STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 11, 2007
v	No. 256187 Wayne Circuit Court
ANTHONY EDWARD CIAVONE, Defendant-Appellant.	LC No. 03-014160-01

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

PER CURIAM.

Defendant appeals as of right his jury convictions of first-degree premeditated murder, MCL 750.316(1)(a), and felony murder, MCL 750.316(1)(b), and the trial court's sentence of life imprisonment for each of the two convictions. We remand to the trial court to amend the order of conviction and sentence to reflect one conviction of first-degree murder supported by two theories—felony murder and premeditated murder, and, *as thereby modified*, affirm defendant's conviction and single sentence for first-degree murder.

Defendant and co-defendant William Hill were tried together, to separate juries, for the murder of Jeannette Zummo, who was found dead in her Palmer Park home in Detroit on December 19, 1999. The cause of death was manual strangulation. Zummo was 85 years old at the time, kept large amounts of cash hidden throughout her house, and had no children. A home health care aid, Martha Chenney, attended to Zummo three days a week, and David Holt, a friend whom Zummo had appointed as one of her two trustees, visited Zummo regularly.

Frank Hodges, a handyman that had worked in Zummo's neighborhood, was arrested about a year after Zummo's murder, and made a statement to the police confessing to having robbed and murdered Zummo. However, Hodges was tried, presented an alibi defense, and was acquitted of all charges.

In April 2004, defendant and co-defendant Hill were tried for Zummo's murder. There was no physical evidence tying defendant to the murder, and no witness placing him at the murder scene. The prosecution's case rested largely on the testimony of three associates of defendant and co-defendant Hill, Hadel, Lane, and Salaytah, all of whom, along with Hill, were caught red-handed robbing a cigarette store in Macomb County in 2002. After being arrested for that robbery, Hadel, Lane and Salaytah came forward and informed authorities that defendant

and Hill had robbed and killed Zummo. The prosecution also called a jail-house informant, Joseph Addelia, who testified that he and defendant had been cellmates in Wayne County jail for a few weeks in August 2003, and that defendant told him he and Hill robbed and murdered Zummo. Addelia had served time for bank robbery and was being held in jail for unarmed bank robbery at the time. Addelia testified that he had his mother contact the Detroit Police Homicide division "out of repulsion," and that he got nothing in return for his testimony, either from the Wayne County prosecutor, Detroit police, or the federal authorities.

Defense counsel in opening statement cast suspicion for Zummo's murder on Hodges and on David Holt, noting that Holt was a *revocable* trustee of Zummo's, that Holt and Zummo had argued about money shortly before her murder, and that Holt inherited Zummo's house and several hundred thousand dollars from her. Defense counsel stated that Hadel, Lane and Salaytah were thieves, did not come forward until years after the murder when they were arrested for the cigarette store robbery, and that they believed defendant had tipped the police off about the Macomb County robbery, thus they had reason to concoct testimony against defendant.

At trial, Holt testified that Zummo's house needed new roofing, that he had recommended TLC Roofing, and that TLC had called him with an estimate for the job. Defendant was the owner of TLC Roofing.

Hadel, Lane and Salaytah testified at trial that they had known defendant and Hill for years, and that defendant had told them that he and Hill robbed Zummo and that Hill killed her, and that Hill had told them he and defendant had robbed Zummo and defendant killed her. Lane also testified that defendant asked him one evening to be dropped off in the Palmer Park area because he was owed money by a man he had done work for. Hadel testified that defendant called him very late one night and asked that he pick him up at Seven Mile and Woodward, which is near Palmer Park, and that when he picked defendant up, defendant said that they had to pick Hill up down the road. Hadel testified that Hill ran out of some bushes, carrying a bag that he later learned contained tens of thousands of dollars. Lane testified that he heard after he was convicted of the Macomb County robbery that defendant or defendant's wife had tipped off the authorities about that robbery. Neither defendant nor co-defendant Hill testified.

The jury convicted defendant of first-degree murder and felony murder, and co-defendant Hill of second-degree murder and felony murder. The trial court denied defendant's motion for directed verdict, and his motion for JNOV or for a new trial. The court sentenced defendant to *two* terms of life in prison. On defendant's appeal, this Court remanded for an evidentiary hearing and a decision on whether defendant should be granted a new trial. On remand, the trial court again denied defendant's motion for new trial.

I

Defendant asserts that Investigator Barbara Simon's testimony regarding Hodges' earlier trial and acquittal was both hearsay and testimonial, and thus violated his right of confrontation. A defendant has the right to be confronted with the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20; *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004). *Crawford* held that testimonial statements are inadmissible under the Confrontation Clause unless the declarant was unavailable and the defendant had a prior opportunity for adequate cross-examination. *Crawford*, 541 US at 53-56. The term "testimonial" was held to

apply "at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* at 68.

Although defendant contends that he objected below on grounds of hearsay, and "the right to cross-examination," as well as "to any reference to the outcome of [Hodges'] trial," the record indicates defense counsel timely objected only on hearsay and relevance grounds. An objection on hearsay grounds does not preserve a Confrontation Clause challenge for appeal. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003). Thus, defendant's unpreserved claim of constitutional error is reviewed for plain error that affected defendant's substantial rights, i.e., there must be a showing that the error affected that outcome. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999); *Coy*, *supra* at 12. "The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines*, *supra* at 774.

A

Defendant asserts that the trial court erred in concluding that Simon's testimony regarding the alibi witnesses was not hearsay. He argues that the fact that Hodges' defense witnesses offered alibi testimony is hearsay, since it was offered for the truth of the matter asserted (i.e., that he offered a defense, that the defense was alibi), and that it is prior testimony—even if in summary form.

The prosecution argues that the only reason the Hodges case was even relevant was that, over the prosecutor's objection, defense counsel introduced Hodges' confession. The prosecution notes that the admission of Hodges' confession was an abuse of discretion under MRE 804(b)(3)[1], given that Hodges' unavailability had not been established and there were no corroborating circumstances clearly indicating the trustworthiness of the alleged confession, and that, in light of this abuse of discretion, it (the prosecution) sought to introduce the facts of Hodges' alibi defense and that he was not convicted through Investigator Simon, to rebut the implication that Hodges was the real killer or that the prosecutor wanted to convict both

[1] MRE 804 governs hearsay exceptions where the declarant is unavailable, and provides in pertinent part:

> (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (3) *Statement Against Interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

defendant and Hodges of the same crime. The prosecution contends that the fact that Hodges was not convicted tended to show the jury disbelieved his confession, and that a conviction in defendant's case would not result in two men being punished for the same crime.

B

Before trial, defendant moved for the prosecution to produce Investigator Simon so that the defense could introduce Hodges' confession through Simon. The trial court granted the motion, over the prosecutor's objection under MRE 804(b)(3), see n 1, *supra*. Although no explanation appears for the court's failure to address the issue of Hodges' availability, any error in the admission of his confession through Simon would not excuse a violation of defendant's confrontation rights.

During trial but before Simon testified, the prosecution renewed its objection to defendant calling Simon to put forward Hodges' confession. There was extensive discussion on the record regarding what the prosecution would be permitted to ask Simon on cross-examination. The trial court ruled in response to defendant's objection on relevance and hearsay grounds that the testimony the prosecution planned to elicit from Simon regarding Hodges' having presented alibi witnesses and not having been convicted was not hearsay. Defendant then called Investigator Simon and, on direct examination, had Simon read Hodges' confession to the jury. On cross-examination, the prosecutor elicited the following from Investigator Simon:

Q. Now you were present when Mr. Hodge [sic] was on trial; am I not correct?

A. That's correct.

Q. And Mr. Hodge [sic] had an attorney, correct?

A. Correct.

Q. Presented a defense did he not?

A. Yes.

Q. And he called several witnesses—

MR. SCHULMAN [*defendant's counsel*]: Objection. She can't testify to what other witnesses what they said.

MS. WALKER [*counsel for the prosecution*]: I'm not doing that.

Q. He presented several alibi witnesses did he not.

A. Yes.

Q. Mr. Hodge [sic] was not convicted was he yes or no?

A. No.

C

Simon's testimony regarding Hodges' confession was admitted under MRE 804, as the statement against interest of an unavailable witness. See n 1, *supra*. MRE 806 states:

> When a hearsay statement . . . has been admitted into evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. . . .

Hodges' confession was offered to show that he was the murderer. Evidence that he presented an alibi defense at his trial was admissible under MRE 806 as conduct that was inconsistent with his declaration of guilt. Whether Simon's additional testimony was admissible, or the phrasing of the questions and answers sufficiently tailored to comply with MRE 806, are questions we need not address because it is clear that the additional testimony did not affect the outcome of the trial. The prosecutor could properly elicit from Simon that Hodges presented an alibi defense, the additional information that he did so through witnesses could not have influenced the outcome. Nor can we conclude that the outcome of the trial was affected by the jury's knowledge that Hodges' jury did not find him guilty beyond a reasonable doubt. The prosecution's case clearly rested on the credibility of the witnesses who testified that defendant admitted being involved in the robbery and murder. Simon's testimony regarding Hodges' trial was not dispositive. As defendant's objection on hearsay grounds did not preserve a Confrontation Clause challenge for appeal, *Coy*, *supra*, 258 Mich App at 12, our review is for plain error that affected defendant's substantial rights, i.e., there must be a showing that the error affected the outcome. *Carines*, *supra*, 460 Mich at 764-765. No such showing has been made, we therefore find no plain error.

II

Defendant also asserts that his Sixth Amendment rights were violated through the trial court's admission of non-testifying co-defendant Hill's alleged statements to their "friends" Hadel, Lane and Salaytah. Review of this preserved claim of non-structural constitutional error is to determine whether the beneficiary of the error has established that it is harmless beyond a reasonable doubt. *Carines*, *supra* at 774.[2]

Defendant asserts that although co-defendant Hill's statements to Hadel, Lane and Salaytah are not testimonial under *Crawford*, *supra*, admission of these statements still implicate his Sixth Amendment right of confrontation under pre-*Crawford* precedent, specifically *Ohio v*

[2] The prosecution contends review of this evidentiary ruling is for an abuse of discretion, since co-defendant Hill's statements to his friends are nontestimonial hearsay and not violative of the Confrontation Clause. Given the analysis provided below, which includes both 804(b)(3) and Confrontation Clause concerns, we disagree.

Roberts, 448 US 56; 100 S Ct 2531; 65 L Ed 2d 597 (1980), and its progeny. *Roberts* held that a statement is admissible if it falls under a firmly rooted hearsay exception or bears particularized guarantees of trustworthiness. Defendant maintains that statements against penal interest are not a firmly rooted hearsay exception and that statements Hill made implicating defendant lack the necessary guarantees of trustworthiness.

The prosecution asserts that co-defendant Hill volunteered to three of defendant's friends that the two had robbed and killed an old lady, and that because these statements were not made to the police or in the context of a judicial proceeding, they are nontestimonial and thus not barred by *Crawford*, and are admissible under MRE 804(b)(3). The prosecution notes that most of the incriminating statements introduced at trial came from defendant himself, but that any additional information Hill provided was admissible under *People v Poole*, 444 Mich 151; 506 NW2d 505 (1993), which, the prosecution asserts is our Supreme Court's application of *Roberts* to a case in which a co-defendant's statements are admitted at trial, whereas *Roberts* did not address that particular question.[3]

Poole, *supra*, which is not mentioned by defendant, is on point, as it addressed the issue "whether a declarant's noncustodial, out-of-court, unsworn-to statement, voluntarily made at the declarant's initiation to someone other than a law enforcement officer, inculpating the declarant and an accomplice in criminal activity, can be introduced as substantive evidence at trial pursuant to MRE 804(b)(3)." *Poole*, 444 Mich at 153-154. The *Poole* Court answered in the affirmative:

> We conclude . . .that where, as here, the declarant's inculpation of an accomplice is made in the context of a narrative of events, at the declarant's initiative without any prompting or inquiry, that as a whole is clearly against the declarant's penal interest and as such is reliable, the whole statement -- including portions that inculpate another -- is admissible as substantive evidence at trial pursuant to MRE 804(b)(3). [444 Mich at 161.]

The *Poole* Court then addressed whether admission of the statement violated the defendant's Sixth Amendment right of confrontation, noting that because the majority opinion in *Roberts* declined to rule that the exception for statements against penal interest is a firmly rooted hearsay exception, "[c]ourts must thus decide case by case whether a statement against penal interest that also inculpates an accomplice bears sufficient indicia of reliability to provide the trier of fact a satisfactory basis for evaluating the truth of the statement, whether it has particularized guarantees of trustworthiness sufficient to satisfy Confrontation Clause concerns." 444 Mich at 163-164, citations omitted.

