STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN LOTT,

Defendant-Appellant.

UNPUBLISHED
April 19, 2007

No. 265051
Macomb Circuit Court
LC No. 2004-002866-FC

Before: Judges Zahra, PJ, and Bandstra and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant Brian Lott[1] was convicted of one count of possession with intent to deliver 1,000 or more grams of a mixture containing cocaine, MCL 333.7401(2)(a)(*i*), and one count of conspiracy to possess with intent to deliver 1,000 or more grams of a mixture containing cocaine, MCL 750.157a.[2] He received concurrent sentences of 179 months' to 30 years' imprisonment for each conviction, with 392 days' credit for time served. He now appeals as of right. We affirm.

I. Facts

On February 11, 2004, in response to information regarding potential narcotics trafficking, Deputy Kenneth Rumps of the Macomb County Sheriff's Department began surveillance of a 2003 Chevy Blazer located in the parking lot of the Extended Stay Hotel in Roseville, Michigan. About 9:00 p.m., Rumps observed Ronnie Kevin Turrentine leave the hotel, enter the Blazer, and drive away. After calling for backup, Rumps followed the Blazer and observed Turrentine make a series of traffic infractions. Because Rumps was in an unmarked car, he notified an officer in a marked car to pull over the Blazer for a traffic stop.

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[1] Defendant's given name is Angelo Matthews. "Brian Lott" is an alias.

[2] Brian Lott was tried with two codefendants, Ronnie Kevin Turrentine and Kareem Dale Rhodes. We refer to Lott individually as "defendant," to Turrentine and Rhodes collectively as "codefendants," and to Lott, Turrentine, and Rhodes collectively as "defendants."

Rumps and other officers arriving on the scene conducted a normal traffic stop. After learning that Turrentine was from another state and driving a rental car and receiving evasive answers from Turrentine regarding his reasons for visiting Detroit, the officers grew suspicious. Two officers had police dogs with them, and they had the dogs conduct exterior sniffs of the Blazer to locate narcotics. Both dogs indicated that they smelled narcotics near the rear driver's side tire and wheel well of the Blazer and under the vehicle's carpeted trunk. When searching the vehicle, the officers noticed that the bolts used to hold the gas tank to the undercarriage of the Blazer looked unusually clean and were covered in fresh grease. The officers also noticed scuff marks near the gas tank. An officer in possession of a fiber-optic scope threaded the scope through the opening of the gas tank and noticed white packages with black zip ties inside the tank. The officers immediately drove the Blazer to the Oakland County Sheriff's Department Central Garage, where garage mechanics removed the gas tank and found 22 heat-sealed bricks of cocaine inside.[3]

The officers also confiscated a key to Room 328 of the Extended Stay Hotel from Turrentine. Room 328 was registered to Turrentine on the night in question. Rumps immediately contacted other officers to begin surveillance of Room 328 and returned to the hotel. Eventually, defendant and Kareem Dale Rhodes attempted to enter Room 328. The officers detained them and escorted them to the room across the hall, where they confiscated a key to Room 328 of the Extended Stay Hotel found in their possession.

When defendant admitted that he had driven to the hotel, the officers asked to search his vehicle. Defendant said that he was driving a Ford Taurus and permitted the officers to take his car keys. The officers located the vehicle in the parking lot, and a police dog performing an exterior sniff of the car identified the scent of narcotics at the back of the trunk and on the driver's side door handle. The officers, including Rumps, opened the trunk and found a toolbox with miscellaneous tools, a red bucket, nylon pants, and a nylon jacket inside. The red bucket contained a box of natural latex disposable gloves, a pair of size 12 Neoprene shoes, a hat, a sponge, and more nylon clothing. Among the tools in the box was a 15-millimeter socket with grease in it and a 15-millimeter wrench.[4] The trunk also contained two heat sealers of different sizes, rolls of FoodSaver plastic in a plastic bag, rubber bands, a box cutter razor knife, and a black handheld bag with a red zip tie containing three plastic rolls and an extension cord.

After searching the Taurus, the officers transported defendant and Rhodes to the Macomb County Jail, where Detective Sergeant Terrance Mekoski of the Oakland County Sheriff's Department questioned them. Defendant told Mekoski that he was from California and had arrived in Michigan the previous day to meet a female. When Mekoski asked for the female's name, defendant paused and then replied "Veronica." Defendant claimed that he arrived at Detroit Metro Airport the day before, rented the Taurus, and drove to Veronica's apartment on the east side of Detroit. Defendant claimed that he spent the night with her, but his interaction with Veronica "wasn't what he thought it was going to be" and he left the following day.

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[3] The weight of the cocaine totaled 11 kilograms.

[4] Rumps noticed that these tools were similar to the tools that the county mechanics used to remove the gas tank from the Blazer.

Defendant claimed that he could not provide her last name, an address or the specific location of the apartment, or a telephone number.

Defendant claimed that Turrentine also happened to be visiting Detroit at this time. Defendant and Turrentine knew each other, and defendant claimed that he left Veronica's apartment on the morning of February 11, 2004, to meet Turrentine and stay in his hotel room at the Extended Stay Hotel. After meeting with Turrentine that morning, defendant "drove around the whole day going to various malls . . . ." Eventually, defendant went to Eastland Mall, where he had a chance encounter with Rhodes, another acquaintance. Defendant and Rhodes left the mall together in defendant's rented Taurus and spent the rest of the day traveling from mall to mall and "hooking up with girls."

Mekoski also interviewed Rhodes in the Macomb County Jail's interview room that evening. Rhodes waived his Miranda rights and spoke with Mekoski. Rhodes claimed that he had flown to Detroit from California approximately one week before his arrest. He claimed that he had been staying at the Quality Inn near the Detroit Metro Airport, but recently switched lodgings and was staying at the Extended Stay Hotel. Rhodes confirmed that he and defendant had been "hanging out" and "hooking up with girls" when visiting the Detroit area, but he did not provide names, addresses, or telephone numbers of these females.

Mekoski then described to Rhodes what the officers had found in Turrentine's Blazer and defendant's Taurus. When he asked Rhodes where the narcotics would be delivered, Rhodes admitted that the narcotics were scheduled for delivery at a house on the east side of Detroit. Rhodes also admitted that the police found the narcotics just before their scheduled delivery.

Defendant, Rhodes, and Turrentine were each charged with one count of possession with intent to deliver 1,000 or more grams of a mixture containing cocaine, MCL 333.7401(2)(a)(*i*), and one count of conspiracy to possess with intent to deliver 1,000 or more grams of a mixture containing cocaine, MCL 750.157a, and were bound over for trial on these charges. Defendants did not ask for separate trials or separate juries. After deliberation, the jury found all defendants guilty of all charges.

II. Prosecutorial Misconduct

Defendant argues that the prosecutor committed five instances of misconduct. We find that defendant failed to establish that any of his alleged instances of error constituted prosecutorial misconduct.

> The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted). 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. [*People v Abraham*, 256 Mich App 265, 272-273; 662 NW2d 836 (2003) (citations omitted).]

A defendant may be denied a fair trial if the prosecutor makes a clear misstatement of the law that remains uncorrected, but even an erroneous legal argument made by the prosecutor can potentially be cured if the jury is correctly instructed on the law. *People v Grayer*, 252

Mich App 349, 357; 651 NW2d 818 (2002). Further, "'[p]rosecutors are accorded great latitude regarding their arguments and conduct.' They are 'free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case.'" *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (citations omitted). If a timely instruction to the jury could have cured the prejudicial effect of a prosecutor's comments, no error requiring reversal is established. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998).

A. Improper Voir Dire of Juror 5

First, defendant argues that the prosecutor improperly questioned Juror 5 during voir dire. Defendant maintains that in the challenged exchange, the prosecutor attempted to elicit a "different" answer from Juror 5 and, when Juror 5 responded in a manner that the prosecutor did not like, the prosecutor "tried to force the 'correct' response in front of the entire pool," potentially tainting the jury pool. Essentially, defendant argues that the prosecutor attempted to use the contested line of questioning to argue the government's case to the jury during voir dire proceedings. We find that the prosecutor's actions did not constitute misconduct denying defendant a fair trial.

"Appellate review of allegedly improper conduct is precluded if the defendant fails to timely and specifically object, unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Generally, we review allegations of prosecutorial misconduct de novo. *Abraham*, *supra* at 272. However, because this issue is unpreserved, we review for plain error affecting defendant's substantial rights.[5] *Rodriguez*, *supra* at 32. Error affects substantial rights if it is outcome-determinative; therefore, "[a] reviewing court should reverse only if the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 24.

An analysis of the propriety of this voir dire is unnecessary because any potential error did not deny defendant a fair and impartial trial. Presumptively improper conduct by counsel during voir dire does not require reversal if the error is harmless. See *Phillips v Mazda Motor Mfg Corp*, 204 Mich App 401, 411; 516 NW2d 502 (1994). The prosecutor's questions alluded to the government's theory that Turrentine knew that 11 kilos of cocaine were in the gas tank of his rented Chevy Blazer. Yet neither party disputed that defendant was not present in the Blazer when it was stopped. The question whether someone could drive the Blazer without knowing that 11 kilos of cocaine are in the gas tank is harmless to defendant, because the prosecutor never

[5] Although Turrentine's counsel challenged a portion of the prosecutor's voir dire of Juror 5 on grounds that it was argumentative, defense counsel did not object to the line of questioning. Although defendants agreed that an objection by one codefendant would function as an objection by all codefendants' attorneys, they entered this agreement after the disputed voir dire of Juror 5 occurred. Accordingly, at the time of the contested voir dire, an objection by a codefendant did not function as an objection by defendant, so this issue is unpreserved.

claimed that defendant drove the Blazer. Any error caused by the exchange between the prosecutor and Juror 5 is harmless to defendant.[6]

B. *Batson* Violation

Next, defendant argues that the prosecutor improperly used a peremptory challenge to strike Juror 9 from the panel because she was African-American. We disagree. Because plaintiff properly preserved this claim of error, we review it de novo. *Abraham*, *supra* at 272.

In *Batson v Kentucky*, 476 US 79, 84; 106 S Ct 1712; 90 L Ed 2d 69 (1986), the United States Supreme Court determined that the use of a peremptory challenge to strike a juror solely on the basis of race violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The *Batson* Court developed a three-step test to determine if a peremptory challenge has been used improperly to disqualify a juror on the basis of race.

First, the party contesting the peremptory challenge must make a prima facie showing of discrimination based on race. *People v Bell*, 473 Mich 275, 282; 702 NW2d 128 (2005).

> To establish a prima facie case of discrimination based on race, the opponent of the challenge must show that: (1) the defendant is a member of a cognizable racial group; (2) peremptory challenges are being exercised to exclude members of a certain racial group from the jury pool; and (3) the circumstances raise an inference that the exclusion was based on race. [*Batson*, *supra* at] 96. The *Batson* Court directed trial courts to consider all relevant circumstances in deciding whether a prima facie showing has been made. *Id.* [*Bell*, *supra* at 282-283.]

After the contesting party makes a prima facie showing of discrimination, the burden shifts to the party exercising its peremptory challenge to present a race-neutral explanation for using the challenge. *Id.* at 283. "The neutral explanation must be related to the particular case being tried and must provide more than a general assertion in order to rebut the prima facie showing. If the challenging party fails to come forward with a neutral explanation, the challenge will be denied." *Id.* (citations omitted).

If the party exercising its peremptory challenge presents a race-neutral explanation for using the challenge, the trial court must then determine if the party contesting the peremptory challenge has established "purposeful discrimination." *Id.* Purposeful discrimination is established if the trial court concludes that the race-neutral explanation for using the peremptory challenge is not credible. *Id.* "Credibility can be measured by, among other factors, the . . . []

[6] Regardless, after Juror 5 answered the question in the affirmative, the trial court stopped the prosecutor, noted that his question was argumentative, and told him to proceed to another subject. The acknowledgement by Juror 5 that an individual could drive a vehicle without knowing that 11 kilos of cocaine were hidden in the gas tank and the trial court's instruction to the prosecutor to change subjects without challenging the juror's response negated any harm to defendant that would have arisen from the prosecutor's question.

demeanor [of the party exercising the peremptory challenge]; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Bell*, *supra* at 283, quoting *Miller-El v Cockrell*, 537 US 322, 339; 123 S Ct 1029; 154 L Ed 2d 931 (2003). If the trial court concludes that the reasons offered for using a peremptory challenge are merely a pretext for discrimination, the challenge is denied. *Bell*, *supra* at 283.

Defendant, Rhodes, and Turrentine are African-American. The 100-person jury pool selected in defendants' trial included only three African-Americans. Juror 9 was the only African-American on the petit panel at the time she was questioned. During voir dire, Juror 9 noted that she had served as a juror in a criminal sexual conduct case in Macomb Circuit Court in either 2001 or 2002 and participated in deliberations. Juror 9 noted that the panel reached a verdict of "not guilty" after a long deliberation. Regardless, she stated that nothing in her experience would prevent her from being a fair and impartial juror in the present case. However, after learning of her previous jury experience, the prosecutor used a peremptory challenge to remove Juror 9 from the panel.

Defendant failed to establish a prima facie case of racial discrimination. Although Juror 9 is African-American, the circumstances under which the prosecutor used the peremptory challenge do not indicate that race was a motivating factor in the juror's dismissal from the panel. The prosecutor had previously used a peremptory challenge to dismiss another juror, and nothing in the trial court record indicated that that prospective juror was African-American or another racial minority, or that the prosecutor intended to dismiss him from the panel because of his race.[7] The prosecutor exercised peremptory challenges to dismiss both that juror and Juror 9 after these prospective jurors revealed previous instances in which they essentially disagreed with the Macomb County prosecutor's position in a criminal justice proceeding, not because of race. Accordingly, no prime facie showing that the prosecutor used peremptory challenges to dismiss jurors because of race has been established.[8] The prosecutor's use of a peremptory challenge to dismiss Juror 9 does not constitute misconduct.

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[7] That juror was dismissed because he admitted that his son had been convicted in Macomb County of a drug offense approximately ten years earlier. The juror believed that his son had been treated unfairly by the criminal justice system. Further, that juror admitted that his son's experience was upsetting, and expressed concern that it would affect his ability to be fair and impartial, although he understood that as a juror, he was obligated to be fair and impartial.

[8] Regardless, the prosecutor provided a race-neutral reason for the dismissal, namely, that Juror 9 had been on a jury in a criminal case tried by the Macomb County Prosecutor's Office, and, after deliberation, acquitted that defendant. Defendant argued that the prosecutor's explanation was a pretext for discrimination because the juror's dismissal would likely result in an all-white jury. However, as the trial court noted, even if defendant had established a prima facie case of discrimination, it found the prosecutor's race-neutral explanation for its use of the peremptory challenge credible. This determination by the trial court that the prosecutor's reason for using the peremptory challenge was credible is one of fact to which we accord great deference. *People v Knight*, 473 Mich 324, 344; 701 NW2d 715 (2003). Accordingly, even if defendant established a prima facie showing of race-based discrimination, the prosecutor's race-neutral

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C. Improper Opening Argument

Third, defendant argues that the prosecutor committed misconduct during his opening statement when he apparently held up the tools found in the trunk of defendant's rented Ford Taurus and argued that they were "used for one specific job" and included "one socket head that fits bolts that hold a gas tank." He maintains that the prosecutor improperly implied that these tools were used for removing the gas tank on the Chevy Blazer to put cocaine inside, although the prosecutor knew or should have known that the evidence would not support his allegations. We disagree. Because defendant failed to preserve this issue for our review, we review it for clear error affecting his substantial rights. *Rodriguez*, *supra* at 32.

"[T]he purpose of an opening statement is to tell the jury what the advocate will attempt to prove. A party may succeed or fail in this attempt." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 503; 668 NW2d 402 (2003). When reviewing defendant's claim that the prosecutor's comments during opening argument were improper, we must evaluate the prosecutor's comments in context, in light of defendant's arguments and the relationship that these comments bear to the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). "The propriety of a prosecutor's remarks depends on all the facts of the case." *Rodriguez*, *supra* at 30. Further, "[a] prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence." *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). Reversal is not warranted if defendant could have requested a cautionary instruction that would have cured any perceived prejudice. *Green*, *supra* at 693.

The challenged comments made by the prosecutor during his opening statement were proper. The prosecutor did not specifically allege in his opening statement that he would establish that the tools found in the trunk of the Taurus were used to remove the gas tank from the Blazer. Instead, the prosecutor noted that the tools found in the Taurus were the kind of tools needed to remove a gas tank from a vehicle. He discussed this evidence, along with evidence that defendants admitted that they knew each other, that defendant and Rhodes were detained when attempting to enter Turrentine's hotel room, and that defendant and Rhodes had a key to the hotel room, as circumstantial evidence that defendant, Rhodes, and Turrentine were involved in a conspiracy to transport cocaine by hiding it in the gas tank of a rental vehicle. In light of these facts, the prosecutor's argument that a juror could infer from the presence of these tools in the Taurus that defendant and Rhodes were involved with Turrentine in hiding drugs in rental vehicles for transport was reasonable.

Further, the prosecutor presented evidence at trial to support this inference. Specifically, the evidence presented at trial supported an inference that the gas tank of the Blazer had recently been removed, and cocaine was found inside the gas tank. In addition, Rumps testified that the tools found in the trunk of the Taurus were similar in appearance to the tools he saw the county mechanics use to remove the gas tank from the Blazer earlier in the evening. Officers testified that they detained defendant and Rhodes as they attempted to enter Turrentine's hotel room and

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explanation is sufficient to rebut this prima facie showing. Purposeful discrimination has not been established.

that they had a key to the room when they were detained. These facts, mentioned by the prosecutor in his opening statement, support the prosecutor's reasonable inference that defendant, Rhodes, and Turrentine were involved in a drug trafficking conspiracy. The prosecutor did not commit misconduct when he made this argument.

D. Improper Use of Rhodes' Statement

Mekoski testified that the parties agreed that he would discuss the contents of Rhodes' statement to the police without indicating that Rhodes had also incriminated defendant or Turrentine in his confession. Defendant argues that despite this agreement, the prosecutor erroneously introduced Mekoski's testimony regarding Rhodes' confession to police, in which Mekoski alluded that when confessing his guilt, Rhodes also tied defendant to the conspiracy. We disagree. Because defendant failed to preserve this issue for our review, we review it for clear error affecting his substantial rights. *Rodriguez*, *supra* at 32.

First, defendant argues that Mekoski's statement that Rhodes revealed that "him and Mr. Lott hooked up" improperly tied defendant to the conspiracy and, therefore, is prejudicial. Regardless of the admissibility of this comment, reversal is not required because the testimony is cumulative and the comment harmless. Mekoski testified that Rhodes stated that he and defendant "hooked up" when answering questions regarding his activities in the days preceding his arrest. When Rhodes made the disputed statement, he merely communicated that he and defendant met and interacted during Rhodes' trip to the Detroit area.[9] The parties do not dispute that defendant and Rhodes were acquaintances and that they socialized on February 11, 2004. Accordingly, the reference to Rhodes and defendant "hooking up" does not constitute error affecting defendant's substantial rights. Reversal of his convictions is not warranted.

Next, defendant argues that Mekoski's use of the term "them" in his statement that the police "had got them just before" the delivery inculpated defendant of possession and conspiracy. However, in the sentence preceding the contested comment, Mekoski used the term "they" to refer to the narcotics confiscated from the Blazer. Similarly, we interpret the term "them" in Mekoski's statement to refer to the cocaine, and conclude that Mekoski's statement indicates that the officers found the cocaine just before the scheduled delivery, not that the officers detained defendant and Rhodes just before the scheduled delivery. Because Mekoski's use of the term "them" referred to the cocaine, not to Rhodes and defendant, Mekoski did not improperly implicate defendant in the conspiracy when he made this statement. Defendant's claim that this comment referred to him is without merit.[10]

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[9] Notably, Mekoski also noted that Rhodes used the term "hooking up" to describe socializing with females during his trip.

[10] Regardless, even if a juror understood the phrase "we had got them just before" the scheduled delivery to communicate that Rhodes admitted that the officers detained him and defendant before the time of the delivery, this imputed reference to defendant does not constitute error affecting his substantial rights. The parties do not dispute that cocaine was found in the gas tank of the Chevy Blazer and that defendant and Rhodes were detained at the Extended Stay Hotel and not in the Blazer. Instead, defendant argued at trial that he was unaware that Rhodes and

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Defendant also argues that the prosecutor compounded this error when he referred to Rhodes' statement in the portion of his closing argument concerning defendant. Although the prosecutor mentioned Rhodes' statement to police after introducing the topic of defendant's guilt during closing arguments, he immediately noted that the jury could only consider the statement when deliberating on Rhodes' culpability. Defendant fails to explain how he was prejudiced by this reference when the prosecutor properly reminded the jury regarding the limitations of its use.

> It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. [*Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).]

Because defendant failed to provide any substantive basis for this assertion of error, it is waived and we will not consider it further.

E. Improper Closing Argument

Finally, defendant claims that the prosecutor argued facts not in evidence during his closing argument, namely, that defendant "pulled up in the Taurus" immediately before a police dog smelled traces of narcotics on the driver's side door handle of the car. Again, we disagree. Because defendant failed to preserve this issue for our review, we review it for clear error affecting his substantial rights. *Rodriguez*, *supra* at 32.

"A prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence." *Ackerman*, *supra* at 450. The prosecutor's statement that defendant "pulled up in the Taurus" was a reasonable inference arising from the evidence. Defendant was the registered renter of the Taurus and admitted that he had rented the Taurus when he arrived in Detroit the day before. Defendant also admitted that he had been driving the Taurus all day. Based on this evidence, the prosecutor argued to the jury a reasonable inference that defendant drove the Taurus to the hotel. Further, after hearing testimony that a police dog smelled narcotics on the driver's side door handle of the Taurus, a juror could reasonably infer that because defendant was driving the Taurus and therefore likely used that door to enter the Taurus, drug residue on the door handle likely came from drug residue on his hand. The prosecutor's closing argument was proper.[11]

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Turrentine were involved in drug trafficking and that he was in the wrong place at the wrong time when he was detained with Rhodes at the hotel. If a juror interpreted the term "them" to refer to Rhodes and defendant, Mekoski's testimony merely indicates that Rhodes admitted that he and defendant were detained before the drugs were delivered. The statement does not indicate that defendant knew of or was involved in the delivery. Further, it does not undermine his defense that he was merely in the wrong place at the wrong time. Instead, this interpretation is merely cumulative of other testimony admitted before the court indicating that defendant and Rhodes were together before and at the time of their arrest.

[11] Regardless, the trial court properly instructed the jury that the prosecutor's closing argument is

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III. Right of Confrontation

Defendant claims that when the prosecutor allegedly committed misconduct by having Mekoski improperly testify regarding inadmissible portions of Rhodes' statement, his right of confrontation was violated. We disagree. Because defendant did not challenge the admission of Mekoski's testimony regarding the contents of Rhodes' statement at trial, this issue is unpreserved. See *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006). We review unpreserved claims of constitutional error for plain error affecting defendant's substantial rights. *Id.* at 274. "To avoid forfeiture under the plain error rule, a defendant must show actual prejudice. Under the plain error rule, reversal is only warranted if the defendant is actually innocent or the error seriously undermined the fairness, integrity, or public reputation of the trial." *Id.* The challenged statements by Mekoski did not contradict defendant's theory of the case or otherwise inculpate defendant and therefore were harmless. Because defendant failed to establish that he suffered actual prejudice from Mekoski's statements, reversal of his conviction is unwarranted.

IV. Ineffective Assistance of Counsel

Defendant identifies nine instances in which he alleges that his counsel, Craig Tank, was ineffective. However, defendant fails to establish that any of his allegations of ineffective assistance of counsel warrant the reversal of his convictions. A claim of ineffective assistance of counsel should be raised by a motion for a new trial or an evidentiary hearing. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Because the trial court held a *Ginther* hearing, this issue is preserved.

Whether defendant has been deprived of effective assistance of counsel is a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We must first determine the facts and then decide whether these facts constitute a violation of defendant's right to effective assistance of counsel. *Id.* Factual findings are reviewed for clear error, while constitutional determinations are reviewed de novo. *Id.* "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). In reviewing a claim of ineffective assistance of counsel, "[t]his Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Criminal defendants are entitled to effective representation at every critical stage of proceedings against them. *People v Abernathy*, 153 Mich App 567, 568-569; 396 NW2d 436 (1985). However, counsel is not ineffective merely because the outcome is not optimal. *People v Davidovich*, 463 Mich 446, 453 n 7; 618 NW2d 579 (2000). Instead, counsel is ineffective if it has "sunk to a level at which it is a problem of constitutional dimension." *Id.*

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not evidence. See MCR 6.414(G). "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). The court's instruction was sufficient to protect defendant's substantial rights.

"To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense." *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). To demonstrate that counsel's performance was deficient, a defendant must establish that his attorney's representation "fell below an objective standard of reasonableness under prevailing professional norms. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *Id.* "A sound trial strategy is one that is developed in concert with an investigation that is adequately supported by reasonable professional judgments." *People v Grant*, 470 Mich 477, 486; 684 NW2d 686 (2004).

To establish that counsel's deficient performance prejudiced the defense, the defendant must show that his attorney's representation "was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). In other words, the defendant must show that, because of counsel's deficient performance, the resulting proceedings "were fundamentally unfair or unreliable." *Rodgers*, *supra* at 714. This requires the defendant to demonstrate a reasonable probability that, but for his counsel's unprofessional errors, the outcome of the proceeding would have been different. *Toma*, *supra* at 302-303.

A. Failure to Move for Severance

First, defendant argues that Tank was ineffective because he failed to move to sever defendant's trial from that of his codefendants, creating a risk that defendant would be found "guilty by association." Defendant essentially argues that Tank created a situation in which Mekoski could testify regarding Rhodes' statement to police and, in so doing, could indicate that Rhodes inculpated defendant of the charged offenses. We disagree.

The trial court has the discretion to try separately or jointly two or more defendants indicted for a criminal offense. MCL 768.5. Public policy favors joint trials "in the interest of justice, judicial economy, and administration, and a defendant does not have an absolute right to a separate trial." *People v Etheridge*, 196 Mich App 43, 52; 492 NW2d 490 (1992). A trial court is only required to grant a defendant's motion for severance "on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant." MCR 6.121(C). Stated differently, complete severance is required "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *People v Hana*, 447 Mich 325, 359-360; 524 NW2d 682 (1994), quoting *Zafiro v United States*, 506 US 534, 539; 113 S Ct 933; 122 L Ed 2d 317 (1993). Severance is not required if codefendants merely have inconsistent defenses. *Hana*, *supra* at 349. Instead, the codefendants' defenses must be "irreconcilable." *Id.* "Incidental spillover prejudice, which is almost inevitable in a multi-defendant trial," is not sufficient to require severance. *Id.*, quoting *United States v Yefsky*, 994 F2d 885, 896 (CA 1, 1993).

However, decisions concerning which motions to file are matters of trial strategy, within the sound professional judgment of the trial counsel. *People v Traylor*, 245 Mich App 460, 463; 628 NW2d 120 (2001). Tank explained that he chose not to move for severance as a matter of trial strategy. Specifically, Tank noted that the prosecution had less inculpatory evidence against defendant than against his codefendants. He concluded that with one jury,

> we would have a situation where many times you have a multiple defendant case, a jury wants to acquit . . . on one to not concede that the government was right with respect to everything.
>
> I considered it from a trial strategy standpoint to proceed forward with the redacted confessions. And to hope that the jury in the process of finding Mr. Turrentine and Mr. Rhodes guilty, would find reasonable doubt with respect to Mr. Lott.

Again, to prevail on his claim of ineffective assistance of counsel, defendant must overcome the presumption that Tank's decision to not move for severance constituted sound trial strategy. *Riley*, *supra* at 140. Yet defendant does not explain why severance was necessary to protect his substantial rights or why Tank's actions did not constitute sound trial strategy. We will not substitute our judgment for that of trial counsel regarding matters of trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Because defendant cannot overcome the presumption that his counsel engaged in sound trial strategy, his argument that Tank was ineffective for failing to move for severance lacks merit.[12] *Riley*, *supra* at 140.

B. Failure to Challenge Search of the Ford Taurus

Next, defendant argues that Tank was ineffective because he failed to challenge the police search of the Taurus and falsely claimed that defendant told him at the preliminary examination that he consented to the search. We do not agree.

Pursuant to MRPC 3.3(a), if Tank knew that defendant consented to the search of the Taurus, he had an ethical obligation not to file a motion to suppress the evidence found pursuant to the search.[13] If Tank reasonably believed that defendant consented to the search of the Taurus, pursuant to MRPC 3.3(c) he had the discretion not to offer evidence that defendant did not consent to the search.[14]

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[12] Regardless, even if Tank's failure to move for severance constituted deficient performance, as defendant claims, his alleged inaction did not affect the fairness and reliability of the subsequent trial. Defendant argues that he was prejudiced because, as a result of Tank's failure to move for severance, the jury improperly considered Mekoski's testimony indicating that Rhodes inculpated defendant. However, Mekoski's testimony did not prejudice defendant because, at most, Rhodes' statements, as presented to the jury by Mekoski, merely confirmed defendant's acknowledgement that he socialized with Rhodes on February 11, 2004, and that the men were together when police detained them. Therefore, defendant failed to establish that Tank's failure to move for severance was sufficiently prejudicial to affect the outcome of the trial. Reversal of his conviction and remand for a new trial based on this allegation of error is unwarranted.

[13] MRPC 3.3(a)(1) prohibits a lawyer from knowingly making a false statement of material fact or law to a tribunal. MRPC 3.3(a)(4) prohibits a lawyer from knowingly offering evidence that he knows to be false.

[14] MRPC 3.3(c) states, "A lawyer may refuse to offer evidence that the lawyer reasonably believes is false."

The question whether Tank was ineffective because he failed to challenge the search of the Taurus hinges, therefore, on the credibility of the witnesses testifying at the *Ginther* hearing. Several witnesses at the *Ginther* hearing testified that Tank told them that he planned to move to suppress the evidence found in the Taurus because defendant did not consent to the search. Tank testified that, at first, defendant told him that he did not consent to the search. When Tank believed that defendant did not consent to the search, he anticipated that a challenge to the admissibility of the evidence found in the Taurus on Fourth Amendment grounds constituted a legitimate trial strategy. The witnesses at the *Ginther* hearing did not indicate when Tank allegedly represented to them his intent to file the motion to suppress evidence. However, Tank testified that defendant told him privately at the preliminary examination that he consented to the search of the vehicle, and Tank decided not to file the motion to suppress after learning this information. Only defendant provided testimony disputing Tank's assertion, stating that he never made such an admission. This is a question of credibility, and the judge chose to believe Tank's statements that defendant told him that he consented to the search. Recognizing the superior ability of the trial court to judge the credibility of witnesses who appear before it, we defer to the trial court's conclusion that Tank's version of events was more believable and that defendant told him that he consented to the search.[15] See MCR 2.613(C).

Accordingly, the trial court properly determined at the *Ginther* hearing that Tank knew that defendant consented to the search and that, consistent with his ethical obligation, he chose not to argue to the trial court that defendant did not consent to the search, because he knew that this assertion would be false. An attorney's refusal to knowingly assist in the presentation of perjured testimony or a similarly false claim is consistent with his ethical obligations and, therefore, does not constitute ineffective assistance of counsel. See *Toma*, *supra* at 303 n 16. Accordingly, Tank was not ineffective because he failed to file a motion to suppress the evidence found in the Taurus.

Defendant also claims that during his closing argument, Tank argued that defendant consented to the search when, in fact, he did not. Again, defendant told Tank that he had consented to the search. Accordingly, if Tank argued that defendant did not consent to the search although he knew that he did, he would violate his ethical obligation to not knowingly make a false statement of material fact or law to a tribunal. See MRPC 3.3(a)(1). Tank was not ineffective for failing to make an argument that he believed was untrue. Further, Tank used defendant's consent to the search to advance his theory that defendant did not know that incriminatory evidence was in the car and, therefore, was not involved in drug trafficking. His decision to use evidence of defendant's consent to indicate his lack of knowledge is a matter of trial strategy. Again, we will not second-guess counsel regarding matters of trial strategy.

[15] Although defendant argues that the trial court should have considered a polygraph examination indicating that defendant was not lying when he asserted that he did not tell Tank that he consented to the search, defendant admits that these test results may only be considered when weighing defendant's credibility. However, the trial court admitted testimony regarding the results of defendant's polygraph examination, yet chose to believe Tank instead of defendant. In so doing, the trial court made a credibility determination, and as we stated *supra*, we defer to the trial court's judgments regarding witness credibility. MCR 2.613(C).

People v Rice (On Remand), 235 Mich App 429, 445; 597 NW2d 843 (1999). Accordingly, defendant fails to establish that Tank's statement during his closing that defendant consented to the search denied him a fair trial and constituted ineffective assistance of counsel.

C. Failure to Move to Redact Rhodes' Statement

Next, defendant argues that his counsel was ineffective for failing to move *in limine* to redact Rhodes' statement. This argument lacks merit because Tank joined codefendants' motion to redact Rhodes' statement and, regardless, the parties agreed that Mekoski would not discuss Rhodes' statements regarding defendant and Turrentine at trial.

Defendant also claims that Tank was ineffective because he failed to request and review a copy of Rhodes' entire redacted statement instead of merely reviewing an outline of the statement before Mekoski testified regarding Rhodes' confession. Defendant is unclear regarding the portion of Mekoski's testimony that he claims constituted prejudicial error. He references a portion of Mekoski's testimony to which codefendants vigorously objected, but which Tank did not challenge, and appears to claim that Tank would have known that he should challenge this testimony if he had properly reviewed the entire redacted statement.

However, in the portion of Mekoski's testimony challenged by codefendants, Mekoski described defendant's statement to police on the night of his arrest. This testimony is admissible against defendant pursuant to MRE 801(d)(1). Further, codefendants challenged a misstatement by Mekoski, in which he incorrectly stated that defendant told him that he had spent the day with Turrentine, when defendant actually spent the day with Rhodes. Defendant fails to explain why Tank's failure to challenge Mekoski's testimony regarding this issue was deficient and prejudicial to him. Accordingly, defendant has abandoned this argument, and we will not consider it further. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

Defendant also argues that he was prejudiced by "the improper use of the Rhodes statement at trial" as a result of these errors. Yet he does not identify specific instances of improper use, and we will not consider these allegations further.[16] *Mitcham*, *supra* at 203.

Because defendant fails to establish that any of Mekoski's testimony affected the outcome of the proceedings, he consequently fails to establish that Tank's failure to review a copy of Rhodes' entire redacted statement affected the outcome of the trial. This allegation of ineffective assistance of counsel lacks merit.

D. Failure to Challenge Mekoski's Testimony

Defendant alleges that his counsel was ineffective for failing to challenge Mekoski's testimony that Rhodes made statements inculpating defendant when he confessed to police. Again, defendant fails to identify the allegedly improper testimony. Accordingly, we will not consider his allegations further. *Mitcham*, *supra* at 203.

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[16] Regardless, Tank's failure to contest Mekoski's testimony did not constitute ineffective assistance of counsel because the challenged testimony did not prejudice defendant.

Defendant also argues that his counsel should have challenged Mekoski's testimony on the grounds that these statements violated his right of confrontation. However, as discussed *supra*, because this testimony did not prejudice defendant, an objection to its admission was unnecessary. "Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion." *Riley*, *supra* at 142.

E. Failure to Investigate, Subpoena, and Call Defense Witnesses

Defendant argues that his counsel was ineffective for failing to investigate, call, and subpoena witnesses. We disagree. Admittedly, Tank did not call witnesses in his client's defense. However, "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy . . . ." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004), quoting *Rockey*, *supra* at 76. "The failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *Dixon*, *supra* at 398. "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

First, defendant argues that Tank was ineffective because he failed to contact or subpoena the female clerk of the Extended Stay Hotel, although he had her name and other information before trial. Defendant fails to discuss evidence that the hotel clerk might have provided or to otherwise explain how Tank's failure to contact the hotel clerk deprived him of a substantial defense. Therefore, we will not consider this claim further. *Mitcham*, *supra* at 203.

Second, defendant argues that Tank was ineffective when he failed to contact Veronica, the woman defendant claimed he was visiting in Detroit, or to call her as a witness. Defendant again fails to identify evidence that Veronica might have provided or to otherwise explain how Tank's failure to contact her deprived him of a substantial defense. Therefore, we will not consider this claim further. *Id.*

Finally, defendant argues that Tank was ineffective for failing to hire an expert witness to either address the police dog's identification of the drug residue on the Taurus or the tools found in the trunk of the Taurus, although defendant claims that Tank discussed hiring an expert witness and took money from his mother for this purpose.[17] However, defendant fails to explain why an expert witness would be necessary for his defense. See *People v Tanner*, 469 Mich 437, 442-443; 671 NW2d 728 (2003) (noting that a defendant is only prejudiced if he does not have an expert witness if he can establish a nexus between the facts of the case and the need for an expert). Because defendant fails to establish this claim of error, we will not consider it further. *Mitcham*, *supra* at 203.

[17] Tank received approximately $1,000 from defendant's family, which he used to pay for court-related fees and other miscellaneous expenses and to buy defendant clothes to wear at trial. Tank denied receiving money to hire expert witnesses.

F. Failure to Provide a Defense

Defendant argues that his counsel failed to present a defense. We disagree. First, defendant argues that his counsel did not make an opening statement. However, as will be discussed further *infra*, Tank had a valid strategic reason for choosing not to make an opening statement. Tank's decision not to present an opening statement did not deprive defendant of a valid defense.

Second, defendant argues that Tank "essentially admitted to the trial court that he had not spoken with his client regarding who, if anyone, they would call as a witness in his defense" when he stated at the close of the prosecution's proofs that he was "99 percent sure that he would not call witnesses but he ha[d] to talk to Mr. Lott." However, at the *Ginther* hearing, Tank explained that he had already talked to defendant about his anticipated defense when he made the challenged statement, and that at the close of a prosecutor's case he always discussed with a client whether he wished to testify, despite the extent of his previous discussions with him. The trial court apparently determined that Tank's explanation was credible and that he did not indicate his lack of preparation for trial when he made the disputed statement. This Court defers to the trial court's determinations regarding the credibility of witnesses. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Accordingly, defendant failed to establish that Tank was ineffective because of a general lack of preparation for trial.

Finally, defendant argues that Tank failed to call defense witnesses or to introduce evidence on defendant's behalf. However, as discussed *supra*, Tank's failure to call witnesses did not deprive defendant of a proper defense or otherwise constitute ineffective assistance of counsel. Defendant also maintains that Tank should have introduced "the lab report showing that the plastic bags wrapping the cocaine in the Blazer gas tank were different from the plastic bags seized from the trunk of the Ford Taurus." Defendant claims that Tank "failed to give a reason why he did not use this information in [his] defense at trial." Yet at the *Ginther* hearing, Tank explained that he did not believe this evidence was exculpatory because the prosecution was not trying to establish that plastic taken from the rolls found in the Taurus was used to wrap the cocaine found in the Blazer, but that the presence in the Taurus of the plastic, a common wrapping agent for transporting cocaine, along with other tools used to wrap and transport cocaine, constituted circumstantial evidence that defendant, Rhodes, and Turrentine were involved in drug trafficking. Further, this evidence was not relevant to Tank's theory that defendant was merely an innocent bystander and only Turrentine and Rhodes were involved in trafficking drugs. Again, decisions regarding what evidence to present are matters of trial strategy. *Dixon*, *supra* at 398. Defendant fails to explain why Tank's decision not to introduce evidence that did not further his theory of the case or contradict the prosecution's theory of defendant's guilt did not constitute sound trial strategy. Accordingly, defendant fails to establish that Tank's failure to introduce this evidence affected the outcome of his trial and constituted ineffective assistance of counsel.

G. Failure to Make an Opening Statement

Defendant argues that Tank was ineffective for failing to make an opening statement. We disagree. The purpose of an opening statement is to "state the facts to be proven at trial." *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). The decision whether to

make an opening statement is a matter of trial tactics. *People v Hempton*, 43 Mich App 618, 624; 204 NW2d 684 (1972).

During the *Ginther* hearing, Tank provided several strategic reasons for choosing not to give an opening statement. In particular, he noted that, because the codefendants did not plan to give opening statements, he feared that he would remind the prosecutor of the shortcomings in defendant's case if he gave an opening statement, and the prosecutor would then spend additional time proving its case against defendant. Instead, Tank decided to leave the prosecution to its proofs. Further, Tank concluded that many of the points he would have raised in an opening statement had been discussed in voir dire, and he did not want to insult and bore the jury by repeating many of these points. Although defendant argues that he was prejudiced by Tank's failure to give an opening statement because the jury only heard the prosecutor's theory of the case at the beginning of trial, Tank considered both that the jury had already been exposed to many of the points that he planned to make in an opening statement during voir dire and that his strongest defense was to expose weaknesses in the prosecution's case, not to present an alternate theory establishing defendant's innocence, when he decided not to give an opening statement. Tank presented legitimate tactical reasons to support his decision not to give an opening statement, and this Court does not second-guess counsel regarding matters of trial strategy. *Rice*, *supra* at 445. Accordingly, defendant failed to overcome the presumption that Tank's decision not to present an opening statement constituted sound trial strategy.

H. Failure to Object

Defendant argues that Tank was ineffective for failing to object to "the introduction and receipt of improper, irrelevant and prejudicial evidence" or to make legal arguments during trial. We do not agree. First, defendant argues that although counsel for Turrentine moved for a directed verdict on his client's behalf and Tank joined in the motion, Tank should have provided a separate factual basis in support of a directed verdict for defendant. However, defendant fails to describe the "separate factual basis" that Tank should have raised in a motion for a directed verdict. Because defendant fails to present a factual basis or coherent argument for this claim of error, we will not consider it further. *Mitcham*, *supra* at 203.

Second, defendant again argues that Tank should have challenged Mekoski's testimony regarding Rhodes' statements on his behalf. Yet defendant fails to identify portions of Mekoski's testimony regarding Rhodes' statements to police that prejudiced defendant. Because defendant fails to establish that Mekoski's testimony affected the outcome of the proceedings, this allegation that Tank was ineffective because he failed to challenge the admission of this testimony lacks merit. *Id.*

Finally, defendant argues that Tank should have challenged the prosecutor's closing argument, particularly the prosecutor's references to Rhodes' statement and other "facts not in evidence that were related specifically to" defendant. Yet defendant fails to explain how he was prejudiced by the alleged error. Accordingly, he fails to establish that the prosecutor's argument denied him a fair trial and that Tank's failure to challenge the propriety of the argument constituted ineffective assistance of counsel. *Id.*

I. Improper Closing Argument

Finally, defendant argues that in three instances, his counsel was ineffective during his closing argument. We disagree.

First, defendant notes that his counsel improperly argued "that the jury should find Mr. Lott not guilty because, in essence, his name was not mentioned in the Rhodes confession." This comment drew an objection from the prosecutor and resulted in a lengthy discussion among counsel and the trial court outside the presence of the jury in which the trial court reprimanded defendant's counsel for his statements.

Admittedly, this argument was improper because Tank knew that Rhodes discussed defendant's involvement in the drug trafficking conspiracy in his confession and that defendant was not mentioned in Mekoski's testimony describing Rhodes' confession to police because the parties had agreed that Mekoski would not discuss Rhodes' comments to him regarding defendant's and Turrentine's involvement in drug trafficking.

However, Tank's argument did not prejudice defendant. Although Tank was reprimanded outside the presence of the jury for his improper argument, the trial court did not issue a curative instruction and simply told Tank to move to another topic when he resumed his argument. Accordingly, the jury received no indication that Tank's argument was improper.[18] Defendant's improper argument did not prejudice the jury or otherwise deny defendant a fair trial.

Second, defendant notes that after Tank resumed his closing argument, the prosecutor objected two additional times and sidebar conferences were held to address the objections. However, defendant fails to explain why these additional objections constituted prejudicial error. Further, the jury was instructed at the beginning of trial that it should disregard discussions between the judge and attorneys outside its presence, and jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, these interruptions during Tank's closing argument did not deny defendant a fair trial.

Finally, defendant argues that Tank "repeatedly argued that the hotel room key was never produced and was not in evidence, when the hotel room keys taken from Rhodes and Turrentine were introduced and admitted into evidence by the prosecution during trial." Apparently, defendant challenges two comments by Tank indicating that defendant had not been in possession of a key to Turrentine's hotel room. Admittedly, Detective Sergeant Kozlowski of the Macomb County Sheriff's Department testified that a key to Turrentine's room was found on defendant when he was detained. Rumps was more vague regarding whether the key was found in defendant's or Rhodes' possession. However, no objection to this argument was made on the record and the trial court did not instruct the jury to disregard Tank's argument or otherwise indicated that his argument was improper. Tank's brief argument, presented without comment or

[18] If anything, defendant's uncorrected argument instilled in the jurors the belief that they could consider Rhodes' apparent failure to mention defendant in his confession as indicative of defendant's lack of involvement in the drug trafficking conspiracy.

objection from the trial court or prosecutor, would not automatically cause the jury to question the credibility of his presentation of the facts and theory of the case. These comments did not deny defendant a fair trial.[19]

V. Great Weight of the Evidence

Defendant argues that his convictions are against the great weight of the evidence and, consequently, his convictions should be reversed and the case remanded for a new trial. We do not agree.

We review the trial court's decision to deny defendant's motion for a new trial because the verdict is against the great weight of the evidence for an abuse of discretion. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). A verdict is against the great weight of the evidence "if the evidence preponderates so heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). We may only vacate a conviction because it is against the great weight of the evidence if the verdict "does not find reasonable support in the evidence, but is more likely to be attributed to causes outside the record such as passion, prejudice, sympathy, or some extraneous influence." *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993) (citation omitted).

To determine whether a verdict is contrary to the great weight of the evidence, we review the whole body of proofs. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993), overruled in part on other grounds in *People v Lemmon*, 456 Mich 625 (1998). A verdict is contrary to the great weight of the evidence if "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). "Questions of credibility are left to the trier of fact and will not be resolved anew by this Court." *Avant*, *supra* at 506. Therefore, we may not question the jury's assessments regarding the credibility of witnesses or the weight ascribed to their testimony. See *People v Palmer*, 392 Mich 370, 375-376; 220 NW2d 393 (1974). "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial" based on the weight of the evidence. *McCray*, *supra* at 638, quoting *Lemmon*, *supra* at 647.

[19] Because Tank's challenged statements in his closing argument did not prejudice defendant in a manner that affected the outcome of the proceedings and deny him a fair trial, defendant failed to establish that Tank's alleged errors during his closing argument were sufficiently ineffective to require reversal of his convictions. In any event, the trial court properly instructed the jury that the prosecutor's closing statement is not evidence. See MCR 6.414(G). "It is well established that jurors are presumed to follow their instructions." *Graves*, *supra* at 486. The court's instruction was sufficient to correct any error that might otherwise have affected the outcome of the trial.

A. Possession with Intent to Deliver

Defendant's conviction for possession with intent to deliver cocaine is not against the great weight of the evidence. To establish a charge of possession with intent to deliver cocaine, the prosecution must establish (1) that the defendant knowingly possessed a controlled substance, (2) the defendant intended to deliver this substance to another, (3) that defendant knew that the substance he possessed was cocaine, and (4) that the substance was in a mixture weighing over 1,000 grams. *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998). See also MCL 333.7401(2)(a)(*i*).

The jury's verdict convicting defendant for this offense is not against the great weight of the evidence.[20] First, the evidence presented at trial indicates that defendant was in possession of the cocaine. The element of possession is established if sufficient evidence exists to conclude that defendant had "'dominion or right of control over the drug with knowledge of its presence and character.'" *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000), quoting *People v Maliskey*, 77 Mich App 444, 453; 258 NW2d 512 (1977). "Possession may be either actual or constructive, and may be joint as well as exclusive." *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998). Further, "[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999), quoting *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

Turrentine was found in possession of 11 kilos of cocaine. Defendant admitted that he knew Turrentine and planned to stay in his hotel room that night. Defendant and Rhodes were detained as they attempted to enter Turrentine's hotel room, and a key to the hotel room was found in their possession. Defendant admitted that he was driving a Ford Taurus that he rented the day before, and that he spent most of the day in the car. When officers searched the Taurus, they found tools that could be used to hide drugs in the gas tank of a vehicle and plastic, heat sealers, and other implements used for packaging cocaine. Further, a police dog indicated that he smelled narcotics on the trunk and on the driver's side door handle of the Taurus. This circumstantial evidence, taken together, reasonably supports a finding that defendant was involved in handling and hiding drugs in a vehicle for transport and that, in so doing, he had control over the drugs. In addition, other than defendant's denials of wrongdoing to the police, little evidence was presented contradicting this inference that defendant had been in possession of cocaine.

The evidence also establishes that defendant intended to deliver cocaine. A juror may infer intent to deliver "from the quantity of narcotics in a defendant's possession, from the way in which those narcotics are packaged, and from other circumstances surrounding the arrest." *People v Wolfe*, 440 Mich 508, 524; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

[20] The parties do not dispute that the substance that police found in the gas tank of the Chevy Blazer was cocaine or that the cocaine was in a mixture weighing over 1,000 grams. Although defendant argues on appeal that he did not know that cocaine was present in the gas tank of the Blazer, he does not argue that he thought that the substance was something other than cocaine.

The police found over 11 kilos of cocaine, with a street value approaching $5,000,000, in the gas tank of Turrentine's car. The cocaine was packaged in heat-sealed plastic bags used for transport, storage, and delivery. Tools used for packaging cocaine and hiding it in the gas tank of a vehicle were found in the car defendant had been driving that day. Rhodes also admitted that the cocaine was scheduled for delivery that night. Accordingly, the jury's conclusion that defendant intended to deliver cocaine is not so contradictory to this evidence that it would be a miscarriage of justice to permit defendant's conviction to stand. Defendant's conviction for possession with intent to deliver cocaine is not against the great weight of the evidence.

B. Conspiracy

Defendant's conviction for conspiracy is also not against the great weight of the evidence. To establish a charge of conspiracy to possess cocaine with intent to deliver, the prosecution must establish that the defendant intended to combine with others to accomplish an illegal objective, namely, possession with intent to deliver cocaine. MCL 750.157a; *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001). In particular, the prosecution must establish that the parties "specifically intended to further, promote, advance, or pursue" this unlawful objective. *People v Justice (After Remand)*, 454 Mich 334, 347; 562 NW2d 652 (1997).

Our Supreme Court has long recognized that the clandestine nature of criminal conspiracies often makes identifying the objectives and participants of an unlawful agreement difficult. *Id.*

> The rule has long been recognized that a conspiracy may, and generally is, established by circumstantial evidence and that positive proof is not required but the circumstances must be within safe bounds of relevancy and be such as to warrant a fair inference of the ultimate facts. [*People v Brynski*, 347 Mich 599, 605; 81 NW2d 374 (1957).]

Accordingly, "direct proof of the conspiracy is not essential; instead, proof may be derived from the circumstances, acts, and conduct of the parties." *Justice*, *supra* at 347. Circumstantial evidence may be used to determine the existence of a conspiracy, as long as the inferences drawn are reasonable. *Id.* at 347-348. Further, a conspirator need not know the extent and ramifications of and the participants in the conspiracy to be convicted of this offense. *People v Meredith (On Remand)*, 209 Mich App 403, 412; 531 NW2d 749 (1995).

The evidence presented in this case does not preponderate so heavily against defendant's conspiracy conviction that it would be a miscarriage of justice for the verdict to stand. As discussed *supra*, defendant's conviction for possession with intent to deliver cocaine was not against the great weight of the evidence. Further, the prosecution presented evidence establishing that defendant committed this offense in conjunction with (at least) Turrentine and Rhodes. Again, defendant, Rhodes, and Turrentine admitted that they knew each other and defendant and Rhodes were detained as they attempted to enter Turrentine's hotel room. Tools used to remove a gas tank from a vehicle, heat sealers, and plastic used to package cocaine were found in the Taurus that defendant had been driving that day, and a police dog indicated that drug residue was on the car. Cocaine heat-sealed in plastic was found in the gas tank of Turrentine's rented Blazer. The jury's conclusion that defendant, Rhodes, and Turrentine

conspired to deliver cocaine conforms to this evidence. Defendant's conviction for conspiracy to possess cocaine with intent to deliver is not against the great weight of the evidence.

VI. Cumulative Error

Finally, defendant fails to establish that the cumulative effect of these errors denied him a fair trial. Most allegations of error made by defendant on appeal are unfounded, and the errors that occurred in this case did not prejudice him. Because prejudicial error has not been identified in this case, there is no cumulative error meriting reversal. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Brian K. Zahra
/s/ Richard A. Bandstra
/s/ Donald S. Owens