STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 8, 2004
v	No. 243097 Kent Circuit Court
PIETRO ERNEST TERRELL, Defendant-Appellant.	LC No. 01-009270-FC

Before: Gage, P.J., and O'Connell and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b), for the shooting death of Robert Fryling. The trial court sentenced defendant to life imprisonment without parole. He appeals as of right. We affirm, but remand to determine if a new trial is warranted.

I. Sufficiency of the Evidence

Defendant first argues that the evidence was insufficient to support his felony-murder conviction. We disagree. In reviewing a claim that the evidence was insufficient, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). Circumstantial evidence and reasonable inferences that arise therefrom can constitute sufficient proof of the elements of the crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

The victim, Robert Fryling, was a regular customer of various prostitutes, including Christina VanMeter and Paula Skwarek. VanMeter testified that on August 16 or 17, 1993, she, Skwarek, and defendant, who was their pimp, made plans to rob the victim in his home. On August 18, 1993, VanMeter drove Skwarek and defendant to the victim's house. Defendant let Skwarek in the house while he waited outside with a gun in his pants and a sawed-off shotgun in his sleeve. A few minutes later, defendant walked into the house while VanMeter waited inside the house at the front door as a lookout. VanMeter then heard shots and a dog barking. Defendant and Skwarek walked from the bedroom into the dining room and VanMeter heard more shots. Defendant and Skwarek then walked back to the front door and they all left. When VanMeter and Skwarek asked defendant why he shot the victim, he told them to "shut up."

Later that morning, the victim's mother and father-in-law found the victim and his dog shot to death in the house. One of the victim's pants' pockets was inside out, but he had $60 in another pocket and the victim was still wearing a very expensive watch. The victim's wallet was missing and was never found, and the victim's wife testified that the victim may have owned a gold numberless watch that she had not seen since his death. VanMeter testified that defendant took a gold numberless watch, a ring, a necklace, and some money from the victim's house.

On August 25, 1993, VanMeter was arrested for prostitution. Leanna Rouker, who knew defendant and was in jail at the same time as VanMeter, testified that VanMeter told her that Skwarek "was in the room when it happened," and that defendant went into the house, because Skwarek "was taking too long." VanMeter also commented that they only got $20, but she didn't believe that, because there was a ring with diamonds. On January 10, 1994, VanMeter told police that defendant and Skwarek killed and robbed the victim. VanMeter told the police that she was not involved in the crime and subsequently told Rouker that if she had told the police that she was with defendant, "they could charge [her] too." Rouker told the police what VanMeter had told her while in jail. After Rouker was released from jail, defendant threatened her. Defendant told her that he knew what she had done and that he had killed someone before and would do it again.

Renaldo Kilgore, a pimp who grew up with defendant, testified that defendant told him that he and Skwarek tried to rob the victim, and that he had shot and probably killed him. Defendant told Kilgore that he was worried that Skwarek and VanMeter would tell the police about the murder. Additionally, Fred DeVries, who dated Skwarek, testified that Skwarek told him that defendant killed the victim.

In 2001, the Federal Bureau of Investigation (FBI) interviewed VanMeter, who implicated defendant and Skwarek as the killers of the victim. Defendant was arrested and put in jail. Two men who were in jail with defendant, Anthony Lee and Eddie Crump, testified for the prosecution. Lee testified that defendant told him that he and two of his prostitutes planned to rob a millionaire client. However, when the client said he had no money, defendant "shot him in the back of the head execution style." Defendant also shot the victim's dog. Defendant also told Lee that one of the prostitutes was dead[1] and the other prostitute was in the other room when he shot the victim, so she would only be able to testify that she heard shots.

Crump also testified that defendant told him about his plan to rob a millionaire client. Defendant described to Crump how he went to the victim's house with Skwarek and VanMeter and went in the house when the victim opened the door to admit Skwarek. Defendant told Crump how he shot the victim and his dog "execution style" when the victim told defendant that he did not have much money in the house.[2]

[1] Skwarek died of a drug overdose before the trial.

[2] After defendant was convicted, Crump recanted his testimony. Crump's recantation is the subject of defendant's motion for remand, which is addressed, *infra*, in Issue VI of this opinion.

