STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 27, 2012
v	No. 297237 Jackson Circuit Court
SARAH JO HETTINGER, Defendant-Appellant.	LC No. 09-005898-FH

Before: SHAPIRO, P.J., and WILDER and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial conviction for possession of 50 to 449 grams of a controlled substance (narcotic or cocaine), MCL 333.7403(2)(a)(*iii*). We affirm.

I. BACKGROUND

On July 29, 2009, Jackson police officers conducted a controlled powder cocaine purchase from Patrick Giddis.[1] After the transaction was completed, the officers observed Giddis enter defendant's apartment, located at 305 Homecrest Road. Thereafter, on July 30, 2009, approximately ten police officers executed a search warrant at defendant's apartment. During the search, the officers discovered zippers on the underside of the dining room table chairs, which upon opening the officers located a total of 114.6 grams of cocaine within several plastic baggies and $3,850 in cash, including the marked money given to Giddis by the officers during the controlled powder cocaine purchase.

As previously noted, defendant was charged and convicted by the jury of possessing 50 grams or more but less than 450 grams of a controlled substance (narcotic or cocaine), MCL 333.7403(2)(a)(*iii*). Defendant was sentenced to 5 to 20 years' imprisonment, and now appeals as of right.

II. ANALYSIS

[1] Giddis is the father of defendant's two children.

A. EVIDENTIARY ERRORS

Defendant argues that the trial court erred in admitting evidence regarding crack cocaine, admitting evidence concerning previous unrelated drug investigations in 2005 and 2008, and questioning a witness regarding the probable cause determination for a search warrant. The trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). "[E]ven if we find that evidence was erroneously admitted, we will deem the error harmless if it did not prejudice the defendant[.]" *People v Bartlett*, 231 Mich App 139, 158; 585 NW2d 341 (1998). The trial court's decisions to question a witness concerning probable cause and admit evidence of the 2005 investigation is reviewed for plain error affecting defendant's substantial rights because defendant failed to object to their admission. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The trial court did not abuse its discretion in allowing the admission of evidence regarding the typical unit and cost of a single amount of crack cocaine, and regardless any error was harmless. On direct examination, the prosecution asked an officer how much a typical single use of powder cocaine weighed and its cost. In response, the officer compared the typical single use unit and cost of crack cocaine to the typical single use unit and cost of powder cocaine. The officer's comparison of crack cocaine to powder cocaine was an indirect way of answering the prosecution's question regarding what the typical single use weight and cost of powder cocaine was. And, evidence regarding the typical single use weight and cost of powder cocaine was relevant under MRE 401 because it made the existence of a material fact, namely whether defendant's apartment was being used by Giddis as a narcotics stash house, more or less probable than it would be without the evidence. The dissent mischaracterizes the officer's testimony as not relevant because it concludes that this testimony primarily provided evidence relating to the selling of crack cocaine. However, when the entire dialogue between the prosecution and the officer is reviewed, it is clear that the officer's testimony related to whether defendant's apartment was a stash house based on the amount of powder cocaine found inside her home. The evidence does not imply that defendant was selling crack cocaine.

Moreover, any error regarding the admission of this evidence would have been harmless. See *Bartlett*, 231 Mich App at 158. The potential error did not prejudice defendant because of the strong evidence supporting her conviction, and because the officer made no attempt to link crack cocaine to defendant. See *id*. The police witnessed Patrick Giddis, a known drug dealer and father of defendant's children, selling cocaine, and items recovered from defendant's apartment revealed that Giddis had been living with defendant even though he was using a different address. There was also evidence that defendant was living well above her financial means. For example, the evidence showed that defendant purchased brand new furniture, including the dining room chairs wherein the police discovered the cocaine and cash, and went on a recent trip to Mexico. Defendant also drove a vehicle not registered in her name and, as discussed below, she was aware of Giddis's prior drug dealings. The dissent's concern that the officer's testimony prejudiced defendant stems largely from its perception that the officer's testimony implied that defendant sold and/or used crack cocaine and that crack cocaine is more dangerous to use than powder cocaine. However, neither party made reference to defendant selling or using crack cocaine. In fact, the only reference to crack cocaine was the officer's comparison to explain how much a typical single unit of powder cocaine weighs and its cost.

Given the strong evidence to support defendant's convictions, we cannot find that this evidence prejudiced defendant.

The admission of evidence regarding the 2008 investigation was not an abuse of discretion, and the admission of evidence regarding the 2005 investigation did not constitute plain error affecting defendant's substantial rights. A defendant "opens the door" to the admission of typically inadmissible evidence when it inquires into or makes reference to such evidence. Thereafter, the prosecution is allowed to introduce evidence in response to the evidence and impressions raised by the defendant. *People v Figgues*, 451 Mich 390, 399-400; 547 NW2d 673 (1996). Moreover, a "[d]efendant cannot complain of [the] admission of testimony which [the] defendant invited or instigated." *People v Whetstone*, 119 Mich App 546, 554; 326 NW2d 552 (1982). See also *Troy v McMaster*, 154 Mich App 564, 570; 398 NW2d 469 (1986) (It is well established that "[w]here a defendant raises the issue of his prior bad acts, he has waived any claim of error.").

On direct examination, the prosecution asked the detective, "[a]re you familiar with both [defendant and Giddis]?" and the detective replied, "[u]h, yes, I have dealt with both in the past." Thereafter, on cross-examination, defendant questioned the detective:

> *Q.* Now you testified about having prior investigations. Isn't it true that your prior investigations involved Patrick Giddis?
>
> *A.* Yes.
>
> *Q.* These prior investigations didn't involve [defendant] did they?
>
> *A.* She was residing with him when one of the investigations was conducted.
>
> *Q.* She wasn't the focus of the investigation, correct?
>
> *A.* I would say they were both focused [sic] because I did not know exactly who was selling or who was holding narcotics.

Here, defendant opened the door when she brought out on cross-examination that the detective's "prior dealings" with defendant were actually prior investigations wherein defendant was a focus of the investigation. Because defendant opened the door by asking the detective about his prior investigations involving defendant, the other acts evidence regarding the prior investigations was properly admitted. See *People v Horn*, 279 Mich App 31, 35-36; 755 NW2d 212 (2008) (other acts evidence properly admitted once defendant opened the door by inquiring on the issue).

The dissent's attempt to distinguish Michigan law on this issue is flawed in several respects. First, the dissent relies upon non-binding case law from the United States Court of Appeals for the Ninth Circuit. *Sharp v Lansing*, 464 Mich 792, 803; 629 NW2d 873 (2001). Considering that Michigan law currently does not import the Ninth Circuit's requirement that the evidence admitted after the door is opened be used only to rebut a false impression, see *United States v Whitworth*, 856 F2d 1268, 1285 (CA 9, 1988), we cannot agree that such a limiting rule

should be used in this case. Second, defense counsel's questions to the detective did elicit inadmissible evidence. Defense counsel specifically asked the detective whether his prior investigations involved defendant. Generally, other acts evidence, including prior police investigations, is inadmissible under MRE 404(b)(1). See *People v Williamson*, 205 Mich App 592, 596; 517 NW2d 846 (1994) ("As a general rule, evidence that tends to show the commission of other criminal acts by a defendant is not admissible to prove guilt of the charged offense."). Additionally, the dissent's reliance on *People v Yager*, 432 Mich 887; 437 NW2d 255 (1989) is misplaced. In *Yager*, our Supreme Court held that reference to a defendant's possible habitual offender status did not open the door to evidence of the defendant's prior convictions. *Id*. The *Yager* Court emphasized that evidence that opens the door must specifically relate to the evidence sought to be introduced. *Id*. Here, defense counsel opened the door regarding prior investigations by posing the question directly to the detective. *Yager* confirms that the trial court did not abuse its discretion in allowing the evidence.

Next, although we agree that the trial court's question regarding probable cause for a warrant was not proper, the error did not affect defendant's substantial rights. "A trial court may question a witness in order to clarify testimony or to elicit additional relevant information." *People v Weathersby*, 204 Mich App 98, 109; 514 NW2d 493 (1994); see MRE 614(b). But "[a] trial court may not assume the prosecutor's role with advantages unavailable to the prosecution[,]" *id*., and should not ask questions that are "intimidating, argumentative, prejudicial, unfair or partial[,]" *People v Sterling*, 154 Mich App 223, 228; 397 NW2d 182 (1986). In determining whether the trial court's questions violated a defendant's right to due process and a fair trial, "[t]he test is whether the judge's questions and comments may have unjustifiably aroused suspicion in the mind of the jury concerning a witness' credibility and whether partiality quite possibly could have influenced the jury to the detriment of the defendant's case." *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996).

The trial court should not have inquired about the probable cause determination for a warrant. Defendant had not challenged the sufficiency of the affidavit at or before trial. The question was not relevant because whether there was probable cause for the warrant did not make the existence of any fact that was of consequence to the determination of the action more or less probable. MRE 401. Furthermore, we agree with the dissent that the question may also have improperly bolstered both the witness's credibility and the prosecution's case by implying that there had been a prior determination of probable cause. See *Sterling*, 154 Mich App at 230 (finding that the questions posed by the trial court to a witness "may well have been interpreted as the court's seal of credibility" on the testimony of the witness). However, while the dissent emphasizes that the trial court's comment denied defendant the right to a fair trial, we cannot conclude that it prejudiced defendant because it was an isolated comment not repeated by either counsel or any other witness, and the police officers actually discovered cocaine and cash hidden in defendant's dining room chairs. Thus, despite the impropriety of the trial court's question, there was strong evidence to support defendant's conviction. There was no plain error requiring reversal. *Carines*, 460 Mich at 763.

B. IMPARTIAL JURY

Defendant next argues that she was denied her right to an impartial jury because one of the jurors had a case pending before the trial court. A criminal defendant is entitled to a fair trial

by an impartial jury under the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Miller*, 482 Mich 540, 547; 759 NW2d 850 (2008). "Jurors are presumptively competent and impartial, and the party alleging the disqualification bears the burden of proving its existence." *People v Johnson*, 245 Mich App 243, 256; 631 NW2d 1 (2001).

Defendant waived her right to challenge the impartiality of the jury because when the juror raised the fact that she had a parenting time case pending before the trial court, the trial court gave defendant the opportunity to excuse the juror and she declined. See *Carines*, 460 Mich at 762 n 7; *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001); *Johnson*, 245 Mich App at 253-254 n 3. Moreover, defendant has failed to carry the burden of proving the juror was not impartial because she failed to demonstrate that the juror was biased. See *Johnson*, 245 Mich App at 256.

C. PROBABLE CAUSE

Defendant contends that her Fourth Amendment right was violated because the search warrant was not supported by probable cause. We afford deference to the magistrate's decision, and appellate scrutiny only requires the determination of whether "a reasonably cautious person could have concluded that there was a 'substantial basis' for the finding of probable cause." *People v Whitfield*, 461 Mich 441, 446; 607 NW2d 61 (2000), quoting *Illinois v Gates*, 462 US 213, 238; 103 S Ct 2317; 76 L Ed 2d 527 (1983). We focus on "the facts and circumstances supporting the magistrate's probable cause determination." *People v Martin*, 271 Mich App 280, 298; 721 NW2d 815 (2006). Because defendant did not properly preserve this issue, we review it for plain error affecting the defendant's substantial rights. *Carines*, 460 Mich at 763.

"A search warrant may not be issued absent probable cause to justify the search." *Martin*, 271 Mich App at 298, citing US Const, Am IV; Const 1963, art 1, § 11; MCL 780.651. "Probable cause to issue a search warrant exists where there is a 'substantial basis' for inferring a 'fair probability' that contraband or evidence of a crime will be found in a particular place." *People v Kazmierczak*, 461 Mich 411, 417-418; 605 NW2d 667 (2000) (quotation omitted). "[A] search warrant and the underlying affidavit are to be read in a common-sense and realistic manner." *Whitfield*, 461 Mich at 446 (quotation omitted). "[T]he affidavit must contain facts within the knowledge of the affiant and not mere conclusions or beliefs. The affiant may not draw his or her own inferences, but rather must state matters that justify the drawing of them." *Martin*, 271 Mich App at 298 (citations omitted).

There was no plain error affecting defendant's substantial rights based on the affidavit supporting the warrant because it was sufficient to establish probable cause. The standard for reviewing a magistrate's decision is highly deferential, and the affidavit does not have to include every single detail of the controlled purchase. See also *Whitfield*, 461 Mich at 446. The police officer who wrote the affidavit observed the confidential information perform a controlled purchase of cocaine from Giddis. The police officer observed Giddis return to 305 Homecrest Road. The direct observation by the police officer of the controlled purchase provided a "substantial basis for inferring a fair probability that contraband or evidence of a crime" would be found at 305 Homecrest Road. *Kazmierczak*, 461 Mich at 417 (quotation omitted). "[A] reasonably cautious person could have concluded that there was a 'substantial basis' for the

finding of probable cause" based on the information in the affidavit. *Whitfield*, 461 Mich at 446 (quotation omitted); see also *Martin*, 271 Mich App 298. Thus, the affidavit was sufficient to establish probable cause to support the search warrant.

D. PRV 5

Defendant argues that the trial court abused its discretion because prior record variable (PRV) 5 was improperly scored at two points, resulting in her sentence being disproportionate. We review scoring decisions under the sentencing guidelines for an abuse of discretion. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009). However, "[t]rial courts are afforded broad discretion in calculating sentencing guidelines, and appellate review of those calculations is very limited." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). "Scoring decisions for which there is any evidence in support will be upheld." *Id.* "Generally, . . . [we] review[] a trial court's sentencing decisions for an abuse of discretion." *People v Conley*, 270 Mich App 301, 312; 715 NW2d 377 (2006).

Defendant waived her challenge to the PRV 5 score, as defense counsel argued in favor of and agreed to the PRV 5 score of two points. See *Carines*, 460 Mich at 762 n 7; *Riley*, 465 Mich at 449; *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000); *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998). Nonetheless, the PRV 5 score of two points was not an abuse of discretion because there was evidence that defendant pleaded guilty to the misdemeanor larceny charges and waived her right to counsel. See *Elliott*, 215 Mich App at 260.

The trial court also did not abuse its discretion in sentencing defendant to 5 to 20 years' imprisonment because the sentence was proportionate. Defendant's sentence was within the minimum guidelines range and is presumptively proportionate. See *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). At sentencing, defendant did not present any unusual circumstances which show that a sentence within the guidelines range would not be proportionate. See *People v Sharp*, 192 Mich App 501, 505; 481 NW2d 773 (1992). Accordingly, the trial court did not abuse its discretion because defendant's sentence was proportional and does not constitute cruel and unusual punishment. *Id.*; *Powell*, 278 Mich App at 323.

E. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next makes numerous claims of ineffective assistance of counsel. Our review is limited to errors apparent on the record because defendant's motion for a new trial below was denied, and we denied her motion for remand. *People v Seals*, 285 Mich App 1, 19-20; 776 NW2d 314 (2009). To establish a claim of ineffective assistance of counsel, the defendant must prove that counsel's representation fell below an objective standard of reasonableness and was so prejudicial that it denied the defendant a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). To prove that counsel's performance was deficient, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Trial counsel has "great discretion in the trying of a case-especially with regard to trial strategy and tactics." *Pickens*, 446 Mich at 330. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be

matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Counsel is not required to advance meritless arguments or raise futile objections. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). The defendant demonstrates prejudice by showing the "existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Carbin*, 463 Mich at 600.

We have reviewed all of defendant's claims of ineffective assistance of counsel, most of which were based on issues we have already addressed. The only instance in which defense counsel's performance was arguably deficient was when defense counsel opened the door to the admission of evidence regarding the past drug investigations involving defendant and Giddis. It is clear from the record that it was not defense counsel's trial strategy to open the door to admission of this evidence. Nonetheless, defendant has failed to demonstrate that the error was prejudicial and that but for the error, the result of the proceedings would have been different. See *Carbin*, 463 Mich at 600. There was strong circumstantial evidence in support of defendant's conviction. Therefore, we find that defendant was not denied effective assistance of counsel.

We reject the dissent's contention that counsel was deficient for failing to present defendant's tax forms as evidence in support of defendant's claim that she purchased the new furniture using her tax refund. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *Rockey*, 237 Mich App at 76. Defendant failed to overcome the strong presumption that defense counsel's decision to present testimony on this fact rather than document any evidence constituted sound trial strategy. Moreover, while it is true that the prosecution presented circumstantial evidence to prove the elements of the charged crime, we disagree with the dissent that the admission of defendant's tax forms into evidence would have affected the outcome of the proceedings given that this evidence was actually presented to the jury in the form of defendant's own testimony. See *id* at 76-77.

F. PROSECUTORIAL MISCONDUCT

Defendant asserts that there was prosecutorial misconduct based on the prosecutor's use of irrelevant and inflammatory evidence. We review claims of prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). However, we review defendant's unpreserved claims of prosecutorial misconduct concerning the evidence of the 2005 investigation, defendant's parenting skills, and the method of transport of cocaine into Jackson County for plain error affecting substantial rights. *People v Ericksen*, 288 Mich App 192, 198; 793 NW2d 120 (2010). "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 Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008). "The test for prosecutorial misconduct is whether, after examining the prosecutor's statements and actions in context, the defendant was denied a fair and impartial trial." *People v Hill*, 257 Mich App 126, 135; 667 NW2d 78 (2003). Prosecutors may argue the evidence and all reasonable inferences that can be drawn from it. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). However, prosecutors exceed the proper bounds of argument by making inflammatory statements. *People v Ullah*, 216 Mich App 669, 679; 550 NW2d 568 (1996); *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001).

There was no prosecutorial misconduct concerning the presentation of evidence regarding the 2008 investigation and defendant's purchase of brand new furniture because the evidence was relevant and not inflammatory. Defendant opened the door to admission of the evidence regarding the 2008 investigation, *McMaster*, 154 Mich App at 570; *Whetstone*, 119 Mich App at 554, and it was admissible under the trial court's discretion pursuant to MRE 404(b)(1) and (2). The probative value of the evidence - to help prove that defendant had knowledge of the cocaine - outweighed the danger of unfair prejudice. MRE 403.

There was no plain error affecting defendant's substantial rights regarding the prosecutor's use of evidence concerning the 2005 investigation, defendant's parenting skills, and the method of transport of cocaine into Jackson County. Defendant generally argues that the prosecutor's use of this evidence was irrelevant and inflammatory but does not provide any further specification as to how the prosecutor's actions constituted misconduct. As to this evidence, there was no clear or obvious error. *Carines*, 460 Mich at 763. The evidence of the 2005 investigation was admissible under MRE 404(b) once defendant opened the door. Although arguing that an inference could be made that defendant was an unfit mother from the facts in evidence was not relevant, it did not deny defendant a fair trial. Additionally, the evidence regarding the method of transport of cocaine was relevant because it explained why and how stash houses are used and made it more probable that defendant's apartment was being used as Giddis's stash house. MRE 401. Therefore, there was also no plain error affecting defendant's substantial rights arising from the prosecutor's closing arguments relating to this evidence. In closing, the prosecutor could argue the evidence and all reasonable inferences that could be drawn from it. *Bahoda*, 448 Mich at 282.

G. CUMULATIVE ERROR

Although we do not find the cumulative error doctrine applicable, we respond to the dissent's assertion that several errors in combination require a new trial. The cumulative effect of multiple errors may require reversal where a single error, standing alone, does not. *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002). This Court reviews a claim of cumulative error to determine whether the combination of errors denied the defendant a fair trial. *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001). Reversal is not required unless the errors are consequential and denied the defendant a fair trial. *Id*. at 388.

The dissent's concern mainly lies in what it perceives to be several errors combined with the lack of direct evidence. We have already explained why there were not any errors of consequence. As for the dissent's distaste for a case based purely upon circumstantial evidence, the prosecution's burden of proving all the elements of the charged crime can be satisfied solely on circumstantial evidence and reasonable inferences drawn therefrom. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000); *Carines*, 460 Mich at 757. It is the providence of the jury to determine the weight and credibility of evidence presented by the prosecution. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 478 (1992), amended 441 Mich 1201 (1992); *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Consequently, because the jury has already determined that the evidence presented by the prosecution satisfied the elements of the charged crime, and there were not multiple errors, there cannot be a cumulative effect of errors. *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007); *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

H. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that there was insufficient evidence for a rational jury to find beyond a reasonable doubt that she possessed 50 grams or more but less than 450 grams of cocaine, an argument that we review de novo. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000) aff'd 466 Mich 39 (2002). We "must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *Wolfe*, 440 Mich at 515. "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." *Nowack*, 462 Mich at 400. "Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime." *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005).

Under MCL 333.7403, "[a] person shall not knowingly or intentionally possess a controlled substance . . . ." Possession may be actual or constructive and joint or exclusive. *People v McKinney*, 258 Mich App 157, 166; 670 NW2d 254 (2003). "The essential issue is whether the defendant exercised dominion or control over the substance." *Id.* In *People v Izarraras-Placante*, 246 Mich App 490, 495-496; 633 NW2d 18 (2001) (quotation omitted), this Court provided:

> To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement.

Aiding and abetting "is simply a theory of prosecution," and "is not a separate substantive offense." *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006) (quotation omitted).

Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence for a rational jury to find that defendant possessed 50 grams or more but less than 450 grams of cocaine. Defendant does not dispute that the police discovered cocaine and cash in her apartment. Instead, she simply argues that the evidence was insufficient to prove that she "knowingly or intentionally" possessed the cocaine. The evidence presented at trial established that defendant knew that Giddis was a drug dealer and that twice in the past police found narcotics in the homes that she shared with him. There was testimony from police officers that drug dealers typically use a separate address than the address where they actually reside and that they use a "stash house" to store their narcotics. The evidence supported that Giddis had been living with defendant while using another address. Although defendant was under extreme financial constraints, she went on vacation to Mexico with Giddis and purchased brand new furniture with cash, including the dining room chairs in which police discovered cocaine and $3,850 in cash hidden. From this evidence, the jury could reasonably infer that defendant had knowledge of the cocaine where she knew Giddis had engaged in prior drug dealings and she was benefitting financially from the sale of it.

I. NEWLY DISCOVERED EVIDENCE

Defendant contends that she is entitled to a new trial based on Giddis's proffered testimony, as Giddis could not previously testify because of the criminal charges pending against him. Although defendant moved for a new trial in the trial court, she did not do so on the basis of newly discovered evidence. Thus, we review whether defendant was entitled to a new trial based on the newly available evidence of Giddis's testimony for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

Giddis's testimony was newly available rather than newly discovered and was insufficient to warrant a new trial. For granting a new trial based on newly discovered evidence, a defendant must prove the following:

> (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial. [*People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) (quotations omitted).]

In *People v Terrell*, 289 Mich App 553, 570; 797 NW2d 684 (2010), this Court held that "newly available evidence does not constitute newly discovered evidence sufficient to warrant a new trial[.]" Specifically, this Court concluded that "a codefendant's posttrial or postconviction willingness to provide exculpatory testimony constitutes newly available evidence, not newly discovered evidence, and that if the defendant knew or should have known of the evidence before or during trial, the evidence was not discovered after trial and a new trial is not warranted[.]" *Id*. at 561. Defendant claimed that she had no knowledge of the cocaine in the dining room chairs or that Giddis was dealing drugs while staying in her apartment. Based on defendant's claim regarding the lack of knowledge of the cocaine, defendant knew that Giddis could have offered material testimony before the trial. Therefore, it was not newly discovered, and defendant is not entitled to a new trial.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Christopher M. Murray

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 27, 2012
v	No. 297237 Jackson Circuit Court
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Before: SHAPIRO, P.J., and WILDER and MURRAY, JJ.

SHAPIRO, P.J. (*dissenting*).

I respectfully dissent. Multiple prejudicial errors in this case require reversal, namely: erroneous admission of prior police investigations concerning the defendant; sua sponte questioning of a detective by the trial court about a magistrate's finding of probable cause to search defendant's home; admission of irrelevant and prejudicial testimony concerning crack cocaine; and ineffective assistance of counsel. Given the cumulative nature of the errors,[1] the lack of *any* evidence that defendant ever personally possessed the cocaine and the lack of any direct evidence that defendant was aware the cocaine was in her home, I conclude that the errors undermined the reliability of the verdict and defendant's conviction should be reversed. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010).[2]

I. BACKGROUND

On July 29, 2009, police officers in Jackson conducted a controlled purchase of powder cocaine from Patrick Giddis. Giddis is the father of defendant's two children. After the purchase, the officers saw Giddis enter a house at 305 Homecrest Road. Officers subsequently

[1] The cumulative effect of individually harmless errors can warrant reversal if the cumulative effect was seriously prejudicial so as to merit a finding that the defendant was denied a fair trial. *People v Unger*, 278 Mich App 210, 261; 749 NW2d 272, lv den 482 Mich 1027 (2008).

[2] "In making this determination, this Court should "focus on the nature of the error in light of the weight and strength of the untainted evidence." *Feezel*, 486 Mich at 192.

obtained a search warrant for the upstairs apartment at that address. Defendant was the lessee of the apartment and resided there.

On July 30, 2009, approximately ten officers executed the search warrant at 305 Homecrest Road. When the officers knocked on the door and verbally identified themselves, no one responded, so they rammed open the front door. Inside the apartment, the officers discovered defendant's fifteen-year-old brother and defendant's two children, ages five and one, for whom he was babysitting.

During the search, the officers discovered that there were zippers on the undersides of the dining table chairs. They opened the zippers and inside one of the chairs found plastic baggies of cocaine and in another, $3,850 in cash, including the marked money from the controlled purchase of cocaine. The total amount of cocaine the officers recovered was 114.6 grams.

The prosecution asserted that Giddis was permanently residing at the defendant's apartment and that she was either directly involved with Giddis' cocaine-dealing activities or that she had actual knowledge that Giddis kept cocaine in the house and aided and abetted Giddis' by allowing him to stay at her home despite this knowledge. However, no direct evidence was either admitted or proffered that defendant, as opposed to Giddis, had ever personally possessed the cocaine. Nor was any evidence admitted or proffered that defendant had been advised by Giddis or anyone else of the presence of the cocaine in her home or that she was seen in the presence of the cocaine when it was not hidden.

Defendant testified and called several witness in her defense. She testified that she and Giddis had been involved romantically for several years and had shared a residence for several years, but that in 2008 she, along with the two young children she and Giddis had together, moved out of that residence because she could no longer tolerate his drug activities. Defendant asserted that in July, 2009, just a week or so before the arrest, Giddis told her that his new girlfriend (with whom he had recently had a child) had thrown him out of her home and he asked defendant if he could stay for a few days at her apartment until he found another place.[3] She testified that she agreed to his request because he was the father of her children and that he had promised not to bring any drugs into the apartment. According to defendant, Giddis only planned to stay temporarily until he was able to set up other living arrangements. She testified that although she was aware that Giddis had sold drugs in the past, she did not believe he was selling drugs at that point in time because he had no money while, in the past when he was dealing drugs, he had money.

No witness testified that Giddis had been staying at defendant's home for any time beyond the few days described by defendant. Giddis did not testify. Defendant's landlord supported defendant's version of events in that he testified that although defendant had been renting from him for several months, he was not familiar with Giddis.

[3] The record is unclear but it appears that on at least one of the nights that Giddis stayed at her home, Charles Schmucker, a friend of Giddis' stayed there as well.

The prosecution introduced evidence that the police found some of Giddis' possessions in defendant's home. During their search, the police found three prescription bottles dated July 22, 2009, belonging to Giddis. The bottles were found on top of the microwave oven in the kitchen. Each listed Giddis' address as Kathy Circle which was his grandmother's address[4] and listed on his license as his address. The police also found a bicycle receipt made out to Giddis dated July 24, 2009.[5] It also listed Giddis' address at Kathy Circle.

In a drawer in defendant's bedroom, officers found a variety of other paperwork belonging to Giddis, including court documents from a prior case, a receipt for payment of a plane ticket, as well as his social security card, birth certificate and passport, issued June 29, 2009. In a kitchen drawer, the officers found a letter dated April 29, 2009 to Giddis from his bank, addressed to him at the Kathy Circle address. In the same kitchen drawer they also found Giddis' then-current driver's license and his expired driver's license. In the living room, the officers found a single plastic storage bin containing several articles of men's clothing, men's shoes, a toothbrush in a toothbrush case and a pair of sunglasses.

One of the officers testified that in a dresser in the bedroom they found women's clothing and "men's pants and t-shirts, or a larger size, I assume would be a men's t-shirt." The jury was shown a photo of the contents of that drawer. Contradicting this description of the drawer's contents, defendant testified that all of the clothes in the bedroom belonged to her. At oral argument on appeal, the prosecution conceded that none of the photographs depicted men's clothing in the drawer or elsewhere in defendant's bedroom.

The prosecution also sought to link defendant to the drugs by asserting that defendant had unexplained income. Defendant claimed that she struggled financially and it was uncontested that she worked six days per week at a nursing home as an aide. The prosecution introduced evidence of expenses that it asserted could not have been paid on defendant's hourly wage at the nursing home. First, evidence was admitted that earlier that month,[6] defendant had gone on a vacation in Cancun, Mexico with her stepfather, her sister and Giddis.[7] Defendant testified that the trip was a belated high school graduation present from her stepfather as she had been unable to take the trip upon graduation because she was pregnant at that time. Defendant's step-father supported this defense, testifying that he had paid for the entire trip for both defendant and her sister along with Giddis, and that it had been a belated graduation present.

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[4] Two police officers testified that using multiple addresses was consistent with the methodology of drug dealers. Based on their experience and training, they testified that cocaine dealers, in an attempt to mislead the police, often keep their cocaine at a location different from their residence of record.

[5] These dates fall within the few days that defendant testified Giddis was staying with her.

[6] A photo taken during the trip was dated July 17, 2009.

[7] Defendant explained that Giddis' passport, social security card, and birth certificate were at her apartment because she had helped him obtain his passport for this trip.

Second, the prosecution introduced a photo taken during the Cancun trip in which defendant was wearing an expensive pair of Versace-brand sunglasses. Defendant testified that the sunglasses belonged to Giddis and that she had borrowed them the day the photo had been taken.

Third, the prosecution introduced evidence that defendant's apartment contained recently purchased new furniture, including a dining room table, dining room chairs, a king bed, a twin bed, a crib and a dresser the cost of which totaled approximately $5,500. Defendant testified that she had purchased the furniture with income tax return money that she received in February—$6,000 from her federal income tax and $1,000 from her state income tax return. She testified that she and her children had been living in the apartment for several months without any furniture and that she used the tax refunds to finally purchase these items.

Finally, the prosecution admitted evidence that defendant drove a 2006 Pontiac registered in the name of Giddis' uncle. The prosecution argued that this arrangement was consistent with the practice of drug dealers to register their vehicle in someone else's name in order to avoid vehicle forfeiture. Defendant's uncle testified that he registered the vehicle in his name as a favor to defendant because she had bad credit and could not obtain a loan, but that defendant made the payments.[8]

After a three-day jury trial, defendant was convicted of possessing 50 grams or more but less than 450 grams of a controlled substance (narcotic or cocaine), MCL 333.7403(2)(a)(iii). On March 18, 2010, she was sentenced to 5 to 20 years' imprisonment. On April 8, 2010, defense counsel moved for a new trial on behalf of defendant, arguing that the trial court made erroneous rulings, that the verdict was against the great weight of the evidence, and that irregularity of the proceedings denied defendant a fair trial. Defendant then obtained new counsel, who, on August 16, 2010, moved for a new trial on additional grounds. The trial court denied the motion for new trial and defendant now appeals.

II. ANALYSIS

Defendant argues that several of the trial court's evidentiary rulings were in error and that individually or cumulatively, these errors were not harmless.

A. EVIDENCE OF PRIOR INVESTIGATIONS

Over defendant's objection, the trial court admitted extensive testimony, and argument based thereon, that described two prior investigations in which drugs had been found in homes

[8] The uncle further testified that he agreed to register the vehicle in his name on the condition that no one other than defendant drive the vehicle. However, a few days before the warrant was executed, one of the officers saw Giddis driving the vehicle, and defendant admitted that she had allowed Giddis to drive it on several occasions.

shared by defendant and Giddis during the time defendant admitted they had lived together. The trial court admitted the evidence based on its conclusion that defense counsel had "swung the door wide open" during cross-examination of an investigating detective. I conclude that the trial court erred in admitting the evidence of the prior investigations.

On direct examination of the detective, the prosecution asked, "And are you familiar with both [defendant and Giddis]?" to which the detective replied, "Uh, yes, I have dealt with both in the past." The detective also indicated that he had previously seen defendant's vehicle "on several occasions" related to other prior investigations.

In response, during cross-examination of the detective, defense counsel questioned the detective as follows:

> *Q.* Now you testified about having prior investigations. Isn't it true that your prior investigations involved Patrick Giddis?
>
> *A.* Yes.
>
> *Q.* These prior investigations didn't involve [defendant] did they?
>
> *A.* She was residing with him when one of the investigations was conducted.
>
> *Q.* She wasn't the focus of the investigation, correct?
>
> *A.* I would say they were both focused [sic] because I did not know exactly who was selling or who was holding narcotics.

The prosecution then notified the trial court that, although it had not planned on admitting evidence of the previous 2005 and 2008 drug investigations involving the execution of warrants for narcotics in homes shared by defendant and Giddis, and had not filed a notice under MRE 404(b)(2), it now wished to introduce such evidence without notice because defense counsel had "opened the door" by asking these three questions. The trial court then allowed detailed and extensive questioning of both the detective and the defendant concerning these prior events.

"Opening the door" is the common name for the rule of curative admissibility. *United States v Whitworth*, 856 F2d 1268, 1285 (CA 9, 1988). Under this rule,

> the introduction of inadmissible evidence by one party allowed an opponent, in the court's discretion, to introduce evidence on the same issue to rebut any false impression that might have resulted from the earlier admission." See *United States v. Segall*, 833 F2d 144, 148 (9th Cir. 1987); *United States v. Makhlouta*, 790 F2d 1400, 1402-03 (9th Cir. 1986); I J. Wigmore, Evidence § 15 (Tillers rev. 1983). [*Id.*]

Contrary to the majority's assertion, the rule in Michigan has always been that the door is only opened if the inadmissible evidence introduced by the first party would otherwise prejudice the second party. *Grist v Upjohn Co*, 16 Mich App 452, 482-483; 168 NW2d 389 (1969). The trial

court may not allow inadmissible evidence "merely because the adverse party has brought out some evidence on the same subject, where the circumstances are such that no prejudice can result from a refusal to go into the matter further." *Id.*

Our Supreme Court confirmed in *People v Yager*, 432 Mich 887; 437 NW2d 255 (1989) that a reference to inadmissible evidence does not "open the door" to introduce extensive evidence on that topic. In *Yager*, the trial court had excluded reference to the defendant's prior felony convictions in response to a motion in limine filed by the defendant. *People v Yager*, unpublished opinion per curiam of the Court of Appeals, issued January 22, 1988 (Docket No. 88914), slip at 1-2. During trial, the defendant "claimed that a police officer used coercive techniques in interrogating him, including a threat to charge defendant as a habitual offender if he did not confess to a series of breaking and enterings." *Id.* at 2. The prosecution then questioned the defendant regarding his previous charges. The defendant objected multiple times to the questions, but the trial court allowed them because "the defendant had raised the issue of being threatened by the officer and, therefore the prosecution had a right to explore the nature of the alleged threat on cross-examination." *Id.* This Court, in a 2-1 decision, concluded that the defendant had "opened the door for the admission of the evidence of his prior convictions" by claiming the officer had threatened him with habitual offender status. *Id*. at 4. On appeal, our Supreme Court reversed the majority and granted the defendant a new trial because "[t]he defendant's reference to having been threatened with prosecution as a habitual offender did not 'open the door' to extensive questioning about the defendant's prior record." *People v Yager*, 432 Mich 887; 437 NW2d 255 (1989).[9]

[9] The majority cites *People v Horn*, 279 Mich App 31; 755 NW2d 212 (2008) to support the proposition that any reference to inadmissible evidence opens the door to a full exploration of the otherwise inadmissible subject. However, in *Horn* the prosecution merely elicited exactly the same information from the victim's daughter that the defense had already elicited from the victim: both stated that the victim stopped seeing the defendant because he had raped her. The court stated that the evidence introduced by the prosecution was "merely cumulative" of the victim's testimony. *Id.* at 36.

The majority also misreads *Yager*, suggesting that the evidence that opens the door need merely relate to the evidence sought to be introduced. However, in that case the first evidence was that defendant was threatened with prosecution as a habitual offender, and the "rebuttal" evidence was an exploration of defendant's prior record, which was clearly related to his status as a habitual offender. Nonetheless, the Supreme Court refused to allow the reference to possible habitual offender status to serve as an excuse to bring defendant's entire criminal record before the jury. 432 Mich 887.

The facts in the present case are nearly identical. Defense counsel elicited evidence that defendant was the subject of prior investigations. This did not give the prosecution license to explore the details of those investigations, where the original testimony did not create a false impression or otherwise prejudice the prosecution.

In the present case, defense counsel's question whether defendant was the subject of the prior investigations did not open the door to bring in all of the evidence and circumstances surrounding those investigations, particularly given that the detective's answer was that defendant *was* a subject of those investigations. Even accepting the majority's contention that the detective's answer constituted inadmissible testimony, there was no "false impression" or prejudice to the prosecution that resulted from his answer that had to be cured by admission of evidence about those investigations. *Grist*, 16 Mich App at 482-483. That is, the detective testified that both defendant and Giddis *were* the subject of the prior investigations. Had the detective testified that defendant was not the subject of those investigations, the prosecution may have had an argument that the statement was false and, therefore, had opened the door to more detailed information about those investigations to correct the false impression. That did not occur, however. As the record stood, the jury was aware that defendant was, in fact, the subject of those prior investigations, and there was nothing to be "cured" by admitting the evidence regarding the prior investigations. *Id.* Thus, the rule of curative admissibility was inapplicable and the trial court abused its discretion in admitting the evidence of the two prior investigations.

B. QUESTIONING REGARDING PROBABLE CAUSE

I agree with defendant that the trial court plainly erred by questioning a police officer regarding whether a probable cause determination was necessary before a warrant was issued. "A trial court may question a witness in order to clarify testimony or to elicit additional relevant information." *People v Weathersby*, 204 Mich App 98, 109; 514 NW2d 493 (1994); see also MRE 614(b). However, "[a] trial court may not assume the prosecutor's role with advantages unavailable to the prosecution" and should not ask questions that are "intimidating, argumentative, prejudicial, unfair or partial." *Id.*; *People v Sterling*, 154 Mich App 223, 228; 397 NW2d 182 (1986). In determining whether the trial court's questions denied a defendant of the right to due process and a fair trial, "[t]he test is whether the judge's questions and comments *may* have unjustifiably aroused suspicion in the mind of the jury concerning a witness' credibility and whether partiality *quite possibly could* have influenced the jury to the detriment of the defendant's case." *People v Sterling*, 154 Mich App 223, 228; 397 NW2d 182 (1986) (emphasis in original); *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996).

During a deputy's testimony about the search of plaintiff's home, the trial court interrupted and raised the matter of the magistrate's findings of probable cause, inquiring: "Deputy, I just have one question for the jury because they probably don't understand. When an officer or JNET makes a request for a search warrant of a citizen's home, there's normally gotta [sic] be an affidavit of probable cause and the judge as a threshold matter has to be satisfied that there's at least more probable than not that some type of identified controlled substances or something illegal will be present; is that correct? The officer answered, "that is correct."

The trial court erred by inquiring about the probable cause determination for a warrant. Defendant had not challenged the sufficiency of the affidavit at or before trial and the question was not otherwise relevant as whether there was probable cause for the warrant did not make the existence of any fact that was of consequence to the determination of the action more or less probable. MRE 401. Furthermore, a trial court should not inform the jury of earlier rulings in the case that indicate its opinion regarding the merits of the case, and the trial court's question effectively informed the jury of the earlier probable cause determination. See, e.g., *People v*

Corbett, 97 Mich App 438, 443; 296 NW2d 64 (1980). The question also improperly bolstered the witness's credibility and the credibility of the prosecution's case by implying that there had been a determination of probable cause. See also *Sterling*, 154 Mich App at 230 (finding that the questions posed by the trial court to a witness "may well have been interpreted as the court's seal of credibility" on the testimony of the witness).

C. TESTIMONY REGARDING CRACK COCAINE

Defendant also argues that the trial court erred in admitting evidence regarding crack cocaine over repeated objections of counsel. I agree. Defendant was not charged with possession of crack cocaine and there was no evidence that Giddis was selling crack cocaine or that there was any crack cocaine in defendant's home. Nevertheless the court allowed an officer to testify as to the typical quantities and prices of crack cocaine sold. While testimony as to sales of powder cocaine was arguably relevant even though defendant was not charged with sale, such information as to crack cocaine which is sold in different amounts and for different prices than is powder cocaine was not relevant under MRE 401 because it did not make the existence of any fact that was of consequence to the determination of the action more probable or less probable than it would be without the evidence. [10] Thus, the admission of the evidence fell outside the range of reasonable outcomes, rendering it an abuse of discretion. *Babcock*, 469 Mich at 269. Moreover, the evidence was prejudicial as it suggested that the police believed that defendant was involved in crack cocaine, a drug which has a reputation as more dangerous to both individuals and communities than powder cocaine. Although by itself, the admission of this evidence may have been harmless, when considered with the other trial errors it adds to the cumulative error requiring reversal.

D. COUNSEL'S FAILURE TO PROFFER DEFENDANT'S TAX RETURN

I also agree with defendant that trial counsel was ineffective by failing to introduce a copy of defendant's tax return to support her contention that the $5500 spent on furniture came from her tax refunds to rebut the inference that the furniture was purchased from drug proceeds.[11] To establish a claim of ineffective assistance of counsel, the defendant must prove that the counsel's representation fell below an objective standard of reasonableness and the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). The defendant demonstrates prejudice by showing the "existence of a reasonable probability that, but for

[10] The majority notes that the officer was asked about the cost of powder cocaine and that he responded by comparing the cost of crack and powder cocaine. The majority characterizes this as an indirect way of answering the prosecution's question. I agree, but would add that the information about crack cocaine was "indirect" to the point of irrelevance.

[11] The prosecution suggests that the tax return is suspect, based on a 2009 date on the document. However, this goes to the weight, not the admissibility of the return, particularly in light of the affidavit asserting that the 2009 date is a result of the word processing program that automatically alters the date whenever a copy is printed.

counsel's error, the result of the proceeding would have been different." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). [12]

This question must be considered in the context of the proofs in the case which were overwhelming, if not exclusively, inferential. The prosecution did not offer any direct evidence that defendant ever personally possessed the drugs nor that she was aware of their presence in her home. Moreover, the assertion that defendant and Giddis had never stopped living together as a couple was undercut by the fact that Giddis had only a few clothes at the apartment all of which, along with his toothbrush, were found in a plastic tub in the living room. Given the lack of direct proofs, the claim that defendant was living beyond her means was central to the prosecution's case and admission of the tax return would have substantially undermined that claim. It also would have bolstered defendant's credibility as the prosecution asserted that her testimony about the tax refund was fabricated. Given that the case against defendant rested on inferences derived from contested circumstantial evidence, counsel's error did result in a reasonable probability of a different outcome.

III. HARMLESS ERROR

The doctrine of harmless error directs that even where this Court finds error, we should not reverse a conviction unless we conclude that the "errors . . . have deprived a litigant a fair trial or have otherwise interfered significantly with the trial's search for truth." *People v Mosko*, 441 Mich 496, 503; 495 NW2d 534 (1992). The number of errors in this case and the absence of direct evidence of defendant's participation in, or knowledge of, the hiding of cocaine in her home lead me to conclude that these errors did deprive defendant of a fair trial and interfered significantly with the trial's search for truth.

This was not a case in which a defendant asserts that we should automatically reverse a verdict based on a single error despite substantial evidence of guilt. The trial court erroneously concluded that the defendant had opened the door to admission of extensive evidence regarding prior bad acts and propensity evidence, improperly questioned a witness as to the magistrate's finding of probable cause to search defendant's home, permitted testimony from police officers regarding *sales* of *crack* cocaine where defendant was charged only with ordinary possession of powder cocaine. These errors occurred in a case where there was no testimony that defendant had ever been seen with or spoken of the cocaine found hidden in her home and the prosecution's evidence that Giddis had been staying for more than a few days with defendant was modest at best. Moreover, as the prosecution's case rested largely on the assertion that defendant was living beyond her means based upon the purchase of new furniture, her attorney's

[12] I am also concerned by the statement of defense counsel on the first morning of trial that she was unaware that a primary charge also allows for conviction on an aiding and abetting theory where there is more than one actor. See, e.g. *People v Head*, 211 Mich App 205, 21; 535 NW2d 563 (1995). Defense counsel revealed her ignorance of this well-settled rule when she complained to the court that "[i]n the prosecutor's voir dire she began discussing aiding and abetting theories and aiding and abetting instructions. This is the first time I've heard of aiding and abetting [in this case]."

failure to seek admission of the tax return showing the refund was a serious error. In this unique context, I cannot conclude that the errors were harmless.

IV. OTHER ISSUES RAISED BY DEFENDANT

I agree with the majority that there was probable cause for the warrant to search defendant's home. I also agree that prior record variable (PRV) 5 was properly scored.

V. CONCLUSION

Given the multiple errors described above, I would reverse defendant's conviction and remand to the trial court for a new trial.

/s/ Douglas B. Shapiro