STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 16, 2009
v	No. 282222 Oakland Circuit Court
TAMIR TAUHEED BELL, Defendant-Appellant.	LC No. 2007-215014-FH

Before: Zahra, P.J., and O'Connell and K. F. Kelly, JJ.

PER CURIAM.

Defendant was convicted of one count of conspiracy to deliver 50 to 225 grams of cocaine, MCL 750.157a, one count of possession with intent to deliver 50 to 225 grams of cocaine, MCL 333.7401(2)(a)(*iii*), one count of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(*iv*), and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He received concurrent sentences of 10 to 20 years' imprisonment for his conspiracy to deliver 50 to 225 grams of cocaine and his possession with intent to deliver convictions, and 2 to 20 years' imprisonment for his possession with intent to deliver less than 50 grams of cocaine conviction, and a consecutive sentence of two years' imprisonment for his felony-firearm convictions. He appeals as of right. We affirm.

Defendant first argues that various actions by the prosecutor denied him the right to a fair trial. We disagree. Defendant failed to properly preserve this argument by challenging the alleged instances of prosecutorial misconduct at trial. *People v Nimeth*, 236 Mich App 616, 625; 601 NW2d 393 (1999). We review unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Reversal is necessary only if plain error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings, regardless of the defendant's innocence. *Id.* at 454.

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as it relates to their theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Prosecutorial remarks must be considered in context, and an otherwise improper remark may not cause reversible error if it was made in response to defense counsel's argument. *Watson*, *supra* at 592-

593. A defendant's convictions should not be reversed if the reviewing court is convinced that the defendant was convicted based on the evidence presented, as opposed to the effects of the alleged misconduct. See *Bahoda, supra* at 271-272.

After defense counsel elicited testimony that Tracy Cowan had been convicted in relation to contraband that was seized at 19965 Appoline Street in Detroit, Michigan, the prosecutor asked Officer Kevin Cronin whether Rory Jones had also "take[n] responsibility" for the contraband found at the Appoline residence. Cronin replied that Jones had. During her closing argument, the prosecutor stated:

> In, in this particular case, [defendant] had an agreement with somebody, whether it be [Jones] or [Cowan] or Joe Smith or Lisa Jones, he had an agreement with somebody that was inside the Appoline [residence], most likely, given by the facts that have been produced, [Cowan], who has taken responsibility—well, she didn't take responsibility. She was found guilty for the items in the homes—and Rory Jones, who took responsibility for the items in the home.

Although the conviction of another person involved in a criminal enterprise is generally not admissible at a defendant's separate trial, *People v Kincade*, 162 Mich App 80, 84; 412 NW2d 252 (1987), the prosecutor's closing argument merely commented on the evidence that had already been submitted and thus was proper, *Bahoda, supra* at 289.[1] Furthermore, defense counsel elicited the improper testimony regarding the fact that Cowan had been convicted. Therefore, although the testimony was improperly allowed into evidence, the improper admission of this evidence cannot be attributed to the prosecutor. However, the prosecutor's elicitation of testimony from Cronin regarding whether Jones had taken responsibility for the items found at the Appoline residence was clearly improper. *Kincade*, *supra* at 84. Nonetheless, given that other evidence was presented to link Jones to the Appoline residence and defendant (i.e., Jones's vehicle was parked outside the Appoline residence when defendant entered the residence, and cellular telephone records established that defendant called Jones multiple times about the time he drove to the Appoline address to, presumably, get more cocaine), the prosecutor's improper elicitation of Jones's conviction does not amount to plain error affecting defendant's substantial rights. *Bahoda, supra* at 271-272; *Thomas, supra* at 453-454.

We likewise reject defendant's argument that the prosecutor committed misconduct when she elicited alleged hearsay testimony from Cronin that Jones was also a target of a Drug Enforcement Agency (DEA) investigation. Instead, we find that Cronin's testimony was a non-responsive answer, because the prosecutor was merely looking for a "yes" response so that she could establish how the police became privy to Jones's cellular telephone number. Nonresponsive answers to a prosecutor's questions by a prosecution witness are not attributable as misconduct to the prosecutor unless the prosecutor knew, encouraged, or conspired with the

[1] Even if we found that the prosecutor's comments during closing argument were improper, we note that the jury was instructed that a prosecutor's comments are not evidence. Jurors are presumed to follow a trial court's instructions. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Therefore, we presume that the jury did not improperly consider these comments and reversal is not warranted in this case.

witness to provide the unresponsive testimony. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). Here, defendant has failed to establish that "the prosecutor knew, encouraged, or conspired with" Cronin to provide the unresponsive testimony. Therefore, even if Cronin's answer regarding the DEA investigation was inadmissible hearsay, the improper testimony was not attributable to the prosecutor. *Id*.

We also reject defendant's argument that his convictions should be reversed based on the prosecutor's allegedly improper use of impeachment testimony as substantive evidence of defendant's guilt. After defendant's brother, Terrell Bell, testified that he had never seen defendant sell drugs, the prosecution properly elicited Terrell's prior inconsistent statement to the police that defendant was selling drugs. See MRE 613(b). In the prosecutor's closing argument, the prosecutor stated that the "only reason [Terrell] said that [defendant] sold drugs is because he does."

Previous inconsistent statements of a witness, admissible to impeach the credibility of a witness, are inadmissible as substantive evidence unless they are also admissible under MRE 801(d)(1).[2] See *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002). Here, Terrell's prior statement to the police was not given under oath and thus was inadmissible hearsay. MRE 801(d)(1). Therefore, Terrell's statement was not admissible as substantive evidence, but only as impeachment evidence. See MRE 613(b) ("Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.") The prosecutor acted improperly when she made her closing argument. However, given that testimony had been presented that defendant sold Shannon Portis two eight balls, there was already strong substantive evidence that defendant sold drugs. Furthermore, the trial court instructed the jury that a prosecutor's comments are not evidence, and that the jury could only consider a witness's prior inconsistent statements "in deciding whether the testimony [of that witness] was truthful and in determining the facts of the case." Although the prosecutor's comments were improper, they did not amount to plain error affecting defendant's substantial rights. *Bahoda*, *supra* at 271-272; *Thomas*, *supra* at 453-454.

We likewise reject defendant's argument that the prosecutor improperly vouched for the credibility of her witnesses. Defendant takes issue with the fact that before the prosecutor was allowed to introduce Portis's prior testimony, she asked Portis whether his prior testimony was

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[2] MRE 801(d)(1) states,

> *Prior Statement of Witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person . . . .

truthful and Portis testified that it was. Defendant also takes issue with the prosecutor's comments during closing argument that the police "testified honestly" and that although Portis was not a believable person, his prior testimony was truthful.

"[A] prosecutor may not vouch for the credibility of his witnesses by implying that he has some special knowledge of their truthfulness," but "he may comment on his own witnesses' credibility during closing argument . . . ." *Thomas, supra* at 455. Furthermore, a prosecutor may "argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief." *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). The prosecutor's proposed question to Portis regarding whether his prior testimony was truthful was merely a question and, thus, could not be considered "vouching" for a witness. Furthermore, in regard to the prosecutor's comments during closing argument concerning the truthfulness or untruthfulness of the testimony of the police officers and Portis, neither of the challenged comments implied that the prosecutor had special knowledge of the witnesses' testimony. In her comments concerning the police and Portis, the prosecutor used facts to argue why their testimony was believable. Accordingly, the prosecutor's actions do not constitute improper vouching. *Thomas, supra* at 455; *Howard, supra* at 548.

Defendant next argues that the trial court committed reversible error when it permitted Cronin to give expert testimony and allowed Officers Richard Wehby and David Scott to give what allegedly amounted to expert testimony, despite the fact that the prosecution never moved to qualify either Wehby or Scott as experts. We disagree. Defendant did not challenge the police officers' questioned testimony and thus has failed to properly preserve this argument. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). We review unpreserved claims of error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

MRE 702 states,

> If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness had applied the principles and methods reliably to the facts of the case.

This Court has held that a prosecutor may use expert testimony from police officers to aid the jury in understanding evidence seized in controlled substance cases. *People v Ray*, 191 Mich App 706, 707-708; 479 NW2d 1 (1991). For such expert testimony to be admissible, "(1) the expert must be qualified; (2) the evidence must serve to give the trier of fact a better understanding of the evidence or assist in determining a fact in issue; and (3) the evidence must be from a recognized discipline." *People v Williams* (*After Remand*), 198 Mich App 537, 541; 499 NW2d 404 (1993).

The trial court qualified Cronin as an expert in "the area of narcotics trafficking." Before Cronin was qualified as an expert, the prosecution established that Cronin had been a police officer for 14 years, had worked for Detroit's "Drug Enforcement Administration," as well as

"SONIC" and the "Oakland County Narcotics Unit" and "conspiracy unit." The prosecution further established that Cronin had extensive narcotics training in Michigan and Florida and years of practical experience, which included participating in the execution of over 400 search warrants and purchasing cocaine in an undercover capacity. The trial court did not abuse its discretion, let alone commit plain error, when it qualified Cronin as an expert in "the area of narcotics trafficking." MRE 702. Furthermore, Cronin's challenged expert testimony regarding (1) the general tiered system of drug sales, (2) the fact that the cocaine seized from 23510 Clarita Street in Detroit, Michigan, was pressed in the same manner as the cocaine from the Appoline residence, (3) that a seller would not generally drive around unnecessarily with cocaine in his car to pick up more cocaine if he already had enough cocaine to sell, and (4) that the amount of cocaine that was found at the Clarita residence was consistent with an intent to distribute, would help the jury understand the evidence presented and assist the jurors in determining whether defendant was guilty of the charged offenses. Furthermore, this testimony was based on Cronin's past experience and expertise in the field of narcotics. Accordingly, the trial court did not commit plain error when it allowed Cronin to give the challenged expert testimony. *Williams*, *supra* at 541; *Ray*, *supra* at 707-708.

Defendant also takes issue with Wheby's testimony that the cocaine found at the Appoline residence was powder cocaine that had "been rocked up" in the kilo form, which is how cocaine is "usually shipped from a larger . . . supplier." Defendant also challenges Wehby's testimony that cocaine is usually weighed out in equal amounts on a digital scale and packaged in Ziploc bags before it is sold, and that the going rate between friends for two eight balls was $220. Defendant additionally takes issue with Scott's testimony that the hydraulic jack that was found is commonly used to press cocaine into blocks, that it is common to blend cutting agents (such as baking soda) with cocaine to dilute the cocaine so it is more profitable, that it is common to not be able to find proof of residency inside a home, and that people generally do not store their cocaine where they live.

MRE 701 permits lay witnesses to provide testimony in the form of opinions and inferences if this testimony is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." We conclude that Wehby's and Scott's questioned testimony was basic opinion testimony stemming from evidence that they personally observed and, furthermore, would be helpful to the jury in determining facts in issue. Pursuant to MRE 701, the trial court did not abuse its discretion, let alone commit plain error, when it failed to sua sponte suppress the challenged testimony. *Peterson*, *supra* at 362; *McLaughlin*, *supra* at 657. Similarly, the prosecutor's comments during closing arguments regarding this testimony were proper. See *Bahoda*, *supra* at 282. Further, because Wehby and Scott did not testify as expert witnesses, no corresponding instruction was needed with regard to their testimony.

In regard to defendant's argument that the trial court committed error requiring reversal when it failed to give a cautionary instruction regarding Cronin's "dual roles" as a fact and expert witness, we conclude that defendant waived this argument when he expressed his satisfaction with the jury instructions. See *People v Hall* (*On Remand*), 256 Mich App 674, 679; 671 NW2d 545 (2003).

Defendant also argues that the trial court committed error requiring reversal when it admitted the contents of the police laboratory report and when it allowed Portis's testimony from

a previous trial to be read into evidence. Once again we disagree. Although defendant challenged the admission of Portis's prior testimony, he failed to challenge the admission of the contents of the police laboratory report. We review defendant's preserved argument regarding the admission of Portis's prior testimony for an abuse of discretion, *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998), and review his unpreserved argument regarding admission of the contents of the police report for plain error affecting his substantial rights, *Carines*, *supra* at 763-764.

"'Hearsay' is 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 generally not admissible as substantive evidence. MRE 802.

Here, without objection, the contents of a police laboratory report were read into evidence. MRE 803(8), the public records exception, provides that the following public records are not excluded by the hearsay rule, even if the declarant is available as a witness:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, and subject to the limitations of MCL 257.624.

Although the literal terms of MRE 803(8)(B) appear to exclude, in all criminal cases, reports containing matters observed by police officers, we need not consider whether this evidence was admissible because any potential error arising from the admission of the contents of the police laboratory report was harmless. Here, the admitted police report merely discusses the fingerprint analysis of items that were found at the Appoline and Clarita residences, establishing that a cellophane wrapper found in Cowan's bedroom at the Appoline residence had Cowan's fingerprint on it. Prior testimony had already established that the items listed in the report were found at the Appoline and Clarita residences, and that proof of residency for Cowan was found at the Appoline residence. The testimony regarding the contents of the police report did not establish defendant's presence at either residence and was not otherwise adversarial to defendant. Therefore, any error in the admission of this testimony was harmless.

Over defendant's objection, the trial court allowed the prosecution to read Portis's testimony from an October 23, 2002, proceeding into the record. MRE 803(5) provides:

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

To be admissible under MRE 803(5), "(1) The document must pertain to matters about which the declarant once had knowledge; (2) The declarant must now have an insufficient recollection as to such matters; (3) The document must be shown to have been made by the declarant . . . ."

People v Daniels, 192 Mich App 658, 667-668; 482 NW2d 176 (1991), quoting *People v J D Williams*, 117 Mich App 505, 508-509; 324 NW2d 70 (1982), rev'd and remanded on other grounds 412 Mich 711 (1982).

Here, Portis alleged that he could not remember certain events concerning the incident at hand, but he remembered previously testifying truthfully about the incident on October 23, 2002, when the incident was "fresher" in his mind. Furthermore, defendant acknowledged that the document being read into evidence was his testimony from the October 23, 2002, proceeding. Portis's testimony from the October 23, 2002, proceeding was therefore admissible pursuant to MRE 803(5), *Daniels*, *supra* at 667-668, and thus the trial court did not abuse its discretion when it allowed the testimony to be read into the record.

Defendant next argues that the trial court erred when it denied his motion for a new trial on the ground that he had not been denied his constitutional right to the effective assistance of counsel. We disagree. We review a trial court's factual findings regarding whether a defendant was denied effective assistance of counsel for clear error, while reviewing the trial court's constitutional determinations de novo. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To show that counsel's performance was below an objective standard of reasonableness, "a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *Id*. at 302. Counsel's performance must be measured against an objective standard of reasonableness and without the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). "[C]ounsel does not render ineffective assistance by failing to raise futile objections." *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

As previously discussed, Cronin was properly qualified as an expert in the area of narcotics to give his challenged testimony, Wehby's and Scott's challenged testimony was proper under MRE 701, and the admission of the contents of the police laboratory report was not outcome-determinative. Therefore, any challenge to the aforementioned testimony would have been futile. Defendant's argument that he was denied his right to the effective assistance of counsel when his trial counsel failed to object to the challenged testimony lacks merit. *Ackerman*, *supra* at 455.

We also reject defendant's argument that he was denied his right to the effective assistance of counsel when his defense counsel (1) elicited testimony that co-conspirator Cowan had been convicted as a result of the items seized from the Appoline residence, (2) failed to challenge Cronin's testimony that Jones had also been convicted as a result of the items seized from the Appoline residence, (3) failed to challenge Cronin's alleged hearsay testimony that Jones was part of a DEA investigation, and (4) failed to challenge the prosecutor's comments during closing argument that Cowan and Jones had been convicted as a result of the items seized from the Appoline residence. Evidence that Jones was part of a DEA investigation is likely inadmissible hearsay, and furthermore, as previously discussed, Cowan's and Jones's convictions were not admissible evidence. Thus, defense counsel should not have elicited this

evidence and should have challenged both the prosecutor's attempts to elicit this evidence and her reference to this evidence in her closing argument. However, the solicitation of evidence of Cowan's conviction, as well as defense counsel's failure to challenge the admission of evidence regarding Jones's conviction, the DEA investigation of Jones, and the prosecutor's comments during closing argument regarding the convictions, all coincided with defense counsel's strategy to refute the charges against defendant on the ground that he was not a resident of either residence where the drugs were found and was not present at either residence when the drugs were found. Defense counsel's actions and inactions in this regard furthered his strategy by establishing that other individuals were already convicted for the items found at the Appoline residence. In fact, in regard to the DEA investigation, defendant furthered his strategy on cross-examination by eliciting from Cronin that the DEA was not investigating defendant and did not even have his name. The fact that defense counsel's strategy, which he discussed with defendant and which defendant approved, failed to work does not render counsel's performance in this regard ineffective. *Toma*, *supra* at 302; *LaVearn*, *supra* at 216.

Finally, we also reject defendant's argument that he was denied his right to the effective assistance of counsel when defense counsel failed to challenge the prosecutor's statement during her closing argument that the "only reason [Terrell] said that [defendant] sold drugs is because he does." As previously discussed, the prosecutor improperly used Terrell's statement to the police as substantive evidence that defendant was a drug dealer. But again, given the evidence presented, as well as the trial court's instructions, the comments did not deny defendant his right to a fair trial. For the same reasons, defense counsel's failure to challenge the comments did not affect the outcome of the proceedings and thus does not constitute ineffective assistance of counsel. *Toma*, *supra* at 302-303.

Defendant's final argument on appeal is that insufficient evidence was presented to support his felony-firearm convictions. We disagree. "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court 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." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). "Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense." *People v Warren* (*After Remand*), 200 Mich App 586, 588; 504 NW2d 907 (1993).

This Court has interpreted MCL 750.227b to require the prosecution to show "that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). To establish constructive possession of a firearm, the prosecution must show that the defendant knew of the firearm's location, the firearm was accessible to the defendant, and the defendant had the right to control the firearm. *People v Terry*, 124 Mich App 656, 661-663; 335 NW2d 116 (1983).

When the police searched the detached garage at the Clarita residence, they found a 12-gauge shotgun wrapped in a blanket lying against a side wall of the garage, as well as two shoeboxes in the rafters directly above the garage door. One shoebox contained 96 grams of cocaine that was packaged for sale. The other shoebox contained a loaded nine-millimeter handgun, 12-gauge shotgun shells, a .38-caliber bullet, and two prescription pill bottles.

Although the prescription pill bottles were in Terrell's name, the prosecution presented evidence indicating that the prescriptions were in Terrell's name because defendant posed as Terrell when he went to the dentist so that his visit would be covered by Terrell's dental insurance. The prosecution also presented circumstantial evidence establishing that one of the guns that was seized was found in box next to defendant's prescription pills, while the other gun that was seized was found in close proximity to defendant's prescription pills. Furthermore, immediately before defendant was seen selling two eight balls of cocaine to Portis, the police saw defendant walk into the detached garage. Thus, a rational trier of fact could have inferred that at the time defendant committed the felony of possession with intent to deliver cocaine,[3] he knew the location of the firearms, the firearms were accessible to him, and he had the right to control the firearms. *Warren*, *supra* at 588. After viewing the evidence presented in a light most favorable to the prosecution, we conclude that a rational trier of fact could have found beyond a reasonable doubt that the elements of felony-firearm were met. *Avant*, *supra* at 505; *Terry*, *supra* at 658, 661, 663.

Affirmed.

/s/ Brian K. Zahra
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly

[3] Defendant does not dispute that sufficient evidence was presented to support his possession with intent to deliver cocaine convictions.