---

[3] The prosecution is correct that *Roberts*, *supra*, did not involve admission of a co-defendant's statements at trial. *Roberts* held that the introduction at the defendant's trial of the defendant's daughter's preliminary hearing testimony was constitutionally permissible because the witness was unavailable and the testimony bore sufficient indicia of reliability, noting that the defendant's counsel had tested the daughter's testimony with the equivalent of significant cross-examination, and challenged her veracity.

> In evaluating whether a statement against penal interest that inculpates a person in addition to the declarant bears sufficient indicia of reliability to allow it to be admitted as substantive evidence against the other person, courts must evaluate the circumstances surrounding the making of the statement as well as its content.
>
> The presence of the following factors would favor admission of such a statement: whether the statement (1) was voluntarily given, (2) made contemporaneously with the events referenced, (3) made to family, friends, colleagues, or confederates—that is, to someone to whom the declarant would likely speak the truth, and (4) uttered spontaneously at the initiation of the declarant and without prompting or inquiry by the listener.
>
> On the other hand, the presence of the following factors would favor a finding of inadmissibility: whether the statement (1) was made to law enforcement officers or at the prompting or inquiry of the listener, (2) minimizes the role or responsibility of the declarant or shifts blame to the accomplice, (3) was made to avenge the declarant or to curry favor, and (4) whether the declarant had a motive to lie or distort the truth.
>
> Courts should also consider any other circumstance bearing on the reliability of the statement at issue. While the foregoing factors are not exclusive, and the presence or absence of a particular factor is not decisive, the totality of the circumstances must indicate that the statement is sufficiently reliable to allow its admission as substantive evidence although the defendant is unable to cross-examine the declarant. [444 Mich at 165-166. Citation omitted.]

See also, *People v Shepherd*, 263 Mich App 665, 676-677; 689 NW2d 721 (2004), rev'd on other grounds 472 Mich 343; 697 NW2d 144 (2005) (noting that if not testimonial, the statements at issue were properly admitted as statements against penal interest pursuant to MRE 804(b)(3); that "*Crawford* left *Roberts* intact regarding the admissibility of nontestimonial statements"; and applying the *Poole* analysis quoted above to determine whether the statements bore adequate indicia of reliability or fell within a firmly rooted hearsay exception)].

We conclude that co-defendant Hill's statements to Lane, Hadel, and Salaytah and the circumstances in which they were made have sufficient indicia of reliability to satisfy the Confrontation Clause. *Poole, supra* at 165-166. Hill's statements that he and defendant robbed and killed an old woman were clearly against his own interest and referred to defendant only in the context of narrative descriptions of the December 1999 event. Hill made these statements to friends or, at the least, confederates, most of whom he had known for years, and not to law enforcement personnel, and the statements were voluntary and on Hill's initiative. Hill did not minimize his involvement in the robbery and murder, and there is no indication that he made the statements to curry favor with Lane, Hadel, or Salaytah, or that he had a motive to distort the truth.

The circumstances not favoring admissibility are that the statements were not made contemporaneously with the December 1999 event, but several years later, and that there was some blame shifting. *Poole*, *supra* at 165-166.

We conclude that the trial court did not err in denying defendant's motion in limine. Most of the statements attributed to Hill were admissible under *Poole*. The only arguably inadmissible portion of the statements was Hill's statement that defendant did the actual killing. Any error is harmless because the vast majority of incriminating statements against defendant were those defendant made himself, to Lane, Hadel, Salaytah, and Addelia. Co-defendant Hill's blameshifting statements to Lane, Hadel, and Salaytah added little.

III

Defendant also asserts that he is entitled to a new trial because the prosecution's failure to disclose evidence directly affecting Hadel's credibility violated his constitutional rights to confrontation and due process. This Court reviews this preserved claim of non-structural constitutional error to determine whether the beneficiary of the error established it was harmless beyond a reasonable doubt.[4] *Carines*, *supra* at 774.

"Due process requires the prosecution to disclose evidence in its possession that is exculpatory and material, regardless of whether the defendant requests the disclosure." *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007), citing *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963), and *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994). This Court reviews de novo defendant's due process claim. *People v Izarraras-Placante*, 246 Mich App 490, 493; 633 NW2d 18 (2001). A defendant must establish the necessary elements of a *Brady* violation, which are: "(1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could he have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *Schumacher*, *supra* at 177, quoting *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005).