On appeal, defendant argues that all of the witnesses testifying against him lack credibility and that there is no physical evidence implicating him in the crime. The question of the credibility of witnesses is a matter for the trier of fact to ascertain, and this Court may not interfere with the jury's resolution of credibility disputes. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990); *People v DeLisle*, 202 Mich App 658, 660; 509 NW2d 885 (1993). This Court will generally not overturn a conviction on the basis of the credibility of witnesses. *People v Hughes*, 217 Mich App 242, 248; 550 NW2d 871 (1996). Here, numerous witnesses gave testimony implicating defendant in the murder, and the jury chose to believe those witnesses. We will not overturn defendant's conviction on the basis of the jury's credibility determinations. Viewed in the light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant shot and killed the victim, with malice, during the perpetration or attempted perpetration of a robbery.

II. Great Weight of the Evidence

Defendant also argues that the jury's verdict was against the great weight of the evidence. A trial court may grant a new trial if it finds that the verdict was not in accordance with the evidence and that an injustice has been done. *People v Abraham*, 256 Mich App 265, 269; 662 NW2d 836 (2003). A trial court should grant a new trial based upon the great weight of the evidence only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). Because defendant failed to preserve this issue by moving for a new trial on this basis, our review is for plain error affecting defendant's substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

Defendant's arguments are once more directed at the credibility of the witnesses. Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial based on the great weight of the evidence. *Lemmon, supra* at 647. Here, because defendant has not shown that the testimony against him was so far impeached that it was deprived of all probative value or that the jury could not have believe the witnesses' testimony, the question of the credibility of the witnesses was for the jury. *Id.* at 643, 645-646. The same evidence that defeats defendant's claim of insufficient evidence also defeats defendant's claim that the jury verdict was against the great weight of the evidence.

III. Jury Array

Next, defendant, an African-American, argues that he was denied his Fourteenth Amendment right to equal protection of the law and his Sixth Amendment right to an impartial jury drawn from a fair cross-section of the community, because systematic errors in the Kent County jury management system caused a disproportionately low number of jury notices to be sent to residences in zip codes with proportionally larger African-American populations. The Sixth Amendment guarantees a criminal defendant an impartial jury drawn from a fair cross section of the community. *People v Hubbard (After Remand)*, 217 Mich App 459, 472; 552 NW2d 493 (1996), citing *Taylor v Louisiana*, 419 US 522, 526-531; 95 S Ct 692; 42 L Ed 2d 690 (1975). "To establish a prima facie violation of the fair cross-section requirement, the defendant bears the burden of proving 'that a distinctive group was underrepresented in his venire or jury pool, and that the underrepresentation was the result of systematic exclusion of the

group from the jury selection process.'" *People v McKinney*, 258 Mich App 157, 161; 670 NW2d 254 (2003), quoting *People v Smith*, 463 Mich 199, 203; 615 NW2d 1 (2000), citing *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979). To establish a prima facie case of an equal protection violation through systematic discrimination in the composition of juries, a claimant must

> (1) show that the group excluded is a recognizable, distinct class capable of being singled out for different treatment under the laws, (2) prove the degree of underrepresentation by comparing the proportion of the excluded group in the total population to the proportion actually called to serve on the venire over a significant period, and (3) show that the selection procedure is either susceptible of abuse or not racially neutral. [*People v Williams*, 241 Mich App 519, 527-528; 616 NW2d 710 (2000), citing *Casteneda v Partida*, 430 US 482, 494; 97 S Ct 1272; 51 L Ed 2d 498 (1977).]

Here, defendant did not challenge the jury array until sentencing. A challenge to the composition of a jury array must be made before the jury has been impaneled and sworn. *People v McKinney*, 258 Mich App 157, 161; 670 NW2d 254 (2003). Because defendant failed to timely challenge the jury array, this issue is unpreserved. Accordingly, defendant is entitled to relief only upon a showing of plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999); *People v Eccles*, 260 Mich App 379, 385; 677 NW2d 76 (2004), lv pending (Supreme Court Docket No. 125770).[3]

In *McKinney*, *supra* at 160-162, this Court considered and rejected an almost identical unpreserved claim that African-Americans were systematically excluded from Kent County's jury array when the trial was conducted. Here, as in *McKinney*, there is no evidence in the lower court record to support defendant's argument. Although defendant attempts to expand the record on appeal by providing several newspaper articles and reports with his brief, these documents are not a part of the lower court record and may not be considered by this Court. *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). Furthermore, "[t]his Court may not

[3] Defendant argues, however, that this issue could not have been forfeited in this case, because the asserted error was not discoverable at the time an objection was required. In support of this contention, defendant cites *Amadeo v Zant*, 486 US 214; 108 S Ct 1771; 100 L Ed 2d 249 (1988), on remand 384 SE2d (Ga, 1989). *Amadeo*, *supra* at 216-217, presented a question whether, in considering the petitioner's motion for writ of habeas corpus, the district court's factual findings, upon which it based its conclusion that the petitioner successfully established cause for his failure to raise in state court a challenge to the composition of the juries, were clearly erroneous. The United States Supreme Court addressed the "cause and prejudice" requirement for all petitioners seeking federal habeas relief on constitutional claims defaulted in state court and determined that the district court's factual findings were not clearly erroneous and should not have been set aside by the Court of Appeals for the Eleventh Circuit. *Id.* at 221, 228-229. *Amadeo* is not applicable to the present case because (1) it deals with federal habeas relief, where the present case deals with a state procedural rule that imposes issue preservation requirements over claims of error, and (2) it involves a review of a lower court's factual findings, where the present case does not. Therefore, the plain error rule of *Carines* applies in this case.

take judicial notice of newspaper articles because they constitute inadmissible hearsay." *McKinney, supra* at 161 n 4.[4] Therefore, as in *McKinney, supra* at 161-162, "we have no means of conducting a meaningful review of defendant's allegations on appeal" and must reject defendant's argument.[5]

IV. Pretrial Publicity

Defendant next argues that the trial court erred in failing to sua sponte order a change of venue based on allegedly excessive pretrial publicity. We disagree. Defendant did not request a change of venue before the trial. Furthermore, the record discloses that the question of pretrial publicity was discussed at a pretrial hearing, and that defense counsel agreed with the trial judge that pretrial publicity would not pose a concern. In light of this record, defendant arguably waived this issue. *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001). Regardless, to the extent this issue is reviewed as an unpreserved issue, appellate relief is not warranted because defendant has not demonstrated a plain error affecting his substantial rights. *Carines*, *supra* at 774.

In determining whether defendant was deprived of a fair jury on the ground of extensive pretrial publicity, the initial question is whether the effect of pretrial publicity "was such 'unrelenting prejudicial pretrial publicity [that] the entire community will be presumed both exposed to the publicity and prejudiced by it, entitling the defendant to a change of venue.'" *People v Jendrzejewski*, 455 Mich 495, 501; 566 NW2d 530 (1997), quoting *Mu'Min v Virginia*, 500 US 415, 442 n 3; 111 S Ct 1899; 114 L Ed 2d 493 (1991). Juror exposure to media coverage "does not in itself establish a presumption that a defendant has been deprived of a fair trial by virtue of pretrial publicity." *Id.* at 502. Even when jurors have been exposed to adverse publicity and hold preconceived notions of guilt or innocence, a change of venue is not necessary if the jurors can lay aside their impressions or opinions and render a verdict based on the evidence presented in court. *People v Harvey*, 167 Mich App 734, 741; 423 NW2d 335 (1988). The defendant has the burden to demonstrate "the existence of actual prejudice or the presence of a strong community feeling or a pattern of deep and bitter prejudice so as to render it probable that the jurors could not set aside their preconceived notions of guilt, notwithstanding their

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[4] We note that, as in *McKinney, supra* at 162, another panel of this Court previously denied defendant's request to remand to the trial court for an evidentiary hearing. *People v Terrell*, unpublished order of the Court of Appeals, entered June 10, 2003 (Docket No. 243097).

[5] We add the following comments from *McKinney, supra* at 162:

> [W]e understand the difficulties that counsel would have faced in objecting to what was, according to defendant, a longstanding problem. Moreover, this opinion should in no way be viewed as approving of, or minimizing, any improper jury selection practices that may have occurred in this case. Similar to Justice Cavanagh's rationale in his concurring opinion in [*People v Smith*, 463 Mich 199, 228; 615 NW2d 1 (2000)], a finding that defendant failed to properly preserve her jury array issue is not the same as endorsing improper jury selection practices.

statements to the contrary." *Id.* at 741-742, citing *Sheppard v Maxwell*, 384 US 333; 86 S Ct 1507; 16 L Ed 2d 600 (1966). The totality of the circumstances should be evaluated on appeal in determining whether the defendant was deprived of a fundamentally fair and impartial trial. *Jendrzejewski, supra* at 502; *Harvey, supra* at 742.

