. *Katt, supra*. An evidentiary error does not merit reversal in a criminal case unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *Smith, supra*.

McCullough claims that the trial court improperly allowed Detective Patrick Frederick to testify as an expert in regard to how drug dealers search a house to find drugs and money.

However, at trial, there was no dispute that French's home was ransacked and all agreed that it was searched for drugs and money. Indeed, Johnigan testified that he searched French's home for drugs and money. Thus, there is little probability that any error was outcome determinative, and reversal is not required.

3. Testimony of Brandon O'Connor

McCullough argues that the trial court committed error in admitting O'Connor's testimony that suggested Gordon had robbed him in a manner similar to the instant case to establish a scheme. At trial, Gordon denied taking part in the robbery. Before both juries, the prosecutor sought to impeach Gordon's testimony with police reports indicating that Gordon had previously committed robberies using duct tape to secure the victims. McCullough's counsel objected based on relevance as to McCullough, but the trial court overruled the objection, finding the testimony relates to Gordon's credibility. The prosecutor asked Gordon whether he bound French with duct tape, and when Gordon denied it, the prosecutor asked whether he knew O'Conner, the person Gordon allegedly bound with duct tape and robbed in 1999. Gordon denied robbing O'Conner.

The prosecution then called O'Connor as a rebuttal witness to testify that Gordon had asked him to buy a television, and then robbed him. O'Connor reluctantly admitted that, in 1999, he was robbed by a person named Pee-Wee (Gordon's alias), who bound him in duct tape. He also admitted that the person that robbed him was Marcello Sylvester's cousin. Gordon is Sylvester's cousin. O'Connor also admitted that the person who robbed him had fathered a child to Ms. Crawford, which Gordon did. However, O'Connor denied that Gordon was the person who robbed him.

Even though O'Connor denied that Gordon had robbed him, he admitted that he previously indicated that the person who robbed him was Marcello Sylvester's cousin and had fathered a child with Crawford. The prosecutor essentially impeached O'Connor's failure to identify Gordon as the robber by highlighting facts that make it improbable that Gordon was not the robber. Evidence that the robber was Marcello Sylvester's cousin and had fathered a child with Crawford is sufficient to allow to reasonable juror to conclude that Gordon had robbed O'Connor, despite O'Connor's protestations that Gordon did not rob him. Thus, the trial court did not abuse its discretion in allowing the prosecution to impeach Gordon's denial of involvement with evidence that he previously had used duct tape to commit robberies. A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Meshell*, 265 Mich App 616, 637; 696 NW2d 754 (2005).

E. Cumulative Error

McCullough argues that the cumulative effect of the trial court's errors denied him a fair trial. "The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not. Reversal is warranted only if the effect of the errors was so seriously prejudicial that the defendant was denied a fair trial." *People v Werner*, 254 Mich App 528, 544; 659 NW2d 688 (2002) (Citations omitted). McCullough has failed to establish that he was denied a fair trial. Here, none of claimed errors alone warrant reversal because of the lack of prejudice. Further, McCullough fails to show how the alleged errors relate to one another to cumulatively increase prejudice. Accordingly, reversal is not required.

III. Docket No. 261724

A. Prosecution's Peremptory Challenges

We review de novo issues regarding a trial court's proper application of the law. *People v Bell*, 473 Mich 275, 282; 702 NW2d 128 (2005). We review for clear error a trial court's decision on the ultimate question of discriminatory intent under *Batson*. *Id*.

A peremptory challenge to strike a juror may not be exercised on the basis of race. *Bell, supra* citing *Batson v Kentucky*, 476 US 79, 89, 96-98; 106 S Ct 1712; 90 L Ed 2d 69 (1986). A three-step process determines whether there has been an improper exercise of peremptory challenges. *Id*.

> First, there must be a prima facie showing of discrimination based on race. To establish a prima facie case of discrimination based on race, the opponent of the challenge must show that: (1) the defendant is a member of a cognizable racial group; (2) peremptory challenges are being exercised to exclude members of a certain racial group from the jury pool; and (3) the circumstances raise an inference that the exclusion was based on race. The *Batson* Court directed trial courts to consider all relevant circumstances in deciding whether a prima facie showing has been made. Once the opponent of the challenge makes a prima facie showing, the burden shifts to the challenging party to come forward with a neutral explanation for the challenge. The neutral explanation must be related to the particular case being tried and must provide more than a general assertion in order to rebut the prima facie showing. If the challenging party fails to come forward with a neutral explanation, the challenge will be denied. Finally, the trial court must decide whether the nonchallenging party has carried the burden of establishing purposeful discrimination. Since *Batson*, the Supreme Court has commented that the establishment of purposeful discrimination "comes down to whether the trial court finds the . . . race-neutral explanations to be credible." The Court further stated, "Credibility can be measured by, among other factors, the . . . [challenger's] demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." If the trial court finds that the reasons proffered were a pretext, the peremptory challenge will be denied. [*Bell, supra* at 282-283.]

Gordon challenges the prosecution's neutral explanation of his peremptory challenge. "The neutral explanation must be related to the particular case being tried and must provide more than a general assertion in order to rebut the prima facie showing." *Bell, supra* at 283, citing *Batson, supra* at 97-98.

Plaintiff challenges three of the prosecutor's peremptory challenges: Venireperson Patterson, a male African-American; Venireperson Jones, a female African American; and Venireperson Cardenas, a female Hispanic.

After defense counsel objected to the prosecutor's peremptory dismissal of these jurors, the trial court required the prosecution tender neutral explanations for their removal. The prosecutor explained that he removed Venireperson Patterson because he did not respond (by

nodding like the other panel members) to the prosecutor's first question on voir dire. The prosecutor also explained:

> . . . I apologize to him for this, but he doesn't appear very smart. I was over there asking the question about decision making and [he was] rambling and it went on and on and I'm physically over near him and Ms. Cardenas is right in front of me and she was rolling her eyes at some point about his answer.

In regard to Venireperson Cardenas, the prosecutor explained that:

> her boyfriend got arrested and she very obviously reacted to that. Her eyes welled up and she was obviously close to tears. At one point I asked her if she was all right. That an arrest situation, it's a big issue with her, it's an issue with me and so she's gone.

In regard to Jones, the prosecutor explained that: "Ms. Jones because I thought of the remaining jurors she was one most likely to be, in part because she had just too many contacts with relatives in the criminal justice system for me to perfectly (sic) at ease with her."

We conclude the prosecutor's explanations of his peremptory challenges were racially-neutral and adequate. "[T]he establishment of purposeful discrimination 'comes down to whether the trial court finds the . . . race-neutral explanations to be credible.'" *Bell, supra* at 282 (Citations omitted). "'Credibility can be measured by, among other factors, the . . . [challenger's] demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.'" *Id*. (Citations ommited). Here, the trial court accepted each of the prosecutor's explanations.

Also, there is evidence that Venireperson Patterson's answer to the prosecutor's question was "not really responsive" and that other jurors audibly groaned at Venireperson Patterson's lengthy and irrelevant response. The trial court did not err in finding this explanation for a peremptory challenge both racially-neutral and adequate. Further, that Venireperson Cardenas became emotional with the mention of the arrest of her boyfriend is plainly a racially-neutral and adequate explanation of potential bias against the prosecution, and permissible justification for a peremptory challenge. Last, Venireperson Jones' contacts with police presented potential juror bias in this case. The prosecution's theory was largely based on the jury accepting circumstantial evidence presented by police. The prosecution clearly intended to prevent seating a juror that did not accept this evidence simply based on a juror's negative prior contacts with police. The trial court properly held that the prosecution explanation for its peremptory challenges both racially-neutral and adequate.

B. Testimony of Brandon O'Connor

Gordon, as did McCullough, argues that the trial court committed error in admitting O'Connor's testimony.[5] Here, even though O'Connor denied that Gordon had robbed him, he

[5] O'Conner's testimony in this case followed his testimony in the previous trial.

admitted that he previously indicated that the person who robbed him was Marcello Sylvester's cousin and had fathered a child with Crawford. The prosecutor essentially impeached O'Connor's failure to identify Gordon as the robber by highlighting facts that make it improbable that Gordon was not the robber. Evidence that the robber was Marcello Sylvester's cousin and had fathered a child with Crawford is sufficient to allow to reasonable juror to conclude that Gordon had robbed O'Connor using a similar method of binding the victim. In this context, admitting O'Connor's testimony tended to show that he used duct tape to secure his victims, which plainly contradicts his and Johnigan's testimony that Johnigan alone robbed and killed French. The trial court did not abuse its discretion in allowing the prosecution to impeach Gordon's denial of involvement with evidence that he previously used duct taped to commit robberies. A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *Meshell*, *supra* at 637. Reversal is not required.

C. Sufficiency of Evidence

The prosecution presented sufficient evidence to allow a rational jury to conclude beyond a reasonable doubt that Gordon committed or aided and abetted the murder of French.

This Court reviews a challenge to the sufficiency of the evidence de novo. In doing so, we view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

The elements of second-degree murder are: (1) a death, (2) caused by the defendant's act, (3) with malice, and (4) without justification. *People v Mendoza*, 468 Mich 527, 534; 664 NW2d 685 (2003). To obtain a conviction on an aiding and abetting theory, the prosecutor must prove that: (1) a crime was committed either by the defendant or another person, (2) the defendant performed acts or gave encouragement which assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time the defendant gave the aid or encouragement.

Further,

> [m]alice is defined as the intent to kill or to do great bodily harm, or as the willful and wanton disregard of the likelihood that the natural tendency of the defendant's actions will be to cause death or great bodily harm. *People v Kelly*, 423 Mich 261, 273; 378 NW2d 365 (1985); *People v Aaron*, 409 Mich 672, 728, 299 NW2d 304 (1980). Malice may not be inferred solely from the intent to commit another felony but it may be inferred from the facts and circumstances surrounding the commission of that felony. *Kelly*, *supra* at 273; Aaron, supra at 727-730.
>
> A defendant may be held vicariously liable for a killing committed by another if he had the same mens rea required to convict the principal, that is, malice as defined above. *Kelly*, *supra* at 278; *Aaron*, *supra* at 731. However, "if 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. An

> aider and abettor may also be held liable "on agency principles" where he acts "intentionally or recklessly in pursuit of a common plan." *Aaron, supra* at 731. [*People v Spearman*, 195 Mich App 434, 438-439; 491 NW2d 606 (1992), rev in part on other grounds by *People v Veling*, 443 Mich 23; 504 NW2d 456 (1993).]

We conclude there is sufficient evidence for a rational jury to find beyond a reasonable doubt that Gordon committed second-degree murder. Further, there is substantially more evidence from which a rational jury could find beyond a reasonable doubt that Gordon aided and abetted Johnigan in the robbery of French.

The jury was not required to believe Johnigan's testimony that he alone killed French and searched the home. This Court should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992). Indeed, Johnigan testified that he did not take Viagra samples seen at French's home, which McCullough and Thompson eventually possessed. Also, Johnigan testified that after he left French's home, he went directly to Detroit. However, Thompson testified that she saw Johnigan's car at her house later in the evening. She also testified that she saw Gordon later in the evening, and that two to three persons were standing near the open trunk of Johnigan's car. Thus, the jury may have simply rejected Johnigan's testimony that he acted alone in the robbery and murder of French.

The record reflects that shortly after Gordon discovered that French was a drug trafficker who required heroin for his personal use, he immediately began to talk with McCullough on the phone with more frequency. Gordon obviously told McCullough about French's money and drugs, as McCullough eventually arranged for Johnigan to travel from Detroit to Grand Rapids, and eventually to French's home. Upon Johnigan's arrival in Grand Rapids, Gordon arranged to visit French's home. Thus, Gordon facilitated the meeting between Johnigan and French. Further, Gordon first entered French's home, made a ten second phone call to McCullough, after which Johnigan certainly entered the home. Thus, Gordon facilitated Johnigan's, and possibly McCullough's, entry into French's home.

