STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 31, 2010
v	No. 286208 Wayne Circuit Court
KENNETH RAY HOPKINS, Defendant-Appellant.	LC No. 07-023351-FC

Before: MARKEY, P.J., and ZAHRA and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant of possession with intent to deliver 1,000 grams or more of cocaine, MCL 333.7401(2)(a)(i), being a felon in possession of a firearm, MCL 750.224f, possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as a third habitual offender, MCL 769.11, to concurrent prison terms of 20 to 30 years for the possession with intent to deliver cocaine conviction, two to five years for the felon in possession conviction, two to four years for the possession with intent to deliver marijuana conviction, and a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I. SEARCH AND SEIZURE ISSUES

Defendant raises several appellate challenges to the trial court's denials of his motions to (1) quash a warrant authorizing a search of 1037 Patricia Street in Detroit, and (2) suppress evidence the police seized inside 1037 Patricia and evidence they obtained pursuant to a warrantless arrest of defendant and search of his car. We review for clear error "[a] trial court's findings of fact on a motion to suppress . . . ." *People v Hrlic*, 277 Mich App 260, 262-263; 744 NW2d 221 (2007). "But the application of constitutional standards regarding searches and seizures to essentially uncontested facts is entitled to less deference; for this reason, we review de novo the trial court's ultimate ruling on the motion to suppress." *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005).

A. SEARCH WARRANT FOR 1037 PATRICIA

Defendant first complains that probable cause did not exist to support issuance of the search warrant for 1037 Patricia. "The Fourth Amendment of the United States Constitution and

its counterpart in the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11." *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). A person's constitutional right to remain free of unreasonable searches and seizures generally requires that the police or other searching party have a warrant. *Id*. "A search warrant may not be issued unless probable cause exists to justify the search." *People v Waclawski*, 286 Mich App 634, 697; 780 NW2d 321 (2009).

With respect to appellate review of probable cause supporting a warrant,

> "(t)he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for conclud(ing)" that probable cause existed. [*People v Keller*, 479 Mich 467, 475; 739 NW2d 505 (2007), quoting *Illinois v Gates*, 462 US 213, 238; 103 S Ct 2317; 76 L Ed 2d 527 (1983).]

See also *Kazmierczak*, 461 Mich at 417-418 ("Probable cause to issue a search warrant exists where there is a substantial basis for inferring a fair probability that contraband or evidence of a crime will be found in a particular place.") (internal quotation omitted). "[T]he magistrate's probable cause determination is entitled to great deference by reviewing courts." *Keller*, 479 Mich at 476-477.

> Probable cause must be based on facts presented to the issuing magistrate by oath or affirmation. When probable cause is averred in an affidavit, the affidavit must contain facts within the knowledge of the affiant rather than mere conclusions or beliefs. The affiant may not draw his or her own inferences, but must state the matters that justify the drawing of inferences. However, the affiant's experience is relevant to the establishment of probable cause. . . . [*Waclawski*, 286 Mich App at 698.]

"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." MCL 780.653 (emphasis added).

1. INFORMATION SUPPLIED BY CONFIDENTIAL INFORMANT

Defendant characterizes as inadequate the information contained in the affidavit to search 1037 Patricia that a confidential informant supplied.

> 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:
>
> * * *

> (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*. [MCL 780.653 (emphasis added).]

Defendant disputes that either prong of the statutory requirement is satisfied.

Defendant first argues that the informant gave an insufficiently specific description of the observed drug trafficking to conclude that the informant spoke with personal knowledge.

> In general, the requirement that the informant have personal knowledge seeks to eliminate the use of rumors or reputations to form the basis for the circumstances requiring a search. The personal knowledge element should be derived from the information provided or material facts, not merely a recitation of the informant's having personal knowledge. If personal knowledge can be inferred from the stated facts, that is sufficient to find that the informant spoke with personal knowledge. [*People v Stumpf*, 196 Mich App 218, 223; 492 NW2d 795 (1992).]

In this case, a confidential informant told the affiant, Detroit Police Officer Michael Bryant, that on November 1, 2007 he "was inside 1037 Patricia . . . observing the seller making several sales of suspected Cocaine that day," that he "observed the above-described seller packaging additional suspected Cocaine for street sales," that he "is familiar with the color and texture of Cocaine and the forms of packaging same," and that he "can also recognize Cocaine upon seeing it." The confidential informant did not offer mere "rumors or reputations." *Stumpf*, 196 Mich App at 223. A reasonable inference arises from the confidential informant's averments concerning his observation of multiple drug sales and drug packaging inside 1037 Patricia that the informant spoke with personal knowledge of the drug enterprise. Furthermore, Officer Bryant's descriptions in the next affidavit paragraph about observing on the same day, November 1, 2007, multiple, brief visits to 1037 Patricia involving an exchanged plastic bag lent additional credence to the notion that the confidential informant had spoken with personal knowledge. *Id*. (noting with respect to an informant's personal knowledge that "the affiant conducted an independent investigation that produced corroborating evidence and substantially verified the information supplied by the informant").

Defendant also challenges that the affidavit in this case sufficiently established "either that the unnamed person is credible or that the information is reliable." MCL 780.653(b). "The search warrant affidavit [must] provide[] sufficient facts from which a magistrate could find that . . . the unnamed person was credible." *People v Echavarria*, 233 Mich App 356, 367; 592 NW2d 737 (1999) (finding sufficient facts with respect to the informant's reliability arising from a police officer affiant's averments that "he had used this informant at least three times, resulting in more than three arrests and more than three convictions"). Although Officer Bryant included in the affidavit his attestation that he deemed the informant "to be credible and reliable," the officer's conclusory declaration does not qualify as a basis for a magistrate's independent conclusion with respect to the informant's credibility. See, e.g., *People v Poole*, 218 Mich App

702, 706; 555 NW2d 485 (1996). And the affidavit offered no other information relevant to the informant's credibility.[1]

To satisfy MCL 780.653(b), then, the affidavit must have contained other, additional facts from which the magistrate could conclude that the informant gave reliable information. This Court has often recognized that independent police investigation and corroboration can confirm the reliability of an informant's observations. See *Waclawski*, 286 Mich App at 699 ("A warrant may issue on probable cause if the police have conducted an independent investigation to confirm the accuracy and reliability of the source."); *People v Ulman*, 244 Mich App 500, 509-510; 625 NW2d 429 (2001) ("An independent police investigation that verifies information provided by an informant can also support issuance of a search warrant."). In this case, the confidential informant allegedly watched on November 1, 2007 "several sales of suspected Cocaine" and packaging of some suspected cocaine inside 1037 Patricia. On that same day, Officer Bryant observed two suspicious visits to 1037 Patricia within a 35-minute period, during which different men each went inside the house for two minutes and then departed; one of the men carried as he left "a rolled up white plastic bag" that he had not carried inside the house. Officer Bryant, who had 11 years of law enforcement experience, including with "the Detroit Police Department Narcotics Conspiracy Section" and the federal Drug Enforcement Administration, opined that given his familiarity "with the preparation, manufacture, and distribution methods of cocaine, heroin, and marijuana" and his and the informant's observations, "1037 Patricia is an [sic] Narcotic Enterprise." The fact that Officer Bryant watched apparent narcotic sales at 1037 Patricia on the same day that the informant had reported seeing cocaine packaging and sales inside 1037 Patricia amounted to sufficient information "from which a magistrate could find that . . . the unnamed person was credible" or reliable. *Echavarria*, 233 Mich App at 367.

In summary, the affidavit information related by the confidential informant satisfied both prongs of MCL 780.653(b).

2. PROBABLE CAUSE

Even assuming that the search warrant affidavit did not comport with MCL 780.653(b), any defect in this regard did not render the search warrant unconstitutional. In *People v Hawkins*, 468 Mich 488, 502; 668 NW2d 602 (2003), our Supreme Court explained, "Because we are unable to conclude that the Legislature intended application of the exclusionary rule where the requirements of [MCL 780.653] have not been met, . . . we conclude that defendant

[1] If a confidential informant supplies self-authenticating details in a warrant that "g[i]ve a thorough and particularized description of the crime," "[t]hese details alone establish reliability." *People v Powell*, 201 Mich App 516, 523 (opinion by Corrigan, P.J.), 530 (Shepherd, J., concurring); 506 NW2d 894 (1993). Here, the informant's description contained in Officer Bryant's affidavit contains very few specific details. The informant told Officer Bryant merely that he had witnessed sales and preparation for sales inside 1037 Patricia. The informant did not detail any of the instrumentalities or paraphernalia employed for these activities, or anything else particularized about 1037 Patricia or the witnessed drug operations. The informant simply did not give self-authenticating details that would prove his reliability.

was not entitled to suppression of evidence on the basis of the statutory violation." Stated differently, a mere statutory violation of MCL 780.653(b) does not mandate exclusion of evidence seized pursuant to a warrant if no constitutional violation occurred: "[W]here there is no determination that a statutory violation constitutes an error of constitutional dimensions, application of the exclusionary rule is inappropriate unless the plain language of the statute indicates a legislative intent that the rule be applied." *Id*. at 507. No constitutional violation exists if there was a "substantial basis for the magistrate to conclude that there was a fair probability that contraband or evidence of a crime would be found" in the house. *Keller*, 479 Mich at 477.

Here, any technical statutory violation relating to the affidavit's inclusion of information supplied by an unnamed informant does not eliminate or undermine the substantial basis contained in the affidavit *as a whole* with respect to the probability that a search of 1037 Patricia would uncover drugs and drug-related contraband inside the dwelling. Irrespective of any questionable reliability inherent in the confidential informant's information, the circumstances giving rise to probable cause include the facts that (1) the informant described personally observing inside 1037 Patricia on November 1, 2007 (a) an individual making "several sales of suspected Cocaine," and (b) the same individual "packaging additional suspected Cocaine for street sales," (2) on that same day, Officer Bryant over the course of 35 minutes watched (a) two African-American males visit 1037 Patricia, where they "were greeted by the above listed seller," (b) each male visitor enter the house, remain inside for about two minutes, and leave the house, and (c) the second male visitor, when leaving 1037 Patricia, carry a "rolled up white plastic bag" he had not held when he went inside 1037 Patricia. In light of Officer Bryant's experience with Detroit Police Narcotics Conspiracy Section and his asserted familiarity "with the methods of selling illegal controlled substances," he believed "that based on the above conversation, and observation, 1037 Patricia is an [sic] Narcotic Enterprise." See *People v Levine*, 461 Mich 172, 185; 600 NW2d 622 (1999) (emphasizing that a "court must examine [an] officer's observations in light of her experience and training, not in a vacuum or from a hypertechnical perspective"); *Waclawski*, 286 Mich App at 698 (observing that "the affiant's experience is relevant to the establishment of probable cause"). Extending great deference to the magistrate's probable cause determination, *Keller*, 479 Mich at 476-477, we conclude that the magistrate properly found that probable cause existed to justify a search of 1037 Patricia because the search warrant affidavit contained a "substantial basis for inferring a fair probability that contraband or evidence of a crime will be found in" 1037 Patricia. *Kazmierczak*, 461 Mich at 417-418 (internal quotation omitted). Because no constitutional violation occurred, the trial court correctly denied defendant's motion to quash the search warrant for 1037 Patricia and his motion to suppress the drugs and other evidence the police seized inside 1037 Patricia.

3. DELIBERATE FALSEHOODS OR RECKLESS UNTRUTHS IN SEARCH WARRANT AFFIDAVIT

Defendant finally maintains with respect to the search warrant for 1037 Patricia that the trial court should have ordered an evidentiary hearing to investigate the veracity of the affidavit supporting the warrant. Defendant contends that the affidavit contained false statements because he was not present at 1037 Patricia on November 1, 2007 either when the confidential informant reportedly observed cocaine sales there or Officer Bryant reported seeing an African-American male answering the door when the two visitors to 1037 Patricia arrived. "[W]here the defendant

makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." *Franks v Delaware*, 438 US 154, 155-156; 98 S Ct 2674; 57 L Ed 2d 667 (1978).

> There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. . . . [*Id*. at 171.]

Defendant primarily rests his argument on an affidavit from Brian Bissonnette, who worked as an auto mechanic in Lincoln Park and remembered defendant being in his shop on November 1, 2007. Bissonnette "first talked to [defendant] . . . in the morning" about body work on a female friend's car, on which Bissonnette worked "for some time." Bissonnette recalled next seeing defendant "at about 3:00 in the afternoon" of November 1, 2007 when defendant brought in a car of his own for repairs. In Bissonnette's recollection, defendant "remain[ed] while we were continuing to work on [his] Chevy Caprice. It took substantially more time than anticipated. Typically, we would close at 5:30, I remain[ed] working on the vehicle until after 5:30. . . . I saw [defendant] during this time frame because of his frequent inquiries about the car." Bissonnette repeated later in the affidavit that defendant "was hovering over me a good portion of that day making inquiries about the status of the repairs."[2]

[2] In a second, brief affidavit, defendant asserted

> that on November 1, 2007, I was not present at 1037 Patricia in the City of Detroit during the morning, afternoon or evening hours. Any claims that I was present at the address on November 1, engaged in the packaging and distribution of cocaine is false. Additionally, any claims that I was surveilled at this location and greeting people at the door and making suspected sales of narcotics from this residence are also untrue.

Because defendant's affidavit offers little more than conclusory allegations, it does not support his motion for an evidentiary hearing. *Franks*, 438 US at 155-156.

The Bissonnette affidavit thus establishes that defendant appeared at the Lincoln Park repair shop at some unspecified time in the morning of November 1, 2007 and remained at the shop for an unspecified period of time during the body work on his friend's car. Regarding the purportedly false statements in affidavit ¶ 2 about the confidential informant's observations of drug sales and drug packaging at 1037 Patricia, the affidavit does not set forth any specific time or period in which the informant made these observations. Officer Bryant's November 1, 2007 activity log, which defendant attached to a supplemental brief in support of his motion for an evidentiary hearing, lists that at 10:00 a.m. Bryant was en route to court "from [a] meeting with CI." The activity log again mentions a "CI" in the listing for 3:05 p.m.: "Writer in the area of the Southwestern Dist with CI obtaining intell," and the 4:05 p.m. entry noted, "No change in status." Bryant's log leaves unclear the precise window when the informant watched the drug sales and packaging inside 1037 Patricia on November 1, 2007, either before 10:00 a.m. or between 10:00 a.m. and 3:05 p.m.

The Bissonnette affidavit simply does not "make[] a substantial preliminary showing that" Officer Bryant incorporated into the search warrant affidavit, either "knowingly and intentionally, or with reckless disregard for the truth," a false statement about the confidential informant's November 1, 2007 observations, *Franks*, 438 US at 155. The Bissonnette affidavit does not preclude the possibility that the confidential informant witnessed drug sales and packaging involving defendant at 1037 Patricia on November 1, 2007, because (1) if the informant saw the drug sales and packaging at 1037 Patricia before 10:00 a.m., the Bissonnette affidavit does not suggest defendant's whereabouts at any point before the unspecified time when he arrived at the Lincoln Park repair shop, and (2) if the informant saw the drug sales and packaging at 1037 Patricia between 10:00 a.m. and 3:05 p.m., the Bissonnette affidavit leaves open a potentially wide, but unspecified window of time—between defendant's arrival at the repair shop "in the morning" "for some time" and Bissonnette's next recollection of defendant at the shop "at about 3:00 in the afternoon—during which the informant could have witnessed drug sales and packaging involving defendant. Resort to a map confirms that 1037 Patricia and the repair shop address in Lincoln Park sit within 4-1/2 miles of one another, making feasible a brief trip between the two locations.

Concerning defendant's challenge to affidavit ¶ 3 containing the details of Officer Bryant's "approximately 35 minute[]" surveillance of 1037 Patricia on November 1, 2007, the search warrant affidavit does not specify the time when the surveillance occurred, but Bryant's activity log first mentions his position "on surveillance in the area of the Southwestern Dist" in the hourly listing for 5:30 p.m. The next entry on the activity log for 6:30 p.m. denotes, "Writer still busy on surveillance." Although Bissonnette recalled that defendant remained at the repair shop until "after 5:30" p.m., he did not specify how long after 5:30 p.m. defendant stayed there. In light of Bryant's activity log identification that his 35-minute surveillance took place sometime between 5:30 p.m. and 6:30 p.m., and the very close proximity of 1037 Patricia and the Lincoln Park repair shop, the Bissonnette affidavit simply does not present "a substantial preliminary showing that" Officer Bryant incorporated into the search warrant affidavit, either "knowingly and intentionally, or with reckless disregard for the truth," a false statement about his surveillance of 1037 Patricia on November 1, 2007. *Franks*, 438 US at 155.

Defendant suggests that the trial court applied an incorrect test when evaluating his entitlement to a hearing. In addressing defendant's false statement claims, the trial court first

quoted at length from case law the governing test promulgated in *Franks*, 438 US at 155-156, 171. The trial court then reasoned as follows that defendant had failed to make a sufficient showing to warrant a hearing:

> Defendant's motion and supplemental motion attaches affidavits indicating [defendant] was not at the home, and so therefore, is not the seller. There is nothing in either brief that goes to any knowing falsehood that the affiant—or a reckless disregard for the truth of the affiant, that there was a confidential informant, that the confidential informant spent time on November 1, 2007 at 1037 Patricia, and that the officer did or didn't, did not see or couldn't have seen, it was impossible to have surveilled 1037 Patricia on November 1, 2007 after talking to the confidential informant.
>
> There's nothing from [defendant] that says I never resided there and the place was vacant. There's nothing to say that someone wasn't in this house. There's nothing. There's nothing to say that the affiant was lying.
>
> * * *
>
> . . . As I said, the affidavit's [sic] attached only go to [defendant's] personal presence on the scene. There had been things said during oral argument, "[W]ell we're gonna say that he [Officer Bryant] couldn't have possibly observed with binoculars from the position he was sitting in."
>
> Ye[t], I don't even have an affidavit saying what position he was sitting in. It's conclusory and it's not supported by any offer of proof that would come forward that he was lying. . . .

Our review of the trial court's ruling on the evidentiary hearing question confirms that the trial court plainly had awareness of and applied the appropriate legal standards.

B. WARRANTLESS SEARCHES & SEIZURES OF DEFENDANT & HIS CAR

Defendant next alleges that the police did not possess probable cause when they stopped defendant and searched him and his car on Patricia Street on November 2, 2007. Defendant's appellate complaint about the seizure and search of his person and car mirrors in part his prior arguments about the inadequacy of Officer Bryant's observations to establish probable cause in support of the warrant. Defendant adds that no facts of record regarding the day of his arrest make a stronger case for his arrest.

The trial court ruled that the search warrant for 1037 Patricia was not valid with respect to the arrest of defendant and the searches of defendant and his car because the affidavit itself contained no specific identification of defendant or his car. The court held a hearing concerning the question of probable cause absent a warrant to support defendant's arrest and the searches of his person and car. Officer Bryant and defendant testified at the hearing. Officer Bryant testified that before he commenced his surveillance of 1037 Patricia on November 1, 2007, he obtained a photograph of defendant. Officer Bryant identified defendant at the hearing as the occupant of 1037 Patricia that he saw come to the front door of the house three times over the course of 35

minutes on November 1, 2007: once to look outside, and the other two times when defendant greeted the brief visitors to 1037 Patricia. The next day, Officer Bryant briefed the team assembled to assist him in the execution of the search warrant at 1037 Patricia, and gave the team members photographs of defendant. Officer Bryant related that the search of 1037 Patricia was delayed until shortly after 4:00 p.m. on November 2, 2007, because a surveillance officer had apprised Officer Bryant "that he observed [defendant] leave [1037 Patricia], lock the door and get into a vehicle I had listed in the search warrant, and left." According to Officer Bryant, he directed officers to follow defendant "and see if he return[ed]" to 1037 Patricia. When Officer Bryant heard that defendant had driven back toward 1037 Patricia, but drove into an adjacent driveway, backed out and began driving away from 1037 Patricia again, Officer Bryant instructed members of his team to detain defendant; other officers stopped his car about four houses away from 1037 Patricia and handcuffed him. Officer Bryant testified that he announced defendant's arrest after completing the search of 1037 Patricia, which yielded cocaine, marijuana, drug paraphernalia, a document bearing defendant's name, and a photograph of defendant. Defendant, who denied any connection with 1037 Patricia, recalled differently that the officers who initially handcuffed him also formally announced his arrest. Defendant acknowledged apprising his arresting officers that he had $6,000 in the console of his car. Officers ultimately confiscated from defendant's person a key for 1037 Patricia and $6,000 from his car.

The trial court made substantial findings of fact, then offered the following analysis:

> You know, based on the November 1st observations, [Officer] Bryant having a photo, his personal observations, the fact that [on November 2nd] he was being fed information from somebody who was watching as things were going on, and that the defendant was leaving and had been at the place at 1037 Patricia, the standard is did this Officer Bryant have sufficient information and probable cause to stop the defendant [on November 2, 2007].
>
> I believe he did. It's just common sense he did. He personally had seen him at the house. He suspected narcotics activity. He had his photo. The crew had his photo, and I think they had every—he had probable cause to stop him. Then after [defendant] is stopped, according to him, he was . . . immediately asked to put his hands on the steering wheel and was immediately asked whether he had any guns, contraband . . . [or] cash . . . .
>
> I know [the police] said guns or cash in the car and [defendant] volunteered, quite frankly, that he had cash in the car, that's according to his own testimony. . . . I believe based on the totality of everything I've heard here in this matter that the search warrant for 1037 Patricia being valid now I have some basis to say that there was probable cause that it was the defendant that did, in fact, engage in activity that the confidential informant was referring to and I have that under oath. I think there's probable cause to arrest him.
>
> I don't think it matters whether it was [an] investigatory stop and he was placed in handcuffs. I mean, I agree with defendant. He was detained. That man wasn't going anywhere. He had handcuffs on him and he had guns pointed at him, but I think they had probable cause to arrest him based on the two day's [sic]

activity prior to his arrest and the confidential informant information, which I know is part of this record now.

"A person has been 'seized' under the Fourth Amendment when a police officer has restrained the person's individual freedom." *People v Lewis*, 251 Mich App 58, 68-69; 649 NW2d 792 (2002). "In order to lawfully arrest a person without a warrant, a police officer must 'possess information demonstrating probable cause to believe that an offense has occurred and that the defendant committed it.'" *People v Reese*, 281 Mich App 290, 294-295; 761 NW2d 405 (2008), quoting *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). "Generally, a search [or seizure] conducted without a warrant is unreasonable unless there exist both probable cause and a circumstance establishing an exception to the warrant requirement." *People v Snider*, 239 Mich App 393, 407; 608 NW2d 502 (2000) (internal quotation omitted).

In light of the evidence that the police seized defendant before the search of 1037 Patricia on November 2, 2007, the first question we must consider is whether probable cause at that time supported the warrantless seizure of defendant. The affidavit of Officer Bryant contained probable cause to support a search of 1037 Patricia. Although the affidavit made no mention of defendant's identity, Officer Bryant confirmed at the suppression hearing that before conducting his November 1, 2007 surveillance he retrieved a photograph of defendant, and that defendant was the person Officer Bryant saw repeatedly appear at the door of 1037 Patricia on that date. Additionally, Officer Bryant related at the suppression hearing the information he received concerning defendant's departure from 1037 Patricia on November 2, 2007, and his return to the vicinity of that address immediately before his arrest. Given the totality of the circumstances, including Officer Bryant's November 1, 2007 surveillance of 1037 Patricia in response to drug dealing allegations supplied by an informant, Officer Bryant's multiple observations of defendant interacting with brief visitors to 1037 Patricia on November 1, 2007, and Officer Bryant's belief in light of his narcotics team experience that 1037 Patricia was a narcotic enterprise, we conclude that the trial court correctly found that probable cause existed to support defendant's warrantless arrest before the execution of the search warrant for 1037 Patricia on November 2, 2007. Stated differently, Officer Bryant and his team "possess[ed] information demonstrating probable cause to believe that an offense has occurred and that . . . defendant committed it." *Champion*, 452 Mich at 115. Furthermore, because the officers lawfully arrested defendant, they properly searched defendant's person pursuant to the search incident to arrest exception to the warrant requirement. *Arizona v Gant*, ___ US ___; 129 S Ct 1710, 1716; 173 L Ed 2d 485 (2009); *Reese*, 281 Mich App at 295. Consequently, the trial court correctly denied defendant's motion to suppress the key to 1037 Patricia that the police retrieved from defendant after his arrest on November 2, 2007.

With respect to the police search of defendant's car on November 2, 2007, "[t]he police may search a motor vehicle without a warrant if they have probable cause to believe that evidence of a crime may be found therein." *People v Perreault*, 287 Mich App 168, 172; 782 NW2d 526, rev'd on other grounds 486 Mich 914 (2010).

> . . . [T]he "automobile exception" . . . allows searches without warrants or seizures without warrants of automobiles on the basis of probable cause to believe that the vehicle contains contraband. *People v Levine*, 461 Mich 172, 179; 600 NW2d 622 (1999). The exception applies if the search is based on facts that would have justified the issuance of a warrant, although a warrant was not

> actually obtained. *Id.* . . . If probable cause exists to believe that a vehicle contains contraband, the ability to search without a warrant includes the search of closed containers that might conceal the object of the search. [*People v Wilson*, 257 Mich App 337, 359-360; 668 NW2d 371 (2003), vacated in part on other grounds 469 Mich 1018 (2004).]

Here, on the basis of the facts contained in the search warrant affidavit, the police had probable cause to believe that 1037 Patricia constituted a narcotic enterprise. And Officer Bryant testified at the suppression hearing that defendant apparently was participating in the narcotic enterprise on November 1, 2007. Officer Bryant also described that the police followed defendant in his vehicle on November 2, 2007, until he returned to Patricia Street, where they stopped his car and detained him. Defendant conceded at the suppression hearing that shortly after the police detained him in his car on November 2, 2007, an officer inquired, "[D]id I have anything in the car? . . . I told him I had $6,000 in the middle console." Officer Bryant recalled that he ultimately recovered the $6,000 from defendant's car. In conclusion, the police possessed probable cause to believe that defendant's car contained $6,000 in drug-related proceeds in light of their reasonable belief that a narcotic enterprise was operating inside 1037 Patricia, Officer Bryant's observations of defendant participating in the narcotic enterprise, the police tracking of defendant in his car on November 2, 2007, and defendant's postdetention advice to the officers that he had $6,000 in his console. Because the police properly seized the $6,000 from defendant's car under the automobile exception to the warrant requirement, the trial court correctly denied defendant's motion to suppress the $6,000.

II. INEFFECTIVE ASSISTANCE OF COUNSEL & PROSECUTORIAL MISCONDUCT

Defendant next raises on appeal numerous intertwined assertions of prosecutorial misconduct and ineffective assistance of counsel relating to his primary trial counsel, Daniel J. Reid.

A. GOVERNING LEGAL PRINCIPLES

1. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant preserved his ineffective assistance allegations in a motion for new trial, and the trial court addressed them after a *Ginther* hearing. *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973). Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact, if any, are reviewed for clear error, while questions of constitutional law are reviewed de novo. *Id.*

"[I]t has long been recognized that the right to counsel is the right to the effective assistance of counsel." *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984), quoting *McMann v Richardson*, 397 US 759, 777 n 14; 90 S Ct 1441; 25 L Ed 2d 763 (1970). In *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court held that a convicted defendant's claim of ineffective assistance of counsel includes two components: "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." To establish the first component, a defendant must show that counsel's

performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate a reasonable probability that but for counsel's errors, the result of the proceedings would have differed. *Id*. at 663-664. The defendant must overcome the strong presumptions that his "counsel's conduct falls within the wide range of professional assistance," and that his counsel's actions represented sound trial strategy. *Strickland*, 466 US at 689. A defense counsel possesses "wide discretion in matters of trial strategy." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). This Court may not "substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (internal quotation omitted).

2. PROSECUTORIAL MISCONDUCT

> Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. 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 they relate to the theory of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. [*People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), criticized on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).]

This Court reviews alleged instances of prosecutorial misconduct in context to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

In this case, defendant did not preserve at trial any of the claims of prosecutorial misconduct that he raises on appeal. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Appellate review of improper remarks by the prosecutor is generally precluded absent an objection by defense counsel because a failure to object deprives the trial court of an opportunity to cure the alleged error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). This Court reviews unpreserved claims of prosecutorial misconduct only for plain error that affected the defendant's substantial rights. *Unger*, 278 Mich App at 235; *Schutte*, 240 Mich App at 720. A forfeited plain error warrants reversal "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." *Unger*, 278 Mich App at 235 (internal quotation omitted).

B. COMPLAINTS ON APPEAL

1. FIREARM & FIREARM-RELATED EVIDENCE

Defendant initially complains that (1) Reid should have objected to trial testimony about a stolen gun recovered inside 1037 Patricia and a submachine gun found in the property's attached garage, and (2) the prosecutor engaged in misconduct when it presented irrelevant and

highly prejudicial information about the stolen nature of a firearm found inside 1037 Patricia. Defendant stood trial on two firearm-premised counts, felon in possession and felony-firearm. The prosecutor presented evidence that the police found four weapons in and around 1037 Patricia on November 2, 2007: a .44-Magnum on top of a living room coffee table, two other handguns stuffed barrel-down between cushions of a couch, and an "assault rifle" or "submachine gun" in a garage attached to the residence at 1037 Patricia. When Officer Bryant detailed at trial his collection of the evidence retrieved during the search of 1037 Patricia, the prosecutor asked him whether the "44 Magnum [is] amongst the evidence here[,]" and Officer Bryant explained, "The 44 Magnum was stolen, ... That gun has since been returned to the owner who reported it as stolen." The prosecutor then offered into evidence a police-generated computer printout confirming the .44's return to its owner.

Shortly after the prosecutor rested, defense counsel Reid moved for a directed verdict with respect to the felon in possession and felony-firearm charges, summarizing the defense position that "[t]here's been no testimony to say that the defendant was in the house at the same time that the guns were actually in the house. There's been no testimony to show defendant had possession actually or constructively of the weapons that were found in the house." In support of this position, Reid cited *People v Williams*, 212 Mich App 607; 538 NW2d 89 (1995), and *People v Burgenmeyer*, 461 Mich 431; 606 NW2d 645 (2000).[3] The trial court found that sufficient circumstantial evidence connected the guns in the living room of 1037 Patricia to defendant's presence in the house where drugs were stored as charged on November 1, 2007. However, the court ruled that "the gun in the garage cannot be the basis for felon in possession" or felony-firearm, emphasizing that "[t]here isn't any evidence from anyone that [defendant]'s ever been in the garage."

Regarding the constitutional efficacy of Reid's representation concerning the stolen .44 and the submachine gun, we detect no objectively unreasonable conduct or performance in Reid's pursuit or execution of the defense theory that defendant simply never possessed any firearms. Our review of the directed verdict portion of the record reveals no misapprehension of

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[3] Our Supreme Court in *Burgenmeyer*, 461 Mich at 438-440, overruled *Williams*, 212 Mich App 607, "to the extent that it is inconsistent with the analysis offered in this opinion," explaining in pertinent part:

> The *Williams* Court concluded that, because Mr. Williams was not home when the police found drugs and a firearm, he could not be convicted of possessing the firearm. The panel's error lay in its focus on the time of the raid. In *Williams*, the Court of Appeals treated the statute as though it prohibits possession of a firearm when a person is arrested for a felony, or when the police locate proof that a person has committed a felony. That is not what the statute says. The proper question in *Williams*—and in the case before us today—is whether the defendant possessed a firearm *at the time he committed a felony*. The fact that the defendant did not possess a firearm at the time of the arrest, or at the time of the police raid, is not relevant in the circumstances of this case. [Emphasis in original.]

the law by Reid relevant to when possession of a firearm must occur to support a felony-firearm or felon in possession charge predicated on a felony drug count; Reid mentioned that the circumstances in *Williams*, 212 Mich App 607, tended to support defendant's acquittal in this case, and that pursuant to the subsequent Supreme Court decision in *Burgenmeyer*, 461 Mich at 439, the defendant "must not be in possession at the time of the charge, not at the time of the search warrant or the arrest."[4] In pursuit of the defense strategy to show that defendant never possessed any weapons, Reid asked for the directed verdict. But in the trial court's view, *Burgenmeyer* did not entitle defendant to a verdict of acquittal as a matter of law, at least with respect to the weapons found inside 1037 Patricia on November 2, 2007. Reid did persuade the trial court to exclude the submachine gun from the record and prohibit any firearm charges premised on the submachine gun. In summary, Reid elicited testimony throughout trial that defendant was never seen holding any weapons and repeatedly emphasized in closing argument that the jury should acquit defendant of the firearm charges given the lack of credible evidence supporting them. Under the circumstances of this case, we cannot conclude that Reid's trial strategy to distance defendant from the weapons, as well as the drugs, found inside 1037 Patricia qualified as unsound.

Even assuming that Reid pursued an objectively unreasonable trial strategy relating to the stolen handgun and the submachine gun, we find no reasonable probability that but for counsel's errors, the result of the proceedings would have differed. *Solmonson*, 261 Mich App at 663-664. No reasonable likelihood exists that the outcome of defendant's trial would have differed, in light of the facts that (1) the prosecutor presented a wealth of properly admitted evidence that defendant committed the charged crimes, including the two handguns found in the cushions of the couch at 1037 Patricia, large quantities of cocaine and marijuana, a scale, a photograph of defendant, and an item of mail addressed to defendant, (2) the de minimus portion of the trial record referencing the stolen nature of the .44 handgun, the entirety of which encompassed less than two pages of trial transcript and one mention in the prosecutor's closing argument, and (3) the trial court twice instructed the jury immediately before deliberations that it could not consider "[t]he military firearm found in the garage . . . as evidence to prove" either charged firearm count, see *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997) (noting that "[a]s a general rule, juries are presumed to follow their instructions).

Regarding defendant's criticism of the prosecutor's presentation of the trial testimony about the stolen nature of the .44, the prosecutor elicited relevant testimony about the .44, which the police recovered from 1037 Patricia on November 2, 2007, to sustain the felon in possession and felony-firearm charges against defendant. The prosecutor in apparent good faith referenced the stolen nature of the .44 as an explanation for why, unlike the other physical evidence the

[4] We note our disagreement with the trial court's characterization of Reid's gun charge strategy as "deficient" in its opinion and order denying defendant's motion for a new trial. At the *Ginther* hearing, Reid responded affirmatively to defense counsel's inquiry, "And in fact it was pointed out to you that there was a case; *People* versus *Burgenmeyer*, that directly overturned that [*Williams*]?" Apparently on the basis of this exchange, the trial court expressed in the opinion and order denying a new trial that Reid had misapprehended the applicable law. However, the record of the directed verdict discussion between Reid, the prosecutor and the court belies the trial court's view that Reid misapprehended the law.

police seized from 1037 Patricia, the .44 itself did not appear in the trial record. See *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999) (explaining that "prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence"). Moreover, the reference to the stolen nature of the .44 did not affect defendant's substantial rights, especially given the brief nature of the reference and the lack of any prosecutorial suggestion that defendant had stolen the weapon.

2. HEARSAY FROM THE CONFIDENTIAL INFORMANT & CONCERNING THE SEARCH WARRANT & ACCOMPANYING AFFIDAVIT

Defendant next argues that Reid should have objected to testimony by two police officers, and the prosecutor's opening statement and closing argument references thereto, as inadmissible hearsay and violative of his Sixth Amendment right of confrontation. Defendant highlights Officer Bryant's testimony that he received information about cocaine sales by defendant at 1037 Patricia, and that he later prepared a search warrant and affidavit that both a prosecutor and judge approved. Defendant also points out that another officer, Sergeant Myron Weathers, testified to the hearsay information that defendant's name and car license number appeared in the search warrant. Defendant avers that these references to out-of-court statements made by the informant, prosecutor, and judge constituted inadmissible hearsay and violations of the Confrontation Clause.

With regard to the alleged hearsay provided by the confidential informant, Officer Bryant testified in pertinent part at trial:

> *Prosecutor*: Now, prior to November 2nd, had you had information about a particular location within the city of Detroit that brings us here today?
>
> *Officer Bryant*: Yes.
>
> *Prosecutor*: All right. What was that address that brought you here today?
>
> *Officer Bryant*: 1037 Patricia.
>
> *Prosecutor*: All right. And had you received some information about that particular address?
>
> *Officer Bryant*: Yes, I did.
>
> *Prosecutor*: Can you tell us when or approximately when that was you had received that information?
>
> *Officer Bryant*: The day prior I received information from a confidential source.
>
> * * *
>
> *Prosecutor*: All right. And once that, you had received that information did you do anything with it?

Officer Bryant: Yes, I conducted surveillance of the location.

* * *

Prosecutor: All right. Did you have any documents with you when you were looking, doing surveillance?

Officer Bryant: Yes. I had a photo of Mr. Hopkins, who's seated to my left.

* * *

Prosecutor: And why did you have that with you on November 1st?

Officer Bryant: It was another means of verifying information and ways to identify him.

* * *

Prosecutor: In this particular case, was there a type, specific type of drug you were looking for at the 1037 Patricia address?

Officer Bryant: Yes, cocaine.

* * *

. . . I received information—

* * *

about the cocaine.

Defendant correctly observes the general proposition that "statements of a confidential informant are testimonial." *United States v Cromer*, 389 F3d 662, 675 (CA 6, 2004). Although defendant relies on *Cromer* for this general proposition, defendant ignores the subsequent *Cromer* analysis of "whether any of the testimony provided by [the testifying officer] implicates the [Confrontation] Clause." *Id*. Specifically, the Sixth Circuit addressed as follows the defendant's complaint concerning the hearsay nature of, and Sixth Amendment violation injected by, an officer's trial testimony that he began investigating the defendant after receiving "information about 3284 Buchanan. And we began an investigation about this residence being associated with selling drugs":

> Cromer's Confrontation Clause rights were not violated by this testimony. This exchange at least arguably did not even put before the jury any statements made by the CI. Even if testimonial statements of an out-of-court declarant were revealed by this testimony, Cromer's confrontation right was not implicated because the testimony was provided merely by way of background. The Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford*, 124 S Ct at

> 1369 n 9. Any out-of-court statements alluded to by [the officer] at this juncture served the purpose of explaining how certain events came to pass or why the officers took the actions they did. Because the statements were not offered to establish the truth of the matter asserted, the Confrontation Clause does not apply. [*Id*. at 676 (some citations omitted).]

Because Officer Bryant's testimony "arguably did not even put before the jury any statements made by the CI," and because the prosecutor plainly queried Officer Bryant about his contact with the confidential informant as a background basis for explaining "how certain events came to pass or why the officers took the actions they did," not to establish the truth of the information supplied by the informant, no hearsay or Confrontation Clause violation occurred. *Id*. The prosecutor properly elicited this background information, *Noble*, 238 Mich App at 660-661, to which Reid need not have offered a groundless objection. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005). The prosecutor's opening statement references to Officer Bryant's receipt of a tip and the surveillance it prompted amounted to an accurate and proper summary of the evidence he anticipated introducing at trial, *People v Ericksen*, ___ Mich App ___; ___ NW2d ___ (Docket No. 288496, issued 4/10/2010), slip op at 4, and the prosecutor in closing argument properly summarized Officer Bryant's trial testimony in this regard. *Schutte*, 240 Mich App at 721. Consequently, Reid need not have lodged meritless objections to the prosecutor's opening statement and closing argument references to Officer Bryant's testimony about what prompted his surveillance. *Mack*, 265 Mich App at 130.

After Officer Bryant recounted his surveillance of 1037 Patricia on November 1, 2007, the prosecutor elicited a brief explanation from Officer Bryant concerning the usual steps involved in obtaining a search warrant and the information contained in a warrant and supporting affidavit. Officer Bryant further testified that in this case he presented the warrant to a prosecutor, who "signed off" on it, and next took the warrant "to the district court and . . . got it signed." Neither the testimony of Officer Bryant nor the brief earlier testimony of Sergeant Weathers regarding the procedures involved in obtaining a search warrant contained any hearsay information. And the general search warrant issuance information had some probative value toward undercutting the defense attack of the search warrant affidavit, specifically that the police never saw defendant inside 1037 Patricia on November 1, 2007, given that the affidavit made no mention of defendant.[5] MRE 401. The prosecutor presented this information in good faith,

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[5] Reid attacked the search warrant and affidavit in his opening statement:

> Now, when you submit an affidavit, you put all the information that you have available to you so you can convince a magistrate or a judge to issue a warrant. So if, in fact, they knew that [defendant] was the person to whom [sic] was inside of the house selling narcotics, it would only be reasonable that they'd be able to present to you a document that says right here in the affidavit itself is [defendant's] name saying that he's the person. It doesn't say that on the search warrant that goes with the affidavit. They put his name in there.
>
> But the most important thing that I want you to pay attention to, and this gon' [sic] be real, real important for you to do, pay attention to the affidavit, what

(continued…)

properly referenced the general search warrant procedures in his opening statement in anticipation of his elicitation of these procedures at trial, and properly summarized in his closing argument the evidence of record relating to general search warrant procedures. *Ericksen*, slip op at 4; *Schutte*, 240 Mich App at 721; *Noble*, 238 Mich App at 660-661. Thus, Reid need not have objected to the prosecutor's elicitation of the testimony or his opening statement and closing argument references to the testimony. *Mack*, 265 Mich App at 130.

The prosecutor also asked Officer Bryant at trial about some of the information he had incorporated into the warrant and affidavit, including defendant's name, age, and general appearance, and a description of defendant's car and plate number. Contrary to defendant's position on appeal, Officer Bryant's trial testimony that he placed in the search warrant defendant's name and basic descriptive information did not constitute inadmissible hearsay. In light of Officer Bryant's trial summary of his surveillance efforts on November 1, 2007, during which he saw defendant engage in multiple suspected drug transactions, the prosecutor merely inquired of Officer Bryant, the search warrant affiant, what postsurveillance efforts he made in preparing and securing the search warrant for 1037 Patricia. Stated differently, the prosecutor did not suggest that the search warrant identification of defendant was true. MRE 801(c).[6] Accordingly, the prosecutor appropriately elicited this brief testimony by Officer Bryant and properly referenced it briefly in his closing argument. *Schutte*, 240 Mich App at 721; *Noble*, 238 Mich App at 660-661. And Reid need not have objected to the prosecutor's brief background inquiry or his closing argument reference to the background. *Mack*, 265 Mich App at 130.

Several witnesses before Officer Bryant, the prosecutor questioned Sergeant Weathers, who had assisted in the execution of the search warrant at 1037 Patricia on November 2, 2007, concerning the appearance in the search warrant of defendant's name, his age, and a description of his car. The prosecutor's questions occurred on redirect examination, immediately after Reid had elicited from Sergeant Weathers on cross-examination that defendant's name appeared nowhere in the search warrant affidavit. Notably, defendant does not criticize in any respect Reid's initial question about the search warrant affidavit, which intended to reinforce the defense theory that the police never saw defendant inside 1037 Patricia on November 1, 2007. The prosecutor's inquiries about defendant's name and car appearing in the search warrant had relevance toward clarifying the prior answer Reid had just elicited. The prosecutor did invite hearsay information from Sergeant Weathers concerning a portion of the search warrant, but "[o]therwise improper prosecutorial conduct . . . might not require reversal if they address issues raised by defense counsel." *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007).

(…continued)

> became [sic] before. That was information that should have been in the affidavit, if in fact, it was information that they had and that they knew. But when you look at the affidavit you'll see [defendant's] name is not on that. It comes after the fact. Then they put his name on the warrant, and that's when they come into the house.

[6] Defendant cites *People v Tanner*, 222 Mich App 626; 564 NW2d 197 (1997), for the proposition that a search warrant and affidavit consist of hearsay. However, *Tanner* involved distinguishable circumstances in which the search warrant affiant did not testify at trial and the trial court incorrectly admitted the search warrant and affidavit into evidence. *Id*. at 628-630.

"The doctrine of invited response is used as an aid in determining whether a prosecutor's improper remarks require the reversal of a defendant's conviction." *People v Jones*, 468 Mich 345, 353; 662 NW2d 376 (2003). "Under the doctrine of invited response, the proportionality of the response, as well as the invitation, must be considered to determine whether the error, which might otherwise require reversal, is shielded from appellate relief." *Id*. The invited response inquiry focuses on "whether the prosecutor's improper introduction of evidence at trial affected the fairness of the trial." *Id*.

The instant record reflects that the "invitation" by Reid consisted of a lone question regarding the appearance of defendant's name in the search warrant affidavit, and that the prosecutor's response occurred in relatively abbreviated fashion also, over the course of 1-1/2 transcript pages. The prosecutor's invited response did not affect the fairness of defendant's trial, given its brief nature and the ample, properly admitted evidence of defendant's guilt. In summary, Reid engaged in objectively reasonable conduct by raising a point that furthered the defense, and the prosecutor responded in a fashion that did not undermine the fairness of defendant's trial.

3. EVIDENCE OF ILLEGAL DRUGS & FIREARMS & FEARS OF A SHOOTOUT

Defendant accuses Reid of ineffective assistance for failing to object to prosecution efforts to "scare the jurors into a conviction" by presenting irrelevant and highly prejudicial police officer testimony about the common relationship between illegal drugs and guns, and the fact "that the officers expected that a shoot out would occur" when they executed the search warrant on November 2, 2007. In the course of the prosecutor's direct examinations of Sergeant Weathers, Officer Anthony Gavel, and Officer Bryant concerning their participation in the November 2, 2007 search warrant execution at 1037 Patricia, the prosecutor briefly referred to the extent of each officer's experience in search warrant execution. The prosecutor asked each officer in general terms about what items they generally would look for when executing an illegal drug-related search warrant, and each officer's response mentioned firearms or weapons. The prosecutor then inquired why the officers usually looked for firearms, and the officers responded that drug dealers routinely employed firearms to protect their illegal enterprises. The brief lines of questioning by the prosecutor had relevance to the officers' general experience in narcotic search and seizure cases, and the officers' search warrant experience at least arguably constituted a matter peripherally at issue in the case, in light of the defense strategy attacking the search and the warrant. Therefore, the prosecutor inquired of the drug-firearm connection in good faith and properly referenced the drug-firearm connection briefly in his closing argument. *Schutte*, 240 Mich App at 721; *Noble*, 238 Mich App at 660-661. Again, Reid need not have objected to the general drug-firearm testimony or the prosecutor's isolated closing argument reference to the connection. *Mack*, 265 Mich App at 130. Even if the drug-firearm connection testimony lacked relevance to this case, no reasonable likelihood exists that the prosecutor's questions and closing argument reference, or Reid's neglect to object thereto, affected the outcome of defendant's trial given their isolated nature, the absence of any prosecutorial linkage of the drugs-firearms connection to the facts of this case, and the ample properly admitted evidence of defendant's guilt. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *Solmonson*, 261 Mich App at 663-664.

Regarding defendant's complaint relating to officer-expressed fears of a potential shootout while executing the search warrant at 1037 Patricia, defendant points to the following

exchanges that took place during prosecutor questioning of two officers about a briefing before execution of the warrant:

> *Prosecutor*: Do you know if there was any material passed around indicating who [defendant] was?
>
> *Special Agent Bradley Boyle*: Yes. There was an OPS plan, which is an operational plan, which has basically what's supposed to occur during the operation, what we're there for, arrest, search warrant, whatever it may be. And then all his identifiers, photograph, matches to the address and such items.
>
> *Prosecutor*: In fact you folks even talked about what's he [sic] quickest route to a hospital, those kinds of things, don't you take those into account?
>
> *Special Agent Boyle*: Correct
>
> * * *
>
> *Prosecutor*: And is there a debriefing or briefing session that takes place that you share with the members of the crew?
>
> *Officer Bryant*: Yes. I completed an operations plan. Once that operations plan was—
>
> *Prosecutor*: What's an operations plan? What is that?
>
> *Officer Bryant*: Operations plan is a plan of your operations. In that plan you . . . describe what you're doing that day, which would be search warrant. You also list the seller, if you have it. You also list the location of the briefing. You list the area of the closest hospital in the event that anyone gets injured. You also list job assignments, like individuals that are assigned to certain jobs . . . .
>
> * * *
>
> In this case, I brief [sic] all the officers on the actual location, the description of the address of the two streets that falls in between. I gave each individual officer their particular assignment that they would be doing that day. I assigned some to surveillance, I assigned some to the takedown, and I assigned officers to do the entry of the location. And I also assigned the officers to do the perimeter of that location.
>
> I advised officers of the nearest hospital in case we are running up to the site or broaching the home if any officer were shot or injured. I designated officers that would convey them to the hospital. I also described the quickest route to get to the hospital in the event that one of us were [sic] injured. . . .

These operational protocol inquiries apparently comprised a part of the prosecutor's appropriate overall effort to place before the jury the regular nature of the search of 1037 Patricia, the regularity of which the defense vigorously contested. *Noble*, 238 Mich App at 660-661. Reid

need not have objected to the prosecutor's brief and appropriate reference to the operational protocols. *Mack*, 265 Mich App at 130. Even if the general operational plan discussion had no relevance to this case, the references to the potential injury portion of the plan occasioned no reasonable likelihood of a different outcome at defendant's trial given their abbreviated nature and the absence of any suggestion of record that the officers anticipated or feared gunfire from defendant himself in this case, and the ample properly admitted evidence of defendant's guilt. *Carines*, 460 Mich at 763; *Solmonson*, 261 Mich App at 663-664.

4. DEFENSE COUNSEL'S ELICITATION OF TESTIMONY REGARDING DEFENDANT'S CRIMINAL HISTORY & CONFIDENTIAL INFORMANT HEARSAY

Defendant further contends that Reid twice elicited highly prejudicial trial testimony from Officer Bryant. First, defendant identifies an inquiry by Reid about whether Officer Bryant saw the information on defendant's driver's license. Reid had to pose the question several times before he could prompt Officer Bryant to respond that defendant's license did not identify his address as 1037 Patricia. In response to one of Reid's repetitions of the question, "Did you ever see . . . his driver's license[,]" Officer Bryant answered, "I retrieved all that information from the computer prior to executing the search warrant. I had his whole criminal history, everything." The record shows that Reid did not knowingly elicit any reference to defendant's criminal history, only that he repeatedly sought to present to the jury the information that defendant's license listed "an address on Liddesdale," which was highly relevant to the defense theory that defendant no longer lived at 1037 Patricia. Reid thus was pursuing a reasonable trial strategy when Officer Bryant injected the unresponsive information that he had access to defendant's "whole criminal history." Furthermore, no reasonable likelihood exists that the nonspecific criminal history reference altered the outcome of defendant's trial, especially in light of defendant's stipulation that he had a criminal history and the properly admitted evidence of his guilt.

Defendant also criticizes Reid for asking Officer Bryant, "So you've indicated you had some information that someone was sell [sic] drugs out of . . . 1037 Patricia; is that right?" According to defendant, the question invited Bryant's damning response, "I received information that [defendant] was selling drugs out of 1037 Patricia and that he was packaging additional narcotics for street sells [sic]." Defendant suggests that Officer Bryant's response qualified as highly prejudicial because "[u]p to that point, neither the prosecutor in his opening statement nor the witnesses had actually said that it was [defendant] who was selling drugs at 1037 Patricia." Again, the challenged portion of Officer Bryant's response to Reid's inquiry was not responsive to the question asked. Moreover, no reasonable likelihood exists that this mention of defendant dealing drugs altered the outcome of defendant's trial because (1) Officer Bryant had just testified on direct examination repeatedly and with certainty that on November 1, 2007, he watched defendant engage in two suspicious transactions with brief visitors to 1037 Patricia, which Officer Bryant viewed as apparent narcotic transactions in his experience and training; and (2) other properly admitted evidence connected defendant to 1037 Patricia, including the photograph of defendant and mail bearing his name.

5. DENIGRATION OF DEFENSE COUNSEL

Defendant insists that Reid should have objected to prosecutorial misconduct in the form of denigration of the defense. Our review of the prosecutor's closing argument reveals that it

plainly runs afoul of the well-accepted principle that "[a] prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury." *Watson*, 245 Mich App at 592. In addition to characterizing three aspects of the defense focus at trial as "red herrings," the prosecutor impermissibly expressed three times his view that these topics amounted to a defense attempt "to distract you from what is important in this case." And, as in *Unger*, 278 Mich App at 238, the challenged prosecutorial statements did not occur in a responsive rebuttal argument, but in the prosecutor's initial closing argument. Although we condemn the prosecutor's impermissible statements, the trial court cautioned the jury that the attorneys' "statements and their arguments to you are not evidence," and, "You should accept things that lawyers said that are supported by the evidence or your own common sense and general knowledge," which instructions the "jurors are presumed to follow." *Id*. at 237. In light of the cautionary instruction, the relatively brief segment of improper prosecutorial argument, and the properly admitted evidence of defendant's guilt, we cannot conclude that any reasonable probability exists that the improper argument altered the outcome of defendant's trial. In other words, no plain error affecting defendant's substantial rights arose from the prosecutorial misconduct, and Reid did not render ineffective assistance of counsel by failing to object to the improper argument. *Carines*, 460 Mich at 763; *Solmonson*, 261 Mich App at 663-664.

6. LIMITING INSTRUCTION

With regard to ineffective assistance of counsel, defendant lastly urges that Reid was ineffective for neglecting to request a limiting instruction concerning defendant's stipulation that he had a prior felony conviction, "especially . . . where . . . defendant took the witness stand so that his credibility is at issue." The stipulation the parties placed on the record read, "Both parties, . . . defendant and his counsel of record, Daniel Reid, and the People of the State of Michigan stipulate that . . . defendant, . . . *for the purpose of the charge of felon in possession of a firearm*, has been convicted of a felony." (Emphasis added). The stipulation by its terms plainly reflects that the felony conviction concession only related to the felon in possession charge. Additionally, the trial court properly informed the jury of the considerations relevant in assessing witness credibility, consistent with CJI2d 3.6. Defendant has not offered any authority for the specific proposition that a further limiting instruction was required under the circumstances of this case. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000) (noting that an appellant's failure to cite controlling authority amounts to abandonment of an appellate claim). In conclusion, we detect no objectively unreasonable conduct by Reid to the extent that he did not seek further instruction, and no reasonable likelihood that the result of defendant's trial would have differed if the trial court had read the jury additional instruction in this regard.

7. IMMORAL ACT EVIDENCE

In a final appellate claim, defendant characterizes as misconduct that the "prosecution brought out that the woman depicted in the photo sitting on . . . defendant's lap in . . . [an exhibit] was not his wife." In defendant's estimation, the prosecutor's revelation portrayed him "as a bad man, one lacking in morals." The challenged question took place during the prosecutor's cross-examination of Richard Kinney, who testified on direct examination that he had owned 1037 Patricia for eight years, and rented the house to defendant for a period ending sometime in 2006. Reid introduced into evidence three pieces of mail that Kinney averred belonged to defendant's successor tenant, Kevin Trotter, which Kinney discovered inside 1037

Patricia when cleaning after the November 2, 2007 police raid. On cross-examination, the prosecutor brought up the topic of Kinney's rental property cleaning habits; Kinney agreed that he also would have cleaned 1037 Patricia after defendant left in 2006, and when the prosecutor next showed Kinney the photograph of defendant that police found inside 1037 Patricia, Kinney denied having previously seen the photograph. The prosecutor's questions of Kinney about the photograph had relevance toward undermining the defense position at trial that defendant had vacated 1037 Patricia well before November 2, 2007, and had left the photograph behind. *Noble*, 238 Mich App at 660-661. Moreover, contrary to defendant's complaints on appeal, the prosecutor's several questions about the photograph of defendant and a female not his wife simply gave rise to no reasonable inference that defendant had embarked on an illicit relationship.

Affirmed.

/s/ Jane E. Markey
/s/ Brian K. Zahra
/s/ Elizabeth L. Gleicher