STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 23, 2012
v BRADLEY ALAN WOLFBAUER, Defendant-Appellant.	No. 298949 Oakland Circuit Court LC No. 2010-230414-FH

Before: MURRAY, P.J., and FORT HOOD and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of operating a motor vehicle while intoxicated (OWI), third offense, MCL 257.625(1) and (9), and driving with a suspended license (DWSL), second or subsequent offense, MCL 257.904. He was sentenced as a second habitual offender, MCL 769.10, to five years' probation, with the first 300 days to be served in jail for the OWI conviction, and a concurrent jail term of 300 days for the DWSL conviction. We affirm defendant's convictions and sentences, but remand for correction of a clerical error in the judgment of sentence.

I. BACKGROUND

Defendant's convictions arise from an early morning traffic stop on Woodward Avenue in Berkley. Police Officer Robert Beatty testified that he observed defendant's car drift over the lane markers three times before he initiated a traffic stop. After stopping defendant's vehicle, the officer smelled intoxicants emanating from the vehicle and observed that defendant's eyes were red and watery. Defendant refused to perform any field sobriety tests and also refused a chemical test at the police station. Pursuant to a search warrant, defendant's blood was drawn and revealed a blood alcohol content of .147. The defense argued that defendant was not intoxicated, the officer's testimony regarding defendant's driving was not credible, and the results of the blood test were not reliable. The jury convicted defendant on both counts, and defendant now appeals as of right.

II. ANALYSIS

A. MOTION TO SUPPRESS EVIDENCE

Defendant first argues[1] that the traffic stop was invalid and that the trial court erred in denying his motion to suppress evidence seized as a result of the stop. When reviewing a motion to suppress evidence, we review the trial court's findings of fact for clear error and review its ultimate decision whether to suppress the evidence de novo. *People v Hyde*, 285 Mich App 428, 438; 775 NW2d 833 (2009). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006).

The United States and the Michigan Constitutions both prohibit unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. In order to lawfully stop a vehicle, a police officer must have an articulable and reasonable suspicion that a violation of the law is occurring, which must be evaluated "on a case-by-case basis . . . under the totality of the circumstances, and . . . based on common sense." *People v Dillon*, __ Mich App __; __ NW2d __ (Docket No. 303083, issued May 15, 2012), slip op, p 2. Giving deference to the trial court's determination that the officer's testimony was credible, MCR 2.613(C), defendant has not demonstrated that the trial court's findings were clearly erroneous. After hearing testimony from the officer who conducted the traffic stop, and viewing a video recording from the officer's patrol car, the trial court found that the officer's observation of a traffic violation provided sufficient grounds to justify the traffic stop.

Facts presented at the hearing support the trial court's findings. Specifically, officer Robert Beatty testified that while traveling on Woodward Avenue at approximately 1:30 a.m., he observed defendant's vehicle cross the lane dividers two times. The officer testified that he paced defendant traveling up to 10 miles over the posted speed limit of 45 miles per hour and then observed defendant's vehicle cross the lane dividers a third time before he initiated the traffic stop. Although this scenario arguably shows that more than one traffic violation occurred, an actual traffic violation need not be proven. *People v Fisher*, 463 Mich 881, 882; 617 NW2d 37 (2000) (CORRIGAN, J., concurring). We conclude that the trial court did not err in finding that Officer Beatty had reasonable suspicion that defendant violated MCL 257.642(1)(a), which requires a driver traveling on a divided roadway to remain "entirely within a single lane" and

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[1] Defendant's 50-page brief on appeal contains ten extra pages (for a total of 60 pages) of argument under the guise of endnotes, and thus is not in conformity with our court rules. MCR 7.212(B) expressly states that "briefs are limited to 50 pages double-spaced, exclusive of tables, indexes, and appendixes[,]" and endnotes are not permitted. Hence, because endnotes are not excluded from the page limitation, defendant submitted a 60-page nonconforming brief. And, the endnotes are not limited to citations, but include a great deal of substantive argument. We caution defense counsel that a future brief like this one will be stricken. MCR 7.212(I).

Likewise, since oral argument by the prosecutor, defendant has filed three supplemental authorities. Not one case cited is from Michigan, three sister state cases simply reiterate what defendant claims is "long standing precedent," and one other foreign jurisdiction decision is unpublished. This is not permitted. MCR 7.212(F) limits supplemental authorities to *published* "authority."

MCL 257.648, which requires a driver to signal before changing lanes.[2] Because Officer Beatty had reasonable suspicion to believe that defendant was in violation of a traffic law, the stop was constitutionally valid. *Dillon*, __ Mich App at __ (slip op at 2). Therefore, the trial court did not err in denying defendant's motion to suppress.[3]

B. MOTION TO QUASH THE SEARCH WARRANT

We likewise reject defendant's argument that the trial court erred in denying his motion to quash the search warrant. Defendant contends that Officer Beatty misrepresented in the search warrant affidavit that he performed a quick HGN (horizontal gaze nystagmus) test. A magistrate's determination of probable cause is not reviewed de novo, but instead "should be paid great deference by reviewing courts." *People v Keller*, 479 Mich 467, 474; 739 NW2d 505 (2007) (quotations and citations omitted).

A search warrant may not issue unless probable cause exists to justify the search. US Const, Am IV; Const 1963, art 1, § 11; MCL 780.651(1). "Probable cause to issue a search warrant exists where there is a 'substantial basis' for inferring a 'fair probability' that contraband or evidence of a crime will be found in a particular place." *People v Kazmierczak*, 461 Mich 411, 417-418; 605 NW2d 667 (2000). The magistrate's findings of probable cause must be based on the facts related within the affidavit. MCL 780.653; *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001). In assessing a magistrate's decision with regard to probable cause, the search warrant and underlying affidavit are to be read in a commonsense and realistic manner. *People v Russo*, 439 Mich 584, 604; 487 NW2d 698 (1992). "Affording deference to the magistrate's decision simply requires that reviewing courts ensure that there is a substantial basis for the magistrate's conclusion that there is a 'fair probability that contraband or evidence of a crime will be found in a particular place.'" *Id.* (quotations and citation omitted). "The defendant has the burden of showing, by a preponderance of the evidence, that the affiant knowingly and intentionally, or with a reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to the finding of probable cause." *Ulman*, 244 Mich App at 510.

In this case, defendant has not established that Officer Beatty inserted a false statement or misrepresentation by averring that he performed a "quick HGN" test at the scene. In the affidavit, Officer Beatty did not suggest that he administered the standardized HGN test and, in fact, stated that defendant "refused" the HGN field sobriety test. As the trial court observed, the officer's statement regarding defendant's refusal to perform an HGN test implicitly informed the

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[2] A violation of either statute is a civil infraction. MCL 257.642(3); MCL 257.648(4).

[3] Contrary to defendant's argument, the trial court was not *required* to also determine whether defendant was speeding. The trial court's conclusion that the officer's observation of defendant violating MCL 257.642(1)(a) and MCL 257.648 justified the traffic stop provided a sufficient basis to deny the motion to suppress. Defendant provides no authority for his contention that the trial court was required to address each of the prosecutor's alternative reasons for upholding the validity of the stop. See *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

magistrate that the "quick HGN test" was not the standardized test. Further, even if there was a misrepresentation, the unchallenged portion of Officer Beatty's affidavit provided a substantial basis for the magistrate to conclude there was a fair probability that a blood test would provide evidence of OWI. The affiant avers that at approximately 1:37 a.m., defendant was operating a vehicle that crossed the lane markers on multiple occasions, thereby committing a traffic violation before being stopped, that defendant had the "odor of intoxicants emanating from his [] breath/person/interior of [his] vehicle," that his eyes were "red/watery," and that he refused to perform any field sobriety tests and chemical testing. Considered together, these factors were adequate to establish probable cause to issue a search warrant for defendant's blood. Therefore, the trial court did not err by denying defendant's motion to quash the search warrant.

C. THE TRIAL COURT'S CONDUCT

Defendant also contends that the trial court improperly gave instructions that invaded the province of the jury, made rulings that denied him his right to present a defense, and improperly denied his motion to adjourn trial. Although defendant objected to the officer's testimony regarding the posted speed limit and sought to present evidence of the statutory speed limits for state trunk highways, he did not object to the trial court's instructions. Therefore, this instructional claim is not preserved for appellate review. Defendant also did not raise the argument that admitting evidence of the speed limit for state trunk highways was necessary to preserve his constitutional right to present a defense, also leaving the constitutional issue unpreserved, because an objection on one ground is insufficient to preserve an appellate challenge based on a different ground. *People v Bulmer*, 256 Mich App 33, 35; 662 NW2d 117 (2003). Because defendant moved to adjourn trial, that issue is preserved.

We review unpreserved instructional and constitutional claims for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). We review a trial court's decision on a motion to adjourn for an abuse of discretion. *People v Steele*, 283 Mich App 472, 484; 769 NW2d 256 (2009). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

1. JURY INSTRUCTIONS

During direct examination, Officer Beatty testified that he was drawn to defendant's vehicle because, among other things, defendant was driving 55 miles per hour where the "posted" speed limit was 45 miles per hour. During the officer's testimony, the trial court instructed the jury as follows:

> All right. Ladies and gentlemen, before [the prosecutor] resumes the questioning of this witness, I just want to clarify a couple of things. You heard some testimony yesterday regarding this officer's stopping of defendant's vehicle. I want to just clarify a couple of things for you. Number one, the reasonableness of the stop is not before you. The Court's already made a determination regarding the reasonableness of the stop. It has found that the stop was reasonable so there isn't any issue that you have to weigh whether or not that stop was reasonable or

> not reasonable, so I want you to just understand that. That's not an issue for you to decide.
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> Number two, you heard some testimony regarding the speed at which the defendant's vehicle was traveling according to this witness' testimony. You heard testimony that this witness had paced the defendant's vehicle as traveling for at least a certain period of time at 55 miles an hour. I want to clarify for you that the limited purpose for which that testimony came in. That testimony did not come in as a piece of evidence that you are to consider regarding whether the defendant was operating under the influence of alcohol. The purpose of that testimony was to try to explain to you why this officer's attention was drawn to that vehicle. You heard testimony that the officer observed the posted speed at 45 miles an hour and that he paced the defendant's vehicle at 55 miles an hour. That testimony only comes in to try to explain to you why this officer ended up having his attention drawn to this vehicle and why he then subsequently had the kind of encounter that he did have with the vehicle, but I want to stress that the fact that the defendant was traveling at that rate of speed when the posted speed was less is not any kind of evidence that he was operating under the influence of alcohol, all right? So I want you to take those instructions and keep them in mind as you consider this case and of course you'll consider those instructions along with the instructions I gave you at the end of the case together as a connected series. Every time I give you some instructions about the law, it all becomes a part of the law that you're going to be applying when you sit down to deliberate at the end of the case.

It is well established that the trial court has a duty to control trial proceedings in the courtroom, and has wide discretion and power in fulfilling that duty. *People v Conley*, 270 Mich App 301, 307; 715 NW2d 377 (2006). The trial court must instruct the jury on the applicable law and fairly present the case to the jury in a comprehensive and understandable manner. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). "Questions of fact are the province of the jury, while questions of law are reserved to the courts. Judges presiding over criminal trials regularly separate legal questions from factual ones, leaving to the jury those issues requiring factual resolution and pertaining to the credibility of witnesses and weight of the evidence." *People v Kolanek*, 491 Mich 382, 411; ___ NW2d ___ (2012). This Court will not reverse where the jury instructions "fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003).

Here, the trial court did not err in removing the issue regarding the reasonableness of the stop from the jury's review. The constitutional questions relevant to the suppression hearing are questions of law. *People v Custer (On Remand)*, 248 Mich App 552, 559; 640 NW2d 576 (2001). The trial court had previously ruled that the traffic stop was reasonable, which was a preliminary finding for allowing evidence of defendant's blood alcohol content at trial. There were no factual findings that the jury needed to make in that regard, and the trial court properly concluded that the issue was not before the jury. As the trial court recognized, it did not instruct the jury that defendant had in fact crossed the lane markers, and the defense was allowed to present evidence and argument that defendant did not cross the lane markers. In closing

argument, defense counsel vehemently argued that Officer Beatty's testimony was not credible, and that defendant had not crossed the lane markers.

Further, the record shows that the purpose of the testimony regarding the posted speed limit was to provide background for one of the reasons why Officer Beatty was drawn to defendant's vehicle. Defendant objected to the testimony regarding the "posted" speed limit, sought to introduce evidence regarding the legally enforceable speed limit on a state trunk line highway, and requested that the trial court determine whether the legally enforceable speed limit was 45 miles per hour or 55 miles per hour. The trial court adequately addressed defendant's concern that the jury might consider the testimony that he was speeding as evidence that he committed OWI by instructing the jury that it could not consider the evidence to determine whether defendant was operating his vehicle under the influence of alcohol. The court did not remove from the jury any of the elements of the crime with which defendant was charged. Thus, the trial court's instructions did not invade the province of the jury and, accordingly, defendant has not demonstrated a plain error.

2. DENIAL OF THE RIGHT TO PRESENT A DEFENSE

Although a defendant has a constitutional right to present a defense and to confront his accusers, US Const, Am VI; Const 1963, art 1, § 20; *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993), he must still comply with procedural and evidentiary rules established to assure fairness and reliability in the verdict, see *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984); *People v Arenda*, 416 Mich 1, 8; 330 NW2d 814 (1982). In this case, the trial court did not preclude defendant from presenting evidence to challenge the officer's credibility, but rather precluded evidence of a collateral matter that was not relevant to the charges against defendant. Defendant did not establish that, despite the posted speed limit on Woodward Avenue, the statute or other proposed documents on the speed limit for state trunk highways had any tendency to make his culpability for OWI more or less probable than it would be without the evidence. MRE 401.[4] As previously indicated, the issue of defendant's speed was not before the jury and was offered only as background. The trial court did not preclude defendant from otherwise presenting a defense or challenging Officer Beatty's credibility, and permitted defendant to cross-examine the officer about his actions surrounding his arrest of defendant. Accordingly, the trial court did not violate defendant's constitutional right to present a defense.

3. DENIAL OF AN ADJOURNMENT

"No adjournments, continuances or delays of criminal causes shall be granted by any court except for good cause shown . . . ." MCL 768.2. When deciding whether the trial court abused its discretion in granting an adjournment, this Court considers whether the defendant asserted a constitutional right, had a legitimate reason for asserting the right, had been negligent, and had requested previous adjournments. *People v Lawton*, 196 Mich App 341, 348; 492

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[4] MRE 401 provides that relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

NW2d 810 (1992). A defendant must also show prejudice as a result of the trial court's alleged abuse of discretion in denying an adjournment. *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000).

Defendant did not establish that good cause for an adjournment existed, or that he was actually prejudiced by the lack of an adjournment. On the first day of trial, defendant moved for an adjournment, arguing that he had only recently received the transcripts from an evidentiary hearing and the trial court's opinion denying his motions to quash the search warrant and to suppress evidence and, therefore, he needed time to review those items in order to file follow-up motions and seek clarification of the court's opinion. However, defense counsel was present at the evidentiary hearing, and received the court's opinion nearly a week before trial. The facts and opinion regarding the motions to quash the search warrant and to suppress the evidence were not overly complex. Defendant did, in fact, file a motion for reconsideration less than a week after receiving the transcripts, which the trial court denied. Defendant has failed to make any valid claims of prejudice and, other than filing his motion for reconsideration before trial actually commenced, he has failed to indicate what he would have done differently if the defense had additional time to review the transcripts of the evidentiary hearing. Consequently, the trial court did not abuse its discretion in denying defendant's motion to adjourn.

D. THE PROSECUTOR'S CONDUCT

Defendant next argues that he was denied a fair trial by the prosecutor's remarks during closing argument and by the prosecutor's discovery violations. Defendant preserved the discovery issue by objecting to the prosecutor failing to provide certain requested discovery. But, defendant did not object to the prosecutor's remarks during closing argument, so that issue is unpreserved.

We review a preserved claim of prosecutorial misconduct case by case, examining the challenged conduct in context to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002). We review an unpreserved claim of prosecutorial misconduct for plain error affecting the defendant's substantial rights. *Carines*, 460 Mich at 763-764. We will not reverse if the alleged prejudicial effect of the prosecutor's conduct could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

1. THE PROSECUTOR'S REMARKS

Defendant argues that the prosecutor impermissibly shifted the burden of proof by referencing defendant's silence during his closing argument. Prosecutors are afforded great latitude when arguing at trial. *People v Fyda*, 288 Mich App 446, 461; 793 NW2d 712 (2010). They may argue the evidence and all reasonable inferences that arise from the evidence as it relates to their theory of the case, and they need not state their inferences in the blandest possible language. *Bahoda*, 448 Mich at 282; *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). Although prosecutors may not imply that a defendant must prove something or present a reasonable explanation, *People v Guenther*, 188 Mich App 174, 180; 469 NW2d 59 (1991), once

a defendant advances a theory, argument with regard to the inferences created does not shift the burden of proof, *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998).

The prosecutor made the following remark during closing argument:

> Does it make any sense that that man who you've seen the video on now several times would not say a thing to the officer who's got him stopped on the side of the road about hey, listen, you know, I've been—inhaling fumes all day, I'm not with it today, you know what, you might have seen me cross those lane dividers five times because I've been so involved in my job that I am just, I'm drunk because of it. Did you see that? No, of course not. It doesn't make any sense.

Viewed in context, the prosecutor's remark was part of a permissible argument that was focused on countering defendant's claim that he was not intoxicated, and providing reasons why defendant's claim that his blood alcohol content and appearance were caused by his exposure to work-related chemicals should not be believed. During trial, defendant played the patrol car video recording, which showed his interaction with Officer Beatty during the traffic stop. Defendant denied drinking several times. At trial, defendant presented one of his employees, who testified about the nature of defendant's construction work, which involved inhaling products containing alcohol, and that defendant's vehicle contained those work supplies, including denatured alcohol that has a "very strong odor." Defendant also presented an expert in toxicology, who testified that there are products that people use daily that could have the same smell as intoxicants and cause watery and red eyes. Based on this testimony, defense counsel argued in closing that there were items in defendant's vehicle that would emanate odors, that the officer failed to itemize those items, and that the odor was still present when the employee retrieved defendant's vehicle two days after the traffic stop. The prosecutor's argument, which seemingly urged the jurors to use their common sense in evaluating the evidence, was responsive to the theories presented at trial and, viewed in context, was not improper.

Further, a timely objection could have cured any perceived prejudice by obtaining an appropriate cautionary instruction. See *Watson*, 245 Mich App at 586. Indeed, even without an objection, the trial court instructed the jury that the lawyers' statements and arguments were not evidence, that defendant was not required to offer any evidence or prove his innocence, and that the prosecution was required to prove the elements of the crimes beyond a reasonable doubt. These instructions were sufficient to protect defendant's substantial rights. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Additionally, defendant asserts that the prosecutor impermissibly argued facts not in evidence when he stated that defendant had crossed the line marker "five times." A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). We agree that there was no evidence to support the prosecutor's statement that defendant crossed the lane markers five times. Thus, defendant has established a plain error. As previously indicated, however, defendant must also establish that his substantial rights were affected. *Carines*, 460 Mich at 763-764. Defendant bears the burden of showing actual prejudice, *People v Pipes*, 475 Mich 267, 274; 715 NW2d

290 (2006), and reversal is only warranted if the error resulted in the conviction of an actually innocent defendant or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of the defendant's innocence, *Carines*, 460 Mich at 763-764.

In the cited excerpt the prosecutor was not discussing how many times defendant supposedly crossed the lane dividers. Throughout trial, the testimony was consistent that Officer Beatty believed that defendant crossed the lane dividers only three times. Given the officer's testimony and the trial court's instructions that the lawyers' statements and arguments are not evidence, there is no reasonable likelihood that the prosecutor's improper statement caused defendant's conviction. Defendant is not entitled to a new trial based on the prosecutor's remarks.

2. DISCOVERY VIOLATIONS

Defendant next argues that the prosecutor denied him a fair trial when he "engaged in discovery violations." "Criminal defendants do not have general rights to discovery." *Stanaway*, 446 Mich at 680. However, the prosecution is required by due process to turn over any evidence that is favorable to the defendant or that raises a reasonable doubt about the defendant's guilt. *Id.* at 666; *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998), citing *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). In the absence of "a showing of suppression of evidence, intentional misconduct, or bad faith," due process does not require that the prosecution seek and find exculpatory evidence for a defendant's benefit. See *People v Coy*, 258 Mich App 1, 21; 669 NW2d 831 (2003). Although this Court generally reviews claims of prosecutorial misconduct de novo, *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001), discovery in criminal cases is left to the discretion of the trial court, *Stanaway*, 446 Mich at 680.

During the trial court proceedings defendant requested, among numerous other items, all documents regarding the manufacturer of the blood kit and the packaging from the blood kit. On appeal, defendant notes that he raised the issue of discovery in the trial court, but fails to mention that, after a lengthy discussion, the trial court ruled that there was "no discovery abuse in this case" because the discovery requests were responded to by the prosecutor and the prosecution was under no obligation to obtain information not in its possession. The trial court also found the blood kit that was used to collect defendant's blood was destroyed and that

> it's entirely speculative that there be anything exculpatory that would flow from finding out anything about this blood kit or who the manufacturer was or receipt or invoice numbers or purchase orders or date of receipt or method of storage. We haven't heard any kind of testimony that would suggest that any of that information would have been of assistance to the defense here.

We find no basis in the record for concluding that the trial court's decision was an abuse of discretion. There is no basis for finding any bad faith or intentional misconduct by the prosecutor. Indeed, defendant's argument does not directly address the propriety of the trial court's ruling and appears to confuse the prosecutor's duty to disclose favorable evidence with a duty to develop evidence for a defendant. As previously indicated, the prosecution is not required to seek and find exculpatory evidence for a defendant's benefit. See *Coy*, 258 Mich

App at 21. Further, defendant has not shown anything more than speculation that the requested materials, if they existed, may have made a difference in the outcome of the trial. Defendant is not entitled to a new trial based on the prosecutor's conduct.

E. EQUAL PROTECTION

In his next argument, defendant seems to suggest that he was singled out when his motion to suppress evidence was denied, which led to his prosecution in violation of the Equal Protection Clause. US Const, Am XIV; Const 1963, art 1, § 2. Because defendant did not raise this claim below, we review this unpreserved constitutional claim for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764.

A defendant claiming a violation of equal protection must show that he was "'singled' out for prosecution while others similarly situated were not prosecuted for the same conduct." *In re Hawley*, 238 Mich App 509, 513; 606 NW2d 50 (1999) (quotations and citation omitted). Selective enforcement is not, by itself, a constitutional violation. *People v Monroe*, 127 Mich App 817, 819; 339 NW2d 260 (1983). The defendant must also show that the "discriminatory selection in prosecution was based on an impermissible ground such as race, sex, religion or the exercise of a fundamental right." *Hawley*, 238 Mich App at 513 (quotations and citation omitted). Defendant has not presented any evidence to this Court that he was singled out for prosecution while other similarly situated violators were ignored. Moreover, he has not demonstrated that any supposed selection was based on an unjustifiable classification. Therefore, this argument is meritless.

F. DUE PROCESS OF LAW

Defendant next argues that he was denied his right to due process of law by several "violations of statutory or procedural rules," an argument defendant failed to assert below that is reviewed for plain error affecting his substantial rights. *Carines*, 460 Mich at 763-764.

According to the United States and Michigan constitutions, the government cannot deprive an individual of life, liberty or property without due process of law. US Const, Ams V & XIV; Const 1963, art 1, § 17. Despite the language of the clauses themselves, there are two components to the due process clause, procedural and substantive. *Jenkins v Rock Hill Local Sch Dist*, 513 F3d 580, 590 (CA 6, 2008). Procedural due process requires notice and a meaningful opportunity to be heard before an impartial decision maker, while substantive due process is violated when there is an arbitrary deprivation of a liberty or property interest. *In re Beck*, 287 Mich App 400, 401-402; 788 NW2d 697 (2010) aff'd on other grounds 488 Mich 6 (2010). In a substantive due process claim, the deprivation of the fundamental right[5] must be so arbitrary that, in a constitutional sense, it shocks the conscience. *Id*. at 402.

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[5] "The one theme that links the Court's substantive due process precedents together is their lack of a guiding principle to distinguish 'fundamental' rights that warrant protection from nonfundamental rights that do not." *McDonald v Chicago*, 561 US __, __; 130 S Ct 3020, 3062;

Defendant argues that due process was violated when he was not personally served a copy of the municipal civil infraction by a peace officer, as required by MCL 600.8707, and when defendant's demand for an independent blood test conducted by a person of his own choosing was denied, as required by MCL 257.625a(6)(b)(i). Additionally, defendant asserts that due process was violated when the trial court failed to follow the Michigan Rules of Evidence by allowing Officer Beatty to testify that he performed a "quick" HGN test, even though no HGN test was performed, and by permitting the blood results into evidence when the chain of custody was broken. However, defendant fails to articulate whether he is claiming a violation of procedural or substantive due process. Hence, we consider this argument abandoned on appeal. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Regardless, our review of the record does not reveal any due process violation. Although defendant alleges that he was not provided a copy of the warrant at the time of its execution, and that the officer failed to advise him of the authority and reason for his arrest, defendant fails to cite any applicable legal basis for this argument. As the appellant, defendant is required to do more than merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *Kelly*, 231 Mich App at 640-641. Defendant's argument that he was denied his right to an independent blood test from a person of his choosing is misplaced because MCL 257.625a(6)(b)(i) only affords an arrestee the right to an independent chemical test if the arrestee submits to a blood test at an officer's request. Furthermore, the officer's reference to a quick HGN test was properly used by the prosecutor and the trial court gave a cautionary instruction to the jury concerning the proper use of the evidence. MRE 402; MRE 403. Finally, defendant's assertion that the chain of custody was broken is without merit because the chain of custody was substantially complete, and an adequate foundation for the admission of defendant's blood draw was established. *People v White*, 208 Mich App 126, 132-133; 527 NW2d 34 (1994). Thus, defendant has not demonstrated plain error.

G. DOUBLE JEOPARDY

Defendant contends that if this Court reverses his OWI conviction, double jeopardy prohibits a retrial because the trial court erroneous instructed the jury, and thus, the jury's verdict could be based on the erroneous jury instruction. Defendant did not raise this issue below, thus, we review it for plain error. *People v Matuszak*, 263 Mich App 42, 47; 687 NW2d 342 (2004). Defendant's argument must fail. First, because we have affirmed defendant's OWI conviction, this issue is moot. *People v Briseno*, 211 Mich App 11, 17; 535 NW2d 559 (1995) ("Where a subsequent even renders it impossible for this Court to fashion a remedy, the issue becomes moot."). Additionally, even if this issue was not moot, defendant has failed to show plain error. As previously discussed, the trial court's instructions to the jury regarding the reasonableness of the stop were proper. *Gonzalez*, 256 Mich App at 225. Furthermore, this Court's reversal of a conviction does not preclude a retrial. See *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004) (double jeopardy protects the accused from a second trial on the same offense after an acquittal or conviction and against multiple punishments for the same offense).

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177 L Ed 2d 894 (2010)(THOMAS, J., concurring). Defendant has done nothing to establish that any of the statutory rights asserted are granted constitutional protection.

H. THE JUDGMENT OF SENTENCE

The judgment of sentence erroneously identifies defendant's conviction as "OUIL," third offense, and lists the relevant statutory citation as MCL 257.625(6)(d). Defendant was actually convicted of OWI, contrary to MCL 257.625(1) and (9). Accordingly, we remand this case to the trial court for the ministerial task of correcting this clerical error in the judgment of sentence. MCR 6.435(A); MCR 7.216(A)(7).

Affirmed, but remanded for correction of the judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello