STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 26, 2009
v GERALD HILL, Defendant-Appellant.	No. 277813 Wayne Circuit Court LC No. 06-002236-03

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v KEHINDE TYRU WOFFORD, a/k/a KEHINDA WOFFORD, Defendant-Appellant.	No. 278246 Wayne Circuit Court LC No. 06-002236-01

Before: Borrello, P.J., and Murphy and M. J. Kelly, JJ.

PER CURIAM.

In these consolidated appeals,[1] defendants Gerald Hill and Kehinde Tyru Wofford appeal as of right their convictions by separate juries after a joint trial. Hill's jury found him guilty of felony-murder, MCL 750.316, second degree murder, MCL 750.317, assault with the intent to murder, MCL 750.83, carrying or possessing a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b, possessing a firearm while ineligible to do so (felon-in-possession), MCL 750.224f, two counts of armed robbery, MCL 750.529, and

[1] This Court ordered the consolidation of these appeals for efficient appellate administration. See *People v Hill*, unpublished order of the Court of Appeals, entered June 13, 2007 (Docket No. 277813); *People v Wofford*, unpublished order of the Court of Appeals, entered June 13, 2007 (Docket No. 278246).

kidnapping, MCL 750.349. The trial court sentenced Hill as a third habitual offender, see MCL 769.11, to life without the possibility of parole for his felony-murder conviction, to 50 to 75 years in prison for each of his armed robbery convictions and for his assault with the intent to murder and kidnapping convictions, and to six to ten years in prison for his felon-in-possession conviction. The trial court also sentenced Hill to serve five years in prison for his felony-firearm conviction, which is to be served consecutive to his other convictions. Wofford's jury found him guilty of two counts of second-degree murder, assault with the intent to murder, felony-firearm, felon-in-possession, two counts of armed robbery, and kidnapping. The trial court sentenced Wofford as a third habitual offender to 60 to 90 years in prison for the first of his second-degree murder convictions, to 50 to 75 years in prison for each of his armed robbery convictions and for his assault with the intent to murder and kidnapping convictions, and to six to ten years in prison for his felon-in-possession conviction. The trial court also sentenced Wofford to serve two years in prison for his felony-firearm conviction, which is to be served consecutive to his other convictions. Because Hill's convictions of felony-murder and second-degree murder and both of Wofford's convictions of second-degree murder arose from the death of the same individual, the trial court vacated Hill's second-degree murder conviction and Wofford's second second-degree murder conviction. On appeal, both Hill and Wofford raise a variety of errors, which they claim rendered their trial unfair and, therefore, warrant reversal. We conclude that there were no errors warranting relief and, for that reason, affirm in both cases.

I. Basic Facts

The charges in this case stem from the robbery of Daniel Burks and the robbery and shooting death of Quintin Tuggle on September 12, 2005.

Jovan Sly testified at trial that Wofford and Wofford's friend, Ace,[2] asked him to assist in a "lick," which is slang for a robbery. Sly said that Wofford and Ace told him that they planned to rob a man named Dan (Burks), who supposedly had $300,000 to $500,000 in cash and twelve kilos of cocaine in his house. They told him that Burks lived on Artesian Avenue on the West side of Detroit. Sly said he knew Hill from prison and that he was close to Hill. Sly said he knew Wofford as "Wolf" and knew Hill as "Slug." Sly testified that the plan was to take Burks into his house, get the money and drugs, and then kill him.

On September 12, 2005, Wofford picked Sly up. Sly stated that when he got into Wofford's van, Wofford, Hill, Ace and a man he knew as "Que"[3] were already in the van. The group then drove over to Artesian and Ace switched into a Dodge Durango parked down the street from Burks' house. Sly said that the Durango was parked there from the night before. Sly explained that Wofford told him that he (Wofford), Ace and Ace's brother had been "sitting" on Burks the day before, but could not go through with the robbery because there were too many people about. Sly testified that they then followed Ace to a gas station to "grab a gas can," so

[2] Ace's real name was apparently Leroy Wilson. Wilson was shot and killed by police officers in Kalamazoo before the trial at issue.

[3] At trial, Que was also referred to as "Q". It appears that, as of this trial, Que's real identity had not been determined.

they could "torch" the Durango after the robbery. After this, they drove back to Artesian, parked the van in a getaway spot, got into the Durango and waited for Burks to arrive.

Sly said that Ace was the driver, Hill was in the front passenger seat, Que sat behind Ace, Wofford sat behind Hill, and he (Sly) sat in the third row. Sly testified that, even though he was there to "back up" the robbery, he was not armed. However, he indicated that Wofford, Hill, Ace and Que were all armed. He said Wofford had an AK-47 assault rifle, Que had a .40 caliber handgun, and that Ace and Hill both had 9 mm handguns. Sly said that, after waiting about 45 to 50 minutes, Burks returned home. Sly said that Ace was the one who recognized Burks' truck.

Sly testified that, after Burks pulled into the driveway, Wofford ordered Hill and Ace to get out and grab him. Sly said he saw Hill "post up" on the side of Burks' house and Ace "post up" on the opposite side. At this point, Que "jumped in the driver's seat," Wofford got into the front passenger's seat, and Sly sat in the back row. They then pulled off and drove past the house. Sly said that, as they came back, "the guy was, it looked [like] he was pushing out his trash or something, and I seen him throw his hands up . . . ."

Daniel Burks testified that, on September 12, 2005, he was driving with his wife's uncle, Quintin Tuggle, in Tuggle's Chevrolet Tahoe. Burks stated that Tuggle was driving and that they had just returned to Detroit from Flint. Burks stated that Tuggle pulled into the driveway and asked Burks to get out and open the privacy gate, which he did. Burks then pulled out the trashcan as Tuggle pulled up the rest of the way into the driveway. Burks said that, after he pulled out the trash and began to cut across the grass back to the driveway, Hill came out from around the side of the house and pointed a gun at his head. Burks testified that Hill ordered him to put his hands up and asked him "where is that work?"[4] Burks said he told Hill, "I don't have no work." Burks stated that another man, who also had a gun, came from around the other house and Hill ordered him to "go get that guy in the back." Burks testified that the other man, Ace, went up the driveway and ran into Tuggle, who was apparently coming down the driveway. At this point, Burks saw a black SUV pull up.

Sly testified that, as they pulled up, Wofford put his AK-47 out the window and ordered everybody into the truck. Similarly, Burks testified that Wofford, who was pointing an AK-47 out of the window of the front passenger seat, threatened to kill them unless they got in the SUV. Burks said the backseat passenger, who was also pointing a gun out of the window, pushed open the door. At this point, Hill forced Burks and Tuggle into the backseat. Burks said Hill followed Tuggle into the backseat and that the other man, Ace, ran off after Hill closed the door. Sly also testified that Ace ran off after Burks and Tuggle were forced into the Durango. Sly said that they then "pull[ed] off" and "bent a couple corners."

Burks' neighbor from across the street testified that she was on her porch when Burks arrived home. She stated that right around the time when Burks pulled into his driveway, a black Durango pulled up and two men got out. One man went to one side of Burks' house and then other went to the other side. She stated that one of the men leaned on the house and waited and

[4] The term "work" is slang for drugs.

she saw the other on a cell phone, which she could see because of the lights on the phone. The neighbor stated that the man on the north side of Burks' house came out and pointed a shiny gun at Burks, who had just pulled out a trashcan. She said that Burks put his hands up and that he was soon surrounded by three men, who appeared to be trying to force him into the Durango. The neighbor said she called 9-1-1 and told the operator to hurry and send someone to help Burks. She also stated that, after the men got into the Durango, it pulled away.

Burks testified that, after they were forced into the Durango, Sly hit him with a gun and Hill began hitting Tuggle with a gun. Burks testified that, after Tuggle stated that he did not know what this was about, Hill said, "you know, what this [is] about" and "we're going to kill you anyway." Sly then began to go through Burks' pockets and took the $4,000 to $5,000 that Burks had. Burks said that he had earlier asked Tuggle to hold $10,000 for him and that Hill took that money from Tuggle.[5] Burks said Wofford turned around and pointed the AK-47 at them and said, "let's go," but Hill said "let's take him in the house." Wofford then said, "just get in, let's go." Burks said that Sly and Hill passed the money to the front, but wasn't sure if Wofford took it. Burks indicated that, at this point, they were moving.

Sly testified that, after they pulled away, Wofford turned around and asked about the "money and dope" and told Burks and Tuggle, "I'm going to kill you niggers." Sly said that Wofford also ordered him to check Burks' pockets and that he found bundles of cash in rubber bands. Sly said he gave the money to Hill to put into a backpack they had brought. Sly said Burks said he had some "stacks" in his pocket, but "don't know nothing about no drugs—no five hundred thousand." Burks also said, "Just take the money—please don't kill me." At some point, Wofford took Hill's gun and pointed it at Tuggle's head and pulled the trigger, but it did not fire. Sly said that Wofford told Que to stop and the Durango slowed.

Burks testified that, after only a few blocks, the Durango pulled over and Wofford and Hill got out. Burks said they then pulled Tuggle out of the Durango and ordered him to the ground. Burks said he told Tuggle not to lie down because they were going to kill him. Sly testified that, after the Durango stopped, Wofford told Burks "I'm going to show you how to kill a nigger—and I'm going to kill you next," after which Wofford "pulled Quintin Tuggle out and laid him on the ground, stood over him at the top of him to the back of his head with the [AK-47], and the shot went off." Sly said he then pulled Burks out of the Durango. Burks testified that after he told Tuggle not to lie down, Sly pulled him out and held him; "And all I hear was pow. And when I heard the gunshot, I froze again." Burks admitted that he could not see who fired the shot, but said it sounded like the shot was from the AK-47.

Burks said that he then began to wrestle with Sly and got away. Sly testified that he let Burks get away because he's "not a killer." Burks testified that he started to run: "I'm running with my head down. Lord, I'm just hoping he don't shoot me in my head. So, I'm running and

[5] Burks testified that he got the money as repayment of a loan and through the sale of a motorcycle. However, Burks was apprehended several weeks after the events at issue with 4 kilograms of cocaine. Burks testified that Tuggle had only come to stay with his niece (Burks' wife) in the past week as a result of some family trouble. Burks stated that Tuggle was not involved in the drug business.

it just sound like a gun range behind me. I mean it's shots from everywhere. And I end up getting hit in my arm." Burks testified that he heard both handguns and an assault rifle firing. Sly testified that, after Burks got away, Wofford and Hill came around and began to fire at Burks. Sly stated that they fired too many shots to count.[6] Burks stated that he ran through some trees and a yard and made it to the next street. Burks said he knocked on a few doors and an old woman answered at one. He said he told her that "I think I've been shot and my uncle has been killed." At trial, that woman testified that she answered her door around midnight and that she helped a young man who told her that he had been robbed and that the robbers had killed his uncle. She said she called the police and stayed with him until the police arrived. Burks said he soon heard a fire truck and saw smoke rising a few blocks away.

Sly testified that, after Burks got away, they all got into the Durango and returned to Wofford's van. Sly said Ace was waiting in the van and that Wofford told him to get rid of the Durango. Sly said he grabbed the gas can and doused the Durango while the others waited. He then lit one of his socks on fire and "burned the truck up." Sly said they then went to the home of one of Hill's relatives. There they divided the cash up equally. Sly said he got about $2300.

II. Hill's Appeal in Docket No. 277813

A. Hill's Statements to the Police

Hill first argues that the trial court erred when it concluded that he voluntarily made a statement implicating himself and others in the murder of Tuggle. Because his statement was involuntary, Hill further argues, the trial court should have granted his motion to suppress the statement.

