STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 2, 2010
v	No. 287857 Alger Circuit Court
THOMAS DAVID RICHARDSON, Defendant-Appellant.	LC No. 07-001782-FC

Before: MURPHY, C.J., and BECKERING and M.J. KELLY, JJ.

PER CURIAM.

Following an eight-week jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), and sentenced to life imprisonment without parole. He appeals as of right. We affirm.

I. BACKGROUND

Defendant was convicted of killing his wife, Juanita Richardson, by causing her to fall from a cliff in Pictured Rocks National Park on June 22, 2006. Defendant initially told a park employee that the victim was missing from their "honeymoon spot" at the cliff when he returned from a visit to a restroom. After the victim's body was recovered from the rocks below the cliff, defendant gave different accounts of the event to law enforcement officers, during which he reported both that he observed the victim intentionally jump from the cliff and that he observed her accidentally fall from the cliff. After the incident, defendant also gave conflicting accounts of the event to various relatives, former and current coworkers, and other acquaintances. The medical examiner concluded that the victim's fatal injuries were equally consistent with an accidental, suicidal, or homicidal fall from the cliff. The prosecutor's theory at trial was that defendant may have choked the victim to the point of unconsciousness and then dropped her over the edge, or used some implement to knock her over the edge. The defense theory was that the victim accidentally fell from the cliff.

II. EVIDENTIARY ISSUES

Defendant argues that the admission of various categories of other-acts evidence violated his due process rights and deprived him of a fair trial. Defendant contends that he preserved his various claims by objecting to the prosecutor's pretrial motion to allow other-acts evidence and by making repeated objections at trial. However, although the trial court addressed the

admissibility of certain other-acts evidence at a pretrial hearing, and defendant objected to some other evidence at trial, the categories of evidence that defendant challenges on appeal are broader in scope than the evidentiary matters that were addressed at the pretrial hearing, defendant did not object at trial to most of the evidence that he now challenges on appeal, and many of the objections that were made at trial were based on different grounds than those advanced on appeal. To properly preserve an evidentiary issue for appeal, an appellant must timely object in the trial court on the same basis raised on appeal. *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996). Thus, many of defendant's claims of error are unpreserved.

We review a preserved evidentiary ruling for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Id.* at 217. Any preliminary questions of law involving the admissibility of evidence are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). An unpreserved claim of error is reviewed for plain error under *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). See *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). Defendant has the burden of showing that a plain error affected his substantial rights. *Id*.; *Carines*, 460 Mich at 763.

In addition, although defendant frames this issue in constitutional terms, not all trial errors amount to constitutional due process violations, see *People v Toma*, 462 Mich 281, 296; 613 NW2d 694 (2000), and "[m]erely framing an issue as constitutional does not make it so," *People v Blackmon*, 280 Mich App 253, 261; 761 NW2d 172 (2008). A preserved nonconstitutional evidentiary error is evaluated in light of the untainted evidence to determine whether the defendant has shown that it is more probable than not that a different outcome would have resulted without the error. *Lukity*, 460 Mich at 495-496. An error is outcome determinative if it undermines the reliability of the verdict. *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001). Conversely, a preserved constitutional error is reviewed to determine whether the prosecutor has shown that the error was harmless beyond a reasonable doubt. *Carines*, 460 Mich at 774.

Defendant first argues that the trial court erroneously allowed the prosecutor to present evidence depicting him as a "misogynist." Defendant argues that the prosecutor confused misogyny with sexism, failed to establish that the proffered evidence was probative of his intent, and failed to actually use the evidence in closing argument for the purpose of arguing intent. However, defendant only briefly discusses the May 2007 pretrial hearing at which the trial court addressed the admissibility of this evidence. Defendant also fails to recognize the full scope of the trial court's May 23, 2007, order allowing the evidence.[1] The court's order permitted the prosecution to introduce evidence of defendant's "expressions of hostility towards specified other women" under MRE 404(b). Further, the trial court did not limit the proposed evidence to an intent purpose, but rather allowed it and other specified evidence to be admitted for the

[1] The May 2007 pretrial proceedings were conducted by a different judge. The trial judge announced his intent to abide by the former judge's pretrial rulings.

purpose of showing both "motive and intent." After considering the particular evidence that defendant challenges on appeal, we find no basis for appellate relief.

Initially, we agree with plaintiff that much of the challenged evidence is not implicated by MRE 404(b)(1), which applies to evidence of "other crimes, wrongs, or acts." A statement of general intent does not involve a prior act for purposes of MRE 404(b). *People v Goddard*, 429 Mich 505, 514-515, 523; 418 NW2d 881 (1988); *People v Rushlow*, 179 Mich App 172, 176; 445 NW2d 222 (1989), aff'd 437 Mich 149 (1991). Thus, it is not necessary to analyze the admissibility of defendant's prior "expressions of hostility towards specified other women" under MRE 404(b), inasmuch as such evidence does not involve "other crimes, wrongs, or acts." But this Court may affirm a trial court's evidentiary ruling where it reaches the right result, albeit for the wrong reason. *People v Bauder*, 269 Mich App 174, 187; 712 NW2d 506 (2005).

Under MRE 801(d)(2)(A), a party's own statement that is offered against that party at trial is not inadmissible hearsay. To be admissible, however, a prior statement must be relevant under MRE 401, and must not be more prejudicial than probative under MRE 403. *Goddard*, 429 Mich at 515. MRE 401 provides that relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Under MRE 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]"

As previously indicated, MRE 404(b)(1) governs the admissibility of evidence of a defendant's "other crimes, wrongs, or acts." As a whole, MRE 404(b)(1) reiterates the admissibility of relevant evidence under MRE 402. *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000). To be admissible under MRE 404(b)(1), other-acts evidence must be offered for a purpose other than a character or propensity theory and must be relevant to a material issue of fact at trial. *Sabin*, 463 Mich at 55. The trial court must also determine that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice under MRE 403, although this determination is best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony by the trial court. *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008); *Sabin*, 463 Mich at 56, 71. When evidence is admitted under MRE 404(b)(1), the trial court, upon request, must provide a limiting instruction as provided by MRE 105. *Sabin*, 463 Mich at 56. We note that although defendant refers to MRE 403 in his argument, he substantively presents only a challenge to the relevance of certain testimony presented at trial.

We first address defendant's challenge to the admissibility of a statement he made while in jail, in which he remarked that the prosecutor would be the "next bitch to go off a cliff." Defendant concedes that this statement is possibly probative of his intent. Intent has been defined as "the purpose to use a particular means to effect [a definite] result." *People v Hoffman*, 225 Mich App 103, 106; 570 NW2d 146 (1997) (citations omitted). Unlike second-degree murder, which is regarded as a general intent crime, *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998), first-degree premeditated murder requires that the prosecutor prove that the defendant had an actual intent to kill the victim, *People v Dykhouse*, 418 Mich 488, 496; 345 NW2d 150 (1984). However, although the prosecutor offered defendant's statement for the purpose of showing intent, her substantive argument related more to motive because it was directed at hostility that might provide inducement for defendant to do some act. "[M]otive is

the inducement for doing some act; it gives birth to a purpose." *Sabin*, 463 Mich at 68, quoting *People v Kuhn*, 232 Mich 310, 312; 205 NW 188 (1925). Evidence of hostility can provide powerful evidence of a motive, even if it was not previously acted upon. *Hoffman*, 225 Mich App at 106, 109. Defendant's statement was relevant because it could logically be viewed as an implicit admission that he viewed the victim as a "bitch," whom he sent over the cliff. The statement was also relevant to rebut defendant's prior statements to various individuals after the victim's death that he had a good marriage. The trial court's May 23, 2007, order allowed the prosecutor to show that defendant had made false exculpatory statements. Because only one proper theory is required to admit evidence, *Bauder*, 269 Mich App at 188, defendant has not shown any error stemming from the introduction of this statement.

Defendant also challenges the testimony of four witnesses regarding his demeaning statements about women or his interaction with the witnesses when he worked at Four Winns Boats. Defendant contends that this testimony was evidence of sexism, which was not relevant to his intent. We agree that this testimony was not within the scope of the prosecutor's pretrial motion or the trial court's pretrial ruling. However, defendant did not object to the testimony at trial. Therefore, this claim is unpreserved and our review is limited to plain error affecting defendant's substantial rights. The record discloses that the prosecutor referred to the evidence as being probative of defendant's motive, not his intent. The prosecutor argued that defendant was motivated to kill the victim, in part, out of his extreme disrespect for women and desire not to share any of his financial resources with a woman, specifically the victim, should he and the victim divorce. The prosecutor's arguments, fairly read, do not indicate that she used the evidence for a propensity purpose. But even assuming that the evidence was only marginally relevant to the issue of motive, defendant has not established that his substantial rights were affected by the admission of the evidence, given the overwhelming, properly admitted evidence of his guilt. Accordingly, we find no plain error.[2] See *Jones*, 468 Mich at 355.

Next, defendant argues that evidence regarding the status of his marriage to the victim should have been limited to more recent events, in particular events that arose after his affair with another woman ended and he had reconciled with the victim. Defendant also argues that evidence of his flirtatious conduct toward another woman and his comment to her in 2001 that the reconciliation was not going well should have been excluded. Although defendant contends that these challenges are preserved, he has not shown where they were presented to the trial court. An appellant may not leave it to this Court to search for factual support for an argument. *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). Assuming that defendant's argument is directed at the trial court's May 23, 2007, order allowing evidence of marital discord, without any time limitation, defendant has failed to show an abuse of discretion in the trial court's ruling. Although the age of prior acts can affect their relevancy, *People v Yost*, 278

[2] Defendant also refers to testimony by Amy Schmid and generally asserts that other women should not have been allowed to complain about inappropriate treatment, but does not expand on this claim. An appellant may not "merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Therefore, we decline to further consider this claim.

Mich App 341, 405; 749 NW2d 753 (2008), the evidence here was offered to show marital discord and defendant's unhappiness with his marriage that was not extinguished by his reconciliation with the victim, and was also relevant to rebut various statements by defendant regarding the state of the marriage. The trial court did not abuse its discretion in allowing the prosecutor to establish the long-term nature of the marital discord and defendant's discontent with the marriage in light of these purposes. We also reject defendant's challenge to the admission of letters he wrote to the woman with whom he had an affair. The letters were relevant to show the extent of defendant's unhappiness in his marriage, and the letters were not unduly prejudicial.

Defendant also makes a cursory claim that witnesses should not have been permitted to offer their opinions of how he treated the victim. Defendant suggests that only the victim's opinion was relevant. The record discloses that defendant did not object to the challenged testimony on this ground at trial, leaving this issue unpreserved. The witnesses' opinions were admissible under MRE 701 because they were based on their personal observations of defendant's conduct toward the victim and were relevant to show how defendant treated the victim. Thus, there was no plain error. See *Jones*, 468 Mich at 355. To the extent defendant challenges testimony by the victim's parents regarding their own relationship with and dislike for defendant, we agree that the testimony was irrelevant. It was not directly relevant to establishing how defendant treated the victim or marital discord. We again find, however, that defendant has failed to establish that his substantial rights were affected by the admission of this limited testimony. See *id*. The majority of the witnesses' testimony was relevant to the issue of defendant's relationship with the victim.

Next, defendant argues that the prosecutor improperly introduced evidence regarding his character and personality for the purpose of portraying him as a "jerk," under the guise of introducing evidence to rebut his claim that he suffered a traumatic brain injury. Defendant has failed to show that he objected to any testimony on this basis below, either before or at trial. Accordingly, we review this issue for plain error. One of the issues at trial concerned whether defendant continued to experience the effects of a head injury that he apparently sustained at work in 2002. Defendant had told various witnesses, in the context of explaining inconsistent statements that he gave immediately after the victim's death, that he had memory problems related to a prior head injury. Thus, several of defendant's former coworkers were questioned at trial about their knowledge of defendant's work injury and whether it appeared to affect his work performance. The record discloses that the prosecutor also called several coworkers for a variety of other relevant reasons, including that defendant had made statements to them concerning his relationship with the victim, the status of his marriage, or the circumstances surrounding the victim's death. In this regard, we find no plain error. See *Jones*, 468 Mich at 355.

