STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 31, 2008
v	No. 267245 Saginaw Circuit Court
ROBERT ARGARTHER HOARD, IV, Defendant-Appellant.	LC No. 04-025356-FH

Before: Bandstra, P.J., and Zahra and Owens, JJ.

PER CURIAM.

A jury convicted defendant of possession of marijuana, MCL 333.7403(2)(d), possession of under 25 grams of cocaine, MCL 333.7403(2)(a)(*v*), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, second offense (felony-firearm 2nd), MCL 750.227b. The trial court sentenced him, as a fourth-offense habitual offender, MCL 769.12, to one-year' imprisonment for marijuana possession, 46 months to 15 years' imprisonment for the cocaine possession, and 48 months to 25 years' imprisonment for the felon in possession of a firearm conviction, to be served concurrently, but consecutive to 5 years' imprisonment for the felony-firearm 2nd conviction. He appeals as of right.

I Basic Facts and Proceedings

Defendant's parole agent, Richard Riebschleger of the Michigan Department of Corrections (MDOC), met with defendant's father, a policeman, the month before defendant was to be paroled. Defendant was to live to his father, and defendant's father assured Riebschleger that he would secure his service revolver, a Sig Sauer, in a safe and that he would remove the other guns from the residence. However, shortly after defendant was released from prison, his father was hospitalized and defendant lived alone in the residence for eleven months. Defendant's father died on June 27, 2004.

In January 2004 Riebschleger asked defendant whether his father's gun had been moved and defendant told him it was at his sister's home in Virginia. Riebschleger again asked defendant about the gun about a month later (in February 2004) and defendant assured him "that it was with his sister in Virginia." On September 17, 2004, Riebschleger again asked defendant about the gun and that defendant "told [Riebschleger] in a very clear, no nonsense manner that his sister, Vickie, had taken control of the weapon in Virginia." Also on that day, defendant asked Riebschleger about being a bounty hunter and Riebschleger told defendant that he could

not be a bounty hunter. Riebschleger said that defendant "wanted to debate about it" and asked if he could just assist a bounty hunter and that Riebschleger told defendant to "play it safe" and that it was "just simply not a good idea" because a "lot of the standard conditions of parole would have been in conflict with working as a bounty hunter."

On September 28, 2004, defendant reported to Riebschleger as scheduled, and Riebschleger decided to give defendant a drug test. Defendant failed the drug test and Riebschleger decided that defendant was "going to serve an eight day sanction at the Buena Vista Corrections Center." Riebschleger told defendant to secure his money and jewelry in his van before serving his sanction. This was routinely done without a problem, but in this case, defendant "ended up leaving."

Once Riebschleger was aware that defendant had left the facility, he called him and "instructed him to report back to the center immediately." Defendant replied that "he had an obligation to take care of, he had to do some things at the house, personal business to take care of." Defendant returned to the center after being gone "at least an hour." When defendant returned, he was "processed into the center" which included taking an inventory of his belongings and doing "a strip search to make sure [defendant did not bring] . . . in any contraband."

While defendant was being processed, defendant began to "struggle with the corrections officer." Riebschleger "quickly ran down there" and grabbed defendant's left hand where he "immediately noticed that [defendant] had contraband in his hand," including a "small roach type cigarette" and "full rolled cigarettes." Riebschleger and the corrections officer gave defendant "repeated orders to drop the contraband, to drop that little roach cigarette . . . which was about half an inch long." Riebschleger said that as they "started the process of taking [defendant] to the ground, [defendant] struck" the corrections officer "in the eye."

While defendant was on the ground, Riebschleger "noticed that [defendant] was . . . licking up the contraband, that small roach cigarette." Riebschleger later told his supervisor that defendant "had possibly just snuck in drugs" but that they would "never know because [defendant] swallowed the evidence."

Riebschleger indicated that defendant's behavior led to a search of defendant's van "to make sure there was no other contraband." Inside the van was an owner's manual to a pistol, an unopened bottle of Corona's beer, bounty hunter's credentials and defendant's father's sheriff's hat. Riebschleger indicated that the items in the van led Riebschleger and his supervisor to conclude that defendant was not being truthful about the gun and so they decided to search defendant's residence. Riebschleger's supervisor unlocked the house and watched the search.

MDOC agents found drugs "hidden in the kitchen above the cupboard," "the loaded pistol hidden in a fake plant above a china cabinet in the living room," "more sheriff's equipment, a training manuals [sic], collapsible baton, items from a uniform from the sheriff's department, and . . . clothing . . . that's identified as fugitive recovery agent clothing." Vickie, defendant's sister, called Riebschleger in November 2004 and told him that defendant had lied to her about where the gun was, telling her "that a brother apparently had the weapon."

II Search of Defendant's Home

Defendant argues that warrantless search of his home was invalid and that the trial court erred in not excluding the fruits of that search.

Standard of Review

A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). But a preliminary question of law regarding the admissibility of evidence is reviewed de novo. *Id*.

B. Analysis

Both the United States and Michigan Constitutions guarantee the right against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; see *Illinois v McArthur*, 531 US 326; 121 S Ct 946; 148 L Ed 2d 838 (2001). The Michigan Constitution in this regard is generally construed to provide the same protection as the Fourth Amendment to the United States Constitution. *People v Levine*, 461 Mich 172, 178; 600 NW2d 622 (1999).

A search is lawful if it is reasonable under the circumstances. *Samson v California*, ___ US ___; 126 S Ct 2193, 2197; 165 L Ed 2d 250 (2006). "Searches and seizures conducted without a warrant are unreasonable per se, subject to several specifically established and well-delineated exceptions." *People v Borchard-Ruhland*, 460 Mich 278, 293-294; 597 NW2d 1 (1999).

"A probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.'" *Griffin v Wisconsin*, 483 US 868, 873; 107 S Ct 3194; 97 L Ed 2d 709 (1987). But exceptions have been made to the warrant requirement where "'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" *Id*., quoting *New Jersey v TLO*, 469 US 325, 351; 105 S Ct 733; 83 L Ed 2d 720 (1985) (Blackmun, J., concurring). "A State's operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, . . . presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." *Griffin, supra* at 873-874. A search is "reasonable" under the Fourth Amendment when "conducted pursuant to a valid regulation governing probationers." *Id*. at 880. There is nothing to suggest this should not equally apply to parolees because, as the United States Supreme Court notes, both probationers and parolees enjoy less liberty than ordinary citizens. *Id*. at 874.

The relevant Michigan Administrative Rule governing searches of parolees, 1999 AC, R 791.7735, states as follows:

> (1) A parole agent may conduct a warrantless search of a parolee's person or property under any of the following circumstances:
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> * * *
>
> (d) With the consent of the parolee or a third party having mutual control over the property to be searched.

> (2) Where none of the circumstances specified in subrule (1) of this rule are present and there is reasonable cause to believe that a violation of parole exists, a parole agent may conduct a search of a parolee's person or property if, as soon as possible thereafter, the parole agent files a written report with his or her supervisor setting forth the specific reasons for the search, describing the location or place searched, and describing the specific items seized.

Defendant claims that the search was invalid because the basis for the warrantless search, subrule (2), was not met because there is no evidence that defendant's Riebschleger filed "a written report with his or her supervisor setting forth the specific reasons for the search, describing the location or place search, and describing the specific items seized." Rule 791.7735(2). The trial court justified the search based on subrule (2) in finding there was reasonable cause, making no mention of whether the required paperwork was filed. Assuming that no such paperwork was filed, "[a] search, in law, is good or bad at the time of commencement," *People v Clay*, 468 Mich 261, 266; 661 NW2d 572 (2003), and thus, if there was reasonable cause to believe there was a violation of parole at the time of the search, the search was valid, regardless of deficiencies in paperwork after the fact. See *Samson, supra* 126 S Ct at 2199 (observing that the expectation of privacy for parolees is so diminished that searches may be conducted without even reasonable suspicion), and *US v Knights*, 534 US 112, 121; 122 S Ct 587, 592-593; 151 L Ed 2d 497, 506-507 (2001) (observing that only reasonable suspicion is required to search a probationers home without a warrant).

Here, defendant expressed an interest to Riebschleger about being a bounty hunter, tested positive for drugs, and fled detention only to return and conceal suspected marijuana while being processed. Further, defendant's van contained bounty hunter credentials and equipment, a gun manual, and it was suspected that a gun had been kept in defendant's house. This established reasonable cause to believe there was a violation of parole at the time of the search, making the search valid under the administrative rule at the time of the search. Therefore, the search was valid under the law and defendant's right against unreasonable search and seizure was not violated.

Defendant's argument that, even if the proper procedures were used to legally search defendant as a parolee, the search of his home was invalid because he had no ownership interest in the house and the rationale that allows warrantless searches of parolees would not extend to property not owned by the parolee is without merit. Defendant lived in that house alone for nearly a year. He clearly had access to and control of the premises. Finally, if defendant really had no control over the premises, he would have no standing to challenge the search of the premises and his motion to exclude evidence for lack of a valid search warrant would fail. See *People v Wood*, 447 Mich 80, 89; 523 NW2d 477 (1994) ("As a general rule, criminal defendants do not have standing to assert the rights of third parties. . . . For example, a defendant cannot assert a claim for suppression on the basis of unlawful invasion of the person or property of a third party."). Therefore, whether defendant's name was on the deed or not is not relevant to whether the search was valid.

III Ineffective Assistance of Counsel

Defendant claims he was denied his right to the effective assistance of counsel.

A. Standard of Review

An ineffective assistance of counsel claim should be raised by a motion for a new trial or an evidentiary hearing. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). Neither request was made by defendant below. Where no evidentiary hearing has been held on a claim of ineffective assistance of counsel, appellate review is limited to the existing record. *Id.* at 423. The denial of effective assistance of counsel is a mixed question of fact and constitutional law, which are reviewed, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

B. Analysis

The right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. Where the issue is counsel's performance, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under professional norms, and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 309, 312-313; 521 NW2d 797 (1994).

Defense counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases. *Pickens*, *supra* at 325. There is therefore a strong presumption of effective counsel when it comes to issues of trial strategy. *People v Mitchell*, 454 Mich 145, 155; 560 NW2d 600 (1997). An appellate court will not second-guess matters of strategy or use the benefit of hindsight when assessing counsel's competence. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Defendant first claims that he was denied effective assistance of counsel by his counsel's failure to challenge the search of his home under Rule 791.7735. As addressed in Issue I, *supra*, the warrantless search of defendant's home was appropriate regardless of whether he owned the home. Also as noted, if the home really was not defendant's property, then he would have no standing to challenge the search. Thus, any argument along these lines would have been without merit, and there is no requirement for an attorney to argue a meritless position. *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995). Thus, defendant's claim of ineffective assistance of counsel on this basis fails.

Defendant claims he was denied the effective assistance of counsel by his counsel's failure to properly investigate and then timely file a witness list for a defense of entrapment based on Riebschleger's explicit allowance of a weapon in the home defendant was residing in. No *Ginther*[1] hearing has been held to hear the testimony of the witnesses defendant says should have been called to testify. Based on the existing record, defendant fails to substantiate this claim. Initially, defendant has not articulated exactly what it was defendant was told, and relied on, that constituted entrapment (see Issue IV, *infra*). It is true that defendant was given

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

permission to live in a home that contained a gun owned by his father. However, that permission was premised on the father's promise to keep the gun locked up and away from defendant. Once defendant's father died, it is clear that Riebschleger wanted the gun removed. According to Riebschleger, he repeatedly received assurances from defendant that the gun had been removed (by defendant's sister). Defendant denied this. Defendant also testified that the authorities had not come to his home to confiscate the gun after his father's death. Thus, the dispute underlying a claim that he was entrapped was presented to the jury. Defendant fails to show that he was denied effective assistance on this basis.

Defendant claims he was denied the effective assistance of counsel by his counsel's failure to file a motion in limine to exclude irrelevant and prejudicial testimony regarding fugitive recovery employment materials and sheriff's department property found in defendant's van and residence. However, this evidence was relevant as it corroborated Riebschleger's belief that defendant retained possession of defendant's father's gun. Given the direct relevance of this evidence, it is unlikely it would have been excluded if counsel had raised a relevancy objection. Defense counsel is not required to object where any objection would be futile. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998) (1999).

Defendant claims he was denied effective assistance of counsel by his counsel's failure to file an interlocutory appeal on the trial court's denial of defendant's motion to suppress evidence from the warrantless search and for release for violation of his right to a speedy trial. As indicated in Issue I, *supra*, an appeal would not change the result for defendant's motion to suppress because it was appropriately denied. In any case, defendant has not indicated how an interlocutory appeal would have given him an ultimate result any different than an appeal of those same issues after trial. Because defendant has failed to indicate how the ultimate result would have differed had an interlocutory appeal been made on either or both of those motions, there is no basis to conclude that defendant has received ineffective assistance of counsel on this basis.

Finally, defendant claims he was denied the effective assistance of counsel by his defense counsel's failure to object to testimony by Riebschleger that defendant's sister Vicki told him that defendant lied to her about the location of the gun and testimony from Riebschleger that defendant's father told Riebschleger that he would keep his gun in a safe. However, Riebschleger's testimony that defendant's sister Vicki told him that defendant lied to her about the location of the gun could merely have been offered for impeachment, and his testimony that defendant's father told him that he would keep his gun in a safe could merely have been offered to explain why defendant was allowed to live with a gun in his home. Thus, counsel may have exercised trial strategy in not objecting to avoid further highlighting this testimony. Further, given the overwhelming evidence of defendant's guilt, defendant has failed to show how the result would have been different had the challenged statements been accompanied with limiting instructions.

IV Sentencing

Defendant claims the trial court improperly assessed him 10 points under offense variable (OV) 19 for interference with the administration of justice for allegedly consuming a marijuana cigarette.

A. Standard of Review

"A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). "Questions of statutory interpretation are . . . reviewed de novo." *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005).

B. Analysis

MCL 777.49(c) provides that the trial court assess 10 point where "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c).

The primary source for determining [legislative] intent is the plain and ordinary meaning of the words of the statute. *Nastal*, *supra* at 720. If the meaning of a statute is clear and unambiguous, "further construction is neither required nor permitted." *Id.*

The trial court assessed defendant 10 points under OV 19 for consuming an alleged marijuana cigarette from the floor as he was being searched and processed for detention for his probation violation. While defendant was being processed, defendant began to "struggle with the corrections officer." Riebschleger quickly grabbed defendant's left hand where he "immediately noticed that [defendant] had contraband in his hand," including a "small roach type cigarette" and "full rolled cigarettes." Riebschleger and the corrections officer gave defendant "repeated orders to drop the contraband, to drop that little roach cigarette . . . which was about half an inch long." Riebschleger said that as they "started the process of taking [defendant] to the ground, [defendant] struck" the corrections officer "in the eye."

Defendant specifically claims that the above action was not related to the charges for which he was convicted. OV 19 can include actions taken before a crime is even charged. See *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004) (noting that "investigation of crime is critical to the administration of justice" and, accordingly, affirming scoring 10 points under OV 19 for providing a false name to the police).

Defendant was not charged with consuming the marijuana cigarette at the center. However, the trial court could reasonably find that parole agents began to investigate defendant for possession of marijuana when Riebschleger "noticed that [defendant] had contraband in his hand," including a "small roach type cigarette" and "full rolled cigarettes." Because of this behavior, parole agents further investigated defendant for possession of marijuana by searching his van and home, which revealed evidence of crime. Thus, defendant's consumption of a marijuana cigarette was related to the subsequent convictions. In consuming the marijuana cigarette, defendant interfered with the police's investigation of his marijuana possession. The trial court could properly find that defendant's action inferred with the administration of justice.

V Right to Present a Defense

Defendant claims that the trial court denied him his right to present the defense that "Department of Corrections officers induced the violations of the firearms statutes, and were part of a corrupt sequence of action by his parole agent."

A. Standard of Review

Questions of law are reviewed de novo. *Brown v Loveman*, 260 Mich App 576, 591; 680 NW2d 432 (2004). A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *Lukity*, *supra* at 488. But a preliminary question of law regarding the admissibility of evidence is reviewed de novo. *Id.*

B. Analysis

"Under the Due Process Clause of the Fourteenth Amendment [of the United States Constitution[2]], criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense." *California v Trombetta*, 467 US 479, 485; 104 S Ct 2528; 81 L Ed 2d 413 (1984).

"When a defendant claims entrapment, including entrapment by estoppel, the proper procedure is for the trial court to hold an evidentiary hearing, at which the defendant bears the burden of proving entrapment by a preponderance of the evidence." *People v Pierce*, 272 Mich App 394, 400; 725 NW2d 691 (2006).]

Defendant never asserted an entrapment defense at trial, and there was no need for the trial court to hold an evidentiary hearing. Further, there is no evidence that anyone told defendant he could reside in a house where he could access a gun. To the contrary, the record indicates that defendant was told repeatedly that he was not to have access to that gun. Further, after defendant's father died, he was asked repeatedly if the gun had been removed because defendant was not allowed to keep it. Therefore defendant, who has the burden of proof, has failed to demonstrate the elements of an entrapment defense.

Defendant's witness list was denied because he gave it to the court on the day trial began. At that time, the trial court pointed out that it had given defendant the deadlines almost a year prior, so there was no excuse for defendant filing the witness list late. Under these circumstances, no abuse of discretion is established.

The trial court addressed defendant's concerns that his work supervisor permitted police to search defendant's residence when it addressed his motion to suppress the fruits of that search, and defendant was not denied his right to present a defense in that instance. Additionally, defendant had access to a law library through his appointed counsel.

Finally, defendant's concerns with the search of his residence have been addressed in Issue I, *supra*. Further, defendant does not explain how the fact that not every item seized was

[2] US Const, Am XIV.

actually entered as evidence denied him his right to present a defense. There is no right by statute or case law granting a defendant the right to have everything seized by police entered as an exhibit at trial.

In sum, defendant was not denied his right to present a defense.

VI Lesser Included Offense Instruction

Defendant argues that the trial court erred in denying defendant's request to instruct the jury on lesser-included offenses of personal use.

A. Standard of Review

Whether use of a controlled substance is a lesser-included offense of possession of a controlled substance is a question of law that is reviewed de novo. See *People v Mendoza*, 468 Mich 527, 531; 664 NW2d 685 (2003).

B. Analysis

"For an offense to be lesser included it must contain some, but not all of the elements of the higher offense and there must be no additional elements in the 'included' offense which are not a part of the 'higher' offense." *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672, 684; 194 NW2d 693 (1972). One can possess a controlled substance without necessarily using that substance. Therefore, use of controlled substance, MCL 333.7404, is not a lesser-included offense of possession of a controlled substance, MCL 333.7403. Further, MCL 768.32(2) states that "[a] jury shall not be instructed as to other lesser included offenses involving the same controlled substance nor as to an attempt to commit either a major controlled substance offense or a lesser included offense involving the same controlled substance." Thus, the trial court did not err when it declined to instruct the jury on use of controlled substance as lesser-included offenses of the possession charges.

VI Judgment Notwithstanding the Verdict

Defendant claims the trial court erred in denying his motion for judgment notwithstanding the verdict.

A. Standard of Review

A trial court's decision on a motion for JNOV is reviewed de novo. *Sniecinski v BCBSM*, 469 Mich 124, 131; 666 NW2d 186 (2003).

B. Analysis

> Judgment notwithstanding the verdict should be granted only when there was insufficient evidence presented to create an issue for the jury. When deciding a motion for JNOV, the trial court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party and determine whether the facts presented preclude judgment for the nonmoving party as a

matter of law. [*Merkur Steel Supply Inc v Detroit*, 261 Mich App 116, 123-124; 680 NW2d 485 (2004) (citation omitted).]

Defendant argues that the element of possession was not established with respect to the two firearm convictions. The record reflects that defendant alone lived in the home and that his father's gun was found hidden from view although defendant's father was a police officer. Further, Riebschleger testified that defendant told him the gun was with defendant's sister in Virginia when it was still inside defendant's home. Taking that evidence in the light most favorable to the prosecutor, there was sufficient evidence to show that defendant was aware of the gun in his home. Therefore, there was sufficient evidence to support the jury's verdict and the trial court did not err when it denied defendant's motion for JNOV.

VII Pre-Sentence Investigation Report (PSIR)

Defendant claims the trial court erred in considering portions of his PSIR report.

A. Standard of Review

This Court reviews a claim of inaccuracies in a defendant's PSIR for an abuse of discretion. *People v Harrison*, 119 Mich App 491, 496; 326 NW2d 827 (1982).

B. Analysis

At sentencing, defendant challenged the PSIR's inclusion of various sheriff's department property found in his van and in his house as irrelevant to the facts of the instant offenses. Defendant also challenged the PSIR's reference to defendant consuming a marijuana cigarette off of the floor because there was no proof that the cigarette eaten contained any marijuana.

"A defendant is entitled to be sentenced on the basis of accurate information." *Harrison*, *supra* at 496. A court is required to respond to a defendant's allegations of inaccuracies. *People v Daniels*, 192 Mich App 658, 675; 482 NW2d 176 (1991). "However, where the asserted inaccuracies would have no determinative effect upon the sentence, the failure of a court to respond may be considered harmless error." *Id.*

Defendant does not claim that the report of sheriff's department property found in his van and home was inaccurate, only that it was irrelevant. However, the information is relevant in that there was some concern that defendant might have been using these items to support an identification of himself as a bounty hunter, and such representations might have included the possession of a gun, which is part of what led to the search of defendant's home. Therefore, the trial court did not abuse its discretion when it allowed this accurate and relevant information to remain in defendant's PSIR.

Defendant is correct that there is no definitive confirmation that the small cigarette he ate off of the floor while he was being processed actually contained marijuana. However, he admitted that he owned the marijuana found in his home. Further, given the great lengths defendant went through to prevent the small roach cigarette from being confiscated, it is reasonable to conclude that it contained marijuana, not tobacco. Therefore, the trial court did not

abuse its discretion when it allowed mention of this marijuana in the PSIR. Defendant is not entitled to any relief based on any issues with the accuracy of his PSIR.

VIII Prosecutorial Misconduct

Defendant claims the prosecutor committed several acts of misconduct.

A. Standard of Review

This Court reviews unpreserved claims of error for plain error. *Callon*, *supra* at 329. "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id*. Reversal is not required "where a curative instruction could have alleviated any prejudicial effect." *Id*. at 329-330.

B. Analysis

Prosecutorial misconduct claims are reviewed on a case-by-case basis, looking at the prosecutor's comments in context and in light of the defense arguments and their relationship to evidence admitted at trial. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). A prosecutor may not argue facts not entered into evidence, *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994), but may otherwise argue the evidence, and all reasonable inferences it creates, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007).

Defendant first claims that the prosecutor improperly elicited testimony from defendant in regard to the credibility of prosecution witnesses. It is not proper "for a prosecutor to ask a defendant to comment on the credibility of prosecution witnesses since a defendant's opinion on such a matter is not probative and credibility determinations are to be made by the trier of fact." *People v Knapp*, 244 Mich App 361, 624 NW2d 227 (2001).

Although the prosecutor's question required defendant to call Riebschleger a liar, we do not find that defendant was harmed by the error. Defendant, acting in propria persona, maintained throughout trial that Riebschleger was a liar. In light of defendant's consistent allegations in this regard, we do not find that the questioning of Riebschleger's veracity harmed defendant. Moreover, because any undue prejudice could have been cured by a timely objection and curative instruction, defendant's claim does not warrant reversal.

Defendant also claims prosecutorial misconduct from references to evidence not in the record and hearsay testimony. In regard to the claim that the prosecutor committed misconduct by referring to hearsay, we note there was no objection to the admission of the hearsay evidence. The prosecutor is allowed to argue the evidence presented, *Bahoda*, *supra* at 282, and thus, defendant failed to establish plain error affecting defendant's substantial rights.

Defendant challenges as unfounded the prosecutor's assertion in opening statement that defendant left the corrections center for two to three hours when Riebschleger testified that it was "at least an hour." We do not find the prosecutor's assertion and Riebschleger's testimony

contradictory. Further, that defendant left the center is the salient point, and any error in this regard is not plain error affecting defendant's substantial rights. Similarly, any error regarding whether defendant was on the floor or was taken to the floor when he was struggling with corrections officers while being processed is not significant. In regard to the reference in opening argument that the gun manual was for a police service revolver, the prosecution did not commit misconduct as defendant's father was a policeman and the gun found was his service revolver. Defendant's claimed instances of prosecutorial misconduct primarily involve minor inconsistencies in the prosecutor's statements and various witnesses' amounts, which does not amount to plain error affecting defendant's substantial rights. Further, many of the claimed errors were corrected by the trial court's instruction to the jury that statements by counsel are not evidence, only witness statements are evidence.

Affirmed.

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