

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TONY M. DUPREE,

Defendant-Appellant.

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UNPUBLISHED

November 18, 2003

No. 237037

Wayne Circuit Court

LC No. 00-009139-01

Before: Whitbeck, C.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Defendant Tony Dupree appeals as of right his jury trial convictions of felonious assault,<sup>1</sup> felon in possession of a firearm,<sup>2</sup> and possession of a firearm during the commission of a felony (felony-firearm).<sup>3</sup> The trial court sentenced Dupree to 2 to 15 years' imprisonment for the felonious assault conviction, 2 to 15 years' imprisonment for the felon in possession of a firearm conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

**I. Basic Facts And Procedural History**

In the early morning hours of March 1, 2000, the victim, Erica Smith, left work and stopped at a White Castle in Detroit. When driving out of the restaurant parking lot a gray vehicle, driven by Dupree, began to turn into the same restaurant driveway that Smith was exiting. Four individuals, including Dupree who was the driver, occupied the vehicle. After completing her right turn out of the parking lot and onto the street, Smith observed the gray vehicle turn out of the lot and follow her. Smith turned onto Joy Road, and observed the gray vehicle continuing to follow her, blowing its vehicle horn, and attempting to have her pull over. Smith testified the driver of the gray vehicle was also trying to hit her vehicle's right passenger side. Smith maneuvered her vehicle into oncoming traffic lanes in an attempt to avoid being hit by the pursuing vehicle and phoned "911" on her cell phone. According to Smith, while she was on the phone with "911," the gray vehicle "rammed" the back of her car.

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<sup>1</sup> MCL 750.82.

<sup>2</sup> MCL 750.224f.

<sup>3</sup> MCL 750.227b.

Following the instructions received from the “911” operator, Smith slowed her vehicle to get behind and procure the license plate number of the gray car but the gray vehicle again rammed the rear end of her car. Smith stopped for a traffic light at Joy and Southfield Roads. The gray vehicle pulled up in the lane immediately next to her vehicle’s left side and attempted to block her car. Smith rolled her driver’s window partially down to permit the “911” operator to hear what was happening. Someone in the vehicle then yelled, “Fuck you, bitch; you ain’t all that.” While still stopped at the light, the driver of the gray vehicle leaned over the front passenger in his car and pointed a gun at Smith. Upon seeing the gun, Smith ran the traffic light, entering the wrong way on a median turn around for the Southfield Expressway. The gray vehicle continued to pursue her, ramming her vehicle in the back end for a third time.

According to Smith, she continued westbound on Joy Road while still in communication on her cell phone with the “911” dispatcher. The dispatcher instructed Smith to stop at a nearby fire station but Smith did not stop because the facility appeared dark. The dispatcher next suggested that Smith drive to a nearby all-night restaurant, Mike’s Coney Island, but Smith did not stop because the gray vehicle ended its pursuit by making a U-turn and proceeding in the opposite direction. Smith then went to a local police precinct to report the incident. Smith stated that she provided the police with the license plate number of the vehicle that was pursuing her and described the driver as a black male with a light complexion, aged eighteen to twenty-five, wearing a dark baseball cap with an emblem or logo on the front.

Smith viewed a live line-up of five individuals, including Dupree, in June 2000. Smith testified she had not been shown photographs of Dupree prior to the line-up. Smith positively identified Dupree in the line-up as the driver of the gray vehicle that pursued her on March 1, 2000.

Detroit Police Officers Staffney Larkins and Sherman Flake testified they had received Smith’s preliminary complaint and ran the gray vehicle’s license plate number as provided by Smith. The officers went to the address of the registered owner of the vehicle, 7844 Ashton, then went to another location, found Dupree and arrested him. When the police took him into custody, Dupree was wearing a black leather baseball cap with a Detroit Pistons logo.

Detroit Police Officer Kenneth Emerson testified that he conducted the line-up that involved Dupree. According to Officer Emerson, all the individuals in the line-up were approximately the same height and weight. While being examined by the prosecutor, Officer Emerson was asked if, other than when conducting the line-up, he had the opportunity to speak with Dupree about the March 1, 2000 incident:

- Q. Did there come a time when you wanted to ascertain as to whether he wanted to speak to you or not regarding this incident, this person?
- A. Defendant?
- Q. Yes.
- A. The reason that he was at the Wayne County Jail was because he –

- Q. Don't tell me why he was there. Did there come a time when you asked him if he wanted to make a statement to you?
- A. I couldn't talk to him at that particular time because he was in custody under another jurisdiction.

The jury was excused for the day and Dupree's counsel objected to the testimony of Officer Emerson that alluded to Dupree's incarceration in another jurisdiction, arguing it was in violation of an order in limine that the prosecution witnesses were not to mention that Dupree was on parole at the time of this offense, not to mention that he was arrested at his parole office, and not to mention anything regarding his status as a prior offender. Dupree's counsel requested a mistrial that the trial court denied.

The following day, Officer Emerson continued his testimony regarding the line-up procedure. Officer Emerson acknowledged the descriptions maintained in the police file of Dupree and the other line-up participants listed Dupree as "light complexion" and the remaining five individuals as "light to medium complexion." Officer Emerson also testified Smith stood in front of Dupree for 4 ½ minutes, proceeded to view the other line-up participants, and requested that the participants turn to profile before verbally indicating her identification of Dupree as the person who drove the vehicle that pursued her and the person who pointed the gun at her on March 1, 2000.

Following the conclusion of Officer Emerson's testimony, the parties entered a stipulation pertaining to Dupree's prior felony conviction. The stipulation, as phrased by the trial court and approved by counsel, was that Dupree:

Was convicted of the crime of receiving and concealing stolen property, and three years had not expired since that conviction and, therefore, he was ineligible to carry a weapon.

Detroit Police Officer Frances Hanks testified she was the officer immediately in contact with Smith on March 1, 2000, following the incident, and that she completed the initial police report. Hanks testified that the only description provided by Smith was:

[O]ne black male, light complexion wearing a baseball cap, and three unknown black males in a gray four-door unknown. There's a license plate.

Officer Hanks denied Smith provided any other or additional descriptions or details of the driver or passengers of the vehicle. Officer Hanks testified her report included a statement by Smith that she "pulled over to Mike's Coney Island westbound Joy Road and Greenview and yelled for help."

Following the conclusion of Officer Hanks' testimony, and while the jury was on a break, Dupree's counsel made a record regarding the proposed testimony of defense witness Michael Martin. Dupree's counsel sought to have Martin testify that he had gone to the alleged crime scene and taken photographs the week of the trial, June 11, 2001. Martin's photographs indicated that there was no coney island at the location Smith specified. Dupree's counsel argued that as late as August 9, 2000, at the preliminary examination, Smith testified that another

coney island was operating at the location of Mike's Coney Island. However, the photographs and testimony of Martin would indicate that established businesses existed at the locations indicated by Smith in her testimony. The prosecutor objected to the testimony indicating that the absence of a coney island at the location almost a year later failed to prove its absence at the same location at the time of the crime. The trial court precluded Martin from testifying, stating:

It would be extremely misleading in my opinion to allow him to come and make the representations because it would not, it would not [sic] – there's no basis for him to say one way or another whether or not there was a coney island located at that place back in March of 2000.

The trial court did mark six photographic exhibits submitted by Dupree's counsel depicting the various street corners/intersections and the existing buildings/businesses.

Dupree's counsel then called Michael Hennigan, the assigned attorney who participated in Dupree's line-up, to testify regarding the line-up procedure and Smith's initial identification of Dupree. Hennigan testified he could not locate his notes from Dupree's line-up prior to the hearing. A copy was not located in the police file, contrary to Hennigan's testimony that it was the procedure to provide police with a copy at the conclusion of the line-up. Hennigan also testified he recalled the line-up as unusual because Smith took over four minutes to verbally identify Dupree in the line-up. Hennigan, on cross-examination, acknowledged, "I don't recall the lineup being improper."

On the second day of deliberations, the jury indicated they had a question regarding the "standard procedure in filling out the information on the evidence property tag." The trial court responded:

There is no evidence on the record regarding that procedure. And I don't know, there is no evidence on the record regarding that procedure except for what the police might have said. I don't know what, I don't want to get into your discussions, but I would suggest that you stick to the issues in this case in regards to the verdict.

Now, there is a, I should say insofar as this note regarding the property tag, there is no information that I can give you, there is no information that I can give you about that.

Later that day, the jury returned with a unanimous verdict of guilty on all three counts charged.

At sentencing Dupree's counsel immediately informed the trial court that the jurors had spoken to her and the prosecutor after rendering their verdict. Dupree's counsel stated:

After the jury had rendered a verdict the jurors spoke to both myself and the prosecutor, and a juror that – that juror that was the foreperson indicated to me that one of the compelling reasons that kind of put them over the edge as to guilt as to my client resulted as, resulted from the juror number three . . . bringing to their attention the evidence tag that was submitted with the hat into the jury room. . . . Obviously, the tag was not part of the evidence and obviously the information

that was gleaned from the individuals at the location on 7844 Ashton was obviously crucial, and that's why I asked for an order in limine prior to the trial, which the court granted.

In speaking to the prosecutor, apparently he was not here either when the evidence went into the jury room, and I was not aware that that [sic] evidence tag had gone in either, but they indicated that they did consider that information as part of their deliberations, which is obviously not proper because it was not admitted into evidence. . . . [T]he jury foreperson was quite clear that that did play a role and that is what actually caused them to come to the verdict that they did even though [they] subsequently tried to downplay the role that that information played. . . . I'm making an oral motion for a new trial based on that evidence.

The prosecutor responded that the only issue that arose due to the presence of the evidence tag was a question regarding whose address was located on the tag. "It was because they could not conclude themselves as to whose address was on Ashton. . . . I did speak to the jurors back in the jury room, and the jurors did all say . . . that the evidence tag did not play a huge part in their decision." The trial court ruled:

I don't think there's a basis for granting a new trial. The verdict seems to be reasonable under the circumstances of the evidence presented, so that request is denied.

Following discussions pertaining to scoring of the sentencing guidelines, the presentence report, and the opportunity for Dupree's allocution, the trial court imposed sentence. In late September 2001, Dupree filed a claim of appeal. In early May 2003, Dupree filed a motion to remand for an evidentiary hearing in regard to his claim of ineffective assistance of counsel. This Court denied the motion for failure to persuade the Court of the need to remand.<sup>4</sup>

## II. Request For Mistrial

### A. Standard Of Review

Dupree claims that the trial court abused its discretion in denying his motion for a mistrial following the nonresponsive testimony of a police officer referring to his incarceration in another jurisdiction. The matter was properly preserved for review as Dupree's counsel immediately objected to the witness' testimony and moved for a mistrial.<sup>5</sup> We review a trial court's decision to grant or deny a mistrial for an abuse of discretion.<sup>6</sup>

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<sup>4</sup> *People v Dupree*, unpublished order of the Court of Appeals, entered June 19, 2003 (Docket No. 237037).

<sup>5</sup> *People v Nash*, 244 Mich App 93, 96; 625 NW2d 87 (2000).

<sup>6</sup> *Id.*

## B. Standards For Mistrial

An unresponsive, volunteered answer that injects improper evidence into a trial is not generally grounds for a mistrial unless the prosecutor knew in advance the witness would give the unresponsive testimony or conspired and/or encouraged the witness to give the testimony.<sup>7</sup> This Court will especially scrutinize unresponsive answers of police officers to assure the defense was not prejudiced, given the special obligation for law enforcement officers not to enter into forbidden areas in their testimony.<sup>8</sup> A mistrial is granted only when the error is so egregious that the prejudicial effect can be removed in no other way.<sup>9</sup>