There is no dispute that French was struck in the head, duct-taped and stabbed with a knife in his arm before he died from being shot twelve times. The prosecution discounted Johnigan's testimony that he alone robbed and murdered French, and argued that at least two persons subdued and bound French and subsequently searched French's home. The trier of fact determines what inferences can be fairly drawn from the evidence and determines the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). There is evidence that supports a rational jury's conclusion beyond a reasonable doubt that Gordon directly participated in the robbery and murder of French.

Further, Gordon testified that he drove away from French's home with McCullough soon after Johnigan entered French's home. However, after the brief ten second phone call at 11:58 p.m., neither Gordon, McCullough or Johnigan placed or answered any phone calls for approximately 2 hours. And not only did Gordon not place any calls during this time, but he did not answer calls at 12:01 a.m., 12:10 a.m., 12:16 a.m., and two calls at 11:58 p.m. and 11:59 p.m., went straight to his voicemail. A rational jury could find that Gordon was inside of French's home during the two-hour period after the ten-second-phone call. Given this finding, a rational jury could readily conclude that, that during the two-hour period, Gordon at least knew

that French was being tortured in an attempt to extract the location of his drugs and money. Thus, a reasonable jury could conclude beyond a reasonable doubt that Gordon aided and abetted in the robbery and murder of French.

D. Replacement of Deliberating Juror

Similar to Issue I in Docket No. 260592, the jury in this case, during deliberations, wrote a note to the trial court, apparently asking if an unidentified juror could be excused if the juror could not reach a decision on a charge. The trial court replied that jurors could not be "voted off the island," and that the jury should continue to deliberate.

The jury continued to deliberate for the rest of Thursday and Friday, and was dismissed for the weekend. The following Monday, Juror 9 left the courthouse after lunch and indicated to court staff that she would not return. The trial court discussed the matter on the record with all counsel present. The prosecution suggested that an alternate be seated, finding significant that Juror 9 had not indicated her vote. Defense counsel objected, again requesting that Juror 9 be brought before the trial court for questioning. The trial court held:

> Well, I guess I'm of the opinion that to bring [Juror 9] back would simply be counterproductive. If I thought by brining her back and holding hands with her we could woo her back to the process, I'd say let's do it. But if we bring her in here by force and against her will, I just don't see her as being a productive deliberating participant in the process. I think she seceded from the panel, lawfully or not, and I think we have to accept that as a fete accompli. So to the extent that you want us to go round her up and drag her back, I'm disinclined to do that.

The trial court excused Juror 9 because she indicated in several ways that she would no longer serve as a juror. The trial court found from her message that "the tone of her voice certainly sounded sincere and I think she's having physical problems, perhaps having some difficulty sleeping and she said it's affecting her and she just can't do it anymore." The trial court found that Juror 9 was ill and that she simply would not attend trial. The trial court considered the possibility of arresting Juror 9, but maintained that this action would not be productive. The trial court also indicated that requiring Juror 9 remain on the jury would be detrimental to the entire jury's deliberations.

As in Issue I, we note that *Tate, supra* and *Dry Land Marina, supra,* do not address jurors unwilling to serve and do not rely on amended MCR 2.114 to replace deliberating jurors. Although defense counsel requested an evidentiary hearing, MCR 2.114 has no such requirement. Gordon also claims, relying on *People v Gardner*, 37 Mich App 520, 526; 195 NW2d 62 (1972), that once a jury is sworn, a defendant has a right to have that particular tribunal decide the matter. However, this argument relates to the Double Jeopardy Clause and

concerns the dismissal of an entire jury, not the replacement of one juror. *Tate*, *supra* at 562. The trial court did not abuse its discretion in replacing a deliberating juror that is no longer willing to serve.

Affirmed.

/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly