

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
July 24, 2014

v

RAYSHAWN ANTWAN SOUTHALL,

Defendant-Appellant.

No. 316108
Genesee Circuit Court
LC No. 13-032340-FH

Before: MARKEY, P.J., and OWENS and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of possession of less than 25 grams of heroin, MCL 333.7403(2)(a)(v). Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to a term of 20 months to 15 years' imprisonment. We affirm.

I. FACTUAL BACKGROUND

During the early evening of June 28, 2012, Detective Bradley Ross and Trooper Jasen Sack of the Michigan State Police conducted a traffic stop of a vehicle that had a cracked windshield and illegally tinted windows. Defendant, the driver of the vehicle and its only occupant, was wearing a Ralph Lauren hat and belt, and possibly Ralph Lauren pants. Defendant told the officers that his driver's license had been suspended and gave the officers consent to search the vehicle. The registered owner of the vehicle was Tyisha Wilson, defendant's girlfriend.

During the search, Trooper Sack recovered suspected heroin in a "corner bag"¹ inside a Ralph Lauren sunglass case located on the passenger seat of the vehicle. After being confronted with the suspected heroin, defendant told Detective Ross he did not know anything about it, he did not know the sunglass case had heroin inside it, and the sunglass case was not his. Defendant indicated that he was "quite sure" the sunglass case belonged to his friend, Deonta, who,

¹ According to Detective Ross, a "corner bag" is "a way of packaging certain narcotics . . . that can conform to a plastic baggy" and is a common way of packaging narcotics, such as marijuana, cocaine, and heroin.

according to defendant, had been in the passenger side of the vehicle wearing Ralph Lauren sunglasses the night before. Defendant did not provide the officers Deonta's address, last name, or phone number. Defendant told Detective Ross that his own fingerprints would probably be on the sunglass case because he saw the case earlier between the passenger seat and console, grabbed it, and placed it on the passenger seat, but never opened it. Detective Ross never submitted the sunglass case or bag for fingerprint analysis, never interviewed defendant's girlfriend, who was the registered owner of the vehicle, and never located Deonta. Testing revealed that the substance recovered from the vehicle was heroin.

II. ADMISSION OF POLICE TESTIMONY

Defendant first claims that the trial court erred by admitting several instances of Detective Ross's testimony because the testimony constitutes impermissible opinion regarding defendant's guilt and credibility, impermissible drug profile evidence, and expert testimony that Ross provided without having been qualified as an expert under MRE 702. Defendant failed to preserve this issue for review by specific objection before the trial court. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001), citing MRE 103(a)(1). We review unpreserved evidentiary issues for plain error affecting the defendant's substantial rights, which requires a showing of prejudice, i.e., that the error affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999).

"Generally, all relevant evidence is admissible except as otherwise provided by either the state or the federal constitution or by court rule." *People v Fomby*, 300 Mich App 46, 48; 831 NW2d 887 (2013), citing MRE 402; *People v Yost*, 278 Mich App 341, 355; 749 NW2d 753 (2008). Relevant evidence is evidence which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." MRE 403.

Regardless of the testimony's relevancy, "a witness cannot express an opinion on the defendant's guilt or innocence of the charged offense." *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985). Rather, the determination of a defendant's guilt or innocence is for the trier of fact to decide. *Id.* Likewise, "it is improper for a witness or an expert to comment or provide an opinion on the credibility of another person while testifying at trial" because it is the province of the jury to assess the credibility of witnesses. *People v Musser*, 494 Mich 337, 348-349; 835 NW2d 319 (2013).

Further, drug profile evidence, which is an informal compilation of otherwise innocent characteristics that are often displayed by those involved in the trafficking of drugs, such as the carrying of large amounts of cash, the use of pagers, and the possession of packaging materials, is not admissible as substantive evidence of a defendant's guilt, despite its relevancy, because it is "inherently prejudicial" as suggesting that innocent characteristics are indicative of criminal activity. *People v Murray*, 234 Mich App 46, 52-54; 593 NW2d 690 (1999). Accordingly, a witness is not permitted to testify that, "on the basis of the profile, [the] defendant is guilty," or to "compare the defendant's characteristics to the profile in a way that implies that the defendant is guilty." *People v Williams*, 240 Mich App 316, 321; 614 NW2d 647 (2000); see also *Murray*, 234 Mich App at 54. Drug profile testimony, however, is allowable to "aid[] the jury in

intelligently understanding the evidentiary backdrop of the case, and the modus operandi of drug dealers,” but must “stop short” of commenting directly or substantively on a defendant’s guilt. *Murray*, 234 Mich App at 56.

MRE 702 governs the admission of expert opinion testimony and provides:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Conversely, under MRE 701, testimony by a lay witness in the form of an opinion or inference is admissible only if it is rationally based on the perception of the witness and helpful to a clear understanding of the testimony or a fact in issue. *People v Daniel*, 207 Mich App 47, 57; 523 NW2d 830 (1994). Further, MRE 602 provides that “[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”

A. TESTIMONY REGARDING ILLEGAL DRUGS FOUND DURING CONSENSUAL SEARCHES

In light of these principles, we first find that the trial court did not plainly err in admitting Detective Ross’s testimony that the majority of time he conducts a consensual search of a vehicle at a traffic stop he finds illegal narcotics or weapons. *Carines*, 460 Mich at 763-764. Defendant theorized that he lacked knowledge that the heroin was inside the sunglass case recovered during the officers’ search of the vehicle because he obviously would not have consented to the search of the vehicle had he known there was heroin inside. See MCL 333.7403(2)(a)(v); *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992) (stating that an element of possession of heroin is whether the defendant knowingly possessed the heroin). Detective Ross’s testimony, thus, is relevant to rebut defendant’s theory by explaining the significance, or lack thereof, of an individual’s consent to search. MRE 401; MRE 402; *Fomby*, 300 Mich App at 48.

Further, the challenged testimony does not constitute improper opinion regarding defendant’s guilt or directly concern defendant’s credibility. *Bragdon*, 142 Mich App at 199. Detective Ross did not comment or opine whether he believed defendant knew the heroin was in the vehicle. Instead, the challenged testimony merely indicates Ross’s tendency, as a police officer conducting traffic stops, to find illegal narcotics or weapons when he conducts consensual searches of vehicles during traffic stops, which was obviously based on his own perceptions and experiences during traffic stops as a veteran police officer of almost 15 years. Ross did not testify that in all cases where an individual consents to a search of his or her vehicle he finds illegal narcotics and did not opine on defendant’s credibility. In fact, Ross acknowledged on cross-examination that it is “very possible” that the sunglass case containing the heroin belonged to Deonta, the individual defendant identified as the owner of the sunglass case who, according

to defendant, was inside the vehicle the night before. Furthermore, viewing the testimony in context, it is evident that the prosecutor elicited the challenged testimony for a proper purpose, i.e., to rebut trial counsel's theory that defendant would obviously not have consented to the search had he known about the heroin inside the vehicle. A prosecutor's questioning that is responsive to questions or argument made by defense counsel does not constitute error. *People v Figures*, 451 Mich 390, 399-400; 547 NW2d 673 (1996).

Likewise, the challenged testimony cannot reasonably be characterized as impermissible drug profile evidence. Detective Ross did not testify that individuals who knowingly possess illegal narcotics typically give consent to search their vehicles, that defendant's otherwise innocent act in giving the officers consent to search the vehicle fits the profile or characteristics of or is indicative of an individual who knowingly possesses drugs, or that defendant likely had knowledge of the presence of illegal narcotics in his vehicle based on the fact that he consented to the search. *Williams*, 240 Mich App at 321; *Murray*, 234 Mich App at 52-54. The challenged testimony does not imply that defendant is guilty merely because he fits the profile of an individual who knowingly possesses illegal narcotics nor does it improperly "compare the defendant's characteristics to the profile in a way that implies that the defendant is guilty" of knowingly possessing an illegal narcotic merely because he consented to the search of his vehicle. *Williams*, 240 Mich App at 321; *Murray*, 234 Mich App at 54.

We further find no plain error in the admission of the challenged testimony on the basis that Detective Ross improperly provided expert opinion testimony without having been qualified as an expert under MRE 702. We recognize that the challenged testimony could arguably be characterized as expert testimony because it could be construed as "specialized knowledge" based on his past investigative experience as a police officer. MRE 702. However, we find no plain error in its admission because this testimony fell within the scope of admissibility under MRE 701 and MRE 602. *Carines*, 460 Mich at 763-764. The challenged testimony was clearly based on Ross's own perceptions, MRE 701, first-hand personal knowledge, MRE 602, and his investigatory experience as a police officer conducting consensual searches during traffic stops and was limited in that regard. *People v Oliver*, 170 Mich App 38, 50-51; 427 NW2d 898 (1988), judgment mod on other grounds 433 Mich 862 (1989). The testimony was not overly dependent on scientific, technical, or specialized knowledge. *Id.* at 50. It merely involved Ross's experience and personal observations while conducting traffic stops as a police officer in relation to his consensual search of defendant's vehicle. The challenged testimony did not concern such "highly specialized knowledge" typically presenting the need for expert testimony. *People v McLaughlin*, 258 Mich App 635, 658; 672 NW2d 860 (2003). For example, the challenged testimony does not offer a technical, scientific, or specialized analysis of the behavior of drug possessors during searches. *People v Petri*, 279 Mich App 407, 416; 760 NW2d 882 (2008). Instead, the challenged testimony was brief and very general in nature, it did not contain "any reference to technical comparison or scientific analysis," and it did not extend beyond Ross's personal knowledge and experience conducting traffic stops. *People v Dobek*, 274 Mich App 58, 78; 732 NW2d 546 (2007), citing *Co-Jo, Inc v Strand*, 226 Mich App 108, 117; 572 NW2d 251 (1997). Further, the challenged testimony was helpful to a determination of a fact in issue, i.e., whether defendant's consent to search the vehicle showed that he lacked knowledge of the heroin in the vehicle by explaining the significance, or lack thereof, of an individual's consent to search. MRE 701; *Daniel*, 207 Mich App at 57. Accordingly, the challenged

testimony fell within the scope of MRE 701, and thus, we find no plain error in its admission without expert qualification.

B. TESTIMONY REGARDING SUSPECTS TENDENCY TO LIE

Next, we find no plain error in the admission of Detective Ross's testimony that, in his experience, individuals "quite often" lie during police interviews about whether they possessed illegal narcotics found during a search. This testimony was relevant in light of the fact that defendant provided a statement to the police and argued that his statement was trustworthy. MRE 401. Further, contrary to defendant's argument, this testimony was not an impermissible opinion regarding defendant's credibility or his guilt or innocence. *People v Smith*, 158 Mich App 220, 230; 405 NW2d 156 (1987); *People v Moreno*, 112 Mich App 631, 635; 317 NW2d 201 (1981). The testimony, that suspects are often untruthful while being interviewed about possessing narcotics, does not directly imply or opine that Ross knew something that the jury did not about defendant's credibility or guilt or innocence or whether Ross believed defendant was being untruthful when he spoke to the police. Instead, Ross merely indicated his general observation that suspects often lie during police interviews that he conducts about possession of illegal narcotics. Given the general nature of this testimony, which comports with logic and commonsense knowledge, we find that the challenged testimony was not an improper opinion on the guilt or credibility of defendant. Further, when viewed in context, it is evident that the challenged testimony was responsive to an argument by defendant's trial counsel that defendant was honest and forthright in his statement to the police. See *Moreno*, 112 Mich App at 635-636 (finding that a prosecutor's questioning in response to defense counsel's questions and argument were proper).

Further, we find that Detective Ross's testimony cannot reasonably be characterized as improper drug profile evidence. Although Ross's testimony reveals a tendency of suspects to lie when confronted during police interviews with allegations of possession of illegal narcotics, it does not relate to otherwise innocuous characteristics of a typical person engaged in drug trafficking activity, commonly known as drug profile evidence. *Murray*, 234 Mich App at 52. The challenged testimony does not imply that defendant knowingly possessed the heroin because he fits the profile of a drug possessor. *Williams*, 240 Mich App at 54.

We also find that Detective Ross's testimony falls within the scope of permissible lay opinion testimony under MRE 701. His testimony was based on and limited to his personal observations and experience as a police officer conducting interviews of suspects, was not based on overly scientific, technical or specialized knowledge, was general in nature and common enough, and did not go beyond his personal knowledge and experience, such that expert testimony on the subject matter was necessary. MRE 701; *McLaughlin*, 258 Mich App 645-647; *Co-Jo*, 226 Mich App 116-117; *Oliver*, 170 Mich App at 50-51. Thus, we find the trial court did not plainly err in admitting the challenged testimony.

C. TESTIMONY REGARDING FINGERPRINT ANALYSIS

Next, we find that the trial court did not plainly err in admitting Detective Ross's testimony that, in his experience, fingerprint analysis of "very small pieces of plastic," such as the corner bag containing the heroin recovered from the vehicle, does not yield any results. First,

contrary to defendant's argument on appeal, this testimony cannot reasonably be characterized as improper drug profile evidence. The testimony does not relate to characteristics of a typical person engaged in drug trafficking activity. *Murray*, 234 Mich App at 52

Further, the challenged testimony was properly admissible as lay opinion testimony under MRE 701. Detective Ross observed the "very small" size and makeup of the corner bag and formed an opinion based on his perceptions in light of his experience that fingerprint analysis would not yield any results. This opinion is not "overly dependent upon scientific, technical or other specialized knowledge," but is merely based on his past experience and personal knowledge as a police officer in submitting small samples of plastic to the lab for fingerprint analysis without results. *Oliver*, 170 Mich App at 50. The testimony was helpful in assisting the jurors in determining a fact at issue because it was offered to explain why Detective Ross did not send the corner bag to the lab for fingerprint analysis, which was relevant in light of defense counsel's argument attacking the thoroughness of the police investigation. *Daniel*, 207 Mich App at 57; *Oliver*, 170 Mich App at 50-51. Accordingly, because Detective Ross's opinion was rationally based on his perceptions and experience as a police officer, and assisted the jurors in determining a fact at issue, it was admissible under MRE 701, and thus, the trial court did not plainly err in allowing it without expert qualification.

D. POLICE OFFICER AS EXPERT WITNESS

Contrary to defendant's argument, even assuming the instances of challenged testimony constitute expert testimony, the failure to qualify Detective Ross as an expert does not amount to plain error affecting defendant's substantial rights because it is evident that Ross could have been qualified as an expert to testify on these limited police matters. Ross testified about his extensive background and experience as a police officer, which revealed that he was a veteran police officer with almost 15 years' experience. He had previously been assigned for four years to an undercover drug enforcement team in the capacity of an undercover officer conducting surveillance, handling confidential informants, doing hand-to-hand purchases of narcotics, and studying and making note of the drug trafficking in Genesee County. He had been trained in the field of narcotics trafficking and obviously had experience conducting traffic stops and police interviews. Thus, Detective Ross could have been qualified to testify as an expert on these police matters by his knowledge, experience, and training as a police officer to the extent of the limited testimony presented. See *Petri*, 279 Mich App at 416 (noting that a police witness can be qualified based on his training and experience); *People v Williams (After Remand)*, 198 Mich App 537, 542; 499 NW2d 404 (1993) (stating that "drug-related law enforcement is a recognized area of expertise").

Defendant, citing *United States v Lopez-Medina*, 461 F3d 724 (CA 6, 2006), further claims that the trial court erred in failing to instruct the jury on the difference between Detective Ross's testimony as an expert witness and as a fact witness. We disagree. Trial counsel never requested such instruction and affirmatively stated three times that he had no further requests, which waives any claim of instructional error. *People v Kowalski*, 489 Mich 488, 504; 803 NW2d 200 (2011). Nevertheless, Detective Ross was never qualified as an expert and, as previously discussed, his testimony fell within the scope of lay testimony admissible under MRE 701, and thus, a cautionary instruction in order for the jury to properly distinguish between his fact testimony, and expert testimony was not required. See *Lopez-Medina*, 461 F3d at 743-745

(explaining that a cautionary instruction is only required to when a police officer has a dual role as both a fact and expert witness). Accordingly, the trial court did not plainly err in failing to give such instruction.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next raises claims of ineffective assistance of counsel. Our review is limited to mistakes apparent on the existing record. *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Both the United States Constitution and the Michigan Constitution guarantee criminal defendants the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. To prevail on a claim of ineffective assistance of counsel, a defendant must “show that his attorney’s representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial.” *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To show prejudice, “a defendant must demonstrate ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. . . .’ ” *Toma*, 462 Mich at 302-303, quoting *People v Mitchell*, 454 Mich 145, 1167; 560 NW2d 600 (1997). “Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

A. FAILURE TO OBJECT TO OPINION TESTIMONY

Defendant’s first claim of ineffective assistance is that trial counsel was ineffective by failing to object to the allegedly improper expert opinion testimony of Detective Ross. As we discussed, defendant has not established any plain evidentiary error or prejudice in the admission of the allegedly improper testimony or the lack of jury instruction regarding the police officer’s fact and expert testimony, and thus, any objection would have been futile. Trial counsel is not ineffective for failing to make a futile objection. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

B. FAILURE TO OBJECT TO HANDLING OF EVIDENCE

Defendant’s next claim of ineffective assistance is that his trial counsel was ineffective by failing to object to the prosecution’s failure to submit the sunglass case and the corner bag containing the heroin to the lab for fingerprint analysis. Defendant maintains that there might have been fingerprints, other than his own, on the sunglass case and the corner bag, which could have “greatly supported” his defense theory that he did not knowingly possess the heroin. However, our review is limited to the existing record and defendant made no offer of proof indicating that another individual’s fingerprints would likely appear on the sunglass case or corner bag had fingerprint analysis been completed, and thus, defendant cannot demonstrate a reasonable probability that, but for his trial counsel’s failure to challenge the lack of fingerprinting analysis, the result of his trial would have been different.

Further, in light of defendant’s admission to the police that his fingerprints would likely appear on the sunglass case, we find it entirely reasonable that trial counsel decided not to pursue

fingerprint analysis as a matter of trial strategy because the analysis could have potentially revealed that defendant's fingerprints were, in fact, the only prints on the case, which is evidence that would certainly be more damaging to defendant's case. It is presumed that trial counsel's decisions regarding what evidence to present are a matter of trial strategy, which we will not second-guess. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). It is also apparent that trial counsel used the police officer's failure to test for fingerprints to bolster his argument attacking the credibility and thoroughness of the police investigation. It was reasonable trial strategy under these circumstances for defense counsel to pursue a strategy to attack the police investigation in order to create reasonable doubt. Again, we will not second-guess trial strategy.

C. FAILURE TO TIMELY FILE A WITNESS LIST

Defendant's next claim of ineffective assistance is that trial counsel was ineffective for failing to timely file his witness list, thereby precluding Tyisha Wilson, defendant's girlfriend and the registered owner of the vehicle, from testifying as a defense witness. MCR 6.201(A)(1) requires that a party upon request must provide the names and addresses of all lay and expert witnesses whom the party may call at trial. Pursuant to MCR 6.201(F), a defendant must comply within 21 days of the request, which trial counsel failed to do, waiting until the day before trial to file his witness list disclosing Wilson as a witness.² Due to defense counsel's failure to timely file the witness list, the trial court, acting within its discretion, did not allow Wilson to testify on defendant's behalf.

While we find that trial counsel's failure to timely file his witness list fell below an objective standard of reasonableness, defendant has not established that his counsel's deficient performance was "so prejudicial to him that he was denied a fair trial." *Toma*, 462 Mich at 302. Defendant claims on appeal that Wilson would have supported his defense theory by testifying that defendant did not own the sunglasses case that contained the heroin. However, defendant did not offer any basis in the form of an affidavit or otherwise to establish what Wilson would have testified to, and we cannot speculate that she would have testified that defendant did not own the sunglasses case, as defendant now claims on appeal. Thus, defendant's claim of ineffective assistance must fail because he cannot demonstrate, on the existing record, a reasonable probability that, but for defense counsel's error, the result of the proceedings would have been different.

Furthermore, "the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Because defendant was able to assert his defense theory that he did not knowingly possess the heroin through his own testimony, the testimony of the officers regarding defendant's statement denying knowledge of the heroin, and counsel's argument, the

² Although Wilson was listed as a witness on the information, she was not listed as a witness that the prosecution intended to produce at trial. MCL 767.40a(3). Further, although under MCR 6.201(A)(1) defense counsel can amend a witness list without leave by the court, it must be done no later than 28 days before trial.

failure of Wilson to testify on his behalf did not deprive him of a substantial defense, and thus, cannot constitute ineffective assistance. *Id.*

D. FAILURE TO OBJECT TO TESTIMONY REGARDING MARIJUANA

Defendant's next claim of ineffective assistance is that trial counsel was ineffective in failing to object to police officers' testimony regarding the marijuana found in the hallway of the police station a short time after police officers escorted defendant into the station because it was not relevant to whether defendant knowingly possessed the heroin found in the vehicle, was unfairly prejudicial, and was improperly admitted to show defendant's propensity to possess illegal narcotics. On the record before us, we disagree.

MRE 404(b) governs the admission of other bad acts evidence and provides:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs or acts are contemporaneous with, or prior or subsequent to the conduct at issue in this case.

In determining whether other-acts evidence is admissible under MRE 404(b), a trial court should apply the following four-part standard:

First, that the evidence must be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury. [*People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205 (1994).]

We note that, had the prosecution sought to admit the marijuana evidence to show that defendant knowingly possessed heroin, its admissibility would certainly be questionable in light of its lack of relevancy to whether he possessed the heroin and its prejudicial effect. Defendant was not charged with possession of marijuana, but only with possession of heroin. We also acknowledge the marijuana evidence is prejudicial because it tends to improperly suggest a propensity to possess illegal narcotics. MRE 404(b); *VanderVliet*, 444 Mich at 55. However, it is apparent from a careful reading of the existing record that the prosecution did not seek to offer the testimony regarding the marijuana to show a propensity to possess illegal narcotics. Instead, defense counsel initially elicited the testimony regarding the circumstances of the marijuana during his cross-examination of Detective Ross, thereby opening the door to the prosecutor's follow-up questioning of the officers regarding the marijuana evidence. See *Horn*, 279 Mich App at 35-36.

Trial counsel's questioning of witnesses is presumed to be a matter of trial strategy and this Court will not substitute its judgment for that of trial counsel. *Dixon*, 263 Mich App at 398. Trial counsel's strategy in eliciting testimony from Detective Ross about the marijuana is

apparent from his argument that defendant's alleged attempt to conceal the marijuana on his person and then dispose of it shows that defendant logically would have also attempted to conceal the heroin from the police and dispose of it if he had had any knowledge that the heroin was in the vehicle, instead of leaving the heroin lying on the passenger seat and then consenting to a search. Thus, trial counsel apparently elicited the marijuana testimony to bolster his defense theory that defendant did not know the heroin was inside the vehicle. We find that counsel's elicitation of the marijuana testimony constitutes trial strategy. Trial counsel's elicitation of the marijuana testimony was relevant to his defense theory and apparently elicited for a proper purpose under MRE 404(b), i.e., to negate defendant's knowledge of the heroin and not to show his propensity to possess illegal narcotics. *People v Knox*, 469 Mich 502, 509-510; 674 NW2d 366 (2004). Although we believe the marijuana testimony was prejudicial because it tends to indicate a propensity to possess illegal narcotics, it did have probative value regarding whether defendant lacked knowledge of the heroin in light of trial counsel's argument. *VanderVliet*, 444 Mich at 72. This Court cannot second-guess trial counsel on matters of trial strategy or assess counsel's performance with the benefit of hindsight. *Horn*, 279 Mich App at 39. Therefore, defendant has "failed to overcome the strong presumption that his trial counsel engaged in sound trial strategy" by eliciting and opening the door to testimony concerning the marijuana. *Id.*

IV. PROSECUTORIAL MISCONDUCT

Defendant next raises claims of prosecutorial misconduct regarding improper comments made by the prosecutor during her closing argument. This issue is not properly preserved for review by this Court because defendant failed to object and request a curative instruction with respect to the improper comments. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). "Issues of prosecutorial misconduct are reviewed de novo to determine whether the defendant was denied a fair and impartial trial. Further, allegations of prosecutorial misconduct are considered on a case-by-case basis, and the reviewing court must consider the prosecutor's remarks in context." *Id.* at 475 (citation omitted).

Defendant's first claim of prosecutorial misconduct is that the prosecutor improperly vouched for the credibility of the police witnesses by arguing in closing argument that the police officers had no reason to lie. "[A] prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *Thomas*, 260 Mich App at 455. The instant case called upon the jury to consider and weigh the credibility of the police witnesses and defendant, who testified on his own behalf, and thus the prosecutor's bolstering of the police witnesses during closing argument was appropriate, especially in light of defense counsel's apparent attempt to undermine the police investigation. *Id.* The prosecutor in this case merely argued that the police officers had no reason to lie and did not imply that she had "some special knowledge of the truthfulness of the police officer" or expressed her "personal knowledge or belief regarding the truthfulness of the police witnesses." *Id.* This argument was responsive to argument made by defense counsel and not improper.

Defendant also challenges the propriety of the following remarks made by the prosecutor during closing argument as improperly bolstering the prosecution's case:

And you also heard that a majority of the time that when people give consent to search for their vehicle the majority of the time they have drugs in their vehicle. That consent really has no bearing on whether or not they have contraband in their vehicle.

Although it is improper to argue facts not in evidence or to mischaracterize the evidence presented, *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001), “a prosecutor is given great latitude to argue the evidence and all inferences relating to his theory of the case.” *Thomas*, 260 Mich App at 456. Detective Ross testified that the majority of time he receives consent to search a vehicle he finds illegal narcotics or weapons and this testimony was properly admitted. Thus, it was proper for the prosecutor to argue the evidence in closing argument to rebut the defense theory that defendant consented to the search because he had no knowledge that there was heroin in the vehicle. Further, it was reasonable for the prosecutor to infer from Detective Ross’s testimony that “consent really has no bearing on whether or not they have contraband in their vehicle.” The prosecutor did not improperly bolster her case by arguing facts not in evidence or mischaracterizing the evidence presented.

Moreover, the trial court’s instruction to the jurors that the lawyers’ statements and arguments are not evidence sufficiently cured any prejudice that may have resulted from the instances of allegedly improper commentary, given that jurors are presumed to follow a trial court’s instruction. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

We likewise reject defendant’s argument that his trial counsel’s failure to object to the prosecutor’s allegedly improper argument constitutes ineffective assistance of counsel. The challenged prosecutorial argument was not improper, and trial counsel is not ineffective for failing to raise a futile objection. *Thomas*, 260 Mich App at 457.

Affirmed.

/s/ Jane E. Markey
/s/ Donald S. Owens
/s/ Karen M. Fort Hood