STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 18, 2008
v	No. 279115 Ionia Circuit Court
RICHARD STEVEN RAMNARINE, Defendant-Appellant.	LC No. 06-013373-FH

Before: Hoekstra, P.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his conviction for arson of a dwelling house, MCL 750.72. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to 20 to 40 years' imprisonment. Because the trial court did not abuse its discretion in denying defendant's motion for a new trial and because any prosecutorial misconduct did not affect defendant's substantial rights, we affirm.

Defendant first claims that the trial court erred in denying his motion for a new trial. Specifically, defendant argues that he was denied his right to be present during the critical stages of the proceedings, to the assistance of counsel, and his right of confrontation because the jury, when it played the recording of his 911 telephone call during deliberations and found evidence of a conspiracy, created new evidence. We disagree. We review a trial court's decision to grant or deny a motion for a new trial for an abuse of discretion. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). A trial court abuses its discretion when its decision falls outside the range of principled outcomes. *Id.*

During deliberations, jurors may only consider evidence that is presented during trial. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). The consideration of "extraneous facts not introduced in evidence . . . deprives a defendant of his rights of confrontation, cross-examination, and assistance of counsel embodied in the Sixth Amendment." *Id*. Our Supreme Court has stated:

> In order to establish that the extrinsic influence was error requiring reversal, the defendant must initially prove two points. First, the defendant must prove that the jury was exposed to extraneous influences. Second, the defendant must establish that these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict. Generally, in proving this second point, the

> defendant will demonstrate that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict. [*Id.* at 88-89 (citations omitted).]

The jury's playing of the recording of defendant's 911 telephone call during deliberations and its finding of a conspiracy did not amount to an extraneous influence. The recording was admitted into evidence and played for the jury at trial. Further, during deliberations, the recording was played in the jury room in the presence of all the jurors.

In determining defendant's guilt, the jury was free to consider any matter it believed important to the resolution of defendant's guilt. See *People v Fletcher*, 260 Mich App 531, 543; 679 NW2d 127 (2004). Because the jury based its verdict on evidence presented at trial, the jury's verdict will not be set aside simply because the jury's interpretation of the voices heard on the recording of defendant's 911 telephone call was questionable or faulty. See *id.* at 544. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial. *Blackston, supra*.

Defendant also claims that he was denied a fair trial by the prosecutor's improper denigration of defense witnesses Gary Mihalek and James Fahey. Both of these witnesses were recognized by the trial court as experts in the origin of fires and offered testimony that disputed the prosecution's theory that the fire was intentionally set.

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Further, "in a case that turns largely on conflicting expert testimony, a prosecutor must take special steps to avoid misconduct designed to impugn the integrity of the defendant's experts." *People v Unger*, 278 Mich App 210, 240; 749 NW2d 272 (2008). Claims of prosecutorial misconduct are reviewed on a case-by-case basis, and the reviewing court must examine the entire record and evaluate the prosecutor's remarks in context. *Dobek, supra* at 64. Because defendant did not object to the challenged questions and statements below, defendant's claims are unpreserved.[1] Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting the defendant's substantial rights. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

First, defendant argues the prosecutor improperly subjected Mihalek and Fahey to ridicule as "experts" in false confessions. During the cross-examination of Mihalek, the prosecutor asked whether there was anything about defendant's "confession" to Lieutenant Harris Edwards that was inconsistent with Mihalek's conclusions regarding the origin of the fire. Mihalek replied that defendant had made an admission, rather than a confession, to Edwards. In

[1] At trial, defendant objected during the prosecutor's cross-examination of Mihalek and Fahey. However, the grounds asserted for the objections below are different than the bases for defendant's claim on appeal. Accordingly, defendant's claim that the prosecutor subjected Mihalek and Fahey to ridicule as experts in false confessions is unpreserved. See *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993) ("An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground.").

follow up questioning the prosecutor explored the education and training on which Mihalek based his statement that defendant had not confessed to Edwards. We find nothing improper in the prosecutor's questioning of Mihalek regarding the basis for his opinion about the statement defendant made, particularly in light of the fact that Mihalek is a retired state police officer.

However, the prosecutor's questioning of Fahey regarding whether he was an expert in false confessions is a closer question. In his testimony, Fahey stated that defendant's "admission or confession" to Edwards did not cause him any concern about his findings because he could not prove or disprove whether the fire had been intentionally set. Thus, Fahey, unlike Mihalek, did not state that defendant's statement to Edwards was an admission, rather than a confession. Consequently, there was no reason for the prosecutor to question Fahey about whether he considered himself an expert in false confessions. But because Fahey's expertise in this context was not a meaningful issue, we conclude that defendant cannot establish that this questioning affected his substantial rights. Additionally, we note that during the prosecutor's cross-examination of Fahey, the trial court instructed the jury that "[y]ou must decide which witnesses to believe" and that "no witness in this trial is qualified or is an expert to tell you whether somebody is telling the truth." The trial court's instructions sufficiently cured any prejudice to defendant.

Second, defendant argues that the prosecutor, by asking Mihalek if he was being paid and whether his client was defendant, incorrectly led the jury to believe that the Mihalek was being paid by defendant. The prosecutor's questions to Mihalek were proper. Although Mihalek was ultimately paid by the court, he was hired by defense counsel to investigate the origin of the fire. The bias or interest of a witness is always a relevant subject of inquiry on cross-examination. *People v Morton*, 213 Mich App 331, 334; 539 NW2d 771 (1995).

To the extent that the prosecutor improperly characterized Mihalek's reason for using Fahey, rather than an investigator from another company, as needing to do the investigation "on the cheep [sic]," the characterization does not require reversal. The remark was brief, and the trial court instructed the jury that the lawyers' questions to the witnesses were not evidence. Further, a timely objection and a curative instruction could have alleviated any prejudice arising from the improper characterization. *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003).

Third, defendant argues that the prosecutor used closing arguments as a forum to further impugn the credibility of Mihalek and Fahey. Defendant claims that the prosecutor impugned the credibility of the defense experts when the prosecutor stated (1) that the prosecutor's three expert witnesses were credible because the experts reached the same conclusion and were "not just a punch [sic] of police officers getting together to reach a conclusion or two retired old guys from MSP that work in the same company," (2) that Mihalek asked Fahey to provide an opinion as to the fire's origin in order to protect his integrity and that if Mihalek truly wanted to protect his integrity, he should have gone to an insurance company or a different "fire finding company," and (3) that "it's obvious that Mr. Mihalek had his mind made up when he got to the residence what he was going to do. He's paid by the defense for an opinion. He is not independent." The context surrounding the statements establishes that the prosecutor was arguing that Mihalek and Fahey, and their conclusions, were not credible. A prosecutor is free to argue from the facts the credibility of witnesses, *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997), including that an expert had a financial motive to testify at trial, *Unger, supra*

at 239. Moreover, a prosecutor need not state his argument in the blandest terms possible. *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004). The prosecutor's statements in closing arguments were not plainly and clearly improper.[2]

Affirmed.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Michael J. Talbot

[2] To the extent that the prosecutor's statements could be viewed as an improper attack on the credibility of the defense experts, the statements do not require reversal. The trial court instructed the jury that "[t]he lawyer's [sic] statements and arguments are . . . not evidence" and that "you should only accept things the lawyers say that are supported by the evidence or by your own common since [sic] and general knowledge." Further, a timely objection and a curative instruction would have been sufficient to alleviate the prejudice from any inappropriate argument. *Unger*, *supra* at 241.