STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 21, 2010
v	No. 291259 Wayne Circuit Court
KEVIN SCHUH, Defendant-Appellant.	LC No. 08-013141-FH

Before: GLEICHER, P.J., and ZAHRA and K.F. KELLY, JJ.

PER CURIAM.

A jury convicted defendant of misconduct in office, a common-law crime, MCL 750.505, forgery, MCL 750.248, uttering and publishing, MCL 750.249, and conspiracy to commit insurance fraud, MCL 500.4511(2). The trial court sentenced defendant to concurrent terms of nine months in jail on all counts. Defendant appeals as of right. We affirm.

Defendant formerly worked as a Detroit police officer, and the charges in this case stemmed from his preparation of an accident report (a UD-10) containing false information. Defendant authored a report documenting a three-car collision that occurred in Detroit on December 27, 2004. Investigators for the companies that had insured the vehicles purportedly involved in the December 27, 2004 accident described at trial the series of events leading to their scrutiny of the claims lodged by vehicle owners Norman Dehko, Mahir Kada, and Latifa Ibrahim.[1] In Dehko's recorded phone conversation with his insurer, Dehko averred that as his Cadillac Escalade sat stationary in a left-turn lane, a car struck the Escalade from behind while traveling at least 40 miles an hour, causing him to rear end a Mercedes sport utility vehicle in front of him. After a GMAC fraud investigator became curious about the legitimacy of the claim, he spoke with defendant, who initially denied any recollection of the crash. Some brief discussion prompted defendant's recall that he had come upon the scene of the accident

[1] Some of the primary bases for insurance company skepticism that the reported accident had occurred included that (1) an accident reconstruction firm hired by the insurance companies determined that the damages to the three involved vehicles did not match the insurance claimants' accounts of the crash, and (2) the insurance investigators believed that Dehko had given telephone accounts of not only his own claim information, but that of the other two crash victims, under a different name than Dehko's own.

coincidentally before drafting the accident report, and that defendant knew Dehko, although he did not have any familiarity with the other two crash victims.

Eventually, an investigator for the National Insurance Crime Bureau and an officer working with the Detroit Police Department's internal affairs division referred the investigation to FBI Special Agents Derek Schoon and Michael Hanie. In February 2008, Schoon and Hanie interviewed defendant in front of his home. The trial testimony of Schoon and Hanie consistently recounted the following relevant details of defendant's interview:

> We started by informing him that we had reviewed these reports and that there were activity logs that showed him at one part of the city and at the same time he would file an accident report showing him in another part of the city and we had a dialogue and we agreed that you couldn't be in two places at one time so we asked him if he could explain that to us, which he did.
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> [Defendant] identified Norman Dehko as the owner of Somerset Collision, a person that he had written some reports for.
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> He [also] had mentioned [preparing reports for] a Wally—I don't think we had the last name . . .
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> * * *
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> Yes, [defendant] did mention Wally. He said Wally was associated with Platinum Collision.
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> * * *
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> And also Angie and Samir Cotter who were associated with Broadway Collision.
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> * * *
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> . . . We asked him how—what were the circumstances when he made those reports cause the reports clearly could not have been taken at the scene as they were written up because he was at another point in the city doing other enforcement activities or other police calls that were verified.
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> So he said that he had been provided information by these shop owners; that they would ask him to complete an accident report for them and that he would put the information he had been provided by the shop owners into the report and file it.
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> * * *
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> He told us he had done it approximately 15 times.
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> * * *

> He agreed that he had not been at the scene where the crash was reported at the time of the crash and he also told us that the information that had been input into the actual report was that which had been provided by the collision shop owners.[2]
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> * * *
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> We asked [defendant] [if he received anything in exchange for preparing the requested accident reports]. He said he had never received anything per report, but he admitted that he had received between five and seven thousand dollars from loans from these collision shop owners over a period of time and that these loans had no payback arrangement and that I don't believe, to the best of my recollection, any payment had ever been made, any restitution was ever made.
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> * * *
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> . . . We asked in talking with him, we said, you do understand the value that a collision shop owner would have to having a police officer sign a report saying that he was at the scene? It would give it a certain credibility in the eyes of an insurance agent or somebody else if a police officer had been to the scene, had recorded this accident and had somewhat observed the vehicles at that place.
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> * * *
>
> [Defendant's answer] was, yes, he understood that there would be a value to that.

I

With respect to all four convictions, defendant challenges the sufficiency of the evidence supporting them. We consider de novo defense insufficiency claims. *People v Harrison*, 283 Mich App 374, 377; 768 NW2d 98 (2009). This Court must view the evidence in the light most favorable to the prosecution to determine "whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). An appellate court should not interfere with the factfinder's role to gauge the weight of the evidence and the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992).

> The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. The scope of review is the same whether the evidence is direct or

[2] FBI agent Schoon added defendant's explanation that after writing the "false reports," "later he would view the vehicles to see that the damage lined up with what the accident seemed to indicate."

> circumstantial. Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. [*People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000) (internal quotation omitted).]

A. FORGERY

In defendant's view, the evidence did not suffice to sustain his forgery conviction because the record contained no proof "that anything in the UD-10 was false," and defendant made no effort to "attempt to make the report appear to be anything but what it was: an accident report." A person commits forgery when he "falsely makes, alters, forges, or counterfeits a public record . . . with intent to injure or defraud another person." MCL 750.248(1). As reflected in the language of MCL 750.248(1), this Court has recognized that "[t]he elements of the crime of forgery are: (1) an act which results in the false making or alteration of an instrument (which makes an instrument appear to be what it is not); and (2) a concurrent intent to defraud or injure. The key is that the writing itself is a lie." *People v Kaczorowski*, 190 Mich App 165, 171; 475 NW2d 861 (1990). We review de novo the legal question whether conduct "falls within the statutory scope of a criminal statute." *People v Rutledge*, 250 Mich App 1, 4; 645 NW2d 333 (2002).

Defendant heavily relies on this Court's opinion in *People v Hodgins*, 85 Mich App 62, 63; 270 NW2d 527 (1978), in which the Court framed the "central issue [a]s whether one who opens a checking account using the name, identification and address of another person is guilty of forgery under MCL 750.248 . . . when she writes a check on that account for more than the balance." In *Hodgins*, the defendant used her landlord's driver's license, social security card, and car registration to open a bank account in the landlord's name. *Id*. at 63-64. The defendant made a small deposit into the account, and then tried to buy a television set with a check in an amount that exceeded her deposit. *Id*. at 64. This Court emphasized that the prosecution had premised the forgery charge "not . . . on the opening of the account as described above," but instead "on the fact that [the] defendant used one of the checks she had obtained from the bank when attempting to purchase" the television. *Id*. The Court held that the act of writing the check and presenting it for payment did not constitute forgery because the check was what it purported to be:

> . . . There may have been a litany of offenses committed, but not forgery. The check given by [the] defendant did not purport to be anything other than a personal check drawn by the person who presented it on an account that that person had opened. The misrepresentation of identity to the bank in opening the account did not make the creation of a draft on that account a forgery when presented to pay for the television set.
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> Simply stated, the writing itself was not a lie. Under MCL 440.3401. . . , only defendant would be liable on the instrument. . . . The risk of loss to which the store was exposed was the result of the lack of funds in the account, not the manner in which the instrument was prepared. [*Id*. at 65-66.]

The underlying facts of this case do not resemble the scenario deemed insufficient to sustain a forgery charge in *Hodgins*, 85 Mich App 62. Here, the prosecutor grounded the forgery

count against defendant on his actions in "falsely mak[ing], alter[ing], forg[ing] or counterfeit[ing] a public record, with intent to injure or defraud, to wit: UD-10 Police Traffic Crash Report No. 6547452." And the testimony and other evidence at trial amply supported a reasonable jury's determination beyond a reasonable doubt that defendant committed both forgery elements reiterated by this Court in *Kaczorowski*, 190 Mich App at 171. First, Schoon and Hanie testified concerning defendant's acknowledgement that, with accident or collision details defendant received from Dehko, defendant authored fabricated accident reports and falsely recorded on the UD-10s that he had inspected the accident scenes.[3] From this testimony alone the jury reasonably could have found beyond a reasonable doubt that defendant committed "act[s] which result[ed] in the false making or alteration of an instrument." *Id*. Second, a rational jury could find beyond a reasonable doubt that defendant possessed an "intent to defraud or injure" when he prepared the UD-10's Dehko requested, *id*., in light of the trial evidence that (1) defendant admitted to Schoon and Hanie his awareness that an insurance company assessing an accident claim would deem the claim more credible when accompanied by a UD-10 prepared by a police officer, and (2) defendant acknowledged having written approximately 15 false accident reports.

B. UTTERING & PUBLISHING

Defendant insists that his uttering and publishing conviction is unsustainable given the absence of any evidence that he "present[ed] the UD-10 for payment." As our Legislature set forth in MCL 750.249(1), "A person who utters and publishes as true a false, forged, altered, or counterfeit record, deed, instrument, or other writing listed in section 248 knowing it to be false, altered, forged, or counterfeit with intent to injure or defraud is guilty of a felony . . . ." "The elements of uttering and publishing are: (1) knowledge on the part of the defendant that the instrument was false; (2) an intent to defraud; and (3) [a] presentation of the forged instrument for payment," *People v Shively*, 230 Mich App 626, 631; 584 NW2d 740 (1998), or (b) presentation of a forged "record," "public record," or other document specified in MCL 750.248 in a manner "capable of affecting the rights of others or creating liability in others." *People v Cassadime*, 258 Mich App 395, 399-400; 671 NW2d 559 (2003); *People v Carter*, 106 Mich App 765, 767; 309 NW2d 33 (1981).

The evidence here reasonably supported findings beyond a reasonable doubt that (1) defendant authored and filed false accident reports at Dehko's request, including the December 27, 2004 accident report, (2) defendant intended to defraud the insurance companies, i.e., he knew that his submission of the false UD-10 made more likely that the insurance companies would pay policy benefits for the false claims, and (3) defendant's filing of the false UD-10's amounted to the presentation of a record in a manner "capable of . . . creating liability in others," namely any insurance company that made a payment on behalf of a claimant identified in defendant's false accident reports. *Cassadime*, 258 Mich App at 399-400; *Carter*, 106 Mich App at 767-769. Even accepting, as defendant claims, that the insurance companies did not rely on

[3] Unlike *People v Thomas*, 182 Mich App 225, 229-230; 452 NW2d 215 (1989), aff'd 438 Mich 448; 475 NW2d 288 (1991), also cited by defendant, the instant police report does not contain a single false statement within the body of an otherwise accurate recitation of pertinent facts.

his false UD-10 in making their payments to Dehko and the other claimants, the elements of uttering and publishing nonetheless were satisfied. *People v Harrison*, 283 Mich App 374, 381; 768 NW2d 98 (2009) ("To utter means to put something into circulation. To utter and publish means to offer something as if it is real, whether or not anyone accepts it as real.").

C. CONSPIRACY TO COMMIT INSURANCE FRAUD

The prosecutor charged defendant with entering "an agreement or conspiracy to commit a fraudulent insurance act under section 4503." MCL 500.4511(2). Specifically, the prosecutor's charging documents averred that defendant had engaged in conduct prohibited under MCL 500.4503 by "enter[ing] into an agreement or conspir[ing] to prepare a written or oral statement knowing or believing that it would be presented by or to an insurer or an agent of an insurer, knowing that it contained false information concerning a fact material to an insurance claim." The charging language employed by the prosecutor most closely tracked MCL 500.4503(c) and (d). The plain language of subsections 4503(c) and (d) reveals the following elements necessary for establishing guilt of "[a] fraudulent insurance act": (1) any knowing act or omission, (2) done with the specific intent to deceive, defraud, or injure, (3) that (a) "[p]resents or causes to be presented to" an insurer "any oral or written statement" [subsection 4503(c)], or (b) assists "another to prepare or make any oral or written statement . . . intended to be presented to . . . any insurer" [subsection 4503(d)], (4) in connection with a claim for payment under a policy, and (5) with knowledge that the statement contains false information about any fact material to the insurance claim.[4]

In addition to proving the elements of insurance fraud under MCL 500.4511(2) and MCL 500.4503(c) or (d), to obtain a conspiracy conviction the prosecutor also must present evidence substantiating the conspiracy aspect of the charge.

> Conspiracy is defined by common law as a partnership in criminal purposes. Under such a partnership, two or more individuals must have voluntarily agreed to effectuate the commission of a criminal offense. Establishing that the individuals specifically intended to combine to pursue the criminal objective of their agreement is critical because the gist of the offense of conspiracy lies in the unlawful agreement[,] meaning the crime is complete upon formation of the agreement.

[4] In considering whether statutory offense elements exist in a particular case, we bear in mind the statutory interpretation principles summarized in *Cassadime*, 258 Mich App at 398:

> To discern the Legislature's intent, this Court must first look to the specific language of the statute. Further, this Court must presume that every word, phrase, and clause in the statute has meaning and must avoid any construction that would render any part of the statute surplusage or nugatory. Every word or phrase in the statute is accorded its plain and ordinary meaning. [Internal quotation omitted.]

> The specific intent to combine, including knowledge of that intent, must be shared by two or more individuals because there can be no conspiracy without a combination of two or more. . . . Accordingly, there must be proof demonstrating that the parties specifically intended to further, promote, advance, or pursue an unlawful objective. [*People v Justice (After Remand)*, 454 Mich 334, 344-346; 562 NW2d 652 (1997) (footnotes and internal quotation omitted).]

