

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTINE JACKSON,

Defendant-Appellant.

UNPUBLISHED
December 16, 2004

No. 236360
Wayne Circuit Court
LC No. 99-003988-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTINE JACKSON,

Defendant-Appellant.

No. 236361
Wayne Circuit Court
LC No. 99-003987-01

Before: Whitbeck, C.J., and Saad and Talbot, JJ.

PER CURIAM.

A jury convicted defendant, in two separate cases, of a total of two counts of first-degree premeditated murder¹ and two counts of conspiracy to commit murder² arising from the shooting deaths of Mary Ann Simmons and Kevin Garland. Defendant was tried jointly with a codefendant, Tim Landers. The trial court sentenced defendant to concurrent terms of life imprisonment for each conviction. Defendant appeals her convictions and sentences, and we affirm.

I

¹ MCL 750.316(1)(a).

² MCL 750.157a.

Defendant argues that the trial court violated her Sixth Amendment³ Confrontation Clause right when it admitted hearsay testimony attributed to the murder victims and two other individuals at trial.

The trial court's decision to allow the prosecutor to introduce Angela Wallace's prior testimony in a federal case, for the limited purpose of impeaching her trial testimony, did not contravene defendant's confrontation rights because the Confrontation Clause does not bar the use of testimonial statements for a purpose other than to establish the truth of the matter asserted. *Crawford v Washington*, 541 US 36, ___ ; 124 S Ct 1354, 1369; 158 L Ed 2d 177 (2004); *People v McPherson*, 263 Mich App 124, 134; 687 NW2d 370 (2004). We presume that the jury followed the limiting instruction given by the trial court. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Whether the prosecutor's rebuttal argument regarding this evidence constituted misconduct presents a distinct question that goes beyond the statement of this evidentiary issue. *People v Yarger*, 193 Mich App 532, 540 n 3; 485 NW2d 119 (1992). But as discussed in part III of this opinion, we find no plain prosecutorial misconduct.

We decline to address defendant's claim concerning Ronney Johnson's testimony regarding his mother's statements because defendant has insufficiently briefed this claim. This Court need not address an issue that is given only cursory treatment, *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001), nor may a defendant leave it to this Court to search for a factual basis to sustain or reject a position. *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990).⁴

We reject defendant's constitutional challenge to the admissibility of Kelvin Garland's testimony concerning statements made to him by the murder victims regarding their drug activities for the same reasons given by this Court in its consideration of this related issue when affirming codefendant Landers' convictions. *People v Landers*, unpublished opinion per curiam of the Court of Appeals, issued May 13, 2004 (Docket Nos. 235918 and 235919), slip op at 5-6. The challenged testimony did not violate the Confrontation Clause because it was not testimonial in nature under *Crawford, supra*.

Whether Kelvin Garland's testimony satisfied the reliability test applicable to nontestimonial statements under MRE 804(b)(3) presents a distinct question. See *People v Deshazo*, 469 Mich 1036; 679 NW2d 69 (2004); *People v Shepherd*, ___ Mich App ___; ___ NW2d ___ (Docket No. 247945, issued September 28, 2004). Were we to overlook defendant's failure to join in codefendant Landers' motion in limine to exclude the evidence, see *People v Griffin*, 235 Mich App 27, 41; 597 NW2d 176 (1999), which we do not, we nevertheless would hold that defendant failed to preserve her claim for appeal. Defendant's claim goes beyond the familial relationship between Kelvin Garland and the murder victim that formed the basis of

³ US Const, Am VI

⁴ We further note that defendant's approval of the trial court's limiting instruction to the jury that the evidence could only be used with respect to Johnson's state of mind indicates that defendant waived, rather than merely forfeited, her challenge to the testimony. A waiver extinguishes any error. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000).

codefendant Landers' motion in limine. An objection to evidence on one ground is insufficient to preserve an appellate attack on a different ground. Cf. *Coy, supra* at 12; see also *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Accordingly, we hold that relief on this ground is unwarranted. *Carines, supra* at 763.

II

Defendant argues that the trial court erroneously allowed the prosecutor to introduce videotape evidence of Ronney Johnson's arraignment in his weapons case. Because defendant provides only cursory treatment of this issue, with little citation to the factual and legal basis of her claim, we decline to address it. *Watson, supra* at 587; *Norman, supra* at 260.⁵

III

Defendant also seeks reversal of her convictions based on prosecutorial misconduct. In general, we review claims of prosecutorial misconduct de novo, but a trial court's factual findings bearing on the issue are reviewed for clear error. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). If the issue was not preserved for appeal by timely and specific objection, the plain error standard in *Carines, supra*, applies. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000) overruled on other grounds *Crawford, supra*, 541 US at ___ ; 124 S Ct at 1371.

We decline to address defendant's claims regarding the prosecutor's appearance at Ronney Johnson's arraignment and use of the videotape of the arraignment in his closing arguments because defendant has insufficiently briefed her claims. *Watson, supra* at 587.

We reject defendant's claim that the prosecutor may have improperly withheld the transcript of Wallace's testimony in the federal case. Defendant has failed to show any clear error with respect to the trial court's findings on this issue, both at trial and at the evidentiary hearing on her motion for a new trial. *Pfaffle, supra*; see also *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000).

Because defendant did not object to the prosecutor's rebuttal argument at trial, we examine defendant's challenge to the prosecutor's rebuttal remarks under the plain error standard in *Carines, supra*. Examined in context, it is not clear that the prosecutor made substantive use of Wallace's testimony in the federal case in his rebuttal argument to support his theory regarding defendant's guilty knowledge. The prosecutor's argument was responsive to defense counsel's suggestion in closing argument that Wallace was mistaken in the federal case when she indicated that she represented defendant in March 1998. The prosecutor's use of Wallace's

⁵ Were we to conclude otherwise, which we do not, we would conclude that the trial court admitted the videotape evidence because Johnson gave inconsistent testimony regarding whether an attorney attempted to represent him at the arraignment. It found the evidence relevant to the prosecutor's underlying theories that Johnson had a fearful state of mind and that defendant engaged in conduct indicative of a guilty conscience, namely, attempting to hire an attorney who might convince Johnson not to give a statement to the police.

testimony in the federal cause to refute this argument and, hence, support his position that Wallace lied at defendant's trial, was not improper. A prosecutor may argue from the evidence that a witness is not credible. *Schutte, supra* at 722.

Moreover, were we to hold that the prosecutor's remarks constituted plain error, we would not reverse because a timely objection could have cured the error. Furthermore, absent an objection, the trial court's reiteration in the jury charge preceding deliberations that, "I instructed you as to the Angela Wallace statement, that it could only be considered for impeachment and not be considered as proof of the facts in the statement," was sufficient to dispel any prejudice. *Schutte, supra* at 721-722.

We reject defendant's claim that the prosecutor lacked any substantive evidence to argue that she asked Wallace to provide representation for Johnson in his weapons case. The prosecutor suggested in closing argument that it would have been an unbelievable coincidence for Wallace, a California attorney, to be contacted to represent Johnson in his weapons case and to thereafter represent defendant at her preliminary examination in the instant case. Although not the only inference that could be made from the evidence, we agree with the trial court's conclusion, when denying defendant's motion for a new trial, that the inference was reasonable. A prosecutor is free to argue the evidence and all reasonable inferences arising from it, as it relates to the theory of the case. *Schutte, supra* at 721. Hence, we find no plain misconduct.

Finally, examined in context, we are not persuaded that defendant has established that the prosecutor made a plain appeal to the jury's sympathy in his rebuttal argument. Even if there was error and it was plain, it did not affect defendant's substantial rights. Any prejudice was dispelled when the trial court instructed the jury not to let sympathy or prejudice influence its decision. *Schutte, supra* at 720; *Watson, supra* at 571-572.

IV

Defendant further asserts that she was denied the effective assistance of counsel at trial. Whether a defendant was denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, defendant must establish that defense counsel's performance fell below an objective standard of reasonableness and caused prejudice. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). The trial court's findings of fact are reviewed for clear error. *LeBlanc, supra*.

We decline to address defendant's cursory claim that defense counsel should have objected or sought a limiting instruction relative to evidence admissible against Landers for failure to adequately brief the legal and factual basis of her claim. *Watson, supra* at 587; *Norman, supra* at 260.⁶

⁶ But to the extent that defendant suggests that Michael McConico's testimony regarding his personal observations of the incident in which Landers was shot could be admitted against her only if it qualified under the hearsay rule for a coconspirator's statements, MRE 801(d)(2)(E),
(continued...)

We reject defendant's claim that defense counsel's failure to move for severance constituted deficient performance or caused prejudice. Severance is only mandatory under MCR 6.121(C) if necessary to avoid prejudice to a defendant's substantial rights. *People v Hana*, 447 Mich 325, 331; 524 NW2d 682 (1994), amended 447 Mich 1203 (1994). Because defendant has not shown that severance was mandatory under MCR 6.121(C), and it is clear from the trial court's findings at the *Ginther* hearing that it would not have granted the motion, relief is unwarranted on this ground. Defense counsel need not make a frivolous or meritless motion. *Riley, supra* at 142.

Also, defense counsel's failure to object to extrinsic evidence of Wallace's testimony in the federal case, for purposes of impeaching her trial testimony, did not fall below an objective standard of reasonableness. Rather, we agree with the trial court's determination at the *Ginther* hearing that the impeachment pertained to the substantive issue of defendant's guilty knowledge. Although consciousness of guilt evidence is not direct evidence of a defendant's guilt, it is circumstantial evidence. See *People v Hooper*, 50 Mich App 186, 199; 212 NW2d 786 (1973). Facts are not collateral if they are directly relevant to the substantive issues in the case. *People v Rosen*, 136 Mich App 745, 759; 358 NW2d 584 (1984). Because defendant's guilty knowledge was directly relevant to the substantive issue of whether she aided and abetted a murder and engaged in a conspiracy, the impeachment evidence was not collateral. Hence, defense counsel's failure to object did not constitute deficient performance. Defense counsel need not make futile objections. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

We find defendant's other claims of ineffective assistance of counsel likewise unpersuasive. Even if there was some objectionable evidence or prosecutorial argument at trial, defendant has not shown a reasonable probability that, but for defense counsel's failure to object, the trial result would have been different. *Toma, supra* at 302-303. Stated otherwise, defendant has not established any matter for which confidence in the trial outcome was undermined by defense counsel's failure to object. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

V

Defendant also says that the trial court erroneously excluded impeachment evidence offered by herself and codefendant Landers against Johnson. Defendant has not established her standing to argue that codefendant Landers' right of cross-examination was violated. In general, constitutional protections are personal. *People v Smith*, 420 Mich 1, 24; 360 NW2d 841 (1984).

VI

Finally, defendant alleges that the cumulative effect of several errors requires reversal. We disagree. Only actual errors are aggravated to determine the cumulative effect. *People v Bahoda*, 448 Mich 261, 292; 531 NW2d 659 (1995). We find no actual errors that had the

(...continued)

we disagree. The hearsay rule is implicated if an out-of-court statement is offered to prove the truth of the matter asserted. MRE 801(c). Even if evidence includes statements, MRE 801(d)(2)(E) is not the sole means for admitting statements in a conspiracy case.

cumulative effect of depriving defendant of a fair trial. *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001).

Affirmed.

/s/ William C. Whitbeck

/s/ Henry William Saad

/s/ Michael J. Talbot