STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW GEORGE WILLIAMS,

Defendant-Appellant.

UNPUBLISHED
December 18, 1998

No. 200978
Macomb Circuit Court
LC No. 95-000844 FC

Before: Markey, P.J., and Sawyer and Whitbeck, JJ.

PER CURIAM.

Originally, defendant pleaded no contest to the charge of solicitation to commit premeditated murder, MCL 750.157b(2); MSA 28.354(2)(2), and was sentenced to fifteen to thirty years' imprisonment. Defendant subsequently filed a motion to withdraw his plea, which was granted by the trial court based on the ineffective assistance of counsel. Following a jury trial, defendant was convicted of solicitation to commit premeditated murder. The trial court sentenced defendant to twenty to sixty years' imprisonment. Defendant appeals by right. We affirm.

Defendant argues that the instructions given by the trial court failed to adequately present his renunciation defense to the jury. Because defendant did not object to the instructions at trial, appellate review is precluded unless the failure to consider the issue would result in a miscarriage of justice. *People v Perry*, 218 Mich App 520, 530; 554 NW2d 362 (1996); *People v Paquette*, 214 Mich App 336, 339; 543 NW2d 342 (1995). The jury instructions reviewed as a whole adequately presented to the jury defendant's renunciation defense; consequently, manifest injustice will not occur if we decline to review this issue.

Next, defendant argues that the trial court's reason for increasing the minimum sentence was improper and clearly indicates vindictiveness. According to defendant, the trial judge's sole reason for the sentence increase was his belief that defendant never intended to renounce the solicitation.

When a defendant is resentenced by the same judge and the second sentence is longer than the first, there is a presumption of vindictiveness. *People v Mazzie*, 429 Mich 29, 35; 413 NW2d 1 (1987). The presumption of vindictiveness is not applicable, however, where a sentence imposed after

trial is greater than that previously imposed after a guilty plea, even when the same judge hands down both sentences. *Alabama v Smith*, 490 US 794, 795, 798-799, 801; 109 S Ct 2201; 104 L Ed 2d 865 (1989).

In the instant case, the trial court's decision to increase defendant's sentence was based on defendant's perjured testimony, not merely on the fact that the renunciation defense was unworthy of belief. Defendant's perjury has a logical bearing on his prospects for rehabilitation. We agree with the trial court that defendant's testimony was implausible. Furthermore, because defendant originally pleaded no contest, the trial court was not aware of defendant's perjury until after he testified at trial. Therefore, we believe that the trial court properly considered defendant's apparent perjury as a factor at resentencing. See *People v Adams*, 430 Mich 679, 693-694; 425 NW2d 437 (1988).

The question then becomes whether the increase in defendant's sentence upon resentencing bore a reasonable relationship to the new information, i.e., defendant's apparent perjury. In addition to supplying the trial court with an incredible tale concerning his renunciation defense, defendant's testimony revealed his complete lack of regard for the value of his wife's life. Therefore, we believe that the five-year increase in defendant's minimum sentence was reasonably related to the extent of defendant's perjured testimony.

Next, defendant contends that the trial court's sentence violates the principle of proportionality. A sentence must be proportionate to the seriousness of the crime and to the defendant's criminal record. *People v Phillips (On Rehearing)*, 203 Mich App 287, 290; 512 NW2d 62 (1994). The sentencing court abuses its discretion when it violates the principle of proportionality. *Id.*; *People v Milbourn*, 435 Mich 630, 634-636, 654; 461 NW2d 1 (1990).

Defendant was convicted of solicitation of premeditated murder in violation of MCL 750.157b(2); MSA 28.354(2)(2), which provides:

> A person who solicits another person to commit murder, or who solicits another person to do or omit to do an act which if completed would constitute murder, is guilty of a felony punishable by imprisonment for life or any term of years.

While the statute clearly authorized the trial court to sentence defendant to twenty to sixty years' imprisonment, there were no applicable sentencing guidelines available to aid the trial court during sentencing. Although defendant requested this Court to use the sentencing guidelines for assault with intent to commit murder as a guide when interpreting the proportionality of defendant's sentence, the evidence on the record and case law does not support such a request.