A review of the record in this case reflects that a rational jury could have found defendant guilty of conspiring to commit insurance fraud beyond a reasonable doubt. Viewed in the light most favorable to the prosecution, the substance of defendant's admissions establish or give rise to reasonable inferences that (1) defendant knowingly authored and filed accident reports, (2) defendant assisted Dehko in preparing accident reports entirely on the basis of information supplied by Dehko, (3) defendant knew or reasonably should have known that Dehko intended to submit the accident reports in support of insurance claims, and (4) defendant knowingly documented false collision details in the accident reports requested by Dehko, which details defendant knew had materiality to Dehko's intended insurance claims. And defendant's actions, especially in light of his concession that he knew the insurance companies relied on police reports in paying collision claims, reasonably supported a jury finding that he prepared the false accident reports with an intent to deceive, defraud, or injure. Although defendant emphasizes that "the UD-10 was not material to the claim" by Dehko because none of the involved insurance companies made a payment of benefits on the basis of the accident report, the pertinent portion of the statute clearly and unambiguously envisions only that defendant have knowledge "that the statement contains any false information concerning any fact or thing *material to the claim*." MCL 500.4503(c) and (d) (emphasis added). Moreover, the statute does not define "material," which Black's Law Dictionary (9th ed), p 1066, explains, in pertinent part, as, "2. Having some logical connection with the consequential facts," or, "3. Of such a nature that knowledge of the item would affect a person's decision-making; significant; essential." From the evidence, the jury properly found beyond a reasonable doubt that defendant's completion of accident reports with details supplied by Dehko constituted the declaration of false information having a logical connection or materiality to Dehko's claims; alternatively phrased, the jury reasonably found that the false UD-10's had some logical connection to Dehko's claims, or that the false reports naturally would affect an insurance company's decisionmaking with respect to Dehko's claims.

Furthermore, the admissions of defendant sufficed to permit the jury to conclude beyond a reasonable doubt that defendant had intentionally entered an agreement with Dehko, and that both defendant and Dehko shared the specific intent "to further, promote, advance, or pursue an unlawful objective," namely to fabricate accident reports for Dehko's submission to his automobile insurer in connection with an accident claim. *Justice*, 454 Mich at 345 n 18, 347.

D. MISCONDUCT IN OFFICE

"At common law, misconduct in office was defined as corrupt behavior by an officer in the exercise of the duties of his office or while acting under color of his office." *People v Perkins*, 468 Mich 448, 456; 662 NW2d 727 (2003) (internal quotation omitted). An officer could face conviction of misconduct in office "(1) for committing any act which is itself wrongful, malfeasance, (2) for committing a lawful act in a wrongful manner, misfeasance, or (3)

for failing to perform any act that the duties of the office require of the officer, nonfeasance." *Id*. "In the case of malfeasance and misfeasance, the offender also must act with a corrupt intent, i.e., with a sense of depravity, perversion or taint." *Id*. (internal quotation omitted). "Moreover, the officer's wrongdoing must result from or directly affect the performance of his official duties." *Id*.

As we have previously observed, the instant trial record amply established that defendant authored and filed accident reports containing false information, acts of misfeasance. Defendant's concessions that he manufactured and filed accident reports, for Dehko and others, in exchange for purported loans that had no repayment timetable reasonably tends to establish that defendant authored the false accident reports with a corrupt intent. *People v Milton*, 257 Mich App 467, 471; 668 NW2d 387 (2003) (explaining that corruption in the context of misconduct in office "is used in the sense of depravity, perversion or taint," and that "[p]ursuant to the definitions of depravity, perversion and taint, a corrupt intent can be shown where there is intentional or purposeful misbehavior or wrongful conduct pertaining to the requirements and duties of office by an officer") (internal quotation omitted). Also, the record evidence agrees that defendant authored and filed the false accident reports in his capacity as a Detroit police officer. Notably, the Legislature codified an officer's duty to prepare and file accident reports in collisions causing more than $1,000 in property damage. MCL 257.622 (directing that "[t]he officer receiving the report, or his or her commanding officer, shall immediately forward each report to the director of the department of state police on forms prescribed by the director of the department of state police," and that "[t]he forms shall be completed in full by the investigating officer").

II

Defendant next disputes the propriety of the trial court's admission of other acts evidence concerning his alleged forgery of approximately 15 other accident reports. This Court reviews for a clear abuse of discretion a trial court's decision whether to admit evidence. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

Defendant insists that the trial court's admission of the other acts evidence violated MRE 404(b)(1), because "corroborating a government agent's testimony is not" a proper purpose for admissibility, "the evidence was insufficient that [defendant] actually falsified (or even admitted to falsifying) 15 additional crash reports," and admission of the evidence "was far more unfairly prejudicial than probative." MRE 404(b)(1) prohibits the admission of evidence of a defendant's other acts or crimes when introduced solely for the purpose of showing the defendant's action in conformity with his criminal character. *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000). But evidence of a defendant's other acts or crimes qualifies as admissible under the following circumstances: (1) the prosecutor offers the evidence for a proper purpose under MRE 404(b)(1); (2) the other acts evidence satisfies the definition of logical relevance within MRE 401; and (3) any unfair prejudice arising from the admission of the other acts evidence does not substantially outweigh its probative value, MRE 403. *Starr*, 457 Mich at 496; *People v Ackerman*, 257 Mich App 434, 439-440; 669 NW2d 818 (2003).

