STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED August 25, 2009
v	No. 279546 Wayne Circuit Court
RONNIE GARRETT, Defendant-Appellee.	LC No. 97-03229

Before: Owens, P.J. and Servitto and Gleicher, JJ

PER CURIAM.

Defendant Ronnie Garrett appeals as of right from his conviction after a jury trial. Defendant was convicted of first-degree felony murder, MCL 750.316(1)(b) and home invasion, MCL 750.110(A)(2). The trial court sentenced defendant to life imprisonment without parole for felony murder, and thirteen to twenty years for home invasion. We reverse and remand.

I. Facts

This case arises out of the death of seventy-three year old Mayrose Hall, who lived by herself in a home in the City of Detroit. The prosecutor's theory of the case was that, on February 4, 1997, defendant broke into Hall's home, intending to commit a larceny, and was surprised to find Hall at home. Defendant then inflicted several blunt force injuries to Hall's head, and left.

This case has a very lengthy procedural history. This appeal comes from defendant's third trial for these crimes. Defendant's first trial ended in a hung jury. The second trial resulted in convictions, but was eventually overturned on appeal due to ineffective assistance of counsel.

II. Spousal Privilege

First, defendant argues that the trial court erred in admitting the testimony of Rayneisha Bonner where her testimony should not have been subject to the spousal privilege and where her unavailability was never established. We agree.

A. Standard of Review

Because defendant failed to preserve this issue for appeal, this Court's review is for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, error must have occurred, the error must have been plain (clear or obvious), and the plain error must have affected substantial rights. *Id.* The third requirement generally requires a showing of prejudice, i.e. that the error affected the outcome of the trial court proceedings. *Id.*

B. Analysis

At the time this crime was committed in 1997, defendant and Bonner had been married in a church ceremony, but were not legally married. When she testified at the preliminary examination in 1998, Bonner called herself defendant's "common law wife.[1]" Therefore, the parties were not legally married at the time that defendant allegedly made statements to Bonner regarding this case.

Bonner testified against defendant at the preliminary hearing in 1998. Between the preliminary hearing and the trial in 1998, defendant and Bonner were legally married. At the trial in 1998, defendant exercised the spousal privilege and Bonner did not testify. As a result, Bonner's preliminary examination testimony was read in to evidence during the 1998 trial.[2]

On August 12, 2003, Bonner and defendant divorced. On the first day of the 2007 trial, the prosecution stated that it intended to read Bonner's 1998 preliminary examination testimony at trial because she had subsequently married defendant and was therefore unavailable due to the spousal privilege. However, this was not accurate because Bonner and defendant were no longer married. Because they were no longer married, Bonner's testimony was no longer subject to the spousal privilege.

MRE 804 provides that former testimony may be introduced at trial where the witness is unavailable. An unavailable witness is one who "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown." MRE 804(a)(5).

Both the United States and Michigan constitutions guarantee a criminal defendant the right to confront the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20. To preserve this right, testimonial hearsay is inadmissible against a criminal defendant unless the declarant was unavailable at trial and the defendant had a prior opportunity to cross-examine the

[1] Common law marriage was abolished in Michigan on January 1, 1957.

[2] Currently, the witness-spouse is the holder of the spousal privilege in a criminal case, not the defendant-spouse. The testifying spouse may testify if he or she desires, without regard to the wishes of the defendant spouse. MCL 600.2162.

declarant. *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v Lonsby*, 268 Mich App 375, 377; 707 NW2d 610 (2005). A witness cannot be unavailable for purposes of former testimony unless the government has made a good faith effort to obtain her presence at the trial proceedings. *Ohio v Roberts*, 448 US 56; 100 S Ct 2531; 65 L Ed 2d 597 (1980). Here, there was no evidence that Bonner was unavailable to testify. Defendant claims that her address and phone number were available at the time of trial. Plaintiff asserts that they can establish that they used due diligence in attempting to locate Bonner. In fact, the prosecutor asked the trial court judge for the opportunity to establish due diligence, but the trial court denied the request.

The admission of Bonner's testimony was plain error. Bonner and defendant were not married at the time of trial and, therefore, Bonner's testimony was not subject to the spousal privilege. The trial court never allowed the prosecutor to establish due diligence, so Bonner's unavailability was never established. Bonner's testimony was a crucial component of the prosecution's case against defendant and the admission of her testimony likely affected the outcome of the proceedings.

