

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

DARIUS BELCHER,

Defendant-Appellant.

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UNPUBLISHED

August 24, 2001

No. 218835

Oakland Circuit Court

LC No. 93-122353-FH

Before: Jansen, P.J., and Collins and Cooper, JJ.

PER CURIAM.

This case is before this Court by an appeal as of right following a lengthy procedural history. In 1993, defendant was convicted by a jury of possession with intent to deliver 50 grams or more, but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii), possession with intent to deliver marijuana, MCL 333.7401(2)(c),<sup>1</sup> and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced in July 1993 to two concurrent terms of two years' imprisonment for the felony-firearm convictions, with credit for fifty-one days served, to be followed by concurrent terms of ten to twenty years' imprisonment for the cocaine conviction and one to four years' imprisonment for the marijuana conviction. Defendant appealed his convictions as of right, but the appeal was dismissed for lack of progress. Defendant subsequently moved for relief from judgment under MCR 6.500 *et seq.* The trial judge who presided at a pretrial motion to suppress evidence in this case, but who did not preside at the jury trial, heard the motion. Following a hearing, the trial court issued an opinion and order, dated May 12, 1998, vacating the felony-firearm convictions, but denying any further relief. For purposes of this ruling, the trial court determined that former appellate counsel's failure to preserve defendant's appeal as of right satisfied the good cause requirement of MCR 6.508(D)(3). Defendant thereafter filed an application for leave to appeal with this Court from the trial court's May 12, 1998, opinion and order. Instead of granting leave to appeal, this Court remanded for an evidentiary hearing to determine whether former appellate counsel was at fault in failing to file an appeal brief. If counsel was found to be at fault, the appeal was to be redocketed as a "first appeal of right." Following the trial court's finding that

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<sup>1</sup> This statute was amended after defendant's offense and the proscribed offense is now codified as subsection (d) of MCL 333.7401(2).

defendant's prior counsel was at fault, defendant filed another claim of appeal with this Court. This Court subsequently amended its prior order to provide for the acceptance of defendant's claim of appeal from the May 12, 1998, opinion and order and to "docket the appeal of right." We now affirm, but remand for correction of the judgment of sentence to reflect fifty-one days of sentence credit toward the sentences for the cocaine and marijuana convictions.

## I

As a threshold matter, we find it necessary to address the prosecution's claim that the trial court's ruling on defendant's motion for relief from judgment is moot in light of this Court's order treating this case as a first appeal as of right. Moreover, defendant relies on his motion for relief from judgment for purposes of asserting that issues now raised on appeal were preserved below.

With regard to the issue of mootness, we agree with the prosecutor that appeals from decisions under MCR 6.500 *et seq.* are by leave only. MCR 6.509(A). However, this Court's prior orders are ambiguous regarding whether the intent was to grant an appeal as of right from the May 12, 1998, opinion and order on the motion for relief from judgment and related amended judgment, or to treat the whole matter as a first appeal as of right. Indeed, treating this appeal as a first appeal as of right may create a jurisdictional problem because the time limit for an appeal as of right is jurisdictional, MCR 7.203(A) and MCR 7.204(A), and a jurisdictional defect may be raised at any time. See *People v Martinez*, 211 Mich App 147, 149; 535 NW2d 236 (1995).

In view of the jurisdictional concerns over whether this appeal may be accepted as an appeal as of right relative to either the original or amended judgment, and given that former appellate counsel's neglect of the prior appeal was a proper basis for defendant to argue the "good cause" requirement of MCR 6.508(D)(3)(a), *People v Hardaway*, 459 Mich 876; 585 NW2d 303 (1998); *People v Reed*, 449 Mich 375; 535 NW2d 496 (1995), we find it appropriate to treat this appeal as one where leave to appeal was granted from the May 12, 1998, opinion and order (and the related amended judgment) pursuant to MCR 6.509(A). Cf. *Waatti & Sons Electric Co v Dehko*, 230 Mich App 582, 585; 584 NW2d 372 (1998) (This Court has discretion to treat an untimely appeal as of right as an application for leave to appeal, grant the application, and resolve the appealed issue on the merits).

Nonetheless, considering the unusual circumstances of this case, we will review defendant's challenges to his remaining cocaine and marijuana convictions under the standards applicable for a first appeal as of right, as well as the standards for relief from judgment under MCR 6.508(D)(3). For purposes of the latter rule, we will treat former appellate counsel's neglect of defendant's prior appeal as satisfying the "good cause" requirement of MCR 6.508(D)(3)(a). The dispositive issue, then, is whether defendant can satisfy the "actual prejudice" requirement of MCR 6.508(D)(3)(b).

Within this context, we agree that defendant preserved for appellate review the issues raised in his motion for relief from judgment. However, defendant's failure to brief the standards applicable to that motion could preclude appellate review of that motion. See *People v Kent*, 194 Mich App 206, 210; 486 NW2d 110 (1992) (failure to brief the merits of an allegation of error precludes appellate review). Once again, however, considering the unique circumstances of this

appeal, we will consider defendant's substantive arguments to determine whether he can establish the requisite actual prejudice in MCR 6.508(D)(3)(b).

To the extent, however, that defendant suggests that the motion for relief from judgment is sufficient to avoid forfeiture of issues not raised at trial, we disagree. Defendant's reliance on *Reisman v Regents of Wayne State Univ*, 188 Mich App 526; 470 NW2d 678 (1991), is misplaced because the issue in that civil case involved an instructional claim where an objection was made at trial before the jury was instructed and the issue was again raised in a motion for judgment notwithstanding the verdict. *Reisman* is not relevant for purposes of a motion under MCR 6.500 *et seq.*, which establishes "good cause" and "actual prejudice" requirements that limit a trial court's ability to grant relief from a judgment in a criminal case when MCR 6.508(D)(3) is applicable. *People v Brown*, 196 Mich App 153, 158; 492 NW2d 770 (1992). Further, *Reisman* does not consider the standards that have evolved for review of unpreserved issues in the context of criminal cases. Within this context, our Supreme Court has held that the failure to timely assert a right may result in forfeiture of the issue absent a showing of plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999).

Keeping in mind that the "good cause" that formed the basis for defendant's motion for relief from judgment was his former counsel's neglect of the prior appeal as of right, we deem defendant's issues involving claims that were not raised until the motion for relief from judgment as subject to forfeiture, because they were not timely raised below. Reviewed from the perspective of a first appeal as of right, we apply *Carines* to unpreserved issues, limiting our review to the record developed up to the time of the original July 1993 judgment in determining whether there was plain error affecting defendant's substantial rights. See *People v Powell*, 235 Mich App 557, 561, n 4; 559 NW2d 499 (1999) (expansion of record on appeal is impermissible). Additionally, reviewed from the standpoint of an appeal by leave granted from the trial court's partial grant of the motion for relief from judgment, we will also apply the actual prejudice standards in MCR 6.508(D)(3)(b) to those forfeited issues, bearing in mind that our review is limited to plain error, absent additional relevant materials permitted by the trial court under MCR 6.507(A). Against this backdrop, we now consider each of defendant's claims.

## II

Defendant first challenges the sufficiency of the jury verdict for count I on the ground that it lacks clarity. We review this unpreserved issue for plain error. *Carines, supra* at 763. A jury verdict "is not void for uncertainty if the jury's intent can be clearly deduced by reference to the pleadings, the court's charge, and the entire record." *People v Rand*, 397 Mich 638, 643; 247 NW2d 508 (1976), mod on other grounds 399 Mich 1040 (1977). Although the clerk neglected to mention the word "cocaine" when announcing the jury verdict for count I, it is plainly apparent from the trial record, particularly the jury's written verdict form, that the verdict was based on a finding involving cocaine. It is equally apparent that the conviction for count I was based on the cocaine seized from the condominium on September 24, 1992, during the execution of the search warrant. The verdict is not plainly void for uncertainty.

Because defendant has not shown plain error, this issue affords no basis for relief, regardless of whether this appeal is treated as an appeal as of right or one by leave granted from

the trial court's ruling on the motion for relief from judgment. The trial court correctly rejected defendant's claim that the verdict was void when denying defendant's motion for relief from the judgment.<sup>2</sup>

### III

Defendant next argues that the trial court abused its discretion by admitting evidence of the September 23, 1992, drug transaction, without weighing the probative value of the evidence against its prejudicial effect under MRE 403. A review of the record reveals that the trial court was aware of its discretionary authority and the factors relevant to that discretion. *People v Gendron*, 144 Mich App 509, 516; 376 NW2d 143 (1985). The trial court agreed with the prosecutor's position regarding the admissibility of the evidence, giving specific consideration to *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978), for the proposition that the evidence was admissible as part of the complete story of what occurred, and *People v Mouat*, 194 Mich App 482, 484; 487 NW2d 494 (1992), for the proposition that the evidence was admissible under MRE 404(b) to show defendant's knowledge, intent, and absence of mistake, and was not so prejudicial that it should be excluded. Defendant has not established that the trial court abused its discretion in admitting the evidence. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999); see also *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000) (a ruling on a close evidentiary question ordinarily cannot be an abuse of discretion).

We find no merit to defendant's claim that he was entitled to pretrial notice of the proposed evidence under MRE 404(b)(2). The notice requirement was not adopted until after defendant's trial. See *People v VanderVliet*, 444 Mich 52, 89; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). Furthermore, as noted above, the evidence was admitted for a proper purpose independent of MRE 404(b), consistent with *Delgado, supra*. Accordingly, defendant has not shown plain error. *Carines, supra* at 763.

Because defendant has not established an abuse of discretion with respect to the evidentiary ruling or plain error, we conclude that, treating this case as an appeal as of right, there is no basis for relief. With regard to defendant's motion for relief from judgment, defendant has not established the relevancy of the documentary evidence concerning the criminal history of the individual, Marco Rubino, who actually made the delivery to the undercover officer, but who did not testify at defendant's trial. Furthermore, the record reveals that defense counsel was aware, before trial, of defendant's conviction arising from Rubino's September 23, 1992, drug transaction, and did not seek an adjournment to prepare for the evidence. We agree with the trial court when ruling on defendant's motion for relief from judgment that it was manifest that defense counsel was aware that the evidence might be offered, inasmuch as "the earlier incident was the first in a series of directly related events which culminated in the search of his home."

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<sup>2</sup> Defendant also asserts for purposes of this issue that there was insufficient evidence to support his conviction. However, because he has not briefed the merits of a sufficiency of the evidence claim, see *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992) we decline to consider this claim further. *People v Kent*, 194 Mich App 206, 210; 486 NW2d 110 (1992).

#### IV

Defendant next raises two claims of instructional error. First, he claims that a requested limiting instruction based on CJI2d 4.11 should have been given with respect to the evidence of the September 23, 1992, drug transaction. However, we find no support in the record for defendant's claim that defense counsel requested such an instruction before the jury was excused to commence deliberations, see MCR 6.414(F). Further, the discussion on the record before closing arguments supports the trial court's ruling that CJI2d 5.11 (police witnesses) was to be given, not CJI2d 4.11 (evidence of other offenses)

In any event, while reversal may be warranted if a requested limiting instruction concerning the proper use of MRE 404(b) evidence is not given, *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999), automatic reversal will be found only where an instructional error amounts to a structural defect that defies a harmless error analysis. *People v Duncan*, 462 Mich 47, 51-52; 610 NW2d 551 (2000). Here, a structural defect has not been shown. Even assuming that counsel properly requested a limiting instruction under CJI2d 4.11, failure to give that instruction does not warrant reversal because the evidence in question was admissible independent of MRE 404(b). MCR 6.508(D)(3)(b); cf. *People Sholl*, 453 Mich 730, 740-742; 556 NW2d 851 (1996) (rejecting a claim that an instruction limiting the use of evidence of the defendant's marijuana use to assess his memory should have been given when it was part of the full transaction).

Defendant also argues that the trial court's instruction on reasonable doubt was erroneous. The trial court instructed the jury in accordance with CJI2d 3.2(3). The instruction was not improper. *People v Snider*, 239 Mich App 393, 608 NW2d 502 (2000); *People v Sammons*, 191 Mich App 351, 372; 478 NW2d 901 (1991).

#### V

Defendant next challenges the trial court's ruling to allow opinion testimony. Defendant asserts that the trial court's rationale for admitting Detective Gretz's opinion testimony was manifestly arbitrary because the trial court remarked that Detective Gretz could give an opinion "because I said he could." Examined in context, it is apparent that the trial court's remark was made to the prosecutor, who unsuccessfully sought a judicial ruling regarding Detective Gretz's qualifications as an expert. It is apparent that the trial court agreed with defense counsel's position that Detective Gretz's expertise was a jury question. We agree that the trial court's approach is plainly erroneous because the question whether a witness is an expert is to be decided by the court. MRE 702; *People v Whitfield*, 425 Mich 116, 122; 388 NW2d 206 (1986). The jury decides only the weight of the evidence. *Id.* at 124. However, "error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence." *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999). Therefore, the trial court's remark to the prosecutor does not afford a basis for relief.

Defendant also argues that the evidence was sufficient to allow the jury to decide the question of intent without the aid of expert testimony. Because this specific issue was untimely raised by defendant, we review it for plain error. *Carines, supra* at 763. Although the prosecutor had substantial evidence from which intent to deliver could be inferred, it is not plainly apparent

that Detective Gretz's opinion testimony would not aid the jury in better understanding the evidence or in assisting it in determining a fact in issue. *People v Williams (After Remand)*, 198 Mich App 537, 541-542; 499 NW2d 404 (1993). Also, the fact that Detective Gretz's opinion embraced an ultimate issue did not render it inadmissible. *Id.* at 542; MRE 704.

Because there is no plain error, defendant's claim does not afford a basis for relief, regardless of whether we treat this case as a first appeal as of right or an appeal by leave from the trial court's ruling on the motion for relief from judgment. Further, we conclude that the other strong evidence on the issue of intent demonstrates that defendant cannot show the requisite actual prejudice for relief from judgment with respect to the drug convictions. MCR 6.508(D)(3)(b).<sup>3</sup>

## VI

Defendant next raises two issues concerning his initial encounter with law enforcement officers outside the Pit Stop Oil Change Shop (Pit Stop) during the course of the investigation on September 23, 1992.

First, defendant claims that his statements and other evidence obtained by law enforcement officers without the benefit of the advice required by *Miranda*<sup>4</sup> should have been suppressed. Because the trial court was not under a duty to sua sponte hold a suppression hearing on this issue, *People v Ray*, 431 Mich 260, 272; 430 NW2d 626 (1988),<sup>5</sup> and because defense counsel did not request a suppression hearing when presenting his *Miranda* argument at trial, we limit our review of this issue to Lieutenant Krafft's trial testimony. Although Lieutenant Krafft's testimony established that defendant was stopped for an investigative purpose, it did not establish that he was in custody for purposes of a *Miranda* warning. *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997); *People v Peerenboom*, 224 Mich App 195, 197-198; 568 NW2d 153 (1997). "General on-the-scene questioning as to the facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by the holding of *Miranda*." *People v Dunlap*, 82 Mich App 171, 175; 266 NW2d 637(1978).

Because Lieutenant Krafft's testimony does not establish a violation of *Miranda*, it is unnecessary to address defendant's claim whether collateral estoppel could apply. Regardless, we are satisfied that a note in a police report, indicating that defendant was "immediately arrested by COMET officers," provides no basis for disturbing the trial court's rejection of defendant's *Miranda* claim. The police report was prepared by the undercover police officer involved in the

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<sup>3</sup> Although defendant asserts that repeated objections were made to the prosecutor's conduct in eliciting opinions from other police witnesses, his failure to brief the specific objections precludes further review. *Kent*, *supra* at 210.

<sup>4</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

<sup>5</sup> At the time of defendant's trial, failure to administer *Miranda* warnings was not viewed as a violation of a defendant's Fifth Amendment rights. *Ray*, *supra* at 272. However, *Miranda* rights are now considered constitutionally mandated. See *People v Daoud*, 462 Mich 621, 638; 614 NW2d 152 (2000).

September 23, 1992, drug transaction. Defendant has failed to establish the relevancy of this report to the question whether he was in custody for purposes of *Miranda*.

Second, defendant claims that Lieutenant Krafft's testimony regarding his arrest for marijuana possession at the Pit Stop should have been suppressed because it did not result in a conviction. We find no merit to this unpreserved issue. *Carines, supra* at 763. Defendant's reliance on *People v Rappuhn*, 390 Mich 266, 273-275; 212 NW2d 205 (1973), and *People v Westbrook*, 175 Mich App 435; 438 NW2d 300 (1989), is misplaced. The challenged evidence was not offered for impeachment purposes, as occurred in *Westbrook*, or elicited during cross-examination on credibility, as occurred in *Rappuhn*.

## VII

Defendant next raises several issues concerning the search conducted at the Pit Stop after his initial encounter with law enforcement officers, and the search later conducted at the condominium where the subject controlled substances were discovered.

Defendant's challenges involving the validity of the search warrant for the Pit Stop location were not raised timely below and, therefore, are not preserved. Further, considered in the context of a first appeal as of right, defendant cannot show plain error. *Carines, supra* at 763. Inasmuch as expansion of the record on appeal is not permitted, *Powell, supra* at 561, n 4, we have considered the search warrant document on which defendant relies only in the context of his motion for relief from judgment. Having previously rejected defendant's claim of a *Miranda* violation, we find no basis for defendant's claim that evidence obtained without the benefit of *Miranda* warnings could not be used to justify a search of the Pit Stop.

Defendant's additional claim that the search warrant was facially invalid because it was dated September 22, 1992, but was purportedly based on September 23, 1992, events does not amount to an issue requiring reversal. This error in the dates was not of consequence to the officers who executed the search warrant and did not create an invalid search warrant. *People v Westra*, 445 Mich 284; 517 NW2d 734 (1994).

With regard to the search warrant for the condominium, defendant challenges whether there existed probable cause for the search, raising both the argument presented in his pretrial motion to suppress evidence and new arguments presented in support of his motion for relief from judgment. Having considered each of defendant's arguments, we find no basis for relief. We are satisfied that there was probable cause for the search warrant. Moreover, the information in the affidavit was sufficient to satisfy MCL 780.653. *People v Nunez*, 242 Mich App 610, 612-613; 619 NW2d 550 (2000); *People v Stumpf*, 196 Mich App 218, 222; 492 NW2d 795 (1992).

To the extent defendant challenges the scope of the search warrant for the condominium, we likewise find no basis for relief. The search warrant was not overly broad. See *People v Kaslowski*, 239 Mich App 320, 326, n 1; 608 NW2d 539 (2000) ("all suspected controlled substances, all monies . . ." in a search warrant involving a "controlled delivery" not overly broad); *United States v Williams*, 3 F3d 69, 71 (CA 3, 1993) ("[a]ll drugs, drug paraphernalia, cash money, [and] weapons" not overly broad); *United States v Calisto*, 838 F2d 711, 716 (CA 8,

1988) (“[i]t is well established that firearms may be considered items used in connection with controlled substances”).

Defendant also argues that law enforcement officers violated Michigan’s knock-and-announce statute, MCL 780.656, and the Fourth Amendment’s requirement of reasonableness when executing the search warrant at the condominium. Defendant did not preserve this issue by raising it below and has failed to show plain error that would warrant relief on appeal. *Carines, supra* at 763. The trial testimony does not plainly establish a violation of the knock-and-announce statute or the Fourth Amendment. *People v Fetterley*, 229 Mich App 511; 583 NW2d 199 (1998). Furthermore, suppression would not be an available remedy even if there was a statutory violation. *People v Vasquez (After Remand)*, 461 Mich 235, 241; 602 NW2d 376 (1999); *People v Stevens (After Remand)*, 460 Mich 626, 645; 597 NW2d 53 (1998). Additionally, the evidence at trial supports application of the inevitable discovery doctrine to defendant’s Fourth Amendment claim. Although defendant relies on *United States v Dice*, 200 F3d 978 (CA 6, 2000), to argue that the inevitable discovery doctrine is not applicable, our Supreme Court in *Stevens, supra* at 643, n 6, citing *Schueler v Weintrob*, 360 Mich 621, 633-634; 105 NW2d 42 (1960), reiterated that, notwithstanding disagreement in the federal circuit courts on this federal question, it was free to hold that the inevitable discovery exception to the exclusionary rule should be available. Under these circumstances, we are bound to follow *Stevens*. See generally, *People v Beasley*, 239 Mich App 548, 559; 609 NW2d 581 (2000).

## VIII

Defendant next claims that he was deprived of a fair trial because of prosecutorial misconduct. We note that only seven of the claims presented here were raised by defendant in support of his motion for relief from judgment. With regard to those seven claims, we find no basis or relief, regardless of whether the claims are reviewed in the context of a first appeal as of right or in the context of the trial court’s ruling on the motion for relief from judgment.

First, we reject defendant’s claim the prosecutor improperly argued that the presumption of innocence does not apply. Examined in context, *People v Rice (On Remand)*, 235 Mich App 429, 435; 597 NW2d 843 (1999), it is apparent that the prosecutor was arguing that the presumption was overcome by evidence beyond a reasonable doubt.

Second, we find no basis for defendant’s claim that the prima facie step for establishing a claim of discrimination under *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), was moot. Unlike *United States v Harris*, 192 F3d 580 (CA 6, 1999), on which defendant relies, the record in this case does not show that the prosecutor offered a reason for striking the juror or that the trial court made a finding on the ultimate issue of intentional discrimination. Examined in context, it is apparent that the prosecutor’s remarks addressed only the issue whether defendant established a prima facie case. Therefore, the trial court appropriately confined its ruling to the prima facie case. We conclude that defendant has not established any basis for disturbing the trial court’s determination that defendant failed to establish a prima facie case. *Clarke v Kmart Corp*, 220 Mich App 381, 383; 559 NW2d 377 (1996); see also *People v Barker*, 179 Mich App 702, 705; 446 NW2d 549 (1989).

Next, defendant has failed to show plain error with respect to any of the remaining five unpreserved claims that he raised in his motion for relief from judgment. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). With regard to defendant's claim involving his Fifth Amendment right to remain silent, defense counsel's objection grounded on the prosecutor limiting his argument to comments on the evidence did not preserve a challenge grounded on infringement of defendant's Fifth Amendment right to remain silent. See *People v Nantelle*, 215 Mich App 77, 86; 544 NW2d 667 (1996). Further, considering that a prosecutor legitimately may comment on the weaknesses in a defendant's case, the trial record does not plainly support defendant's claim that this Fifth Amendment right to remain silent was violated. *People v Fields*, 450 Mich 94; 538 NW2d 356 (1995). Because defendant chose in his trial testimony to accuse his brother of possessing the seized items, it was not plainly improper for the prosecutor to suggest that defendant should have come forward with information about his brother before trial, given that it would have been "natural" for a person to come forward with exculpatory information under the circumstances. See *People v Cetlinski (After Remand)*, 435 Mich 742, 760; 460 NW2d 534 (1990); see also *People v Hackett*, 460 Mich 202, 214; 596 NW2d 107 (1999).

We have considered defendant's eighth claim of prosecutorial conduct only in the context of a first appeal as of right, because the record does not show that this claim was briefed by defendant in support of his motion for relief from judgment. The prosecutor's comment during rebuttal argument that defense counsel tried to confuse the jury, even if plain error, did not affect defendant's substantial rights. *Schutte*, *supra* at 720. Although an argument that defense counsel intentionally tried to mislead the jury is improper, *People v Wise*, 134 Mich App 82, 102; 351 NW2d 255 (1984), the challenged remark in this case was brief and was followed by arguments based on the evidence. A timely objection and request for cautionary instruction could have cured any perceived prejudice. *Schutte*, *supra* at 721. Because defendant has failed to show that the prosecutor's brief remark affected the outcome of the trial, we find no basis for relief. *Id.* at 720.

## IX

Defendant next alleges that a new trial is required because of five instances of ineffective assistance of counsel. Defendant advanced these same claims in his motion for relief from judgment. Treating this case as a first appeal as of right, our review is limited to errors apparent from the record. *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999). Having considered each of defendant's claims, we conclude that the only error apparent from the record involves counsel's improper objection to having the trial court rule on Detective Gretz's expertise. However, because defendant has failed to show that a proper objection would have resulted in the exclusion of the subject testimony, he has failed to demonstrate the requisite prejudice to support a claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Considering the factual predicate upon which defendant moved for relief from judgment, defendant's claims of ineffective assistance of counsel presented in that motion likewise afford no basis for relief. Defendant did not show actual prejudice. MCR 6.508(D)(3)(b).

X

Defendant next argues that the cumulative effect of several errors require a new trial. We disagree. Only actual errors are aggregated to determine their cumulative effect. *People v Bahoda*, 448 Mich 261, 292; 531 NW2d 659 (1995). Examined in the context of either a first appeal as of right or review of issues presented in the motion for relief from judgment, we find no basis for relief. Defendant was not denied a fair trial, *id.*, nor has he shown actual prejudice. MCR 6.508(D)(3)(b).

XI

Lastly, defendant seeks to have fifty-two days of sentence credit applied to his sentences for the controlled substance convictions. The prosecution concedes that defendant is entitled to fifty-one days of credit. It is apparent from the record that the trial court's failure to apply this credit was a clerical error. Accordingly, we remand for correction of the judgment of sentence to reflect fifty-one days of sentence credit. MCR 6.435(A). However, we find no basis for defendant's claim of one additional day of credit. The additional day for which defendant seeks credit did not involve time served as a result of being denied or unable to furnish bond "for the offense of which [defendant was] convicted." MCL 769.11b; *People v Adkins*, 433 Mich 732, 746; 449 NW2d 400 (1989); *People v Prieskorn*, 424 Mich 327; 381 NW2d 646 (1985).

Affirmed and remanded for correction of the judgment of sentence to reflect fifty-one days of sentence credit. We do not retain jurisdiction.

/s/ Kathleen Jansen  
/s/ Jeffrey G. Collins  
/s/ Jessica R. Cooper