Before trial, the prosecutor sought to admit evidence of 10 other false accident reports written by defendant, in the form of a witness who could "produce the documents and testify from Internal Affairs that this is a pattern that was revealed in the investigation of . . . Defendant's . . . activity logs and crash reports." The prosecutor also theorized that the other

acts evidence would rebut an anticipated attack by defendant on the credibility of the special agents set to testify regarding defendant's inculpatory statements. The trial court expressed its view that the other acts evidence carried a significant danger of unfair prejudice and declined to admit it, with the caveat that if at trial defendant maintained "the defense of mistake or falsehood; that is the FBI agent is deliberately not being candid, or in other words, lying to the jury, then the Court will allow you to renew your motion to allow these other acts in to corroborate that statement."

After the testimony by special agent Schoon, during which defense counsel questioned the soundness of Schoon's account of defendant's inculpatory statements, the prosecutor renewed his motion to admit other acts evidence. The trial court declined to admit the proffered documentary evidence consisting of multiple other accident reports prepared by defendant and defendant's activity logs, finding the probative value inherent in the documentary evidence substantially outweighed by a danger of unfair prejudice. However, in light of the defense suggestion that the special agent testimony was incredible, the court allowed the prosecutor "to go into, with the second witness, an opportunity to say, . . . there were other reports and they found discrepancies in those reports, but not get into the sum and substance of the other reports" "to corroborate essentially the testimony of the first witness."[5]

We initially address defendant's dispute that an adequate foundation existed for the trial court to deem admissible "evidence . . . that [he] actually falsified (or even admitted to falsifying) 15 additional crash reports."

> Where the admissibility of evidence is disputed, the burden of establishing a proper foundation rests with the party seeking admission. Foundational elements of fact must be proven by a preponderance of the evidence. . . . MRE 104(a). The trial court is not restricted to considering admissible evidence in ruling on the admissibility of evidence under MRE 104(a) . . . . [*In re Brock*, 193 Mich App 652, 669; 485 NW2d 110 (1992), rev'd on other grounds 442 Mich 101; 499 NW2d 752 (1993).]

Here, defendant himself acknowledged when interviewed by agents Schoon and Hanie that he had authored approximately 15 false accident reports for Dehko and others, and a Detroit police internal affairs investigator testified that he uncovered around 15 or 20 discrepancies between accident reports filed by defendant and defendant's daily police activity logs. This evidence formed an adequate foundation for the trial court to admit evidence of defendant's other acts.

With regard to admissibility under MRE 404(b)(1), first, the prosecutor did offer the other acts evidence for a proper purpose—augmenting the basis for Schoon's trial testimony

[5] The prosecutor subsequently offered into evidence Schoon's handwritten notes of defendant's admissions and the report that Schoon had authored to document defendant's admissions. The court admitted the documents on the ground that they contained admissions by defendant, MRE 801(d)(2)(A), and agreed with the defense request to redact irrelevant portions of the documents. Defendant offered no other objection at trial to the admissibility of Schoon's notes and report.

about his and Hanie's interview of defendant. Notwithstanding that MRE 404(b)(1) does not mention witness credibility as a proper basis for introducing other acts evidence, the list of "some . . . permissible uses" of other acts evidence set forth in MRE 404(b)(1) "is not . . . exhaustive." *Sabin*, 463 Mich at 56.[6] Second, the other acts evidence had probative value toward establishing the credibility of Schoon and Hanie, to whom defendant made several incriminating admissions; specifically, the other acts evidence tended to substantiate the probability of the agents' account of defendant's statement, a matter of consequence in this case, especially after defense counsel at trial attempted to impugn Schoon's account of defendant's statement. MRE 401.

> Critical to the instant case and a fact that is also "of consequence" to a determination is the credibility of the witnesses offering testimony. (M)atters in the range of dispute may extend somewhat beyond the issues defined in the pleadings . . . . (T)he parties may draw in dispute the credibility of the witnesses and, within limits, produce evidence assailing and supporting their credibility." 1 McCormick, Evidence (4th ed), § 185, pp 773-774. As noted in 1 Weinstein & Berger, Evidence, ¶ 401[05], p 401-29, evidence may be admitted to assist the evaluation of "the credibility of a witness." Here, the test is whether the evidence will aid the court or jury in determining the probative value of other evidence offered to affect the probability of the existence of a consequential fact." [Emphasis omitted.]
>
> *If a witness is offering relevant testimony, whether that witness is truthfully and accurately testifying is itself relevant because it affects the probability of the existence of a consequential fact.* [*People v Mills*, 450 Mich 61, 72; 537 NW2d 909, mod 450 Mich 1212 (1995) (emphasis added).]

The other acts evidence in this case made more likely than not that the agents had a foundation for their inquiries to defendant, a fact of consequence at defendant's trial. Third, we detect no impropriety in the trial court's assessment of the probative value and potential for unfair prejudice arising from the other acts evidence. The court declined to admit the proffered paper trail documenting defendant's other acts, and instead permitted the prosecutor to reference only generally the existence of other discrepancies between defendant's accident reports and activity logs. In light of the significant probative value inherent in the other acts testimony and the limited, general fashion in which the trial court admitted the evidence, the court did not abuse its discretion in finding no danger that any risk of unfair prejudice substantially outweighed the

[6] The prosecutor in *Sabin* urged the admission of other acts evidence to show the defendant's "motive and intent, show the absence of mistake, demonstrate the possibility that adults can be sexually attracted to, and engage in sex acts with, children, and bolster the complainant's credibility." *Id*. at 59 n 6. The Supreme Court found that "the prosecution clearly offered the evidence for permissible purposes." *Id*.

probative value of the other acts evidence. MRE 403. In summary, the trial court acted within its discretion in admitting the other acts evidence in the general fashion it did so.

III

Defendant further submits that the trial court erroneously instructed the jury with respect to uttering and publishing, and that his trial counsel was ineffective for neglecting to object to the erroneous instruction. Our review of the record reveals that defense counsel affirmatively expressed his satisfaction with the trial court's instruction of the jury, thus waiving and extinguishing any asserted instructional error. *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000). The trial court instructed the jury concerning the elements of uttering and publishing in terminology closely tracking CJI2d 28.2. Defendant's complaint about the trial court's instruction that he must have "represented either by words or actions or both that the document was genuine or true and presented it," reiterates his prior argument that an uttering and publishing conviction must involve a presentation for payment. But defendant again ignores that a police officer's false report filing can satisfy the presentation aspect of MCL 750.249 if the report affects the rights or liabilities of other parties. Because the trial court fully and fairly instructed the jury concerning the elements of uttering and publishing, defense counsel need not have lodged a groundless objection to the instructions. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005); *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003).

IV

Defendant additionally raises several claims of prosecutorial misconduct. At trial, defendant offered no objection to any of the purported instances of prosecutorial misconduct.

> Because the alleged error[s were] not preserved by a contemporaneous objection and a request for a curative instruction, appellate review is for plain (outcome-determinative) error. Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. Further, [this Court] cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect. [*People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003).]

This Court reviews properly preserved claims of prosecutorial misconduct according to the following standards:

> Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. [*People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), criticized on other grounds in *Crawford v Washington*, 541 US 36, 64; 124 S Ct 1354; 158 L Ed 2d 177 (2004).]

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

Defendant argues that the following portions of the prosecutor's opening statement and closing and rebuttal arguments contain improper appeals to the jurors' sense of civic duty, personal disparagement of defendant, and repeated emphasis on defendant's "series of 15 successful insurance frauds" in a manner that made "the forbidden propensity argument":

> Now, what we're concerned about is the report here by this Defendant, a Detroit police officer, entrusted by us in the community, empowered by us to go out and enforce the law, make life and death decisions for us.
>
> That's the trust that we've imposed in our offices [sic] and that's what this case is going to be about and this—*the betrayal of trust by this kind of conduct of filing this false report*.
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> * * *
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> I think that the evidence in this case has demonstrated [defendant's] guilt way beyond a reasonable doubt. It just has and I don't feel good about it.
>
> I mean, as a prosecutor I work with police and I defend police and I'm always trying to explain police and all that. *This is conduct, his against everything that the police stand for*.
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> * * *
>
> . . . Look at the evidence in this case. You know, Kevin Schuh . . . new [sic] the game was up when the FBI came out to talk to him because *he knew there was a paper trail of some fifteen instances where he pulled this stunt on behalf of several other shop owners and that's why he talked*.
>
> They didn't employ any trickery on him. Maybe his thinking was at that time, cut his loses [sic] to do whatever. Somehow from between then and now it was obviously some change in thinking about that, you know. His emotional release and getting it off his chest at that time was what he did then and somehow and for some reason that's not the way it is today, but he still has to be held accountable, *but that's why he talked, fifteen times, fifteen times this was done*.
>
> This isn't an accident. This isn't picking on. This isn't a bunch of people who think they're perfect picking on poor Officer Schuh. . . .
>
> [Defendant] asked you to assume a whole lot, that somehow he got this information legitimately. Somehow, although it's not reflected anywhere, he just got it. You didn't hear

> anything. There was not one tiny bit of evidence to say that he went and somehow this evidence is not what it appears . . .
>
> There was no evidence of that. That's all just the lawyer talking and asking you, really, to assume a whole lot . . . it's some sense of a word game here, but just look at the evidence and the evidence convicts him and *while we didn't bring out all fifteen other documents*, we've had testimony under oath, unimpeached, that there's a pattern of this; that this is what was looked at and he admitted it.
>
> *He admitted doing this some fifteen times so this isn't some mistake*. This isn't something that occurred only once that somehow he forgot to put it in an activity log. You don't forget that.
>
> * * *
>
> I mean, this would have worked . . . . That's the thing about Norm Dehko. That's how this is brazen. This is how he goes into this doing this. It's somebody that's done this before and is getting away with it and his Ace up the sleeve is the police report and that's Kevin Schuh.
>
> *Fifteen times this has been working and he's so casual and it's got to offend you*. He's making these calls and in his shop and, you know, then we have the officer here and he's making part of his money and . . . when he's confronted with it he has his reaction, yeah, I did it and changed his mind and wants to—and we end up, it's being defended on evidence—attacking the evidence, *attacking the character of the people that testified, trying to make them out to be the bad guys and wanting you really to not focus on the evidence*. [Emphasis added.]

The first two italicized portions of the prosecutor's opening and closing arguments do not equate to either improper appeals to the jury's sense of civic duty or denigration of defendant. They constitute appropriate argument by the prosecutor on the basis of the evidence admitted at trial showing that defendant, in his capacity as a Detroit police officer, falsified the December 27, 2004 accident report. *Schutte*, 240 Mich App at 721. Given that the charged offenses in this case included misconduct in office and three other offenses with elements of fraudulent intent, and in light of the evidence tending to show that defendant fabricated the December 27, 2004 accident report, the prosecutor engaged in no impropriety when he characterized defendant's conduct as inconsistent with the duties of a police officer. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007) ("The prosecution has wide latitude in arguing the facts and reasonable inferences, and need not confine argument to the blandest possible terms.").

The prosecutor made no reference to the 15 other instances when defendant fabricated accident reports until his rebuttal closing argument. In the course of the defense closing argument, defendant's trial counsel at length attacked the credibility of Schoon and Hanie and maintained that they had placed words in defendant's mouth when making notes of his statement. The prosecutor subsequently and fairly responded that defendant had confessed to

Schoon and Hanie that he authored false accident reports because he had done so 15 times, a fact borne out by the substance of defendant's admission introduced through the special agents' testimony at trial. *Dobek*, 274 Mich App at 64. The context of the prosecutor's final mention of the 15 false reports and the notion that the jury should feel offended clarifies that this passage referred not to defendant, but Dehko's conduct in making the false accident claims. To the extent that defendant characterizes the final italicized comment as an improper denigration of the defense, the prosecutor merely summarized the tenor of defense counsel's closing argument when he attacked the special agents and criticized the insurance investigators. The final portion of the rebuttal declaration, that defendant did not want the jury to focus on the evidence of his guilt, does not rise to the level of a forbidden contention that defendant and his counsel hoped to mislead the jury, especially in light of defense counsel's closing argument. *Watson*, 245 Mich App at 592-593. Even assuming some minor impropriety in the prosecutor's rebuttal argument, no risk of plain error affecting defendant's substantial rights exists because the trial court cautioned the jury that the attorneys' arguments do not constitute evidence and that the jury alone has the prerogative to decide the facts on the basis of the evidence admitted at trial. *People v Unger*, 278 Mich App 210, 237; 749 NW2d 272 (2008); *Callon*, 256 Mich App at 329-330.[7]

V

In a supplemental brief, defendant asserts his entitlement to a new trial on the basis that his trial counsel failed to present exculpatory evidence in the form of two police officer witnesses and testimony by defendant. Because defendant did not move for a new trial or an evidentiary hearing in the trial court, we limit our review to mistakes apparent in the trial court record. *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. 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." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews for clear error a trial court's findings of fact, and considers de novo questions of constitutional law. *Id*.

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

[7] Because no prosecutorial misconduct occurred, defense counsel need not have made a groundless objection to the alleged misconduct. *Mack*, 265 Mich App at 130. Even assuming that some degree of prosecutorial misconduct took place, no ineffective assistance of counsel was occasioned by defense counsel's failure to object because no reasonable likelihood exists that the result of defendant's trial would have differed had counsel objected. *People v Solmonson*, 261 Mich App 657, 663-664; 683 NW2d 761 (2004).

performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate a reasonable probability that but for counsel's errors, the result of the proceedings would have differed. *Id*. at 663-664. The defendant must overcome the strong presumptions that his "counsel's conduct falls within the wide range of professional assistance," and that his counsel's actions represented sound trial strategy. *Strickland*, 466 US at 689.

