STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 30, 2011
v WALTER BANKS, JR., Defendant-Appellant.	No. 298168 Saginaw Circuit Court LC No. 07-030096-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v MARC BRENNON BANKS, Defendant-Appellant.	No. 298169 Saginaw Circuit Court LC No. 07-030095-FH

Before: WHITBECK, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

In docket number 298168, defendant, Walter Banks, Jr., appeals as of right his jury trial convictions for assaulting, resisting, or obstructing a police officer causing injury, MCL 750.81d(2), and disarming a police officer (non-firearm), MCL 750.479b(1). Walter Banks was sentenced as a second habitual offender, MCL 769.10, to three years' probation with the first year to be served in prison. In docket number 298169, codefendant, Marc Brennon Banks, appeals as of right his jury trial conviction for aiding and abetting Walter Banks in resisting and obstructing a police officer causing injury, MCL 750.81d(2). Marc Banks was sentenced as a third habitual offender, MCL 769.11, to three years' probation, the first year to be served in prison. We affirm, but remand for resentencing with regard to Walter Banks.

I. BASIC FACTS

This case concerns a disturbance at Marc Banks' home early in the morning on September 2, 2007. Buena Vista Police Officer Jamie Villanueva was working alone , when she

responded to a complaint about loud noise at 1801 Ribble Street in Buena Vista Township. At the time, she was carrying a .40 glock firearm, a taser, pepper spray, two pairs of handcuffs, and a baton. Upon arrival at the house in her police vehicle at 3:45 a.m., Villanueva heard loud music and saw young teenagers standing in the yard. Villanueva exited the police car and told the kids to get the homeowner. Eventually, Marc Banks and Walter Banks came out of the rear of the house. Villanueva told them that they needed to turn their music down and the kids needed to remain in the house because of the late hour. Marc Banks replied that he did not need to do anything. Marc Banks and Villanueva began yelling at each other. Seeing neighbors emerging from their homes, Villanueva advised Marc Banks and Walter Banks that they needed to lower their voices because they were making a scene. Villanueva also called for back-up.

Villanueva advised Marc Banks that she was placing him under arrest for a drunk and disorderly charge. Villanueva tried to put the handcuffs on Marc Banks, but she was only able to place one before Marc Banks started putting up a fight. Walter Banks had a cell phone and began recording the arrest of Marc Banks. When Villanueva had one cuff on Marc Banks, codefendant, Nancy Estep,[1] came out of the house and began yelling at Villanueva and telling her not to arrest Marc Banks. Estep swung her arms at Villanueva and tried to pull her away from Marc Banks. Walter Banks joined Estep in trying to prevent the arrest of Marc Banks. Villanueva fought with all three, and she successfully handcuffed Marc Banks. After handcuffing Marc Banks, Villanueva used her taser on him four times because he continued to fight back. Eventually, Villanueva forced Marc Banks to the ground with the taser. Estep and Walter Banks continued swinging their fists at Villanueva, and Walter Banks grabbed Villanueva. Villanueva tried to taser Walter Banks, but inadvertently tasered Estep in the mouth. Afterward, Estep returned to the house. Villanueva used pepper spray on Walter Banks, but he still got hold of the taser and threw it on the ground. Walter Banks also forced Villanueva to the ground by grabbing her around the waist. Eventually, while Villanueva was struggling with Walter Banks, back-up police officers arrived.

Bridgeport Township Police Officer Justin Walker responded to Villanueva's call for help. Upon arrival, Walker witnessed Villanueva and Walter Banks fighting. Walker told Walter Banks to stop or he was going to use a taser on him. Walker proceeded to taser Walter Banks. Walter Banks fell to the ground and refused to follow Walker's instructions. Walker tasered him again. In total, Walker tasered Walter Banks four times.

Saginaw Police Officer Jonathan Brown also responded to Villanueva's call for back-up. Brown arrived at the scene at 3:51 a.m., and he saw Villanueva and Walker attempting to handcuff Walter Banks. Villanueva asked Brown to go into the house and arrest Estep, which he did.

After being tasered by Villanueva, Marc Banks remained on the ground for a while. Eventually, while Villanueva and Walker were attempting "to subdue" Walter Banks, Marc

[1] Estep was tried with Walter Banks and Marc Banks and was convicted of assaulting, resisting or obstructing a police officer. There is no indication that she filed an appeal in her case.

Banks stood up, told Villanueva to come and catch him, and ran off. As he was running, Marc Banks tripped and fell on his face. To control Marc Banks, Brown tasered him.

As a result of the struggle with Walter Banks and Marc Banks, Villanueva suffered neck, back, and elbow "abrasions" and a bruise on her hip. She obtained medical treatment at Saint Mary's Hospital. She was unable to work for a month.

Walter Banks' and Marc Banks' descriptions of what occurred early in the morning on September 2, 2007, vary significantly from the police officers' accounts. Walter Banks testified that in May 2007, he had an accident in which all the tendons in his left wrist were severed, making it impossible for him to do the things Villanueva ascribed to him in the morning of September 2, 2007. He denied taking the taser from Villanueva, grabbing her, or wrestling with her. Similarly, Marc Banks claimed that he did not provoke Villanueva and, upon his arrest, he complied with Villanueva's commands by putting his hands behind his back. According to Marc Banks, Villanueva tasered him four times even though he was in handcuffs and was not fighting back. Marc Banks further denied telling Villanueva that she should try and catch him when he was running away. Mariah Banks, Marc Banks' daughter, also testified that Marc Banks complied with Villanueva's demands. She claimed that Marc Banks never raised his voice or yelled profanities at Villanueva. She also testified that Walter Banks did not wrestle with Villanueva.

Marc Banks and Walter Banks were convicted as charged. Marc Banks and Walter Banks now appeal.

II. DOCKET NUMBER 298169

A. SUFFICIENCY OF THE EVIDENCE

Marc Banks argues on appeal that there was insufficient evidence to convict him of aiding and abetting Walter Banks into resisting and obstructing a police officer. When analyzing a claim based on insufficient evidence, we review the record de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We view the evidence "in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *Id.* (internal quotation marks omitted).

The elements of the offense of assaulting, resisting or obstructing a police officer are: "(1) the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered a police officer, and (2) the defendant knew or had reason to know that the person that the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered was a police officer performing his duties." *People v Corr*, 287 Mich App 499, 502; 788 NW2d 860 (2010). Aiding and abetting is not a separate offense, but is a theory which "permits the imposition of vicarious liability on accomplices." *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006); see MCL 767.39. To establish aiding and abetting, a prosecutor must show that:

> (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave the aid and encouragement. [*People v Carines*, 460 Mich 750, 757-758; 597 NW2d 130 (1999).]

Marc Banks contends that the prosecution presented insufficient evidence that he performed acts or gave encouragement that assisted the commission of the crime and that he intended the commission of the crime when giving the aid and encouragement. We disagree. Marc Banks is correct that at the time Walter Banks and Villanueva were wrestling, he was handcuffed on the ground. However, viewing the evidence in the light most favorable to the prosecution, it is clear that Marc Banks aided and abetted Walter Banks when he called out to Villanueva while she was still attempting to control Walter Banks and told her to come and get him and then ran off. Such an act by Marc Banks allowed Walter Banks to further obstruct Villanueva from her job and showed intent to aid Walter Banks. As a result, there was sufficient evidence to convict Marc Banks of aiding and abetting Walter Banks into resisting and obstructing a police officer.

B. SPEEDY TRIAL

Marc Banks also asserts on appeal that he was denied his right to a speedy trial. We disagree. We review unpreserved claims of constitutional error for plain error affecting substantial rights. *People v Rodriguez*, 251 Mich App 10, 27; 650 NW2d 96 (2002).