Here, defendant attaches to his brief on appeal newspaper articles concerning this case. However, as discussed in Part III of this opinion, this Court may not consider these articles, as they are not a part of the lower court record, and this Court may not take judicial notice of newspaper articles. *McKinney, supra* at 161 n 4; *Sherman, supra* at 56. Furthermore, defendant does not address the tone of the media coverage, allege that the media coverage unfairly depicted defendant as guilty of the crime, or make any effort to demonstrate the extensiveness of the publicity surrounding this case. Defendant does not allege that the prospective jurors' responses during voir dire show that they were impermissibly tainted or that any prospective jurors admitted to disqualifying prejudice. Thus, defendant has failed to demonstrate a pattern of strong community feeling or bitter prejudice against him that would have warranted a change of venue. *Harvey, supra* at 742. The trial court's failure to sua sponte change venue due to pretrial publicity was not a plain error that affected defendant's substantial rights.

V. Evidence

Next, defendant alleges several evidentiary errors. Defendant preserved each of these issues with appropriate objections at trial. A trial court's decision to admit or exclude evidence is generally reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 549; 581 NW2d 654 (1998). Even if error is found, reversal is unwarranted unless the defendant demonstrates that it is more probable than not that the error resulted in a miscarriage of justice. *People v Lukity*, 460 Mich 484, 494-495; 596 NW2d 607 (1999). "In other words, the effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error." *Id.* at 495.

A. Hearsay Statements

Defendant argues that the trial court abused its discretion by admitting several statements that defendant asserts were inadmissible hearsay: (1) DeVries's testimony that Skwarek told him that defendant committed the murder; (2) Rouker's testimony that VanMeter told her that she was present in the house when defendant robbed and killed the victim; and (3) testimony by VanMeter's attorney, Richard Hillary, that VanMeter, apparently ignorant of Skwarek's death, told him that Skwarek would confirm that defendant committed the murder.

1. DeVries's Testimony

First, defendant argues that the trial court abused its discretion by allowing DeVries's hearsay testimony that Skwarek told him that defendant committed the murder. Skwarek made this statement after DeVries, who was dating Skwarek, tried to convince Skwarek to leave defendant and threatened to kill him. The trial court admitted this statement under the residual exception to the hearsay rule. Because Skwarek died before trial, she was unavailable to be a

witness. When the declarant is unavailable as a witness, the following is not excluded by the hearsay rule:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. [MRE 804(b)(7).]

Our Supreme Court held that evidence offered under the residual exception to the hearsay rule must satisfy the following elements:

> (1) it must have circumstantial guarantees of trustworthiness equal to the categorical exceptions, (2) it must tend to establish a material fact, (3) it must be the most probative evidence on that fact that the offering party could produce through reasonable efforts, and (4) its admission must serve the interests of justice. [*People v Katt*, 468 Mich 272, 279; 662 NW2d 12 (2003).[6]]

"[C]ourts should consider the 'totality of the circumstances' surrounding each statement to determine whether equivalent guarantees of trustworthiness exist." *Id.* at 291. Factors to be considered include (1) the spontaneity of the statement, (2) the consistency of the statement, (3) lack of motive to fabricate or lack or basis, (4) the reason the declarant cannot testify, (5) the voluntariness of the statement, (6) the declarant's personal knowledge of the matter on which he spoke, (7) to whom the statements were made, and (8) the time frame within which the statement was made. *People v Lee*, 243 Mich App 163, 178; 622 NW2d 71 (2000).

Defendant argues that Skwarek's statement to DeVries lacked trustworthiness, because Skwarek was a prostitute, had not made a statement to the police regarding the matter, and had motive to lie because she was dating both defendant and DeVries when she made the statement. We disagree. We conclude that the trial court did not abuse its discretion in determining that Skwarek's statement had enough guarantees of trustworthiness to be admissible under the residual exception to the hearsay rule. Skwarek was dating DeVries and apparently trusted him enough to reveal this information. Skwarek was with defendant when he committed the murder and thus had personal knowledge that defendant killed the victim. Skwarek made the statement within months of the murder. She appeared to make the statement voluntarily and spontaneously and, although she may have had motivation to lie to DeVries about defendant's proclivity for violence (in order to scare DeVries away from confronting or killing defendant), she had no reason to specifically tell DeVries that defendant had killed Fryling. Because Skwarek

[6] In *Katt*, the Supreme Court discussed MRE 803(24), which is the residual exception to the hearsay rule where the availability of the declarant is immaterial. The language of MRE 804(b)(7), the residual exception to the hearsay rule when the declarant is unavailable, is identical.

participated in the robbery that resulted in the victim's death, it would have been against her interests to tell anybody (especially the police) that she knew defendant was the murderer. Skwarek had no reason to falsely implicate defendant in the crime. There is no indication that Skwarek ever recanted or made any inconsistent statements (i.e., that defendant did not commit the murder). Additionally, Skwarek's status as a prostitute, alone, did not detract from her statement's trustworthiness. Therefore, we conclude that the trial court did not abuse its discretion in admitting DeVries's hearsay testimony regarding Skwarek's statement.[7]

2. Rouker's Testimony

Second, defendant argues that the trial court abused its discretion by allowing Rouker's hearsay testimony that VanMeter told her that defendant had committed the murder. We disagree. MRE 801(d)(1)(B) provides that a statement is not hearsay if the declarant testifies at the trial and is subject to cross-examination, and the statement is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive . . . ." In this case, VanMeter testified that defendant was the perpetrator of the crime. She was cross-examined extensively concerning prior inconsistent statements, and defense counsel repeatedly implied that she was lying to avoid being charged with the killing, that she had a grudge against both defendant and Skwarek, and that she wanted to "get even." By accusing VanMeter of fabrication and improper motive, defendant opened the door to the admission of VanMeter's prior consistent statements to Rouker. Therefore, the trial court did not abuse its discretion in allowing this testimony.[8]

3. Hillary's Testimony

Third, defendant argues that the trial court abused its discretion by allowing Hillary's testimony regarding a conversation in which VanMeter told him that Skwarek would verify her statement to the police.[9] Again, we disagree. VanMeter's statement was not offered to prove the truth of the matter asserted, but was offered to show that VanMeter did not know that Skwarek was dead. Defendant had suggested at trial that VanMeter's testimony was fabricated in order to get back at defendant. The purpose of offering VanMeter's statement was to show that when VanMeter informed the police that defendant committed the murder, she did so with the belief

[7] Even if the trial court abused its discretion in admitting this statement, the error was harmless. Skwarek's statement was one isolated statement in a very lengthy trial, which included properly admitted testimony from several other witnesses confirming that defendant committed the murder. Defendant has not shown that it is more probable than not that the error resulted in a miscarriage of justice. *Lukity*, *supra* at 494-495.

[8] Even if this testimony was inadmissible, defendant has not shown that it is more probable than not that the alleged error resulted in a miscarriage of justice. *Lukity*, *supra* at 494-495.

[9] In his brief on appeal, defendant misrepresents the nature of the statements admitted at trial, stating that Hillary was allowed to testify that VanMeter told him "that she had been at decedent's home and had been involved in an armed robbery and homicide, and had been cooperative with law enforcement." In fact, Hillary only testified that VanMeter told him that Skwarek would verify her statement to the police.

that Skwarek could confirm her statement, and that it was her best interests to come forward with this information and make a deal with law enforcement before Skwarek had an opportunity to come forward with the same information. Because this testimony was not offered to prove the truth of the matter asserted, it was not hearsay under MRE 801(c).[10]

B. Telephone Conversation

Finally, defendant argues that the trial court abused its discretion by allowing the prosecutor to admit a tape recording of a telephone conversation that defendant had with a family member during the course of the trial. Before defendant had this conversation, he denied on direct examination ever killing anyone, and made the following statement: "I swear on my [B]ible that I carry in my pocket that I did not kill Bob Fryling." The prosecution later offered the taped telephone conversation between defendant and a family member to show that defendant had homicidal qualities, and to contradict defendant's claim of religious or God-fearing qualities. In this conversation, defendant colorfully expressed his anger at being framed by lying witnesses, and stated that he would like to beat up the prosecutor and a testifying detective and shoot a testifying FBI agent in the head.

