

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL MARCUECE BORGES,

Defendant-Appellant.

UNPUBLISHED

September 18, 2008

No. 278100

Kent Circuit Court

LC No. 06-008865-FH

Before: Meter, P.J., and Hoekstra and Servitto, JJ.

PER CURIAM.

Following a jury trial, defendant Michael Marcuece Borges was convicted of possession with intent to deliver more than 50 but less than 450 grams of cocaine, MCL 333.7401(2)(a)(iii). Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 10 to 25 years' imprisonment for his conviction. He appeals as of right. We affirm.

On July 19, 2006, at about 10:00 p.m., a drug search warrant was executed at defendant's house. When defendant saw the approaching police van, he ran from the front porch to the back of the house. Police officers stationed at the back of the home in an alley saw defendant run through the backyard and then exit from an opening in the privacy fence into the alley. As defendant was running, a police officer saw defendant drop an item onto the ground.

After defendant was arrested, police found on him, among other items, approximately four grams of crack cocaine and two cellular telephones. In addition, police officers located a red "Foot Work" bag around the opening of the fence through which defendant ran. A police officer identified the location of the red bag as where he saw defendant drop an item. The red bag contained a "Crown Royal" bag, containing bags of cocaine weighing over 80 grams, along with a cellular telephone charger and a box of "Glad" sandwich bags. The cellular telephone charger found in the red bag did not match either of the two cellular telephones found on defendant. A handgun, a small amount of drugs, and a digital scale were recovered from the house. During an interview with police, defendant admitted to having four grams of cocaine in a bag on his person. Expert testimony supported that the 80 grams of cocaine contained within the red bag was an amount usually possessed by a dealer and was worth approximately \$17,000.

On appeal, defendant claims that his attorney rendered ineffective assistance of counsel. Defendant failed to preserve this claim because a *Ginther*¹ hearing was not requested; nor did the trial court examine this claim when defendant moved for a new trial. When the issue of ineffective counsel is not preserved, this Court's review of the issue is limited to errors apparent on the record. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001).²

To prevail on a claim of ineffective counsel, defendant must prove both deficient performance and prejudice. *People v Dendel*, 481 Mich 114, 125; 748 NW2d 859 (2008), amended 481 Mich 1201 (2008). To satisfy the first component, defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To prevail on this component, defendant also "must overcome a strong presumption that counsel's performance constituted sound trial strategy." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). The second component requires the defendant to show "the existence of a reasonable probability that, but for the counsel's error, the result of the proceeding would have been different." *Id.* Defendant must satisfy both components to prevail. *Id.* at 599-600. Defendant must also show that "the attendant proceedings were fundamentally unfair or unreliable." *People v Rogers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). In addition, "this Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Defendant alleges that defense counsel committed three errors depriving him of effective counsel: (1) defense counsel should have objected to defendant's entrance into the courtroom after the jury had been seated, (2) defense counsel failed to object to the additional count of possession, and (3) defense counsel failed to investigate the existence of a second cellular telephone charger and object to its admission into evidence. We disagree that reversal is required.

First,

the Sixth Amendment guarantee of a right to a fair trial means that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence adduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced at trial." [*People v Banks*, 249 Mich App 247, 256; 642 NW2d 351 (2002), quoting *Taylor v Kentucky*, 436 US 478, 485; 98 S Ct 1930; 56 L Ed 2d 468 (1978).]

We agree that counsel was deficient for failing to object to defendant's entrance into the courtroom with deputies, because defendant had a presumption of innocence, *Banks, supra* at 256, and knowledge that defendant remained in continued custody may have impacted on that

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

² We note that this Court denied defendant's earlier request for a remand related to this issue.

presumption. However, the entrance of defendant after the jury had been seated occurred only once and, upon defense counsel raising the issue, the trial court admonished the jury to not consider the fact that defendant was in custody. Moreover, defendant concedes that he was not observed in shackles. We cannot conclude that, but for counsel's failure to object, the outcome of the trial would have been different.

Second, a prosecutor is allowed to amend the information before, during, or after the trial unless it would unfairly surprise or prejudice the defendant. MCR 6.112(H); see also *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993); MCL 6.112(H). Both the prosecution and defense counsel agreed to add the third count of possession and allowed the judge to instruct the jury on that charge at the conclusion of the trial. There is no evidence apparent in the record to support the contention that the amendment surprised or prejudiced defendant. Defendant was already prepared to defend against the allegation of possession because of the charge of possession with intent to deliver. Also, allowing addition of a lesser charge can be considered sound trial strategy. See, generally, *People v Wise*, 134 Mich App 82, 98; 351 NW2d 255 (1984). We will not second guess counsel in matters of trial strategy. *Matuszak, supra* at 58.

Third, as noted earlier, this Court will not "make[] an assessment of counsel's competence with the benefit of hindsight." *Matuszak, supra* at 58. Defendant claims his trial strategy would have been different if his counsel had known about the second cellular telephone charger, and understood that it was admitted into evidence. At trial, defense counsel argued that because the cellular telephone charger found in the red bag and admitted into evidence did not fit defendant's cellular telephones, he could not be the owner of the red bag and the drugs contained within. The fact that the charger in the red bag did not fit either of defendant's cellular telephones was not altered in any way by the existence of a second cellular telephone charger found by the police on defendant along with the two telephones. Thus, we cannot conclude that, but for any deficiency in counsel's performance related to the challenged evidence, the outcome of defendant's trial would have been different.

Because we find no merit to any of the claims of ineffective assistance of counsel, defendant's cumulative error argument must fail. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Defendant additionally raises several claims of prosecutorial misconduct. Defendant failed to object to any of the alleged occurrences of prosecutorial misconduct. Therefore, the issue has not been preserved for appeal. *People v Cox*, 268 Mich App 440, 451; 709 NW2d 152 (2005). If a defendant fails to "timely and specifically object" to instances of prosecutorial misconduct, this Court's review is limited to plain error affecting a defendant's substantial rights. *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003) (internal citation and quotation marks omitted).

"Claims of prosecutorial misconduct are reviewed on a case-by-case basis." *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). In general, prosecutors are given great latitude 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) (internal citation and quotation marks omitted). Defendant specifically argues that he was denied a fair trial because of the prosecutor's following actions: (1) submitting false evidence, (2) failing to correct false testimony, (3) failing to produce evidence in support of his opening

statement, (4) making inappropriate comments during closing arguments, and (5) failing to disclose exculpatory evidence.

First, defendant contends that the prosecutor admitted a second cellular telephone charger into evidence without providing evidence to support its admission. We disagree that admission of the telephone charger constituted the submission of false evidence. During testimony, a police officer, who was present during the search of defendant, identified two cellular telephones and the second charger as items removed from defendant's person the night of the incident. It was after this identification that the prosecution moved for admission of exhibit eight, which consisted of the two cellular telephones and the charger. Therefore, the prosecutor acted in good faith once testimony was presented to establish a basis for admitting the second cellular telephone charger. A prosecutor may attempt to introduce evidence that he legitimately believes is admissible. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999).

Second, defendant contends that the prosecutor failed to correct false testimony. However, defendant fails to identify any witnesses purported to have provided false testimony or provide any evidence from the record of false testimony. There is also no discussion or analysis of the prosecutorial misconduct argument in defendant's brief. Defendant has not met his burden of establishing the factual predicate of his claim, *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999), and his argument is otherwise abandoned, *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) (“[a]n appellant may not merely announce a position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority”).

Third, defendant challenges three comments made by the prosecutor during his opening statement that defendant alleges were not supported by evidence. This Court has previously held “that when a prosecutor states that evidence will be submitted to the jury, and the evidence is not presented, reversal is not warranted if the prosecutor did so in good faith.” *People v Wolverton*, 227 Mich App 72, 75; 574 NW2d 703 (1997). After a review of the opening statement and the challenged representations, there is no evidence to prove that the prosecutor acted in bad faith when ultimately failing to present testimony to substantiate the claims made during his opening statement.

Fourth, defendant challenges a statement made during closing argument, relating to the prosecutor's contention that the jury should find defendant guilty of a greater charge. A prosecutor's comments during a closing argument are reviewed in context to determine whether they constitute error requiring reversal. *Bahoda, supra* at 283. Reviewing the prosecutor's comments in context, the argument was based on the evidence and reasonable inferences. *Id.* at 282. The prosecutor's closing argument did not deprive defendant of a fair trial.

Fifth, defendant argues that the prosecution acted in bad faith by failing to disclose exculpatory evidence. Defendant's argument is hard to follow, but he appears to be arguing that the prosecutor failed to be forthcoming about the existence of the second telephone charger that a witness testified was found on defendant's person. The Michigan Supreme Court has recognized that “[d]efendants have a due process right to obtain evidence in the possession of the prosecutor if it is favorable to the accused and material to guilt or punishment.” *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994). Evidence is considered material if it raises “a reasonable doubt about the defendant's guilt.” *Cox, supra* at 448. The second cellular telephone charger

did not raise a reasonable doubt about defendant's guilt. It was not exculpatory evidence, and, thus, even if it was not timely disclosed, we cannot conclude that plain error requiring reversal exists.³

After our review of all defendant's claims of prosecutorial misconduct, there is no evidence in the record indicating that the prosecutor acted improperly and denied defendant a fair and impartial trial.

Defendant finally contends that the trial court abused its discretion by admitting hearsay evidence and denying defendant's motion for a new trial. The trial court admitted the evidence as a statement against interest. Defendant does not cite to any authority to support that the admission of the evidence under that hearsay exception was an abuse of discretion, nor does he actually discuss or analyze whether the trial court abused its discretion in the body of his brief. Therefore, the issue is abandoned. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001) (“[d]efendant may not leave it to this Court to search for a factual basis to sustain or reject his position” [internal citation and quotation marks omitted]); *Kelly, supra* at 640-641, *People v Norman*, 184 Mich App 255, 261; 457 NW2d 136 (1990) (“because the defendant has not provided this Court with any factual rationale to support his contention . . ., we decline to review the issue”).

Affirmed.

/s/ Patrick M. Meter
/s/ Joel P. Hoekstra
/s/ Deborah A. Servitto

³ Again, defendant's argument on appeal is unclear. It is possible that he is arguing that the prosecutor committed misconduct by failing to disclose that a police officer, upon arresting defendant, allegedly had failed to find a second telephone charger on defendant's person (or at least had not noted the existence of such a charger). However, we cannot discern how this evidence was exculpatory. The existence or nonexistence of the second charger was not related to defendant's guilt or innocence. We additionally note that we reject defendant's argument that he was entitled to a new trial or an additional hearing because of this “second phone charger” issue.