

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

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENYATTA D. PARKER,

Defendant-Appellant.

---

UNPUBLISHED  
December 4, 2014

No. 317497  
Wayne Circuit Court  
LC No. 13-000951-FH

Before: BORRELLO, P.J., and WILDER and STEPHENS, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver Vicodin, MCL 333.7401(2)(b)(i), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to two years' probation for the possession with intent to deliver Vicodin conviction, and two years' imprisonment for the felony-firearm conviction. He appeals as of right and for the reasons set forth in this opinion, we affirm.

**I. BACKGROUND**

This appeal arises from the seizure of Vicodin pills and firearms acquired pursuant to a search warrant from defendant's on January 14, 2013, in Detroit, Michigan. During the morning hours of January 13, 2013, Stephen Geelhood, a Detroit police officer, conducted surveillance on a house in Detroit that was suspected of being involved in heroin trafficking. Geelhood observed what he believed to be three heroin deals take place on the front porch of the home. Geelhood observed defendant answer the door for three visitors, and make exchanges with the visitors, as part of the suspected heroin deals. Geelhood then sought a search warrant for the purpose of searching defendant's house.

On January 14, 2013, Detroit police officers, equipped with a search warrant, broke down defendant's front door and conducted a search of his house. When police officers entered the home, defendant and his daughter were the only occupants. While defendant was detained by police; Juan Davis, one of the officers at the house, heard defendant make an unprompted statement indicating that there were five firearms underneath the bed in his bedroom. Davis discovered five firearms under the bed in defendant's bedroom. Officers also found two firearms on top of a china cabinet in defendant's dining room along with a plastic bag containing 1,490 Vicodin pills in a drawer in defendant's bathroom.

Geelhood interviewed defendant at the house after reading defendant his *Miranda*<sup>1</sup> rights. Geelhood asked defendant questions, wrote down defendant's answers, and defendant initialed each answer at the conclusion of the interview. During the interview, defendant admitted that four of the guns found in the home belonged to him; further, defendant admitted that he possessed a small amount of marijuana and 1,200 Vicodin pills. Defendant admitted that he possessed the Vicodin pills for the purpose of selling them, and that he generally sold the pills for \$2 each. During Geelhood's testimony, over defendant's objection, the trial court found that Geelhood read defendant his *Miranda* rights, and that defendant's statement was taken voluntarily.

At trial, defendant denied making any statement to the police officers at the scene, instead he stated that he initialed the paper put in front of him by Geelhood, but he did not read any of the items he initialed, insisting that he only initialed the statement because he was in shock at the time of the questioning. Defendant testified that he and his wife both have prescriptions for Vicodin, and the pills had been amassed over time under their prescriptions.

Defendant was convicted and sentenced as indicated above. This appeal then ensued.

On appeal, defendant first argues that he was prejudiced by two incidents of prosecutorial misconduct during his trial. First he argues that, during the prosecutor's rebuttal argument, the prosecutor stated, "[t]he defendant is being charged with possession with intent to deliver Vicodin, not marijuana. That's why you don't see any marijuana. Because he's being charged with Vicodin. But if you smell this bag, it smells like marijuana." Further, defendant contends that the prosecutor improperly shifted the burden of proof to defendant by arguing that defendant failed to provide proof of a proper prescription for the Vicodin pills. Defendant argues that the effect of the prosecutorial misconduct was to deny him of his right to a fair trial.

A defendant's claim of prosecutorial misconduct must be met with a contemporaneous objection or a request to the trial court for a curative jury instruction. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Defendant objected to the prosecutor's statement during rebuttal argument asserting that the bag containing the Vicodin pills smelled like marijuana, and the trial court instructed the jury to disregard the prosecutor's statement. Accordingly, defendant's prosecutorial misconduct challenge regarding that statement is preserved. However, defendant did not contemporaneously object or request a curative jury instruction at the time the prosecutor argued that defendant had failed to provide proof that the Vicodin pills were properly prescribed. Accordingly, defendant's prosecutorial misconduct challenge regarding an improper attempt to shift the burden of proof is unpreserved.

"Where issues of prosecutorial misconduct are preserved, [this Court] review[s] them de novo to determine if the defendant was denied a fair and impartial trial." *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004). Unpreserved claims of prosecutorial misconduct are reviewed for plain error. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

---

<sup>1</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Generally, the test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). This Court makes determinations of prosecutorial misconduct on a case by case basis. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). Comments made by the prosecution must be read as a whole and evaluated in the context of a defendant's arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). "Prosecutors are accorded great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (internal citation omitted). Prosecutors are free to argue the evidence and reasonable inferences that arise from the evidence; however, they "may not make a statement of fact to the jury that is unsupported by the evidence." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated in part on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). It is improper for the prosecution to argue that the burden of proof lies with the defendant regarding any element of a criminal offense. *People v Fields*, 450 Mich 94, 113-114; 538 NW2d 356 (1995).

The prosecutor's statement regarding the bag smelling like marijuana constituted prosecutorial misconduct. Apparently, the statement was made out of ignorance of the law, though the intent of the prosecutor is not at issue. Rather, our analysis is set forth in *Schutte*, in which this Court stated:

Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence*, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Schutte*, 240 Mich App at 721. (Emphasis added).

Defendant is correct in his assertion that the fact that the bag smelled like marijuana was not part of the evidence at trial. Further, there was no evidence presented regarding the smell of the bag that contained the Vicodin pills. Accordingly, the prosecutor's statement constituted misconduct because it involved a statement of fact that was unsupported by the evidence. *Id.* Defense counsel immediately objected to the prosecutor's statement, and the trial court stated, "[t]he jury is gonna [sic] disregard that statement."

However, a finding of prosecutorial misconduct does not end our inquiry. We review alleged instances of prosecutorial misconduct in context to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). In this case, though the prosecutor's statement regarding the smell of marijuana in the bag containing the Vicodin pills was inappropriate, it did not deny defendant a fair and impartial trial. First, the prosecutor's statement was irrelevant to the determination of whether defendant was guilty of possession with intent to deliver Vicodin, which is the offense for which he was charged. In order to establish that a defendant is guilty of possession with intent to deliver Vicodin, the prosecution must prove beyond a reasonable that that he or she knowingly possessed Vicodin and intended to deliver it to another person. See MCL 333.7401(2)(b)(i).

Because whether the bag containing the Vicodin pills smelled like marijuana was irrelevant to whether defendant knowingly possessed Vicodin with intent to deliver it to another person, the prosecutor's comment had little prejudicial effect regarding the actual elements of the crime charged. Further, the trial court immediately instructed the jury that it was to disregard the prosecutor's statement. Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). In addition to the curative instruction provided immediately following the prosecutor's statement, the trial court also instructed the jury that counsel's comments during closing argument did not constitute evidence to be considered in deliberations. In the context of all the evidence presented at trial, the prosecutor's statement was minor and irrelevant to the actual elements of the offense with which defendant was charged; though it was misconduct, the trial court immediately cured the error with a curative instruction. Accordingly, we cannot find that the prosecutor's statement denied defendant a fair and impartial trial.

Defendant also argues that the prosecutor improperly shifted the burden of proof by arguing that defendant failed to provide proof that the Vicodin pills were properly prescribed. During his rebuttal argument, the prosecutor stated, "[n]ow it doesn't matter that you have a prescription. Although we never saw a prescription. Not one prescription for all these pills. It doesn't matter if you have a prescription or not. The issue is, on the date of the 14<sup>th</sup>, you can't sell it. You're not a pharmacist." We find no merit to defendant's argument on this issue. The prosecutor expressly stated that it did not matter if defendant had a prescription for the Vicodin pills; selling the pills was illegal regardless of any prescription. Further, defendant claimed in his testimony that he and his wife possessed prescriptions for the pills; the prosecutor was merely arguing, based on the evidence, that the issue of the prescription was irrelevant. Considering the wide latitude afforded prosecutors in their arguments, the prosecutor's statement did not constitute misconduct. Additionally, as noted, the trial court instructed the jury that the statements of counsel did not constitute evidence; even if the prosecutor's statement was misconduct, the jury was instructed not to consider it as evidence. Further, the trial court instructed the jury that the prosecution bore the burden of proof at all times during the trial. Accordingly, the prosecutor's statement did not deprive defendant of a fair and impartial trial, and it did not constitute plain error.

Defendant next argues that he received ineffective assistance of counsel at trial. Specifically, defendant contends that defense counsel failed to investigate whether he and his wife had valid prescriptions for the Vicodin pills. Further, defendant argues that defense counsel failed to call witnesses and present evidence to corroborate defendant's claim that he was not home on the morning before his arrest, when Geelhood claimed he saw defendant involved in heroin deals outside his home. Defendant also argues that defense counsel should have moved to suppress defendant's confession to Geelhood on the grounds that the search warrant was invalid and the statement was involuntary. Further, defendant contends that defense counsel should have objected to the prosecutor's comments during closing argument regarding a lack of a prescription for the Vicodin pills. Defendant argues that defense counsel's errors prejudiced him, and the outcome of the trial would have been different but for those errors.

Effective assistance of counsel challenges are mixed questions of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court takes the facts as found by the trial court, then analyzes whether the facts "constitute a violation of the

defendant's constitutional right to effective assistance of counsel." *Id.* The lower court's findings of fact are reviewed for clear error. *Id.* "Questions of constitutional law are reviewed de novo." *Id.* Because there was no evidentiary hearing held, this Court's review is limited to the existing record. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

Criminal defendants have a right under the United States and Michigan Constitutions to the effective assistance of counsel at trial. *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012). To establish ineffective assistance of counsel, a criminal defendant must show that (1) under prevailing professional norms, counsel's performance fell below an objective standard of reasonableness; (2) but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different; and (3) the proceedings were fundamentally unfair or unreliable. *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). Michigan Courts employ a presumption that counsel's performance is effective, and there is a heavy burden upon the defendant to prove otherwise. *Vaughn*, 491 Mich at 670. There is also a strong presumption that counsel's assistance constitutes sound trial strategy. *People v Armstrong*, 490 Mich 281, 291; 806 NW2d 676 (2011). This Court will not substitute its judgment for that of defense counsel on matters of strategy, nor will it employ the benefit of hindsight to assess the competence of defense counsel. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). However, counsel's choices made after "less than complete investigation" are afforded deference as trial strategy only to the extent that reasonable professional judgments support the limitations on investigation. *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004), citing *Strickland v Washington*, 466 US 668, 690-691; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Accordingly, counsel has an affirmative duty to reasonably investigate a client's defense or to make a reasonable decision that makes investigation unnecessary. *Id.* Counsel's decision not to pursue objections at trial may be sound trial strategy. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008).

Defendant argues that defense counsel made errors falling below an objective level of reasonableness in two general areas: (1) failure to investigate evidence that could have exonerated defendant and failure to call witnesses that would have supported defendant's theory of the case, and (2) failure to make motions and objections before and during the trial.

Defendant argues that defense counsel failed to investigate whether defendant and his wife actually had valid prescriptions for the Vicodin pills found in his home. During defendant's testimony at trial, defense counsel did ask him whether the Vicodin pills were prescribed to him, and defendant stated that he and his wife both had valid prescriptions for the pills. Defendant argues that defense counsel should have sought out physical evidence that the Vicodin pills were properly prescribed to defendant and his wife, and that witnesses should have been called to corroborate defendant's assertion that the pills were properly prescribed. However, it is unclear what benefit defendant would have enjoyed if defense counsel had sought out evidence of defendant's or his wife's prescriptions. As noted, the criminal offense of possession with intent to deliver Vicodin requires only that a defendant knowingly possess Vicodin with the intent to deliver it to another person. See MCL 333.7401(2)(b)(i). Even if defendant lawfully possessed the Vicodin pills via a proper prescription from a doctor, he was guilty of possession with intent to deliver the pills if he intended to deliver them to another person. See MCL 333.7401(2)(b)(i). Whether defendant or his wife had a valid prescription for the pills was irrelevant to whether he was guilty of the charged offense. Had counsel presented an actual doctor's prescription for all

of the Vicodin, defendant would still be guilty of the charged offense. Accordingly, trial counsel's decision not to pursue the matter was not an error falling below an objective standard of reasonableness.

Defendant also argues that defense counsel should have more fully investigated defendant's presence at the hotel on January 13, 2013, and that defense counsel should have called other witnesses to corroborate defendant's version of the events of that day. Specifically, defendant contends that defense counsel should have contacted employees at the hotel to verify that defendant had been present there until 2:00 p.m. on January 13, 2013. Defendant argues that if more evidence had been presented corroborating defendant's version of the events of January 13, 2013, Geelhood's testimony would have been significantly discredited, because Geelhood alleged that he saw defendant make three suspected heroin deals on the morning of January 13, 2013, outside his home. Defendant suggests that Geelhood's testimony regarding the voluntariness of defendant's statement on January 14, 2013, would have been discredited by the jury if it had been proven that Geelhood was lying about the alleged heroin deals that occurred on January 13, 2013. Defendant's argument is tenuous at best. Defendant did present a receipt at trial for the hotel stay; however, the receipt did not include what time defendant checked out. Further, the receipt did not include defendant's name; rather, defendant's wife was listed as the customer on the receipt. The trial court denied defendant's request to admit the receipt into evidence because it was not properly authenticated.

It is unclear what benefit defendant would have gained if defense counsel had invested time and resources into investigating defendant's presence at the hotel on January 13, 2013. Even if defense counsel had been able to gather evidence definitively demonstrating the Geelhood lied about the seeing defendant making the heroin deals on the morning of January 13, 2013, defendant admitted to possessing and selling the Vicodin pills on January 14, 2013. The prosecution's theory of the case did not rest solely on Geelhood's credibility in preparing a police report summarizing defendant's statements; rather, defendant initialed the statement indicating that he sold the pills for \$2 each. Further, defendant admitted that Geelhood informed him of his *Miranda* rights before he made and initialed his statement. Defendant's conduct on the morning of January 13, 2013, had limited relevance to his ultimate guilt for possession with intent to deliver Vicodin on January 14, 2013. Further, defense counsel did call multiple witnesses, albeit defendant's family members, who stated defendant was at the hotel until 2:00 p.m. on January 13, 2013. Defense counsel's decision not to pursue that line of investigation further was not an error in performance falling below an objective level of reasonableness.

Defendant also argues that defense counsel should have interviewed defendant's wife prior to trial, and that he should have objected to the trial court forcing him to call her as a witness out of the intended order. This argument is meritless because the record reveals that defendant's wife refused to testify based on her assertion of the Fifth Amendment right not to incriminate herself. Regardless of whether defense counsel interviewed her prior to trial, he could not have forced defendant's wife to testify at trial. Further, defendant's wife appears to have planned on testifying, but she was advised by her own counsel that she should not testify. It is unclear what defense counsel could have done to secure testimony from defendant's wife that would have assisted in the defense. Accordingly, defendant's argument regarding defendant's wife is meritless.

Defendant also argues that it constituted ineffective assistance of counsel when defense counsel failed to object to the alleged prosecutorial misconduct that occurred during closing argument. Specifically, defendant contends that the prosecutor improperly shifted the burden of proof by arguing that defendant failed to produce evidence of his Vicodin prescription, and that defense counsel should have objected at that time. As previously stated, the prosecutor's argument regarding the lack of a prescription was appropriate; he simply argued that in the context of the crimes charged, it was irrelevant whether defendant possessed a proper prescription for the Vicodin. That statement was a correct assertion of law. Any objection made by defense counsel would therefore have been futile; accordingly, the lack of an objection was not an error falling below an objective standard of reasonableness.

Defendant also argues that defense counsel should have moved to suppress defendant's statement to Geelhood because it arose from the execution of an unlawful search warrant. Defendant argues at length that the search warrant was invalid because it relied upon statements from an unknown informant; however, the warrant itself is not included in the lower court file.<sup>2</sup> However, Geelhood stated that the search warrant executed on January 14, 2013, was based on his own observation of three suspected heroin deals that defendant was involved in on his front porch on January 13, 2013. Based on Geelhood's personal observation of defendant taking part in suspected heroin deals on his front porch, probable cause to secure a search warrant existed; any motion to suppress by defense counsel was very likely to be futile. To the extent that the search warrant was based on the word of an unnamed informant, the warrant was based on a credible and reliable informant used by Geelhood over 10 times in the past for drug offenses, the use of a credible unnamed informant to secure a search warrant is proper. See *People v Echavarria*, 233 Mich App 356, 366-367; 592 NW2d 737 (1999). Defense counsel chose the defense strategy of arguing that defendant's statement was not taken voluntarily. Because defense counsel pursued that strategy, he invested time and resources in the case on that strategy. Though defendant has alleged that defense counsel should have taken several actions that he did not at trial, none of the alleged errors constituted performance falling below an objective standard of reasonableness.

Even if defense counsel had pursued the courses of action that defendant alleges should have been taken at trial, the outcome of the trial would not have been different. Police officers discovered seven firearms and 1,490 Vicodin pills in defendant's home. When interviewed by Geelhood, defendant admitted that he sold the Vicodin pills for a price of \$2 each. Further, defendant admitted that he was read his *Miranda* rights before giving his statement. Based on that evidence alone, defendant could have been convicted of the charged offenses. While there was conflicting evidence regarding the events of January 13, 2013, those events were irrelevant to defendant's ultimate convictions. Though defendant argues that defense counsel should have called other witnesses, investigated other areas of evidence, and made other motions and objections, all of the requested courses of actions were likely to be have futile. Accordingly, defendant was not prejudiced by any of defense counsel's alleged errors.

---

<sup>2</sup> The prosecution obtained a copy of the search warrant on appeal to its answer to defendant's motion for bond. However, the prosecutor has not filed a brief on appeal.

Defendant next argues that his right to a fair trial was violated when the trial court ruled, in the presence of the jury, that defendant's confession was made voluntarily. Specifically, defendant contends that it was the role of the jury to determine the voluntariness of the confession.

Questions of constitutional law are reviewed de novo. *LeBlanc*, 465 Mich at 579. Generally, an evidentiary hearing regarding the admissibility of a criminal confession must be conducted out of the presence of the jury. MRE 104(c); *People v Ray*, 431 Mich 260, 269; 430 NW2d 626 (1988). If a defendant wishes to challenge the voluntariness of a confession, he or she must demand an evidentiary hearing pursuant to *People v Walker*, 374 Mich 331, 338; 132 NW2d 87 (1965), where the trial court must ultimately make a determination of whether the confession was voluntary. *Ray*, 431 Mich at 269-271. "Denial of a pretrial motion for a *Walker* hearing constitutes error." *People v Littlejohn*, 197 Mich App 220, 222; 495 NW2d 171 (1992). However, even if a defendant fails to move for a *Walker* hearing prior to or during trial, the trial court may conduct the hearing sua sponte if there are "certain alerting circumstances." *Ray*, 431 Mich at 271. Only in "cases in which the evidence clearly and substantially reflects a question about the voluntary nature of a confession or implicates others due process concerns" must the trial court hold a *Walker* hearing sua sponte. *Id.*

At trial, the prosecutor stated, "Your Honor, at this time I would like the Court to make a finding that *Miranda* was given in this case. And after *Miranda* was given the defendant made voluntary statement [sic]." Defense counsel objected by stating, "I'm gonna [sic] object, your Honor. I think that's up to the jury whether that's voluntary. I think it's a weight question. So I'm gonna [sic] object to that admission, or that finding by the Court." The trial court stated, "Okay. Based on the testimony that was presented, I will find that it was, he was properly Mirandized [sic]. And that the statement was voluntary." Defendant did not request a *Walker* hearing prior to the trial; further, though he objected to the prosecutor's request that the trial court find the confession voluntary, defense counsel did not request a *Walker* hearing to determine the issue. Instead, defense counsel's objection was based on an erroneous statement of law; despite defense counsel's statement that it was the jury's role to determine voluntariness the issue of whether a confession is voluntary is a question of law for the court's determination. *Walker*, 374 Mich at 338. Though a trial court may hold a *Walker* hearing sua sponte, it may also rule that a statement was voluntary without such a hearing. *People v Bender*, 208 Mich App 221, 226; 527 NW2d 66 (1994), aff'd 452 Mich 594 (1996).<sup>3</sup> On appeal, defendant continues this incorrect premise. It is not the role of the jury to determine whether a waiver of *Miranda* rights, and subsequent confession, was voluntary. *Id.* at 226.

---

<sup>3</sup> Our Supreme Court's decision in *Bender*, in which this Court's opinion was affirmed, was recently overruled by *People v Tanner*, 496 Mich 199; 853 NW2d 653 (2014). However, the issues in *Tanner* are unrelated to the issues in this case, and to the assertions cited to in *Bender*.

Defendant's objection at trial was based on an incorrect statement of law; accordingly, the trial court did not err by failing to hold a *Walker* hearing.<sup>4</sup> Further, there were no alerting circumstances present on the record requiring a *Walker* hearing to be held sua sponte. Though defendant denied that he made any statement to Geelhood, defendant initialed his statement, which indicated that he sold the Vicodin pills for \$2 each. Further, defendant admitted that he was informed of his *Miranda* rights by Geelhood prior to the interview. Finally, although defendant argues on appeal that the trial court read the jury "a corrective instruction" in regard to its ruling on the voluntariness of the confession, the trial court actually instructed the jury that it was to determine whether defendant made a statement to Geelhood at all, which is entirely separate from whether the statement was made voluntarily. The trial court properly determined, based on the existing record, that defendant's confession was voluntary. See *Bender*, 208 Mich App at 225-227. Accordingly, the trial court's ruling on the voluntariness of the confession was not erroneous for the reasons set forth by defendant.

Defendant next argues that the cumulative errors that occurred during the trial deprived him of his right to a fair trial. Specifically, defendant argues that he was prejudiced by the alleged prosecutorial misconduct and ineffective assistance of counsel.

"The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not." *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003). "This Court reviews this issue to determine if the combination of alleged errors denied defendant a fair trial." *Id.* "Reversal is warranted only if the effect of the errors was so seriously prejudicial that the defendant was denied a fair trial." *Id.*

In his brief on this issue, defendant simply reiterates his arguments, but he argues that the cumulative effect of those errors was to deprive him of a fair trial. However, defendant only identified one actual error that occurred at trial: it was improper for the prosecutor to comment during closing argument on the smell of the bag that contained the Vicodin pills. However, the trial court immediately cured that error with an instruction to the jury that it should disregard the prosecutor's statement. Defendant's other argument regarding prosecutorial misconduct was meritless; the prosecutor's comment regarding defendant's failure to provide proof of a proper prescription for the Vicodin was in direct response to defendant's testimony at trial. Further, defendant's argument regarding ineffective assistance of counsel was also meritless. Defense counsel chose the trial strategy of attacking the credibility of defendant's confession; it did not constitute deficient performance for counsel to ignore the ultimately irrelevant question of whether defendant was actually at the hotel in Dearborn on the day before his arrest. Further, considering the presumption of effective assistance, counsel's decisions regarding which witnesses to call, motions to make, and comments to object to, were ultimately reasonable.

---

<sup>4</sup> While not raised by defendant, what is perplexing to this Court was the rationale behind the request by the prosecutor for the trial court to make such a finding and the trial court's decision to do so sua sponte. Under MCR 104(c) and *Ray*, 431 Mich at 269, generally, such decisions are to be made outside of the presence of the jury.

Because defendant has not demonstrated that multiple errors occurred at trial, he was not prejudiced by cumulative errors. Defendant was not denied a fair trial.

Affirmed.

/s/ Stephen L. Borrello

/s/ Kurtis T. Wilder

/s/ Cynthia Diane Stephens