Defendant argues that the phone conversation was inadmissible, because it was irrelevant to the issue of defendant's guilt or innocence.

> Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402. Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v Sabin (After Remand)*, 463 Mich 43, 57; 614 NW2d 888 (2000). [*People v Taylor*, 252 Mich App 519, 521-522; 652 NW2d 526 (2002).]

Evidence of a defendant's character may be relevant to rebut his claim of good character. "Once a defendant has placed his character in issue, it is proper for the prosecution to introduce evidence that the defendant's character is not as impeccable as is claimed." *People v Vasher*, 449 Mich 494, 503; 537 NW2d 168 (1995). A "prosecutor [is] fully entitled to challenge the defendant's claim of good character either upon cross-examination or through extrinsic evidence in rebuttal." *People v Bouchee*, 400 Mich 253, 262; 253 NW2d 626 (1977). Such a challenge might take the form of reputation evidence tending to disprove a claim of religious, moral and God-fearing qualities, if such evidence has been presented. *Id*.

Here, by swearing on the Bible, defendant impressed on the jury his God-fearing qualities. Defendant's subsequent expression of his desire to kill the FBI agent in the telephone conversation was contrary to his expressed religious convictions. Therefore, the trial court did

[10] Once again, even if this testimony was inadmissible, defendant has not shown that it is more probable than not that the alleged error resulted in a miscarriage of justice. *Lukity, supra* at 494-495.

not abuse its discretion in determining that extrinsic evidence of defendant's desire to commit violence and murder was relevant to rebut his claim of having God-fearing qualities.

Defendant also argues that, even if the telephone conversation was relevant, its probative value was substantially outweighed by the danger of unfair prejudice. Under MRE 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." As used in this rule, "'unfair prejudice refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock.'" *People v Pickens*, 446 Mich 298, 337; 521 NW2d 797 (1994), quoting *People v Goree*, 132 Mich App 693, 702-703; 349 NW2d 220 (1984).

In the telephone conversation, defendant spoke of violence and used "street language," including obscene words. However, at trial, defendant admitted that he sold drugs, lived with and protected prostitutes, slapped and pushed VanMeter around, carried a shotgun in his coat pocket, and once shot at people from inside a house. The jury was aware of defendant's lifestyle, and the admission of defendant's telephone conversation would not have adversely affected defendant's position by further injecting the jury with anger or shock. The trial court did not abuse its discretion in concluding that the probative value of the telephone conversation was not substantially outweighed by the danger of unfair prejudice.

VI. Motion for Remand

Before oral argument, defendant submitted to this Court a motion to remand, arguing that the matter should be remanded to the trial court because Crump recanted his trial testimony. "It is the trial court's responsibility to determine whether a new trial should be granted on the basis of a witness' recantation of testimony." *People v LaPlaunt*, 217 Mich App 733, 736; 552 NW2d 692 (1996). Because defendant did not file this motion within the time provided for filing his appellate brief, MCR 7.211(C)(1)(a), it is untimely.[11] However, defendant did not learn that Crump was recanting his testimony until May 1, 2004. Therefore, defendant could not have filed a timely motion to remand. This Court has determined that a manifest injustice results where a defendant is foreclosed from both directly moving for a new trial and pursuing a remand to the trial court merely because he did not learn of a recantation before the time limits for bringing these motions had passed. *LaPlaunt*, *supra* at 736. Under these circumstances, this Court is required to remand the case to the trial court, pursuant to MCR 7.216(A)(5), to determine if a new trial is warranted on the basis of the recantation. *LaPlaunt*, *supra* at 737.[12]

[11] Defendant was also precluded from filing a motion for a new trial with the trial court, because he had already filed his claim of appeal. MCR 6.431(A)(2).

[12] Defendant also argues that he is entitled to a remand because new information emerged regarding another suspect in the Fryling murder. However, it is unclear what "new" information has emerged regarding this suspect, and there is no indication that defendant did not or could not have known this information at the time of the trial. Therefore, defendant is not entitled to a remand on this basis.

Affirmed, but remanded. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Peter D. O'Connell
/s/ Brian K. Zahra