

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
March 27, 2012

v

SARAH JO HETTINGER,

Defendant-Appellant.

No. 297237
Jackson Circuit Court
LC No. 09-005898-FH

Before: SHAPIRO, P.J., and WILDER and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial conviction for possession of 50 to 449 grams of a controlled substance (narcotic or cocaine), MCL 333.7403(2)(a)(iii). We affirm.

I. BACKGROUND

On July 29, 2009, Jackson police officers conducted a controlled powder cocaine purchase from Patrick Giddis.¹ After the transaction was completed, the officers observed Giddis enter defendant's apartment, located at 305 Homecrest Road. Thereafter, on July 30, 2009, approximately ten police officers executed a search warrant at defendant's apartment. During the search, the officers discovered zippers on the underside of the dining room table chairs, which upon opening the officers located a total of 114.6 grams of cocaine within several plastic baggies and \$3,850 in cash, including the marked money given to Giddis by the officers during the controlled powder cocaine purchase.

As previously noted, defendant was charged and convicted by the jury of possessing 50 grams or more but less than 450 grams of a controlled substance (narcotic or cocaine), MCL 333.7403(2)(a)(iii). Defendant was sentenced to 5 to 20 years' imprisonment, and now appeals as of right.

II. ANALYSIS

¹ Giddis is the father of defendant's two children.

A. EVIDENTIARY ERRORS

Defendant argues that the trial court erred in admitting evidence regarding crack cocaine, admitting evidence concerning previous unrelated drug investigations in 2005 and 2008, and questioning a witness regarding the probable cause determination for a search warrant. The trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). “[E]ven if we find that evidence was erroneously admitted, we will deem the error harmless if it did not prejudice the defendant[.]” *People v Bartlett*, 231 Mich App 139, 158; 585 NW2d 341 (1998). The trial court's decisions to question a witness concerning probable cause and admit evidence of the 2005 investigation is reviewed for plain error affecting defendant's substantial rights because defendant failed to object to their admission. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The trial court did not abuse its discretion in allowing the admission of evidence regarding the typical unit and cost of a single amount of crack cocaine, and regardless any error was harmless. On direct examination, the prosecution asked an officer how much a typical single use of powder cocaine weighed and its cost. In response, the officer compared the typical single use unit and cost of crack cocaine to the typical single use unit and cost of powder cocaine. The officer's comparison of crack cocaine to powder cocaine was an indirect way of answering the prosecution's question regarding what the typical single use weight and cost of powder cocaine was. And, evidence regarding the typical single use weight and cost of powder cocaine was relevant under MRE 401 because it made the existence of a material fact, namely whether defendant's apartment was being used by Giddis as a narcotics stash house, more or less probable than it would be without the evidence. The dissent mischaracterizes the officer's testimony as not relevant because it concludes that this testimony primarily provided evidence relating to the selling of crack cocaine. However, when the entire dialogue between the prosecution and the officer is reviewed, it is clear that the officer's testimony related to whether defendant's apartment was a stash house based on the amount of powder cocaine found inside her home. The evidence does not imply that defendant was selling crack cocaine.

Moreover, any error regarding the admission of this evidence would have been harmless. See *Bartlett*, 231 Mich App at 158. The potential error did not prejudice defendant because of the strong evidence supporting her conviction, and because the officer made no attempt to link crack cocaine to defendant. See *id.* The police witnessed Patrick Giddis, a known drug dealer and father of defendant's children, selling cocaine, and items recovered from defendant's apartment revealed that Giddis had been living with defendant even though he was using a different address. There was also evidence that defendant was living well above her financial means. For example, the evidence showed that defendant purchased brand new furniture, including the dining room chairs wherein the police discovered the cocaine and cash, and went on a recent trip to Mexico. Defendant also drove a vehicle not registered in her name and, as discussed below, she was aware of Giddis's prior drug dealings. The dissent's concern that the officer's testimony prejudiced defendant stems largely from its perception that the officer's testimony implied that defendant sold and/or used crack cocaine and that crack cocaine is more dangerous to use than powder cocaine. However, neither party made reference to defendant selling or using crack cocaine. In fact, the only reference to crack cocaine was the officer's comparison to explain how much a typical single unit of powder cocaine weighs and its cost.

Given the strong evidence to support defendant's convictions, we cannot find that this evidence prejudiced defendant.

The admission of evidence regarding the 2008 investigation was not an abuse of discretion, and the admission of evidence regarding the 2005 investigation did not constitute plain error affecting defendant's substantial rights. A defendant "opens the door" to the admission of typically inadmissible evidence when it inquires into or makes reference to such evidence. Thereafter, the prosecution is allowed to introduce evidence in response to the evidence and impressions raised by the defendant. *People v Figgues*, 451 Mich 390, 399-400; 547 NW2d 673 (1996). Moreover, a "[d]efendant cannot complain of [the] admission of testimony which [the] defendant invited or instigated." *People v Whetstone*, 119 Mich App 546, 554; 326 NW2d 552 (1982). See also *Troy v McMaster*, 154 Mich App 564, 570; 398 NW2d 469 (1986) (It is well established that "[w]here a defendant raises the issue of his prior bad acts, he has waived any claim of error.").

On direct examination, the prosecution asked the detective, "[a]re you familiar with both [defendant and Giddis]?" and the detective replied, "[u]h, yes, I have dealt with both in the past." Thereafter, on cross-examination, defendant questioned the detective:

Q. Now you testified about having prior investigations. Isn't it true that your prior investigations involved Patrick Giddis?

A. Yes.

Q. These prior investigations didn't involve [defendant] did they?

A. She was residing with him when one of the investigations was conducted.

Q. She wasn't the focus of the investigation, correct?

A. I would say they were both focused [sic] because I did not know exactly who was selling or who was holding narcotics.

Here, defendant opened the door when she brought out on cross-examination that the detective's "prior dealings" with defendant were actually prior investigations wherein defendant was a focus of the investigation. Because defendant opened the door by asking the detective about his prior investigations involving defendant, the other acts evidence regarding the prior investigations was properly admitted. See *People v Horn*, 279 Mich App 31, 35-36; 755 NW2d 212 (2008) (other acts evidence properly admitted once defendant opened the door by inquiring on the issue).

The dissent's attempt to distinguish Michigan law on this issue is flawed in several respects. First, the dissent relies upon non-binding case law from the United States Court of Appeals for the Ninth Circuit. *Sharp v Lansing*, 464 Mich 792, 803; 629 NW2d 873 (2001). Considering that Michigan law currently does not import the Ninth Circuit's requirement that the evidence admitted after the door is opened be used only to rebut a false impression, see *United States v Whitworth*, 856 F2d 1268, 1285 (CA 9, 1988), we cannot agree that such a limiting rule

should be used in this case. Second, defense counsel's questions to the detective did elicit inadmissible evidence. Defense counsel specifically asked the detective whether his prior investigations involved defendant. Generally, other acts evidence, including prior police investigations, is inadmissible under MRE 404(b)(1). See *People v Williamson*, 205 Mich App 592, 596; 517 NW2d 846 (1994) ("As a general rule, evidence that tends to show the commission of other criminal acts by a defendant is not admissible to prove guilt of the charged offense."). Additionally, the dissent's reliance on *People v Yager*, 432 Mich 887; 437 NW2d 255 (1989) is misplaced. In *Yager*, our Supreme Court held that reference to a defendant's possible habitual offender status did not open the door to evidence of the defendant's prior convictions. *Id.* The *Yager* Court emphasized that evidence that opens the door must specifically relate to the evidence sought to be introduced. *Id.* Here, defense counsel opened the door regarding prior investigations by posing the question directly to the detective. *Yager* confirms that the trial court did not abuse its discretion in allowing the evidence.

Next, although we agree that the trial court's question regarding probable cause for a warrant was not proper, the error did not affect defendant's substantial rights. "A trial court may question a witness in order to clarify testimony or to elicit additional relevant information." *People v Weathersby*, 204 Mich App 98, 109; 514 NW2d 493 (1994); see MRE 614(b). But "[a] trial court may not assume the prosecutor's role with advantages unavailable to the prosecution[.]" *id.*, and should not ask questions that are "intimidating, argumentative, prejudicial, unfair or partial[.]" *People v Sterling*, 154 Mich App 223, 228; 397 NW2d 182 (1986). In determining whether the trial court's questions violated a defendant's right to due process and a fair trial, "[t]he test is whether the judge's questions and comments may have unjustifiably aroused suspicion in the mind of the jury concerning a witness' credibility and whether partiality quite possibly could have influenced the jury to the detriment of the defendant's case." *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996).

The trial court should not have inquired about the probable cause determination for a warrant. Defendant had not challenged the sufficiency of the affidavit at or before trial. The question was not relevant because whether there was probable cause for the warrant did not make the existence of any fact that was of consequence to the determination of the action more or less probable. MRE 401. Furthermore, we agree with the dissent that the question may also have improperly bolstered both the witness's credibility and the prosecution's case by implying that there had been a prior determination of probable cause. See *Sterling*, 154 Mich App at 230 (finding that the questions posed by the trial court to a witness "may well have been interpreted as the court's seal of credibility" on the testimony of the witness). However, while the dissent emphasizes that the trial court's comment denied defendant the right to a fair trial, we cannot conclude that it prejudiced defendant because it was an isolated comment not repeated by either counsel or any other witness, and the police officers actually discovered cocaine and cash hidden in defendant's dining room chairs. Thus, despite the impropriety of the trial court's question, there was strong evidence to support defendant's conviction. There was no plain error requiring reversal. *Carines*, 460 Mich at 763.

B. IMPARTIAL JURY

Defendant next argues that she was denied her right to an impartial jury because one of the jurors had a case pending before the trial court. A criminal defendant is entitled to a fair trial

by an impartial jury under the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Miller*, 482 Mich 540, 547; 759 NW2d 850 (2008). “Jurors are presumptively competent and impartial, and the party alleging the disqualification bears the burden of proving its existence.” *People v Johnson*, 245 Mich App 243, 256; 631 NW2d 1 (2001).

Defendant waived her right to challenge the impartiality of the jury because when the juror raised the fact that she had a parenting time case pending before the trial court, the trial court gave defendant the opportunity to excuse the juror and she declined. See *Carines*, 460 Mich at 762 n 7; *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001); *Johnson*, 245 Mich App at 253-254 n 3. Moreover, defendant has failed to carry the burden of proving the juror was not impartial because she failed to demonstrate that the juror was biased. See *Johnson*, 245 Mich App at 256.

C. PROBABLE CAUSE

Defendant contends that her Fourth Amendment right was violated because the search warrant was not supported by probable cause. We afford deference to the magistrate’s decision, and appellate scrutiny only requires the determination of whether “a reasonably cautious person could have concluded that there was a ‘substantial basis’ for the finding of probable cause.” *People v Whitfield*, 461 Mich 441, 446; 607 NW2d 61 (2000), quoting *Illinois v Gates*, 462 US 213, 238; 103 S Ct 2317; 76 L Ed 2d 527 (1983). We focus on “the facts and circumstances supporting the magistrate’s probable cause determination.” *People v Martin*, 271 Mich App 280, 298; 721 NW2d 815 (2006). Because defendant did not properly preserve this issue, we review it for plain error affecting the defendant’s substantial rights. *Carines*, 460 Mich at 763.

“A search warrant may not be issued absent probable cause to justify the search.” *Martin*, 271 Mich App at 298, citing US Const, Am IV; Const 1963, art 1, § 11; MCL 780.651. “Probable cause to issue a search warrant exists where there is a ‘substantial basis’ for inferring a ‘fair probability’ that contraband or evidence of a crime will be found in a particular place.” *People v Kazmierczak*, 461 Mich 411, 417-418; 605 NW2d 667 (2000) (quotation omitted). “[A] search warrant and the underlying affidavit are to be read in a common-sense and realistic manner.” *Whitfield*, 461 Mich at 446 (quotation omitted). “[T]he affidavit must contain facts within the knowledge of the affiant and not mere conclusions or beliefs. The affiant may not draw his or her own inferences, but rather must state matters that justify the drawing of them.” *Martin*, 271 Mich App at 298 (citations omitted).

There was no plain error affecting defendant’s substantial rights based on the affidavit supporting the warrant because it was sufficient to establish probable cause. The standard for reviewing a magistrate’s decision is highly deferential, and the affidavit does not have to include every single detail of the controlled purchase. See also *Whitfield*, 461 Mich at 446. The police officer who wrote the affidavit observed the confidential informant perform a controlled purchase of cocaine from Giddis. The police officer observed Giddis return to 305 Homecrest Road. The direct observation by the police officer of the controlled purchase provided a “substantial basis for inferring a fair probability that contraband or evidence of a crime” would be found at 305 Homecrest Road. *Kazmierczak*, 461 Mich at 417 (quotation omitted). “[A] reasonably cautious person could have concluded that there was a ‘substantial basis’ for the

finding of probable cause” based on the information in the affidavit. *Whitfield*, 461 Mich at 446 (quotation omitted); see also *Martin*, 271 Mich App 298. Thus, the affidavit was sufficient to establish probable cause to support the search warrant.

D. PRV 5

Defendant argues that the trial court abused its discretion because prior record variable (PRV) 5 was improperly scored at two points, resulting in her sentence being disproportionate. We review scoring decisions under the sentencing guidelines for an abuse of discretion. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009). However, “[t]rial courts are afforded broad discretion in calculating sentencing guidelines, and appellate review of those calculations is very limited.” *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). “Scoring decisions for which there is any evidence in support will be upheld.” *Id.* “Generally, . . . [we] review[] a trial court’s sentencing decisions for an abuse of discretion.” *People v Conley*, 270 Mich App 301, 312; 715 NW2d 377 (2006).

Defendant waived her challenge to the PRV 5 score, as defense counsel argued in favor of and agreed to the PRV 5 score of two points. See *Carines*, 460 Mich at 762 n 7; *Riley*, 465 Mich at 449; *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000); *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998). Nonetheless, the PRV 5 score of two points was not an abuse of discretion because there was evidence that defendant pleaded guilty to the misdemeanor larceny charges and waived her right to counsel. See *Elliott*, 215 Mich App at 260.

The trial court also did not abuse its discretion in sentencing defendant to 5 to 20 years’ imprisonment because the sentence was proportionate. Defendant’s sentence was within the minimum guidelines range and is presumptively proportionate. See *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). At sentencing, defendant did not present any unusual circumstances which show that a sentence within the guidelines range would not be proportionate. See *People v Sharp*, 192 Mich App 501, 505; 481 NW2d 773 (1992). Accordingly, the trial court did not abuse its discretion because defendant’s sentence was proportional and does not constitute cruel and unusual punishment. *Id.*; *Powell*, 278 Mich App at 323.

E. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next makes numerous claims of ineffective assistance of counsel. Our review is limited to errors apparent on the record because defendant’s motion for a new trial below was denied, and we denied her motion for remand. *People v Seals*, 285 Mich App 1, 19-20; 776 NW2d 314 (2009). To establish a claim of ineffective assistance of counsel, the defendant must prove that counsel’s representation fell below an objective standard of reasonableness and was so prejudicial that it denied the defendant a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). To prove that counsel’s performance was deficient, the defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Trial counsel has “great discretion in the trying of a case—especially with regard to trial strategy and tactics.” *Pickens*, 446 Mich at 330. “Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be

matters of trial strategy.” *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Counsel is not required to advance meritless arguments or raise futile objections. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). The defendant demonstrates prejudice by showing the “existence of a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different.” *Carbin*, 463 Mich at 600.

We have reviewed all of defendant’s claims of ineffective assistance of counsel, most of which were based on issues we have already addressed. The only instance in which defense counsel’s performance was arguably deficient was when defense counsel opened the door to the admission of evidence regarding the past drug investigations involving defendant and Giddis. It is clear from the record that it was not defense counsel’s trial strategy to open the door to admission of this evidence. Nonetheless, defendant has failed to demonstrate that the error was prejudicial and that but for the error, the result of the proceedings would have been different. See *Carbin*, 463 Mich at 600. There was strong circumstantial evidence in support of defendant’s conviction. Therefore, we find that defendant was not denied effective assistance of counsel.

We reject the dissent’s contention that counsel was deficient for failing to present defendant’s tax forms as evidence in support of defendant’s claim that she purchased the new furniture using her tax refund. “Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy.” *Rockey*, 237 Mich App at 76. Defendant failed to overcome the strong presumption that defense counsel’s decision to present testimony on this fact rather than document any evidence constituted sound trial strategy. Moreover, while it is true that the prosecution presented circumstantial evidence to prove the elements of the charged crime, we disagree with the dissent that the admission of defendant’s tax forms into evidence would have affected the outcome of the proceedings given that this evidence was actually presented to the jury in the form of defendant’s own testimony. See *id* at 76-77.

F. PROSECUTORIAL MISCONDUCT

Defendant asserts that there was prosecutorial misconduct based on the prosecutor’s use of irrelevant and inflammatory evidence. We review claims of prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). However, we review defendant’s unpreserved claims of prosecutorial misconduct concerning the evidence of the 2005 investigation, defendant’s parenting skills, and the method of transport of cocaine into Jackson County for plain error affecting substantial rights. *People v Ericksen*, 288 Mich App 192, 198; 793 NW2d 120 (2010). “Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial.” *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008). “The test for prosecutorial misconduct is whether, after examining the prosecutor’s statements and actions in context, the defendant was denied a fair and impartial trial.” *People v Hill*, 257 Mich App 126, 135; 667 NW2d 78 (2003). Prosecutors may argue the evidence and all reasonable inferences that can be drawn from it. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). However, prosecutors exceed the proper bounds of argument by making inflammatory statements. *People v Ullah*, 216 Mich App 669, 679; 550 NW2d 568 (1996); *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001).

There was no prosecutorial misconduct concerning the presentation of evidence regarding the 2008 investigation and defendant's purchase of brand new furniture because the evidence was relevant and not inflammatory. Defendant opened the door to admission of the evidence regarding the 2008 investigation, *McMaster*, 154 Mich App at 570; *Whetstone*, 119 Mich App at 554, and it was admissible under the trial court's discretion pursuant to MRE 404(b)(1) and (2). The probative value of the evidence - to help prove that defendant had knowledge of the cocaine - outweighed the danger of unfair prejudice. MRE 403.

There was no plain error affecting defendant's substantial rights regarding the prosecutor's use of evidence concerning the 2005 investigation, defendant's parenting skills, and the method of transport of cocaine into Jackson County. Defendant generally argues that the prosecutor's use of this evidence was irrelevant and inflammatory but does not provide any further specification as to how the prosecutor's actions constituted misconduct. As to this evidence, there was no clear or obvious error. *Carines*, 460 Mich at 763. The evidence of the 2005 investigation was admissible under MRE 404(b) once defendant opened the door. Although arguing that an inference could be made that defendant was an unfit mother from the facts in evidence was not relevant, it did not deny defendant a fair trial. Additionally, the evidence regarding the method of transport of cocaine was relevant because it explained why and how stash houses are used and made it more probable that defendant's apartment was being used as Giddis's stash house. MRE 401. Therefore, there was also no plain error affecting defendant's substantial rights arising from the prosecutor's closing arguments relating to this evidence. In closing, the prosecutor could argue the evidence and all reasonable inferences that could be drawn from it. *Bahoda*, 448 Mich at 282.

G. CUMULATIVE ERROR

Although we do not find the cumulative error doctrine applicable, we respond to the dissent's assertion that several errors in combination require a new trial. The cumulative effect of multiple errors may require reversal where a single error, standing alone, does not. *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002). This Court reviews a claim of cumulative error to determine whether the combination of errors denied the defendant a fair trial. *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001). Reversal is not required unless the errors are consequential and denied the defendant a fair trial. *Id.* at 388.

The dissent's concern mainly lies in what it perceives to be several errors combined with the lack of direct evidence. We have already explained why there were not any errors of consequence. As for the dissent's distaste for a case based purely upon circumstantial evidence, the prosecution's burden of proving all the elements of the charged crime can be satisfied solely on circumstantial evidence and reasonable inferences drawn therefrom. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000); *Carines*, 460 Mich at 757. It is the providence of the jury to determine the weight and credibility of evidence presented by the prosecution. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 478 (1992), amended 441 Mich 1201 (1992); *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Consequently, because the jury has already determined that the evidence presented by the prosecution satisfied the elements of the charged crime, and there were not multiple errors, there cannot be a cumulative effect of errors. *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007); *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

H. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that there was insufficient evidence for a rational jury to find beyond a reasonable doubt that she possessed 50 grams or more but less than 450 grams of cocaine, an argument that we review de novo. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000) aff'd 466 Mich 39 (2002). We “must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *Wolfe*, 440 Mich at 515. “The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict.” *Nowack*, 462 Mich at 400. “Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime.” *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005).

Under MCL 333.7403, “[a] person shall not knowingly or intentionally possess a controlled substance” Possession may be actual or constructive and joint or exclusive. *People v McKinney*, 258 Mich App 157, 166; 670 NW2d 254 (2003). “The essential issue is whether the defendant exercised dominion or control over the substance.” *Id.* In *People v Izarraras-Placante*, 246 Mich App 490, 495-496; 633 NW2d 18 (2001) (quotation omitted), this Court provided:

To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement.

Aiding and abetting “is simply a theory of prosecution,” and “is not a separate substantive offense.” *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006) (quotation omitted).

Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence for a rational jury to find that defendant possessed 50 grams or more but less than 450 grams of cocaine. Defendant does not dispute that the police discovered cocaine and cash in her apartment. Instead, she simply argues that the evidence was insufficient to prove that she “knowingly or intentionally” possessed the cocaine. The evidence presented at trial established that defendant knew that Giddis was a drug dealer and that twice in the past police found narcotics in the homes that she shared with him. There was testimony from police officers that drug dealers typically use a separate address than the address where they actually reside and that they use a “stash house” to store their narcotics. The evidence supported that Giddis had been living with defendant while using another address. Although defendant was under extreme financial constraints, she went on vacation to Mexico with Giddis and purchased brand new furniture with cash, including the dining room chairs in which police discovered cocaine and \$3,850 in cash hidden. From this evidence, the jury could reasonably infer that defendant had knowledge of the cocaine where she knew Giddis had engaged in prior drug dealings and she was benefitting financially from the sale of it.

I. NEWLY DISCOVERED EVIDENCE

Defendant contends that she is entitled to a new trial based on Giddis's proffered testimony, as Giddis could not previously testify because of the criminal charges pending against him. Although defendant moved for a new trial in the trial court, she did not do so on the basis of newly discovered evidence. Thus, we review whether defendant was entitled to a new trial based on the newly available evidence of Giddis's testimony for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

Giddis's testimony was newly available rather than newly discovered and was insufficient to warrant a new trial. For granting a new trial based on newly discovered evidence, a defendant must prove the following:

(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial. [*People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) (quotations omitted).]

In *People v Terrell*, 289 Mich App 553, 570; 797 NW2d 684 (2010), this Court held that "newly available evidence does not constitute newly discovered evidence sufficient to warrant a new trial[.]" Specifically, this Court concluded that "a codefendant's posttrial or postconviction willingness to provide exculpatory testimony constitutes newly available evidence, not newly discovered evidence, and that if the defendant knew or should have known of the evidence before or during trial, the evidence was not discovered after trial and a new trial is not warranted[.]" *Id.* at 561. Defendant claimed that she had no knowledge of the cocaine in the dining room chairs or that Giddis was dealing drugs while staying in her apartment. Based on defendant's claim regarding the lack of knowledge of the cocaine, defendant knew that Giddis could have offered material testimony before the trial. Therefore, it was not newly discovered, and defendant is not entitled to a new trial.

Affirmed.

/s/ Kurtis T. Wilder

/s/ Christopher M. Murray