We are troubled, however, that the prosecutor elicited testimony from some witnesses regarding defendant's personality traits, such as whether defendant was belligerent, had an ego, or was image conscious and self-absorbed. We note that the trial court's May 23, 2007, order expressly allowed the prosecutor to present evidence of "relevant personality traits" to establish motive and intent. Defendant does not address that decision on appeal and, therefore, has failed to properly present the issue to this Court. See *Kelly*, 231 Mich App at 640-641. While "character" evidence includes personality traits, *People v Dobek*, 274 Mich App 58, 101; 732 NW2d 546 (2007), we disagree with the prosecution's suggestion that the trial court's jury

instructions regarding character evidence applied to the evidence regarding defendant's belligerence, ego, and image consciousness. That instruction pertained to defendant's evidence of his good character for "honesty, integrity, and non-violence," and the prosecution witnesses who were presented to rebut that evidence. "Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same," is admissible under MRE 404(a)(1). But the prosecution's authority to rebut a defendant's character is limited to traits introduced by the defendant. *People v Johnson*, 409 Mich 552, 561; 297 NW2d 115 (1980).

The prosecutor did not offer the challenged evidence of defendant's personality traits to rebut his character evidence, but rather to show his motive to select murder over divorce as a way to end his marriage. The evidence of defendant's personality traits arguably lacked logical relevancy to this purpose. Cf. *Sabin*, 463 Mich at 68. But even assuming that the prosecutor should not have been permitted to introduce evidence of defendant's personality traits in the workplace or elsewhere, and that defendant properly presented this issue for appellate consideration, we are satisfied that defendant was not prejudiced by the evidence. Considering the overwhelming untainted evidence that defendant had a motive to kill the victim, he cannot establish that the admission of evidence that he was belligerent, had an ego, or was image conscious and self-absorbed affected his substantial rights. See *Jones*, 468 Mich at 355.

Next, defendant argues that evidence of a break-in at the home of Kelli Brophy was improperly admitted pursuant to MRE 404(b)(1). The record shows that defendant objected to this evidence at trial, but did not state the ground for the objection. To properly preserve an issue for appeal, a timely objection or motion to strike must appear on the record, stating the specific ground for the objection, unless the specific ground is apparent from the context. MRE 103(a)(1); *Bauder*, 269 Mich App at 177. Therefore, we shall treat this issue as unpreserved. Given the absence of any evidence linking defendant to the break-in, we agree that the evidence was not relevant. For the same reason, however, the evidence did not affect defendant's substantial rights. See *Jones*, 468 Mich at 355. Because defendant was not linked to the break-in, he was not prejudiced by the evidence.

III. SUFFICIENCY OF THE EVIDENCE

Defendant argues that he was improperly convicted of first-degree murder because there was insufficient evidence that he killed the victim. An appellate court reviews claims of insufficient evidence de novo. *People v Harrison*, 283 Mich App 374, 377; 768 NW2d 98 (2009). "The test for determining the sufficiency of evidence in a criminal case is whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). "The credibility of witnesses and the weight accorded to evidence are questions for the jury, and any conflict in the evidence must be resolved in the prosecutor's favor." *Harrison*, 283 Mich App at 378.

"To establish first-degree premeditated murder, the prosecutor must prove that the defendant intentionally killed the victim with premeditation and deliberation." *People v Taylor*, 275 Mich App 177, 179; 737 NW2d 790 (2007). Although there was no direct evidence that defendant intentionally caused the victim to fall from the cliff, circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime. See *Nowack*, 462 Mich at 400; *Harrison*, 283 Mich App at 378.

The medical examiner testified that the victim's injuries were equally consistent with an accidental, suicidal, or homicidal event. But evidence that defendant had an opportunity to kill the victim was relevant circumstantial evidence to support the murder charge. See *Unger*, 278 Mich App at 224. Further, evidence was presented that defendant gave numerous conflicting statements regarding the circumstances of the victim's death to friends, acquaintances, law enforcement officers, and others. These conflicting statements were relevant to show a consciousness of guilt. See *id.* at 225-226. There was also evidence that defendant went out of his way to try to explain himself to various individuals and to create explanations for potentially damaging evidence.

Further, defendant's motive for killing the victim was highly relevant because there was evidence that he was the only witness to her death. See *People v Fisher*, 449 Mich 441, 453; 537 NW2d 577 (1995). Evidence of marital discord or disharmony may be used to establish a motive where the accused is a spouse. *Id.*; *Unger*, 278 Mich App at 224; *People v Rotar*, 137 Mich App 540, 548; 357 NW2d 885 (1984). Evidence of financial considerations, such as insurance on the life of the victim, is also evidence of motive. *Unger*, 278 Mich App at 224. In this case, substantial evidence was presented showing that defendant had multiple motives to kill the victim. Evidence was presented that defendant was unhappy in his marriage, and that his reconciliation with the victim after his affair did not cure his unhappiness or stop his demeaning treatment of the victim. Evidence was presented that defendant told a witness in the spring of 2006 that his reconciliation with the victim was the worst decision of his life.

Evidence was also presented that defendant had developed an interest in Kelli Brophy close to the same time he lamented reconciling with the victim. According to Brophy, defendant gave her earrings as a Christmas gift in 2005, and she told defendant that one of her criterion for a relationship was not to have any wife alive. Brophy testified that defendant told her in the "warm weather" months of 2006 that the victim would be dead by Christmas, explaining that she was seeing a doctor because of breast cancer, even though the victim was advised in April 2006 that she had a benign cyst. Brophy also testified that defendant was emphatic that he did not believe in divorce, but at the same time asked her to wait for him. After a memorial service for the victim, defendant showed up unexpectedly at Brophy's home with a flower. There was also evidence that defendant had developed, or attempted to develop, relationships with other women soon after the victim's death. The evidence supported a reasonable inference that defendant was motivated to kill the victim by a desire to be free from an unhappy marriage, without a divorce, so that he could pursue a relationship with Brophy and other women.

The evidence also showed that defendant had a financial motive to kill the victim. The amount of life and accident insurance available because of the victim's death was approximately $243,000. Evidence was also presented that defendant was adamant that he and the victim obtain a will before they left for their vacation, and that, after the victim's death, defendant attempted to falsely portray his desire for a will as being motivated by a desire to protect his children. A jury may infer a consciousness of guilt from lying or deception. *Unger*, 278 Mich App at 227.

Viewing the evidence regarding defendant's opportunity to kill the victim, his consciousness of guilt, his multiple motives to kill the victim, and other circumstantial evidence in the light most favorable to the prosecution, a jury could reasonably find beyond a reasonable doubt that defendant intentionally killed the victim with premeditation and deliberation.

IV. PROSECUTORIAL MISCONDUCT

Next, defendant argues that the prosecutor's conduct deprived him of a fair trial. We disagree. Generally, claims of prosecutorial misconduct involve constitutional issues, which we review de novo. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Any factual findings made by the trial court are reviewed for clear error. *Id.* But "'[r]eview of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice.'" *Unger*, 278 Mich App at 234-235, quoting *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Defendant cites his post-trial motion for a new trial in support of his assertion that his various claims of prosecutorial misconduct are preserved. However, because defendant had an obligation to timely and specifically object to the prosecutor's conduct at trial in order to preserve a given claim, the fact that he may have raised the claim in a motion for a new trial does not render it preserved. In any event, defendant does not specifically challenge the trial court's decision denying his motion for a new trial. We review an unpreserved claim of prosecutorial misconduct for plain error affecting substantial rights. *Carines*, 460 Mich at 763; *Brown*, 279 Mich App at 134. To establish a constitutional error, the defendant must show either a violation of a specific constitutional right or that "error so infected the trial with unfairness as to make the resulting conviction a denial of due process of law." *Blackmon*, 280 Mich App at 262.

"Prosecutorial misconduct issues are decided case by case." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). A prosecutor's remarks are examined in context to determine whether they denied the defendant a fair trial. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995).

First, defendant argues that the prosecutor engaged in misconduct by making repeated references during jury voir dire, opening statement, and closing argument to the September 11, 2001, terrorist attack on the World Trade Center. Defendant contends that the prosecutor's remarks were intended to inflame the jurors' passions and prejudices. However, there was no objection to the challenged remarks on the record, leaving this issue unpreserved. Thus, our review is limited to plain error affecting defendant's substantial rights. See *Brown*, 279 Mich App at 134. Defendant asserts that defense counsel objected during an unrecorded side bar, preserving this issue for review. Regardless, defendant has not established that he was denied a fair trial. See *Bahoda*, 448 Mich at 267.

A prosecutor may not intentionally make inflammatory references that have no apparent justification except to arouse prejudice. *Id*. at 266. In this case, however, the prosecutor's references to the World Trade Center attack during voir dire were made in the context of exploring the concepts of circumstantial evidence and reasonable doubt with the prospective jurors, to determine whether they were capable of understanding and applying those concepts at trial. These were proper subjects of voir dire. See *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994) (opinion of MALLETT, J.) and MCR 6.412(C)(1). While there are certainly less emotionally charged examples that could be used to explain circumstantial evidence and reasonable doubt, there was no apparent attempt by the prosecutor to refer to the World Trade Center attack for an inflammatory purpose. Thus, there was no plain error. See *Brown*, 279 Mich App at 134.

The prosecutor's references to the World Trade Center incident during opening statement and closing argument were improper to the extent that they involved commentary on matters beyond the evidence at trial. Unlike jury voir dire, the purpose of an opening statement is to make a "full and fair statement of the prosecutor's case and the facts the prosecutor intends to prove." MCR 6.414(C). In addition, although a prosecutor has wide latitude during closing argument, she may not make factual statements or arguments that are not supported by the evidence. *Dobek*, 274 Mich App at 66. Here, however, there was no apparent purpose of using the remarks to inflame the passions of the jurors or to compare defendant to terrorists. Examined in context, the remarks were a continuation of the prosecutor's position that the World Trade Center incident was a useful analogy for applying the concept of circumstantial evidence. Further, the trial court instructed the jury before opening statements and again after closing arguments that the attorneys' statements and arguments are not evidence, that it was the trial court's duty to explain the applicable law, and that the jury was "not [to] let sympathy or passion influence your decision." Considering the context in which the prosecutor's remarks were made, and the instructions given by the trial court, the remarks did not affect defendant's substantial rights. See *Brown*, 279 Mich App at 134. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Nonetheless, we must advise against using such an emotionally-charged incident to explain the concepts of circumstantial evidence and reasonable doubt, considering that in most cases, much more innocuous examples or analogies are available.

We also reject defendant's claim that reversal is required because the prosecutor referred to other notorious crimes. In *People v Kelley*, 142 Mich App 671, 673-674; 370 NW2d 321 (1985), this Court found that error requiring reversal occurred when the prosecutor attempted to compare the defendant to John Wayne Gacey. However, a mere reference to a well known crime or criminal does not necessarily require reversal. See, e.g., *People v Ullah*, 216 Mich App 669, 681-682; 550 NW2d 568 (1996); *People v Smith*, 122 Mich App 106, 111-112; 332 NW2d 428 (1982), rev'd on other grounds 417 Mich 1100 (1983); *People v Rowen*, 111 Mich App 76, 82-83; 314 NW2d 526 (1981). As with other claims of misconduct, it is necessary to examine the prosecutor's remarks in context. *Bahoda*, 448 Mich at 267.

In this case, the prosecutor asked prospective jurors during voir dire if they had read a nonfiction book about a murder that occurred in the Upper Peninsula, which involved an offense that was staged to look like a hunting accident (the Moilanen murder), and whether they had noticed that even notorious criminals have supporters. The prosecutor referred to the Moilanen murder again in her closing argument in the context of discussing an example of a case in which the manner of death could not be determined by autopsy. The prosecutor also commented that this case was different from the Moilanen murder because the victim in this case was not killed in a humane manner. The prosecutor could have made this same argument by using the hypothetical of a husband shooting his wife, and then claiming that it was an accident. Regardless, even without an objection, the trial court's jury instructions were sufficient to cure any perceived prejudice. See *Unger*, 278 Mich App at 235; *Schutte*, 240 Mich App at 721-722. Unlike *Kelley*, which was essentially a credibility contest between the victim and the other witnesses, including the defendant, and in which there was a high likelihood that the jury would compare the defendant to Gacey, this case presented much more than a mere credibility contest. *Kelley*, 142 Mich App at 673-674. Considering the overwhelming, properly admitted evidence of defendant's guilt and the trial court's instructions to the jury, any prejudicial implications of

the prosecutor's statements were sufficiently mitigated so as not to deprive defendant of a fair trial.

We also disagree with defendant's argument that reversal is required because the prosecutor referred to the Scott Peterson case during her cross-examination of a defense character witness and cross-examined other defense witnesses regarding whether they were aware that even notorious criminals have supporters. The trial court overruled defense counsel's objections to the prosecutor's questions. "[T]here is nothing improper about a prosecutor's reliance on a state court's evidentiary ruling, *whether or not the ruling itself was correct*." *Blackmon*, 280 Mich App at 269 n 7 (internal quotation marks and citation omitted, emphasis in original). While we must advise against a line of questioning that infuses the trial with references to notorious criminals and could arouse unnecessary prejudice against a defendant, and even if the trial court erred in overruling defendant's objections in this case, the error was harmless because it is not more probable than not that the brief questioning, which did not directly suggest any comparison between defendant and a notorious criminal, affected the outcome of the trial. See *Lukity*, 460 Mich at 495-496.

Defendant next argues that the prosecutor improperly attempted to invoke sympathy for the victim in closing argument. A prosecutor may not appeal to a jury to sympathize with the victim. *Unger*, 278 Mich App at 237. Defendant relies on the prosecutor's comment that the victim was killed in a manner that allowed her to know that she was going to die, and a comment that the victim was betrayed by her own children "who now stand with [defendant] against her." The latter remark was made in the context of addressing the credibility of defendant's children, who testified in support of defendant. A prosecutor may argue from the facts that a witness is not worthy of belief, *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997), and the prosecutor need not state her arguments in the blandest of terms. *Dobek*, 274 Mich App at 66. Even if the prosecutor exceeded the bounds of proper argument by characterizing the children's testimony as an act of betrayal, and by commenting on the manner in which the victim died, the trial court's instruction that the jury was not to let sympathy or passion influence its decision was sufficient to cure any prejudice. The brief remarks did not deprive defendant of a fair trial. Cf. *People v Watson*, 245 Mich App 572, 591-592; 629 NW2d 411 (2001).

Next, defendant argues that the prosecutor engaged in misconduct by improperly referring to his constitutional rights and evidentiary privileges. In support of this claim, defendant first points to a brief line of questioning posed by the prosecutor regarding defendant contacting an attorney while hiding from the police. Defendant treats a remark by the prosecutor when responding to a defense objection to the questioning as a statement to the jury that defendant's act of hiring an attorney implied his guilt. The trial court overruled defendant's objection to the subject matter of the prosecutor's questioning. As previously indicated, it is not improper for a prosecutor to rely on a state court's evidentiary ruling, regardless of whether the ruling was correct. *Blackmon*, 280 Mich App at 269 n 7. Further, "[a] prosecutor's good-faith effort to admit evidence does not constitute misconduct." *Dobek*, 274 Mich App at 70. In this instance, the prosecutor explained that the line of questioning was relevant to establishing consciousness of guilt, the trial court overruled defendant's objection, and the prosecutor relied on the court's ruling.

Further, we find no merit to defendant's newly raised claim that the "consciousness of guilt" purpose of the prosecutor's questions establishes a claim of constitutional error. Although

a prosecutor may not imply that an accused's decision to meet with counsel implies guilt, *Sizemore v Fletcher*, 921 F2d 667, 671 (CA 6, 1990), the record does not support defendant's claim that the prosecutor attempted to argue anything to the jury. The prosecutor's statement was presented to the trial court in response to an objection. The prosecutor suggested that defendant's conduct of hiding from the police during the execution of a search warrant was probative of his consciousness of guilt. Although the prosecutor also elicited that defendant had phoned his attorney, the significance of that testimony related to defendant's state of mind while hiding, namely, that he thought there could be an arrest warrant. Evidence of flight is admissible to support an inference of consciousness of guilt, even where the defendant does not actually flee the scene. *Unger*, 278 Mich App at 226. Therefore, viewing the challenged remark in context, defendant has not shown any error.

Defendant also asserts that the prosecutor improperly infringed on his right to remain silent during her direct examination of Alger County Sheriff's Deputy Steven Blank. Although not mentioned by defendant, this issue was raised in his motion for a mistrial and was thoroughly addressed by the trial court when it denied the motion. The court determined that the challenged line of questioning was directed at defendant's failure to convey information during pre-custody, pre-*Miranda*[3] questioning and, accordingly, did not infringe on defendant's right to remain silent. The trial court correctly determined that commentary on a defendant's pre-arrest, pre-*Miranda* silence is not prohibited. See *People v Shafier*, 483 Mich 205, 212; 768 NW2d 305 (2009). Further, because defendant's discussion of this claim is cursory and he fails to address the trial court's decision, we find no basis for relief. See *Kelly*, 231 Mich App at 640-641.

Next, we find no merit to defendant's claim that remarks by the prosecutor during rebuttal argument infringed on a "pastor/penitent privilege" or defendant's right to remain silent. The record discloses that the prosecutor was responding to defense counsel's characterization of the nature of the police questioning of defendant at the hospital and how that questioning allegedly affected his mental state. The prosecutor disputed defense counsel's characterization of the questioning and noted that defendant had also met with a pastor at the hospital, but had not called the pastor as a witness to substantiate the defense position regarding the nature of the police questioning. Contrary to what defendant asserts, there is nothing about the prosecutor's remarks that can be construed as a comment on defendant's right to remain silent. Although defendant contends that the prosecutor's remark also infringed on a "pastor/penitent privilege," the prosecutor's comment was not directed at any communications between defendant and the pastor, but rather at the fact that the pastor was in a position to substantiate defense counsel's characterization of defendant's behavior and demeanor in response to the police questioning, but had not been called. Examined in context, the prosecutor was attacking the weakness of the defense theory. "A prosecutor may fairly respond to an issue raised by the defendant." *Brown*, 279 Mich App at 135. Where a defendant advances an alternate theory, explicitly or implicitly, the prosecutor may show weaknesses in the theory by pointing out the lack of corroborating witnesses. *People v Fields*, 450 Mich 94, 111-112; 538 NW2d 356 (1995).

[3] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Next, while a prosecutor may not inject issues broader than a defendant's guilt or innocence into a trial, *Dobek*, 274 Mich App at 63-64, defendant has failed to show that the prosecutor's brief remark in closing argument regarding the possibility that her conduct would be flyspecked in a future appeal infringed on his right to counsel or was prejudicial. Further, there was no objection to the remark at trial. Instead, it appears that defense counsel decided to respond to the statement during his own closing argument by explaining that "[t]here are a lot of appeals in criminal cases and few succeed," thereby reinforcing the importance of the jury's verdict. Defendant has not shown a plain error affecting his substantial rights. See *Brown*, 279 Mich App at 134.

Defendant next refers to one evidentiary matter and three aspects of the prosecutor's closing argument that he contends represent improper attacks on his character or witnesses. With respect to the evidentiary matter, the record shows that the trial court overruled defense counsel's relevancy objection when the prosecutor asked defendant's son, Levi, whether he thought it would be appropriate to leave the courtroom when his former girlfriend was called to testify. That witness was ultimately called by the prosecutor to impeach certain testimony provided by Levi. While the prosecutor was apparently suggesting that Levi's presence in the courtroom may influence the testimony of the witness, defendant has not established that the prosecutor intended to personally denigrate Levi or that it is more probable than not that the question affected the outcome of the trial. See *Lukity*, 460 Mich at 495-496.

During closing argument, the prosecutor stated that it would be blasphemous for defendant to lay claim to Christian values. It is impermissible for a prosecutor to appeal to a jury's religious duties at trial to inflame the jury's passions and fears. *People v Rohn*, 98 Mich App 593, 597-598; 296 NW2d 315 (1980), overruled on other grounds in *People v Perry*, 460 Mich 55; 594 NW2d 477 (1999). Further, questions regarding a witness's religious beliefs are generally improper. *Dobek*, 274 Mich App at 73-75. Here, however, the remark did not concern a witness's religious beliefs, but rather defendant's alleged motive. Brophy testified that her involvement with defendant involved discussing the Bible or scripture, and that defendant had told her that he was opposed to divorce. The prosecutor argued that part of defendant's motive for killing the victim was that "[b]eing widowed meant he could maintain his image as a morally and spiritually superior person, one who was opposed to divorce." Further, defendant presented witnesses who testified regarding defendant's religious background and his involvement as a spiritual mentor and leader in Promise Keepers, an organization that was described as promoting men to be good husbands. Examined in this context, the challenged remark was a fair response to the defense evidence. Further, the prosecutor was not required to state her argument in the blandest of terms. See *Dobek*, 274 Mich App at 66.

The two other aspects of closing argument that are challenged by defendant relate to Brophy and whether there was a disconnect between her "professed Christian values" and value for the truth. The prosecutor also remarked that she was "a bottom feeder, so manipulative, greedy and self-absorbed." The thrust of the prosecutor's remarks, which defendant did not object to at trial, was that Brophy was not entirely credible. A prosecutor may argue from the evidence that a witness is not worthy of belief. *Howard*, 226 Mich App at 548. Even if the prosecutor exceeded the bounds of proper argument by commenting on Brophy's "professed Christian values" and by asserting that she is manipulative, defendant has failed to establish that the remarks affected his substantial rights. See *Brown*, 279 Mich App at 134. Further, any

perceived prejudice could have been cured by a cautionary instruction upon timely request. See *Unger*, 278 Mich App at 234-235. Thus, reversal is not required.

Next, defendant argues that the prosecutor engaged in misconduct by mocking the defense and defense counsel. Defendant's principal claim is that the prosecutor improperly referred to a defense computer animation of the victim's fall as a "cartoon" and argued that it showed that "even the defense doesn't believe the defendant." There was no objection to the prosecutor's remarks at trial. A prosecutor may not personally attack defense counsel, *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003), or suggest that defense counsel is intentionally trying to mislead the jury, *Unger*, 278 Mich App at 236. But a prosecutor is free to comment on weaknesses in a defense theory. *Fields*, 450 Mich at 115. Examined in context, the prosecutor's argument was directed at the weakness of the defense evidence. The prosecutor pointed out that the computer animation was inconsistent with one of defendant's last statements describing how the victim fell. While the prosecutor's statement that "the defense doesn't believe the defendant" was inartfully phrased, examined in context, it does not constitute plain error. See *Brown*, 279 Mich App at 134. Further, any perceived prejudice could have been cured by a cautionary instruction upon timely request. See *Unger*, 278 Mich App at 234-235.

Defendant gives only cursory consideration to other alleged improper attacks on defense counsel or defense theories in the prosecutor's opening statement, questioning of witnesses, and closing and rebuttal arguments. For example, defendant asserts that the prosecutor improperly asked several witnesses about their alleged mistreatment by defense counsel, but he does not discuss the alleged improper cross-examination of any particular witness, or the evidentiary issue suggested by the assertion. Defendant also asserts that the prosecutor improperly remarked in her opening statement that the only place the jury would see "gratuitous nastiness" is in defense counsel's cross-examination. Defendant's argument ignores the full context of the remark, however, which was made in the context of addressing police interview techniques.[4] Further, defense counsel had previously advised the prospective jurors during voir dire that they should expect rigorous cross-examination. Although the prosecutor frequently used colorful language when commenting on defense witnesses and defense theories, the use of such language was not improper. See *Dobek*, 274 Mich App at 66. Although we agree that some of the challenged comments were unnecessary, they did not deny defendant a fair trial.

In another cursory argument, defendant asserts that the prosecutor committed misconduct by referring to a defense expert as a "whore" during closing argument. Defendant raised a late objection to the statement, and the trial court instructed the prosecutor not to use such terminology again. While a party may argue the potential financial incentives of a paid expert,[5]

[4] The prosecutor stated, "You'll also learn, still under the heading of police conduct, that modern day interview techniques involve building solidarity with suspects. And the only place that you're going to see the shouting, the sarcasm, the bullying, the – the gratuitous nastiness that you would normally associate with an interrogation is right here in court during the cross examination of our witnesses."

[5] See *Unger*, 278 Mich App at 236-237.

and the prosecutor explained to the jury that her use of the term "whore," in reference to expert witnesses, is not "a gender-based slur" and "simply refers to opinions being for sale," we agree with defendant and the trial court that the prosecutor's choice of words was in bad taste and not befitting of a courtroom setting. Defendant, however, has not established that he was denied a fair trial as a result of the statement. See *Bahoda*, 448 Mich at 267.

Defendant also argues that the prosecutor acted improperly by complaining about court rulings not in her favor. Because defendant did not object to the challenged remarks, our review is limited to plain error affecting his substantial rights. During trial, the prosecutor announced her preferences for a jury view and for the courtroom to be cleared during the playing of certain tapes, and her frustration that certain nonexpert witnesses were not permitted to comment on defendant's behavior. While we agree that the prosecutor's expressed preferences were not relevant and unnecessary, we fail to see how defendant was prejudiced by the comments. Further, the trial court instructed the jury at the beginning of the trial that it was the court's responsibility to "make sure that the trial is run fairly and efficiently, and to make decisions about the evidence." The jury was again instructed before deliberations began that "[i]t is my duty to see that the trial is conducted according to the law" and that the jury "must decide this case based only on the evidence admitted during this trial." These instructions were sufficient to protect defendant's substantial rights. See *Brown*, 279 Mich App at 134.

We reach this same conclusion with respect to defendant's challenge to the prosecutor's remark in closing argument that a witness was limited or "muzzled" concerning what she could say. In addition, while the prosecutor continued by addressing differences between the scope of fact-based and expert witnesses, defendant has failed to explain why the prosecutor's remarks were improper or affected his substantial rights. See *id*. Finally, it was not improper for the prosecutor to refer to the defense computer animation as "fiction, fantasy, a cartoon." The remark was a proper comment on the perceived weakness of a defense theory that was based on a computer-generated exhibit that did not depict actual events. See *Fields*, 450 Mich at 115.

In sum, defendant has not shown that the prosecutor's conduct requires reversal. "Defendant was entitled to a fair trial, not a perfect one." *Abraham*, 256 Mich App at 279. While the prosecutor could have chosen more diplomatic words and refrained from irrelevant and unnecessary remarks at times over the course of a lengthy trial, defendant has not shown any actual errors that, viewed singularly or cumulatively, deprived him of a fair trial. See *Bahoda*, 448 Mich at 292 n 64; *Brown*, 279 Mich App at 146.

V. ATTORNEY-CLIENT PRIVILEGE

Defendant argues that the trial court erred when it granted the prosecutor's pretrial motion to allow an attorney and his assistant to testify at trial concerning their meeting with defendant and the victim regarding defendant's desire to have a will prepared shortly before their vacation to the Upper Peninsula. Defendant argues that the communications were protected by the attorney-client privilege. We disagree.

"Privilege is governed by the common law, except as modified by statute or court rule." MRE 501. The attorney-client privilege attaches to communications made by a client to an attorney, acting as a legal adviser, for the purpose of obtaining legal advice on some right or obligation. *People v Waclawski*, 286 Mich App 634, 693; 780 NW2d 321 (2009), lv pending. It

is also necessary that the communication be confidential. *People v Compeau*, 244 Mich App 595, 597; 625 NW2d 120 (2001). Under the "common-interest doctrine," where multiple clients consult or retain an attorney on a matter of common interest, their communications with the attorney become privileged against third parties. 81 Am Jur 2d, Witnesses, § 368. However, the privilege does not apply "when such communications are for an unlawful purpose, having for their object the commission of a crime." *People v Van Alstine*, 57 Mich 69, 79; 23 NW 594 (1885). It is not necessary that the attorney be aware of the improper purpose. *People v Paasche*, 207 Mich App 698, 708 n 6; 525 NW2d 914 (1994).

In *Paasche*, 207 Mich App at 705, this Court agreed with the reasoning of the United States Supreme Court in *United States v Zolin*, 491 US 554, 562-563; 109 S Ct 2619; 105 L Ed 2d 469 (1989), that where the attorney's advice involves future wrongdoing, the crime-fraud exception applies. Relying on *In re John Doe, Inc*, 13 F3d 633, 637 (CA 2, 1994), this Court concluded that "the prosecution must show that there is a reasonable basis to (1) suspect the perpetration or attempted perpetration of a crime or fraud and (2) that the communications were in furtherance thereof." *Paasche*, 207 Mich App at 707. Further, relying on MRE 104(a),[6] this Court also determined that this "showing must be made without reference to the allegedly privileged material." *Paasche*, 207 Mich App at 707. Although the *Paasche* Court did not provide for an in camera proceeding to assist the trial court in making its preliminary ruling, "*in camera* review does not destroy the privileged nature of the contested communications." *Zolin*, 491 US at 569 (emphasis in original).[7] Further, in camera proceedings are recognized in Michigan as an appropriate means of resolving discovery disputes involving privileged information. See *In re Costs & Attorney Fees*, 250 Mich App 89, 101; 645 NW2d 697 (2002); see also MCR 6.201(C)(2).

In this case, an in camera proceeding was not conducted, but defendant does not contend that one was necessary or should have been held. Indeed, the alleged privileged communications had already been disclosed at defendant's preliminary examination, where attorney Anthony Badovinac, and his legal assistant, Amy Schmid, testified, over defendant's objection, regarding their meeting with defendant and the victim. Their testimony formed the basis for the prosecutor's subsequent motion to admit defendant's communications with the attorney. Although defendant opposed the pretrial motion on the grounds that the privilege was not waived

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[6] MRE 104(a) provides:

> Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the Rules of Evidence except those with respect to privileges.

[7] Under the federal approach, only nonprivileged material may be used to trigger in camera review by the party opposing admission of the material. *Zolin*, 491 US at 574; *In re John Doe, Inc*, 13 F3d at 636. The evidence must be sufficient to support a reasonable belief that an in camera review will yield evidence that establishes the exception. *Zolin*, 491 US at 574-575.

and that the evidence did not involve the furtherance of a crime, he did not argue that the applicability of the crime-fraud exception must be determined without consideration of the alleged privileged communications themselves. Therefore, that portion of defendant's argument is unpreserved. See *Maleski*, 220 Mich App at 523.

Even if we were to agree with defendant that evidence of the communications between counsel and his joint clients, defendant and the victim, may not be considered in determining the applicability of the crime-fraud exception, defendant has failed to demonstrate that his substantial rights were affected. There was ample evidence, independent of defendant's communications with counsel, that defendant sought action (the preparation of a will) in furtherance of a plan to murder the victim and, in particular, that he was taking preparatory steps to kill the victim by satisfying his own financial concerns. The timing of the meeting, combined with the evidence of defendant's statements to Schmid to set up an immediate meeting, and the evidence that after the victim's death, defendant made false statements related to the reason for setting up the meeting, provide a reasonable basis to conclude that the communications were in furtherance of the planned murder.

Further, while defendant preserved his claim regarding whether hiring an attorney to prepare a will could be treated as a furtherance of the crime, because there was a reasonable basis to believe that defendant was preparing to kill the victim, an interest that would not be shared by the victim, the trial court did not err in its determination that the attorney-client privilege was abrogated. Accordingly, we find no basis for disturbing the trial court's decision to allow the evidence.

VI. MATERIAL WITNESS HEARING

Defendant lastly argues that he was deprived of his Sixth Amendment right to counsel at a critical stage of the proceeding when the trial court conducted a hearing, without the presence of defense counsel, regarding Brophy's pretrial arrest on a material witness warrant. Defendant allegedly first learned of this hearing at trial. After he learned of the hearing, he moved for a mistrial based on his lack of notice of the prior hearing, the alleged ex parte communication between the prosecutor and the trial court that occurred at that hearing, and the prosecutor's failure to provide materials concerning the hearing during discovery. Defendant raised similar arguments in a motion for a new trial. However, defendant did not raise the Sixth Amendment constitutional claim either at trial or in his motion for a new trial. Accordingly, the constitutional claim is unpreserved. Thus, defendant must demonstrate a plain error affecting his substantial rights. *Carines*, 460 Mich at 763.

Defendant's argument rests on the presumption of prejudice that arises under *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984), where an accused is denied counsel at a critical stage of the proceeding. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). A critical stage generally denotes a step in a criminal proceeding that has significant consequences for the accused. *Bell v Cone*, 535 US 685, 696; 122 S Ct 1843; 152 L Ed 2d 914 (2002).

The hearing at issue in this case involved Brophy's arrest on a material witness warrant pursuant to MCL 767.35, which provides, in relevant part:

> When it appears to a court of record that a person is a material witness in a criminal case pending in a court in the county and that there is a danger of the loss of testimony of the witness unless the witness furnishes bail or is committed if he or she fails to furnish bail, the court shall require the witness to be brought before the court.

Contrary to what defendant argues, the subject of the bench warrant proceeding involved Brophy and whether she intended to appear at trial. It was not a critical stage of defendant's criminal proceeding. Defendant did not have a due process right to be present, or represented by counsel, at the proceeding. See *People v Parker*, 230 Mich App 677, 689; 584 NW2d 753 (1998) (holding that it was not a denial of the defendant's due process rights when he and his counsel were not allowed to be present for a material witness hearing concerning the witness's fear of testifying and at which no substantive evidence was taken). Thus, we reject defendant's claim the he was deprived of his Sixth Amendment right to counsel.

Further, defendant has not shown that the trial court abused its discretion in denying his motion for a mistrial or motion for a new trial based on the prosecutor's failure to timely disclose the materials relating to the material witness hearing. See *Blackston*, 481 Mich at 460; *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). Although defendant argued that the prosecutor violated *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), because defense counsel was provided with the materials during trial, the material question is whether the untimeliness of the disclosure resulted in any prejudice. See *United States v Burke*, 571 F3d 1048, 1055-1056 (CA 10, 2009). Under *Brady*, a defendant has a due process right to certain information possessed by the prosecutor that "might lead a jury to entertain a reasonable doubt about [his] guilt." *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998).

Defendant did not establish that he was prejudiced by the untimely disclosure of the materials. Although a transcript of the material witness hearing was not made available to defense counsel until after Brophy concluded her testimony at trial, defendant did not request an opportunity to recall Brophy as a witness for further cross-examination regarding that hearing. Further, the transcript and other materials were made available to defense counsel before the questioning of other witnesses involved in the procurement of the bench warrant and Brophy's arrest. Defendant also received the benefit of a jury instruction regarding the lack of notice of the material witness hearing. Because defendant failed to demonstrate that he was prejudiced by the late disclosure, appellate relief is not warranted. See *Blackston*, 481 Mich at 460; *Dennis*, 464 Mich at 572; see also *Bauder*, 269 Mich App at 195.

Affirmed.

/s/ William B. Murphy
/s/ Jane M. Beckering
/s/ Michael J. Kelly