The record establishes that the prosecution did not introduce any evidence regarding class rings. On the fourth day of trial, Hadel testified on direct examination that a ring (not a class ring) was in the bag defendant and Hill brought from the Zummo robbery. The first mention of *class* rings was when defense counsel on cross-examining Hadel asked "but there were some I'll describe as class rings, right?" and Hadel answered "Yes. There was a class ring I believe." Hadel testified that he kept the class rings and turned them over to a detective in connection with this case. When defense counsel said the class rings had not been taken from the Zummo home, the prosecution objected on the basis of personal knowledge, and when the trial court instructed Hadel to answer, he said, "I'm not aware of that, no."

Other than this brief reference to class rings, defendant's cellmate, Brent Addelia, testified that defendant told him that authorities were trying to use two rings to pin him to this case, but defendant could prove they came from a different burglary. Defendant told Addelia the

[4] The prosecution argues that review of the trial court's determination whether a discovery violation occurred is for clear error, citing MCR 2.613(C) (trial court's factual findings may not be set aside unless clearly erroneous).

class rings were from Ferris State and Notre Dame. In closing argument, the prosecutor did not make any argument regarding class rings, only briefly referring to Hadel's testimony that "jewelry" had been in the bag, along with a certificate and money.

In contrast, defense counsel stated in closing argument that the prosecutor had produced no physical evidence tying defendant to the crime, including "the jewelry that didn't come from Ms. Zummo's home." Defense counsel also stated that there was nothing to support Hadel's testimony, including the jewelry he allegedly kept from the robbery, and reiterated that "we know that the jewelry did not come from Ms. Zummo's home. So nothing verifies what he says as the truth."

This challenge was the central claim of defendant's motion for new trial, heard by the trial court on remand from this Court. The trial court denied defendant's motion after having taken post-trial testimony and hearing oral arguments.

We agree with the trial court (on remand) that defendant has not shown a violation of *Brady*, *supra*. First, that the rings belonged to Robert Tebo was not favorable to defendant since it tied him to another home invasion, and introduction of additional crimes would not have helped his case. Second, defendant knew that the rings were not connected to the Zummo robbery and murder, as he told his cell mate, Addelia, he could prove that, and defense counsel knew that as well, as he stated several times on the record the rings were not connected to Zummo. Third, the record establishes that the prosecutor out of the jury's presence said the rings were from a Macomb County breaking and entering, and the prosecutor maintains, without contrary argument from defendant, that no further information was requested by defendant. Fourth, as the prosecution argues, defendant has not established that there was a reasonable probability that the outcome of the proceedings would have been different. Defendant posits that it establishes Hadel lied, but the class rings were a minor part of trial, and the jury could easily have concluded that Hadel was mistaken about the rings having been tied to Zummo and either that Hadel made a mistake regarding *when* defendant had given him the rings, or that defendant gave Hadel rings *from several robberies at one time*.

We thus conclude that defendant's challenge under *Brady* fails.

IV

Next, defendant asserts that his right to due process was violated through the prosecution's knowing use of false testimony. We disagree.

Prosecutorial misconduct issues are decided on a case-by-basis, and this Court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). A prosecutor may not knowingly use false testimony to obtain a conviction. See *Banks v Dretke*, 540 US 668, 694; 124 S Ct 1256; 157 L Ed 2d 1166 (2004); *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998). A prosecutor has a constitutional obligation to report to the defendant and the trial court whenever a government witness lies under oath, and a duty to correct false evidence. *Lester*, *supra* at 276.

Defendant argues that the trial court erred in failing to find that the prosecution knowingly used false testimony, asserting that the prosecutor "allowed" Hadel to testify that the

class rings had come from Zummo's home. The trial court concluded on defendant's motion for new trial (on remand from this Court) that this claim failed. As discussed in Issue III, and as the trial court concluded on remand, the prosecution did not introduce any evidence regarding the class rings, and it was defense counsel who elicited testimony regarding class rings at trial. Defendant's challenge fails, and the trial court did not clearly err in finding the prosecutor had not knowingly used false testimony to obtain defendant's convictions.

V

Defendant asserts that imposition of two life sentences for the murder of one person violates the prohibition against double jeopardy. We agree.

This Court reviews de novo a claim of a violation of the prohibition against double jeopardy. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). In *People v Adams*, 245 Mich App 226, 241-242; 627 NW2d 623 (2001), this Court held that

> Where dual convictions of first-degree premeditated murder and first-degree felony murder arise out of the death of a single victim, the dual convictions violate double jeopardy. *People v Bigelow*, 229 Mich App 218, 220-222; 581 NW2d 744 (1998). The proper remedy is to modify the judgment of conviction and sentence to specify that defendant's conviction is for one count and one sentence of first-degree murder supported by two theories: premeditated murder and felony murder. *Id.* at 220-221. . . . .
>
> Therefore, defendant's conviction and single sentence for first-degree murder, as modified, are affirmed. We remand to the trial court to amend the judgment of sentence to specify that defendant's conviction is for one count and one sentence of first-degree murder supported by two theories: premeditated murder and felony murder. . .

Defendant's order of conviction and sentence reflects dual convictions of first-degree murder and felony murder, and life sentences for each of the two convictions, and the prosecution concedes that defendant may not be sentenced to two life terms for a single murder. We thus remand to the trial court to amend the judgment of sentence to specify that defendant's conviction is for one count and one sentence of first-degree murder supported by two theories: premeditated murder and felony murder.

VI

In a supplemental brief filed in propria persona, defendant asserts that he is entitled to a new trial because of prosecutorial misconduct, and ineffective assistance of trial and appellate counsel. We disagree.

A

Defendant contends that the prosecutor vouched for the state's witnesses. Defendant acknowledges that he did not raise his five prosecutorial misconduct challenges in the trial court. Review of alleged prosecutorial misconduct is precluded unless the defendant timely and

specifically objected below, unless an objection could not have cured the error or failure to review the error would result in a miscarriage of justice. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). When there was no contemporaneous objection and request for a curative instruction, appellate review of prosecutorial misconduct claims is limited to ascertaining whether there was plain error that affected substantial rights. *Carines*, *supra* at 763.

We note that *both* the prosecution and the defense characterized the state's witnesses as "thieves," including in opening statement. The prosecutor acknowledged the questionable veracity of these witnesses, but urged that, in the final analysis, the jury believe them. It is not improper for a prosecutor to urge based on the evidence that the state's witnesses be believed, *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007), so long as the prosecutor does not vouch for the credibility of a witness to the effect that she has some special knowledge that the witness is testifying truthfully, *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). We conclude that defendant has not shown that the prosecutor improperly vouched for state's witnesses, and thus did not establish plain error. *Carines*, 460 Mich at 764-765.

B

Defendant also contends that the prosecutor allowed false and perjured testimony from state witnesses to go uncorrected, thus depriving defendant of his rights to due process and a fair trial.

Defendant has made no showing that the prosecutor had prior knowledge of the inconsistencies in the state's witnesses account of events. In any event, it would seem that inconsistencies in the state's witnesses' testimony, which defense counsel at trial actively exploited, inured only to defendant's benefit at trial. We conclude that defendant has not shown either plain error or that his substantial rights were affected. *Carines*, 460 Mich at 764-765.

C

Defendant maintains that his due process and fair trial rights were violated when the prosecutor injected grossly improper remarks impugning his character into the trial, including that Hill was defendant's "partner in crime," referring to defendant as a cannibal by saying "Hannibal over there," and stating that defendant and Hill "thieved with their fellow thieves."

As noted, both the prosecutor and defense counsel argued to the jury that Lane, Hadel and Salaytah were thieves. It was clear to the jury that those three witnesses, along with Hill, had been arrested around 2002 in connection with a separate robbery, of a tobacco store. The prosecutor's reference to "Hannibal the Cannibal" came from Addelia's testimony that defendant wanted to be the next white rapper, and called himself "Hannibal the Cannibal." Another state's witness testified that defendant had written a song about killing an old lady. Thus, the prosecutor's references were based on the evidence and, although less than prudent, we conclude that they did not deprive defendant of a fair trial.

D

Defendant asserts that his due process and fair trial rights were violated by the prosecutor injecting into her closing argument facts that were not in evidence. Defendant asserts that the prosecutor in closing argument stated that Holt received an estimate from defendant's company,

TLC Roofing, to repair roofing on Zummo's house, when Hold testified to the contrary. Defendant is incorrect; Holt testified that TLC called him with an estimate for the job.