Defendant attached to his supplemental brief an affidavit of Michigan State Police Sergeant Melinda Logan, who formerly held a position as a "UD-10 Traffic Crash Report Trainer," and an email to which defendant's former partner, Francis Tull, attested. Logan advised that "the UD-10 Manual and all documents related to properly completing the crash report, did not distinguish exactly when or under what circumstances an officer should or should not complete the investigated at scene bubbles." Logan added, "[I]f an officer were called to take an accident report and went to the scene after the vehicle(s) had been removed, but looked at the scene to determine how the crash occurred, the officer could mark on the report that the accident was investigated at the scene." Tull recounted that an academy instructor had played Tull a telephone message from Sergeant Logan advising "that there is not anything stating that a police officer cannot do an accident report that way [going to the scene of a car accident after the cars were removed, yet checking the UD-10 box indicating that the officer had investigated the accident at the scene] and that the officer [defendant] did not do anything wrong." Defendant's contention that Logan's and Tull's testimony would have altered the outcome of his trial ignores the thrust of the prosecution's theory throughout trial—that defendant fabricated the December 27, 2004 accident report entirely, and that no accident ever existed for defendant to have investigated. Even assuming that defense counsel should have introduced the evidence relating to the checking of the accident report box denoting whether defendant had investigated the reported vehicle collision at the scene, defense counsel did not deprive defendant of a substantial defense. *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). Taking into account the substantial properly admitted evidence establishing that defendant inserted fabricated content into the December 27, 2004 accident report other than the accident-scene investigation detail, we detect no reasonable likelihood that the admission of testimony regarding the circumstances when an officer may check the "investigated at the scene" box would have affected the outcome of defendant's trial. *Solmonson*, 261 Mich App at 663-664.

To the extent that defendant premises an ineffective assistance of counsel complaint on his trial counsel's decision, against defendant's wishes, not to call him to testify, the record contradicts this proposition, which defendant sets forth in an abbreviated affidavit attached to his supplemental brief. On the third and final day of trial, the trial court inquired on the record about defendant's decision against testifying, eliciting defendant's age (36), his possession of 56 college credits, his desire not to testify, his understanding of the scope of a defendant's constitutional rights to remain silent or testify in his behalf, and the facts that no one had promised defendant "anything or said anything to get you to . . . exercise your right to remain silent," among additional questions. Because defendant knowingly and voluntarily opted against invoking his right to testify at trial, he has waived and thus extinguished any appellate claim of error relating to his decision. *Carter*, 462 Mich at 214-215; *People v Simmons*, 140 Mich App 681, 684-685; 364 NW2d 783 (1985).

VI

Defendant lastly assigns as error the trial court's admission of Schoon's report into evidence. He also maintains that his trial counsel should have objected to the admission of Schoon's report.[8] In light of defendant's failure to object at trial to admission of a redacted copy of Schoon's report, we review for plain error defendant's evidentiary claim of error. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999).

The FBI report by Schoon plainly consisted of hearsay that did not fall within any recognized exception. MRE 801(c); MRE 803(8) (excluding from admissibility "in criminal cases" public records and reports containing "matters observed by police officers and other law enforcement personnel"). However, the evidentiary error does not equate to ineffective assistance by defendant's trial counsel or otherwise mandate reversal. The properly admitted trial testimony by Schoon and Hanie concerning defendant's inculpatory statements mirrored the redacted content of Schoon's erroneously admitted written report. *People v Hill*, 257 Mich App 126, 140; 667 NW2d 78 (2003) (explaining that because an "evidence technician properly testified extensively with regard to the evidence found in defendant's vehicle, . . . the admission of her report was merely cumulative and did not place any relevant and damaging information before the jury that the jury did not know already"). In summary, given the properly admitted testimony by Schoon and Hanie and the substantial other properly admitted evidence of defendant's guilt, we detect neither a reasonable probability that but for defense counsel's purported error the result of defendant's trial would have differed, *id*., nor any plain error that affected defendant's substantial rights. *Carines*, 460 Mich at 763-764.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly

[8] Although defendant suggests that the trial court also improperly admitted "his alleged statements to FBI agents," he neglects in the supplemental brief to develop the argument or cite any authority in support of it. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Moreover, Schoon's and Hanie's testimony recounting defendant's own statements was admissible pursuant to MRE 801(d)(2)(A). Defendant's supplemental brief raises no challenge to the trial court's admission of Schoon's handwritten notes, which he used as the foundation for the written report. The record reflects defense counsel's view that Schoon's notes contained some details and omissions of assistance to the defense.