Next, defendant argues that the trial court erred in admitting Bonner's out-of-court statement to the police that had never been the subject of prior testimony or cross-examination. Having already concluded that none of Bonner's testimony was properly admitted, we decline to address this issue.

III. Informant Testimony

Next, defendant argues that the trial court erred in concluding that the prosecutor exercised due diligence in attempting to locate witness Danny Shannon and in excluding evidence of Shannon's past relationship with police. He also claims that defendant's Sixth Amendment right to counsel was violated by his conversations with Shannon. We disagree.

A. Standard of Review

The test for whether a witness is "unavailable" as envisioned by MRE 804(a)(5) is that the prosecution must have made a diligent good-faith effort in its attempt to locate a witness for trial. The test is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it. *Barber v Page*, 390 US 719, 724-725; 88 S Ct 1318; 20 L Ed 2d 255 (1968); *People v Dye*, 431 Mich 58, 67, 83; 427 NW2d 501 (1988). The trial court's determination will not be disturbed on appeal unless a clear abuse of discretion is shown. *Dye, supra* at 83

We also review the trial court's evidentiary decision to admit the challenged evidence for a clear abuse of discretion. *People v Jones*, 270 Mich App 208, 211; 714 NW2d 362 (2006). The trial court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes. *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

B. Analysis

Here, the police tried to locate Shannon by going to his last known address, contacting the probation department, using internet databases, checking local hospitals and jails and doing a LEIN (Law Enforcement Information Network) search. Police were able to track Shannon to his last known address. There they learned that he was probably homeless and had not been living at that residence for more than a year. We conclude that that the police diligently generated and pursued some leads in attempting to locate Shannon and the trial court did not err in ruling that Shannon was unavailable.

Next, defendant argues that the trial court erred in excluding evidence of Shannon's on-going relationship with police. The trial court excluded evidence of Shannon's prior paid informant relationship with police. At the *Ginther*[3] hearing, Sgt. Robert Ennis testified that the police paid Shannon for providing information about auto thefts. Ennis stated that he never put Shannon in a position where Shannon could elicit information in the jail from an incarcerated person.

Had defendant offered evidence that Shannon was acting as a paid informant specifically *in this case*, we would certainly agree that this information was relevant. However, defendant has only established that Shannon was a paid police informant, and that Ennis did not pay him for his involvement in this case. Therefore, we conclude that the trial court properly excluded evidence of Shannon's past relationship with police.

Next, defendant argues that his Sixth Amendment right to counsel was violated because the state deliberately elicited incriminating statements from him without him having assistance of counsel. This argument is based on the premise that Shannon was a jailhouse informant acting on behalf of the state. In this case, however, there is no evidence of government involvement in the solicitation of defendant's statements. Even if Shannon elicited the statements with the intent of reporting the information to authorities for the purpose of obtaining favorable treatment, absent any evidence of government involvement, defendant's Sixth Amendment rights were not violated. *Matteo v Superintendent, SCI Albion,* 171 F3d 877, 892 (CA 3, 1999).

IV. Defendant's Past Drug Use

Next, defendant argues that the trial court erred in admitting defendant's statement about his past drug use. We agree.

A. Standard of Review

Defense counsel made timely objections to the admission of both statements; thus, these issues were preserved for appeal. Generally we review a trial court's evidentiary decisions for an abuse of discretion. *People v Katt,* 468 Mich 272, 278; 662 NW2d 12 (2003). However, where

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

the admission of evidence involves a preliminary question of law, such as whether a rule of evidence precludes admissibility, the question is reviewed de novo. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003), citing *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Constitutional issues are reviewed de novo. *People v Geno*, 261 Mich App 624, 627; 683 NW2d 687 (2004).

B. Analysis

At trial, the court allowed defendant's written statement to police to be read into the record. A portion of the statement referred to defendant's past drug use. During defendant's first trial (ending in a hung jury), the trial court admitted defendant's written statement to Detective Donald Couturier, but excluded any reference to defendant's drug use. During defendant's second trial, Couturier read the statement in its entirety, including defendant's reference to going to a methadone clinic and his daily marijuana use. The trial judge later found that defense counsel's failure to object to this statement during the second trial constituted ineffective assistance of counsel, requiring a new trial. This Court affirmed the trial court in an Order of the Court of Appeals, issued April 29, 2002, (Docket No. 221184), as did our Supreme Court in an Order of the Supreme Court, issued October 10, 2003, (Docket No. 228653).

"When this Court disposes of an appeal by opinion or order, the opinion or order is the judgment of the Court." *Kasben v Hoffman,* 278 Mich App 466, 470; 751 NW2d 520 (2008). And, "an appellate court's determination of law will not be differently decided on a subsequent appeal in the same case if the facts remain materially the same." *People v Kozyra,* 219 Mich App 422, 433; 556 NW2d 512 (1996).

The second trial court specifically ruled that defendant's right to a fair trial was seriously compromised by the introduction of the drug use evidence to the extent that a new trial was warranted. Both this Court and our Supreme Court upheld that decision. Therefore, the law of the case doctrine should have precluded the admission of this testimony and it was error for the trial court to admit it over defense counsel's objections.

V. Ineffective Assistance of Counsel

Next defendant argues that defense counsel was ineffective in failing to object to the trial court's incorrect explanation of felony murder. We agree; however, defendant's remaining claims of ineffective assistance are without merit.

A. Standard of Review

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Grant,* 470 Mich 477, 484; 684 NW2d 686 (2004). The Court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* at 484-485.

B. Analysis

To establish ineffective assistance of counsel, a defendant must show that: (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (2) there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different, and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). "[C]ounsel's performance must be measured against an objective standard of reasonableness" and without "benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

First, defendant argues that defense counsel was ineffective for failing to argue for the exclusion of all of Bonner's testimony where her prior testimony was inadmissible. Defense counsel Jeffrey Edison testified at the *Ginther* hearing that had he known that defendant and Bonner were divorced, his decision not to object to the admission of her testimony might have been different. Defendant did not tell his attorney that he and Bonner were divorced. However, defense counsel knew that the prosecution was prepared to conduct a due diligence hearing. He was also unsure that he wanted to elicit Bonner's live testimony. He stated that she was an unpredictable witness; by having her testimony read into the record, defense counsel knew in advance exactly what her testimony would be. Therefore, his failure to object was a matter of trial strategy. We conclude that defense counsel's performance did not fall below the objective standard of reasonableness. *Toma, supra.*

Next, defendant argues that defense counsel was ineffective for failing to present the testimony of Daryl Morris, a fellow inmate of defendant and Shannon at the time defendant allegedly confessed to Shannon. Morris would have testified that he observed Shannon going through defendant's discovery packet. Generally, "[d]ecisions regarding what evidence to present and whether to call or question witnesses are [ ] matters of trial strategy," *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999), which we will not second-guess with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Although Edison's basis for failing to call Morris was his incorrect understanding of the law and his admittedly misplaced analysis of this issue, Morris was indeed a convicted felon. It was a matter of trial strategy to preclude the testimony of this witness.

Next, defendant argues that defense counsel was ineffective for failing to present the testimony of the victim's next-door neighbor, Kristle Rice. Rice admitted that she did not have a specific memory of the victim's back door opening and closing at 11:30 pm, but that it was the victim's usual pattern to let her dog out at that hour. Also, Wilma Williams testified that she went to the victim's house at 7:30 am and found her side door open and the victim dead. Williams then ran across the street. This would account for Rice observing the door closed at 7:35 am: Williams closed it on her way out to get help. Thus, the failure to call this witness did not constitute ineffective assistance of counsel because the testimony of this witness would not have provided defendant a substantial defense.

Next, defendant argues that defense counsel was ineffective for failing to object to several instances of what defendant claims to be prosecutorial misconduct. We did not find any prosecutorial misconduct; therefore, defense counsel was not ineffective for failing to object. Defense counsel is not required to raise meritless objections. *People v Snider,* 239 Mich App 393, 425; 608 NW2d 502 (2000).

Next, defendant argues that defense counsel was ineffective for failing to attempt to exclude Shannon's testimony under *Massiah v United States,* 377 US 201, 205-206; 84 S Ct 1199; 12 L Ed 2d 246 (1964). *Massiah* is not applicable to the facts of this case. Even though Edison admitted that he was only vaguely familiar with *Massiah*, and that he would have tried to exclude Shannon's testimony had he understood the holding in *Massiah*, we still conclude that his failure to do so did not constitute ineffective assistance of counsel. Even if Edison had made this argument, it would have failed given the lack of evidence of any government involvement in Shannon's elicitation of defendant's confession. Counsel is not required to argue a meritless position. *People v Mack,* 265 Mich App 122, 130; 695 NW2d 342 (2005).

Next, defendant argues that defense counsel was ineffective for failing to object to erroneous jury instructions. We agree. We conclude, *infra*, that the trial court committed error when, during jury selection, it incorrectly explained the crime of felony murder to the jury. The other two instances of error in the jury instructions were harmless.

Allowing the jury to hear the incorrect explanation of felony murder was below an objective standard of reasonableness under prevailing professional norms, created a reasonable probability that, but for counsel's error, the result of the proceeding would have been different, and caused the resultant proceedings to be fundamentally unfair or unreliable. *Toma*, *supra* at 302. An attorney should be familiar with the elements of the crimes with which his client has been charged and should object when they are blatantly misstated to the jury. Here, defense counsel was ineffective for failing to object in this situation.

Next, defendant argues that defense counsel was ineffective for stipulating to evidence that the trial court excluded. At the motion hearing, the trial court stated that it would not allow the fact that the similar act ended in a conviction, but would allow the circumstances surrounding the conviction. Nonetheless, defense counsel stipulated that defendant had pled guilty to that crime. We find this to be an error. However, there was not a reasonable probability that, but for this error, the result of the proceedings would have been different. The jury heard the evidence of the subsequent break-in and there was testimony from witnesses who identified defendant as the perpetrator of that other crime. Therefore, the jury probably already presumed that defendant had pled guilty or had been found guilty of the other home invasion and this extra information would not have changed the results of the proceedings.

VI. Jury Instructions

Defendant argues that the trial court erred in its instruction to the jury on felony murder. We agree. This constituted plain error that affected defendant's substantial rights and warrants reversal. The other two errors in jury instruction did not affect defendant's substantial rights and are not grounds for reversal.

A. Standard of Review

This Court reviews de novo questions of law arising from jury instructions. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). In order to preserve a challenge to jury instructions on appeal, a party must object to or request an instruction before the jury deliberates. *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). Failure to object to jury instructions, as defendant did here, limits review to whether there was plain error affecting the defendant's substantial rights. MCL 768.29; *Carines*, *supra* at 764-765; *People v Martin*, 271 Mich App 280, 353; 721 NW2d 815 (2006).

B. Analysis

A trial judge must instruct the jury as to the applicable law, and fully and fairly present the case to the jury in an understandable manner. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005); *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). This Court reviews jury instructions as a whole to determine whether a trial court committed error requiring reversal. *People v McLaughlin*, 258 Mich App 635, 668; 672 NW2d 860 (2003). "The instructions must not be extracted piecemeal to establish error." *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). "Even if somewhat imperfect, jury instructions are not erroneous if they fairly present the issues for trial and sufficiently protect the defendant's rights." *McLaughlin*, *supra* at 668.

During jury selection, the trial court stated, "[f]elony murder is different. What you look at is the intent to do an underlying crime." She then gave the example of armed robbery and concluded that if a person ". . . did not have the intent to kill that person, the fact of the matter is that when they died during this robbery its called felony murder." Then the court described felony murder as the "foreseeability" of someone's death. The trial court then gave an example of felony murder:

> THE COURT: Okay, juror number three, you grab my necklace, and smack me, and I fall down and hit my head on a rock. "Well, I didn't push her down, she fell, her heels were too high." Does it make a difference juror number three?
>
> JUROR THREE: It doesn't make a difference.
>
> THE COURT: Huh?
>
> JUROR THREE: It doesn't make a difference.
>
> THE COURT: Because when you grabbed my necklace, and you smacked me, even though I slipped and fell, it was during the course of what?
>
> JUROR THREE: You grabbing the necklace.
>
> THE COURT: Which is?
>
> JUROR THREE: A robbery.
>
> THE COURT: A robbery, do you understand juror number two?

> JUROR TWO: Yes.
>
> THE COURT: But I didn't mean to kill her, all I wanted to do is just get that necklace. Does it make a difference, juror number two?
>
> JUROR TWO: No.
>
> THE COURT: That's felony murder. See, you all learned all of this, and people go to law school forever.

Plaintiff agrees with defendant that this was a misstatement of the law. The elements of first-degree felony murder are:

> (1) the killing of a human being, (2) *with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice],* (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [the statute, including [home invasion]]. [*Carines, supra* at 758-759, quoting *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995).] [emphasis added].

"A judge's incorrect recitation of the law undermines the purpose of jury instructions." *People v Butler*, 413 Mich 377, 387; 319 NW2d 540 (1982). It is not, therefore, surprising that this Court will scrutinize the contested instruction closely and, upon finding that a judge failed to inform a jury of the true nature of the offense charged, will not countenance claims of "harmless error" but will reverse. *People v Reed*, 393 Mich 342, 351; 224 NW2d 867 (1975). See also *People v Hearn*, 354 Mich 468, 473, 93 NW2d 302 (1958) ("We are in accord with appellant's contention that this Court can *and should* reverse when the charge to the jury omits a legally essential ingredient, even though no request was made by defendant") (emphasis added); *People v Kanar*, 314 Mich 242, 252, 22 NW2d 359 (1946); *People v Hernandez*, 84 Mich App 1, 10, 269 NW2d 322 (1978) ("Even though there was no request for this instruction or any objections to the ones given, reversible error is committed if the judge fails to instruct the jury on an essential element of the offense ...")

This Court follows the presumption that in situations where both a correct and an incorrect instruction are given, the jury followed the incorrect instruction. *People v Hess*, 214 Mich App 33, 37; 543 NW2d 332 (1995). Here, the elements of the crime were improperly presented to the jury in a misleading and confusing manner. The trial court instructed the jury that intent was not a necessary element of felony murder. Rather than conforming the jury's fact-finding to the law, an incorrect instruction poses the unacceptable risk of convicting a defendant of a crime unknown to the laws of Michigan. *Reed, supra* at 351. As this Court stated in *Butler, supra*:

> The fairness of a jury charge cannot be assessed in a purely mechanical manner. Juries are not steeped in the law. They do not methodically parse statutes to discern their meaning. Though the quotation of the statute may in theory place all the elements of a crime before the jury, such a recitation may be ignored in favor

> of the judge's subsequent and oftentimes more colloquial explanation of the offense. [*Id*. at 389]. [footnote omitted].

In this situation, the trial court took great pains to explain felony murder to the jury, although her explanation was incorrect. The trial court actively engaged the jurors by calling on them to respond to her hypothetical scenarios. Then, when they appeared to understand what she was attempting to teach them, she reinforced their misunderstanding and told them that they had "learned this" and that other people have to go to law school to learn what she just taught them. We believe that this sort of personal teaching of the law probably had a greater impact than would the rather monotonous reading of a list of jury instructions. We conclude that this was an error requiring reversal.

Defendant also argues that the trial court erred when it instructed the jury, "[e]very defendant has the absolute right to testify" in reference to defendant's decision not to testify at trial. However, the trial court followed that statement with, "you must not consider the fact that he did not testify. It must not effect your verdict in any way." As a general rule, jurors are presumed to have followed their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 221 (1998). Thus, as a whole, the jury was properly instructed that defendant's failure to testify should not be used against him and any error in the instruction did not affect defendant's substantial rights.

Finally, defendant argues that the trial court erred in instructing the jury that it should not decide the case based on which side presented more witnesses, when defendant did not call any witnesses at all. The use note to CJI 2d 5.2 states that "[t]his charge should not be given unless the defendant has introduced evidence, and it should be given only if there is a disparity between the number of witnesses or volume of evidence presented by the state and the defendant." While it appears that this instruction was not intended to be read in a case where a defendant does not introduce any witnesses, we conclude that if the jury applied this instruction, it would not result in error. It is accurate to say that the prosecution did produce more witnesses than the defense, and it is also accurate to say that the jury should not decide the case on such grounds. Therefore, the trial court merely made a harmless error when it read this instruction.

VII. Prosecutorial Misconduct

Next, defendant argues that several instances of prosecutorial misconduct occurred that denied him a fair and impartial trial. We conclude that prosecutorial misconduct requiring reversal did not occur in this case.

A. Standard of Review

We review claims of prosecutorial misconduct de novo to determine whether a defendant was denied a fair and impartial trial. *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005).

B. Analysis

The role and responsibility of a prosecutor differs from that of other attorneys: his duty is to seek justice and not merely to convict. *People v Jones*, 468 Mich 345, 354; 662 NW2d 376

(2003); *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Dobek, supra*, at 63. A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *Dobek, supra*, at 63-64.

Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008).

A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994); *People v Unger*, 278 Mich App 210, 241; 749 NW2d 272 (2008), but he is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *Unger, supra* at 236. He need not use the least prejudicial evidence available to establish a fact at issue, nor must he state the inferences in the blandest possible terms. *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995); *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). A prosecutor's good-faith effort to admit evidence does not constitute misconduct. *Dobek, supra*, at 70.

Review of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objected below, unless an objection could not have cured the error or failure to review the issue would result in a miscarriage of justice. *Unger, supra at 2*34-235. When there was no contemporaneous objection and request for a curative instruction, appellate review of claims of prosecutorial misconduct is limited to ascertaining whether there was plain error that affected substantial rights. *Brown, supra* at 134. Reversal is warranted only when plain error resulted in the conviction of an innocent person, or seriously affected the fairness, integrity, or public reputation of the proceedings. *Unger, supra* at 235.

Defendant argues that the prosecutor committed misconduct when he improperly suggested that Bonner's nonappearance at trial was due to the fact that she was frightened of defendant. The prosecutor stated, "And ladies and gentlemen why do you think [Bonner] is not here today? Scared? Doesn't want to testify against her husband?" There is no evidence that would suggest that Bonner did not testify because she was too frightened of defendant. It appears that Bonner did not testify at trial because nobody thought she needed to be there. It does not appear that she was even told about this trial. She and defendant were divorced and not in communication, defense counsel did not attempt to locate her, and the prosecution merely stated that Bonner's testimony was read into the record as opposed to live because of the spousal privilege. At the trial court, plaintiff offered to prove that due diligence was exercised in attempting to locate Bonner, but the current record is devoid of any information that would support the prosecutor's assertion that Bonner did not testify because she was afraid of defendant.

Plaintiff argues that this statement was a reasonable inference because in her preliminary examination testimony Bonner said that defendant threatened to kill her if she told anyone about

the crime. Prosecutors may not make statements that are not supported by the facts in evidence, but may make arguments based on the evidence and reasonable inferences that arise from the evidence. *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). Also, prosecutors are afforded great latitude in making closing arguments. While the prosecutor has a duty to see that a defendant receives a fair trial, he may use "hard language" when it is supported by the evidence, and he is not required to phrase his arguments in the blandest of terms. *People v Ullah*, 216 Mich App 669, 678, 550 NW2d 568 (1996). But the prosecutor must refrain from making prejudicial remarks. *Bahoda, supra* at 283.

Bonner did testify that defendant threatened to kill her and it is reasonable to infer that a person would be too frightened to testify against someone who had threatened to kill them. Therefore, the prosecutor's statement did not constitute error requiring relief.

Next, defendant argues that the prosecutor improperly referred to him as a "professional thief." Our review of the record indicates that the prosecutor was not specifically calling defendant "a professional thief." First, the prosecutor stated that a professional thief had committed the crime—he specifically did not use Garrett's name in this sentence, but said "the man." This indicates that he was speaking generally about the nature of someone who knows what he is doing, and why there might not be any physical evidence tying the perpetrator to the crime. Second, the prosecutor spoke generally about a situation where a "professional thief" might not leave evidence. Thus, it appears that the prosecutor was making the reasonable inference, based on a lack of physical evidence, that whoever broke in to the victim's house was a "professional thief." This did not constitute error.

Next, defendant argues that the prosecutor improperly argued sympathy and religion. Several times, the prosecutor made reference to the fact that when the body of the victim was found, she was "still wearing her church clothes" and that she was on her way to the seniors' club. Although a prosecutor may argue that a witness should be believed, he may not appeal to the jury to sympathize with the victim. *Unger*, *supra* at 237; *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). The victim was murdered while getting ready to go to a meeting of the seniors' club at her church. She *was* dressed in her church clothes. The prosecutor did not attempt to elicit sympathy or invoke religion; he was merely stating the facts. This argument is without merit.

Next, defendant argues that the prosecutor improperly mentioned defendant's unemployment status. During his questioning of Couturier, the prosecutor asked Couturier whether defendant had listed a job or occupation on a statement he made. Couturier responded that defendant said he was "unemployed." Furthermore, the prosecutor asked Wimmer, "you don't recall [defendant] ever having a job, did you—do you?" Wimmer replied, "no." The prosecutor also introduced Bonner's testimony, which included defendant's statement that he was going to the unemployment office. Defense counsel did not object on any of these occasions.