In the instant case, defendant admitted to hiring another man to kill his wife, the mother of his child, in exchange for $4,000 and some jewelry. The men discussed the "hit" on numerous occasions, most of which were preserved on tape. Defendant suggested that the "hit man" beat his wife to death with a baseball bat. The only "reasons" given by defendant for the plan to kill were based on his wife's desire not to return to work less than four months after the birth of their daughter and the couple's deteriorating relationship. On the morning of his wife's scheduled death, defendant handed the hit man a

set of keys so that he could gain entry into his home. While defendant claims that he changed his mind and tried to get home in time to ward off the attack, a rational review of the evidence does not support such a theory. Considering defendant's lengthy, careful, and deliberate plan to have his wife killed in such a violent manner, coupled with a lack of remorse, the seriousness of defendant's crime was proportionate to his sentence. Accordingly, the court did not abuse its discretion in sentencing defendant to twenty to sixty years in prison.

Next, defendant argues that the prosecutor's improper and denigrating remarks about defense counsel require that this Court reverse defendant's conviction and grant him a new trial. Because defendant failed to object to the prosecutor's rebuttal remarks, appellate review is precluded unless the prejudicial effect could not have been cured by a cautionary instruction and the failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

When the prosecution's statements are reviewed in context, it is apparent that the prosecutor was addressing issues raised during the defense's closing remarks and was not improperly denigrating defense counsel. The prosecutor asked the jury to focus on the evidence. Therefore, defendant was not denied a fair trial. *Paquette, supra* at 342. Even if we had determined that the prosecutor's comments were improper, a curative instruction could have eliminated any prejudicial effect. See *People v Ullah*, 216 Mich App 669, 679; 550 NW2d 568 (1996). Moreover, the trial court instructed the jury that statements made by either counsel were not evidence. Therefore, manifest injustice will not occur if this Court declines to review the issue.

Next, in defendant's standard 11 supplemental brief, he argues that the trial court erred in using his post-arrest, post-*Miranda* silence as both substantive and impeachment evidence of his guilt. While defendant failed to object at trial, we may consider claims of unpreserved constitutional error when the alleged error could have been decisive of the outcome. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994).

When an individual is interrogated by police while in custody or otherwise deprived of freedom of action in any significant manner, *Miranda* warnings are required. *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997). If a defendant remains silent during police interrogation, there is an irrebuttable presumption of irrelevancy. *People v McReavy*, 436 Mich 197, 218; 462 NW2d 1 (1990). Such silence may not be used substantively or for impeachment purposes because there is no way to determine, after the fact, whether defendant's silence was based on his exercise of his constitutional rights or on his guilty knowledge. *Id.* "Where the defendant has not maintained 'silence,' but has chosen to speak, the Court has refused to endorse a formalistic view of silence." *Id.*, quoting *Anderson, Warden v Charles*, 447 US 404; 100 S Ct 2180; 65 L Ed 2d 222 (1980). If a defendant voluntarily waives his Fifth Amendment right to be silent and decides to make some statements, while failing to respond to other questions, the focus of the inquiry becomes (a) whether the defendant manifested either a total or selective revocation of his earlier waiver of his Fifth Amendment rights and (b) whether that revocation was induced by the implicit assurances contained in the *Miranda* warnings. *McReavy, supra* at 218-219. If the defendant failed to respond based on the invocation of his right to remain silent, the defendant's failure to offer a response would again become prohibited testimony. *Id.*

at 219. The *McReavy* Court declined, however, to offer any indication of conduct, besides a formal exercise of the Fifth Amendment right to remain silent or request counsel, that would constitute an invocation by a defendant of his right to remain silent. *Id.*

In the first incident, Officer Suminski's testimony did not relate to the custodial interrogation of defendant. There was no evidence offered that Suminski asked defendant anything while defendant was a passenger in the police car. Furthermore, much of Suminski's testimony related to observations he made about defendant's demeanor and actions. Suminski testified that defendant did not appear nervous or upset while being transported to the Roseville Police Department. In fact, Suminski testified that defendant remained silent during his trip to the police station. Although the prosecutor asked Suminski if defendant mentioned that his wife's life was in danger or that his own life was in danger while en route to the police station, the prosecutor's questions were designed to elicit evidence of any possible renunciation of the crime. The prosecutor's questions had no relation to any elements of the crime of solicitation. Therefore, defendant's silence could not have been used as substantive evidence of his guilt. Thus, we believe that defendant's silence was not constitutionally protected, and his rights were not violated by the witness' testimony. See *People v Stewart (On Remand)*, 219 Mich App 38, 43; 555 NW2d 715 (1996).

Also, the record indicates that defendant was informed of his *Miranda* rights and he decided to waive them before his interview with Detective Urbaniak. The prosecution asked Urbaniak questions relating to defendant's possible renunciation of the crime. Urbaniak testified that defendant told him that he left work early on the date scheduled for his wife's murder because his work hours had been reduced. After Urbaniak informed defendant that he was charged with solicitation to commit murder, defendant denied any involvement with the crime numerous times. Because he waived his rights, defendant's statements, made during the interview, could be used against him at trial. Additionally, defendant's silence could be used against him. Because there is no evidence that defendant declined to inform police of his renunciation defense during his interview, and because he had decided to invoke his right to remain silent after previously waiving the right during police questioning, we believe that defendant's silence, i.e., his failure to offer an exculpatory explanation, was not improperly admitted into evidence. Moreover, the officer's testimony relating to defendant's silence concerned aspects of defendant's renunciation defense and was not used as substantive evidence of defendant's guilt.

With regard to statements that the prosecutor made during his closing argument and during his cross-examination of defendant, defendant failed to point to the specific testimony evidencing that his post-arrest, post-*Miranda* silence was used as substantive or impeachment evidence of his guilt. Because defendant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, we decline to review or address this issue. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Even if the prosecutor had improperly introduced evidence of defendant's post-arrest, post-*Miranda* silence, i.e., defendant's failure to offer an exculpatory explanation during police questioning, any error was harmless. Cf. *People v Smith*, 190 Mich App 352, 356; 475 NW2d 875 (1991), modified 439 Mich 954 (1992). At trial, defendant admitted to hiring Paul to murder his wife. Furthermore, Paul testified against defendant concerning their agreement to murder defendant's wife.

There were tapes played for the jury in which defendant and Paul discussed the crime. Moreover, defendant's testimony about his alleged effort at renunciation was highly incredible on its fact. See People v Crawford, ___ Mich App ___; ___ NW2d ___ (Docket No. 200722, issued November 20, 1998), Slip op at 4-5); MCL 750.157b(4); MSA 28.354(2)(4). Even if the two police officers' challenged testimony had been excluded, there was overwhelming evidence of defendant's guilt.

Next, defendant asserts that the prosecution's questioning about his prior marijuana use, his alleged devil worshipping, and his alleged infidelity denied him of a fair trial. Because defendant failed to object at trial, appellate review of the prosecutor's improper questioning or improper arguments is limited to situations where a curative instruction could not have eliminated any prejudice or where failure to consider the issue would result in a miscarriage of justice. *Stanaway*, *supra* at 687. Because defendant's testimony on direct-examination opened the door to the prosecutor's questions with regard to his character and because the prosecutor's questions did not delve into defendant's religious beliefs or opinions, we believe that the prosecution's questions were not improper. See *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996); *Paquette*, *supra* at 342.

At one point, defendant was asked "[d]on't you own the satanic Bible as well?" Defendant said no, he did not. This is the only reference to satanic beliefs in the record. Because the question did not ask for or reveal defendant's opinion or belief regarding the subject of religion, it did not violate MCL 600.1436; MSA 27A.1436, which states that "[n]o witness may be questioned in relation to his opinions on religion, either before or after he is sworn. See also MRE 610 ("Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced"). Thus, the question did not constitute error requiring reversal. See *People v Leonard*, 224 Mich App 569, 594-595; 569 NW2d 663 (1997).

With regard to the prosecutor's closing and rebuttal arguments, his statements were confined to the evidence and the reasonable inferences arising out of that evidence. See *People v Bahoda*, 448 Mich 261, 282, 285; 531 NW2d 659 (1995). Therefore, failure to consider this issue would not result in manifest injustice.

Next, defendant contends that the trial court erred by admitting evidence of confidential communications between himself and his wife in violation of the spousal communications privilege. Because defendant failed to object at trial, this issue is unpreserved and we will not address this issue, unless a curative instruction could not have eliminated the prejudicial effect or the failure to address the issue would result in a miscarriage of justice. See *People v Mayfield*, 221 Mich App 656, 661; 562 NW2d 272 (1997). Most of defendant's alleged errors do not involve a confidential communication, which is necessary to invoke the privilege. Furthermore, even if the contested portions of defendant's wife's testimony should have been excluded from evidence based on the spousal communications privilege, we believe any error was harmless in light of the overwhelming evidence of defendant's guilt. Cf. *People v Love*, 425 Mich 691, 706; 391 NW2d 738 (1986). (Cavanagh, J., joined by Levin, J.).

Next, defendant argues that the trial court erred in allowing the jury to read along with a transcript of a tape recorded conversation while the tape was being played for the jury. We agree, but conclude the error was harmless.

We review this issue for an abuse of discretion. See *People v Lester*, 172 Mich App 769, 774-776; 432 NW2d 433 (1988). In *Lester*, we adopted the approach used by the Sixth Circuit in *United States v Robinson*, 707 F2d 872 (CA 6, 1983), in order to guide courts in the future when dealing with transcripts of tape recorded conversations. To insure the accuracy of a transcript before it is shown to the jury, this Court held:

> We therefore reiterate our preference for using a transcript when the parties stipulate to its accuracy. But in the absence of a stipulation, we hold that the transcriber should verify that he or she has listened to the tape and accurately transcribed its content. The court should also make an independent determination of accuracy by reading the transcript against the tape. Where, as here, there are inaudible portions of the tape, the court should direct the deletion of the unreliable portion of the transcript. This, however, assumes that the court has predetermined that unintelligible portions of the tape do not render the whole recording untrustworthy. Finally, we find submission of two versions of the transcript prejudicial when the tape is significantly inaudible. Such a practice would undoubtedly inspire wholesale speculation by the parties and engender jury confusion. It would be entirely too difficult for the jury to read two separate transcripts while listening to the tape recording. Furthermore, this method is impractical in cases . . . where the defendant has asserted his Fifth Amendment right to remain silent. [*Lester, supra* at 776, citing *Robinson, supra* at 878-879.]

Defendant argues that the trial court erred by allowing the jury to utilize a transcript of a tape recorded conversation between defendant and Paul without authentication by the transcriber, without the stipulation of the parties, and/or without the trial court conducting an independent review as to the transcript's accuracy. We agree. In the instant case, the parties did not stipulate to the accuracy of the transcript. While Urbaniak testified that Jan Tremonti prepared the transcript, the prosecution did not call Tremonti to testify regarding the accuracy of the transcript. Furthermore, there is no evidence in the record that the trial court made an independent evaluation regarding the accuracy of the transcription. Therefore, the trial court erred by allowing the jury to utilize the transcript without making any determination as to its accuracy. We find, however, that the trial court's error was harmless due to the overwhelming evidence of defendant's guilt. See *People v Howard*, 226 Mich App 528, 542-543; 575 NW2d 16 (1997).

Defendant further asserts that the tape of his conversation with Paul should not have been admitted into evidence because the large number of inaudible portions on the tape made the evidence unreliable. According to defendant, the trial court erred by failing to determine whether the tapes were audible and comprehensible before the jury heard the tapes. We again disagree.

"'[U]nless the unintelligible portions of a tape recording are so substantial as to render the recording as a whole untrustworthy, the recording is admissible and the decision whether to admit it should be left to the sound discretion of the trial judge.'" *People v Parker*, 76 Mich App 432, 444; 257 NW2d 109 (1977), quoting *People v Frison*, 25 Mich App 146, 148; 181 NW2d 75 (1970). The fact that a recording did not reproduce an entire conversation, or that some parts of the recording may be indistinct or inaudible, does not usually require the exclusion of the recording, however, unless the recording is so inaudible and indistinct that the jury must speculate as to what was said. *People v Karmey*, 86 Mich App 626, 632; 273 NW2d 503 (1978), citing *Frison*, *supra*, citing 29 Am Jur 2d, Evidence, § 436, p 495.

In the instant case, there has been no evidence provided that the tape was so inaudible or unintelligible such that the jury would be forced to speculate concerning its contents. Moreover, both Paul and defendant testified at trial and were given the opportunity to explain any discrepancies or what they had said on the tape. From the record, it appears that the trial court did review the transcript of the taped conversation before admitting the tape into evidence. Therefore, we believe that the trial court did not abuse its discretion in admitting the tape into evidence.

Finally, defendant contends that he was denied the effective assistance of counsel. Because defendant failed to object or preserve this issue at the trial court, our review is limited to the record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). To establish that the right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Defense counsel's performance must be evaluated against an objective standard of reasonableness without the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Furthermore, effective assistance of counsel is presumed and a defendant bears a heavy burden of proving otherwise. *Stanaway*, *supra* at 687. Decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy or assess counsel's competency with the benefit of hindsight. *LaVearn, supra; People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

In the instant case, many of defendant's alleged errors were matters of trial strategy. Even if we believed that defense counsel's representation was lacking, it does not appear that defendant was prejudiced by any of the alleged errors. To find prejudice, a court must find "'a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.'" *Pickens*, *supra* at 312, quoting *Strickland v Washington*, 466 US 668, 695; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Because there was overwhelming evidence of defendant's guilt,

we do not believe that, absent the alleged errors, the jury would have had a reasonable doubt respecting guilt.

We affirm.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ William C. Whitbeck