1. Standard of Review

Although whether a defendant's statement was voluntarily made is initially a question of law for the trial court, *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965), this Court must independently review the trial court's determination. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). On de novo review, this Court will affirm the trial court's decision unless it is left with the definite and firm conviction that a mistake has been made. *Id.*

2. Hill's Statement and Motion to Suppress

Shortly after Hill's arrest in October 2005, Sergeant Michael Russell interviewed Hill. At trial, Russell described the interview and stated that he wrote out the statement based on information provided by Hill.

According to the statement, Sly contacted Hill and told him that he (Sly) and his boys Ace and Wofford had a "lick" at a drug house on the West side. Hill stated that he (Hill), Sly, Q,

[6] Evidence and testimony established that more than 20 shots were fired. The shots were 7.62 mm and 9 mm in caliber and damaged several houses across from where Tuggle was found.

and Wofford decided that they would wait for "the guys" to get home and take them into the house, get the money and dope, and tie them up in the basement. He indicated that they went to the area and got into a Durango and waited for the guys to get home. Hill stated that he had a 9 mm handgun that he got from Sly. When the guys arrived at the house, Hill said he and Ace got out of the Durango. Hill stated that one of the men was pulling out a trashcan. Hill indicated that he said he wanted to take them in the house, but that Wofford said to bring them in the truck. Hill said they drove off and that Wofford and Sly began to hit the guys and go through their pockets. At some point, Wofford told Q to stop, which he did. Hill said Wofford pulled one guy out of the Durango and told him to lie down. Wofford then shot him in the back of the head with his AK-47. Hill said he saw Sly struggling with the other guy and then saw that guy break free and run. Hill said Wofford and Q, who had Sly's 9 mm, began to fire at him. They then got back in the Durango, drove to Wofford's van and waited while Sly poured gas on the Durango and lit it on fire. Hill stated that they then went to his nephew's house and split the money. Hill said he got about $2600, which he used to pay some bills and do some stuff with his kids.

In August 2006, Hill moved to have his statement suppressed on the grounds that it was not voluntary. In November 2006, the trial court held a *Walker* hearing to determine whether Hill's statement was voluntary. See *Walker*, 374 Mich 331.

At the hearing, Russell testified that, before taking Hill's statement, he obtained some basic information from Hill and then read Hill his constitutional rights. After reading Hill's rights, Russell said he asked Hill to read them himself and then initial each right to show that he understood it. Russell said that he had a black ink pen and that Hill used a blue ink pen. Russell stated that Hill put his initials by each of the constitutional rights stated on the sheet after he read them. Russell also stated that Hill did not appear to have any injuries, to be under the influence of alcohol or any narcotics, appeared alert, and did not request food or drink.

After getting the personal information and addressing Hill's rights, Russell stated that he proceeded to write out a series of questions in black ink and Hill wrote out his answers in blue ink:

> Q Sir, did I read to you and do you understand your Constitutional Rights?
>
> A Yes.
>
> Q Do you have any questions regarding your Constitutional Rights?
>
> A No.
>
> Q Have you been threatened or promised anything for your statement today?
>
> A No.
>
> Q Do you wish to give me, Sergeant Russell, a statement today regarding the murder that occurred on or in the area of Artesian and Belton in the City of Detroit on September 12th, 2005?
>
> A Yes.

Q Sir, do you wish to write out your statement today or do you wish for me, Sergeant Russell, to write your statement as you direct?

A I'd prefer Sergeant Russell to write out my statement.

After he wrote out the information provided by Hill, Russell said he again wrote a series of questions out in black ink and Hill wrote out his answers in blue ink:

Q Have you been given the time to proofread your statement prior to signing it?

A Yes.

Q Do you wish to make any changes or corrections to your statement?

A No.

Q Have you been threatened or promised anything for your statement?

A No.

Q How have you been treated by the Detroit Police Department today?

A Pleasant.

Q Is your statement truthful?

A Yes.

Russell testified that Hill's signature appeared at the bottom of the statement.

On cross-examination, Russell admitted that the interview was not taped and that no other officer was present for the interview. However, he denied that Hill ever asked for an attorney and denied that Hill ever asked whether he needed an attorney. Russell stated that the whole interview lasted about an hour. Russell also denied that he suggested that it would be better for Hill to make a statement or told him that he would never see his baby if he were convicted of murder. Russell testified that he took Hill's statement within three hours of Hill's arrest. Russell also testified that he never threatened Hill or promised him anything.

At the hearing, Hill admitted that he had been interrogated by police officers twice in the past. He also admitted that he signed the statement and wrote out some things in his own handwriting in blue ink. However, he denied wanting to make the statement and stated that he asked Russell "would I need an attorney?" Hill said Russell told him that he did not think he would need an attorney. Hill also testified that he later specifically stated that he wanted an attorney. Hill also stated that he was not actually involved in the events at issue.

Hill admitted that he was not physically struck by any of the officers, but said he felt compelled to sign the statement because he did not want to go back to prison and Russell promised to help him with his parole situation and said he would not be charged with murder if

he signed the statement. Hill said that Russell told him that the police really only wanted Wofford and that if Hill helped get Wofford off the street he (Russell) would help him. Hill said that Russell told him to coordinate his statement with Sly's statement, which Russell threw in front of him.

At the conclusion of the hearing, the trial court recognized that the issue came down to the credibility of the witnesses and found "that the testimony of Sergeant Russell was credible—that he did not promise anything to [Hill] in exchange for giving the statement." The trial court further characterized Hill's testimony as an "attempt to retract" the statement, which Hill only determined to do as "an after thought after getting into this case" and as an attempt to "extricate himself and relieve himself from the incriminating statement that he made voluntarily." For that reason, the trial court denied Hill's motion to suppress the statement

3. Analysis

On appeal, Hill does not contest that he knowingly and intelligently made the statement at issue; he only argues that it was not voluntary. Specifically, Hill argues that, during the interview with Russell, he was under "intense psychological pressure" to make a statement as a result of the "coercive atmosphere" created by Russell. He further contends that it was only while under the influence of this stress and after Russell made promises of leniency that he agreed to participate in the making of the statement and signed it. A custodial statement is not admissible against a defendant unless the defendant voluntarily waived his or her right to remain silent. *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005). In considering the issue of voluntariness, courts must examine whether "considering the totality of all the surrounding circumstances, the confession is 'the product of an essentially free and unconstrained choice by its maker,' or whether the accused's 'will has been overborne and his capacity for self-determination critically impaired . . . .'" *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988), quoting *Culombe v Connecticut*, 367 US 568, 602; 81 S Ct 1860; 6 L Ed 2d 1037 (1961).

In this case, although Hill claims that Russell created a "coercive" environment, Hill admitted that he was not physically struck and there is no evidence that Hill was suffering from thirst, hunger, sleep-deprivation or any other physical or mental condition that might have impaired his will. Indeed, by his own admission, Hill's primary concern was his desire to avoid going back to prison. Hence, Hill's claim that his statements were not voluntary essentially hinges on his assertion that he only cooperated with the creation of the statement because Russell promised to help him with his parole situation and led him to believe that he would not be charged with Tuggle's murder. Therefore, even though there are a variety of factors that courts traditionally examine when confronted with a challenge to the voluntariness of a statement, see *Cipriano*, 431 Mich at 334, those factors are largely not at issue. Instead, as the trial court recognized, this issue came down to a credibility contest—that is, the trial court had to determine whether Russell did in fact promise leniency or aid to Hill in exchange for Hill's statement. And the trial court clearly resolved this credibility contest in favor of Russell. The trial court stated that Russell's testimony was credible and found that Russell did not make any promises to Hill. The trial court also clearly rejected Hill's testimony that he only cooperated based on promises of leniency. Indeed, the trial court went further and found that Hill's testimony was motivated by a desire to "extricate and relieve" himself from his inculpatory statement. Thus, the trial court essentially found that Hill only recently fabricated his claim that he was coerced into making the

statement. Because the trial court is in a superior position to judge credibility, we will not second guess its findings based on credibility. *Sexton*, 461 Mich at 752. Consequently, we accept the trial court's finding that Hill's statement was not influenced by promises of leniency or aid. Hill made the statement of his own volition and, for that reason, the trial court did not err when it refused to suppress the statement.

B. Motions for Mistrial

1. Standard of Review

Hill next argues that the trial court erred when it refused to grant his motions for mistrial. This Court reviews a trial court's decision on a motion for a mistrial for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). A trial court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008).

2. Analysis

At various points during the trial, Hill's trial counsel moved for a mistrial, but in each case the trial court denied the motion. Each of these motions followed statements by the trial court or prosecutor that Hill's trial counsel found objectionable. However, a trial court should only grant a mistrial "for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) (citations omitted). Hence, we must examine the nature of the objectionable statements and determine whether those statements impaired Hill's ability to have a fair trial.

Hill first claims that the trial court should have granted his motion for a mistrial premised on the trial court's statements to Wofford's trial counsel. The incident at issue occurred during Wofford's trial counsel's cross-examination of Burks. At various points throughout the cross-examination, Wofford's trial counsel tried to use Burks' prior statements to impeach Burks' trial testimony, but did so in a manner that the trial court thought improper. For that reason, the trial court interrupted and asked Wofford's counsel to modify his technique. Finally, the trial court stopped Wofford's counsel and told him how he wanted further impeachment to proceed:

> This is the way it's done—do you recall being asked this question on page X, line Y, and then you state the question, and then the line number of the answer, and then state the answer. That's the way it's done. That's how I'm able, and the Prosecutor is looking, and that's how we're able to follow you. Don't ask the question then we've got to hunt for the line because I've got to read it and make sure you're reading it completely and accurately. So, I have to know where to start.

The trial court also admonished Wofford's counsel that his attempts at impeachment had to be done according to the court rules or they would not be let in.

After examining these remarks in the context of the whole cross-examination, we conclude that the remarks were not improper. Wofford's trial counsel repeatedly used an impeachment technique that made it difficult for the trial court and prosecutor to follow the

transcripts being used. As a result, the trial court had to repeatedly interrupt to get the appropriate page and line numbers. And, in at least one case, the trial court had to correct Wofford's trial counsel's reading of the transcript. The trial court's request of Wofford's counsel was well within the limits of the trial court's discretion to control the proceedings. See *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988) (explaining that trial courts have "wide discretion and power in matters of trial conduct."); MRE 611(a) (giving the trial court reasonable control over the mode and order of interrogating witnesses). Further, the trial court's remarks do not appear motivated by any animosity and were not demeaning or intemperate—that is, they did not pierce "the veil of judicial impartiality." *Collier*, 168 Mich App at 698. Because the trial court's remarks were proper, there was no prejudice to Wofford and certainly no prejudice to Hill. Therefore, the trial court properly denied Hill's motion for a mistrial premised on the trial court's remarks. *Haywood*, 209 Mich App at 228.

Hill's trial counsel also made several motions for mistrial based on alleged prosecutorial misconduct. Hill argues that each of these instances of misconduct independently warranted a mistrial or, in the alternative, that the cumulative effect of the prosecutor's misconduct warrants reversal by this Court. We shall separately examine each of the alleged instances of misconduct in context to determine whether the prosecutor's conduct or remarks prejudiced Hill. See *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

Hill first argues that the prosecutor improperly tried to elicit prior bad acts testimony about Wofford during her examination of Sly. During Sly's examination, the prosecutor attempted to explore the relationship between Sly and Wofford. The prosecutor first established that Sly met Wofford through his family.

> Q Can you give us a sense of how you were hanging out with him, if you were hanging out with him?
>
> A He was like my home-boy.
>
> Q What does that mean, sir? Explain that to members of the jury?
>
> A We were cool, go out, everything like that.
>
> Q Do stuff together?
>
> A Yes.
>
> Q So, when he picked up the phone and called you and said I got a lick, that was usual or unusual?
>
> A It would be usual.

At this point both defense attorneys objected. After the juries left, the prosecutor explained that she only wanted to establish the nature of the relationship between these individuals and to establish that one could call the other about a "lick" and the other would serve as back-up with no questions asked. The prosecutor also indicated that she was aware of the court's rulings and had not planned any further questions after the question that elicited the objections. The trial

court determined that the question was relevant, but also concluded that the prejudice accompanying the inference to be drawn from the answer—that they committed other robberies together—substantially outweighed its probative value. For that reason, the trial court sustained the objection and instructed the jury to disregard the answer. The trial court also denied the motion for a mistrial.

As the trial court aptly noted, the prosecutor's question was relevant to establishing the nature of the relationship between Wofford and Sly and, consequently, tended to reinforce the credibility of Sly's testimony about the events of the day in question. If Sly and Wofford were only acquaintances or casual friends, it would seem incredible to an average person that he would call Sly out of the blue and ask him to participate in a robbery. Hence, we cannot conclude that the prosecutor's decision to ask this question was inherently improper. See *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999) (noting that a prosecutor does not commit misconduct when he makes a good faith effort to introduce evidence). Likewise, even if the question gave rise to an inference that Wofford had engaged in prior bad acts, evidence of prior acts can be admitted for purposes other than to establish that the defendant acted in conformity with his bad character. See MRE 404(b)(1). Thus, Sly's answer might have been admissible. Indeed, the trial court itself recognized that the question had some validity, but nevertheless concluded that the answer should be excluded under MRE 403. Therefore, we discern no misconduct and, in any event, whatever minimal prejudice there may have been was to Wofford and not Hill and the trial court cured the prejudice by instructing the jury to disregard the question and answer. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003) ("Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors.").

Hill also claims that the trial court should have granted a mistrial based on the prosecutor's use of leading questions. The trial court did sustain some objections based on the prosecutor's use of leading questions. However, even assuming that each instance actually involved improper leading questions, there is no indication in the record that the prosecutor's use of the questions was motivated by an improper purpose. Likewise, any prejudice occasioned by these questions—even when aggregated—was insignificant. And, for that reason, the trial court's instruction informing the jury that the attorneys' questions were not evidence was sufficient to dispel that prejudice. *Id.* Therefore, the trial court did not abuse its discretion when it refused to declare a mistrial on the basis of leading questions.

Hill also argues that the prosecutor impermissibly denigrated Wofford's counsel and that the prejudice caused by the prosecutor's remarks also affected the fairness of his trial. During trial, the trial court acknowledged that the attorneys had been attacking each other and indicated that there were "things going on both sides that need[] to stop." The record reveals several examples of petty remarks by both the prosecutor and Wofford's trial counsel. However, although we find these remarks unprofessional and unbecoming, on review of the entire record and in light of the evidence, we are convinced that the trial court correctly concluded that they did not prejudice either defendant. The prosecutor did make reference to Wofford's trial counsel making a "$30,000 speech" and accused him of going into a "tirade", but the remarks were not pervasive and do not appear to be part of a pattern of conduct designed to question the integrity of either defense counsel. See *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988) (stating that a prosecutor may not imply that the defendant's own counsel does not

believe his client). Moreover, any minimal prejudice does not warrant relief because the prejudice did not deny Hill a fair and impartial trial. See *Thomas*, 260 Mich App at 453. The trial court did not err in declining to grant a mistrial on the basis of the comments at issue.

Hill next contends that the prosecutor engaged in misconduct by raising a discovery issue in front of the juries. During the presentation of Wofford's defense, Wofford's trial counsel called an inmate by the name of Charles Blunt. Blunt testified that he was incarcerated with Sly and that Sly told him that he "involved Mr. Wofford into a case that he had nothing to do with." Blunt further testified that he wrote a letter to Wofford indicating what Sly had told him. On recross-examination, the prosecutor inquired about the number of letters that Blunt sent to Wofford and Blunt indicated that he sent two letters. After this answer, the prosecutor addressed the court and asked "that those letters be turned over as discovery . . . . If he tells us that he wrote these things relating to him being a witness, then your Honor, I believe that I'm entitled to them as a matter of discovery based upon what his testimony is here." At that point, Wofford's counsel interrupted and declared that he thought the prosecutor purposely raised the issue in front of the jury. The trial court then excused the jury and determined that any prejudice could be cured by giving the jury an instruction not to infer anything negative from the mention of the purported failure to produce the letters.

We agree with the trial court's determination that any prejudice occasioned by the prosecutor's discovery request was minimal and did not warrant a mistrial. Contrary to Hill's contentions on appeal, the prosecutor's request did not amount to an accusation that Wofford's counsel had improperly failed to comply with discovery. The prosecutor did not directly accuse Wofford's attorney of misconduct; she merely asked that she be given copies of the letters as a "matter of discovery." Further, to the extent that the jurors might have inferred that Wofford's attorney engaged in gamesmanship, any prejudice did not implicate Hill's attorney and was easily cured by the trial court's instruction. *Abraham*, 256 Mich App at 279. Consequently, the trial court again properly refused to grant a mistrial.

Hill also claims that the trial court should have granted his motion for a mistrial based on the prosecutor's improper remarks that Hill's alibi defense was really a "lie-by" defense. Although we find the prosecutor's decision to characterize Hill's alibi defense in this way regrettable, we do not agree that the remarks warrant relief. It is well-settled that a prosecutor need not confine her closing arguments to the blandest of terms. *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989). Rather, the prosecutor may use emotional language, which is "an important weapon in counsel's forensic arsenal." *People v Mischley*, 164 Mich App 478, 483; 417 NW2d 537 (1987). Examining the remarks in context, see *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996) (noting the importance of reviewing remarks in context), it is clear that the prosecutor was arguing that Hill's alibi defense had no merit given the overwhelming evidence of guilt—that is, she argued that Hill could not be believed when he stated that he was home watching football on the night in question. And a prosecutor may argue that a witness—even a defendant—is not worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Because this remark was within the realm of permissible

arguments, the prosecution did not commit misconduct in making it.[7] Moreover, even if we were to conclude that this isolated comment was improper, any prejudice was minimal and was cured by the trial court's instructions to the jury. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Therefore, the trial court did not err when it declined to grant a mistrial on the basis of the prosecution's characterization of Hill's alibi defense.

Finally, Hill argues that the cumulative effect of the prosecutor's misconduct independently warrants a new trial. We do not agree. Although the cumulative effect of several errors can constitute sufficient prejudice to warrant reversal where the prejudice of any one error would not, *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002), as we have already noted, the errors at issue either were not errors or caused only minimal prejudice, which was readily cured by the trial court's instructions. Finally, we conclude that any prejudice occasioned by the trial court and prosecutor's remarks—even when aggregated—did not affect the outcome of the trial. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

C. The Effective Assistance of Counsel

1. Standard of Review

Lastly, Hill argues that he did not receive the effective assistance of counsel. A claim of ineffective assistance of counsel involves a mixed question of fact and constitutional law and this Court reviews the trial court's findings of fact for clear error and reviews determinations of constitutional law de novo. *LeBlanc*, 465 Mich at 579. However, because the trial court did not conduct a separate evidentiary hearing on the issue of ineffective assistance of counsel, our review is limited to mistakes that are apparent on the record before us. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

2. Analysis

A defendant has the right to the effective assistance of counsel at trial. "To establish ineffective assistance of counsel, the defendant must first show: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Yost*, 278 Mich App at 387.

On appeal, Hill notes that his trial counsel was appointed just two weeks before the start of trial. Hill argues that two weeks was insufficient time for his counsel to prepare for such a complicated trial. However, there is no indication in the record that Hill's trial counsel had to make all the preparations for the trial. Hill's previous counsel may have made the majority of the preparations. And two weeks may have been sufficient time for an experienced attorney to familiarize himself with the evidence and previous counsel's strategy. Furthermore, aside from

[7] However, we caution the prosecutor against using such strong language in the future. Referring to the alibi defense as a "lie-by" defense invites appellate scrutiny and, although we conclude that the remark was arguably not improper in the context of this case, it is not difficult to image a case where such comments would be deemed improper and warrant relief.

the bald assertion that two weeks was insufficient, Hill does not identify any specific instances of his trial counsel's conduct at trial to support his theory that he was deprived of the effective assistance of counsel. Instead, he argues that his trial counsel should have requested prison phone records that would corroborate Hill's contention that Sly implicated him in retaliation for refusing to fund Sly's defense on unrelated charges. Hill also argues that his trial counsel was ineffective for failing to subpoena Sly's girlfriend, who purportedly participated in some of Sly's calls, and locate Hill's girlfriend and alibi witness, Amber Harris, who disappeared before trial. Therefore, we shall limit our analysis accordingly.

Although Hill claims that Sly's prison phone records and girlfriend would support his theory, there is no record evidence to support that claim. Further, Hill has presented no evidence concerning the content of Sly's calls. This is despite the fact that Sly purportedly left messages on Hill's phone and the fact that the prosecution was able to obtain recordings of Wofford's phone calls from jail. Hill has also not provided any evidence that Sly's girlfriend would have provided testimony to support his theory. See *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003) (stating that, in order to establish the predicate for his claim, a defendant must offer proof that the witness would have testified favorably if called for the defense). Moreover, Hill has not provided any evidence as to whether his previous counsel had investigated these same matters. Hence, there is nothing on the record before us to suggest that Hill's trial counsel was ineffective for failing to obtain the records at issue or interview Sly's girlfriend.

The same concerns apply equally to Hill's assertion that his trial counsel was ineffective for failing to find Harris. Although Hill claims that she would have corroborated his alibi defense, Hill failed to present any evidence that his trial counsel would have been able to find her even with a continuation and that she would have testified favorably. *Id.* Likewise, Hill again failed to indicate whether and to what extent his prior counsel had investigated the matter. If prior counsel had already taken unsuccessful steps to find her or determined that her testimony would be unhelpful, Hill's trial counsel would have been justified in refusing to take further steps to procure her testimony.

Finally, given the strength of the evidence against Hill, we cannot conclude that it is more likely than not that the phone records and additional witness testimony would have resulted in a different outcome. *Yost*, 278 Mich App at 387. Hill has failed to demonstrate that his trial counsel was constitutionally ineffective.

III. Wofford's Appeal in Docket No. 278246

A. Suggestive Identification

1. Standard of Review

Wofford first argues that Burks should not have been permitted to identify him at trial. Wofford contends that Burks' identification of Wofford at a live line-up was tainted by a custodial encounter between Wofford and Burks at the jail before the live line-up occurred and that this resulted in the line-up being unduly suggestive. Because the live line-up was unduly suggestive and Burks did not have an independent basis for his identification, Wofford contends that the trial court should have suppressed the line-up identification and refused to permit Burks

to identify him at trial. This Court reviews for clear error a trial court's findings with regard to whether an identification procedure. *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998).

2. Analysis

"An identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process." *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). Where the trial court finds that an identification was impermissibly suggestive, the evidence of that identification is inadmissible at trial. *Id.* at 542-543. The fairness of an identification procedure must be evaluated "in light of the total circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification." *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002).

Immediately after the robbery and shooting, Burks did not give a description specific to Wofford. Indeed, Burks testified at trial that he was not cooperative with the police because he "wanted the individuals." However, following his arrest, investigators gave Burks a photo line-up and Burks readily identified Wofford as the man with the AK-47. After this photo identification, Russell arranged for Burks to attend a line-up with Wofford in it before a preliminary examination scheduled for the same day. While awaiting the preliminary examination and line-up, Burks and Wofford were temporarily held in the same jail facility and saw each other. Indeed, Burks testified at an evidentiary hearing that Wofford walked by and looked at him (Burks) while being escorted to his cell. However, the trial court postponed the line-up and preliminary examination. Burks testified that, when Russell later escorted him to another jail later that same day, Wofford remarked "[t]hat's the guy they trying to get to testify against me." Burks said that he did not speak to Wofford or respond to Wofford's remarks. Approximately two weeks after this encounter, Burks identified Wofford as the man with the AK-47 at the live line-up at issue. Before his trial, Wofford's trial counsel moved to have Burks' photo and line-up identifications suppressed as unduly suggestive. Wofford's trial counsel also moved to have the trial court exclude any in-court identification of Wofford by Burks. The trial court held an evidentiary hearing to determine whether the identifications should be suppressed.

At the conclusion of the hearing, the trial court found that the line-up identification was not impermissibly suggestive. In addition, the trial court found that, given the totality of the circumstances, Burks had an independent basis for his identification. For that reason, the trial court concluded that Burks would be able to make an in-court identification, even if the live line-up were impermissibly suggestive.

On appeal, we note that Wofford no longer argues that Burks' identification of Wofford during the photo line-up was impermissibly suggestive. Further, he does not argue that there was any irregularity in the manner that the live line-up was handled that rendered it impermissibly suggestive. Wofford only argues that his encounters with Burks before the live line-up tainted the subsequent identification. We do not agree that these encounters rendered the subsequent live line-up "so impermissibly suggestive that it led to a substantial likelihood of misidentification." *Hornsby*, 251 Mich App at 466. Although Burks said he recognized Wofford during the encounters in the jail, he testified that he did not speak to Wofford or make any gestures towards him. Rather, it was Wofford who initiated all the contact. With regard to the encounters, testimony established that Wofford remarked that Burks was the person that the

police officers were trying to get to implicate him and later blurted out that he had nothing to do with Burks' uncle's death. There was no mention of Wofford's purported role or use of a weapon. Yet, at the photo line-up, which was before these jail encounters, Burks unequivocally identified Wofford as the man with the AK-47. Likewise, at the live line-up, Burks again picked Wofford out and stated that he was the man who had the AK-47—the one who called all the shots. Given the prior untainted identification and the fact that Wofford does not contest the validity of the actual procedures employed during the live line-up, we conclude that the line-up itself was not rendered suggestive by virtue of the fact that Burks saw and heard Wofford at the jail.

In addition, we agree with the trial court's finding that Burks had an independent basis for identifying Wofford. For that reason, Burks could properly make an in-court identification of Wofford. *Gray*, 457 Mich at 114-115. Burks had ample opportunity to see Wofford during the commission of the robbery and murder at issue. At the evidentiary hearing, Burks testified that when the Durango drove up in front of his house, the front passenger window was down. Burks stated that Wofford had an AK-47 pointed out of the window and ordered him into the Durango. While in the Durango, Burks testified that Wofford turned around and asked him about money and drugs. Although Burks testified that he was being hit, he also stated that he remained attentive and looked at Wofford. Burks also identified a scar under Wofford's eye. When Burks' testimony about the events of the crime are coupled with his quick and certain identification of Wofford as the man with the AK-47 at the photo line-up, it is evident that he had an independent basis other than the encounters in the jail from which to identify Wofford. Therefore, the trial court properly permitted the identification evidence.

B. Vouching for Credibility

Wofford next argues that the prosecutor committed misconduct by vouching for Sly's credibility and that his trial counsel was constitutionally ineffective for failing to object to the prosecutor's comments. In this case, the prosecutor mentioned in her opening statement that Sly had agreed to a plea deal, which included a requirement that he testify truthfully. She also asked Sly about his plea agreement and specifically about his agreement to testify truthfully. She then asked whether he had in fact testified truthfully, to which he responded, "sure did."

As Wofford correctly notes, a prosecutor may not vouch for the credibility of a witness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). However, a prosecutor does not vouch for the credibility of a witness by arguing that the witness is truthful or even by asking the witness if he is telling the truth. Rather, a prosecutor impermissibly vouches for the credibility of a witness when she implies that she has special knowledge that the witness is testifying truthfully or otherwise places the prestige of the prosecutor's office behind a personal belief in the witness' truthfulness. See *People v Reed*, 449 Mich 375, 399; 535 NW2d 496 (1995). In this case, the prosecutor did not imply that she had special knowledge concerning Sly's truthfulness. Instead, the prosecutor's comments and questions simply made the jury aware that Sly testified under the terms of a plea agreement, which included a provision that he had to testify truthfully. Hence, these remarks were proper. *Bahoda*, 448 Mich at 277. Further, even to the extent that these remarks could be deemed prejudicial, any prejudice could have been cured by a jury instruction. See *Watson*, 245 Mich App at 586. Therefore, the remarks would not warrant relief. Finally, because the remarks and questions were proper, Wofford's trial counsel cannot be faulted for failing to object to them. *Riley*, 468 Mich at 142.

C. Judicial Comments and Prosecutorial Misconduct

Wofford next argues that he was deprived of a fair trial based on conduct and remarks made by the trial court and the prosecutor. We do not agree that any of the alleged conduct or remarks warrant relief.

Wofford first argues that the trial court deprived him of a fair trial when it denigrated his trial counsel by interrupting his examination of Burks and instructing him on the proper procedure for impeaching Burks with his prior testimony. As we already noted with Hill's claim of error on the same matter, the trial court's remarks were well within its discretion to control the proceedings and did not prejudice Wofford. Hence, the trial court's conduct and remarks do not warrant any relief.

Like Hill, Wofford also argues that the prosecutor committed misconduct when she asked Sly whether it was usual or unusual for Wofford to call him about a "lick." And for the same reasons discussed above, we conclude that the prosecutor's question did not amount to misconduct and did not prejudice Wofford.

Wofford also argues—as did Hill—that the prosecutor's improper questions deprived him of a fair trial. However, as was the case with Hill, after having examined the record in context, we conclude that the prosecutor's questions, even to the extent that they were inappropriate, were only minimally prejudicial. And any minimal prejudice was alleviated by the trial court's instruction to the jury that the prosecutor's questions were not evidence. *Abraham*, 256 Mich App at 279.

The trial court did not commit error when it instructed Wofford's trial counsel on how it wanted him to proceed with Burks' impeachment. Likewise, the prosecutor did not commit misconduct when she inquired about Sly's relationship with Hill and any minimal prejudice occasioned by the form of the prosecutor's questions was cured by the trial court's instructions to the jury. Consequently, none of these claims of error warrants relief.

D. Hill's Testimony

1. Standard of Review

Wofford next argues that his jury should not have been permitted to hear Hill's testimony. Specifically, Wofford contends that the testimony about Hill's statement to the police and testimony about Hill's prior bad acts prejudiced his trial. This Court reviews a trial court's evidentiary decisions for an abuse of discretion. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006). However, a trial court invariably abuses its discretion when it admits evidence that is inadmissible as a matter of law. *Id.*

2. Analysis

As already noted, Hill made a statement to the police shortly after his arrest. In his statement, Hill implicated Wofford in the robbery and assault of Burks and the robbery and death of Tuggle. For that reason, Wofford's trial counsel moved to have his trial severed from that of Hill, but the trial court instead elected to seat separate juries. Initially, only Hill's jury heard

testimony about Hill's statement. However, Hill decided to testify on his own behalf and the prosecutor moved to endorse Hill so that Wofford's jury could hear his testimony. On cross-examination, the prosecutor impeached Hill with his statement to the police. During the impeachment, Wofford's jury learned that Hill had implicated Wofford in the crimes at issue.

In this case, the trial court determined that Hill and Wofford should be tried jointly, but with separate juries. The purpose of separate juries is to alleviate the prejudice that may accompany joint trials where the defendants have antagonistic defenses. See *People v Hana*, 447 Mich 325, 351; 524 NW2d 682 (1994). Codefendants have antagonistic defenses when their defenses are mutually exclusive such that the jury would have to disbelieve the core evidence offered on behalf of the co-defendant in order to believe the core evidence offered on behalf of the defendant. *Id.* at 350 (citation omitted). But the fact that there might be some spillover prejudice inherent in the use of a multi-defendant trial does not necessarily warrant severance. To warrant severance, the "'tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other.'" *Id.* at 349, quoting *United States v Yefsky*, 994 F2d 885, 897 (CA 1, 1993).

In this case, Hill and Wofford did not have antagonistic defenses. Both men claimed that they had no involvement with the crimes at issue and presented alibi defenses. Likewise, both men claimed that Sly and Burks were mistakenly or wrongfully implicating them in the crimes at issue. Moreover, contrary to Wofford's contention on appeal, Hill did not testify "in an attempt to shift blame to [Wofford] and exculpate himself." Instead, Hill testified in order to disavow his statement to the police and explain that the statement was coerced.

In addition, the trial court did not err in permitting the prosecutor to impeach Hill with his statement to the police in front of Wofford's jury. As long as Hill elected not to testify at trial, Hill's statement to the police could not be admitted before Wofford's jury. See *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968). However, once Hill waived his Fifth Amendment rights and elected to testify, the prosecution could properly call Hill to testify against Wofford. *Hana*, 447 Mich at 361. And, because Hill was available for cross-examination by Wofford's counsel, Wofford's statement to the police could be admitted without violating Wofford's right to confront the witnesses against him. See *Crawford v Washington*, 541 US 36, 59 n 9; 124 S Ct 1354; 158 L Ed 2d 177 (2004) (stating that, "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements."). Further, Wofford's speculation about whether Hill would have consented to testify at Wofford's trial had his trial been separate is irrelevant to determining whether the trial court properly determined that Hill could testify in front of Wofford's jury. See *Hana*, 447 Mich at 361 (refusing to employ "'what if' speculation as the basis for a severance rule."). Finally, any minimal prejudice occasioned by references to Hill's prior acts that were not relevant to Wofford's trial were cured by the trial court's instructions to Wofford's jury. *Id.* at 351.

Because Wofford and Hill did not have mutually exclusive defenses, the trial court did not err when it elected to proceed with two juries at a joint trial—even after Hill decided to waive his Fifth Amendment right not to testify. Likewise, because Hill's statement to the police was admissible against Wofford once Hill elected to testify, the prosecutor's use of Hill's statement to impeach Hill did not prejudice Wofford. Finally, any spillover prejudice occasioned by Hill's testimony did not, by itself, warrant further severance and did not prejudice Wofford's

trial. For these reasons, the trial court did not err when it permitted Hill to testify in front of Wofford's jury.

E. Cumulative Error

Finally, Wofford argues that, even if no single error warrants relief, the cumulative effect of the errors nevertheless warrants a new trial. The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal where the prejudice of any one error would not. *LeBlanc*, 465 Mich at 591. However, in order to reverse on the basis of cumulative error, the effect of the errors must be so seriously prejudicial that they denied defendant a fair trial. *Ackerman*, 257 Mich App at 454. Further, only actual errors are aggregated to determine their cumulative effect. *People v Rice (On Remand)*, 235 Mich App 429, 448; 597 NW2d 843 (1999). In this case, we have concluded that many of Wofford's claimed errors were not in fact errors. And, to the extent that there were errors, those errors were not so prejudicial that they denied Wofford a fair trial.

IV. General Conclusion

There were no errors warranting relief for either defendant. Therefore, we affirm in both docket number 277813 and docket number 278246.

Affirmed in both cases.

/s/ Stephen L. Borrello
/s/ William B. Murphy
/s/ Michael J. Kelly