Defendant also asserts that the prosecutor improperly stated that Lane followed defendants blindly, without knowing they were going to commit a crime, when Lane actually testified that defendant told him defendant and Hill needed him to help them steal furniture. Defendant is correct that Lane so testified, but Lane also testified on cross-examination that he had no clue where he was going and was just following defendant's car.

Defendant also contends that the prosecutor said defendant told Hadel that the old woman had put up a good fight, when it was Hill who Lane said made the comment. Lane did testify that Hill said "the old bitch put [up] a good fight, but Hadel testified that defendant told him Hill had killed "grammy," and multiple witnesses testified that defendant and/or Hill told them that the old lady had woken up and seen one of them when they were robbing her house and that they therefore had to kill her. A logical inference from this testimony is that when Zummo woke up and recognized defendant and/or co-defendant, she realized she was being robbed and fought back when the pillow was placed over her face.

Defendant also takes issue with the prosecutor's statement that Zummo was beaten in the chest with fists, maintaining that there was no such testimony. There was testimony that, on finding Zummo dead, she appeared to have been beaten, including on the face and neck, and she had been strangled. There was also testimony that Zummo had struggled. Given these circumstances and testimony, even assuming that there was no testimony that Zummo had been beaten *in the chest*, we cannot conclude that this minor misstatement constituted plain error. *Carines, supra.*

E

Finally, defendant asserts that his due process and fair trial rights were violated by the prosecutor's injecting her own personal opinion into the trial. This argument is a reiteration of arguments addressed *supra.* As stated above, defendant has shown neither plain error or that his substantial rights were affected by these errors.

VII

Defendant maintains that his right to effective assistance of counsel was violated where counsel failed to investigate and failed to object to numerous instances of prosecutorial misconduct.

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). A defendant can overcome the presumption by showing a failure to meet a minimum level of competence, *People v Jenkins*, 99 Mich App 518, 519; 297 NW2d 706 (1980).

Defendant argues that trial counsel was ineffective for failing to subpoena witnesses who could have disputed the State's case against him, failing to produce exculpatory evidence that would have disputed the State's case, and failing to investigate the inconsistencies in sworn witness statements and prior testimony as compared to testimony offered at his client's trial.

Defendant raised the issue of ineffective assistance in the motion for new trial he filed before this Court remanded to the trial court. On remand, counsel was appointed for defendant and at the hearing on remand counsel did not pursue these ineffective assistance of counsel claims, and effectively abandoned them. Thus, no record was made of these claims and this Court's review is limited to errors apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). We conclude that defendant has not established that the alleged ineffective assistance deprived him of a defense that might have made a difference in the trial's outcome.

It is well established that this Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Decisions as to what evidence to present are presumed be matters of trial strategy, *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997), and the failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense, *People v Hoyt*, 185 Mich App 531, 538; 462 NW2d 793 (1990). A substantial defense is one that might have made a difference in the outcome of the trial. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Defendant asserts that trial counsel's failure to call a neighbor of Hadel's, who would have testified that Hadel had confessed to her that he (Hadel), Lane and Salaytah were testifying against Ciavone in the Zummo trial just to get even with him for snitching on them in the tobacco store robbery. These claims were not supported on remand. We further note that the theory that Hadel, Lane and Salaytah contacted the authorities after their arrest in the tobacco store robbery because they suspected defendant tipped the police off regarding that robbery was well explored and advanced at trial. Thus, had Hadel's neighbor been called, her testimony would likely have been cumulative. Defendant thus has not established that this testimony could have made a difference in the trial's outcome.

Defendant also maintains that trial counsel failed to call defendant's wife and step-daughter, who would have established there was no possibility that Salaytah ever worked for defendant at TLC because defendant immensely disliked Salaytah, and could have established that there is no way Salaytah could have heard about the Zummo murder at work, and the dates Salaytah provided to his probation officer as being in TLC's employ could not have been accurate because defendant had an alibi and was somewhere else when Salaytah claims to have had certain conversations with him. Defendant contends that his wife and step-daughter also could have attested to the fact that defendant used his car as collateral for a loan with a loan shark to pay house bills and the car was unavailable to him from April until the end of July 2002, which would have disputed Lane's testimony that he had heard any kind of argument in that particular car in June 2002.

Other than defendant's statements, there is no evidence supporting that his wife and step-daughter would have so testified at trial, or that the testimony would have affected the outcome. Defendant has the burden of establishing the factual predicate for his claim of ineffective assistance, *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999), and has not done so.

Defendant also asserts that trial counsel was ineffective in failing to have defendant take the stand to testify in his own behalf so he could establish the fact that Lane was an employee of

TLC who had gone with defendant to the Zummo residence on Holt's instructions to provide an estimate for roofing repairs. Defendant maintains that he could have testified that although he (defendant) had never seen or spoken to Zummo personally, he had seen Lane speaking to someone inside the home, and that this testimony would have contradicted Lane, who claimed never to have been at the Zummo residence. Defendant also contends that he should have been called to testify that he had been feuding with co-defendant Hill since December 1998, and that Hill was prepared to testify against him relative to a weapons charge. Defendant asserts he would have testified that he made a statement to police in August 1999 accusing Hill of robbing his residence, that he testified against Hill in a chop shop trial in October 2000, that he took out a personal protection order against Hill in April 2001, and that this testimony would have helped illustrate how and why Lane, Hadel and Salaytah conspired to frame defendant for participating with Hill in Zummo's murder.

Defendant failed to develop this claim of ineffective assistance on remand, and we cannot conclude on the existing record that the decision not to call defendant was anything other than sound trial strategy. Nor do we have any basis to conclude that the jury would have been swayed by defendant's testimony.

Defendant also asserts that defense counsel failed to present evidence from any former TLC employees, who would have attested to the fact that defendant is a workaholic who frequently drives his employees to quit, which would have disputed the prosecution's case. Again, other than defendant's statements, there is no evidence showing that calling former TLC employees would have benefited him. Thus, there are no errors apparent on the record. See *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002). Defendant has the burden of establishing the factual predicate for his claim of ineffective assistance, *Hoag*, *supra* at 6, and has not done so.

Next, defendant maintains that trial counsel was constitutionally ineffective for failing to produce exculpatory evidence he was aware existed. Defendant contends he wanted his trial counsel to present the formal complaint defendant made in 1999 to State Police alleging Hill robbed his residence; Marine City District Court documents showing that Hill was to testify against defendant in November 1999; St. Clair Circuit Court documents proving that defendant testified against Hill in an October 2000 chop shop case where Hill faced life imprisonment as a habitual offender; the PPO defendant took out against Hill in April 2001; Macomb County jail records that provided proof that defendant was incarcerated at the time of Hodges' arrest, confession and trial, which would have been evidence that defendant could not have known anything about a black man who confessed, and thus could not have bragged to the witnesses that someone else had been arrested for and charged in the murder he allegedly committed; and defendant's and Salaytah's MDOC probation records to prove that Salaytah erroneously claimed to work for TLC from June 2002 until January 2003, because defendant's records reported Salaytah was employed elsewhere due to a lack of roofing business, and Salaytah's records would have provided proof that he had previously been exposed as lying to his probation officer about where he was employed.

Again, defendant failed to present the facts supporting these claims on remand. Defendant has the burden of establishing the factual predicate for his claim of ineffective assistance, *Hoag*, *supra* at 6, and has not done so.

Defendant also maintains his trial counsel was constitutionally ineffective for his failure to investigate inconsistencies in sworn witness statements and prior testimony as compared to testimony offered at defendant's trial. We note that trial counsel zealously cross-examined Hadel, Lane and Salaytah at trial, and drew out many inconsistencies in their various accounts. Defendant has made no showing that trial counsel indeed failed to investigate such inconsistencies. Further, defendant relies on documents, including statements of witnesses the prosecution had called at trial, which he obtained and sent to the trial court on May 10, 2007, well after proceedings below had concluded in December 2006. These documents are not properly considered as they are not part of the record below.

In sum, we conclude that defendant has not supported trial counsel's alleged instances of ineffective assistance and has not shown that they deprived him of a substantial defense. Given our disposition, we need not address defendant's remaining claim--that appellate counsel's failure to raise trial counsel's ineffectiveness at a hearing and in her appellate brief is itself ineffective assistance.

We remand to the trial court to amend the order of conviction and sentence to reflect one conviction of first-degree murder supported by two theories—felony murder and premeditated murder, and, *as thereby modified*, affirm defendant's conviction and single sentence for first-degree murder.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Peter D. O'Connell