Both the United States and the Michigan Constitutions guarantee a defendant the right to a speedy trial. US Const, Am VI; Const 1963, art 1, § 20. The right is also protected by statute and court rule. MCL 768.1; MCR 6.004(A). In determining whether a defendant has been denied his right to a speedy trial, a court must consider: "(1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) the prejudice to the defendant." *People v Williams*, 475 Mich 245, 261-262; 716 NW2d 208 (2006).

In determining whether a defendant has been denied his right to a speedy trial, the pertinent period commences on the date of the defendant's arrest. *Id.* at 261. If the total delay was under 18 months, the burden is on the defendant to prove that he suffered prejudice, while a delay which exceeds 18 months is presumed to be prejudicial, and the burden is on the prosecutor to rebut that presumption. *People v Waclawski*, 286 Mich App 634, 665; 780 NW2d 321 (2009). In this case, Marc Banks was arrested on September 2, 2007, but his trial did not begin until March 18, 2010. The delay between Marc Banks' arrest and the first day of his trial was more than 30 months. As a result, the prosecution must rebut the presumption that Marc Banks was not prejudiced as a result of the delay.

In determining whether a delay violated a defendant's right to a speedy trial, when assessing the reasons for the delay, a court must examine whether each period of delay is attributable to the prosecutor or to the defendant. *Id.* at 666. Unexplained delays, scheduling delays and docket congestion are charged against the prosecutor, but scheduling and congestion delays inherent in the court system are assigned only minimal weight when deciding whether a

violation of a speedy trial right occurred. *Id.* In this case, the majority of the delay occurred as a result of docket congestion and scheduling delays. Other delay occurred because one of Marc Banks' codefendants needed surgery. None of the delay occurred as a result of Marc Banks. While the majority of the delay is attributable to the prosecution, we give it only minimal weight in determining if there was a violation of the right to speedy trial because it primarily occurred as a result of docket congestion and scheduling delays.

A defendant's failure to assert his right to a speedy trial in a timely manner weighs against a finding that he was denied a speedy trial. *People v Wickham*, 200 Mich App 106, 112; 503 NW2d 701 (1993). In this case, Marc Banks concedes that he did not assert his right to a speedy trial before the trial court and, therefore, this factor weighs against finding a violation of the right to a speedy trial.

Two types of prejudice arise from delay in commencement of trial: prejudice to the defendant's person and prejudice to the defense. *Williams*, 475 Mich at 264. "Prejudice to the defense is the more serious concern." *Id.* In this case, there is no indication that Marc Banks suffered any prejudice, either to his person or to his defense, as a result of the delay. Marc Banks was on bond during the period between his arrest and his trial and so did not suffer prejudice to his person. Moreover, based on the record, there is no indication that the defense presented by Marc Banks was in any way affected by the delay. Marc Banks argues that the prosecution used the delay to question the memories of defense witnesses and to argue that they had time to get their stories straight. There is no evidence, however, that this affected the outcome of the case. Moreover, such arguments could also have been made by defendants with regard to the testimony of the police officers. Further, there is no evidence that key witnesses became unavailable as a result of the delay. Even though the burden was on the prosecution to rebut the presumption of prejudice, we conclude that there was no evidence whatsoever of prejudice and, as a result, Marc Banks was not denied his right to a speedy trial.

III. DOCKET NUMBER 298168

A. PROSECUTORIAL MISCONDUCT

Walter Banks contends that he is entitled to a new trial as a result of prosecutorial misconduct. We disagree. "Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting the defendant's substantial rights." *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003). To show plain error affecting the defendant's substantial rights, the defendant must prove prejudice occurred, meaning that "the error must have affected the outcome of the lower court proceedings." *Id.*

Prosecutors are afforded "great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (internal quotation marks omitted). They may argue the evidence and any reasonable inferences from the evidence related to their theory of the case. *Id.* A prosecutor, however, may not vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness's truthfulness. *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009). A prosecutor's remarks should be evaluated in context, in light of defense counsel's arguments and the relationship these comments bear to the admitted evidence. *Id.*

Walter Banks contends that the following comments by the prosecutor were inappropriate because he improperly told the jury that defendants were lying:

> To believe what they've told, ladies and gentlemen, you have to believe that Officer Villanueva goes over there and decides here's a couple of guys I'll pick a fight with, what the heck, I got no backup, well, I'm a police officer; that's what you would have to believe.
>
> And then you'd have to continue to believe that all the rest of the officers also get in on this. Hey, what the heck? Let's go gang up. She's already got the situation started. We will go there. We'll use our tasers, too.
>
> Bridgeport, Saginaw County Sheriff's Department, one of her colleagues, Shawntina Austin, also with the Buena Vista Township Police Department, racing from Tuscola County to get there because, boy, this is going to be fun. We will all get in on this. That's what you would have to believe if Marc and Walter Banks are to be believed.
>
> Ladies and gentlemen, that makes no sense at all. It makes no sense that Officer Villanueva had nothing better to do than to go pick a fight with a couple of men.

Walter Banks also argues that the prosecutor improperly vouched for the credibility of the police officers. The prosecutor further argued to the jury in rebuttal:

> Did the police lie? I would never stand here and tell you that police officers are different from everybody else, that they never lie, but if they lied in this situation, here's what had to have happened. [sic]
>
> Officer Villanueva had to go there to pick a fight with a couple of guys alone without backup. You then had to get different departments to go in on this with her, so somehow the sheriff's department's got to decide, well, we'll go along with Buena Vista on this and back up this lie. Bridgeport Township has to get involved; we are going to back it up, too. No, that doesn't make any sense, ladies and gentlemen. It makes no sense whatsoever.

We conclude that these remarks by the prosecutor were not improper. The prosecutor was not indicating to the jury that he had some special knowledge that defendants were lying and the police officers were telling the truth. Instead, the prosecutor argued the evidence in the record and the inferences that were required if defendants' testimony was to be believed. Such arguments were proper, and the prosecutor did not engage in misconduct.

Walter Banks further contends that the prosecutor engaged in misconduct by shifting the burden of proof from the prosecution to defendants. A prosecutor may not imply in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence, or comment on the defendant's failure to present evidence; such arguments impermissibly shift the burden of proof. *People v Fyda*, 288 Mich App 446, 463-464; 793 NW2d 712 (2010). The prosecutor stated in this case:

> If you really think there's something on [the cell phone], if he really thought there was something that would help out, then he could provide the code to it. That's within his control.

Taken alone, this statement might have been improper. However, taken in context, these remarks were a proper response to the closing argument made by counsel for Walter Banks, who stated:

> Now, let's add another dimension to this case, the cell phone. Mr. Banks was holding his cell phone in the good hand, which is the right hand here. We got the bad hand, which is the left hand. Now, you saw the taser video, and he was clearly holding the phone for dear life with that good hand.
>
> * * *
>
> Now, it's very convenient that Officer Villanueva's taser has no camera until Officer Walker gets there and begins tasing Mr. Banks, there would be no account of this incident, but here we go again. The camera is located on the cell phone that Mr. Banks is holding in the good hand, and he makes an announcement that I'm recording this incident while his brother's being arrested.
>
> If you're engaged in so many activities that you don't want people to know about, you certainly don't want them to have an opportunity to see it for themselves. If you come there with an attitude already and then you're confronted with the issue of being videotaped, hmm, you're going to be instructed, and we talked about this in voir dire, that a police officer's testimony is to be evaluated in the same manner that anybody else's testimony is evaluated. Simple because that person is a police officer, that doesn't give that testimony any more value or weight.

Walter Banks' counsel is clearly arguing that the cell phone video taken by Walter Banks contained exculpatory evidence and, for that reason, the prosecution and the police did not want the jury to see it. It was proper for the prosecutor to highlight, in response to counsel's argument, that Walter Banks, and not the police, had control over the access codes to the phone. The prosecutor's rebuttal argument did not improperly shift the burden to defendants; it merely responded to counsel's argument.

Finally, Walter Banks contends that the prosecutor mischaracterized the testimony. "A prosecutor may not make a statement of fact to the jury which is unsupported by evidence[.]" *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). In this case, Walter Banks argues that following statements were not supported by the evidence:

> Walter Banks said he never touched anybody. Well, that's not what the other officers said when they arrived. Even they said they saw Walter Banks engaged – literally engaged with Officer Villanueva, that they actually tumbled off this stoop or this little porch, whatever you want to call it, on the ground.

Walter Banks concedes that at least one officer, Walker, testified that when he arrived at the scene he saw Walter Banks and Villanueva wrestling. However, no other officers besides Villanueva testified that they saw Walter Banks and Villanueva physically engaged. The prosecutor's argument, therefore, was only partially supported by the record. However, such a minor error did not amount to plain error affecting Walter Banks' substantial rights.

Walter Banks further testified that the following remarks were not supported by the evidence in the record:

> Here's Miss Estep now grabbing on her arm. Now, at least she has enough sense at some point, I guess, to back off and go back to the house. There doesn't seem to be any dispute about all of that, although [Estep] seemed to claim she was never outside. You can believe that or not.

Walter Banks contends that this was a misstatement of the evidence because Estep did not testify and could not have claimed that she remained in the house. Walter Banks is correct that Estep did not testify, but Estep's counsel made statements and asked questions on her behalf claiming that Estep never left the house. During his opening statement, Estep's counsel stated, "It may surprise you because I believe the testimony is going to show that my client, Ms. Nancy Estep, never left the house. Multiple witnesses may, in fact, testify to that." Estep's counsel asked Walter Banks if he ever saw Estep outside the house and Walter Banks testified that he did not recall seeing her outside the house. Estep's counsel also asked Mariah Banks if she saw Estep outside of the house that night and Mariah Banks testified in the negative. The prosecutor's remark was, therefore, proper based on the statements and questions of Estep's counsel.

Even if the statements of the prosecutor were improper, they were cured by the trial court's instructions to the jury. An improper argument by a prosecutor may be cured by a cautionary instruction that the arguments of counsel are not evidence. See *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). In this case, the trial court instructed the jury that it was to decide the facts based on the evidence and "[t]he lawyers' statement and arguments are not evidence. They are only meant to help you understand the evidence and each side's legal theories." The instruction cured any harm caused by the prosecutor's statements.

B. SENTENCING

Walter Banks also argues that the trial court erred when it failed to respond to his objections to the presentence investigation report (PSIR). We agree. A trial court's response to a claim of inaccuracy in a presentence report is reviewed for an abuse of discretion. *People v Lucey*, 287 Mich App 267, 275; 787 NW2d 133 (2010).

A sentencing court must respond to challenges to the accuracy of information in a presentence report, but it has wide latitude in responding to these challenges. *Id.* "The trial court may determine that the challenged information is accurate, accept the defendant's version, or disregard the challenged information as irrelevant." *Id.* If the court chooses to disregard the challenged information, it must indicate on the record that it did not consider the information when fashioning the sentence, and must strike the information from the report. *Id.*

In this case, Walter Banks objected to a criminal conviction that appeared in the PSIR. Walter Banks stated that the charge against him was dismissed and the charge was for conspiracy to commit larceny and was not a drinking and driving offense. The trial court did not address Walter Banks' objection and did not explicitly state whether it considered the criminal conviction at issue when it sentenced Walter Banks. Because the trial court did not respond to the objection and indicate whether it was considering it, we remand this case for resentencing of Walter Banks to consider his previous objections.[2]

IV. ASSISTANCE OF COUNSEL

Marc Banks and Walter Banks both argue that they were denied the effective assistance of counsel. We disagree. Whether a defendant has been denied the effective assistance of counsel presents a mixed question of fact and constitutional law. *Seals*, 285 Mich App at 17. Findings of fact are reviewed for clear error, but the rulings on questions of law are reviewed de novo. *Id.* As defendants did not establish a testimonial record regarding their ineffective assistance of counsel claims, our review is limited to mistakes apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

Effective assistance of counsel is presumed, and the defendant has the burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

A. FAILURE TO OBTAIN CELL PHONE VIDEO

Marc Banks and Walter Banks contend that counsel was ineffective for failing to investigate and obtain the video recording that Walter Banks captured on his cell phone. We disagree. The failure to make a reasonable investigation can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005). However, this Court will not substitute its judgment for that of counsel regarding matters of strategy, and there is a presumption that defense attorney's actions were based on reasonable trial strategy. *Cline*, 276 Mich App at 637.

