STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 3, 2009
v	No. 269505 Saginaw Circuit Court
TOD KEVIN HOUTHOOFD a/k/a TODD KEVIN HOUTHOOFD, Defendant-Appellant.	LC No. 02-021097-FH 04-024765-FH 05-025865-FH

Before: Beckering, P.J., and Borrello and Davis, JJ.

PER CURIAM.

Defendant Tod Kevin Houthoofd was convicted of obtaining property valued over $100 by false pretenses, MCL 750.218, intimidation of a witness, MCL 750.122, and solicitation to commit murder, MCL 750.157b. He was sentenced to prison terms of five to ten years for the false pretenses conviction, ten to 15 years for the intimidation conviction, and 40 to 60 years for the solicitation conviction. Defendant appeals as of right. We affirm defendant's convictions and sentences for obtaining property by false pretenses and intimidating a witness, and vacate his conviction and sentence for solicitation to commit murder.

I. Facts and Procedural History

This case stems from three consolidated, lower court cases involving: obtaining a tractor, tiller, and trailer by false pretenses (LC No. 02-021097-FH); intimidating witness Detective Sergeant Michael VanHorn (LC No. 04-024765-FH); and soliciting Michael Dotson to murder Edward Wurtzel, Jr. (LC No. 05-025865-FH).[1] The cases were consolidated by the trial court and tried together in January and February of 2006.

In April of 1998, a man identifying himself as Colin Francis called a rental equipment store in Saginaw County. The man indicated that he was interested in renting a tractor and tiller. Wurtzel, a co-owner of the store, spoke to the man over the phone and made arrangements for

[1] For ease of reference, we will refer to the three lower court cases as the tractor case, the intimidation case, and the solicitation case.

the rental. Wurtzel testified that a few days later, a man appeared at the store to pick up the tractor and tiller. In order to complete the rental agreement, the man produced a driver's license bearing the name "Colin Francis." The tractor, tiller, and trailer used to haul the equipment were not returned to Wurtzel's store. Wurtzel then discovered that Francis was not the man who had rented the equipment. Francis testified that at the time of the rental, he worked with defendant at a General Motors (GM) plant in Bay City, Michigan and had recently lost his driver's license.

Detective VanHorn testified that he discovered evidence related to the tractor case in November of 2001. At the time, the detective was investigating a shooting at the home of Jody Meagher. Someone had fired a round of buckshot directly at Meagher and her husband through their window. Meagher informed the investigators, and later testified, that she was a co-worker of defendant's at GM in Bay City, that defendant had been placed on two periods of disciplinary suspension, and that her department was responsible for imposing the suspensions. The shooting occurred during defendant's second suspension. Meagher also indicated that there was a separate, ongoing investigation of defendant involving acts of violence against another GM employee. Defendant had previously worked at a GM plant in Toledo, Ohio. In 1994, GM supervisor Robert Griffith terminated defendant's employment. Shortly thereafter, Griffith was assaulted at his home. Defendant's employment with GM was subsequently reinstated. In 1997, after defendant began working in Bay City, a pipe bomb exploded at Griffith's home.

On the night of the shooting at Meagher's home, defendant was arrested for trespassing on GM property. Upon searching defendant's truck for evidence related to the shooting, Detective VanHorn found two driver's licenses belonging to men other than defendant. The licenses bore the names "Colin Francis" and "Dale White." The detective then learned of the "cold" tractor case. While investigating the Griffith case, the Meagher case, and the tractor case, the detective obtained a search warrant for defendant's home and property in Arenac County. Upon executing the warrant, investigators found Wurtzel's tractor and tiller, two pipe bombs, and reading materials entitled, "How to Outfox the Foxes, 297 Secrets the Law and Lawyers Don't Want You to Know," "The Poisoner's Handbook," and "How to Be Your Own Private Detective." The Arenac County prosecutor subsequently charged defendant with receiving and concealing stolen property based on his possession of Wurtzel's equipment and two counts of possessing illegal explosives. Defendant was incarcerated in the Arenac County jail.

In December of 2001, Detective Sergeant Wilbur Yancer of the Saginaw County Sheriff's Department became aware of the developments in the tractor case and arranged for an "in-custody lineup" at the Arenac County jail. At the December 6 lineup, Wurtzel picked defendant out as the man who took his equipment. Later that day, Wurtzel identified defendant's truck. On December 10, the Saginaw County prosecutor charged defendant with obtaining Wurtzel's property by false pretenses. The Arenac County prosecutor subsequently dropped the charges against defendant in favor of Saginaw County proceeding with its false pretenses case. Defendant remained in the Arenac County jail until January of 2002.

During his time in the Arenac County jail, defendant met Dotson, a fellow prisoner. Dotson testified that two or three days after the December 6 lineup, defendant offered him

money to shoot out the windows of a Bay City house[2] and to kill Wurtzel at his rental equipment store in Saginaw County. Over the course of several conversations, defendant gave Dotson the details of his plan and a copy of a police report listing Wurtzel's name and business address. Dotson initially agreed to the plan, although he testified that he never intended to carry it out, and told defendant that a man named Chucky could assist with the Bay City shooting.

At some point in December of 2001, or early 2002, Dotson told his girlfriend Sandra Faulman and one of Faulman's relatives about defendant's "murder-for-hire" scheme. In March of 2002, Faulman's relative conveyed the information to Trooper James Moore. Thereafter, Trooper Moore and Detective VanHorn met with Dotson at the Arenac County jail, and Dotson agreed to cooperate with their investigation. Upon searching Faulman's home, the officers recovered the police report listing Wurtzel's name and business address. They then arranged for Detective Sergeant William Eberhardt, posing as Chucky, to make contact with defendant.[3] Investigators also arranged for Dotson to talk to defendant over the phone. During Dotson's recorded phone conversation with defendant, they discussed "the shit in Bay City," money that defendant owed Dotson, Chucky, and Wurtzel picking defendant out of a lineup in the tractor case. When Dotson asked if they were going to do anything about Wurtzel, defendant said, "Nah, nah, no, I, I got a real good case. . . . [M]y lawyer will pick [Wurtzel's] fucking wings off." Defendant then stated that he thought the phone might be bugged.

Defendant was first tried for obtaining Wurtzel's property by false pretenses in February and March of 2004 in Saginaw County. During the trial, Detective VanHorn, Francis, and Wurtzel, among several others, testified for the prosecution. Defendant testified that he purchased the tractor and tiller in 1999 from Denny VanHaaren at Delta College where Denny was a bricklayer. Defendant presented a receipt from the transaction, and it was undisputed that Wurtzel's trailer was recovered at Delta College. Defendant further testified that he found Francis and White's driver's licenses in the tractor after purchasing it from Denny. The trial ended in a hung jury, and the case was scheduled for retrial on June 29, 2004.[4] Detective VanHorn later testified that during the trial, he saw defendant in the hall and defendant said, "Fuck off VanHorn, fuck off."

On June 21, 2004, just eight days before the scheduled retrial, Detective VanHorn received a page from a phone number he did not recognize. The detective testified that he called the number and initiated a conversation, saying, "Somebody paged me from this number." The recipient of the call responded, "Yeah." When the detective then identified himself, the recipient said, "Never mind all that. I want to let you know I saw you in court last week, and I want to let

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[2] Detective VanHorn's testimony suggested that the Bay City home defendant described to Dotson was Meagher's home.

[3] At a 2007 hearing on remand from this Court, Detective Eberhardt testified that he posed as Chucky and had a phone conversation with defendant. The detective testified that he did not bring up the "murder-for-hire" scheme during the conversation, and that defendant made no mention of it. They only discussed bailing Dotson out of jail.

[4] At the consolidated trial, defendant did not testify. Rather, Detective Yancer recounted for the jury relevant portions of defendant's testimony at the first tractor trial.

you know that I know where you live, motherfucker." According to the detective, he recognized the recipient's voice almost immediately and believed that it was defendant. The detective also believed that defendant "was letting [him] know that there was no doubt that he was going to kill [him], attempt to kill [him], or harm [his] family," and that "it was just a matter of time."

A phone company representative testified that the cell phone used to call Detective VanHorn's pager on June 21 belonged to Brandean Rinness, but Rinness testified that she lost the phone in early June. According to the phone records, the call originated in Bay County and terminated in Ogemaw County. The same cell phone was used to call the GM call center, defendant's girlfriend Roberta Haertel, a restaurant located on the same street that Haertel lived on, and another person associated with Haertel.

On June 24, 2004, the Saginaw County prosecutor charged defendant with intimidating a witness and obstructing justice, based on the statements made to Detective VanHorn over the phone. Defendant then moved to adjourn the retrial of the tractor case. The prosecution stipulated to the adjournment, indicating that it intended to use the facts of the intimidation case and the solicitation case as evidence of consciousness of guilt in the retrial of the tractor case.

In July of 2004, Detective VanHorn received a call on his cell phone. During the call, he heard a male voice that he did not recognize saying over and over, "I know where you live motherfucker." The call originated from a pay phone in Bay County and occurred while defendant was in Saginaw County jail. Detective VanHorn testified that the caller could have been James Franklin, a man he had previously testified against. Defendant's first trial attorney, Matthew Reyes, testified that he had represented Franklin in a number of cases and believed that Franklin could have made the call to Detective VanHorn. At a motion hearing in July of 2005, Reyes testified that he had planned, as a part of his trial strategy in this case, to create a reasonable doubt in the jurors' minds as to the identity of the person who first threatened Detective VanHorn by introducing Franklin as a possible perpetrator.

In September of 2004, the prosecution filed a memorandum of law regarding the "admissibility of evidence that defendant solicited [Dotson] to kill [Wurtzel] and that defendant threatened [Detective VanHorn] to establish defendant's consciousness of guilt" in the tractor case. The prosecution asserted that the evidence was admissible, independent of MRE 404(b), to establish consciousness of guilt and that defendant's statements to Detective VanHorn on June 21 constituted a threat to kill or injure the detective or the detective's family, or to damage their property under MCL 750.122. The prosecution argued that background evidence or a "timeline of events" must be presented to the jury to demonstrate the "meaning and magnitude" of defendant's statements to Detective VanHorn, emphasizing that the detective was well aware of the evidence at the time of the statements, and that defendant knew the detective was so aware. The evidence included several prior acts defendant had committed or was suspected of committing, but according to the prosecution, whether defendant had actually committed any of the acts was irrelevant.

On October 20, 2004, at the hearing on the motion to admit the aforementioned evidence, Reyes conceded that the facts of the solicitation case were admissible to establish consciousness of guilt in the tractor case. He objected, however, to admitting the facts of the intimidation case and the background evidence proffered by the prosecution, referring to the background evidence as the "kitchen sink material." The trial court found that the "kitchen sink material" was only

relevant in the intimidation case. The court stated that if the tractor and intimidation cases were tried separately, it would allow the prosecution to present evidence that the allegedly intimidating statements were made to establish consciousness of guilt in the tractor case, but not any of the "kitchen sink material." If, however, the cases were tried jointly, the prosecution could present the "kitchen sink material" to establish that the statements constituted a threat of violence or property damage under MCL 750.122. Reyes indicated that if the cases were tried jointly, he would be forced to withdraw because of an "ethical conflict." The court then ruled that the cases would be tried separately. The next day, the court granted Reyes' motion to withdraw and the cases were adjourned.[5]

In November of 2004, the prosecution filed a motion for reconsideration and joinder, requesting that the "kitchen sink material" be admitted in the tractor case and that the tractor and intimidation cases be consolidated for trial. Defendant opposed the motion. In March of 2005, defendant was charged in Saginaw County with solicitation to commit murder. The trial court then ordered, in August of 2005, to consolidate the tractor case, the intimidation case, and the solicitation case for trial, primarily as a matter of judicial economy. The court further indicated that it would reconsider the admission of the "kitchen sink material."

In September of 2005, defendant filed two motions in limine, arguing that the "kitchen sink material" was inadmissible character evidence and bad-acts evidence. In a written response and at oral arguments, the prosecution reiterated its arguments for admitting the material. On December 13, 2005, the court entered an omnibus order allowing the admission of the "kitchen sink material" at the consolidated trial.

On December 28, 2005, defendant filed an application for emergency leave to appeal in this Court, along with motions for immediate consideration and stay of proceedings. Defendant argued that the trial court erred in consolidating the three lower court cases for trial and denying his motions to exclude the "kitchen sink material." We granted defendant's motion for immediate consideration, but denied his application for leave to appeal and motion for stay. *People v Houthoofd*, unpublished order of the Court of Appeals, entered December 29, 2005 (Docket No. 267348).

The consolidated trial commenced on January 5, 2006, and concluded on February 13, 2006. After the prosecution rested, defendant moved for directed verdict in all three cases, and the trial court denied the motions. The jury convicted defendant of obtaining property by false pretenses, solicitation to commit murder, and witness intimidation involving a threat to kill, injure, or damage property or malicious use of a telephone.

Following trial, defendant moved for dismissal, new trial, and judgment notwithstanding the verdict. The trial court subsequently denied the motions. The court also issued a written opinion and order placing the jurors' information under seal. In its opinion, the court stated that after the trial, "at least two jurors expressed concerns for their personal safety, based upon fears

[5] The court then appointed attorney James Piazza to represent defendant in the tractor case and attorney Bruce Petrick to represent him in the intimidation case.

of retribution from Defendant or a person or persons acting in his behalf. Other jurors expressed concerns about walking from the Courthouse to their vehicles on that final day of their jury service." The court further stated, "[t]he evidence this court has heard . . . paints a sinister picture of Defendant . . . as a man who lacks the capacity to either forgive or forget any perceived wrong." After summarizing the evidence admitted at trial, the court concluded, "Under these circumstances – on the record – the concerns of the jurors are not fragments of over-anxious minds. This Court views them as well-founded concerns. That is why this Court pledged to the jurors that it would take steps to protect them from harassment or harm."

The trial court sentenced defendant to prison terms of five to ten years for the false pretenses conviction, and ten to 15 years for the intimidation conviction. The court exceeded the guidelines for the solicitation to commit murder conviction, sentencing defendant to 40 to 60 years' imprisonment.

Defendant filed a claim of appeal in this Court in April of 2006. In August of 2006, defendant filed an untimely motion to remand for an evidentiary hearing. Defendant argued that his trial counsel was ineffective for failing to move to dismiss for improper venue and failing to object to numerous instances of prosecutorial misconduct. He further argued that a previously unknown witness, Detective Eberhardt, could offer potentially exculpatory testimony. We initially denied defendant's motion to remand, *People v Houthoofd*, unpublished order of the Court of Appeals, entered September 12, 2007 (Docket No. 269505), but later granted his motion for reconsideration and remanded "to the trial court so that defendant-appellant [could] file, within 14 days, a motion for new trial," *People v Houthoofd*, unpublished order of the Court of Appeals, entered October 16, 2007 (Docket No. 269505).

On remand, defendant moved for dismissal and new trial. The trial court held hearings on defendant's motion in November of 2007 and January of 2008. On April 9, 2008, the trial court issued a lengthy written opinion and order denying defendant's motion for new trial. The court found that defendant's motion for dismissal exceeded the scope of the remand order.

II. Venue

Defendant first argues that Saginaw County was not the proper venue for prosecution of the witness intimidation and solicitation to commit murder charges because all of the acts done in perpetration of those offenses occurred in other counties. We find that venue was properly established in Saginaw County as to the intimidation charge, but not the solicitation charge.

Failure to establish venue is a matter to be preserved at trial. *People v Williams*, 1 Mich App 441, 443; 136 NW2d 774 (1965). See also MCL 767.45(1)(c) (stating that "[n]o verdict shall be set aside or a new trial granted by reason of failure to prove that the offense was committed in the county or within the jurisdiction of the court unless the accused raises the issue before the case is submitted to the jury"). Defendant preserved this issue in a motion for

dismissal for lack of jurisdiction and a motion to quash. The trial court denied defendant's motions, finding that venue was properly established in Saginaw County.[6]

We review a trial court's determination regarding proper venue in a criminal proceeding de novo. *People v Fisher*, 220 Mich App 133, 145; 559 NW2d 318 (1996). "Venue is a part of every criminal case and must be proved by the prosecutor beyond a reasonable doubt." *Id*. Under the United States Constitution, criminal trials must take place in the state and district where the crime was committed. US Const, art III, § 2, cl 3; US Const, Am VI. Accordingly, this Court has held that "[d]ue process requires that trial of criminal prosecutions should be by a jury of the county or city where the offense was committed, except as otherwise provided by the Legislature." *Fisher*, *supra* at 145.

The prosecution argues that venue was properly established in Saginaw County under MCL 762.8. MCL 762.8 provides that "[w]henever a felony consists or is the culmination of 2 or more acts done in the perpetration thereof, said felony may be prosecuted in any county in which any one of said acts was committed." In interpreting MCL 762.8, this Court has stated:

> Where . . . venue is established by statute, this Court's primary objective is to effectuate legislative intent without harming the plain wording of the act. The plain language of MCL 762.8 provides that venue is proper "in any county in which any one of said acts [done in perpetration of a felony] was committed." The Legislature did not draft MCL 762.8 to provide for venue in the county where the "effects" of the acts done in perpetration of a felony were felt. Cf. MCL 762.2(1)(e) ("A person may be prosecuted for a criminal offense he or she commits while he or she is physically located within this state or without this state if . . . (e) the criminal offense produces substantial and detrimental *effects* within this state [emphasis added]"). If the language of a statute is clear and unambiguous, this Court must assume that the Legislature intended its plain meaning and enforce the statute as written. [*People v Webbs*, 263 Mich App 531, 534; 689 NW2d 163 (2004) (internal quotations and citation omitted).]

In this case, the prosecution relies on this Court's interpretation and application of MCL 762.8 in *People v Flaherty*, 165 Mich App 113; 418 NW2d 695 (1987), and *Fisher*, *supra*. In those cases, this Court interpreted MCL 762.8 broadly, ruling that when an act done in perpetration of a felony has effects elsewhere that are essential to the offense, venue is proper in the place where the act has its effects. *Webbs*, *supra* at 534-535; *Fisher*, *supra* at 152; *Flaherty*, *supra* at 119. In *Flaherty*, the defendant was charged in St. Clair County with larceny by false pretenses. *Flaherty*, *supra* at 116, 119. The defendant owned an insurance agency located in Macomb County, and defrauded a general insurance agency located in St. Clair County by accepting payment for an insurance policy that was never issued. *Id*. at 117, 119. The larceny was accomplished through a series of mail and telephone communications across county lines.

[6] Defendant asserts in his brief on appeal that his trial attorneys were ineffective for failing to object to prosecution in Saginaw County. But he concedes in his reply brief that his attorneys properly preserved this issue and states that we need not address his ineffective assistance claim.

Id. at 119. The *Flaherty* Court found that some of the defendant's "communication 'acts'" had effects in St. Clair County. *Id*. Specifically, the defendant's acts of placing a cover note and invoice in the mail and sending it to St. Clair County induced the general agency to authorize an invoice and mail payment to the defendant. *Id*. Noting that "detrimental reliance by the victim on the [defendant's] false representation" is an essential element of larceny by false pretenses, the *Flaherty* Court concluded that although the defendant was physically present in Macomb County, the "effective false representation occurred in St. Clair County." *Id*. Thus, venue was properly established in St. Clair County. *Id*.

In *Fisher*, the defendant was charged in Wayne County with inciting perjury and attempted obstruction of justice. *Fisher*, *supra* at 135. The defendant had previously been convicted in Wayne County of murdering his wife and, pending an appeal of that conviction, was imprisoned in Jackson County. *Id*. at 135-136. While in prison, the defendant asked a prison mate to swear to a false affidavit and claim that he, not the defendant, had committed the crime for which the defendant had been convicted. *Id*. The *Fisher* Court noted that the defendant's acts were intended to affect the proceedings pending in Wayne County and that the charge of attempted obstruction of justice required proof that defendant committed an act with the intent "to hinder the due course of justice in the case pending in Wayne County." *Id*. at 149, 152. See *People v Milstead*, 250 Mich App 391, 405; 648 NW2d 648 (2002) (stating that obstruction of justice is generally defined as "an interference with the orderly administration of justice," "impeding or obstructing those who seek justice in a court, or those who have duties or powers of administering justice therein," or an "effort . . . to thwart or impede the administration of justice"). After examining federal case law holding that in obstruction of justice cases, "venue is proper in the district where the proceeding affected is pending,"[7] other states' decisions regarding offenses such as tampering with a witness, and this Court's reasoning in *Flaherty*, the *Fisher* Court concluded that, while MCL 762.8 does not use the words "effects" or "results," an "act that has effects elsewhere that are essential to the offense is, in effect, committed in the place where the act has its effects," and therefore that venue was properly established in Wayne County as to the attempted obstruction of justice charge. *Fisher*, *supra* at 146-150, 152. The defendant conceded that if Wayne County was the proper venue for prosecution of the attempted obstruction of justice charge, it was also the proper venue for the inciting perjury charge because both charges arose out of the same transaction. *Id*. at 143-144 and n 1.

In *Webbs*, *supra*, the case that defendant relies on, the defendant was charged in Grand Traverse County with larceny by false pretenses, but all of the acts done in perpetration of the offense occurred in Wayne County. *Id*. at 532. The defendant falsely identified himself as James Hardy and applied for and received a loan in Wayne County. *Id*. Hardy was a resident of Grand Traverse County and claimed that the defendant's acts affected him in his home county.

[7] At the time *Fisher* was decided, Congress had finally ended the problem of diverging federal court viewpoints regarding the proper situs of a charge of obstruction of justice by adding a venue provision to 18 USC § 1512(i), which provides: "A prosecution under this section or section 1503 may be brought in the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred."

Id. The *Webbs* Court criticized *Flaherty* and *Fisher*, stating that the holdings in those cases did not comport with the plain language of MCL 762.8. *Id*. at 536. As previously discussed, the *Webbs* Court stated that "the plain language of MCL 762.8 requires an act to be done in the perpetration of the felony without regard to where the effects of the crime are felt." *Id*. at 534. But, the *Webbs* Court did not overrule *Flaherty* and *Fisher*, instead finding those cases factually distinguishable. *Id*. at 534, 536. In contrast to *Flaherty* and *Fisher* in which "*the defendants' acts had effects elsewhere that were essential to the offenses charged*," the defendant's use of Hardy's personal information in Wayne County was "not an act that had effects essential to the offense of larceny by false pretenses" in Grand Traverse County. *Id*. at 536 (emphasis added). Thus, venue was not properly established in Grand Traverse County. *Id*. at 532.

Thus, according to current Michigan case law, venue is proper under MCL 762.8 in any county where an act culminating in the charged offense occurred or, in cases where the essential conduct elements of the charged offense are defined in terms of their effects, the effects of that conduct are felt. While *People v Jones*, 159 Mich App 758, 761; 406 NW2d 843 (1987) states that MCL 762.8 is concerned with the acts that culminate in the felony, and not with the elements of the felony, in both *Flaherty* and *Fisher*–the only published Michigan cases that have extended MCL 762.8 to the effects of the defendant's acts–the essential elements of the charged offenses were defined in terms of their effects. In *Flaherty*, the offense of larceny by false pretenses required the prosecution to prove, as an essential element, detrimental reliance by the victim on the defendant's false representation. *Flaherty*, *supra* at 531 n 1, 536. While the defendant in that case was physically present in Macomb County, his actions caused the victim's detrimental reliance in St. Clair County. *Id*. at 536. Likewise, in *Fisher*, the attempted obstruction of justice charge required the prosecution to prove that the defendant committed an act with the intent "to hinder the due course of justice in the case pending in Wayne County." *Fisher*, *supra* at 152. In obstruction of justice cases, the offense is committed when the effort is made to hinder the judicial proceeding, regardless whether the defendant's efforts to obstruct justice are actually successful. See *Milstead*, *supra* at 405-406, citing *People v Thomas*, 438 Mich 448, 455; 475 NW2d 288 (1991) and *People v Tower*, 215 Mich App 318, 320; 544 NW2d 752 (1996); *Fisher*, *supra* at 149, 152.

Our reading of Michigan case law comports with the limited effects-based approach to venue set forth in analogous federal authority. As articulated in *United States v Bowens*, 224 F3d 302, 311 (2000), "the Supreme Court's recent decisions in [*United States v Cabrales*, 524 US 1; 118 S Ct 1772; 141 L Ed 2d 1 (1998) and *United States v Rodriguez-Moreno*, 526 US 275; 119 S Ct 1239; 143 L Ed 2d 388 (1999)] require us to determine venue solely by reference to the essential conduct elements of the crime, without regard to Congress's purpose in forbidding the conduct. Venue may nevertheless be proper where the effects of criminal conduct are felt, but only when an essential conduct element is itself defined in terms of its effects." The Court explained that "'the nature of the crime' refers only to the conduct constituting the offense . . . and that the conduct constituting the offense is limited to essential conduct elements." *Id*. at 312 (citations omitted). "At the same time, we do not understand the Supreme Court's recent decisions to have altered the well-established rule that Congress may, consistent with the venue clauses of Article III and the Sixth Amendment, define the essential conduct elements of a criminal offense in terms of their effects, thus providing venue where those effects are felt." *Id*. When the essential conduct elements are defined not just in terms of the forbidden act (e.g., "assault" or "retaliate"), but rather in terms of their effects (e.g., intimidation of a witness or

obstruction of the administration of justice), venue is proper in the district where those proscribed effects would be felt. *Id*. at 313. "This is because the criminal statutes involved in those cases [do] not merely proscribe particular acts, but actually [define] the essential conduct elements in terms of their particular effects, e.g., 'affecting' interstate commerce and 'obstructing' or 'impeding' the administration of justice." *Id*.

In this case, defendant was charged in Saginaw County with intimidation of a witness and obstruction of justice on the basis of the allegedly threatening statements made to Detective VanHorn, the lead investigator and witness in the tractor case. According to Detective VanHorn's testimony, on June 21, 2004, just eight days before the retrial of the tractor case was scheduled to commence in Saginaw County, he received a page from a phone number he did not recognize. Phone records established that the call originated in Bay County and terminated in Ogemaw County. When the detective called the phone number, defendant allegedly answered the phone and threatened the detective. Although defendant was physically present in Bay County when he threatened Detective VanHorn, like the defendant in *Fisher*, his actions were intended to affect proceedings pending in Saginaw County. The charges of obstruction of justice and intimidating a witness both required proof that defendant committed an act with the intent "to hinder the due course of justice" in the tractor case pending in Saginaw County. *Fisher*, *supra* at 152; MCL 750.122(3)(a). See also *Milstead*, *supra* at 405 (stating that common law obstruction of justice was not a single offense but a category of offenses and intimidation of a witness was an indictable common law offense associated with obstructing justice). Defendant's acts had effects in Saginaw County that were essential to the charged offenses. Therefore, pursuant to this Court's holdings in *Flaherty*, *Fisher*, and *Webb*, we conclude that Saginaw County was a proper venue for prosecution of defendant's intimidation charge.

The same cannot be said, however, for defendant's solicitation to commit murder charge. Defendant was charged in Saginaw County with soliciting Dotson to murder Wurtzel, the victim and eyewitness in the tractor case. At the time of the alleged solicitation, defendant and Dotson were incarcerated in Arenac County. Later, Dotson engaged in a recorded phone conversation with defendant during which they alluded to plans to kill Wurtzel. The call originated in Bay County and terminated in Arenac County. Defendant committed no acts in perpetration of the offense in Saginaw County.

The prosecution asserts that venue was properly established in Saginaw County because defendant's act of solicitation had effects in Saginaw County, emphasizing that Wurtzel resided in Saginaw County, defendant wanted Wurtzel killed at his business in Saginaw County and, similar to the facts in *Fisher*, defendant intended to thwart the ongoing tractor investigation in Saginaw County by having Wurtzel killed. But, contrary to the prosecution's assertion, none of defendant's acts had effects in Saginaw County *essential to the charged offense* of solicitation to commit murder. Unlike obstruction of justice cases where the essential conduct elements of the offense are defined in terms of their effects, e.g., "obstructing," interfering," or "impeding," and the prosecution is required to prove that the defendant made an effort to hinder judicial proceedings pending in a particular location, solicitation to commit murder is complete when "(1) the solicitor purposely seeks to have someone killed and (2) tries to engage someone to do the killing." *People v Crawford*, 232 Mich App 608, 616; 591 NW2d 669 (1998). Pursuant to MCL 750.157b(1), "'solicit' means to offer to give, promise to give, or give any money, services, or anything of value, or to forgive or promise to forgive a debt or obligation." Further,

while the solicitor must intend that a killing take place, actual incitement is not necessary. *Crawford*, *supra* at 616. Thus, any effect of the solicitation on the intended victim, and the location of the intended victim at the time of the solicitation or otherwise, is irrelevant to the charge. The defendant's motive in seeking to have the person killed is also irrelevant to the charge. While evidence of motive for soliciting a killing may be relevant to establishing the defendant's guilt at trial, see e.g., *People v Vandelinder*, 192 Mich App 447, 454; 481 NW2d 787 (1992), it is not an essential element of the offense of solicitation to commit murder and is irrelevant to establishing venue under MCL 762.8.

In this particular case, the intended victim had ties to Saginaw County and defendant's apparent motive in soliciting the killing was to thwart an ongoing investigation in Saginaw County. But, defendant was charged with solicitation to commit murder, not obstruction of justice. The prosecution was not required to prove that defendant had any particular motive for soliciting the killing or that the solicitation had any effect on the intended victim. Thus, it cannot be said that defendant's acts had effects in Saginaw County *essential to the charged offense* of solicitation to commit murder. Accordingly, we must conclude that venue was not properly established in Saginaw County for defendant's solicitation charge.

The prosecution asserts that its correspondence with the Attorney General's office and this Court's denial of defendant's emergency application for leave to appeal suggests that venue was properly established in Saginaw County for all of defendant's charges. We are unpersuaded by the prosecution's assertion. An assistant attorney general informed the prosecution in a January 2005 letter that, in his opinion, sufficient facts existed to establish venue in Saginaw County for the solicitation to commit murder charge. But, the attorney's letter was merely an expression of his opinion regarding proper venue with no citation to authority. In fact, the letter specifically states that the Attorney General was declining to designate Saginaw County as a proper venue under MCL 762.3(2) because venue was not impossible to ascertain in this case. Further, this Court's denial of defendant's emergency application for leave to appeal does not constitute a ruling that venue was properly established in Saginaw County. In his emergency application, defendant specifically argued that the trial court's consolidation of the three lower court cases was improper. This Court's denial of defendant's application was not a decision on the merits of his venue claim.

Venue was properly established in Saginaw County as to the intimidation of a witness charge, but not the solicitation to commit murder charge. Accordingly, we must vacate defendant's solicitation conviction and sentence.

III. Admission of the "Kitchen Sink Material"

Defendant next argues that the trial court abused its discretion in admitting the "kitchen sink material." While we are inclined to agree with defendant that at least some of the "kitchen sink material" was unfairly prejudicial, the admission of the evidence did not affect the outcome of the case.

On appeal, defendant challenges the admission of the "kitchen sink material." In the facts section of his brief, he lists the particular evidence to which he is referring: his 1983 conviction for preparing to burn his uncle's property and the expungement of that conviction; the 1994 assault on Griffith and 1997 pipe bomb explosion at Griffith's home; the November 2001 shooting at Meagher's home; his possession of pipe bombs and certain reading materials discovered during the November 2001 search of his property; his 2002 acquittal of attempting to burn his own home; his 2003 acquittal of forging GM documents; his vulgar performance evaluation of a GM co-worker for which he received a disciplinary suspension; reports that his estranged wife found fish hooks and other foreign substances in her pills; several peoples' opinions of him; and, his alleged verbal confrontation with Detective VanHorn during the first tractor trial when he told the detective to "fuck off."[8] The "kitchen sink material" was admitted through Detective VanHorn's testimony about the evidence he discovered during his investigation of defendant. Additional witnesses, including Meagher, a private investigator, and several police officers, testified to some of the same information. Defendant argues that most of the material was inadmissible under MRE 404(b), and that all of it was irrelevant and unfairly prejudicial.

We review preserved challenges to the admission or exclusion of evidence by a trial court for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 179; 712 NW2d 506 (2005). An abuse of discretion occurs when the outcome chosen by the trial court is not within the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). "[D]ecisions regarding the admission of evidence frequently involve preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence. Questions of law are reviewed de novo." *People v Dobek*, 274 Mich App 58, 85; 732 NW2d 546 (2007) (internal quotations and citation omitted). "The primary goal of statutory interpretation is to determine and give effect to the intent of the Legislature in enacting the provision." *People v Althoff*, 280 Mich App 524, 535; __ NW2d __ (2008). "Every word or phrase of a statute should be accorded its plain and ordinary meaning, but if the legislative intent cannot be determined from the statute itself, dictionary definitions may be consulted." *Id*.

In this case, the trial court did not admit the challenged evidence under MRE 404(b). MRE 404(b) excludes the admission of evidence of other crimes, wrongs, or acts to prove character and show action in conformity therewith. But, not all "other-acts" evidence is subject to MRE 404(b) analysis. *People v VanderVliet*, 444 Mich 52, 64; 508 NW2d 114 (1993), mod on other grounds 445 Mich 1205 (1994). Evidence of other acts may be admissible under MRE 401 as substantive evidence without regard to MRE 404(b) if it does not operate through an intermediate inference of character. *VanderVliet*, *supra* at 64. In this case, the prosecution repeatedly argued that whether defendant committed any of the prior acts at issue was irrelevant–although defendant was at least suspected of committing all of them–and that the evidence was

[8] As previously indicated, throughout the lower court proceedings, both the parties and the trial court referred to these individual pieces of evidence, as well as others, as the "kitchen sink material." The trial court admitted the "kitchen sink material" as one collective body of evidence, without reference to the individual pieces of evidence included therein. Even on appeal, neither party has addressed the admissibility of the individual pieces of evidence.

only admitted to establish what information Detective VanHorn had collected during his investigation of defendant, and that defendant knew the detective possessed that information. We agree with the prosecution that the challenged evidence is not subject to MRE 404(b) analysis and, therefore, that the appropriate analysis is whether the evidence was relevant, and if so, whether its probative value was substantially outweighed by the danger of unfair prejudice. *People v Goddard*, 429 Mich 505, 518; 418 NW2d 881 (1988); *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001).

First, defendant argues that the "kitchen sink material" was irrelevant. We disagree. The prosecutor initially bears the burden of establishing relevance. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). To be relevant, evidence must be material to a fact of consequence to the action. *People v Ackerman*, 257 Mich App 434, 439; 669 NW2d 818 (2003).

The witness intimidation statute, MCL 750.122, "identif[ies] and criminalize[s] the many ways individuals can prevent or attempt to prevent a witness from appearing and providing truthful information in some sort of official proceeding." *People v Greene*, 255 Mich App 426, 438; 661 NW2d 616 (2003). MCL 750.122 provides in relevant part:

> (3) A person shall not do any of the following by threat or intimidation:
>
> (a) Discourage or attempt to discourage any individual from attending a present or future official proceeding as a witness, testifying at a present or future official proceeding, or giving information at a present or future official proceeding.
>
> * * *
>
> (7) A person who violates this section is guilty of a crime as follows:
>
> * * *
>
> (c) If the violation involves committing or attempting to commit a crime or a threat to kill or injure any person or to cause property damage, the person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than $25,000.00, or both.

The term "threat" is not defined in MCL 750.122. Random House Webster's College Dictionary (2005) defines a "threat" as "a declaration of an intention to inflict punishment, injury, etc., as in retaliation for, or conditionally upon, some action or course."

Detective VanHorn testified that on June 21, 2004, just eight days before the tractor case was scheduled to be retried, he received a page from a phone number he did not recognize. When the detective returned the call, a person who sounded like defendant said, "I want to let you know I saw you in court last week, and I want to let you know that I know where you live, motherfucker." The trial court admitted the "kitchen sink material" to establish that defendant's alleged statements to Detective VanHorn constituted a threat to kill or injure the detective or his family or to damage their property under MCL 750.122(7)(c), an issue disputed at trial. The fact that Detective VanHorn had uncovered a plethora of information about defendant and list of allegations against him, regardless whether defendant had actually committed any of the alleged

offenses or whether people's opinions of him had any merit, provided the jury with the full context of defendant's statements. The fact that defendant knew Detective VanHorn possessed that information at the time he made the threatening statements indicates that he knew how the statements would be interpreted–as a "declaration of his intention" to kill or injure the detective or his family at their home or to damage their property if the detective testified at the tractor case retrial. Accordingly, we find that the prosecution met its initial burden of establishing relevance. *Knox*, *supra* at 509.[9]

Next, defendant argues that the probative value of the "kitchen sink material" was substantially outweighed by the danger of unfair prejudice. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001), citing MRE 403. The probative value of the "kitchen sink material" was only marginal, considering that the phrase "I know where you live, motherfucker," coming from defendant to the detective on the eve of the tractor case retrial, could reasonably be construed as a threat of violence or property damage in and of itself, and the danger existed that the jury could have given undue or preemptive weight to some of the most outrageous pieces of evidence. Thus, we are inclined to agree with defendant that at least some of the "kitchen sink material" was unfairly prejudicial. But, because neither party has addressed the admissibility of the individual pieces of evidence included in the "kitchen sink material," we decline to find that the material was unfairly prejudicial as a whole.

Furthermore, even if we were to make a finding of unfair prejudice, reversal is not required unless it is more probable than not that a trial court's error in admitting evidence was outcome determinative. See *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). We acknowledge that this is a fairly close question, particularly considering that at least some of the jurors expressed concern for their personal safety after the trial. But, in light of all of the other evidence presented at trial, defendant cannot establish that the admission of "kitchen sink material" was outcome determinative.

In regard to the false pretenses charge, the prosecution presented evidence that a man identifying himself as Colin Francis, and using Francis's driver's license, rented a tractor and tiller from Wurtzel's store, but never returned the equipment. Francis was a co-worker of defendant's who had recently lost his driver's license. Years later, investigators found a tractor and tiller on defendant's property, and driver's licenses bearing the names "Colin Francis" and "Dale White" in defendant's truck. Wurtzel subsequently identified the tractor and tiller, and picked defendant out of a lineup as the man who had rented the equipment. Although all of this evidence was admitted at the first tractor trial, and that trial ended in a hung jury, the prosecution presented additional incriminating evidence at the consolidated trial. Defendant claimed to have purchased the tractor and tiller in 1999 from Denny VanHaaren at Delta College, where Denny

[9] There is evidence in the record that the trial court allowed the prosecution to present at least some of the "kitchen sink material" for a secondary purpose–to rebut defendant's claim during opening statements that Detective VanHorn and GM were "out to get him" or had a vendetta against him.

was a bricklayer, and to have found the driver's licenses in the tractor. But, at the consolidated trial, Donald VanHaaren testified that his son Denny had not been in Michigan since 1994, and that the handwriting on the purchase receipt defendant presented was not Denny's handwriting. Guy Periard, who was familiar with all of the bricklayers who worked at Delta College in 1999, testified that no person named Denny VanHaaren had ever worked there. White testified that he recognized defendant from flight instruction trainings they had both attended and that at one of those trainings, he lost his driver's license. Additionally, evidence that defendant solicited Dotson to murder Wurtzel before the first tractor trial, and then threatened Detective VanHorn before the retrial, demonstrated consciousness of guilt.[10] Considering all of this evidence, defendant cannot establish that, but for the admission of the "kitchen sink material," the jury would not have found him guilty of obtaining property by false pretenses.

In regard to the intimidation charge, the prosecution presented evidence that eight days before the tractor case retrial was scheduled to commence, Detective VanHorn received a page from a phone number he did not recognize. Phone records established that the cell phone used to call the detective's pager belonged to Rinness, but Rinness testified that she had lost the phone. The same cell phone was used to call several phone numbers associated with defendant and his girlfriend. Detective VanHorn testified that when he returned the page, a person who sounded exactly like defendant said, "I want to let you know I saw you in court last week, and I want to let you know that I know where you live, motherfucker." According to the detective, when he heard defendant say those words, he believed that defendant "was letting [him] know that there was no doubt that he was going to kill [him], attempt to kill [him], or harm [his] family," and that "it was just a matter of time." The phrase, "I want to let you know that I know where you live, motherfucker," coming from defendant to the detective–one of the key witnesses in the tractor case–immediately before the tractor case retrial, could reasonably be construed as a threat of violence or property damage. Even absent the "kitchen sink material," those words strongly indicated defendant's intention to find the detective or his family at the place where they lived, and kill or injure them or damage their property, if the detective testified at the retrial. We are not persuaded that, but for the admission of the "kitchen sink material," the outcome of the intimidation case would have been different.

In light of the overwhelming amount of evidence establishing defendant's guilt in the tractor case and the intimidation case, defendant cannot establish that the outcome of the proceedings would have been different, but for the admission of the "kitchen sink material." See *Lukity*, *supra* at 495-496. Accordingly, we find that the trial court's admission of the "kitchen sink material" was harmless and, therefore, that reversal is not warranted. See *id*.

[10] It is apparent from the record that even if the three lower court cases had not been consolidated, the trial court would have admitted the facts of the solicitation case and the intimidation case to establish consciousness of guilt in the tractor case.

IV. Sufficiency of the Evidence

Defendant argues that there was insufficient evidence to convict him of obtaining property by false pretenses because the victim in a false pretenses case must intend to convey both possession and title under MCL 750.218. We disagree.

When reviewing the sufficiency of the evidence in a criminal case, we must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). The requirements of a criminal statute are a question of law that we review de novo. *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006).

MCL 750.218 states, in pertinent part:

> (1) A person who, with the intent to defraud or cheat makes or uses a false pretense to do 1 or more of the following is guilty of a crime punishable as provided in this section:
>
> * * *
>
> (c) Obtain from a person any money or personal property or the use of any instrument, facility, article, or other valuable thing or service.

We have held that in order to prove false pretenses, the prosecution must show: (1) a false representation concerning an existing fact; (2) knowledge by the defendant that the representation is false; (3) use of the representation with an intent to deceive; and (4) detrimental reliance on the false representation by the victim. *People v Dewald*, 267 Mich App 365, 371; 705 NW2d 167 (2005).

In this case, the prosecution presented evidence that defendant used another man's identification to obtain the tractor, tiller, and trailer from Wurtzel's rental company with the intent to cheat or defraud. This conduct clearly falls within the parameters of MCL 750.218(1)(c). Nonetheless, defendant asserts that because Wurtzel did not intend to convey title to him, an essential element of the charged offense was missing. Contrary to defendant's assertion, however, we noted in *People v Cage*, 90 Mich App 497, 498; 282 NW2d 368 (1979), rev'd on other grounds 410 Mich 401 (1981), that intent to pass title is no longer required under MCL 750.218. See also *People v Sharpe*, 22 Mich App 454, 458; 178 NW2d 90 (1970) (on which the *Cage* Court relied).

We acknowledge that in *People v Malach*, 202 Mich App 266, 271; 507 NW2d 834 (1993), a panel of this Court stated that "if the owner of the goods intends to keep title but part with possession, the crime is larceny; if the owner intends to part with both title and possession, albeit for the wrong reasons, the crime is false pretenses." *Malach* and the cases cited therein, *People v Jones*, 143 Mich App 775, 777-780; 372 NW2d 657 (1985), *People v Long*, 409 Mich 346, 350-351; 294 NW2d 197 (1980), and *People v Martin*, 116 Mich 446, 450-451; 74 NW 653 (1898), describe the historical difference between the common law crime of larceny and the

statutory offense of false pretenses. *Malach*, *supra* at 270-271. In *Long*, our Supreme Court summarized the historical development of MCL 750.218, stating:

> The statute has early been described as having the purpose of punishing cheats. The Legislature amended the statute several times prior to our consideration in [*Martin*, *supra*]. Subsequent to *Martin*, the statute was again amended by 1915 PA 245 so as to additionally proscribe obtaining "the use of any instrument, facility or article or other valuable thing or service" by false pretenses. The statute has not changed significantly since that time. The common-law concepts of transfer of title and possession to which we referred in *Martin* are noteworthy in pointing out the delineation between larceny (with its common-law origin) and the developing statutory offense of false pretenses. While serving this function well, these concepts do not pertain to definition of the statutory offense of false pretenses, a matter committed to legislative prerogative. [*Long*, *supra* at 352 n 8 (citation omitted).]

While the victim's intent to pass title is a noteworthy distinction between the common law crime of larceny and the statutory offense of false pretenses as stated in *Long*, we have held that intent to pass title is no longer a required element under MCL 750.218. See *Dewald*, *supra*; *Cage*, *supra*; *Sharpe*, *supra*. Therefore, defendant was properly charged under MCL 750.218 and his sufficiency of the evidence argument must fail. Furthermore, while defendant argues that failing to return rental property with intent to defraud, MCL 750.362a, would have been a more appropriate charge, "the decision whether to bring a charge and what charge to bring lies in the discretion of the prosecutor." *People v Venticinque*, 459 Mich 90, 100; 586 NW2d 732 (1998).

V. Alleged Prosecutorial Misconduct and Ineffective Assistance of Counsel

Defendant argues that during closing arguments, the prosecutor committed misconduct by making several statements suggesting that defendant posed a threat to the jury and disparaging him and his trial counsel. Defendant argues that his trial attorneys were ineffective for failing to object to all of the prosecutor's allegedly improper statements. We disagree.

To preserve a claim of prosecutorial misconduct, there must be a contemporaneous objection and request for a curative instruction. *People v Brown*, 279 Mich App 116, 134; ___ NW2d ___ (2008). To the extent that a preserved claim of prosecutorial misconduct is a constitutional issue, it is reviewed de novo, but a trial court's factual findings are reviewed for clear error. *Id*. "[I]n order for prosecutorial misconduct to constitute constitutional error, the misconduct must have so infected the trial with unfairness as to make the conviction a deprivation of liberty without due process of law." *People v Blackmon*, ___ Mich App ___; ___ NW2d ___ (2008) (emphasis omitted), slip op p 9. Nonconstitutional error, even if preserved, is not a ground for reversal unless, after an examination of the entire case, it affirmatively appears that it is more probable than not that the error was outcome determinative. *Id*., slip op p 10; *People v Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d 584 (1999), citing *Lukity*, *supra* at 495-496.

We review unpreserved claims of prosecutorial misconduct for plain error affecting the defendant's substantial rights. *Ackerman*, *supra* at 448. Reversal is warranted only if plain error resulted in the conviction of an innocent defendant or "'seriously affected the fairness, integrity,

or public reputation of judicial proceedings, independent of defendant's innocence.'" *Id*. at 448-449, quoting *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Where a curative instruction could have alleviated any prejudicial effect reversal is not warranted. *Ackerman, supra* at 449; *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Prosecutorial misconduct issues are decided on a case-by-case basis. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The propriety of a prosecutor's remarks depends on all of the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). The remarks must be reviewed as a whole and in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Brown, supra* at 135. A prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case, and need not state the inferences in the blandest possible terms. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *Dobek, supra* at 66.

Defendant first argues that the prosecutor made two statements suggesting that defendant posed a threat to the jury. Defendant's trial counsel did not object to these statements at the time that they were made, challenging them instead in a motion for new trial. This is the first statement:

> I'd like to resume where I was, and I was speaking about Ms. Haertel as a witness.
>
> Remember when she looked out at you and tried to create evidence where she had none, that Detective Sergeant VanHorn is a bad cop? Now, in her mind, she may believe that he is a bad cop. But he's prosecuting or investigating her loved one. . . . .
>
> * * *
>
> Ms. Haertel said, when I asked her, since you've been with him since '97, '98, do you know about these books? The Poisoner's Handbook. How to Outfox the Foxes. Mad as–"no, I don't know anything about them.["]
>
> * * *
>
> Mr. Piazza sort of made light of it when Detective Sergeant VanHorn was on the stand. I'd like to have that, "297 Secrets the Law and Lawyers Don't Want You to Know." Perhaps Mr. Piazza should have read it, and he could have been aware of what I had Detective Sergeant Van Horn read. And I'll only reread one sentence that was chilling. It is page 115. *"It is never enough to argue the facts to a jury, whether the jury is composed of 1 or 12. What you must point out to them is that their ultimate decision, if not in your favor, will cause pain to them."* I've never read anything like that before. [(Emphasis added.)]
>
> But Ms. Haertel hadn't seen these books.

Defendant specifically objects to the quote the prosecutor read to the jury. We find, however, that the prosecutor's remarks, viewed in context, were not improper. The prosecutor

cited evidence admitted during trial and made remarks consistent with the parties' theories of the case. During opening statements, defendant's trial counsel asserted that Detective VanHorn and GM were "out to get" defendant and had a vendetta against him. During trial, the prosecution questioned Detective VanHorn about the books and pamphlets discovered at defendant's home. At the prosecution's request, the detective read a lengthy passage from one of the books, including the quote the prosecutor read during closing arguments. Defendant's girlfriend, Haertel, testified at trial that she tried to initiate an internal affairs investigation of Detective VanHorn because she was aware of 14 people who had complaints about the detective. At the conclusion of Haertel's testimony, the trial judge questioned her, in relevant part:

> *Q*. The people who gave you negative feedback against Detective VanHorn, had these people been in trouble with the law and that's how they knew Detective VanHorn?
>
> *A*. Yes, I believe–yes, yes. It wasn't personal, you know, like outside of work situations, no, it was through criminal proceedings or–
>
> *Q*. All right. Are you aware or have you seen the books and pamphlets on violence that [defendant] owns?
>
> *A*. Have I–I'm aware of them because of the court proceedings. I've heard of them before in the court proceedings, but I wasn't aware of them before that point. I just–
>
> *Q*. All right. Can you explain your thoughts on this? I think what the jury is saying is does that make a difference to you?
>
> *A*. Well, without having–giving away trial strategy, it's hard for me to say because some of those books I don't even think belong to [defendant].

It is apparent from the record that in reading the quote to the jury during closing arguments, the prosecutor was simply reiterating that Haertel's opinion of the relationship between defendant and Detective VanHorn was incomplete, given that she was unaware of the books and pamphlets defendant kept at his house. Moreover, the quote had already been read to the jury during Detective VanHorn's testimony.

Defendant also challenges the prosecutor's remarks during his rebuttal argument:

> Right now I'm ending partly because I'm out of voice, but also because I have addressed the arguments raised by the defense. . . . I want to end with this thought. Up until now, that's been a safe spot to be. But you're going to have to go in the deliberation room, after you're instructed, and make a decision.
>
> And from the point of view of this defendant, you're going to have to get personal with him. You're going to have to get intimately close to him, as close as one can be intimate in this courtroom, from there to there. And if you vote like the evidence show that he's guilty and you're going to be telling him that, you're not going to be able to hide behind your foreperson, whoever it is . . . . You are

> going to have to individually say, when asked by the judge–because it will be asked of you, I assure you. One side or the other will say to you, I want the jury polled. And your foreperson will sit down and the 12 of you will say that was my verdict. You'll have to say that, I find you guilty as charged Mr. Houthoofd. Based on the evidence you've heard, that might trouble you. Please don't let it trouble you. Your fear of him, if you have it, has nothing to do with deliberations and deciding this case.

The prosecutor's remarks suggest that the jurors might be afraid of defendant, or at least afraid to find him guilty. But the remarks were appropriate in light of all of the evidence presented at trial and do not appear calculated to produce fear. Defendant asserts that there is no Michigan case law directly addressing this issue, and cites several out-of-state cases to support his argument that the prosecutor's remarks were improper: *People v Blackman*, 44 Ill App 3d 137; 358 NE2d 50 (1976), *State v Jones*, 266 Minn 523; 124 NW2d 727 (1963), *Grant v State*, 194 So 2d 612 (Fla, 1967), *Johnson v State*, 453 NE2d 365 (Ind App, 1983), *Cleveland v Egeland*, 26 Ohio App 3d 83; 497 NE2d 1383 (1986), *People v Ferguson*, 594 NYS2d 860; 191 AD2d 809 (1993), and *State v Hoppe*, 641 NW2d 315 (Minn App, 2002). We note, however, that in all of those cases, the prosecutor's remarks strongly suggested that acquitting the defendant or finding the defendant guilty of a lesser charge would expose the jurors or their loved ones to attack. In this case, the prosecutor urged the jurors to find defendant guilty based on the evidence presented at trial, whether they feared him or not. The prosecutor's remarks were proper.

Next, defendant argues that the prosecutor made several statements disparaging defendant and his trial counsel. In his brief on appeal, defendant quotes 20 separate passages from the prosecutor's closing arguments that he claims were improper. Defendant's trial counsel objected to only two of those 20 statements at the time they were made.

We find that the prosecutor's remarks, viewed in context and in light of the parties' theories of the case, were not improper. Most of the prosecutor's remarks related to defendant's trial strategy. Throughout the trial proceedings, defendant's attorneys argued that Detective VanHorn and GM were "out to get" defendant and had a vendetta against him, and that the prosecution only presented the "kitchen sink material" to assassinate defendant's character. The prosecutor suggested during his closing arguments that defendant's attorneys were simply engaging in trial strategy games–one minute suggesting that the "kitchen sink material" was improper character evidence, and the next, using the material to bolster defendant's vendetta theory. The prosecutor further suggested that had defendant simply stipulated to certain facts and dropped his vendetta theory, none of the "kitchen sink material" would have been necessary. The prosecutor also referred to Reyes' use of Franklin in the intimidation case as a desperate trial strategy. Reyes' testified that he never believed Franklin made the phone calls to Detective VanHorn, but maintained that it was just as likely that Franklin made the calls as defendant. We find nothing improper in the prosecutor's remarks in light of the parties' theories of the case. While a prosecutor may not suggest that defense counsel is intentionally trying to mislead the jury, if a comment is directly responsive to a particular defense argument, it is not improper. *Watson, supra* at 592-593.

Additionally, defendant argues that the prosecutor committed misconduct by suggesting that defendant is selfish and manipulative, calling him a "selfish coward," and making references

to terrorism. We disagree. While a prosecutor may not argue facts that are not in evidence, he may argue the evidence and reasonable inferences arising from it. *Bahoda*, *supra* at 282. Nor is the prosecutor constrained to use bland terms when doing so. *Id*. The prosecutor did not engage in excessive name-calling during his closing arguments and in light of all of the evidence presented at trial, it was reasonable for him to refer to defendant as selfish, manipulative, and as a "selfish coward" a limited number of times. The prosecutor's references to terrorism were also limited, and quite mild in nature. In making those references, the prosecutor emphasized for the jury that people intent on doing evil acts cannot always be stopped and that serving on a jury is less of a hardship than fighting a war. The prosecutor did not, as defendant suggests on appeal, dwell on the topic of terrorism or equate defendant to the 9/11 terrorists.

Even if we were to determine that the prosecutor committed misconduct during his closing arguments, defendant cannot establish that the prosecutor's statements were outcome-determinative. *Blackmon*, *supra*, slip op p 10; *Ackerman*, *supra* at 448-449. Although defendant challenges more than 20 separate statements, the prosecutor's closing arguments were extraordinarily long, taking up more than 160 pages of transcript. So, the challenged statements were, in actuality, only a small part of the prosecutor's argument. Moreover, the trial court instructed the jury that the lawyers' statements and arguments were not evidence. Where a curative instruction could have alleviated any prejudice to defendant, reversal is not warranted. *Ackerman*, *supra* at 449; *Watson*, *supra* at 586. The evidence admitted at trial establishing defendant's guilt was overwhelming, and he cannot establish that any of the prosecutor's statements affected the outcome of the case.

Alternatively, defendant argues that his trial attorneys were ineffective for failing to object to all of the prosecutor's allegedly improper statements during closing arguments. A claim of ineffective assistance of counsel should be raised by a motion for new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *Rodriguez*, *supra* at 38. Defendant raised this issue in a motion for new trial on remand from this Court. The trial court determined, after holding evidentiary hearings on the issue, that defendant's trial attorneys were not ineffective. We review a trial court's factual findings on a claim of ineffective assistance of counsel for clear error, while questions of constitutional law are reviewed de novo. *People v Grant*, 470 Mich 477, 484-485; 684 NW2d 686 (2004).

To establish ineffective assistance of counsel, defendant must show that defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and denied him a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). Furthermore, defendant must show that, but for defense counsel's error, it is likely that the proceeding's outcome would have been different. *Id*. at 146. Effective assistance of counsel is presumed; therefore, defendant must overcome the presumption that defense counsel's performance constituted sound trial strategy. *Id*.

Considering that the prosecutor's statements during closing arguments were proper, any objection by defense counsel would have been futile. "Counsel is not ineffective for failing to make a futile objection." *Thomas*, *supra* at 457. Further, defendant's trial attorneys testified at the remand hearing that they chose not to repeatedly object during the prosecutor's closing arguments as a matter of trial strategy, and "this Court will not second-guess counsel regarding matters of trial strategy." *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). The trial court found that defendant "had not only adequate representation but

representation of sterling quality." Moreover, for the reasons indicated, defendant cannot establish that the outcome of the proceedings would have been different had his trial attorneys objected to all of the prosecutor's allegedly improper statements. See *Henry*, *supra* at 146. Therefore, defendant's claim of ineffective assistance of counsel must fail.

VI. Sentencing

Defendant argues that resentencing is necessary because the trial court scored OV 9, OV 12, and OV 19 based on facts not proven beyond a reasonable doubt at a jury trial in violation of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We disagree.

At sentencing, defendant objected to the scoring of OV 9 and OV 12 for his intimidation and solicitation convictions. He did not object to the scoring of OV 19.[11] We review questions of constitutional law de novo. *People v Harper*, 479 Mich 599, 610; 739 NW2d 523 (2007). But, to the extent that this issue is unpreserved, review is limited to plain error affecting defendant's substantial rights. *People v McCuller*, 479 Mich 672, 695; 739 NW2d 563 (2007).

According to *Blakely*, *supra* at 303-304, in order to preserve a defendant's right to trial by jury, any fact that increases a sentence beyond the statutory maximum must be admitted by the defendant or submitted to a jury and found beyond a reasonable doubt. But, our Supreme Court recently reaffirmed in *Harper*, *supra* at 615, that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. Moreover, as discussed in *Harper*, *supra* at 613 n 21, and *People v Drohan*, 475 Mich 140, 162 n 13; 715 NW2d 778 (2006), Michigan's habitual offender statutes are not affected by *Blakely* or its predecessor, *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000). Therefore, the trial court did not err in scoring the guidelines or fashioning defendant's maximum sentence.

VII. Conclusion

Because we must vacate defendant's conviction and sentence for solicitation to commit murder on the basis of improper venue, we need not address the remainder of his arguments on appeal.

We affirm defendant's convictions and sentences for obtaining property by false pretenses and intimidating a witness, and vacate his conviction and sentence for solicitation to commit murder.

/s/ Jane M. Beckering
/s/ Stephen L. Borrello
/s/ Alton T. Davis

[11] As previously explained, we must vacate defendant's conviction and sentence for solicitation to commit murder. Therefore, defendant's arguments regarding that sentence are moot.