As our Supreme Court has stated, "evidence of a defendant's financial condition, because it ordinarily has limited probative value and usually goes to a collateral issue, will often distract rather than aid the jury." *People v Henderson*, 408 Mich 56, 65; 289 NW2d 376 (1980). The Court further explained, "[e]vidence of poverty, dependence on public welfare, unemployment, underemployment, low paying or marginal employment, is not admissible to show motive." *Id.*

at 66. Here, unlike in *Henderson*, the prosecutor never argued that defendant's unemployment was his motive. In this case, the occasional mention of defendant's unemployment did not take on a negative or disparaging tone. It did not create a notion that defendant was a "bad man" or a "worthless individual." *Henderson, supra* at 66. Therefore, the concerns of prejudice contained in *Henderson* were not present in this case. Defendant has failed to establish plain error affecting his substantial rights in this issue.

Next, defendant argues that the prosecutor made improper personal attacks on defense counsel. In his closing rebuttal, the prosecutor stated that defense counsel was trying to mislead and distract the jury by arguing "red herrings" and through distraction like a "magic show."

A prosecutor may not personally attack defense counsel, *McLaughlin, supra* at 672, or the credibility of defense counsel, *People v Kennebrew*, 220 Mich App 601, 607; 560 NW 2d 354 (1996), or suggest that defense counsel is intentionally attempting to mislead the jury. *Unger, supra* at 236.

Here, the prosecutor's comments did suggest that defense counsel was trying to distract the jury from the truth. However, the prosecutor's comments must be considered in light of defense counsel's comments. *People v Messenger,* 221 Mich App 171, 181; 561 NW2d 463 (1997). "[A]n otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *People v Kennebrew,* 220 Mich App 601, 608; 560 NW2d 354 (1996). The prosecutor's comments here were made in rebuttal to defense counsel's closing argument, wherein he dissected the testimony of several of the witnesses, focusing on minor discrepancies in their testimonies. It was not improper for the prosecutor to respond by emphasizing the truth of the big picture, despite defense counsel's attempts to find discrepancies between the testimonies of various witnesses.

Next, defendant argues that the prosecutor improperly used impeachment evidence as substantive evidence of defendant's guilt. During closing arguments, the prosecutor recounted Bonner's statement to police about defendant's statement that "he did a B and E in the morning (of February 4th) and the shit, just didn't go straight." The prosecutor told the jury, "and that's the first substantial conversation about what happened in this case. And she called the police and told them over the phone what her husband admitted and it came from no other source than her husband . . ." The prosecutor went on to argue that "if the police had told her what to say she would have known the victim's name, she would have known the victim's address, she would have known more details than she did." Further, the prosecutor argued, "Does she say any of that in her first testimony? No she says exactly what Ronnie Garrett told her."

Because a prosecutor may not argue facts not in evidence, it is improper for a prosecutor to argue statements used solely for impeachment purposes as substantive evidence. *People v Dalessandro,* 165 Mich App 569, 581-582; 419 NW2d 609 (1988). The prosecutor, in his closing argument, used the statement for the purpose for which it was admitted: impeachment. He was arguing that Bonner must have been telling the truth when she made that statement, and that it could not have come from the police, because it was so lacking in detailed information. "A finding of prosecutorial misconduct may not be based on a prosecutor's good-faith effort to admit evidence." *People v Abraham,* 256 Mich App 265, 278; 662 NW2d 836 (2003). Although this statement should not have been admitted, the prosecutor did not commit misconduct when he argued the evidence as impeachment and not as substantive evidence of defendant's guilt.

Finally, defendant argues that the cumulative nature of the prosecutor's misconduct deprived him of a fair trial. Because we have concluded that prosecutorial misconduct did not occur, there is no basis for finding that reversal is warranted due to cumulative error. See *People v Howard*, 226 Mich App 528, 549; 575 NW2d 16 (1997).

VIII. Common Plan or Scheme

Next, defendant argues that the trial court abused its discretion in admitting evidence of defendant's subsequent breaking and entering crime because it showed a common scheme, plan, or system. We disagree.

A. Standard of Review

Generally we review a trial court's evidentiary decisions for an abuse of discretion. *Katt, supra* at 278. However, when a trial court's decision to admit evidence involves a preliminary question of law, such as whether a rule of evidence precludes the admission of evidence, we review a trial court's decision under a de novo standard of review. *Id.* Thus, when preliminary questions of law are at issue, we will find an abuse of discretion when a trial court admits evidence that is inadmissible as a matter of law. *Id.*

B. Analysis

MRE 404(b)(1) provides, in relevant part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. *It may, however, be admissible for other purposes, such as proof of* motive, opportunity, intent, preparation, *scheme, plan, or system in doing an act*, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case. [Emphasis added.]

For other crimes, wrongs or acts evidence to be admissible under MRE 404(b)(1), the proponent of the evidence must show three things: (1) the other acts evidence must be for a proper purpose (other than to show character and action in conformity therewith); (2) the evidence must be relevant to an issue of fact that is of consequence at trial; and (3) under MRE 403, the danger of unfair prejudice must not substantially outweigh the probative value of the evidence. *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000).

In *Sabin*, our Supreme Court held that "evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *Sabin, supra* at 63. There must be *such a concurrence of common features* so that the charged acts and the other acts are logically seen as part of a general plan, scheme or design. *Id.* at 63-64. The evidence of uncharged acts "needs only to support the inference that the defendant employed the common plan in committing the charged offense."

People v Hine, 467 Mich 242, 253; 650 NW2d 659 (2002). "[D]istinctive and unusual features are not required to establish the existence of a common design or plan." *Id.* at 252-253.

Here, the other acts evidence had a concurrence of common features so that the charged acts, and the other acts, can be logically seen as part of a general plan, scheme or design. Defendant's scheme, plan or system was to drive to a neighborhood, park and get out of the car carrying pamphlets or a clipboard. He pretended to have a legitimate reason to be in the neighborhood and on his victim's property. Then, appearing to be on official business, he cased his victim's houses. When he believed he found houses whose owners were out, he would break into the house.

Thus, here, the charged home invasion was sufficiently similar to the other crime such that the trial court did not abuse its discretion in admitting evidence of the subsequent crime.

IX. Right to a Public Trial

Next, defendant argues that the trial court erred in excluding the public from jury selection. We conclude that while the trial court erred in excluding the public from jury selection without an explanation on the record, the error did not affect defendant's substantial rights.

A. Standard of Review

Defendant did not object to this issue at trial; therefore, it is unpreserved. We review unpreserved issues for plain error affecting defendant's substantial rights. *Carines, supra* at 763, 774.

B. Analysis

Here the trial judge stated "and because we will be doing jury selection, the family will have to stay outside. You cannot be in the courtroom when I'm doing jury selection, nobody can, okay?" The prosecutor stated, "I've already told them that, your Honor." The Sixth Amendment guarantees every defendant in a criminal case the right to a "speedy and public trial." US Const, Am VI; Const 1963, art 1, § 20. "Although the right to an open trial is not absolute, that right will only rarely give way to other interests." *People v Kline*, 197 Mich App 165, 169; 494 NW2d 756 (1992).

The right to complain about an order of exclusion may be waived either expressly or by an accused's failure to object. *People v Smith*, 90 Mich App 20, 23; 282 NW2d 227 (1979). Here there was no specific order of exclusion; thus, there could be no waiver. Judging by the prosecutor's prior anticipation of this policy, and the trial court's statement, it appears that this trial court judge must routinely close her courtroom during jury selection. There is nothing in the record to indicate the reason the trial court does this.

Had defendant objected to this procedure, the trial court could have devised an alternative way to handle the situation. However, given defendant's failure to object, the temporary nature of the exclusion, and defendant's failure to explain how the procedure caused him prejudice, we

conclude that defendant's Sixth Amendment right to a public trial was not violated. *People v Bails*, 163 Mich App 209, 211; 413 NW2d 709 (1987).

Although we do not know why the courtroom was closed in this particular instance, it was a temporary closure and a review of the transcripts does not indicate that there were any "secret proceedings" as suggested by defendant. Even assuming that the closure of the courtroom constituted plain error, defendant has not established that his substantial rights or the fairness of the judicial proceedings were affected by this error. See *Carines, supra* at 763.

Nonetheless, routinely closing the courtroom without explanation during jury selection is a highly questionable practice. While it constituted harmless error in this case, the trial court should reexamine the routine practice of excluding the public from jury selection, and if it is necessary because of space concerns, then the trial court should note that on the record.

X. Cumulative Error

Having found several instances of plain error in the proceedings at the trial court level, we decline to address defendant's cumulative error argument.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher