# S T A T E O F M I C H I G A N

# C O U R T O F A P P E A L S

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>December 15, 2009 |
| v<br><br>MATTHEW THOMAS DESHONE,<br><br>Defendant-Appellant. | No. 286417<br>Saginaw Circuit Court<br>LC No. 05-026949-FC |

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Before: Beckering, P.J., and Cavanagh and M. J. Kelly, JJ.

PER CURIAM.

Defendant Matthew Thomas Deshone appeals as of right his jury convictions of two counts of first-degree murder, MCL 750.316, two counts of carrying or possessing a firearm during the commission of a felony (felony-firearm), MCL 750.227b, carrying a concealed weapon, MCL 750.227, carrying a dangerous weapon with unlawful intent, MCL 750.226, and falsely reporting a felony, MCL 750.411a(1)(b). The trial court sentenced Deshone to life in prison without the possibility of parole for each of the first-degree murder convictions, to two years in prison for each of the felony-firearm convictions, to two to five years in prison for carrying a concealed weapon, to two to five years in prison for carrying a dangerous weapon with unlawful intent, and to two to four years in prison for falsely reporting a felony. The main issues on appeal involve whether the trial court erred when it permitted the prosecutor to introduce recorded statements made by some witnesses along with transcripts of those statements and whether the admission of these recorded statements and transcripts deprived Deshone of a fair trial. We conclude that the trial court erred when it permitted the prosecutor to improperly introduce two recorded statements and that the introduction of these statements prejudiced Deshone's trial. For that reason, we reverse Deshone's convictions and sentences and remand for a new trial.

## I. Basic Facts

Deshone's convictions arose out of the shooting deaths of Demario Sherman and Franscoir Shepherd. At trial, the most significant evidence against Deshone came from an accomplice, Joseph Villarreal, who had earlier pleaded guilty to two counts of second-degree murder and falsely reporting a felony arising from the same events.

Villarreal testified that he had known Deshone for a month or two by the time of the events at issue and was dating Deshone's sister, Michelle. Villarreal said he drove his mother's car, a white 1992 Chevy Lumina, over to Deshone's house and joined Deshone's family for trick-or-treating on October 31, 2005. After trick-or-treating, Villarreal, Deshone and Deshone's sister, Rebecka, went to a local store to purchase cat food. Rebecka testified that she overheard Villarreal talking to someone on the phone concerning the sale of cocaine during the trip to the store. She said that she told Deshone that she was going to tell their mother and Villarreal or Deshone told her to "shut up" and the other told her to mind her own business. She stated that Deshone appeared to know about the cocaine deal.

Villarreal stated that he knew Sherman and that Sherman had asked him several days earlier about finding someone who could sell him an ounce of cocaine. Villarreal said he asked Deshone about finding the cocaine for Sherman and that Deshone responded that he would look into it.

After they purchased the cat food, Villarreal said they went back to Deshone's house. Later, Deshone and Villarreal drove to the home of Gerald Williams. Villarreal said that Deshone introduced him to Gerald and that he had only met him once before that day. At some point Shepherd also arrived at Gerald's home. Villarreal stated that they all drank and the others began to smoke marijuana while he did some "coke." They then left and went to Freddie Williams' house and stayed there until Freddie arrived home. Villarreal said that Freddie was Gerald's brother and that he met Freddie for the first time on that night.[1] When Freddie arrived he was with another man, whose name Villarreal could not remember. Villarreal referred to him as the man with braids.

At Freddie's house, Deshone approached Villarreal and asked him if his friend still wanted the ounce of cocaine. Villarreal then called Sherman and arranged the sale. Villarreal said that he left with Deshone and the man with braids to go sell the cocaine to Sherman. The man with the braids drove Villarreal's car and provided Villarreal with the cocaine. When they arrived at Sherman's apartment, Deshone and Villarreal went in to meet Sherman while the man with the braids remained in Villarreal's car.

Villarreal testified that they met Sherman in the hallway outside Sherman's apartment. Villarreal showed Sherman the cocaine and Sherman showed them a bundle of money wrapped with a rubber band. Villarreal stated that Sherman wanted to weigh the cocaine, but that Deshone then pulled a gun from the pouch of his hoodie and told Sherman to "run that shit," which is street talk for give me the money. After Sherman responded, "forget ya all," Deshone shot Sherman twice. The medical examiner testified that Sherman died from two gun shot wounds; one shot to Sherman's chest and one shot through his right eye.

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[1] Freddie Williams was apparently killed sometime after the events at issue.

Villarreal said that they got scared and ran from the apartment without taking Sherman's money. Sherman's mother testified that she heard the shots and came out into the hallway and saw her son dead with a roll of money next to him. Villarreal stated that they returned to the car where the man with the braids was waiting. Villarreal said he was panicky and that the man with braids told him to calm down. Villarreal then gave the man with braids the cocaine and they drove back to Freddie's house.

Villarreal said that Gerald, Freddie and Shepherd were at Freddie's house when they returned. Villarreal sat in Freddie's garage while Gerald, Freddie, Shepherd, Deshone and the man with braids went into Freddie's house. Gerald and Freddie's wife then came out and said they were taking Villarreal's car to park it somewhere else. After they returned, they told Villarreal that they had parked it at a nearby bar. Villarreal said that he, Deshone, Gerald and Angie then began to talk and drink in the garage. At some point, Villarreal went into Freddie's house to use the bathroom. Villarreal testified that when he went in he saw that the man with braids and Freddie had Shepherd in the bathroom. The man with braids had a gun to Shepherd's head and told Shepherd "if you say anything, we'll fuckin' kill you." Villarreal then went out back and relieved himself there. Villarreal said he returned to the garage and sat with the others for a while and then went to Freddie's basement and took a short nap.

When Villarreal woke up, he asked Gerald if Freddie would take him to his car. Villarreal said that Freddie told him he could not drive his car anymore under the circumstances and offered to pay Villarreal for it. Villarreal declined because it was his mother's car. Villarreal then got into Freddie's car with Freddie, the man with braids, Deshone and Shepherd and they drove to the bar where Villarreal's car was parked. Villarreal said that, when they arrived near the bar, the man with braids told him, Shepherd and Deshone to get out, get Villarreal's car, and follow him.

Villarreal testified that he, Deshone, and Shepherd walked to his car and he got in to drive. Shepherd got into the front passenger's seat and Deshone climbed into the back seat and sat somewhat in the middle, but more towards the driver's side. He then followed Freddie's car to a park near the Saginaw River. After he pulled in behind Freddie, Freddie circled around and behind his car. At that point he heard a "pow" and saw Shepherd grab the back of his head. Villarreal said that, at the same time, Shepherd turned and said, "what the fuck." Villarreal then heard "pow, pow, pow, pow, rapid fire." Villarreal stated that the passenger's side front window blew out. They then ran to Freddie's car where Deshone handed his gun to the man with braids and drove away with Freddie and the man with braids.

The medical examiner testified that Shepherd was hit by two shots. One shot to the back of his head by his left ear which hit a very strong bone and stopped and a second that hit Shepherd in the head and entered his brain. The medical examiner testified that the shot behind Shepherd's left ear would not have killed him, but would have been very painful. He said that the shot that entered Shepherd's brain had a slightly downward trajectory and moved to the right. This shot eventually caused Shepherd's death. Testimony also established that the passenger's side front window had been shattered and that the majority of the glass fell outside the car.

Villarreal testified that the man with braids and Freddie said they needed to get rid of the gun, which Villarreal said was the same gun that Deshone used to kill Sherman. After driving a short ways, Freddie pulled over and the man with braids got out and threw the gun towards the Saginaw River. Freddie then drove them back to his house. Villarreal later led police officers to the area where the gun was thrown and the police found it. Testimony established that the gun was a nine-shot .22 caliber revolver and that it had two empty chambers and seven fired cartridges in it when it was recovered.

Villarreal stated that, at some point they decided to drive up to a local grocery store. They discussed the situation and agreed that Villarreal and Deshone would go into the store and call 911 to report that they had been carjacked at the YMCA near the park where they left Villarreal's car. Villarreal said he gave his jewelry to the man with braids to make it look like he had been robbed. After Freddie left, he and Deshone went into the store and used the payphone to call 911.

Deshone's sister Michelle testified that Deshone admitted to shooting both victims on the day after the killings and stated that he was supposed to kill Villarreal as well, but ran out of bullets. She said that Deshone told her that he fired seven shots at Shepherd. Deshone's mother also testified that he told her that he shot both victims. However, both Deshone's mother and sister also stated that he eventually said that he did not kill the victims.

The police officers investigating the shootings eventually determined that the shootings at issue were related and arrested both Villarreal and Deshone. Villarreal agreed to assist the police officers in exchange for a plea deal. At trial, defendant's theory of the case was that Deshone was an innocent bystander at the shootings; that the evidence showed only that Deshone was "merely present and didn't walk away." The jury ultimately rejected Deshone's theory of the case and found him guilty as noted above.

## II. Audio Recording of Phone Call

We shall first address Deshone's argument concerning an audio recording of a telephone conversation between Deshone and his mother. Deshone argues that he was deprived of a fair trial by the prosecutor's failure to disclose the existence of the recording before trial, by the trial court's failure to grant a continuance so his trial counsel could review the audio recording, and by permitting the prosecutor to admit a transcript of the recording despite a dispute about the accuracy of a portion of the transcription.

### A. Introduction of the Telephone Conversation

Before the start of the sixth day of trial, defendant's trial counsel informed the trial court that he had just learned of the prosecutor's decision to use a recording of a telephone conversation between Deshone and his mother that Deshone made from jail. Deshone's trial counsel argued that the trial court should bar the prosecutor from using the recording or transcripts of the recording in his case-in-chief because the recording was not disclosed under a preexisting discovery request. In response, the prosecutor stated that he had only just discovered the contents of the recording because they spent almost the entire past weekend listening to jail phone calls. The prosecutor indicated that, in the recording, Deshone admits to his mother that he committed the murders. The prosecutor explained that it was his intent to use the recording to

impeach Deshone's mother, who was about to testify. The trial court determined that the recording could be used to impeach Deshone's mother. However, the trial court agreed with Deshone's trial counsel that whether the recording could be used for impeachment depended on her testimony.

Kimberly Kohn, Deshone's mother, testified at trial concerning what she knew about the events on the night at issue. She also admitted that her son told her shortly after the shootings that he had shot both victims. However, she also testified that she could not remember the details surrounding the conversations with her son. Kohn testified that Deshone later stated that he did not shoot the victims and that he was afraid to state who actually committed the murders. She then testified that he only told her that he did the shooting the one time:

> Q So after the second conversation, then, you're saying Matt said he didn't do it?
>
> A Yeah. He only told me the one time, and it was a brief conversation, sir, that he did it.
>
> Q That's the only time he told you he did it?
>
> A That's the only time he told me that he did it.

Shortly after this, the prosecutor asked for permission to play the recording of the telephone conversation. Deshone's trial counsel objected and argued that it was improper impeachment because the prosecutor did not ask her whether she remembered having a telephone conversation in which Deshone again admitted to shooting the victims. The prosecutor responded by noting that Kohn had already denied having any other conversation and by arguing that it was also admissible to refresh Kohn's recollection. The trial court determined that the recording was admissible and the prosecutor played it for the jury.

According to the transcript of the recording, Kohn tells her son that he better start communicating better with his lawyer. Specifically, she tells Deshone that she has been telling his attorney that another person did the shootings:

> [Kohn]: I said, well every time I talk to Matt he tells me I can't say this person's name and I can't say that person's name. And he said, you know what you better start fucking naming some names.
>
> [Deshone]: I told him.
>
> [Kohn]: He said…ooh. This is not looking good at all.
>
> [Deshone]: I know ma I'm done. That's all there is to it basically I'm…I'm…this is a wrap for me, sorry. I'm done. I'm just…I mean it's fuckin' over for me.
>
> [Kohn]: Matt why did you lie to me? I told you don't lie.
>
> [Deshone]: I did it mom.

[Kohn]: What?

[Deshone]: I did it mom.

[Kohn]: Oh my God!

[Deshone]: I didn't lie to you ma.

[Kohn]: We're gonna have to take a plea.

[Deshone]: They're ain't no plea to take.

After playing the recording, the prosecutor asked Kohn if she remembered the conversation and she stated that she did, but that she had forgotten it. She also admitted that there might have been other times that he admitted to the crimes, but that she could no longer remember.

On cross-examination, Deshone's trial counsel replayed portions of the tape and suggested that Deshone did not actually say "I did it," but rather that he said, "I didn't do it." Kohn agreed that it was difficult to hear and that he may have stated that he did not do it. Deshone's trial counsel also asked Kohn if that would be consistent with the remainder of the recording wherein she asked Deshone to name the people actually involved.

After both parties finished their questioning, Deshone's trial counsel reiterated his objection to the admission of the recording and also argued that the transcript should not be submitted to the jury because there was a dispute about the accuracy of that portion of the transcript where Deshone purportedly stated that he did it. However, the trial court denied the objection and noted that the jury had been instructed that the recording controlled over the transcript in the event of an inconsistency.

### B. Review Applicable to Discovery Violations

Relying on *People v Pace*, 102 Mich App 522, 530-531; 302 NW2d 216 (1980), Deshone argues that *every* discovery violation in a criminal case will warrant reversal unless the prosecutor demonstrates that the violation was harmless beyond a reasonable doubt. In *Pace*, this Court determined that the violation of a discovery order implicates a defendant's constitutional rights and, as a result, must be reviewed using a harmless beyond a reasonable doubt standard. *Id.* at 531 n 2. We do not agree that *Pace* is an accurate statement of the law.

Although a criminal defendant has a due process right to obtain exculpatory evidence possessed by the prosecution if it would raise a reasonable doubt about his or her guilt, see *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005), there is generally no constitutional right to conduct discovery. See *People v Elston*, 462 Mich 751, 765; 614 NW2d 595 (2000). Rather, the court rules generally govern the availability of discovery in a criminal proceeding. See MCR 6.201. Thus, although a discovery violation might under some circumstances implicate a constitutional right, this is not invariably the case. Indeed, our Supreme Court has specifically stated that a prosecutorial violation of MCR 6.201(A) based on a failure to disclose a laboratory report or wet swab sample would be nonconstitutional as would any error in the trial court's decision concerning the remedy for the discovery violation. *Elston*,

462 Mich at 765-766. Consequently, a discovery violation that does not implicate a defendant's due process right to obtain exculpatory evidence must be reviewed under the harmless error standard applicable to nonconstitutional error. *Id.* Moreover, in the event that there is a discovery violation, the trial court has the discretion to fashion an appropriate remedy and this Court reviews discretionary decisions for abuse. *People v Banks*, 249 Mich App 247, 252; 642 NW2d 351 (2002); see also MCR 6.201(J).

C. Discovery Sanction

Under the circumstances present here, it is not entirely clear that the prosecutor committed a discovery violation. Although the prosecutor was apparently aware that the jail routinely recorded Deshone's telephone conversations, there is no indication on the record that the prosecutor had reviewed any of the recordings to determine the content before the time described by the prosecutor. See MCR 6.201(B)(3) (requiring the prosecutor to turn over recorded statements by the defendant *if* the recordings pertain to the case).[2] And we are aware of no authority that requires the prosecution to investigate and review recordings to determine whether the recordings should be turned over—that is, we are aware of no authority that requires a prosecutor to review every recording of every telephone conversation simply because the jail made the recording. Therefore, on this record, we cannot conclude that the prosecutor committed a discovery violation; there is no record evidence that the prosecutor failed to timely disclose the existence of the relevant recording as soon as the details were discovered.

In any event, even if we were to conclude that the prosecutor committed a discovery violation by failing to disclose the existence or content of this recording earlier, on this record, we conclude that the trial court did not abuse its discretion when it declined to sanction the prosecution by prohibiting the use of the recording.[3] In fashioning an appropriate remedy for a discovery violation, a trial court should examine the totality of the circumstances including the cause of the noncompliance and the nature of the prejudice to the objecting party. See *People v Davie (After Remand)*, 225 Mich App 592, 598; 571 NW2d 229 (1997). Further, while it is within a trial court's discretion to remedy a violation by precluding the use of the undisclosed evidence, preclusion is an extreme remedy that should be used in only the most egregious cases. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

[2] Deshone's trial counsel did serve the prosecutor with a discovery request that asked for all recorded statements by Deshone, including telephone taps, but framed the request as being made "pursuant to" MCR 6.201. Moreover, Deshone's attorney did not request the trial court to order the prosecutor to turn these recordings over. There is also no record evidence that Deshone's trial counsel specifically requested a copy of the more than 200 recorded telephone calls made by Deshone while in jail even though he may very well have known that the jail recorded Deshone's conversations and could easily have asked his client about the conversations.

[3] Deshone does not argue on appeal that the recording itself was inadmissible under any other theory, including the rules of evidence.

The trial court in this case determined that the recording could be used to impeach Kohn. After Kohn testified that her son only admitted to the shootings shortly after the events at issue and then consistently denied having done the shootings thereafter, the prosecutor could impeach her testimony by showing that Deshone had admitted to her that he committed the crimes during the telephone conversation at issue.[4] Further, the trial court instructed the jury that the recording could only be considered to the extent that it reflected on Kohn's credibility. The decision to permit the recording's use for this limited purpose was within the range or reasonable and principled outcomes. *Yost*, 278 Mich App at 379. Additionally, we cannot fault the trial court for failing to give Deshone a continuance to examine the recording. Deshone's trial counsel did not request a continuance and a trial court cannot be faulted for failing to grant a continuance that was never requested. See *Elston*, 462 Mich at 764-765 (stating that the rule in Michigan is that, in the absence of a request, a trial court should assume that a party does not desire a continuance and, for that reason, "the trial court cannot be faulted for failing to grant a continuance on its own motion."). Therefore, the trial court did not abuse its discretion when it refused to preclude use of the recording as a sanction for a discovery violation.

Finally, even if we were to conclude that the trial court abused its discretion when it declined to suppress the recording, we would nevertheless conclude that any error was harmless. The recording did not implicate Deshone's constitutional right to have the prosecutor disclose exculpatory evidence. Even when interpreted in the manner preferred by Deshone, the recording is merely consistent with his theory of the evidence. It was not evidence that would cast reasonable doubt as to whether he was the person who shot the victims and, for that reason, was not exculpatory. *Cox*, 268 Mich App at 448. Furthermore, Deshone's trial counsel effectively examined Kohn about the substance of the conversation and made the jury aware that the recording could be interpreted differently from the manner suggested by the prosecution in its transcript. This cross-examination focused the jury's attention on the recording over the transcript and was especially effective in light of the remaining portions of the recorded conversation, which could be understood to show that Deshone might be covering for someone else. Deshone's counsel also raised the matter again in closing and told the jury they should disregard the transcript because it did not accurately reflect the fact that Deshone actually told his mother that he did not do it. In addition, there is also no indication that Deshone and his trial counsel were not actually aware of the fact that the jail routinely recorded Deshone's conversations; and if Deshone or his trial counsel were aware that the jail routinely recorded Deshone's conversations, Deshone could not be prejudiced by the prosecutor's failure to remind Deshone of that fact. See *People v Taylor*, 159 Mich App 468, 486 n 26, 487-488; 406 NW2d 859 (1987) (stating that a defendant cannot claim surprise or prejudice by the use of evidence of which he has actual knowledge independent of discovery). Given Deshone's trial counsel's effective examination on this issue and the trial court's limiting instructions during trial and after the close of proofs, we conclude that any error in the admission of the recording was harmless. *Elston*, 462 Mich at 766-767.

[4] To the extent that Kohn could not remember whether her son had admitted to the shootings, the prosecutor could use the recording to refresh her recollection. MRE 803(5).

## D. Submission of the Transcript

Deshone also argues that the trial court erred when it permitted the submission of the transcript of this recording to the jury despite the dispute as to whether Deshone stated "I did it" or "I didn't do it." This Court has held that trial courts should take steps to ensure the accuracy of transcripts before submitting them to the jury in order to avoid potential harmful prejudice. *People v Lester*, 172 Mich App 769, 776; 432 NW2d 433 (1988), adopting the procedures stated in *United States v Robinson*, 707 F2d 872 (CA 6, 1983). The preferred method for ensuring the accuracy of the transcript is to obtain a stipulation as to the accuracy of the transcript by the parties. *Lester*, 172 Mich App at 776. In the absence of a stipulation, this Court noted that there were other methods that the trial court could use in order to ensure the accuracy of the transcript. *Id.* However, the Court in *Lester* noted that the procedures stated in *Robinson* did not constitute an exhaustive list; rather the overriding goal was to ensure the reliability of the transcript. *Id.* at 775. Thus, the trial court has the discretion to utilize varying methods for ensuring that a defendant is not prejudiced by the use of a transcript.

In this case, there was no dispute as to the accuracy of the majority of the transcript. Further, although Deshone's trial counsel argued that the transcript did not accurately record Deshone's statements on two lines, the trial court did not actually find that the transcript was inaudible in this area.[5] Indeed, when Kohn listened to the tape she initially admitted that her son said that he did it on the recording. Even after stating that her son might have said I didn't do it on cross-examination, during redirect examination the prosecutor played the second instance, which he described as being a "lot clearer", and she again admitted that her son said he did it:

> Q You heard it that time?
>
> A Yeah. I heard it every time. I mean, I don't know what I'm supposed to say. The—conversation's there.
>
> Q He admitted to you he did it?
>
> A He admitted it several times, and then admitted he didn't.

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[5] We note that it would have been preferable for the trial court to have listened to the tape out of the presence of the jury before making a determination with regard to the transcript. Had the trial court done this, it could have heard any objections, made findings with regard to the disputed portion of the transcript and, thereby, provided a better record for our review. Nevertheless, on the record before us, we cannot conclude that the trial court's decision to handle the dispute in the manner that it did fell outside the range of reasonable and principled outcomes. *Yost*, 278 Mich App at 379.

Based on this testimony, it is not entirely clear that the transcript was actually inaccurate—that is, it is not clear that the disputed portion was actually susceptible of two different interpretations.[6] Given that there are no required procedures for handling situations of this nature, *Lester*, 172 Mich App at 775, we cannot agree that the trial court's decision to permit the jury to use the transcript was error.

The trial court determined that the transcript should be submitted to the jury, but reminded the jury about its earlier instruction that the transcripts were not evidence and, if the jurors were to conclude that there was a discrepancy between a transcript and a recording, the jurors should rely on the recording. The trial court also permitted the parties to explore the alleged discrepancy at length during Kohn's examination and Deshone's trial counsel argued to the jury that the section of the transcript at issue was not accurate and should be disregarded. Given the possibility that one or both statements were not reasonably in dispute, we do not believe that the trial court abused its discretion when it permitted the use of the transcript with the prior cautionary instruction regarding the controlling nature of the recording and while permitting the parties to examine Kohn at length about the possible alternate interpretations. This decision fell within the range of reasonable and principled ways to handle the transcript.[7] *Yost*, 278 Mich App at 379. There was no error warranting relief.

### III. Officer Ruth's Testimony

On appeal, Deshone argues that the trial court also erred when it permitted officer Robert Ruth to offer his opinion about Deshone's guilt and to bolster Villarreal's credibility. This Court reviews a trial court's evidentiary decisions for an abuse of discretion. *Yost*, 278 Mich App at 353.

The trial court did not err in overruling the objections to Ruth's testimony. Deshone likens this case to *People v Lucas*, 138 Mich App 212; 360 NW2d 162 (1984). In that case, two men committed a robbery. *Id.* at 214. One of the robbers, Fox, named defendant Lucas as his partner. *Id.* at 214-215. There was evidence indicating that the robbers were actually Fox and another man, Thompson. *Id.* The deputy who had investigated the crime was allowed to testify that he had investigated Thompson's alibi and was satisfied by it. *Id.* at 217-219. This Court held that the defendant's right to have the jury decide the credibility of witnesses without the opinions of the deputy interfering was a "very substantial right," and reversed the conviction. *Id.* at 223-224.

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[6] We note that neither party has submitted the actual recording to this Court. For that reason, we must rely on the testimony by witnesses and the descriptions proffered by the parties at trial.

[7] Although we cannot conclude that the trial court's decision fell outside the range of reasonable and principled ways to handle the submission of the transcript, if reasonable persons could disagree about what was said on the disputed portions of the recording, we believe that the better practice would have been to permit the jury to resolve that dispute without the suggestive influence of a transcript prepared by one party. For that reason, on retrial, we would encourage the trial court to either make findings as to the accuracy of the transcript or, if reasonable people could disagree about what was said, let the jury resolve the dispute without the transcript.

But not every instance of a police officer expressing an opinion is error warranting reversal. For example, in *People v Dobek*, 274 Mich App 58, 70-71; 732 NW2d 546 (2007), one of the investigating detectives was allowed to testify that he had no concerns about the victim lying to him. This Court affirmed the conviction: "Given that [the detective] was called as a witness by the prosecutor and that a criminal prosecution against defendant was pursued, the jurors surely understood that [the detective] believed that the victim was telling the truth even without the disputed testimony." *Id.* at 71.

Moreover, some of the testimony about which Deshone complains was given by Ruth by way of an explanation as to why he investigated the case the way he did. Ruth testified that he did not believe Deshone's story that he was carjacked. Given that Deshone later acknowledged that the carjacking story was a lie, the prejudice from Ruth's statement would be minimal, if any. Other statements were unsolicited. Specifically, the prosecutor asked Ruth how he investigated the murders, and Ruth responded with both how and why. As a general rule, "a volunteered and unresponsive answer to a proper question is not cause for granting a motion for mistrial." *People v Holly*, 129 Mich App 405, 415; 341 NW2d 823 (1983). However, unresponsive statements given by police witnesses are subject to greater scrutiny because a police witness is charged with a special responsibility to know what topics are off limits. *Id.* at 415-416. Nonetheless, even under this higher level scrutiny, the statements were likely not prejudicial given the context in which they were made, and the fact that the jury must have understood that, as the prosecution's witness and chief investigating officer, Ruth had certain theories about these murders. Cf. *Dobek*, 274 Mich App at 71.

In addition, Ruth's testimony that Deshone admitted that he and Villarreal planned Sherman's robbery was Ruth's recollection of Deshone's admission to the circumstances surrounding the Sherman murder. Deshone's trial counsel objected to Ruth's characterization of a "plan" and asked the court "to instruct the jury to just review the videotape and not this witness's synopsis of it." And the prosecutor responded that his testimony was not improper, but acknowledged that "the videotape is the best evidence and I invite the jury to watch it again and again if they wish." Ruth's recollection of what defendant said was proper testimony, as he had first-hand knowledge of an admission of a party-opponent. MRE 801(d)(2)(A). Accordingly, no error occurred in allowing this testimony.

The remaining statements were arguably permissible as lay opinions based on Ruth's experience. See *People v Oliver*, 170 Mich App 38, 50-51; 427 NW2d 898 (1988) (noting that police officers may give opinion testimony on matters within their experience as long as it is not overly scientific, technical, or specialized).

For these reasons, after carefully reviewing Ruth's trial testimony, we conclude that there were no errors warranting relief.

## IV. The Admission of Other Recorded Statements

Deshone also generally argues that the trial court erred when it permitted the admission of recorded statements by his sisters Rebecka and Michelle, as well as the recorded telephone conversation with his mother discussed above. This Court reviews a trial court's evidentiary decisions for an abuse of discretion. *Yost*, 278 Mich App at 353. However, it is necessarily an abuse of discretion to admit evidence that is inadmissible as a matter of law. *Id.*

### A. Kohn's Telephone Conversation

Deshone argues that the recording of the telephone conversation between him and his mother was improperly admitted to impeach his mother. As we noted above, this recording was admissible to impeach Kohn's statement that her son only admitted to the murders on one occasion and then consistently stated that he did not commit the murders thereafter. MRE 613; *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995). It was also admissible to refresh her recollection. MRE 803(5). Moreover, we do not agree that she could not properly be impeached on the matter because the impeachment involved a statement that tended to directly inculpate Deshone. *People v Kilbourn*, 454 Mich 677, 682-683; 563 NW2d 669 (1997). Kohn's credibility was clearly at issue because her testimony tended to bolster Deshone's theory of the case—that is, that he initially admitted to the shootings out of fear, but that the shootings were actually perpetrated by someone else. Therefore, the fact that the impeachment involved Deshone's statements did not render this recording inadmissible. *Id.* at 683.

Deshone also argues that the trial court failed to instruct the jury about the proper use of the telephone recording even though it gave a specific instruction with regard to the recording of Michelle's statements to police officers. First, we note that Deshone's trial counsel did not object to the instructions on this basis. Second, although the trial court did not refer to the recording of Kohn's conversation with Deshone, it did instruct the jury on the law applicable to prior statements made by witnesses:

> You must be very careful about how you consider this evidence. The statement was not made during the trial, so you must not consider it when you decide whether the elements of the crime have been proven. On the other hand, you may use it to help you decide whether you think the witness is truthful.
>
> Consider the statement carefully. Ask yourself if the witness made the statement, whether it was true, and whether it differs from the witness's testimony here in court. Then remember that you may only use it to help you decide whether you believe a witness's testimony here in court.

Therefore, the trial court did not err in failing to instruct the jury on the proper use of Kohn's recorded statement.

### B. The Recording of Michelle's Conversation

Deshone also argues that the trial court erred when it admitted the recording of Michelle's conversation with police officers over objection.

At trial Michelle testified on direct examination that, on the day after the shootings, her brother admitted to shooting both victims. She also testified that he said that he was supposed to kill Villarreal if he had bullets left and that he fired seven bullets at Shepherd. She stated that he told her that he shot Shepherd from the back seat of a car that was being driven by Villarreal.

On cross examination Deshone's counsel elicited testimony that Deshone's statements to her varied over time and that he also stated that he did not shoot the victims and even implicated others. Michelle also testified that her brother had indicated that he feared the others and that he was only admitting to the shootings to cover for Freddie Williams.

On redirect examination, the prosecutor asked Michelle if all this additional information came out before she spoke to the police officers. Michelle testified that a "lot of it came out." After this statement, the prosecutor asked to play the recording of Michelle's statement to the police. Although Deshone's trial counsel objected that it was improper impeachment, the prosecutor indicated that he wanted to play it both because it was "so different from her testimony" and to refresh her recollection about the conversation. At this point, the trial court permitted it to be played both to impeach and refresh her recollection over Deshone's trial counsel's objection. And, after the recording advanced to statements by others, Deshone's counsel again objected and the recording was stopped.

After playing the recording, the prosecutor again asked Michelle if she knew the additional details that she testified about during her cross-examination before she spoke to the police officers and Michelle said, "yes." He then asked: "I didn't hear you mention that once. Did you?" Michelle acknowledged that she did not tell the police officers about the additional details, but emphatically stated that her brother had told her. After these questions, Michelle testified that her brother gave her the additional details after the police officers interviewed her.

On this record, we conclude that it was error to permit the use of this recording to impeach Michelle. Michelle never testified that she told the police officers about her brother's varying stories. Hence, there was nothing inconsistent between her testimony and the recorded statements. See MRE 613. Likewise, Michelle never stated that she did not recall making any specific statement to the police. Therefore, there was no reason to refresh her recollection. See MRE 803(5).

Although we agree that it was error to admit this recording for impeachment or to refresh Michelle's recollection, we cannot conclude that this error standing alone warranted a new trial. The recording for the most part merely related the same details that the prosecutor elicited from Michelle on direct examination. Additionally, because Michelle's statements in the recording were consistent with her testimony, the recording cannot be said to have undermined her credibility. Finally, as noted above, the trial court gave a limiting instruction applicable to all prior witness statements that were played for the jury. Consequently, we conclude that this error by itself would not warrant relief.

### C. The Recording of Rebecka's Conversation

Finally, Deshone argues that the trial court also erred when it permitted the prosecution to play a recording of Rebecka's conversation with police officers without a proper basis for its admission and without limiting the recording to those statements made by Rebecka.

On direct examination, Deshone's sister Rebecka testified about the events that occurred on Halloween. She also testified that Deshone told her that he shot and killed Shepherd. She said he told her that he shot him because he had to and that he used a revolver. Rebecka stated that he said he was in the back seat of a car, fired seven shots, and that the shooting occurred at a

park. However, Rebecka also expressed some hesitation during the questioning about the specific details and indicated that she did not remember when asked certain questions. After some time, the prosecutor asked her if it would help for her to review the tape of her conversation with the police officers and she asked if she could review a transcript. When the prosecutor prepared to play the recording, Deshone's trial counsel objected, noting that Rebecka had only requested a transcript. Nevertheless, the trial court permitted the recording to be played because the transcripts were not "controlling"—the tape was.

The prosecutor then played 52 minutes of recording. On the recording, the jury heard, among other things, Ruth state that: (1) Rebecka had previously told him that Deshone had committed both murders, (2) Villarreal and Deshone had previously told them that there was no one in the car with them and Shepherd before Shepherd's murder, (3) no one had mentioned there being another car at the park, (4) Villarreal and Deshone had told them that they threw the gun away, (5) Villarreal and Deshone had enough time to walk from the park to the store from which they called the police, (6) that Deshone had previously admitted to killing Sherman, (7) that Villarreal had previously told him that Deshone shot Sherman, (8) Deshone and Villarreal had told him that no other persons were present at the murder of either Sherman or Shepherd, (9) Deshone had previously stated that he would have shot Villarreal if he had not run out of bullets, (11) Deshone did in fact run out of bullets, (12) it defies common sense to think that Deshone would admit killing someone to his mother if he did not do it, (13) Deshone and Villarreal traded Villarreal's cell phone for cocaine as part of the plan to murder Shepherd, (14) Deshone and Villarreal murdered Shepherd because he heard Deshone bragging about Sherman's murder, (15) there was only one set of tire tracks in the mud at the park, (16) perhaps Villarreal and Deshone had replaced the cocaine they were supposed to sell to Sherman with pancake mix, and used the real cocaine themselves, and (17) if Deshone were released he would murder his mother and sisters.

Even if the trial court properly permitted the prosecutor to play the recording to refresh Rebecka's recollection, it was clearly error to permit the jury to hear the full recording and see the full transcript without any effort to redact Ruth's statements. See *People v Etheridge*, 196 Mich App 43, 47-51; 492 NW2d 490 (1992) (noting that it may be necessary to redact some statements that are otherwise admissible in order to avoid prejudice to the defendant); see also *People v McGillen*, 392 Mich 251, 263; 220 NW2d 677 (1974) (stating that, where a statement to a police officer is admissible, it is the statement itself that is admissible, not the police officer's editorialized version of the statement). Indeed, the trial court recognized the potential for undue prejudice and gave the jury a strongly worded instruction in an attempt to mitigate the harm:

> You have been allowed to view a videotape and transcript of an interview that took place between Detective Ruth, the defendant's mother, and witness Becka Deshone. The purpose of allowing Becky Deshone to view this videotape and transcript was to allow her to refresh her memory. Many of the statements made during the course of the videotape interview had nothing to do with refreshing the witness's memory and should be totally disregarded. Evidence in a trial consists of sworn testimony of the witnesses, exhibits, and anything else I told you to consider as evidence. You are instructed that the only evidence and testimony you may consider with regard to Becka Deshone is the sworn testimony

she gave while she was on the stand along with any other earlier statement she made which she acknowledged was true.

Although jurors are presumed to follow their instructions, this presumption can be overcome. See *Richardson v Marsh*, 481 U.S. 200, 207; 107 S Ct 1702; 95 L Ed 2d 176 (1987). Given the repeated and highly prejudicial nature of Ruth's statements, we conclude that the trial court's effort to cure the error was insufficient. Taken in their totality, we conclude that it is more probable than not that the improperly admitted statements were outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Consequently, Deshone is entitled to a new trial on the basis of this error.

We reverse Deshone's convictions and sentences and remand for a new trial consistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Mark J. Cavanagh
/s/ Michael J. Kelly