STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 28, 2006
v	No. 264332 Wayne Circuit Court
GREGORY EUGENE JACKSON, Defendant-Appellant.	LC No. 05-000027-01

Before: Wilder, P.J., and Kelly and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession with intent to deliver 50 to 449 grams of cocaine, MCL 333.7401(2)(a)(iii), and possession of a firearm during the commission of a felony, MCL, 750.227b. Defendant was sentenced to 2 to 20 years' imprisonment for the possession with intent to deliver conviction and a two-year consecutive term of imprisonment for the felony-firearm conviction. Defendant's convictions arise from the discovery of 54.90 grams of cocaine and two guns inside his house during the execution of a search warrant on September 9, 2004. We affirm.

Defendant first contends that the prosecutor improperly argued a fact that had not been placed into evidence. We agree, but find that the error does not require reversal. We review claims of prosecutorial misconduct on a case-by-case basis, examining any remarks in context, to determine if the defendant received a fair and impartial trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). In this case, the trial court sustained defendant's objection at trial when the prosecutor attempted to elicit testimony regarding the confidential informant and controlled buy that led to the issuance of the search warrant. During rebuttal closing argument, however, the prosecutor argued that Redford police officer Brian Jones knew that he would find drugs in defendant's house and that defendant was a drug dealer.

It is clear from the record that Officer Jones never testified at trial that defendant had previously been identified as a drug dealer. Although Officer Jones insinuated that the investigating officers had a reason to search defendant's house, no officer testifying at trial provided any background information to explain that reason. A prosecutor is prohibited from arguing facts not in evidence and mischaracterizing the evidence presented; however, a "prosecutor may argue reasonable inferences from the evidence." *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001), citing *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), and *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). The jury

could reasonably infer that the Redford Police Department had some information leading them to search defendant's house. However, the prosecution presented absolutely no evidence that the officers had information identifying defendant as a drug dealer. Accordingly, we agree with defendant that the prosecutor improperly argued a fact that had not been placed into evidence.

However, the trial court immediately sustained defendant's objection to the prosecutor's statement. Defendant made no further objection and never requested a more specific instruction to ignore the particular comment. At the close of trial, the court instructed the jury that it must base its verdict solely on the evidence properly admitted in this case, including the "sworn testimony of the witnesses, the exhibits and the stipulations," and not the lawyers' statements and questions. Although the prosecutor's comment was improper, the jury was instructed that the comment was not evidence and we presume that the jury followed that edict. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, defendant is not entitled to a new trial.

Defendant next challenges the trial court's failure to suppress the evidence discovered during the execution of the search warrant based on Officer Jones's alleged false statements in the search warrant affidavit. In relation to a motion to suppress, we review a trial court's findings of fact for clear error. *People v Martin*, 271 Mich App 280, 297; 721 NW2d 815 (2006), citing *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005). We review de novo the "trial court's interpretation of the law or the application of a constitutional standard to uncontested facts." *Martin*, *supra* at 297, citing *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001). We also review de novo the trial court's ultimate determination. *People v Williams*, 240 Mich App 316, 319; 614 NW2d 647 (2000).

Before trial, defendant filed a motion to suppress the evidence asserting that Officer Jones falsely stated in the search warrant affidavit that the confidential informant was under "constant and uninterrupted surveillance." Defendant contended that the officers could not have continually kept the informant in their sights because several trees, bushes, and a fence obscure the view of his house. Following the *Franks*[1] hearing, defendant further contended that the officers failed to give an adequate description of the events on the day in question and falsely testified that the informant entered defendant's house through the front door.

Pursuant to MCL 780.653, in issuing a search warrant, "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." "This Court must evaluate the search warrant and underlying affidavit in a common-sense and realistic manner," to "determine whether a reasonably cautious person could have concluded, under the totality of the circumstances, that there was a substantial basis" to support a finding of probable cause. *People v Darwich*, 226 Mich App 635, 637; 575 NW2d 44 (1997). However,

> *Franks*[, *supra* at 155-156], requires that if false statements are made in an affidavit in support of a search warrant, evidence obtained pursuant to the warrant must be suppressed if the false information was necessary to a finding of probable

[1] *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978).

> cause. In order to prevail on a motion to suppress the evidence obtained pursuant to a search warrant procured with alleged false information, the defendant must show by a preponderance of the evidence that the affiant had knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to a finding of probable cause. *Id.* [at] 171-172; *People v Williams*, 134 Mich App 639, 643; 351 NW2d 878 (1984) . . . . [*People v Stumpf*, 196 Mich App 218, 224; 492 NW2d 795 (1992), quoted in *Williams, supra* at 319-320, and *People v Melotik*, 221 Mich App 190, 200; 561 NW2d 453 (1997).]

Where the defendant makes the required showing, the evidence obtained as a result of the search warrant must be excluded as "fruits" of an illegal search. *People v Reid*, 420 Mich 326, 336; 362 NW2d 655 (1984), quoting *Franks, supra* at 155-156.

First, we find that defendant's challenge to the veracity of the statement that the informant entered through the front door lacks merit. Defendant admitted at the *Franks* hearing that he could open the front door from the inside and, therefore, left open the possibility that he had allowed others to enter through the front door in the past. Officer Jones and Redford police officer John Butler both testified that they saw the informant approach the front door of defendant's house. While defendant presented the testimony of friends and family that he only allowed people to enter his house through the back door, judging the credibility of the witnesses is the sole province of the trier of fact. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998). Given the trial court's opportunity to view the videotape of defendant's house and our opportunity to view the still photographs of the house, the trial court properly determined that the officers had an unobstructed view of the front of the house.

Second, we find that the trial court was entitled to use its discretion in considering the polygraph examination results in weighing defendant's credibility. While it is well established that the results of a polygraph examination are inadmissible at trial given their uncertain reliability, the trial court may consider such tests in ruling on a motion for new trial, *People v Barbara*, 400 Mich 352, 357-358, 411-414; 255 NW2d 171 (1977). A trial court may consider polygraph evidence when ruling on a pretrial motion to suppress, but only if the presiding judge does not subsequently sit as the trier of fact in a bench trial. *People v McKinney*, 137 Mich App 110, 117; 357 NW2d 825 (1984). The results of the polygraph examination should only be considered to weigh the credibility of the declarant and not to establish the truth of the matter asserted. *Barbara*, *supra* at 412-413. The trial court, therefore, did not abuse its discretion in discounting the results of the polygraph examination when it evaluated the credibility of defendant's assertion that he did not allow anyone to enter his front door on September 9, 2004.

Third, we find that Officer Jones did not improperly bolster the credibility of the informant or improperly rely on a new informant in preparing the search warrant affidavit. Pursuant to MCL 780.563:

> 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:
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> * * *

> (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.

While the search warrant affidavit in this case did not specifically set forth factors supporting the confidential informant's reliability, the informant participated in a controlled buy at defendant's house earlier on the same day that the search warrant was issued. It is well established that a controlled purchase of narcotics is "sufficient to establish probable cause to permit [a] magistrate to issue [a] warrant." *People v Head*, 211 Mich App 205, 209; 535 NW2d 563 (1995). A confidential informant's reliability may be established by the success of the controlled buy alone. *Id.* Therefore, Officer Jones properly used a controlled buy as a method of supporting the search warrant affidavit in this case.

Defendant further challenges the search warrant affidavit because the officers failed to take notes during their surveillance of defendant's house, failed to investigate the two cars that approached defendant's house during the informant's absence, failed to specifically indicate that the informant entered through the front door, and could not recall where the informant parked his car at defendant's house. The rule from *Franks* has been extended to material omissions from affidavits. *People v Kort*, 162 Mich App 680, 685-686; 413 NW2d 83 (1987). However, none of the challenged omissions were material. The material information in the search warrant affidavit was that the officers saw the informant enter defendant's house on two separate occasions and that the informant gave the officers cocaine upon exiting on the second occasion. Because the information material to making a finding of probable cause was included in the affidavit, the challenged omissions would not affect the magistrate's decision in this case. We would further note that the officers' investigation of the two cars that stopped by defendant's house would not have affected defendant's case. Although such an investigation could, potentially, have led to more arrests, it would not have changed the fact that cocaine and tools for the distribution of that drug were found in defendant's house.

Finally, we find that defendant's assertion that the evidentiary hearing was not a *Franks* hearing completely lacks merit. The whole purpose of the hearing was to ascertain whether Officer Jones falsified information in the search warrant affidavit. Although defense counsel allegedly learned new grounds to challenge Officer Jones's veracity at the hearing, defense counsel argued these grounds in depth and a second evidentiary hearing was not required.

Defendant has also raised several challenges in a Standard 4 Brief on appeal. Defendant first contends that he was denied the effective assistance of counsel by his original trial counsel. Defendant failed to preserve his challenges to the adequacy of defense counsel's performance by filing a motion for a new trial or *Ginther*[2] hearing on that ground.[3] *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Absent a *Ginther* hearing, our review "is limited to

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

[3] Defendant filed a motion for a new trial, but based on the lack of evidence that defendant knew that cocaine was present in his house.

mistakes apparent on the record." *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003), rem by 388 F Supp 2d 789 (ED Mich, 2005).

> Whether a defendant has been denied the effective assistance of counsel is a mixed question of law and fact. A judge must first find the facts and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. [*Riley (After Remand)*, *supra* at 139 (citation omitted).]

Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, defendant must prove that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the proceedings would have resulted differently. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Defendant first contends that defense counsel failed to formulate an adequate strategy of defense. However, defense counsel did formulate a defense theory in this case, i.e., that defendant had no knowledge of the existence of the cocaine found in his home. Defense counsel elicited testimony that the officers failed to fingerprint any of the evidence to determine if defendant had touched the contraband. Defense counsel also elicited testimony revealing the possibility that someone other than defendant resided in the northeast bedroom where the contraband was found. Defense counsel further highlighted the possible confusion between defendant and his son of the same name.

Defendant also contends that defense counsel failed to adequately cross-examine key prosecution witnesses. At trial, defense counsel asked no questions of the officer who handled the canine unit. Defense counsel subsequently waived the testimony of several Redford Township police officers – Lieutenant Eric Gillman, Officer Butler, and Officer Duane Gregg. Defense counsel further stipulated the accuracy of the laboratory report identifying the narcotics as 54.90 grams of cocaine. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *Rockey*, *supra* at 76. The failure to call or question particular witnesses amounts to ineffective assistance only when the failure deprives the defendant of a substantial defense, i.e., one likely to affect the outcome of the case. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

There is no indication in the record regarding the potential testimony of Lieutenant Gillman or Officer Gregg. Accordingly, defendant cannot establish that their absence deprived him of a substantial defense. Officer Butler testified at the *Franks* hearing that he witnessed the confidential informant enter the front door of defendant's house on two separate occasions. Because Officer Butler's testimony would have further incriminated defendant, defense counsel was wise not to call that witness. See *People v Rice (After Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999) (finding that defense counsel may have strategically failed to request a jury instruction in order to downplay the defendant's prior conduct).

Contrary to defendant's assertion on appeal, Officer Jones never testified *at trial* that a controlled buy had taken place. In fact, no officer testified that a controlled buy had occurred. Accordingly, there was no testimony for defense counsel to challenge. It is true that the

prosecution also failed to present into evidence the prerecorded bills and narcotics from the earlier controlled buy. However, the introduction of such evidence would only provide further evidence that defendant, or someone in his house, sold narcotics to a confidential informant. Because this evidence would have further incriminated defendant, we again find that defense counsel was wise not to challenge its omission at trial. See *Rice (After Remand), supra* at 445.

Defendant contends that defense counsel should have subpoenaed a Detroit police officer known as "Bullet" to testify that defendant was already negotiating with that officer to become a confidential informant at the time of the current charged offenses. Defendant further contends that records kept by the Detroit Police Department regarding a previous surveillance of his house would contradict the prosecution's assertion that defendant sold drugs from his house. However, there is no indication in the record that "Bullet" actually exists or that he could testify in defendant's favor. Defendant failed to even present an affidavit from this individual regarding his potential testimony. Moreover, had "Bullet" been negotiating with defendant to work as an informant, that fact would tend to establish that defendant was already involved in selling narcotics given that many civilian informants are involved in illegal activities. Accordingly, it is possible that defense counsel did not pursue this witness to prevent further damage to his client. See *Rice (After Remand), supra* at 445.

Defendant further argues that defense counsel should have done more to attack the veracity of the officers who conducted the surveillance at his house. Defendant alleges that Officer Jones and Officer Butler had poor service records, which could have been used to challenge their credibility at the *Franks* hearing. Defendant also asserts that the activity logs regarding this investigation and the reports and notes of all the officers involved would have revealed various inconsistencies in the officers' versions of events. However, there is no indication in the record that Officer Butler and Officer Jones had poor service records or that there is any reason to question their whereabouts during the surveillance of defendant's house, and therefore, no reason to remand on these grounds.

Defendant also provided inadequate support for his assertion that defense counsel should have subpoenaed defendant's phone records to prove that defendant did not call the informant on September 9, 2004, and, therefore, was not involved in the sale of narcotics. Defendant has not provided us with a copy of his phone bill for that day to support his allegation. "Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990).

Defendant also challenges the trial court's failure to suppress the evidence against him based on the raid team's alleged violation of the "knock and announce procedure." It is well established that, pursuant to the "knock and announce rule," police officers must knock on the door of a private residence and announce their presence to give the homeowner an opportunity to open the door. *Hudson v Michigan*, ___ US ___; 126 S Ct 2159, 2162; 165 L Ed 2d 56 (2006). The prerequisite "knock and announce" is unnecessary, however, when there is a threat of physical violence, when advance notice would allow the residents the opportunity to dispose of the evidence, or if "knocking and announcing would be 'futile.'" *Id.* When the "knock and announce rule" applies, we must review the reasonableness of the procedure on a case-by-case basis. *Id.* at 2163.

In this case, the raid team clearly believed that they were required to knock and announce their presence. At trial, Officer Jones testified that the members of the raid team went to the back door of defendant's house and knocked and announced their presence. Officer Jones asserted that no one answered and they were required to force the door open with a battering ram. On appeal, defendant contends that he was only three feet away from the door at the time that the officers allegedly "knocked and announced" their presence and yet heard nothing until the officers started to force the door open.

Even if the officers failed to comply with the knock and announce rule, however, the United States Supreme Court recently determined that suppression is not the appropriate remedy in such a situation. In *Hudson, supra* at 2164, the Court noted that an officer's illegal entry in violation of the knock and announce rule is not the "'but-for' cause of obtaining . . . evidence." The officer would have ultimately discovered the evidence had he or she knocked and announced their presence before entering. Accordingly, the evidence discovered is not the "fruit" of an illegal search. *Id.* The Court further noted that suppression of the evidence discovered after the violation of the knock and announce rule would be inappropriate because that remedy would not further the purposes of the rule. The knock and announce rule protects the residents of the home and the entering officers from the risk of physical violence following an unannounced entry. *Id.* at 2165. Knocking and announcing allows the residents the opportunity to open the door and avoid property damage. *Id.* It also protects the privacy interests of the residents from a sudden and unannounced entry. *Id.* However, the purpose of the knock and announce rule has never been to shield potential evidence from the eyes of the investigating officers entering with a search warrant. *Id.* Therefore, even if the officers did violate the knock and announce rule in this case, suppression of the evidence would be unwarranted.

Defendant further argues that the trial court should have suppressed the evidence because the Redford police officers were acting outside of their jurisdiction when they secured and executed the search warrant for his Detroit home. In the alternative, defendant contends that this fact should have been used to attack Officer Jones's credibility as a witness.

> Where violation of a state statute is involved, "'whether suppression is appropriate is a question of statutory interpretation and thus one of legislative intent.'" . . . "'Because our judicial role precludes imposing different policy choices than those selected by the Legislature, our obligation is, by examining the statutory language, to discern the legislative intent that may reasonably be inferred from the words expressed in the statute.'" . . . "'When a statute is clear and unambiguous, judicial construction or interpretation is unnecessary and therefore, precluded.'" . . . [*People v Sobczak-Obetts*, 463 Mich 687, 694-695; 625 NW2d 764 (2001) (internal citations omitted).]

MCL 764.2a(1) provides that a police officer may act outside his or her jurisdiction when working in conjunction with the Michigan State Police or an officer of another jurisdiction when inside that other jurisdiction, or if the officer witnessed the violation of a statute inside his or her jurisdiction and pursued the individual into another jurisdiction. MCL 117.34 further provides that a police officer may follow an individual across city borders when in "hot pursuit." It is clear from the record that the Redford police officers were not entitled to conduct this investigation and execute the search warrant under any of the statutory provisions. The officers were not working in conjunction with the Michigan State Police or the Detroit Police

Department. Moreover, no officer actually witnessed defendant commit a crime in the township of Redford. Rather a Redford police officer gleaned information from a confidential informant regarding alleged drug activity in another city.

However, defendant is not entitled to the suppression of the evidence in this case pursuant to *People v Hamilton*, 465 Mich 526; 638 NW2d 92 (2002). In *Hamilton, supra* at 532-533, the Michigan Supreme Court found:

> That the officer acted without statutory authority does not necessarily render the arrest unconstitutional. The Fourth Amendment exclusionary rule only applies to constitutionally invalid arrests, not merely statutorily illegal arrests. *People v Lyon*, 227 Mich App 599, 611; 577 NW2d 124 (1998). "The constitutional validity of an arrest depends on whether probable cause to arrest existed at the moment the arrest was made by the officer." *Id*.

The purpose of the jurisdictional requirements of MCL 764.2a "'is not to protect the rights of criminal defendants, but rather to protect the rights and autonomy of local governments.'" *People v McCrady*, 213 Mich App 474, 480-481; 540 NW2d 718 (1995), quoting *People v Clark*, 181 Mich App 577, 581; 450 NW2d 75 (1989).

At the time of defendant's arrest, the police officers had a search warrant based on probable cause. Defendant was arrested based on probable cause given that the officers found almost 55 grams of cocaine and two guns inside his house. Because there was probable cause to arrest defendant at that exact moment, defendant's arrest was only "statutorily illegal" and not unconstitutional. Therefore, suppression is unwarranted under *Hamilton, supra* at 532-533.

Finally, defendant contends that the prosecution violated his Sixth Amendment right to confront the witnesses against him by failing to produce the confidential informant for cross-examination. Defendant has not preserved this issue for appellate review because it was never raised before or considered by the trial court. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994).[4] We review unpreserved constitutional errors, such as a challenge to the violation of the confrontation clause, for plain error affecting a defendant's substantial rights. *People v Pipes*, 475 Mich 267, 270; 715 NW2d 290 (2006), citing *Carines, supra* at 763. Even if there is plain error affecting substantial rights, reversal is not warranted unless the defendant is actually innocent or the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra*, p 763.

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." US Const, Am VI. To preserve this right, testimonial hearsay is inadmissible against a criminal defendant unless the declarant is unavailable and there was a

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[4] A party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001); MRE 103(a)(1). Assertion of an evidentiary objection does not preserve a constitutional objection based on the confrontation clause. *People v Moorer*, 262 Mich App 64, 67; 683 NW2d 736 (2004); *People v Geno*, 261 Mich App 624, 629-630; 683 NW2d 687 (2004).

prior opportunity for cross-examination of the declarant. *Crawford v Washington*, 541 US 36, 42, 58; 124 S Ct 1354, 1369-1370; 158 L Ed 2d 177 (2004); *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005).

Crawford applies retrospectively to cases pending on direct appeal at the time it was decided. *People v Bell (On Second Remand)*, 264 Mich App 58, 62; 689 NW2d 732 (2004). However, in *People v Geno*, 261 Mich App 624, 629-630; 683 NW2d 687 (2004), this Court held that the defendant failed to establish that *Crawford* was retroactively applicable where the defendant failed to preserve the confrontation issue at trial. *Geno, supra*, p 630. Here, too, defendant fails to establish that *Crawford* applies retroactively to this case, where defendant failed to preserve the confrontation issue at trial.

Even if *Crawford* were retroactively applicable to defendant's case, defendant cannot establish plain error. Because the prosecution never presented at trial any out of court statement by the confidential informant, the prosecution correctly argues that the confidential informant was not a witness against defendant and, therefore, defendant had no right to confront the informant. Defendant was not charged with the delivery of cocaine to the informant or with possession of a gun during a delivery. Rather, defendant was charged with possession with intent to deliver, and with felony firearm because of evidence found during the search of his house. Given that the charges against defendant were based solely on the cocaine and guns found inside his house during the execution of the search warrant, defendant was not entitled to cross-examine that individual. Moreover, it appears from the record that defendant was aware of the identity of the confidential informant. Accordingly, defendant could have subpoenaed this witness himself if he believed the witness had necessary testimony, rather than depending on the prosecution to do so.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello