

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARLOS EMANUEL COLLINS,

Defendant-Appellant.

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UNPUBLISHED

August 21, 2008

No. 277098

Wayne Circuit Court

LC No. 06-008379-01

Before: Murray, P.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

Defendant Carlos Collins appeals as of right his jury trial convictions for first-degree felony murder,<sup>1</sup> second-degree murder,<sup>2</sup> armed robbery,<sup>3</sup> felon in possession of a firearm,<sup>4</sup> and possession of a firearm during the commission of a felony (felony-firearm).<sup>5</sup> The trial court sentenced Collins, as a fourth habitual offender,<sup>6</sup> to mandatory life imprisonment for the first-degree felony murder conviction, which merged with Collins's second-degree murder conviction, 30 to 50 years' imprisonment for the armed robbery conviction, two to five years' imprisonment for the felon in possession of a firearm conviction, and ten years' imprisonment for the felony-firearm conviction. We affirm.

I. Basic Facts And Procedural History

Collins's convictions arise from events that transpired in Lula Vaughn's residence on June 17, 2006,<sup>7</sup> that resulted in the fatal shooting death of Claude "Main" Marshall, Jr. Vaughn,

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<sup>1</sup> MCL 750.316(1)(b).

<sup>2</sup> MCL 750.317.

<sup>3</sup> MCL 750.529.

<sup>4</sup> MCL 750.224f.

<sup>5</sup> MCL 750.227b.

<sup>6</sup> MCL 769.12.

<sup>7</sup> Vaughn, the sole witness to the events leading to Marshall's death, did not testify with certainty regarding whether the events took place on Friday, June 16, 2006, or Saturday, June 17, 2006.

(continued...)

Marshall, and Collins sat together at Vaughn's kitchen table for about 30 minutes that day; each drank an eight-ounce glass of beer and each smoked one rock of crack cocaine, which Marshall had brought. Vaughn had known Marshall for about 17 years and Collins for about two years at the time of the incident, and had been romantically involved with Collins sometime in the past for about two or three months. After Vaughn, Marshall, and Collins smoked the crack cocaine, Marshall and Collins left Vaughn's apartment for about 20 minutes, during which time they obtained additional crack cocaine and heroin.

Marshall and Collins rejoined Vaughn at her kitchen table, and Vaughn inhaled the heroin that Collins offered to her. Marshall declined to try the heroin, and Collins refused to take the heroin. Vaughn testified that she felt the effects of the heroin immediately, but supposed that something was wrong with the heroin because her head fell down upon her kitchen table. According to Vaughn, she could still see at that point; however, "it seemed like things were going, started to go in slow motion to me." Vaughn stated that she was able to hear, but she described the sounds as "blurred," and "it seemed like it was far away, you know, like an echo."

While Vaughn's head was resting on the table, Vaughn testified that she heard Collins tell Marshall to stand up, empty his pockets, and place the items on the table. Vaughn heard the sound of change and keys hitting the table. At that point, Vaughn raised her head, and asked Collins why he was searching Marshall. Collins did not respond to Vaughn's question. Vaughn testified that while she was attempting to push herself away from the table in order to see what was happening, Marshall was sitting at the table, and repeatedly asked, "what's up?" In response, Collins told Marshall to leave Vaughn's apartment. Vaughn then heard, but did not see, what she believed was a pistol being cocked.

At that point, Vaughn was attempting to get up, and was pushing herself back from her kitchen table. Also at this point, Marshall and Collins had left the table, and were engaged in a physical altercation behind Vaughn. Vaughn asked Collins why he told Marshall to leave, but Collins did not respond. According to Vaughn, she pushed herself back from the table, and then she heard a gunshot. Vaughn testified that although she continued to feel the effects of the heroin, and thus was unsure of the timing, she believed that she heard the gunshot soon after the altercation between Marshall and Collins began. After she heard the gunshot, Vaughn once again attempted to push herself away from the table, but instead, fell onto the kitchen floor, and lost consciousness.

Vaughn testified that she did not know how long she remained on the floor, or remained unconscious. However, when she regained consciousness, Vaughn noticed that Collins had

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While the events relevant to this case were taking place, Vaughn was admittedly under the influence of alcohol, crack cocaine, heroin, and subsequently, a prescription sleep aid. As explained in more detail below, Vaughn reported Marshall's death to the police on Sunday, June 18, 2006, and stated to the police that Marshall had been dead for two days. However, before trial, the trial court granted defendant's motion for a bill of particulars, and ruled that the bill of particulars would reflect that the approximate time of death was 8:00 p.m., on Saturday, June 17, 2006. Accordingly, to avoid confusion, we will hereinafter refer to the date of the incident as Saturday, June 17, 2006.

gone, and Marshall was lying on the floor near Vaughn's front door. Vaughn also noticed a blood stain on the wall. The objects Vaughn had previously heard falling on her kitchen table were gone. Although Vaughn was not certain that Marshall was dead at that point, she eventually covered Marshall with a sheet. However, Vaughn decided not to cover Marshall's face with the sheet in case he was still alive. Although Vaughn testified that she continued to feel the effects of the crack cocaine and heroin, she took three or four doctor-prescribed sleeping pills and fell asleep on her couch.

Vaughn alleged that she awoke sometime during the night when her telephone rang. Vaughn answered the telephone and spoke to her sister, Norma. Norma asked Vaughn what was wrong, and Vaughn responded that nothing was wrong, although Vaughn testified that Marshall's body was lying on her floor at that time. Sometime later, Vaughn's sister Ruby telephoned Vaughn. Vaughn did not know the interval of time between the telephone call from Norma and the telephone call from Ruby because, at that point, Vaughn continued to have difficulty estimating periods of time.

Ruby also asked Vaughn what was wrong. Vaughn denied that anything was wrong. However, Ruby insisted that something was wrong, and Vaughn's nephew, who took the telephone from Ruby, demanded that Vaughn tell him what was wrong. Vaughn then told him that Marshall was lying on her floor and that he had possibly died. When Vaughn's nephew asked Vaughn how long Marshall had been lying on the floor, Vaughn responded that Marshall had been lying on her floor for two days. At trial, Vaughn testified that she did not actually know that Marshall had been lying on her floor for two days because it was still difficult for her to estimate time intervals.

Sometime thereafter, Norma and Vaughn's nephew arrived at Vaughn's apartment door, but did not enter. Norma asked Vaughn if she had called the police. Vaughn responded that she had; but in fact, Vaughn had not called the police at that point. Between the time Norma and Vaughn's nephew left the apartment building and the time Vaughn telephoned the police, Vaughn had washed the bloodstain off of her apartment wall. Vaughn explained that she washed the blood from the wall "[b]ecause I didn't want no one to come in and see my house in a mess like that." When the police arrived at Vaughn's apartment, according to Vaughn, she was still feeling the effects of the drugs she had taken. Vaughn described her mood at the time as "terrorized."

When the police asked how long Marshall had been dead, Vaughn told the police that Marshall had been lying on her floor for two days. Vaughn testified at trial that she waited to call the police because she "couldn't accept the fact that [Marshall] was dead." Further, Vaughn testified that she cleaned the blood from her wall because she was in shock. A police officer on the scene testified that Vaughn told her that she washed the blood off of her wall because Vaughn could not stand the sight of it.

At trial, Vaughn acknowledged that she falsely told the police that she did not report the homicide sooner because Collins had threatened her. Vaughn testified that she became afraid because she realized that she was a witness to a homicide. According to Vaughn, she asked the police if one of the officers could stay with her because Collins told her that he would return and she was afraid, but the police officer told her that an officer could not stay.

The Detroit police officer dispatched to Vaughn's apartment on June 18, 2006, testified that, pursuant to his investigation, he did not find any firearm evidence. The officer noticed a very faint red smear on the north wall of Vaughn's apartment. Although the officer attempted to obtain fingerprints, he was unable to find any usable fingerprints.

At trial, Assistant Wayne County Medical Examiner Leigh Hlavaty testified that she performed an autopsy on Marshall and determined that Marshall had been dead for one to three days. Hlavaty also observed that Marshall had sustained a contact gunshot wound to his left upper chest. A deformed, jacketed bullet was recovered from Marshall's body. Marshall's death was ruled a homicide on the basis of information from the police that Marshall did not pull the trigger of the gun that caused the contact gunshot wound. Hlavaty performed a toxicological analysis of Marshall's body and found the presence of alcohol and cocaine.

Police officer David Pauch testified that he analyzed the bullet recovered from Marshall's body during the autopsy and identified it as a .40 or 10 mm-caliber bullet. Pauch testified that a .40 caliber cartridge is intended for use in semi-automatic pistols, as opposed to revolvers.

Darryl Thomas, an inmate of the Wayne County Jail at the time of trial, testified that he met Collins in jail after Collins was arrested for the homicide. According to Thomas, Collins told him that Collins had visited his father and then decided to visit a woman who lived in the same apartment building. Thomas testified that Collins told him that the persons present in the apartment started to drink and smoke crack cocaine, and Collins decided to rob a man who was present. Collins stated that he told "the guy" not to move during the course of the robbery, and when "the guy" failed to comply with Collins's order, Collins shot him with either a .40 or .45 caliber pistol. Thomas recalled that Collins told him that, after he shot the victim, he searched the victim's pockets. When Thomas asked Collins how the woman reacted to the situation, Collins responded that the woman "just looked up and looked around." Thomas testified that Collins told him that he left the apartment after the robbery and shooting, shaved his beard, and was eventually arrested while visiting a patient at a hospital.

At the close of the prosecution's case-in-chief, the parties stipulated to reduce the charge of first-degree premeditated murder to second-degree murder because there was no evidence that Collins's killing of Marshall was premeditated. Collins then brought a motion for a directed verdict on the remaining first-degree felony murder, second-degree murder, armed robbery, and firearms charges. Trial court ruled that the prosecution presented sufficient evidence with regard to the remaining charges for the case to be submitted to the jury, and therefore denied Collins's motion for a directed verdict. Following the denial of Collins's motion for a directed verdict, Collins declined to present any evidence. The jury found Collins guilty of the first-degree felony murder, second-degree murder, armed robbery, felon in possession of a firearm, and felony-firearm charges. Collins now appeals.

## II. Motion For Directed Verdict

### A. Standard Of Review

Collins argues that the trial court improperly denied his motion for a directed verdict, alleging that the prosecution presented insufficient evidence to support each element of first-degree felony murder and armed robbery beyond a reasonable doubt. We review de novo a trial

court's decision on a motion for a directed verdict in order to ascertain whether the evidence presented by the prosecutor, when viewed in a light most favorable to the prosecution, could persuade a rational trier of fact that the elements of the crimes charged were proved beyond a reasonable doubt.<sup>8</sup>

## B. Analysis

Due process requires that the trial court direct a verdict of acquittal if there is insufficient evidence to support a conviction.<sup>9</sup> The court must not weigh the evidence or determine the credibility of the witnesses, even if the testimony was inconsistent or vague.<sup>10</sup> Questions regarding the credibility of witnesses are within the purview of the trier of fact.<sup>11</sup>

As Collins frames the issue with regard to his first-degree felony murder conviction, the question in this case is whether the prosecution presented sufficient evidence to persuade a rational trier of fact beyond a reasonable doubt that Collins was the person who committed the homicide. According to Collins, the prosecution “failed to present any real evidence” that Collins shot and killed Marshall. Further, Collins asserts that the prosecution failed to present any evidence that Collins took any item from Marshall for the purposes of the enumerated felony element of the first-degree felony murder charge, here, armed robbery.

In Michigan, the elements of first-degree felony murder are: “(1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [MCL 750.316(1)(b)].”<sup>12</sup> “The facts and circumstances of the killing may give rise to an inference of malice.”<sup>13</sup> “Malice may also be inferred from the use of a deadly weapon.”<sup>14</sup> “The elements of armed robbery are: (1) an assault; (2) a felonious taking of property from the victim’s presence or person; and (3) while the defendant is armed

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<sup>8</sup> *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006); *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999).

<sup>9</sup> MCR 6.419(A); *People v Lemmon*, 456 Mich 625, 633-634; 576 NW2d 129 (1998).

<sup>10</sup> *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997); *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992).

<sup>11</sup> *People v Peña*, 224 Mich App 650, 659; 569 NW2d 871 (1997), mod in part on other grds 457 Mich 885 (1998).

<sup>12</sup> *People v Smith*, 478 Mich 292, 318-319; 733 NW2d 351 (2007), quoting *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999).

<sup>13</sup> *Id.* at 759.

<sup>14</sup> *Id.*

with a weapon.”<sup>15</sup> Reasonable inferences drawn from circumstantial evidence can be sufficient evidence to sustain a criminal conviction.<sup>16</sup>

According to Vaughn, Collins and Marshall were engaged in a physical altercation when she heard a gunshot. Vaughn lost consciousness soon after she heard the gunshot, but when she awoke, she noticed that Collins had left her apartment, Marshall was lying on her floor, and a bloodstain was on her wall. Vaughn positively identified Collins at trial as being present in her apartment on the night of Marshall’s death and testified that Marshall was also present in her apartment on the night he was shot. Although Vaughn was admittedly under the influence of drugs during the altercation between Collins and Marshall, she was able to see, albeit in “slow motion,” and hear, although sounds seemed “far away.”

Medical Examiner Hlavaty testified that Marshall sustained a single contact gunshot wound to his chest, and at the time she performed the autopsy on Marshall, Marshall had been dead for one to three days. Thomas testified that Collins told him that he shot his victim with either a .40 or .45 caliber handgun. And Officer Pauch testified that a .40 caliber or 10 mm caliber bullet was recovered from Marshall’s body.

Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find beyond a reasonable doubt that Collins killed Marshall, and could reasonably infer from the facts and circumstances, including Collins’s use of a handgun, that Collins intended to kill Marshall, to do great bodily harm to Marshall, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, when Collins shot Marshall in the chest at close range.<sup>17</sup>

The prosecution also presented sufficient evidence for a rational trier of fact to find that the elements of the predicate felony, armed robbery, were proved beyond a reasonable doubt. Thomas testified that Collins told him that he decided to rob a man who was present at a woman’s apartment. There was no evidence that anybody else was present in Vaughn’s apartment on the night of Marshall’s death other than Vaughn, Marshall, and Collins. Vaughn heard Collins order Marshall to stand up and place the items in Marshall’s pockets on Vaughn’s kitchen table. Later, the objects Vaughn heard falling on her table, after Collins ordered Marshall to empty his pockets, were gone. Thomas testified that Collins told him that Collins shot his victim when the victim disregarded Collins’s order not to move, and searched the victim’s pockets after Collins shot him. From this evidence, a rational trier of fact could find that Collins assaulted Marshall with a handgun and took the items Marshall placed on Vaughn’s table.<sup>18</sup>

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<sup>15</sup> *Smith, supra* at 319, citing *Carines, supra* at 757.

<sup>16</sup> *Carines, supra* at 757.

<sup>17</sup> See *id.* at 757-759.

<sup>18</sup> See *Smith, supra* at 318-319.

Because the prosecution presented sufficient evidence to support each element of first-degree felony murder, including the predicate felony of armed robbery, beyond a reasonable doubt, the trial court properly denied Collins's motion for a directed verdict.

### III. Jury Instructions

#### A. Standard Of Review

Collins next argues that the trial court abused its discretion when it declined to give the disputed accomplice jury instruction<sup>19</sup> and that the trial court's failure to give the cautionary accomplice jury instruction<sup>20</sup> was plain error.

A party must object to or request a jury instruction before the jury deliberates in order to preserve a challenge on appeal to the trial court's direction of the jury.<sup>21</sup> Collins requested that the trial court instruct the jury regarding disputed accomplices.<sup>22</sup> Accordingly, Collins's challenge to the jury instructions is properly preserved for appeal. However, Collins did not request the cautionary instruction on accomplice testimony,<sup>23</sup> and did not object when the trial court did not give the cautionary accomplice jury instruction. Thus, to the extent that Collins asserts that he was entitled to the cautionary instruction regarding accomplice testimony, his argument is unpreserved on appeal.

"[T]he decision whether to give a cautionary accomplice instruction falls within the trial court's sound discretion."<sup>24</sup> Thus, this Court reviews Collins's preserved challenge to the trial court's decision not to give the disputed accomplice jury instruction,<sup>25</sup> for an abuse of discretion.<sup>26</sup> This Court reviews Collins's unpreserved issue regarding the cautionary instruction concerning accomplice testimony<sup>27</sup> for plain error affecting Collins's substantial rights.<sup>28</sup> To overcome forfeiture of an issue under the plain error rule, a defendant bears the burden of persuasion to demonstrate that: "(1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected a substantial right of the defendant."<sup>29</sup> Even if a defendant can

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<sup>19</sup> CJI2d 5.5.

<sup>20</sup> CJI2d 5.6.

<sup>21</sup> MCR 2.516(C); *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). See also, *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000).

<sup>22</sup> CJI2d 5.5.

<sup>23</sup> CJI2d 5.6.

<sup>24</sup> *People v Young*, 472 Mich 130, 135; 693 NW2d 801 (2005).

<sup>25</sup> CJI2d 5.5.

<sup>26</sup> *Id.*

<sup>27</sup> CJI2d 5.6.

<sup>28</sup> *Id.*

<sup>29</sup> *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006).

show that a plain error affected a substantial right, reversal is appropriate only where “the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings . . . .”<sup>30</sup>

## B. Analysis

### 1. Disputed Accomplice Jury Instruction, CJI2d 5.5

This Court has adopted the definition of “accomplice” set forth in CJI2d 5.5: an accomplice is a “‘person who knowingly and willfully helps or cooperates with someone else in committing a crime.’”<sup>31</sup>

Here, as the trial court observed, there was no evidence that Vaughn assisted anyone else in robbing and shooting Marshall. Collins strenuously asserts that Vaughn’s testimony that she washed the bloodstain from her wall and delayed reporting Marshall’s death to the police was evidence that Vaughn herself killed Marshall or assisted an unidentified third person in the commission of the shooting. However, Vaughn reported to the police, and testified at trial, that she cleaned the bloodstain from her wall because she did not want visitors to her apartment to see it. Vaughn also admitted that her decision to clean the wall was unusual, but she did so because she was in shock. According to Vaughn, she hesitated to call the police because she was in denial that Marshall was dead.

Significantly, other than covering Marshall’s body with a sheet, Vaughn did not disturb it in any way. Further, although Vaughn admitted that she delayed reporting Marshall’s death to the police for an indeterminate period of time, Vaughn did in fact report the incident. Moreover, nothing in the record shows that Vaughn fabricated any of her testimony, there is no evidence to contradict Vaughn’s testimony, and Thomas’s testimony corroborated many aspects of Vaughn’s more detailed account of the events surrounding Marshall’s death.

Accordingly, we conclude that Vaughn’s testimony does not demonstrate that Vaughn knowingly and willingly helped or cooperated with someone else in committing a crime.<sup>32</sup> There is no other evidence in this case that Vaughn acted as an accomplice. Nothing in the record demonstrates that there was any agreement between Collins and Vaughn regarding the events that culminated in Marshall’s death. In the absence of evidence that Vaughn acted as an accomplice, the trial court did not abuse its discretion when it declined to give the disputed accomplice instruction.<sup>33</sup>

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<sup>30</sup> *Carines, supra* at 763 (internal quotations and citation omitted).

<sup>31</sup> *People v Allen*, 201 Mich App 98, 105; 505 NW2d 869 (1993), quoting CJI2d 5.5.

<sup>32</sup> See *id.* at 105.

<sup>33</sup> CJI2d 5.5.

## 2. Cautionary Accomplice Jury Instruction, CJI2d 5.6

As a general rule, a trial court is required to give a cautionary jury instruction regarding the testimony of an accomplice if the defendant requests the instruction.<sup>34</sup> However, a trial court does not abuse its discretion where it declines to give a requested jury instruction that is unsupported by the evidence.<sup>35</sup>

With respect to Collins's argument that he was entitled to the cautionary jury instruction regarding accomplice testimony, the trial court's failure to give the instruction does not constitute plain error. Collins asserts that the trial court should have given the cautionary jury instruction regarding accomplice testimony, even though Collins did not request it, because the issue was "closely drawn," or, in other words, because the issue of Collins's guilt was a credibility contest between Collins's theory of the case and Vaughn's account of the events surrounding Marshall's death.

However, the prosecution correctly points out that, in *People v Young*<sup>36</sup> the Michigan Supreme Court rejected the rule set forth in *People v McCoy*.<sup>37</sup> In *Young*, the Court held that the rule "invented" in *McCoy*—that if the issue is "closely drawn," reversal may be required if a trial court fails to give a cautionary instruction regarding accomplice testimony, even in the absence of a request for the instruction—had no basis under Michigan law, and specifically contravened MCL 768.29 and MCR 2.516(C).<sup>38</sup> The Court also held that the standard of review for an unpreserved challenge to a trial court's decision not to give a jury instruction was for plain error.<sup>39</sup>

Here, the trial court's failure to give the cautionary jury instruction regarding accomplice testimony did not constitute clear or obvious error. There was no evidence that Vaughn was an accomplice of Collins or anyone else in Marshall's shooting.<sup>40</sup> Further, Thomas's testimony regarding Collins's statements to Thomas following Collins's arrest corroborated key aspects of Vaughn's testimony regarding Collins's robbery and shooting of Marshall. Significantly, when Thomas asked Collins how the woman in the apartment reacted to Collins's robbery and shooting of the victim, Collins responded that the woman "just looked up and looked around." This testimony is consistent with Vaughn's account that she was physically incapacitated by narcotics during the incident and could not participate in the events resulting in Marshall's death.

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<sup>34</sup> *People v Ho*, 231 Mich App 178, 188-189; 585 NW2d 357 (1998).

<sup>35</sup> *Id.*

<sup>36</sup> *Young*, *supra* at 132.

<sup>37</sup> *McCoy*, 392 Mich 231; 220 NW2d 456 (1974).

<sup>38</sup> *Id.* at 132.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 143.

Collins fully presented his position to the jury, that Vaughn's testimony was incredible, through vigorous cross-examination.<sup>41</sup> Nearly all of Collins's closing argument consisted of an attack on Vaughn's credibility. Collins presented his theory during his closing argument that either Vaughn killed and robbed Marshall or that she was an accomplice of some other person. During Collins's closing argument, defense counsel specifically urged the jury to consider whether "a witness [has] any special reason to lie or special reason to tell the truth?" Following closing arguments, the trial court instructed the jury to judge the credibility of the testimony in light of whether "the witness [has] any special reason to lie or any special reason to tell the truth[.]" Moreover, the trial court instructed the jury to consider whether "the witness has a bias, a prejudice, or an interest in how the case is decided" when assessing whether a witness testified credibly.<sup>42</sup> Because Collins failed to demonstrate that the trial court's failure to give the cautionary jury instruction regarding accomplice testimony was plain error, reversal is unwarranted.<sup>43</sup>

#### IV. Prosecutorial Misconduct

##### A. Standard Of Review

Collins next argues that the prosecutor committed misconduct when he suggested that the government was privy to special information unavailable to the jury when he questioned Thomas regarding the terms of his plea agreement. We agree, but conclude that reversal is unwarranted because any prejudice to Collins could have been cured by a timely jury instruction.

This Court reviews allegations of prosecutorial misconduct on a case-by-case basis, analyzing the prosecutor's comments in view of defense arguments and the evidence admitted at trial, to determine whether a defendant has been denied a fair and impartial trial.<sup>44</sup> However, this Court reviews for plain error unpreserved claims of prosecutorial misconduct.<sup>45</sup> "To avoid forfeiture under the plain error rule, a defendant must show actual prejudice."<sup>46</sup>

##### B. Analysis

It constitutes improper argument for a prosecutor to vouch for a witness's credibility in order to imply that the prosecutor is privy to "special knowledge" that the witness is telling the truth.<sup>47</sup> A prosecutor's reference to a plea agreement requiring a witness to testify truthfully does

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<sup>41</sup> *Id.* at 143-144.

<sup>42</sup> See *Id.* at 144.

<sup>43</sup> *Id.*

<sup>44</sup> *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). See also *People v Reed*, 449 Mich 375, 398-399; 535 NW2d 496 (1995).

<sup>45</sup> *Carines, supra* at 752-753.

<sup>46</sup> *Pipes, supra* at 274.

<sup>47</sup> *Bahoda, supra* at 276.

not constitute misconduct, “unless it is used by the prosecution to suggest that the government ha[s] some special knowledge . . . that the witness was testifying truthfully.”<sup>48</sup> However, if the prejudicial effects of a prosecutor’s comments could have been dispelled with a timely jury instruction, then reversal is not required.<sup>49</sup>

On direct examination, as a preliminary matter, the prosecutor questioned Thomas regarding the terms of his plea agreement, and questioned Thomas again at the conclusion of the direct examination. Under the circumstances, it is unlikely that the prosecutor intentionally suggested to the jury that the government had special knowledge that Thomas was testifying truthfully. However, in this case, the prosecutor went beyond merely eliciting the terms of Thomas’s plea agreement by suggesting twice, without further clarification, that the government had information to enable it to verify whether Thomas was lying or telling the truth.<sup>50</sup>

Moreover, the rule, that a prosecutor may not suggest that the government has access to information not available to the jury, does not distinguish between situations where the prosecution may intend to suggest to the jury that the witness is testifying truthfully, and situations similar to this case, where the prosecutor may intend to remind the witness of the consequences of false testimony.<sup>51</sup> Instead, the test is whether the questioning “convey[ed] a message to the jury that the prosecutor had some special knowledge, or facts indicating the witness’ truthfulness.”<sup>52</sup> Although the prosecutor’s question may have been directed to Thomas, the prosecutor’s questioning nevertheless conveyed a message to the jury that the government had access to special knowledge it could use to verify whether Thomas was testifying truthfully.

Additionally, unlike the situation presented in *People v Bahoda*, the prosecutor’s questions regarding the plea agreement occurred during direct examination, and not on cross-examination; therefore, the prosecutor’s suggestion that it was privy to information regarding whether Thomas was testifying truthfully cannot be characterized as a response to questioning by defense counsel.<sup>53</sup> Thus, the prosecution’s implication that it had, or could access, information to verify Thomas’s testimony was improper.

However, reversal is unwarranted in this case because any prejudice to Collins could have been cured by a timely jury instruction.<sup>54</sup> Collins failed to object to the prosecutor questioning Thomas regarding the plea agreement, and failed to request a curative instruction. Moreover, prior to deliberations, the trial court specifically instructed the jury to view Thomas’s

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<sup>48</sup> *Id.* (internal quotations and citation omitted).

<sup>49</sup> *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). See also *People v McElhaney*, 215 Mich App 269, 284; 545 NW2d 18 (1996).

<sup>50</sup> *Bahoda*, *supra* at 276.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 277.

<sup>53</sup> *Id.* at 279-280.

<sup>54</sup> *McElhaney*, *supra* at 284.

testimony with caution. As a general rule, jurors are presumed to have followed their instructions.<sup>55</sup> Accordingly, the prosecutor's questioning of Thomas regarding the terms of Thomas's plea agreement does not require reversal.

## V. Evidence Of Prior Incarceration

### A. Standard Of Review

Collins argues that the trial court improperly admitted testimony referring to Collins's prior incarceration. We review for plain error an unpreserved evidentiary issue.<sup>56</sup>

### B. Analysis

As a general rule, references to a defendant's prior incarceration are inadmissible because the jury may rely upon such references as evidence of the defendant's bad character.<sup>57</sup> However, where the testimony of a witness constitutes "an unresponsive, volunteered answer to a proper question," reversal is not generally warranted, particularly where the "witness was not in a position to know that [her] testimony was improper."<sup>58</sup>

In response to the prosecutor's question to Vaughn regarding when her romantic relationship with Collins had ended, Vaughn responded, "Just before he went away to do five months in Macomb County." Collins does not argue, and the record does not show, that the prosecutor either anticipated that Vaughn would refer to Collins's prior incarceration, or that Vaughn's reference was "calculated to prejudice the minds of the jurors against" Collins.<sup>59</sup> Rather, Vaughn provided a non-responsive answer in response to the prosecutor's proper question.<sup>60</sup> Furthermore, nothing in the record suggests that Vaughn was in a position to know that her reference to Collins's prior incarceration was improper.<sup>61</sup>

Moreover, Collins cannot demonstrate that Vaughn's reference to Collins's prior incarceration affected the outcome of the trial proceedings.<sup>62</sup> Collins failed to object to Vaughn's remark. Further, the prosecutor did not explore the subject of Collins's incarceration. Neither the prosecution nor the defense referred to Collins's prior incarceration during Collins's trial. Accordingly, Collins cannot demonstrate that Vaughn's fleeting reference to Collins's

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<sup>55</sup> *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

<sup>56</sup> See MRE 103(d); MCL 769.26; *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

<sup>57</sup> *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999), overruled on other gds, *People v Thompson*, 477 Mich 146, 148, 157-158; 730 NW2d 708 (2007).

<sup>58</sup> *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

<sup>59</sup> Cf: *People v Greenway*, 365 Mich 547, 551; 114 NW2d 188 (1962).

<sup>60</sup> *Haywood*, *supra* at 228.

<sup>61</sup> *Id.*

<sup>62</sup> *Pipes*, *supra* at 279.

prior incarceration affected the outcome of the proceedings, particularly in light of the other evidence presented in the case that supported Collins's convictions. As such, Collins is not entitled to relief on the basis of his argument that the trial court improperly admitted Vaughn's testimony referring to Collins's incarceration.

## VI. Double Jeopardy

### A. Standard Of Review

Collins argues that his convictions and sentences for both first-degree felony murder and the predicate felony, here armed robbery, violate Collins's constitutional double jeopardy protections against multiple punishments. Because a double jeopardy question presents a significant constitutional issue, this court will review the double jeopardy issue on appeal regardless of whether Collins raised it before the trial court.<sup>63</sup> However, because Collins failed to preserve the Double Jeopardy issue, the applicable standard of review is for plain error affecting Collins's substantial rights.<sup>64</sup>

### B. Analysis

Our Supreme Court recently held that a defendant's convictions and sentences for felony-murder and the predicate felony do not constitute the same offense for the purposes of the double jeopardy clauses of the federal and Michigan constitutions so long as each offense requires proof of an element that the other does not.<sup>65</sup> In *People v Ream*, the Supreme Court overruled *People v Wilder*,<sup>66</sup> which held that "convicting and sentencing a defendant for both the felony murder and the predicate felony will always violate the double jeopardy clause."<sup>67</sup>

Rejecting the *Wilder* Court's focus on the facts of each particular case as a basis for determining whether a defendant's double jeopardy protections against multiple punishments had been violated, the *Ream* Court held that the correct focus, and the proper method to ascertain whether the Legislature intended to impose multiple punishments, was an analysis driven by the abstract elements of each crime, as set forth in *Blockburger v United States*.<sup>68</sup> Thus, the *Ream* Court concluded, "convicting and sentencing a defendant for both first-degree felony murder and the predicate felony does not violate the 'multiple punishments' strand of the Double Jeopardy Clause if each offense has an element that the other does not."<sup>69</sup>

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<sup>63</sup> *People v Colon*, 250 Mich App 59, 63; 644 NW2d 790 (2002).

<sup>64</sup> *Pipes*, *supra* at 274.

<sup>65</sup> *Ream*, 481 Mich 223, 225-226; 750 NW2d 536 (2008).

<sup>66</sup> *Wilder*, 411 Mich 328; 308 NW2d 112 (1981).

<sup>67</sup> *Ream*, *supra* at 228.

<sup>68</sup> *Ream*, *supra* at 225-226, 228-229, 232, 238, citing *Blockburger*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932).

<sup>69</sup> *Id.* at 240.

Applying the rule set forth in *Ream* to this case, felony murder requires proof of an element, the killing of a human being, that the predicate felony, armed robbery, does not.<sup>70</sup> Further, armed robbery contains an element that first-degree felony murder does not, specifically, a felonious taking of property from the victim's presence or person.<sup>71</sup> Moreover, "it is possible to commit the greater offense [first-degree felony murder] without committing the lesser offense [armed robbery]."<sup>72</sup> In other words, analogous to the *Ream* Court's observation, to obtain a conviction for first-degree felony murder, the prosecutor is not necessarily required to prove a felonious taking of property from the victim's presence or person.<sup>73</sup> Because first-degree felony murder and the predicate felony, armed robbery, each contain an element that the other does not, they are separate offenses, and Collins may be convicted of, and punished for, each crime without violating Collins's double jeopardy protections against multiple punishments.

Affirmed.

/s/ Christopher M. Murray  
/s/ William C. Whitbeck  
/s/ Michael J. Talbot

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<sup>70</sup> *Smith, supra* at 318-319.

<sup>71</sup> *Id.*

<sup>72</sup> *Ream, supra* at 241, quoting *People v Cornell*, 466 Mich 335, 361; 646 NW2d 127 (2002).

<sup>73</sup> *Id.* at 241.