In this case, neither Walter Banks nor Marc Banks has overcome the presumption that defense counsels' failure to obtain the video from the police was a matter of trial strategy. Although Walter Banks and Marc Banks testified that Villanueva acted without instigation, there was significant evidence from the testimony of Villanueva that Walter Banks and Marc Banks

[2] Because we conclude that the trial court erred in failing to respond to Walter Banks' objection and the case should be remanded for resentencing, we need not reach Walter Banks' argument that his counsel was ineffective for failing to demand a response from the trial court to the objection in the PSIR.

were extremely combative towards Villanueva and physically assaulted her. The cell phone video may not have corroborated Walter Banks and Marc Banks' version of events, but, instead, might have supported Villanueva's account. As a result, the video could have been used by the prosecution against Walter Banks and Marc Banks, and, for that reason, it was reasonable trial strategy for defense counsel not to pursue the video. Walter Banks and Marc Banks were not denied the effective assistance of counsel by the failure of their defense counsel to obtain the video.

B. FAILURE TO REQUEST A JURY INSTRUCTION

Marc Banks further posits that he was denied the effective assistance of counsel by counsel's failure to request a jury instruction concerning the cell phone evidence. According to Marc Banks, defense counsel should have requested an instruction that the jury was allowed to infer that the video was unfavorable to the prosecution given the prosecution's failure to present the video as evidence. We disagree. "Jury instructions must include all the elements of the offenses charged against the defendant and any material issues, defenses, and theories that are supported by the evidence." *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007).

In this case, there is no indication that the instruction Marc Banks believes should have been requested was supported by the evidence. Police Detective Greg Klecker testified that he was never given access codes to view the video on the cell phone and never saw the video from the cell phone. As a result, there was no indication that the prosecution was not showing the video because the video evidence was unfavorable to it. In fact, if the video was favorable to defendants and unfavorable to the prosecution and the prosecution knew that, the prosecution would have violated its duty to disclose exculpatory evidence by not providing that evidence to the defense. See *People v Fink*, 456 Mich 449, 453-454; 574 NW2d 28 (1998) ("Under due process principles, the prosecution is obligated to disclose evidence that is both favorable to the defendant and material to the determination of guilt or punishment"). The instruction was not supported by the evidence. Giving the instruction would have implied that the prosecution acted illegally. Moreover, it would have been futile for defense counsel to have requested the instruction. Accordingly, Marc Banks' argument that he was denied the effective assistance of counsel by counsel's failure to request this instruction is without merit.

C. FAILURE TO OBJECT TO PROSECUTORIAL MISCONDUCT

Walter Banks posits that he was denied the effective assistance of counsel by counsel's failure to object to the prosecutor's remarks discussed in section III.A. *supra*. We disagree. Counsel is not ineffective by failing to advance a meritless argument or raise a futile objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). In this case, the prosecutor did not engage in prosecutorial misconduct and, as a result, defense counsel was not ineffective for failing to object to the prosecutorial misconduct.

D. MISCELLANEOUS TRIAL ERRORS

Walter Banks further argues that the defense counsel was ineffective for failing to demand a separate trial from codefendants, Marc Banks and Estep, and for failing to subpoena Walter Banks' eyewitness. Walter Banks has failed to demonstrate how he was prejudiced by

the lack of a separate trial. Moreover, Walter Banks has provided no information about the alleged eyewitness. Based on the evidence in the record, we conclude that Walter Banks was not denied the effective assistance of counsel on these grounds.

Affirmed, but remand for resentencing. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly