STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 21, 2004
v	No. 248960 Genesee Circuit Court
MUTIZWA SARAB-REMATUAL FINLEY, a/k/a MUTIZAW SARAB-REMATUAL FINLEY, Defendant-Appellant.	LC No. 248960

Before: Kelly, P.J., Gage and Zahra, JJ.

PER CURIAM.

A jury convicted defendant of possession with intent to deliver 650 or more grams of cocaine, MCL 333.7401(2)(a)(i); maintaining a drug house, MCL 333.7405(d); possession of marijuana, MCL 333.7403(2)(d); felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life in prison for the possession with intent to deliver cocaine conviction, forty-one days for the drug house and marijuana convictions (with credit for forty-one days served), 2 to 7-1/2 years for the felon-in-possession conviction, and two years for the felony-firearm conviction. He appeals as of right. We affirm.

I. Basic Facts and Proceedings

After a confidential informant made a controlled buy of cocaine at defendant's house on January 2, 2002, narcotics officers obtained a search warrant and searched defendant's house on January 3, 2002. The officers found more than 800 grams of cocaine, a small amount of marijuana, eleven firearms, scales, packing and cutting materials, written records of drug transactions, a bulletproof vest, a glass cooking jar that could be used for converting powder cocaine to crack cocaine, expensive jewelry and receipts showing other jewelry purchases, and documents linking defendant to the ownership and possession of the house. Defendant challenged the validity of the search warrant in a pretrial motion to suppress, which the trial court denied.

Although defendant had not been seen with any of the accoutrements of drug dealing found in his house, and the only physical evidence connecting defendant to the items was his fingerprint on the glass jar, the prosecutor argued at trial that defendant constructively possessed the drugs, firearms, and related items found in the house. Defense counsel attempted to

undermine this theory by emphasizing the lack of direct evidence of a nexus between defendant and the items, and by suggesting that the items and equipment found in the house belonged to another person, such as defendant's domestic partner or a hired cleaner.

II. Improper Peremptory Challenges

Defendant first argues that the trial court erred in finding the prosecutor's reasons for peremptorily dismissing two African-American prospective jurors were sufficient to overcome a discriminatory motive under *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).

A. *Batson* Framework and Standard of Review

In *Purkett v Elem*, 514 US 765, 767-768; 115 S Ct 1769; 131 L Ed 2d 834 (1995), the United States Supreme Court outlined the *Batson* framework and clarified its statements in *Batson* regarding the prosecution's burden of production.

> Under our *Batson* jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination. The second step of this process does not demand an explanation that is persuasive, or even plausible. "At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."
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> * * *
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> It is not until the third step that the persuasiveness of the justification becomes relevant--the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination. [*Id*. (emphasis omitted) (internal citations omitted).]

This Court reviews a trial court's *Batson* ruling for an abuse of discretion. *People v Howard*, 226 Mich App 528, 534; 548; 575 NW2d 16 (1998). This Court defers to the trial court's evaluation of the prosecutor's state of mind based on demeanor and credibility. An appellate court must give great deference to the trial court's findings on a *Batson* issue because they turn in large part on credibility. *Id*. citing *Harville v State Plumbing & Heating, Inc*, 218 Mich App 302, 319-320; 553 NW2d 377 (1996). The decision on the ultimate question of discriminatory intent represents a finding of fact accorded great deference on appeal, which will not be overturned unless clearly erroneous. *Miller-El v Cockrell*, 537 US 322, 339-340; 123 S Ct 1029; 154 L Ed 2d 931 (2003).

B. Analysis

Before the trial court denied defendant's *Batson* challenge, the prosecutor had exercised two peremptory challenges to excuse two African-American prospective jurors, Ammon Broden and Sharon Robinson.[1] The prosecutor explained that she struck Broden because he was young, presumably had little life experience, and exhibited a negative attitude toward the courtroom proceedings. The prosecutor also was concerned that his first name might give him a sense of sympathy or connection with defendant. The prosecutor explained that she struck Robinson out of concern that her work as a child associate in an intermediate school district might make her sympathetic to people who were in trouble. Defendant maintains that the prosecutor's reasons were pretextual because (1) the prosecutor's explanation with regard to Robinson was disingenuous, inasmuch as Robinson's answers suggested that she would be favorable to the prosecution, (2) there was no linguistic connection between defendant's and Broden's first names, and (3) there was no legitimate reason for favoring older jurors with more "life experience."

In *McCurdy v Montgomery Co, Ohio*, 240 F3d 512, 521 (CA 6, 2001), the Sixth Circuit addressed the degree of scrutiny required when the prosecutor's proffered reasons are based on subjective perceptions or hunches. The Sixth Circuit acknowledged that body language, demeanor, passivity, inattentiveness, or inability to relate to other jurors are valid, race-neutral explanations for exercising a peremptory challenge, but stated that the trial court must explicitly adjudicate the prosecutor's race-neutral explanations. The federal court explained:

> The need for an explicit, on-the-record analysis of each of the elements of a *Batson* challenge is especially important when the purported race-neutral justification is predicated on subjective explanations like body language or demeanor. . . . Because the primary defense to pretext based violations of *Batson* is the district court's ability to assess the credibility of an attorney's representations, it is critical that the district court independently assess the proffered justifications. [*Id.* (citations omitted).]

Here, the prosecutor gave racially-neutral explanations based on her subjective perceptions about Broden and Robinson. The trial court scrutinized these explanations by extensively assessing the prosecutor's perceptions and comparing them to its own perceptions of Broden and Robinson. The trial court agreed that Broden was unlikely to be a conscientious juror because he exhibited a hostile attitude, and was young and inexperienced. Defendant argues that the prosecutor could not establish any similarity between Broden's and defendant's given names, because they are linguistically and etymologically unrelated. However, defendant's emphasis on linguistics and etymology is misplaced because the prosecutor is not restricted to factually sound reasons. The court agreed that Broden's and defendant's first

[1] The trial court apparently presumed there was an established pattern of strikes made in relation to the racial identities of other members of the jury pool. The prosecution, at trial and on appeal, does not challenge the existence of an established pattern of strikes made in relation to the racial identities of other members of the jury pool. We do not address whether there was an established pattern of strikes, but rather we assume, for purposes of this opinion, that such a pattern was established.

names, whatever their origins, "conjure up" the impression that both were names of similar origin that might invoke Broden's sympathy. We cannot conclude that the trial court clearly erred in determining that these reasons, though subjective and not empirically verifiable, were genuine and sincere. See also *Partida v State*, 133 SW3d 738, 742 (Tex App, 2003) (the trial court did not err in accepting the prosecutor's race-neutral explanation that a juror was struck because he had a shaved head and wore an earring, which caused him to appear anti-establishment, and unsympathetic to the government).

The trial court acknowledged that it had formed a different perception of Robinson, and that it was surprised when the prosecutor struck her. However, the trial court carefully considered the prosecutor's explanation, and determined that it too was genuine, and not pretextual. Thus, with both Broden and Robinson, the trial court properly scrutinized the prosecutor's subjective explanations, and found that the prosecutor was credible and sincere. We find no reason for not deferring to the trial court's credibility assessments.

Defendant contends that the prosecutor committed an age-based *Batson* violation by considering Broden's age as a factor. Because defendant fails to cite any authority for the proposition that *Batson* applies to aged-based exercises of peremptory challenges, we deem this issue waived. *People v Weathersby*, 204 Mich App 98, 113; 514 NW2d 493 (1994). Furthermore, we note that several jurisdictions have accepted youthfulness and inexperience as genuine, race-neutral factors for striking jurors. See *State v Payne*, 943 SW2d 338 (Mo App, 1997) (no *Batson* violation where the prosecutor exercised a peremptory challenge against a young juror based on a perception that she would sympathize with the youthful defendant, and not the elderly prosecution witness); *Ealoms v State*, 983 SW2d 853, 856-857 (Tex App, 1998) ("Youth and employment (or lack thereof) are acceptable race-neutral explanations for striking a prospective juror.")

III. Evidentiary Issues

A. Standard of Review

Defendant raises several evidentiary issues. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002). "An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no excuse for the ruling made." *People v Aldrich*, 246 Mich App 101, 113; 632 NW2d 67 949 (2002). However, if the alleged evidentiary error is not preserved by timely objection, MRE 103(a)(1), we review for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *Aldrich*, *supra* at 113.

B. Analysis

1. Surveillance Officers' Testimony Regarding the January 2, 2002, Controlled Buy

Defendant argues that the trial court erred in admitting testimony regarding the January 2, 2002, controlled buy. Defendant contends that this testimony was based on inadmissible hearsay and was irrelevant. At trial, defendant objected to this testimony on relevance grounds, but did

not raise a hearsay objection. Accordingly, the hearsay aspect of this issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *Carines, supra*.

Defendant contends that the testimony was based on inadmissible hearsay because it recounted the confidential informant's nonverbal, assertive conduct of entering and leaving the house and handing Officer Blough two rocks of crack cocaine. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is not admissible except as provided by the rules of evidence. MRE 802. Nonverbal conduct may constitute a statement as contemplated by the prohibition against hearsay, but only if the person intended the nonverbal conduct to be an assertion. MRE 801(a).

Defendant incorrectly characterizes the confidential informant's conduct as nonverbal assertive conduct. There was no indication that the informant intended any of his actions to be assertions. He simply fulfilled his role in the controlled buy. Although his actions allow the inference that he purchased drugs at the house, this inference is based on the totality of the circumstances, not the informant's intent to communicate a message through his conduct. Thus, defendant has failed to satisfy the "error" prong of the plain error test, let alone shown a plain error affecting defendant's substantial rights. *Carines, supra*.

Defendant also contends that the evidence of the confidential informant's conduct was inadmissible under MRE 404(b) and unduly prejudicial under MRE 403. MRE 404(b) excludes evidence of prior bad acts to prove action in conformity therewith, but allows such evidence for a non-character purpose such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material. *People v Knox*, 469 Mich 502, 510; 674 NW2d 366 (2004). Under MRE 403, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

The prosecutor offered the evidence of the January 2 controlled buy to establish that the officers used this information to obtain a valid search warrant, thereby demonstrating that the officers had a legal right to search the home on January 3. Although the evidence was offered for a non-character purpose, MRE 404(b) also requires that the evidence be relevant to a material issue. We are not persuaded that the officers' legal right to be in the home was a material factual issue because defendant was not contesting that issue at trial and defense counsel was willing to so stipulate. The prosecution argues that the issue was material, citing *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998), for the proposition that all elements of a criminal offense are at issue when a defendant pleads not guilty, and that the prosecution bears the burden of proving every element beyond a reasonable doubt, regardless of whether the defendant specifically disputes or offers to stipulate to any of the elements. Here, however, the officers' legal right to search the house was not an element of any of the charged offenses.

Nonetheless, we conclude that any error in admitting this evidence was harmless because defendant has not shown that it is more probable than not that it affected the outcome of the trial in light of the properly admitted evidence. *People v Whittaker*, 465 Mich 422, 427-428; 635 NW2d 687 (2001). The prosecution presented overwhelming evidence indicative of drug trafficking based on the evidence seized during the January 3 search. In light of this evidence, it

is not more probable than not that the jury's verdict would have been different without the evidence of the January 2 controlled buy.

3. Testimony that a Magistrate Signed a Search Warrant and Reasons Why a Confidential Informant Would Desire Anonymity

Defendant next argues that the trial court improperly admitted hearsay testimony that the confidential informant had good reason to desire anonymity, and that a magistrate signed the search warrant. Officer Blough testified that he wanted to preserve the confidential informant's anonymity to protect the informant and the informant's family from retribution. Officer Blough then testified that, by using the confidential informant, he was able to obtain a valid search warrant from a judge. Defendant preserved his challenge to this evidence by objecting on grounds of relevancy at trial, but he did not raise a hearsay objection. Accordingly, we review defendant's hearsay challenge for plain error. *Carines*, *supra*.

We find no merit to defendant's hearsay argument. Officer Blough testified from his own knowledge that informants want their identities secret because they fear retribution against themselves and their families. He testified about informants in general, without suggesting that the informant in this case had any specific reason to fear retribution for his involvement in defendant's case. Officer Blough's testimony regarding the search warrant also was derived from his own knowledge that he had a warrant to search the house on January 3.

Although defendant also contends that evidence of an authorized search warrant was unacceptably prejudicial, we conclude that any error in the admission of this evidence was harmless given the overwhelming evidence indicative of drug trafficking that was presented at trial. *Whittaker*, *supra*. Furthermore, evidence that the officers were authorized to search defendant's house on January 3, did not suggest that a judge had sanctioned every aspect of the prosecution's case. Thus, defendant's argument that the evidence was unduly prejudicial is without merit.

4. Tabulation Sheet

Finally, defendant argues that the trial court erred in admitting into evidence Officer Byrd's tabulation sheet of the evidence seized during the January 3, 2002, search. The trial court admitted the document under MRE 803(6), the business records exception to the hearsay rule. Defendant argues, as he did below, that the business records exception is not applicable because the document was prepared in anticipation of litigation.

MRE 803(6) provides, in pertinent part:

> A memorandum, report, record or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of

> information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

In *People v McDaniel*, 469 Mich 409, 414; 670 NW2d 659 (2003), our Supreme Court held that the business records exception "is based on the inherent trustworthiness of business records," which "is undermined when the records are prepared in anticipation of litigation." Accordingly, the Court concluded that MRE 803(6) did not apply to a police laboratory report of a chemical analysis of heroin that the defendant sold to an undercover police officer. *Id.* at 410, 414. The Court held that the report was inherently untrustworthy because it was prepared in anticipation of litigation. *Id.* The Court also held that the report was inadmissible under MRE 803(8), the public records exception, because the report was adversarial, and intended to establish an element of the crime for which the defendant was charged.[2] *Id.* at 413.

Defendant also relies on *People v Stacy*, 193 Mich App 19, 33; 484 NW2d 675 (1992), in which this Court construed the public records exception, MRE 803(8), to allow routine police reports made in nonadversarial settings, but to exclude observations made by law enforcement officials at the scene of a crime or while investigating a crime.

Defendant contends that the tabulation sheet was prepared in an adversarial setting, and is therefore inadmissible under either MRE 803(6) or 803(8). Whether this issue is approached under either MRE 803(6) or 803(8), the salient question is whether an adversarial relationship existed between defendant and law enforcement at the time Byrd prepared the tabulation sheet. We conclude that the investigation had progressed far enough to answer this question in the affirmative. The police had already established probable cause that defendant's house was being used to sell drugs, they were in his house searching for evidence of drug trafficking, and they had found substantial amounts of drugs and records of drug transactions, as well as other incriminating evidence such as large amounts of cash, firearms, and equipment and materials related to drug trafficking. Presumably, the police anticipated that their search would lead to criminal charges against the drug house operator. Indeed, several items on the tabulation sheet were flagged for fingerprint examination, and several other items flagged for forfeiture proceedings. We therefore conclude that the tabulation sheet was not admissible under either MRE 803(6) or 803(8).

Again, however, the error was harmless because it is not more probable than not that it affected the outcome. *Whittaker, supra*. Unlike *McDaniel*, where the laboratory report was the only evidence that established an element of the crime for which the defendant was charged, the officers in the instant case independently testified about the items found during the search. The tabulated listing of the items was thus cumulative to the officers' properly admitted testimony about their findings during the search. Accordingly, the error was harmless.

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[2] MRE 803(8) provides a hearsay exception for records kept by public offices and agencies, "excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, and subject to the limitations of MCL 257.624."

IV. Failure to Suppress Evidence from Search Warrant

We next address defendant's argument that the trial court erred in denying his motion to suppress the evidence seized pursuant to the January 3, 2002, search warrant.

A. Standard of Review

When reviewing a magistrate's decision to issue a search warrant, this Court must examine the search warrant and underlying affidavit in a common-sense and realistic manner. *People v Darwich*, 226 Mich App 635, 636-637; 575 NW2d 44 (1997). Under the totality of the circumstances, this Court must then determine whether a reasonably cautious person could have concluded that there was a substantial basis for the magistrate's finding of probable cause. *Id.* at 637.[3]

B. Analysis

Defendant first argues that the affidavit does not support issuance of the search warrant because Officer Urban, the affiant of the search warrant, did not participate in the controlled buy.

Defendant is correct that Officer Urban did not participate in the controlled buy. Indeed, all the information that Officer Urban received concerning the controlled buy was supplied to him by Officer Blough, who coordinated the controlled buy through his confidential informant and the assistance of two other police officers.

Defendant first argues that the affidavit of warrant was defective because Officer Urban failed to inform the magistrate that averments were based on hearsay. In support, defendant cites to averments contained in the affidavit that reference Officer Urban's "personal knowledge," even though Officer Urban did not participate in the controlled buy. This assertion is not supported by a common-sense reading of the affidavit. The affidavit early-on stated that Officer Urban believed probable cause existed "based upon the following facts, which are based on your affiant's personal knowledge, fellow officer's knowledge, *and on the personal knowledge of XX as related directly to me from fellow officers*." (emphasis supplied.) This averment makes clear that Officer Urban did not have contact with the informant.

Defendant also claims that the phrase "fellow officers" is misleading because only Officer Blough had contact with the informant. This assertion is not supported by the evidence. Indeed, as defendant recognizes, before the controlled buy, Officer Petrich searched the informant, provided the informant with recorded funds, and searched the informant's vehicle. Officer Petrich then followed the informant to Christener Street, where Officer Tracy Bryd

[3] We note that defendant maintains that the trial court relied on the wrong standard for deciding the suppression motion. This argument refers to a passing reference the trial court made regarding the applicable standard where it acknowledged uncertainty about the application of a clear and convincing evidence standard. However, there is no indication that the trial court later erroneously used that standard when making its final ruling. Therefore, we reject this claim of error.

watched the informant go inside the house and then leave. Officer Petrich then followed the informant back to the police station where the informant handed Officer Blough suspected narcotics. Given these undisputed facts, defendant's claim is without merit.

Defendant also argues that there is no evidence that the informant spoke with personal knowledge and that he was credible or that the information was reliable. MCL 780.653[4] provides, in pertinent part:

> The magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her. The affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains 1 of the following:
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> (b) If the person is unnamed, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable.

Officer Urban averred that the informant had demonstrated his reliability and credibility by consistently giving accurate information to "fellow officers" (i.e., Officer Blough) during a nine-day period. Officer Urban could presumptively rely on Officer Blough for information concerning the informant's reliability and credibility. *People v Powell*, 201 Mich App 516; 506 NW2d 894 (1993). Also, Officer Urban related specific details of the controlled buy, in which it was verified that the informant possessed no drugs or non-recorded money when he went to defendant's house, but left with a substance that field-testing revealed to be cocaine. The informant was monitored from the time he left for defendant's house to the time he returned to the police station. Supplied with this information by Officer Blough, Officer Urban stated that he believed probable cause existed "based upon the following facts, which are based on your affiant's personal knowledge, fellow officer's knowledge, and on the personal knowledge of XX as related directly to me from fellow officers." This statement sufficiently outlines the chain of hearsay from the informant, to Officer Blough, and to Officer Urban. It also provided sufficient information to show that the information originated from a reliable and credible source, and that it reached Officer Urban through a reliable and credible channel. *People v Poole*, 218 Mich App 702, 706; 555 NW2d 485 (1996). Defendant has thus failed to show that the affidavit was insufficient with regard to the informant's credibility.

Defendant also argues that Officer Urban did not provide sufficient information about the drug transaction to establish probable cause that evidence of drug dealing would be found in the house on January 3, 2002. He contends that the affidavit did not report the quantity of drugs or amount of money exchanged during the controlled buy, or other information to establish that

[4] Notably, in *People v Hawkins* 468 Mich 488, 502; 668 NW2d 602 (2003), our Supreme Court held that a statutory defect under MCL 780.653 is not grounds to suppress evidence seized under a search warrant, unless there is also a constitutional defect.

drug-dealing was an ongoing activity. We disagree with defendant's characterization of the search warrant affidavit. Officer Urban stated that, based on his training and experiencing, persons who possess and sell controlled substances from a certain location tend to keep larger supplies of drugs and related items at those premises. Officer Urban's allegations were sufficient to allow a reasonably caution person to conclude that there was a substantial basis for finding probable cause. *Darwich, supra*.

Defendant next argues that the trial court erred in not finding that the affidavit contained falsehoods and statements made in reckless disregard for the truth. In *People v Williams*, 240 Mich App 316, 319-320; 614 NW2d 647 (2000), this Court explained:

> "[I]f false statements are made in an affidavit in support of a search warrant, evidence obtained pursuant to the warrant must be suppressed *if the false information was necessary to a finding of probable cause.* In order to prevail on a motion to suppress the evidence obtained pursuant to a search warrant procured with alleged false information, the defendant must show by a preponderance of the evidence that the affiant had knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit *and that the false material was necessary to a finding of probable cause.*" [*Id*. quoting *People v Melotik*, 221 Mich App 190, 200, 561 NW2d 453 (1997), in turn quoting *People v Stumpf*, 196 Mich App 218, 224, 492 NW2d 795 (1992), citing *Franks v Delaware*, 438 US 154, 98 S Ct 2674, 57 L Ed 2d 667 (1978) (emphasis in original).]

Defendant takes issue with several statements contained in the underlying affidavit. First, defendant claims untrue the affidavit's description of the seller on the basis it could not have been have true given defendant's and his girlfriend's testimony that they moved out of the house a day earlier. However, there is no testimony to indicate that Officer Blough or Officer Urban knew or had reason to believe that the informant lied about the seller's description. Defendant also argues that Officer Urban, with reckless disregard for the truth, (2) did not tell the magistrate that the contents of the affidavit were hearsay; (3) led the magistrate to believe that he or someone other that Officer Blough, the officer who knew the informant and coordinated the controlled buy, had contact with the confidential informant.[5]

[5] Defendant also attempts to buttress his argument by questioning Officer Blough's credibility. Defendant specifically maintains that although Officer Blough testified that he did not sign the January 3, 2002 affidavit because the Flint Police Department did not want its officers applying for warrants outside of Flint, he signed a January 4, 2002, affidavit to support a second search warrant for defendant's house. However, without further explanation, this discrepancy is insufficient to show that Officer Blough either lied about his jurisdictional restrictions or improperly signed the January 4, 2002 affidavit. More important, because Officer Blough did not sign the January 4, 2002 affidavit until after the first search warrant was obtained on January 3, 2002, it did not provide a basis for Officer Urban, or the magistrate, to question Officer Blough's credibility.

However, Officer Urban averred that he believed probable cause existed "based upon the following facts, which are based on your affiant's personal knowledge, fellow officer's knowledge, and on the personal knowledge of XX as related directly to me from fellow officers." This statement expresses that Officer Urban did not have contact with the confidential informant. Also, defendant is incorrect in stating that no officer other than Officer Blough had contact with the confidential informant. Indeed, the above summary of Officers Petrich's and Bryd's participation in the controlled buy indicates they had contact with the informant. Thus, defendant's claim is without merit.

V. Ineffective Assistance of Counsel

A. Standard of Review

Defendant raises several claims of ineffective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001). A defendant claiming ineffective assistance of counsel must overcome the strong presumption that the attorney was exercising sound strategy. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001).

B. Analysis

1. Conflict of Interest

Defendant moved for a *Ginther*[6] hearing asserting that he was denied effective assistance of counsel because defense counsel had been charged with possession of crack cocaine before trial, which created a conflict of interest with regard to his representation of defendant. Defendant's claim on appeal is premised on trial court improperly denying his motion for a *Ginther* hearing. However, because defendant's allegations do not constitute ineffective assistance of counsel, we conclude the trial court properly denied his motion for a *Ginther* hearing.

In *People v Smith*, 456 Mich 543, 556-558; 581 NW2d 654 (1998), the defendant requested our Supreme Court "presume a conflict of interest exists whenever an attorney is being prosecuted in the same county as a criminal defendant whom he represents." The Court "decline[d] to create such a rule and h[e]ld instead that in order to demonstrate that a conflict of interest has violated his Sixth Amendment rights, a defendant 'must establish that an actual conflict of interest adversely affected his lawyer's performance.'" *Id*. quoting *Cuyler v Sullivan*, 446 US 335, 350; 100 S Ct 1708, 64 L Ed 2d 333 (1980).

[6] *People v Ginther*, 390 Mich 436; (1973)

Here, there is no reason to presume an actual conflict because defense counsel was being prosecuted by the Attorney General's office, not by the county prosecutor, and because defense counsel's case was before a district court, not a circuit court. Moreover, defendant has failed to cite any example of how defense counsel's own legal problems adversely affected his representation of defendant. Defendant claims that defense counsel improperly handled his remand for a preliminary examination to curry favor with the prosecutor. However, defendant does not state how the remand could have benefited him, and thus does not provide support for his claim. Therefore, defendant has not shown that his right to effective counsel was violated or that the trial court was obligated to sua sponte intervene.

2. Failure to Stipulate to Predicate Felony

Defendant next argues that defense counsel was ineffective for not accepting the prosecutor's offer to stipulate to the predicate felony for the felon-in-possession charge.

Defendant pleaded guilty to attempted carrying a concealed weapon (CCW) in 1998, and was sentenced to probation for eighteen months. Consequently, he was not permitted to possess a firearm for five years following the satisfaction of his probation. MCL 750.224f(2) and (6)(iii).

When defense counsel declined the prosecutor's offer to stipulate to the predicate felony, he explained that he wanted the prosecutor to prove that defendant's firearm rights had not been restored (although the trial court indicated that this was an affirmative defense), and further, he did not want the jury to speculate about the severity of the prior offense or defendant's probationary status. It also appears that defense counsel hoped to insinuate that defendant's girlfriend may have actually committed the prior CCW offense.

At trial, defendant's former probation officer testified about the pertinent details relative to defendant's prior CCW conviction, including that he was discharged from probation before eighteen months had expired, and that a forty-five-day jail term was waived. The probation officer's testimony established that defendant's prior offense was not especially serious, particularly considered in light of the drug and weapons charges in this case, and also portrayed defendant as a responsible person who took his probation seriously and rehabilitated himself.

While the evidence clearly established that defendant's firearm rights had not been restored, counsel's strategy of attempting to insinuate that defendant's girlfriend was the actual offender was not "nonsensical." Furthermore, it was not unsound strategy for counsel to allow the jury to hear evidence of defendant's prior felony conviction in an attempt to undermine any unwarranted speculation about the severity of defendant's criminal conduct and to highlight defendant's successful completion of probation.

3. Failure to Sever Felon-in-Possession Charge

Similarly, defense counsel was not deficient in failing to move to sever the felon-in-possession charge. A trial court must sever unrelated offenses for separate trial. Two offenses are related if they are based on the same conduct or a series of connected acts constituting part of a single scheme or plan. MCR 6.120(B). Here, defendant's possession of eleven firearms was closely connected to his charged activity of maintaining a drug house and trafficking in large amounts of narcotics. The guns were kept in the same house where the stock of drugs, the drug

proceeds, and the records, equipment, and supplies related to an ongoing drug operation were kept. Under these circumstances, a motion to sever would not have been successful.

4. Failure to Redact Prejudicial Information

Defendant also argues that defense counsel erred in failing to take steps to redact or exclude prejudicial information from the judgment of sentence for the attempted CCW conviction. This document shows that four unspecified counts were dismissed, that defendant's probation requirements included "treatment as directed by probation department," and that defendant was required to pay $500 to a special restitution fund, and $60 to a crime victim rights fund. Defendant claims that this information was highly prejudicial and irrelevant to proving the predicate felony. We conclude that allowing this document to reach the jurors in unredacted form was neither objectively unreasonable nor outcome-determinative. The information about the four additional counts was not prejudicial where the judgment of sentence did not specify the nature of the offenses and indicated that they had been dismissed. That defendant's probation required treatment was not prejudicial, especially in light of the evidence that defendant successfully completed the requirements of his probation. Nor was defendant prejudiced by the presence of information indicating that he was ordered to pay an amount of restitution.

5. Failure to Object to Testimony

Next, defendant argues that defense counsel was ineffective for not objecting to testimony from Agent Bowman, who testified that of the eleven firearms found in defendant's house, none were registered except two handguns, which were stolen. Bowman also testified that defendant possessed a sawed-off shotgun which should have been registered, but was not. (The shotgun did not require registration before it was modified.)

In addition to the firearms charges, however, defendant was additionally charged with maintaining a drug house and possession with intent to deliver cocaine. "[F]irearms are recognized as tools of the drug trade; thus, courts have sustained the admission of weapons evidence in narcotics cases because the possession of a weapon is often a hallmark of drug trafficking." *United States v Hubbard*, 61 F3d 1261, 1270 (CA 7, 1995). Evidence that defendant acquired firearms through illegal channels is relevant to whether he was involved in drug trafficking. In addition, evidence that guns were not registered and were stolen was relevant to establishing the prosecution's constructive possession theory. The guns in question here were likely owned by someone who could not legally register firearms, namely defendant. Accordingly, defense counsel's failure to object to this evidence was not objectively unreasonable.

6. Failure to Object to Prosecutor Misconduct

Next, defendant argues that defense counsel was ineffective for failing to object to misconduct by the prosecutor. However, a defense attorney is not ineffective for failing to object to a prosecutor's conduct when there is no merit to the underlying claims of prosecutorial misconduct. *People v Matuszak*, ___ Mich App ___; ___ NW2d ___ (2004), slip op at 8.

Defendant argues that the prosecutor improperly vouched for the credibility of the fingerprint expert, Syble Smith. A prosecutor may not vouch for a witness' credibility or suggest

that the government has some special knowledge that a witness' testimony is truthful. *Knapp, supra* at 382. A prosecutor may, however, argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief. *Howard, supra* at 548. Here, the prosecutor merely argued that Syble Smith was a credible fingerprint expert given her experienced and that her department deemed her deserving of a promotion. This was not improper vouching. Consequently, there was no prosecutorial misconduct, and no there reason for defense counsel to object.

Defendant also challenges the prosecutor's argument that the stolen and unregistered firearms were further proof of defendant's guilt. Although a prosecutor may not argue a fact to the jury that is not supported by evidence, a prosecutor is free to argue the evidence and any reasonable inferences that may arise from the evidence. *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003). Here, the prosecutor was drawing the reasonable inference that, because the firearms were unregistered, it was more likely that they were possessed by defendant, inasmuch as he could not legally register guns. Consequently, there was no valid basis for an objection.

Similarly, the prosecutor's comments about defendant's expenditures on luxury items were not an improper attempt to seek his conviction based on his lifestyle. Rather, the prosecutor was suggesting that defendant's purchases did not comport with his live-in domestic partner's financial situation or with his legitimate earnings. This evidence was relevant to the prosecution's theory that defendant was involved with a lucrative narcotics operation, and was therefore a proper argument based on the evidence. *Callon, supra*.

Because the alleged claims of prosecutorial misconduct are without merit, defense counsel was not deficient for failing to object.

VI. Sentencing

Defendant argues that the trial court erroneously increased his sentence for felon-in-possession without prior notice. We disagree.

A court may at any time correct an invalid sentence, but the court may not modify a valid sentence after it has been imposed except as provided by law. *People v Harris*, 224 Mich App 597, 599-600; 569 NW2d 525 (1997); MCR 6.429(A). Clerical mistakes in judgments may be corrected by the court at any time on its own initiative. MCR 6.435(A). Here, the trial court announced at sentencing that it was sentencing defendant to a term of 2 to 7-1/2 years for the felon-in-possession conviction. But the judgment of sentence erroneously reported defendant's felon-in-possession sentence as forty-one days, which was the sentence the court had announced for the possession of marijuana conviction. Because the error was plainly clerical in nature, the trial court properly corrected the error on its own initiative.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Hilda R. Gage
/s/ Brian K. Zahra