## C. Applying The Standards

Here, it is clear the prosecutor was not attempting to elicit improper testimony. Further, the question that elicited the unresponsive answer was proper and did not appear to be calculated to elicit inadmissible evidence.<sup>10</sup> Dupree's counsel quickly intervened in the questioning in a manner that did not call undue emphasis to the statement by the jury. The unresponsive statement provided no significant details regarding Dupree's arrest and did not mention his being on parole or having been arrested at his parole office pursuant to the trial court's initial limiting instruction. There was no further mention throughout the trial of Dupree's prior or subsequent arrests, other than the stipulation of the parties to his prior felony conviction.

While the unsolicited statement might be construed as an irregularity, we conclude that it was not so egregious that it denied Dupree a fair trial. The test is not whether there were irregularities, but whether the defendant received a fair and impartial trial.<sup>11</sup> The determination whether to grant a mistrial due to an unresponsive answer is within the sound discretion of the trial court and the decision is not disturbed on appeal absent an abuse of discretion.<sup>12</sup> We conclude that the trial court did not abuse its discretion in denying a mistrial due to one unresponsive statement that was adequately limited by counsel.

## III. Ineffective Assistance Of Counsel

### A. Standard Of Review

Dupree contests the effectiveness of his counsel due to the detailed stipulation regarding the type and nature of his prior felony conviction. To preserve the issue of effective assistance of counsel for appellate review, the defendant must make a motion, at the trial court level, for a new

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<sup>7</sup> *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999).

<sup>8</sup> *People v Holly*, 129 Mich App 405, 415; 341 NW2d 823 (1983).

<sup>9</sup> *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988).

<sup>10</sup> *People v Haisha*, 111 Mich App 165, 170; 314 NW2d 465 (1981).

<sup>11</sup> *Lumsden*, *supra* at 298.

<sup>12</sup> *Id.* at 298-299.

trial or evidentiary hearing.<sup>13</sup> Here, while Dupree's counsel did move for a new trial, the motion was not made in conjunction with the issues presented on appeal pertaining to ineffective assistance of counsel. As the issue was not properly preserved by timely motion for a new trial or evidentiary hearing, we review it only to the extent that claimed counsel mistakes are apparent on the record.<sup>14</sup> "Failure to move for a new trial or for a *Ginther*<sup>15</sup> hearing ordinarily precludes review of the issue unless the appellate record contains sufficient detail to support the defendant's claim."<sup>16</sup>

## B. Standards Relating To Ineffective Assistance Of Counsel

To establish a claim of ineffective assistance of counsel, it must be shown that (a) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (b) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different,<sup>17</sup> and (c) the resulting proceeding was fundamentally unreliable or unfair.<sup>18</sup> As effective assistance of counsel is presumed, a defendant bears a difficult burden of demonstrating otherwise.<sup>19</sup> The performance of counsel is compared to an objective standard of reasonableness and without benefit of hindsight.<sup>20</sup>

## C. Applying The Standards

Here, Dupree argues that informing the jury of the nature of the prior felony as a crime that involved dishonesty was unfairly and unnecessarily prejudicial. He fails, however, to demonstrate how the inclusion of the information affected his right to a fair trial. While he contends this was a credibility contest between him and the victim, this argument is difficult to sustain given the fact that he did not testify. Hence, the information was not used to impeach his testimony. The references were made only in conjunction with his status as a prior felon to establish that element for the charge of felon in possession of a firearm. Further, his counsel took steps to clarify to the jury the extent and meaning of the stipulation.

Decisions regarding what evidence is to be presented are presumed to be a matter of trial strategy and will not be second-guessed on appeal.<sup>21</sup> Dupree argues that his trial counsel's overly detailed stipulation regarding the specific nature of his prior felony conviction demonstrates ineffective representation. However, Dupree fails to show how the stipulation

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<sup>13</sup> *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

<sup>14</sup> *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985).

<sup>15</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

<sup>16</sup> *Sabin*, *supra* at 658-659.

<sup>17</sup> *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

<sup>18</sup> *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

<sup>19</sup> *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

<sup>20</sup> *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

<sup>21</sup> *Id.*

resulted in an unfair trial, or that a limitation on the stipulation likely would have resulted in a different outcome. Given the consistent and affirmative testimony elicited from Smith, coupled with the fact that the jury had to be made aware, at a minimum, of the existence of Dupree's prior felony conviction, we conclude that the actions of Dupree's trial counsel met an objective standard of reasonableness and professionalism.

Further, we note that the information provided was not used in a manner precluded by MRE 404(a), which states that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." The information provided was not used to imply anything relating to Dupree's character. The information was referred to only in the original stipulation and when the elements of felon in possession of a firearm were reviewed. No further implications or references were made by the prosecution regarding Dupree's honesty, character or any similarity of the prior conviction to the acts currently charged. Although the stipulation may have been unnecessarily specific, we conclude that Dupree has failed to demonstrate the information resulted in prejudice or an unfair trial.

Dupree also contends he was denied effective assistance of counsel due to the failure of his attorney to suppress Smith's in-court identification of him. Again, to preserve the issue of ineffective assistance of counsel for appellate review the defendant should make a motion, at the trial court level, for a new trial or evidentiary hearing.<sup>22</sup> While Dupree's counsel did move for a new trial, the motion was not made in conjunction with the issues presented on appeal pertaining to ineffective assistance of counsel. As the issue was not properly preserved by a timely motion for a new trial or evidentiary hearing, it will be reviewed only to the extent that claimed counsel mistakes are apparent on the record.<sup>23</sup>

We note that trial counsel is not required to advocate meritless positions.<sup>24</sup> Dupree argues his trial counsel's failure to attempt to suppress Smith's in-court identification of him comprises ineffective representation. There was, however, no legitimate reason to attempt to suppress or require an independent basis for Smith's in-court identification of Dupree. There was no objection to the propriety of the pretrial line-up and Dupree had counsel available at the line-up. There was no testimony the pretrial procedure was tainted or unduly suggestive. Dupree's trial counsel more than adequately raised questions regarding the accuracy of Smith's identification of Dupree through direct and cross-examination. An independent basis for an in-court identification need only be provided when a pretrial identification has been improperly conducted.<sup>25</sup>

Given the propriety of the pretrial line-up procedure, any attempt by Dupree's trial counsel to suppress the in-court identification would have been frivolous and unsubstantiated.

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<sup>22</sup> *Sabin, supra* at 658-659.

<sup>23</sup> *Johnson, supra* at 129-130.

<sup>24</sup> *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

<sup>25</sup> *People v Gray*, 457 Mich 107, 114-115; 577 NW2d 92 (1998).



Rather, Dupree's trial counsel relied on direct and cross-examination to call into question the accuracy of Smith's identification of him. This was the only reasonable choice available at trial. Hence, we conclude that Dupree's allegation of ineffective assistance of counsel fails, as he has not demonstrated an improper pretrial investigation or a need to establish an independent basis for the in-court identification.

#### IV. Exclusion Of Testimony Concerning Photographs

##### A. Standard Of Review

Dupree contends the trial court abused its discretion in excluding testimony of a defense witness regarding photographs taken at an area involved in the crime a year subsequent to the events alleged. We review a trial court's decision to admit or exclude evidence for an abuse of discretion.<sup>26</sup> An error in the exclusion of evidence is not grounds for reversal unless it can be affirmatively shown that the error complained of resulted in a miscarriage of justice.<sup>27</sup> A reviewing court cannot reverse unless it is demonstrated to be more probable than not the error was outcome determinative.<sup>28</sup>

##### B. Applying The Standards

Here, we conclude that the failure to permit the testimony of Dupree's investigator was neither erroneous nor outcome determinative. The investigator photographed an area more than one year subsequent to the events alleged. His testimony was only to comprise the current condition of the described intersections as to buildings in existence or businesses operating. He admittedly could not testify regarding the appearance or existence of businesses in that area more than a year previously.

In general, relevant evidence is admissible, and irrelevant evidence is not.<sup>29</sup> For evidence to be deemed relevant, it must "have any tendency to make the existence of any fact that is of consequence . . . more or less probable."<sup>30</sup> Here, we conclude that the proposed evidence does not meet this standard. First, Smith never actually testified to entering the particular restaurant on the night of the incident, merely that she received instruction to proceed to that location. The absence of the business from the described location, more than a year subsequent to the event, is irrelevant. We conclude that the exclusion of this evidence was not an abuse of discretion.

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<sup>26</sup> *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

<sup>27</sup> MCL 769.26.

<sup>28</sup> *People v Snyder*, 462 Mich 38, 45; 609 NW2d 831 (2000).

<sup>29</sup> MRE 402; *Starr*, *supra* at 494.

<sup>30</sup> MRE 401; *Sabin*, *supra* at 57.

## V. Motion for New Trial

### A. Standard Of Review

Dupree alleges the trial court abused its discretion in denying his motion for a new trial where an evidence tag, not in evidence, was inadvertently allowed into the jury room during deliberations.<sup>31</sup> We review a trial court's decision to deny or grant a new trial for an abuse of discretion. In order to determine whether a trial court abused its discretion, the Court is "required to examine the reasons given by the trial court for granting [or denying] a new trial. This Court will find an abuse of discretion if the reasons given by the trial court do not provide a legally recognized basis for relief."<sup>32</sup>

### B. Applying The Standards

A trial court cannot provide a jury with unadmitted evidence.<sup>33</sup> While it is undisputed that the court inadvertently permitted the evidence tag to be in the jury room, defendant has failed to establish that the error actually affected his verdict.<sup>34</sup> The discussion between defense counsel and the prosecutor regarding the response of the jurors to the evidence tag was contradictory and inconclusive. Earlier in the trial, a police officer testified that evidence tags contain "our pension numbers for each individual that fills it out. It also has the description of what the item is prior to putting them in the same envelope." The officer stated the "evidence tag reads as 577483, one black leather baseball cap with the Detroit Pistons logo on it." Based on the prosecutor's statement, the evidence tag must also have contained an address. The address listed on the evidence tag was not new to the jury. It had been stated during the trial on at least four separate occasions.

Even if providing the jury with the tag was error, the error was harmless, as it did not provide information that had not already been submitted to the jury at trial. The situation is analogous to that in *Williams*,<sup>35</sup> where a redacted transcript of a preliminary examination was read to the jury due to the unavailability of the victim to testify. While the preliminary examination testimony was read at trial, the transcript was not introduced into evidence. The jurors had access to the transcript during their deliberations. In that instance, the Court indicated, "[W]e see little difference in the impact on the jury between having the transcript read to the jurors or having them read it themselves. Accordingly, we do not believe that this error operated to defendant's substantial injury."<sup>36</sup>

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<sup>31</sup> *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999).

<sup>32</sup> *Id.*

<sup>33</sup> *People v Davis*, 216 Mich App 47, 57; 549 NW2d 1 (1996), citing *People v Williams*, 179 Mich App 15, 22-23; 445 NW2d 894 (1989), rev'd on other grounds 434 Mich 894 (1990).

<sup>34</sup> *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999)

<sup>35</sup> *Williams*, *supra* at 20.

<sup>36</sup> *Id.* at 22.

Here, the inclusion of the address on the evidence tag was arguably merely duplicative of testimony heard by the jury during trial and properly in evidence. Although the submission of the evidence tag to the jury was error, it was harmless as it conveyed no substantively different information to the jury than that already admitted. The information provided on the evidence tag was merely contextually different from the manner the information had been presented at trial. Accordingly, we conclude that the trial court did not abuse its discretion in denying the motion for a new trial.

Affirmed.

/s/ William C. Whitbeck

/s/ Brian K. Zahra

/s/ Pat M. Donofrio