STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 11, 2012
V	No. 306411 Jackson Circuit Court
JEROME FRANCIS JONES, Defendant-Appellant.	LC No. 10-006273-FH

Before: O'CONNELL, P.J., and CAVANAGH and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of possession with intent to deliver less than 50 grams of a controlled substance, MCL 333.7401(2)(a)(4), resisting or obstructing a police officer, MCL 750.81d(1), maintaining a drug house, MCL 333.7405(1)(d), tampering with evidence, MCL 750.483a(6)(a), and possession of marijuana, MCL 333.7403(2)(d). Because the evidence was sufficient to support defendant's convictions, the improperly admitted drug profile evidence did not affect the outcome of the proceedings, defendant's remaining claims of evidentiary error lack merit, defendant was not denied his constitutional rights to confrontation or to the effective assistance of counsel, defendant waived appellate review of his claim of instructional error, and the prosecutor did not commit misconduct, we affirm.

I. SUFFICIENCY OF THE EVIDENCE

We first address defendant's arguments that the evidence was insufficient to support his convictions of possession with intent to deliver a controlled substance, maintaining a drug house, and tampering with evidence. We review de novo challenges to the sufficiency of the evidence. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the prosecution proved the elements of the crime beyond a reasonable doubt. *Id.* Circumstantial evidence and reasonable inferences arising therefrom can constitute satisfactory proof of the elements of an offense. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). We review de novo issues involving statutory interpretation. *People v Kissner*, 292 Mich App 526, 533; 808 NW2d 522 (2011).

Defendant does not claim that he did not possess the plastic baggie containing nine paper packets of heroin and 14 rocks of cocaine that Officer Wesley Stanton retrieved from the toilet

bowl during the police raid of defendant's apartment. Rather, defendant contends that the evidence was insufficient to support his convictions of possession with intent to deliver less than 50 grams of a controlled substance because the prosecution failed to present sufficient evidence of an intent to deliver. A defendant's intent may be inferred from all the facts and circumstances. *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998); see also *People v Wolfe*, 440 Mich 508, 524; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992) (an intent to deliver may be inferred from the quantity of the controlled substance, the manner in which the controlled substance is packaged, and other circumstances surrounding the defendant's arrest). Because of the difficulty of proving a defendant's state of mind, minimal circumstantial evidence of intent is sufficient. *Fetterley*, 229 Mich App at 518.

According to Trooper Steven Temelko, who testified as an expert regarding the use and delivery of narcotics, the nine paper packets were intended for delivery rather than personal use because the amount of powder in each packet was commonly sold for $10 or $20 and an individual user would generally buy only one or two packets at a time. The day before the drug raid, Temelko gave a confidential informant (CI) a prerecorded $20 bill to purchase drugs from defendant. The CI entered defendant's apartment and returned with a packet of heroin similar to the nine paper packets retrieved from the toilet bowl during the raid. Temelko also testified that the 14 cocaine rocks, which were packaged in plastic baggie corners cut from plastic baggies, were intended for delivery because rocks of the same size commonly sold for $20 and an individual user would normally buy a "larger chunk" rather than 14 individual rocks. Temelko also recovered from defendant's pocket an envelope with names and numbers written on it. Temelko testified that he believed that the envelope was a "tally sheet" or a ledger where defendant recorded the names of persons who owed him money for drugs. Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that defendant intended to deliver the cocaine and heroin.[1] Thus, the evidence was sufficient to support defendant's convictions of possession with intent to deliver a controlled substance.

Defendant also argues that the evidence was insufficient to support his conviction of maintaining a drug house because there was no evidence of continuity. Under MCL 333.7405(1)(d), a person "[s]hall not knowingly keep or maintain a . . . dwelling . . . that is used for keeping or selling controlled substances . . . ." In *People v Thompson*, 477 Mich 146, 154; 730 NW2d 708 (2007), our Supreme Court held that "the words 'keep' and 'maintain' both contain an element of continuity." The Court further stated that "[t]he phrase 'keep or maintain' implies usage with some degree of continuity that can be deduced by actual observation of

[1] Although we hold in Issue II that Temelko's drug profile testimony was improperly used as substantive evidence of defendant's guilt, in reviewing the sufficiency of the evidence we must consider all the evidence admitted during trial, even if it was erroneously admitted. *McDaniel v Brown*, 558 US 120; 130 S Ct 665, 672; 175 L Ed 2d 582 (2010). In any event, as discussed in Issue II, the improperly admitted evidence does not warrant reversal because it did not affect the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

repeated acts or circumstantial evidence, such as perhaps a secret compartment or the like, that conduces to the same conclusion." *Id.* at 155.

Defendant does not dispute that a drug transaction involving himself and the CI occurred at the apartment the day before the drug raid. Rather, defendant argues that a single drug transaction does not establish the continuity element. The evidence showed, however, that the day after the drug transaction, the police discovered defendant in his apartment with cocaine and heroin that was packaged for delivery and a tally sheet showing that defendant had engaged in additional drug transactions. This evidence permits the inference that defendant used his apartment for ongoing drug sales. Thus, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that defendant kept or maintained his apartment for keeping or selling narcotics. As such, the prosecution presented sufficient evidence to support defendant's conviction of maintaining a drug house.

Defendant also argues that the prosecution presented insufficient evidence to support his tampering with evidence conviction because, at the time that he attempted to flush the cocaine and heroin down the toilet, no official proceeding had been commenced and there was no guarantee that an official proceeding would be commenced. MCL 750.483a(5)(a) prohibits "tamper[ing] with evidence to be offered in a present *or future* official proceeding." (Emphasis added.) "[T]he term 'proceeding' encompasses the entirety of a lawsuit, from its commencement to its conclusion." *Kissner*, 292 Mich App at 536. *Random House Webster's College Dictionary* (2000) defines the word "future," in pertinent part, as "something that will exist or happen in time to come." Thus, by definition, a future official proceeding is a proceeding that has not yet commenced.

The evidence was sufficient to support defendant's tampering with evidence conviction. At the time that defendant attempted to flush the heroin and cocaine down the toilet, he was handcuffed and had already been arrested. The clear and unambiguous language of MCL 750.483a(5)(a) did not require that an official proceeding already have been commenced. A rationale trier of fact could have reasonably determined that defendant knowingly attempted to dispose of evidence that could be used against him in a future official proceeding. Thus, the evidence, viewed in a light most favorable to the prosecution, was sufficient to support defendant's tampering with evidence conviction. Defendant asserts that allowing his conviction under the circumstances of this case will lead to absurd results because a person could be charged with tampering with evidence if he possesses drugs, decides that he no longer wants to use them, and throws them away. Defendant's argument is misplaced because that is not what occurred in this case. Defendant did not merely decide that he no longer wanted the cocaine and heroin. Rather, after he had been arrested and handcuffed, he attempted to flush the cocaine and heroin down the toilet in order to avoid a police officer discovering the substances on his person. Thus, defendant's argument that his conviction will lead to absurd results lacks merit.

II. EVIDENTIARY ISSUES

Defendant also raises several challenges regarding the evidence admitted during trial. He first argues that he was denied his constitutional right to a fair trial when the prosecution used drug profile evidence as substantive evidence of his guilt. Although defendant objected to Temelko being qualified as an expert, he did not challenge Temelko's testimony on the basis that

it constituted improper drug profile evidence. Because an objection on one ground does not preserve for appellate review a challenge based on a different ground, this issue is unpreserved. See *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). We review unpreserved claims of evidentiary error for plain error affecting the defendant's substantial rights. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003). In order to avoid forfeiture under the plain error rule, a defendant must show that clear or obvious error occurred that affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Drug profile evidence is "an informal compilation of characteristics often displayed by those trafficking in drugs." *People v Hubbard*, 209 Mich App 234, 239; 530 NW2d 130 (1995) (quotation marks and citation omitted); see also *People v Murray*, 234 Mich App 46, 52-53; 593 NW2d 690 (1999) ("Drug profile evidence is essentially a compilation of otherwise innocuous characteristics that many drug dealers exhibit, such as the use of pagers, the carrying of large amounts of cash, and the possession of razor blades and lighters in order to package crack cocaine for sale.") Drug profile evidence may properly be used as background or modus operandi evidence but may not be used as substantive evidence of a defendant's guilt. *Id*. at 54; *Hubbard*, 209 Mich App at 241.

Defendant argues that Temelko's testimony that there was no doubt in his mind that the cocaine and heroin recovered from the toilet bowl belonged to defendant constituted improper drug profile evidence. Defendant's argument lacks merit. The testimony was not drug profile evidence, but rather, when read in context, explained why the baggies were not preserved for fingerprint or DNA analysis. Accordingly, the testimony did not constitute drug profile evidence.

Defendant also argues that Temelko's testimony regarding the tally sheet was improper drug profile evidence. Temelko testified that the envelope found on defendant was a tally sheet or a ledger used by defendant to record the names of people who owed him money for drug transactions. Temelko's testimony constituted plain error because it was clearly or obviously improper. See *Carines*, 460 Mich at 763. The testimony crossed the line from background or modus operandi evidence to substantive evidence of defendant's guilt. An "expert witness should not express his opinion, based on a profile, that the defendant is guilty, nor should he expressly compare the defendant's characteristics to the profile in such a way that guilt is necessarily implied." *Murray*, 234 Mich App at 57. Here, although Temelko properly testified that it is fairly common for a drug dealer to keep a tally sheet to record transactions, he also testified that the envelope recovered from defendant was in fact a tally sheet. Because the testimony necessarily implied defendant's guilt, its admission amounted to plain error.

Defendant also challenges Temelko's testimony that the cocaine and heroin recovered from the toilet bowl were packaged for delivery. Again, the testimony constituted plain error. Temelko testified that the nine paper packets and the 14 cocaine rocks were packaged for delivery rather than for personal use. He explained that the paper packets containing heroin commonly sold for $10 or $20 and that an individual user would buy one or two packets at a time. He also explained that cocaine rocks commonly sold for $20 and that an individual would not normally buy 14 individual rocks, but would instead purchase a "larger chunk." Because Temelko expressed his opinion that defendant was guilty of possession with intent to deliver the substances, his testimony constituted plain error. See *Murray*, 234 Mich App at 57.

Further, defendant challenges Temelko's testimony that it is not unusual for drug dealers not to carry money on them. The prosecution questioned Temelko as follows:

> *Q.* [W]as that prerecorded money that the confidential informant used recovered at the time of the search warrant?
>
> *A.* It was not.
>
> *Q.* Was any money found on [defendant's] person?
>
> *A.* No money was found on [defendant].
>
> *Q.* Based on your training and experience as a trained narcotics officer is it unusual to have somebody involved in the delivery of narcotics not have any money on his or her person?
>
> *A.* None whatsoever.
>
> *Q.* Okay. Do you have, based on your training and experience, how do people involved in the delivery of narcotics, where do they keep their money or how – what do they do with their money based on your training and experience?
>
> *A.* Generally narcotics dealers don't want to keep all their, to say it simply, eggs in one basket. They don't want to everything on them [sic]. What they'll do is they'll either hide it somewhere . . . within the residence or they'll have someone else hold their money. . . .
>
> *Q.* And the only money that was located in the apartment at the time of the execution of the search warrant was located on Pamela Bardsdale, is that correct?
>
> *A.* That is correct.

This testimony amounted to improper drug profile evidence. "[P]oint by point examination of profile characteristics with specific reference to [the defendant] constitutes use of the profile not as background . . . but as substantive evidence that [the defendant] fits the profile and, therefore, must have intended to distribute the cocaine in his possession." *United States v Quigley*, 890 F2d 1019, 1023-1024 (CA 8, 1989). Accordingly, Temelko's testimony constituted plain error.

A defendant bears the burden of proving that plain error affected his substantial rights. *Carines*, 460 Mich at 763. Here, defendant has not shown that Temelko's improper testimony affected his substantial rights because it did not affect the outcome of the proceedings. See *id*. Temelko's testimony that the cocaine and heroin was packaged for delivery rather than for personal use was harmless given defendant's testimony that the drugs did not belong to him. Defendant's defense was not that the drugs were merely for his personal use. As such, Temelko's testimony that they were packaged for delivery had no bearing on defendant's defense. If the jury determined that defendant possessed the cocaine and heroin, there was no reason, based on the testimony, for the jury to conclude that defendant possessed the cocaine and

heroin without an intent to deliver it. Moreover, the prosecution elicited Temelko's testimony that the envelope recovered from defendant was a tally sheet and that it was not unusual that defendant did not have any money on him to show that defendant intended to deliver the cocaine and heroin. Temelko had already testified, however, that the day before the search of defendant's apartment, Temelko conducted a controlled buy using a CI with prerecorded money to purchase drugs from defendant. The CI returned to Temelko's vehicle with a folded paper containing heroin that was similar to the nine paper packets recovered from the toilet bowl. Thus, considering the other evidence admitted during trial, defendant has not shown that Temelko's improper testimony affected the outcome of the proceedings.

Defendant next argues that the trial court erred by allowing the prosecutor to impeach him with his prior armed robbery conviction. We review a preserved challenge to the admission of evidence for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Id.* at 217.

Pursuant to MRE 609, a witness's credibility may be impeached with evidence of a prior conviction under certain circumstances. MRE 609 provides, in relevant part:

> **(a) General Rule.** For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross-examination, and
>
> (1) the crime contained an element of dishonesty or false statement, or
>
> (2) the crime contained an element of theft, and
>
> (A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and
>
> (B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.
>
> **(b) Determining Probative Value and Prejudicial Effect.** For purposes of the probative value determination required by subrule (a)(2)(B), the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. The court must articulate, on the record, the analysis of each factor.

The prior conviction at issue is defendant's 1981 armed robbery conviction. Because armed robbery contains an element of theft, MRE 609(a)(2) was applicable. Defendant argues that the

conviction was inadmissible under MRE 609(a)(2)(B) because it had no probative value given that it occurred more than 30 years before trial and was highly prejudicial.

Although the armed robbery occurred more than 30 years before trial, it satisfied the time requirement of MRE 609(c)[2] because defendant was released from parole in 2005, less than 10 years before trial. Given that armed robbery is primarily an assaultive crime, it has a lower probative value on the issue of credibility than does other theft offenses. See *People v Allen*, 429 Mich 558, 611; 420 NW2d 499 (1988). The dissimilarity of a prior conviction to the charged offenses, however, reduces the prejudicial effect of evidence involving the prior conviction. *People v Meshell*, 265 Mich App 616, 636; 696 NW2d 754 (2005).

In deciding to admit evidence of the armed robbery conviction, the trial court noted that defendant intended to testify and that his credibility would be at issue. The court reasoned as follows:

> It obviously comes down to a question of credibility. I assume the defendant's going to say something different than what the officers have testified to concerning [the cocaine and heroin] that they're contending he took out of his groin area or his underwear, threw in the toilet in this matter, so everything's going to come down to a question of credibility, who to believe, the defendant or the police officers if I'm reading his testimony correctly in this matter.
>
> Under those circumstances the court is satisfied that the probative value is certainly much more than the prejudicial effect based upon the armed robbery.

Whether to admit evidence of the armed robbery in this case was a close question, and the trial court's decision to admit the evidence did not fall outside the range of reasonable and principled outcomes. *Unger*, 278 Mich App at 217; see also *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000) ("[T]he trial court's decision on a close evidentiary question . . . ordinarily cannot be an abuse of discretion.) The trial court determined that the evidence was particularly probative of defendant's credibility given the circumstances of this case. Moreover, the prejudicial effect of the evidence was reduced because of the dissimilarity between the armed robbery and the drug charges at issue. *Meshell*, 265 Mich App at 636. Further, there was no concern that the admission of the evidence would cause defendant to elect not to testify as discussed in MRE 609(b) because defendant had already elected to testify at the time that the trial court ruled on the issue of admissibility. Therefore, the trial court did not abuse its discretion by admitting evidence of defendant's prior armed robbery conviction for impeachment purposes.

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[2] MRE 609(c) provides:

> Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.

In any event, even if the admission of the evidence was erroneous, defendant is not entitled to a new trial. "[A] preserved, nonconstitutional error is not a ground for reversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999) (quotation marks omitted). Here, defendant was also impeached with evidence involving his 2010 uttering and publishing conviction. In addition, the jury was instructed that it could use the prior convictions only to decide whether defendant was a truthful witness. A jury is presumed to follow its instructions. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Because defendant was impeached with another conviction and the jury was properly instructed on the limited use of the prior convictions, it does not affirmatively appear more probable than not that any error in allowing evidence of the armed robbery conviction was outcome determinative. *Lukity*, 460 Mich at 495-496.

Defendant also argues that during his cross-examination the prosecutor improperly described the elements of uttering and publishing. When the prosecutor questioned defendant regarding the elements of his 2010 uttering and publishing conviction, defense counsel objected and the trial court sustained the objection. Thus, defendant did not receive an adverse ruling from which to appeal, leaving this issue unpreserved. See *People v Nash*, 244 Mich App 93, 96; 625 NW2d 87 (2000). We review unpreserved claims of error for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

The prosecutor's question regarding the elements of uttering and publishing did not constitute plain error. When cross-examining a defendant about a prior conviction, a prosecutor must limit the questions to the fact of the conviction and the nature of the crime. *People v Rappuhn*, 390 Mich 266, 274 n 2; 212 NW2d 205 (1973). The prosecutor may not delve into the details or circumstances surrounding the crime. *Id*. Here, the prosecutor did not ask defendant about the details or circumstances surrounding his uttering and publishing conviction. Rather, the prosecutor questioned defendant about the nature of the crime, i.e., whether it involved passing a false, forged, altered or counterfeit check with the intent to injure or defraud. Accordingly, no plain error occurred.

Defendant next argues that the trial court erred by admitting evidence of the controlled drug purchase because it constituted improper other acts evidence under MRE 404(b) and was not admissible under the res gestae exception to MRE 404(b). Because defendant failed to preserve this issue for our review by objecting to the admission of the evidence below, our review is limited to plain error affecting his substantial rights. *Carines*, 460 Mich at 763.

MRE 404(b)(1) precludes the admission of "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." Under the "res gestae" exception to MRE 404(b)(1), "evidence of prior 'bad acts' is admissible where those acts are 'so blended or connected with the (charged offense) that proof of one incidentally involves the other or explains the circumstances of the crime.'" *People v Robinson*, 128 Mich App 338, 340; 340 NW2d 303 (1983), quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978). The admissibility of the evidence in such cases is premised on "the principle that the jury is entitled to hear the complete story[.]" *Id*. (quotation marks and citations omitted.) In this case, evidence regarding the controlled drug purchase was admissible under the res gestae exception because it explained the circumstances of the crimes and allowed the jury to hear the

complete story. The evidence explained why the police executed a search of defendant's apartment and why they expected to find drugs at the apartment. It was also indicative of defendant's intent to sell the drugs and relevant to whether he was guilty of maintaining a drug house. Thus, the evidence was properly admissible under the res gestae exception to MRE 404(b)(1).

Defendant also argues that evidence regarding the controlled drug purchase lacked relevance because the prosecution did not present the testimony of the CI. Defendant's argument is misplaced. Evidence is relevant if it has "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." MRE 401. The prosecution's failure to produce the CI did not render evidence of the controlled drug purchase irrelevant. Rather, the evidence tended to show that defendant was involved in drug trafficking and sold drugs out of his apartment. Thus, the evidence was highly relevant. Defendant contends that without the testimony of the CI, it is merely speculative that defendant sold the CI a controlled substance. Defendant's argument pertains to weight rather than relevance. Although the jury could have doubted or disbelieved Temelko's testimony regarding the controlled purchase, the testimony was not irrelevant simply because the CI did not testify. Accordingly, defendant's argument lacks merit.

Defendant further contends that his right of confrontation was violated when Temelko testified that the CI had told him that the CI would be able to purchase drugs from defendant. Temelko testified as follows:

> *Q.* I had received a phone call from the confidential informant that they could purchase --
>
> *[Defense Counsel]:* Your Honor, I – the – whatever the phone call is.
>
> *[The Court]:* Yeah, we don't want to get into hearsay –
>
> *[The Witness]:* Okay.
>
> *[The Court]:* -- what somebody said.
>
> *By [the Prosecutor]:*
>
> *Q.* Don't tell us what the – what you were told, just tell us – (multiple speakers) –
>
> *A.* I met up with the confidential informant and the confidential informant was searched by Deputy Bretes.
>
> *Q.* Were you given information by the confidential informant about a narcotics investigation?
>
> *A.* Yes, I was.

Although defendant objected when Temelko attempted to testify regarding what the CI had told him on the telephone, the objection was based on hearsay. Because an objection on one ground is insufficient to preserve an appellate challenge based on a different ground, *Stimage*, 202 Mich App at 30, defendant's Confrontation Clause argument is unpreserved. Our review of this issue is therefore limited to plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

"The Confrontation Clause prohibits the admission of all out-of-court testimonial statements unless the declarant was unavailable at trial and the defendant had a prior opportunity for cross-examination." *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007). A statement that a confidential informant makes to the police generally constitutes a testimonial statement. "However, the Confrontation Clause does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted." *Id.* at 10-11. Thus, a statement offered to show its effect on a listener, including a statement offered to show why police officers acted in a certain manner, does not violate the Confrontation Clause. *Id.*

Temelko's initial attempt to testify regarding what the CI had told him was met with an objection by defense counsel. The objection was sustained, and Temelko never completed his statement regarding what the CI had told him. Because the trial court sustained the objection, defendant did not receive an adverse ruling from which he could appeal. See *Nash*, 244 Mich App at 96. Moreover, Temelko's testimony that the CI had given him information about a narcotics investigation was offered to explain why the police set up the controlled drug purchase and was not offered for the truth of the matter asserted. Accordingly, the admission of the testimony did not violate defendant's right of confrontation. *Id*.

Defendant next claims that defense counsel rendered ineffective assistance of counsel by failing to object to Temelko's testimony regarding the controlled drug purchase and the information that the CI provided. Because evidence of the controlled purchase was properly admissible under the res gestae exception to MRE 404(b)(1) and Temelko's testimony regarding the information that the CI had provided was not offered for the truth of the matter asserted, the objections would have been futile. Counsel is not required to make a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Defendant also claims that defense counsel was ineffective for failing to request the identity of the CI. Defendant fails to offer any explanation regarding why counsel should have requested the CI's identity and fails to provide any argument that it would have been helpful to his defense if the identity of the CI had been known. Accordingly, defendant has not established a reasonable probability that, but for counsel's alleged deficient performance, the result of the proceedings would have been different. See *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008).

III. JURY INSTRUCTIONS

Defendant next argues that the trial court erred by failing to instruct the jury on the difference between fact testimony and expert testimony because Temelko testified as both a fact witness and an expert witness. Because defendant expressly approved the trial court's jury instructions, however, he waived appellate review of this issue. A defendant waives any objection to an alleged erroneous instruction by expressly approving the instructions on the

record. *People v Kowalski*, 489 Mich 488, 504; 803 NW2d 200 (2011). Accordingly, defendant waived appellate review of this claim of error.[3]

IV. PROSECUTORIAL MISCONDUCT

Defendant next contends that the prosecutor committed misconduct by asking defendant to comment on the credibility of witnesses and by arguing facts not in evidence. Because defendant did not preserve this issue for our review by objecting to the alleged misconduct below, our review is limited to plain error affecting his substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

Defendant asserts that the prosecutor repeatedly asked him to comment on the credibility of the police officers who testified at trial. It is well established that a prosecutor may not ask a defendant to comment on the credibility of prosecution witnesses. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). A defendant's opinion regarding the credibility of prosecution witnesses is not probative because credibility is to be determined by the trier of fact. *Id*. Here, the prosecutor did not ask defendant to comment on the credibility of the police officers and never asked defendant whether the officers had lied. Rather, where the police officers' testimony differed from defendant's version of events, the prosecutor asked defendant if he knew any reason why the officers would testify as they did. Because the prosecutor did not ask defendant to comment on the officers' credibility, the prosecutor's questioning did not constitute plain error.

Defendant also claims that the prosecutor argued facts not in evidence when he stated during his rebuttal closing argument that no needles, pipes, burn spoons, syringes, or "chore boys" were found in defendant's apartment. A prosecutor may not make a statement of fact that is not supported by the evidence. *People v Schumacher*, 276 Mich App 165, 178; 740 NW2d 534 (2007). A prosecutor's comments, however, must be considered in light of defense counsel's arguments, and an otherwise improper comment may not rise to the level of an error requiring reversal if it was made in response to defense counsel's argument. *Unger*, 278 Mich App at 238. The record shows that defense counsel argued during closing argument that defendant was not a drug dealer because no drug paraphernalia, such as scales, pipes, or packaging material, was found in his apartment. In response to defense counsel's argument, the prosecutor argued that the drugs recovered in the apartment were not for personal use because no pipes, needles, burnt spoons, syringes, or "chore boys" were found in the apartment, which would have been indicative of personal use. Accordingly, it was defendant who first relied on the absence of drug paraphernalia recovered in the apartment. Because the prosecutor merely responded to defense counsel's argument, the prosecutor's comments were not erroneous. See *id*.

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[3] In any event, unlike the trial court in *United States v Lopez-Medina*, 461 F3d 724 (CA 6, 2006), on which defendant relies, the trial court in the instant case instructed the jury regarding how to weigh expert opinion testimony. The court's instructions informed the jury that it was free to reject Temelko's opinions.

Further, defendant's argument that defense counsel rendered ineffective assistance by failing to object to the alleged prosecutorial misconduct lacks merit. As discussed above, the prosecutor did not commit misconduct, and counsel is not ineffective for failing to make a futile objection. *Fike*, 228 Mich App at 182.

V. STANDARD 4 BRIEF

Defendant raises several arguments in his Standard 4 Brief on appeal, some of which were raised in the brief that his attorney filed on his behalf and which we have already addressed. Of the new issues that defendant asserts in his Standard 4 Brief, none has any merit.[4]

Defendant asserts that the prosecutor improperly bolstered the credibility of a witness or witnesses. Because defendant does not identify the witness or witnesses whose credibility was allegedly bolstered or offer any argument regarding how the prosecutor bolstered a witness's credibility, he has abandoned appellate review of this argument. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Similarly, defendant has abandoned his claim that the trial court relied on inaccurate information when it sentenced him because he has failed to identify the alleged inaccurate information on which the trial court relied.

It appears that defendant contends that the evidence was insufficient to support his convictions because there was no evidence of constructive possession and no delivery without a buyer. Contrary to defendant's argument, Officer Stanton testified that he observed defendant pull a plastic baggie from his pants and throw it into the toilet. Thus, a rational trier of fact could have found beyond a reasonable doubt that defendant possessed the cocaine and heroin. *Cline*, 276 Mich App at 642. In addition, actual delivery of a controlled substance to a buyer is not required to prove an intent to deliver. *Stimage*, 202 Mich App at 30.

Defendant argues that he did not receive notice of the tampering with evidence charge until trial. The record fails to support his argument. The record shows that the prosecutor requested at the preliminary examination that the tampering with evidence charge be added and, over defendant's objection, the district court added the charge. Thus, the felony information contained the charge, and defendant had notice of the charge before trial.

Defendant also claims that defense counsel rendered ineffective assistance of counsel by failing to inform him of a plea offer. Because nothing in the record supports defendant's claim, he has failed to establish the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Defendant further asserts that counsel allowed him to be illegally sentenced, failed to file motions to suppress testimonial statements, and failed to conduct discovery. Because defendant fails to elaborate the bases for his claims and indicate how counsel's actions or inactions were deficient, he has failed to show that counsel's performance fell below an objective standard of reasonableness. *Uphaus*, 278 Mich App at 185.

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[4] We note that it is difficult to discern what defendant is arguing in his Standard 4 Brief because the brief is largely incoherent. We address defendant's arguments to the extent that they are decipherable.

Finally, defendant claims that he was entrapped. A defendant is entrapped "if either (1) the police engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances or (2) the police engaged in conduct so reprehensible that it cannot be tolerated." *People v Johnson*, 466 Mich 491, 498; 647 NW2d 480 (2002). There is no entrapment, however, if the police present nothing more than an opportunity to commit a crime. *Id.* Here, Temelko gave the CI prerecorded money and drove the CI to defendant's apartment. Thus, Temelko did nothing more than present defendant with an opportunity to commit a crime. Accordingly, defendant's argument that he was entrapped lacks merit.

Affirmed.

/s/ Peter D. O'Connell
/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio