STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED September 27, 2002
v	No. 224173
JOSEPH EDMUND PUERTAS, Defendant-Appellant/Cross Appellee.	Oakland Circuit Court LC No. 98-157485-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee/Cross-Appellant,	
v	No. 224286
JAMES MICHAEL TALLEY, Defendant-Appellant/Cross-Appellee.	Oakland Circuit Court LC No. 98-157489-FH

Before: Whitbeck, P.J., and Holbrook, Jr., and Zahra, JJ.

PER CURIAM.

In these consolidated appeals from a joint jury trial, defendants Joseph Puertas and James Talley appeal by right. Puertas appeals his convictions of operating a criminal enterprise, MCL 750.159i(1), and six counts of delivery of less than 50 grams of cocaine, second offense, double penalty, MCL 333.7413(2). Puertas was sentenced to consecutive terms of two to twenty years' imprisonment for operating a criminal enterprise, and two to forty years' imprisonment on each of the six counts of delivery. The jury also found Puertas guilty of conspiracy to deliver 50 to 225 grams of a controlled substance, MCL 333.7413(1)(c), but the trial court set aside that conviction. The prosecution timely filed a claim of cross-appeal challenging that decision.

Defendant James Talley filed a claim of appeal from his convictions of operating a criminal enterprise, MCL 750.159i(1), and three counts of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv)[1] Talley was sentenced to lifetime probation.

While the claims of appeal were pending, defendants moved the court for a new trial. The trial court initially denied the motion for new trial, but granted it on reconsideration. The prosecution filed a cross-appeal from that decision. We reverse the trial court's order granting defendants a new trial; we affirm the trial court's judgment of acquittal that set aside Puertas' conviction for conspiracy to deliver cocaine; and we affirm the balance of defendants' convictions.

I. RELEVANT FACTS AND PROCEDURAL HISTORY

On August 7, 1997, the Oakland County Sheriff's Department raided the home of Jimmy Sweeney, seized cocaine, money and guns, and arrested Jimmy Sweeney and his brother, Joseph Sweeney. Joseph Sweeney cooperated with the arresting officers and pledged to do whatever it would take to ensure that Jimmy would not face drug charges, including working with police to buy illegal narcotics as part of an undercover investigation (controlled buys). Joseph Sweeney (Sweeney) successfully completed two controlled buys in Pontiac and was advised that he had "worked off" his brother Jimmy's drug charges.[2]

Thereafter, Sergeant Ken Quisenberry of the Oakland County Sheriff's Department, who was then assigned to the Narcotics Enforcement Team (NET),[3] asked Sweeney to serve as a paid informant.[4] Detective Sergeant Gary Miller of the Oakland County Sheriff's Department and Sgt. Quisenberry discussed with Sweeney drug trafficking in Oakland County. Sgt. Miller mentioned Puertas and advised Sweeney that Puertas was dealing narcotics out of his business, the Megabowl bowling alley. Sweeney offered to try to buy cocaine from Puertas at the Megabowl.

The prosecution maintains that between August 19 and August 30, 1997, Sweeney successfully completed four controlled buys of cocaine from Puertas, Talley or both. The amount of cocaine ranged between one-quarter and three-quarter ounces per buy. Sgt. Quisenberry and Sweeney testified that Sweeney was searched to ensure that he had no drugs or money on his person or within his control before each buy was attempted. Sweeney was followed from the time he was given the money to purchase the drugs until he turned over any evidence of a drug purchase. For each transaction after the initial controlled buy, Sgt.

[1] The jury acquitted James Talley of the charge of conspiracy to deliver 50 to 225 grams of a controlled substance, MCL 333.7413(1)(c). It is this acquittal that formed the basis for Puertas' motion to set aside his conspiracy conviction, which the trial court granted.

[2] Neither Jimmy Sweeney nor Joseph Sweeney was ever charged with any crime arising from the August 7, 1997 raid of Jimmy's house.

[3] The NET was described at trial as a Michigan State Police coordinated program that brought together officers from eight different law enforcement agencies in Oakland County.

[4] Sweeney was paid from $40 to $150 for participating in each successful controlled buy involving defendants.

Quisenberry had one or more officers inside the Megabowl whose duty it was to observe Sweeney upon his entry into the Megabowl. For two of these four controlled buys, the sole surveillance officer assigned to observe the transactions within the Megabowl was Oakland County Deputy Sheriff Kenneth Everingham. On one other occasion, Deputy Everingham was assigned surveillance with another member of the Oakland County Sheriff's Department, Sergeant Chris Yuchasz.

Between August 31 and September 24, 1997, Sgt. Quisenberry, through Sweeney, attempted five or six additional controlled buys without success. On September 25, 1997, Sweeney successfully completed a fifth controlled buy. This time, Sgt. Quisenberry personally drove Sweeney to the Megabowl, followed Sweeney into the Megabowl and joined Sgt. Yuchasz to conduct surveillance from within the Megabowl.[5]

Sweeney successfully completed a sixth controlled buy on November 18, 1997. Again, Sgt. Quisenberry followed Sweeney into the Megabowl and joined two other officers to conduct surveillance of the interaction between Sweeney and Puertas. This transaction yielded two "coin envelopes containing cocaine."

After the November 18 transaction, Sgt. Quisenberry sought and obtained search warrants to search the Megabowl and other locations where defendants were observed during the investigation. Search warrants were issued for twelve different locations and, on December 16, 1997, the warrants were executed. This search involved approximately 110 investigators and two dogs purportedly trained to alert to the scent of certain illegal narcotics. The two dogs alerted to nine different safes, although no drugs were found in any of these safes. The officers in charge of the dogs testified that their dogs would alert to the trace odor that lingers even after drugs have been removed from a place. Subsequent to the search, the Oakland County Prosecutor filed a forfeiture action against the Megabowl and almost two million dollars in cash and property seized during this raid.[6]

In June 1998, more than a year before trial, the trial court entered a stipulated supplemental discovery order. This order provided that the prosecution had to give the defense:

> a. Any exculpatory information or evidence known to the prosecution regarding any individual, including, but not limited to, the Defendant's wife, children, any plea agreement, grant of immunity or other agreement for testimony in connection with the case.
>
> b. Any and all statements of interviews conducted by the prosecution and/or any investigating police agency from the beginning of the investigation until trial, shall be turned over forthwith, whether in the possession of the Oakland County Prosecutor's Office or any of the police investigating agencies.

[5] Sgt. Quisenberry followed Sweeney out of the Megabowl. Sgt. Quisenberry was surprised when Sweeney produced one-quarter ounce of cocaine because, from what Sgt. Quisenberry was able to observe, it did not appear that a transaction took place.

[6] See *In re Forfeiture of $1,923,235*, 247 Mich App 547; 637 NW2d 247 (2001).

> c. Any expert, scientific testimony, the names of the witnesses of [sic] any experts or scientific testimony that the prosecution intends to present in trial in their direct case or rebuttal.

In June 1999, approximately four months before trial, local newspapers published articles in which it was claimed that Everingham, the Oakland County deputy sheriff who allegedly acted as the sole surveillance officer for two of the controlled buys at the Megabowl, had lied at Puertas' preliminary examination and that Sgt. Quisenberry fabricated portions of his reports.

The Michigan State Police immediately commenced a public corruption investigation that ultimately produced a report detailing the investigation. The report documents interviews with numerous individuals involved in the Megabowl investigation or other law enforcement agents who had contact with those individuals. Not all the information directly touched on the case against Puertas and Talley. Some of the information detailed problems Everingham and others were having at work. None of the statements provided a "smoking gun," such as information that Quisenberry provided Sweeney with cocaine before the controlled purchases to frame Puertas and Talley. However, the report may fairly be characterized as having impeachment value to the defense as it relates to the credibility of some of the key players in the Megabowl investigation.

At the conclusion of an extensive eleven-week investigation, the Michigan State Police concluded that Everingham's allegations were "unfounded." Persuasive to the investigating officer was the lack of evidence, documents, or other support to bolster Everingham's claims. This investigation closed on September 23, 1999, approximately two weeks before the first day of trial.

At trial, the prosecution's theory was that Puertas and Talley conspired with each other to sell cocaine to Megabowl customers, which the police confirmed through Sweeney's controlled buys. In contrast, Puertas and Talley claimed that they were innocent and that the prosecution's motivation in bringing the criminal charges was to provide a basis for the civil forfeiture action. The jury rejected defendants' claims that they were innocent, except that Talley was found not guilty of the conspiracy charge.

Prior to sentencing, defense counsel obtained a redacted portion of the State Police's public corruption investigative report, which prompted several post-verdict motions. The trial court denied the defense motions for directed verdict of acquittal with respect to all but Puertas' conviction of conspiracy to deliver cocaine. Both defendants had also moved the trial court to grant them a new trial because of what they viewed as improper profile evidence related to the drug-sniffing dogs, prosecutorial misconduct during closing arguments, and the prosecution's discovery violation in failing to give the defense the State Police's public corruption investigative report. The trial court initially rejected each of these grounds.

While the appeals were pending, the trial court granted Puertas and Talley's joint motion for additional discovery concerning the State Police's public corruption investigative report. The prosecution claimed not to have a copy of the report, but the parties stipulated to an order compelling the Michigan State Police to provide a complete copy of the report for the trial court to review in-camera. The trial court also provided defendants a copy of the portion of the report concerning Everingham's allegations against Quisenberry.

On rehearing of the motion for a new trial, the trial court concluded that by failing to provide defendants a copy of the State Police public corruption investigative report, the prosecution had committed a *Brady*[7] violation and also violated the pretrial discovery order, thus undermining the reliability of the trial's outcome. The trial court set aside defendants' convictions and reinstated their bonds pending the new trial. The prosecution filed a cross-appeal as of right from the trial court's order granting defendants a new trial.

II. ANALYSIS

A. The Prosecution's Cross-Appeal

In its cross-appeal, the prosecution challenges the trial court's grant of a new trial to both defendants for alleged *Brady* and discovery violations, and the trial court's judgment of acquittal that set aside the conviction of Puertas for conspiracy to deliver cocaine in violation of MCL 333.7413(1)(c). These issues are addressed separately.

1. The Order Granting Defendants a New Trial

Preliminarily, defendants argue that the prosecution's cross-appeal from the trial court's order granting defendants a new trial must be dismissed as there is no constitutional or statutory authority to support an appeal as of right from such an order. Defendants brought before this Court a motion to dismiss the cross-appeal on these grounds, which this Court denied.

We agree with defendants that the prosecution has no right to appeal the grant of a new trial because such an order is a nonfinal, interlocutory order that may only be appealed by leave granted. MCL 770.12(2)(a); MCR 7.203(E). Nonetheless, this procedural defect does not require us to dismiss the prosecution's appeal. We have the discretion to treat improvidently filed appeals by right as applications for leave to appeal. See *Waatti & Sons Electric Co v Dehko*, 230 Mich App 582, 585; 584 NW2d 372 (1998). Interests of justice and judicial economy dictate that we consider the order denying the motion for dismissal as if it granted the prosecution leave to appeal the order granting defendants a new trial, and we consider this issue on its merit.

A trial court's decision to grant a new trial is reviewed for an abuse of discretion. *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998). Also, discovery sanctions are reviewed for an abuse of discretion. *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). A court "by definition abuses its discretion when it makes an error of law." *Koon v United States*, 518 US 81, 100; 116 S Ct 2035; 135 L Ed 2d 392 (1996). Constitutional issues, such as due process claims emanating from application of *Brady*, are reviewed de novo. See *People v Conat*, 238 Mich App 134, 144; 605 NW2d 49 (1999).

(a) Defendants' due process claims pursuant to Brady v Maryland

In *Brady*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is

[7] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, *supra* at 87. Reversal is required where the "cumulative effect of all such evidence suppressed by the government . . . raises a reasonable probability that its disclosure would have produced a different result . . . ." *Kyles v Whitley*, 514 US 419, 421-422; 115 S Ct 1555; 131 L Ed 2d 490 (1995). "[T]he prosecutor remains responsible for gauging that effect regardless of any failure by the police to bring favorable evidence to the prosecutor's attention." *Id.* at 421. A defendant seeking appellate relief based on a *Brady* violation bears the burden of proving:

> (1) that the state possessed evidence favorable to the defendant, (2) that the defendant did not possess the evidence and could not have obtained it with the exercise of reasonable diligence, (3) that the prosecution suppressed the favorable evidence, and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*People v Fox (After Remand)*, 232 Mich App 541, 549; 591 NW2d 384 (1998).]

We conclude the trial court clearly erred when it found that the first of the above-cited elements was satisfied. Relying on *Kyles*, the trial court charged the prosecutor with a duty to learn of all evidence favorable to the defense known to anyone in the course of government work. However, *Kyles* makes clear that this duty is limited to learning of all evidence favorable to the defense known by government actors *working on the same case*. *Kyles*, *supra* at 437. In this instance, the investigation by the State Police was not taking place on behalf of the Oakland County Prosecutor. In fact, these proceedings may fairly be characterized as being adverse to the Oakland County Sheriff's Department. Thus, it is unreasonable to impute to the prosecutor or the Sheriff's Department possession of the work product resulting from the State Police's public corruption investigation. Admittedly, the prosecutor and those police officers assisting in building the prosecution's case against defendants were aware of the State Police investigation into Everingham's allegations of public corruption. However, such knowledge does not support the conclusion that the work product the State Police generated in the public corruption investigation was ever in the hands of the Oakland County Prosecutor or the law enforcement officers involved in the Puertas and Talley investigation, or that those actors were in a position to demand possession of the State Police work product. The trial court thus erred in charging the prosecutor with possession of the report.

We also conclude that defendants failed to demonstrate that they exercised reasonable diligence to obtain the Michigan State Police public corruption investigative report. The fact that news about this investigation was available through the media does not help defendants' cause. Defendants should have attempted to utilize the subpoena power of the court to obtain information of public corruption from the State Police. At a minimum, defendants should have created a record demonstrating that such efforts were made.[8]

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[8] We also doubt the trial court's conclusion that there existed a reasonable probability of a different outcome, had defendants been provided the Michigan State Police public corruption investigative report. While there is much in the report that defendants could have used to

(continued…)

For these reasons, the trial court erred in concluding that the prosecutor withheld evidence from the defense in violation of *Brady* and in violation of defendants' rights to due process of law.

(b) The purported discovery violation

We further conclude that the trial court abused its discretion in granting a new trial based on violation of the stipulated discovery order. As noted, the trial court's June 1998 order called on the prosecutor to disclose "all statements of interviews conducted by the prosecution and/or any investigating police agency from the beginning of the investigation until trial, . . . whether in the possession of the Oakland County Prosecutor's Office or any of the police investigating agencies." In granting the motion for new trial, the trial court conflated the government's work product attendant to the investigation against defendants with the government's investigation of allegations of corruption within the Oakland County Sheriff's Department. As discussed, the State Police's public corruption investigation was not an investigation *in this case* as the trial court determined, but an undertaking apart from the instant prosecution that only indirectly touched on matters relating to this case.

Moreover, the prosecution had no duty to acquire and disclose undiscoverable materials. No provision of MCR 6.201, governing discovery in criminal cases, or MCL 767.94a, which the court rule incorporates,[9] can reasonably be interpreted to obligate a prosecutor to obtain and disclose a police report prepared in connection with an investigation into something other than the case on which the prosecutor is working.

The rules of discovery reflect the due process right of a defendant to have access to all exculpatory information known to the prosecutor, MCR 6.201(B)(1). Exculpatory evidence or information is that which "extrinsically tends to establish defendant's innocence of crimes charged as differentiated from that which although favorable, is merely collateral or impeaching." Black's Law Dictionary (6th ed, 1990). Even if the prosecutor is charged with knowledge of the whole contents of the report in question, the report reveals accusations of sloppy procedure attendant to the investigation of defendants and elsewhere in the Oakland County Sheriff's Department, but does not suggest that defendants were actually innocent of the crimes of which they were convicted. At best, the information revealed in the State Police's report was collateral or impeaching evidence; not exculpatory evidence.

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impeach many government witnesses, this information must be balanced against the information within the report favorable to the prosecution. Chief among the information favorable to the prosecution are the multiple reports that Everingham was a less than responsible employee of the Sheriff's Department, that Everingham was suffering the consequences of a severe gambling problem, and, in conclusion, that Everingham's accusations pursuant to the Puertas investigation were "unfounded." Add to that the confirmation from Sweeney that he actually obtained cocaine from defendants at the Megabowl on six occasions, and the report, considered in total, is indeed a double-edged sword. Had the complete report rested in the defense's possession all along, a different result might be considered a possibility, but not a "reasonable probability."

[9] This legislation deals exclusively with a defendant's duty to disclose information to the prosecutor.

In any event, if the trial court was indeed ordering the prosecutor to seek out and retrieve from police agencies information that came into existence pursuant to investigations not of defendants but of those investigating defendants, then the trial court exceeded its authority. The State Police's investigation of corruption in other police agencies cannot be considered material prepared by or for the prosecutor, or in any way for the use of the prosecution in the case against defendants. The fact that the prosecutor or police officers assigned to this case cooperated in the State Police investigation does not by itself mean that the prosecutor should be charged with possession or control of the State Police's work product in the public corruption investigation. Because defendants demonstrate neither the prosecutor's actual knowledge of exculpatory information within the report of the State Police nor that the prosecutor had a duty to acquire such knowledge, defendants have failed to show any violation of a discovery order. The trial court thus erred in ruling that a new trial was justified based on a discovery violation by the prosecution.[10]

2. The Setting Aside of Puertas' Conviction for Conspiracy to Deliver Cocaine

We reject the prosecution's argument that the trial court erred in setting aside Puertas' conspiracy conviction. Our Supreme Court has decreed: "There can be no question that Michigan is [not] a '. . . one-man conspiracy' state. Our conspiracy statute is a bilateral conspiracy statute which requires proof of an agreement between two or more persons." *People v Anderson*, 418 Mich 31, 35; 340 NW2d 634 (1983); see also *People v Williams*, 240 Mich App 316, 324-329; 614 NW2d 647 (2000). In the instant case, defendant Puertas was charged with conspiring with defendant Talley and no one else. Because Talley was acquitted of conspiracy in the same proceeding, according to the case law of this state, Puertas' conviction of conspiracy cannot stand. *Anderson, supra; Williams, supra.*

B. Defendants' Issues on Appeal

Defendants jointly raise five claims of error. In addition, Puertas alleges that the trial court erred in denying his request for a hearing pursuant to *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978), and in failing to suppress evidence discovered as a result of the search warrant. Each issue is addressed separately.

1. Issues Related to the Request for a Franks Hearing

We review a trial court's decision to deny a motion for an evidentiary hearing for an abuse of discretion. *People v Collins*, 239 Mich App 125, 138-139; 607 NW2d 760 (1999);

[10] We further reject the claim that the motion for new trial should be affirmed on the ground that the report constitutes new evidence throwing the guilt of defendants, or the integrity of the proceedings, into serious doubt. The State Police's report has information of use to both parties. While the report contains nothing actually exculpatory of defendants it is potentially beneficial to them by way of suggesting possible avenues for impeachment of prosecution witnesses. However, even if the report is regarded as newly discovered evidence, it does not warrant a new trial. "Newly discovered evidence is not ground for a new trial where it would merely be used for impeachment purposes." *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993).

People v Mischley, 164 Mich App 478, 482; 417 NW2d 537 (1987). Affidavits supporting search warrants come with "a presumption of validity[.]" *Franks*, *supra* at 171. A defendant seeking to defeat this presumption must make "allegation[s] of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof." *Id.* Even if such allegations are asserted, a defendant is not entitled to a *Franks* hearing if, upon setting aside the challenged portions of the affidavit, there remains sufficient content in the affidavit to support a finding of probable cause. *Id.* at 171-172.

We conclude that the trial court properly denied defendant's motion for a *Franks* hearing. Puertas challenges Sgt. Quisenberry's averment that the informant (Sweeney) was "thoroughly searched" for drugs and money before each controlled buy. Defendant makes much of the fact that Sgt. Quisenberry testified that he merely "patted down the informant before most of the controlled buys." This discrepancy between the affidavit and Sgt. Quisenberry's testimony does not rise to the level of a reckless disregard for the truth. Moreover, Sweeney's testimony supports the content of the affidavit. Sweeney claimed he was required to remove his shoes and socks before the first controlled buy. In sum, Puertas offers no record evidence to cast doubt on the averment that Sweeney was carefully searched before each controlled buy.

Puertas also claims the affidavit overstates the degree of surveillance undertaken for the controlled buys. Specifically, Puertas relies upon former Deputy Everingham's subsequent claims that he misrepresented his involvement in the investigation and had not undertaken surveillance as he had testified to at the preliminary exam. Further, Sgt. Yuchaz also indicated that he worked surveillance at the Megabowl, although Yuchaz's account of his involvement in the case does not match up perfectly with the averments of Sgt. Quisenberry. To the extent that the subsequent deposition testimony of Everingham and Yuchaz do not perfectly comport with Sgt. Quisenberry's account of who worked surveillance on certain days, they do not throw Sgt. Quisenberry's averments within the affidavit into such poor light as to support the conclusion that Sgt. Quisenberry either lied in his affidavit or acted in reckless disregard for the truth. Even after proclaiming that he misstated his involvement in this case, Everingham admitted that there were "two occasions when I was assigned to do surveillance or assist . . . " Also, Sgt. Yuchaz's records reflect that he worked on the case August 19 and 26, and he testified to working on the case eight additional shifts from September 6 through December 16. Simply put, the deposition testimony relied upon by defendants is less than clear. Thus, Puertas has failed to demonstrate he is entitled to a *Franks* hearing on this issue.[11]

Nor do we find persuasive Puertas' claim that there was too large of a gap between the last controlled buy of November 18 and the issuance of the warrant on December 16. The affiant alleged that a mere four days before the warrant was issued, the informant attempted another controlled buy and that Puertas refused to sell cocaine at that time only because he was too busy

[11] We also find meritless, Puertas' claim that the affidavit was fatally defective for failing to point out the disreputable character of informant Sweeney. Judicial officers reviewing applications for warrants understand that such informants are rarely model citizens and instead are generally people who have repeated encounters with law enforcement agencies. "An affiant's failure to disclose the backgrounds and alleged biases of informants does not establish . . . reckless disregard for the truth." *United States v Dale*, 301 US App DC 110, 135; 991 F2d 819 (1993).

to fill the request. This suggested that the pattern of illegal activity documented by earlier controlled buys continued.

2. Objections Relating to Use of Drug-Sniffing Dogs

Two dogs trained to alert to the scent of narcotics were utilized during the execution of the search warrants. The prosecutor offered four witnesses relative to these dogs. Two witnesses, Dr. Stefan Rose, M.D. and Dr. Kenneth G. Furton, Ph.D. (the forensic experts), were qualified by the Court to offer expert opinions relating to what caused the dogs to alert to safes that contained currency but no illegal narcotics and to opine about the adequacy of the training of the dogs. Defendants objected to these witnesses both by way of a pretrial motion and at trial when the witnesses were called to testify. The prosecution also called two witnesses charged with handling the dogs (the canine patrol officers). Each canine patrol officer testified to the training of his particular dog and to the fact that his dog had alerted to one or more safes located on the searched premises. Although no narcotics were found in the safes to which each dog alerted, the witnesses were permitted to opine that narcotics must have recently been inside the safes in order to cause the dogs to alert. Defendants objected during trial to the testimony of these witnesses. Defendants sought a special limiting instruction relating to the drug-sniffing dog evidence. The trial court denied defendants' request for a special instruction. We review evidentiary rulings for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 288; 531 NW2d 659 (1995).

(a) The forensic experts

Defendants maintain that the trial court applied the wrong legal standard in passing on the admissibility of the opinions of the forensic experts. Defendants claim the opinions offered by these experts were based on science too novel to be admitted under MRE 702. We disagree. The trial court made reference to the 1993 United States Supreme Court case of *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), which rejected the test from *Frye v US*, 54 App DC 46; 293 Fed 1013 (1923),[12] because the Frye test was incompatible with FRE 702. However, the trial court in the present case did not adopt *Daubert* as the controlling case interpreting MRE 702, Michigan's counterpart to the federal rule. Rather, the trial court merely referenced *Daubert* as part of its overall consideration. This Court has made observations regarding *Daubert* similar to those cited by the trial court in this case. See *Nelson v American Sterilizer Co (On Remand)*, 223 Mich App 485, 491; 566 NW2d 671 (1997). Pursuant to *Nelson*, the trial court must:

> determine the evidentiary reliability or trustworthiness of the facts and data underlying an expert's testimony before that testimony may be admitted. To determine whether the requisite standard of reliability has been met, the court

[12] The *Davis-Frye* rule, adopted from *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955), and *Frye, supra*, and now codified in MCL 600.2955(2), requires that novel scientific evidence be shown to have gained general acceptance in the scientific community to which it belongs to be admissible at trial. *People v Young*, 418 Mich 1, 17-18; 340 NW2d 805 (1983); *People v Vettese*, 195 Mich App 235, 238; 489 NW2d 514 (1992).

> must determine whether the proposed testimony is derived from "recognized scientific knowledge." To be derived from recognized knowledge, the proposed testimony must contain inferences or assertions, the source of which rests in the application of scientific methods . . . As long as the basic methodology and principles employed by the expert to reach a conclusion are sound and creates trustworthy foundation for the conclusions reached, the expert testimony is admissible no matter how novel. [*Id.* at 491-492 (citations omitted).]

In the present case, the parties disputed whether the dogs alerted to the trace amount of cocaine that testimony suggests exists on all currency[13] or to actual amounts of cocaine that had recently been removed from the safes. The trial court satisfied the requirements of *Nelson* in analyzing the expert testimony on this subject. The trial court reviewed the credentials and published articles of the proffered experts and observed:

> The scientific principles to be used by both doctors are from established areas of chemistry, biology, mathematics, physics and basic physiology of mammals. Their conclusions are based on these same principles. Basic scientific method was used to form their opinions. In addition, the clinical studies of the doctors are well documented and published and are subject to peer review.

We find no error in the conclusions reached by the trial court. The opinion held by these experts, that a properly trained dog would not alert to cocaine residue found on U.S. currency in general circulation, may be novel. However, we cannot conclude the trial court abused its discretion by relying on the witness-authored materials and concluding that the scientific principle and methodology on which these experts based their opinions were sound.

Defendants also maintain that the trial court erred by allowing the forensic experts to offer opinion testimony regarding the adequacy of the specific training provided to the dogs used in the search. We also find no merit in this argument. MRE 702 provides that if the court determines that the trier of fact needs assistance in understanding certain types of specialized evidence, "a witness qualified as an expert by knowledge, skill, experience, training or education, may testify . . . in the form of an opinion or otherwise." In the present case, the two proffered experts had undertaken several studies involving drug-sniffing dogs, and they were involved in teaching canine handlers on the proper method of training and handling such dogs. This is sufficient experience to support the admission of expert opinion testimony under MRE 702. That these experts were vulnerable to criticism regarding the extent of their experience and training does not render their opinions inadmissible. Such criticisms go to the weight rather than the admissibility of this testimony. *McPeak v McPeak(On Remand)*, 233 Mich App 483, 493; 593 NW2d 180 (1999).

(b) The canine patrol officers

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[13] Defendants presented no evidence to support the conclusion that most U.S. currency is tainted with cocaine residue. However, the prosecution's expert substantiated this claim for defendants.

Defendants next argue that testimony from the two canine patrol officers to the effect that their dogs alerted to the presence of drugs in certain safes during the execution of the search warrant was substantially more prejudicial than probative given that no narcotics were found within the safes to which the dogs alerted. The trial court rejected defendants' arguments, determining the drug dog alerts relevant and admissible. We find no abuse of discretion.

Defendants' argument that this evidence is substantially more prejudicial than probative is premised on the conclusion that there exists a substantial chance the dogs gave a false alert. Defendants maintain that a large percentage of U.S. currency is tainted with cocaine. Thus, defendants argue, the dogs were alerting to the presence of innocently tainted currency rather than large amounts of cocaine. Defendants presented no evidence to support this theory. Rather, they rely on *United States v U S Currency, $30,060,* 39 F3d 1039 (CA 9, 1994) to support this proposition. Interestingly, the Ninth Circuit Court revisited this issue in *United States v U S Currency, $22,474,* 246 F3d 1212 (CA 9, 2001), and distinguished their prior holding, stating:

> the government presented evidence [in the present case] that the dog would not alert to cocaine residue found on currency in general circulation. Rather, the dog was trained to, and would only, alert to the odor of a chemical by-product of cocaine . . . Moreover, the government provided evidence that unless the currency . . . had recently been in the proximity of cocaine, the detection dog would not have alerted to it. [*Id*. at 1216].

This is exactly the evidence presented by the prosecution in this case. Under these circumstances, we cannot conclude that the prejudice from evidence of the drug-dog alerts substantially outweighed its probative value.

(c) Defendants' request for a limiting instruction regarding drug-sniffing dog evidence

Defendants asked the court for a limiting instruction, based on CJI 2d 4.14, to address the evidence relating to drug-sniffing dogs. CJI 2d 4.14 is derived from *People v Perryman*, 89 Mich App 516; 280 NW2d 579 (1979), a case involving use of a tracking dog. In *Perryman,* defendant was convicted of breaking and entering an unoccupied dwelling with intent to commit a larceny. The homeowner arrived with the crime in progress. Gunshots were exchanged and the perpetrators fled the scene. Thereafter, a canine patrol unit was summoned and a footprint and blood were observed 75 feet behind the house, where one of the perpetrators was observed fleeing. The tracking dog led police to defendant, who was found with two gunshot wounds to his leg. The trial court admitted evidence of the tracking dog without objection from defendant. On appeal, defendant argued that the trial court erred by failing to *sua sponte* give a limiting instruction relating to tracking dog evidence. This Court affirmed defendant's conviction, finding no manifest injustice resulting from the court's failure to *sua sponte* provide a limiting instruction. Nonetheless, the Court prospectively ruled:

> a [trial] court has a duty, even absent a request by counsel, to inform the jury that tracking dog evidence: must be considered with caution; is of slight probative value; and if found reliable, cannot support a conviction in the absence of other direct evidence of guilt. [*Id.* at 524 (citations omitted).]

In the present case, the trial court declined to give defendants' requested instruction, reasoning that there exists material distinctions between tracking dogs and drug-sniffing dogs. The trial court reasoned tracking dogs are used to hunt down human suspects where drug-sniffing dogs merely detect drugs. As such, the trial court concluded a tracking dog is presenting direct evidence of a defendant's guilt.

We decline to accept the reasoning offered by the trial court. There is no evidence to support the conclusion that dogs trained to alert to the scent of certain substances are inherently more reliable than dogs trained to track the scent of humans. We also reject the conclusion that tracking dogs provide direct evidence of guilt while drug-sniffing dogs provide a mere inference. Even if we accepted that such an evidentiary distinction existed between tracking and drug-sniffing dogs, there exists no rational basis on which to conclude that CJI 2d 4.14 should be given to the jury for cases involving tracking dogs yet denied for cases involving drug-sniffing dogs. Accordingly, we conclude the trial court erred by failing to give the limiting instruction requested by defendants.

Our inquiry does not end upon this finding of error. The Michigan Legislature has declared that a new trial should not be granted on the ground of misdirection of the jury unless it appears after examination of the entire record that the error resulted in a miscarriage of justice. MCL 769.26; see also *People v Graves*, 458 Mich 476, 484; 581 NW2d 229 (1998). A miscarriage of justice occurs when an erroneous or omitted instruction pertained to a basic and controlling issue in the case. *People v Bartlett*, 231 Mich App 139, 144; 585 NW2d 341 (1998). We conclude the failure to give the limiting instruction requested by defendants did not result in a miscarriage of justice.

The evidence relating to the drug-sniffing dogs, standing alone, could not establish the crimes of which defendants were convicted. An essential element to the charge of delivering cocaine is evidence of the intent to deliver. This evidence was established through the evidence of narcotic sales at the Megabowl, as demonstrated by the controlled buys executed by Sweeney. Likewise, the crime of operating a criminal enterprise is not established merely by evidence of possession of illegal narcotics and large amounts of cash. Rather, the prosecution was required to prove that defendants were employed or associated with the Megabowl and knowingly participated in the affairs of the Megabowl through a "pattern of racketeering activity" as that term is defined by MCL 750.159f(c).[14] This pattern of racketeering activity was established by

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[14] MCL 750.159f(c) provides:

> "Pattern of racketeering activity" means not less than 2 incidents of racketeering to which all of the following characteristics apply:
>
> (i) The incidents have the same or a substantially similar purpose, result, participant, victim, or method of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated acts.
>
> (ii) The incidents amount to or pose a threat of continued criminal activity.

(continued…)

the evidence of multiple sales of narcotics from behind the business counter of the Megabowl.[15] At most, the drug-sniffing dog evidence was circumstantial evidence that corroborated the very powerful evidence of six controlled buys of illegal narcotics. As such, this evidence was not a basic or controlling issue in this case and the failure to give the requested instruction did not result in a miscarriage of justice.

3. Defendants' Request for a Special Instruction Addressing the Lack of Evidence Relating to the Past Performance of the Informant

Defendants next argue that because the prosecutor failed to comply with the court's order to produce affidavits supporting the search warrants issued in other cases that utilized Sweeney as an informant, the court erred in refusing to charge the jury regarding the missing affidavits.[16] Defendants claim the prosecution's case depended heavily on the use of Sweeney, and evidence concerning his performance in other cases could have been valuable to the defense.

The trial court properly denied defendants' request for an instruction on this issue. Because the documents sought concerned the propriety of searches not involved in this case, that evidence was of potential use for impeachment purposes only. The trial court acted within its discretion in declining to give an undefined jury charge regarding the prosecutor's inability to produce affidavits from unrelated cases that are sought only for impeachment purposes.

4. The Exclusion of Impeachment Evidence

During the testimony of Sgt. Gary Miller, defendants sought to recross-examine Miller regarding testimony he offered during the prosecution's redirect examination of him. Specifically, defendants sought to question Sgt. Miller about allegations made by former Deputy Sheriff McClure, who purportedly claimed Sgt. Miller knowingly presented false information in search warrant affidavits and encouraged other law enforcement officers to do so as well. The trial court precluded this testimony. Defendants now claim the preclusion of this evidence

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(…continued)

> (iii) At least 1 of the incidents occurred within this state on or after the effective date of the amendatory act that added this section, and the last of the incidents occurred within 10 years after the commission of any prior incident, excluding any period of imprisonment served by a person engaging in the racketeering activity.

[15] Moreover, the jury was charged with a cautionary instruction relating to the value and proper use of expert testimony. Because a great deal of the evidence relating to the activities of the drug-sniffing dogs came in through experts, we must presume that the jury considered this testimony in light of the court's expert testimony instruction. Jurors are presumed to follow their instructions. *Graves, supra* at 486. While the expert witness charge does not cover all of the issues addressed in CJI 2d 4.14, it nonetheless ensured that the jury considered whether the experts' testimony made sense when considered in conjunction with all the other evidence presented in the case.

[16] Defendants' argument on this issue is greatly hampered by their failure in the trial court and in this Court to provide specific instruction addressing the issue of the affidavits.

amounts to a denial of defendants' right of confrontation. We disagree and conclude the trial court properly excluded this collateral impeachment evidence. "[A] party may introduce extrinsic evidence to contradict an adversary's answers on cross-examination regarding matters germane to the trial, but generally a party may not introduce extrinsic evidence to contradict a witness regarding collateral, irrelevant, or immaterial matters." *People v Lester*, 232 Mich App 262, 275; 591 NW2d 267 (1999), citing MRE 608(b) and *People v Vasher*, 449 Mich 494; 537 NW2d 168 (1995).

In this case, the prosecutor, while examining Sgt. Miller on direct, did not make issue of Miller's honesty. On cross-examination, however, defendant Puertas' attorney elicited from Miller that he had been trained in testifying, and also in lying pursuant to undercover operations. The prosecutor's redirect examination addressed whether Sgt. Miller was trained to lie under oath. It is apparent that despite defendants' attempt to posture the facts, it was indeed the defense on cross-examination of Sgt. Miller, through unmistakable implication, that raised the issue of the witness' truthfulness, not the prosecution. "Under no circumstances may testimony of others be produced to impeach by putting in issue the accuracy or truthfulness of the witness on unrelated matters." *People v Ellerhorst*, 12 Mich App 661, 671; 163 NW2d 465 (1968).

5. Issues Relating to Media Influence on the Jury

After the proofs were in, but before the jury was instructed, defendant Puertas' lawyer said to the trial court, "I'd like the jury polled as to anyone who read the *Oakland Press* this morning, because there's a headline Ex-Con . . . coke dealer goes to the jury. I mean big headline on the second page and they couldn't avoid it[.]" We review a request to poll a jury for an abuse of discretion. MCR 6.420(C). We find no abuse of discretion on these facts.

At the beginning of proceedings, the trial court admonished the prospective jurors: "I would please ask you over the weekend not to read, listen to or watch any news reports about this case," reminded the jury that news reports did not adhere to judicial fact-discovering standards, and added, "therefore, to be fair to both sides, I ask you, if you see an article that you might relate to this case, please put it aside." After the jury was impaneled, the court reiterated, "don't discuss the case with anyone please and if you pick up the newspaper and you see an article about the case, please just put it aside." Before sending the jury to begin deliberations, the trial court's instructions included the following: "When you discuss the case and decide the verdict, you may only consider the evidence that has been properly admitted in this case." The court further explained that evidence consisted of only "sworn testimony of the witnesses, the exhibits admitted into evidence and anything else that I told you to consider as evidence." These instructions served to avoid any prejudice to defendants arising from anything written in the local press. "It is well established that jurors are presumed to follow their instructions." *Graves, supra* at 486. The trial court acted within its discretion in declining to poll the jury in the matter.

In *People v Adams*, 245 Mich App 226; 627 NW2d 623 (2001), this Court held that where "[t]here is simply no indication that the jury ignored the trial court's repeated instructions to avoid publicity surrounding the case," and also "no indication that any juror was improperly exposed to media coverage of the case," a trial court does not abuse its discretion in declining to conduct midtrial voir dire regarding over exposure to media coverage. *Id.* at 241. The issue in such instances is not one of juror misconduct, but rather speculation that juror misconduct might

occur. *Id.* Because a trial court need not poll the jurors over such speculation, no appellate relief is warranted from a court's refusal to do so.

6. Prosecutorial Misconduct

Defendants raise four separate claims of prosecutorial misconduct. We address each claim of error separately. "Absent an objection or a request for a curative instruction, this Court will not review alleged prosecutorial misconduct unless the misconduct is sufficiently egregious that no curative instruction would counteract the prejudice to defendant or unless manifest injustice would result from failure to review the alleged misconduct." *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). For preserved claims of prosecutorial misconduct, this Court evaluates the prosecutor's comments in context to determine if the defendant was denied a fair and impartial trial. *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant, and impairs his ability to get a fair trial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) (citations omitted).

(a) Arguing facts not in evidence

During the execution of the search warrants, police discovered in one safe a small bag of white powder that upon analysis was discovered to be a powdered food mixture. During closing argument, the prosecution stated "[t]his bag of white powder, which is not a controlled substance, but is in the safe, is a dig from [defendants] who knew we were coming and that's why this is in here." Defendants did not object to this comment. However, the following day defendants moved for a mistrial, which was denied by the court. Assuming that this reference to defendants' motive for placing the powder in the safe was an unreasonable and improper inference drawn from the evidence, we conclude this comment does not warrant relief because a special instruction would have cured any prejudice to defendants.

(b) Comment regarding Puertas' decision not to testify

After closing arguments, but before jury deliberations began, counsel for defendant Puertas moved for a mistrial because he claimed that while listening to an audio tape of the trial, he discovered that the prosecutor had loudly inquired during a heated exchange at side bar "why doesn't [Puertas] take the stand?" Defendant Talley joined the motion.

The trial court denied the motion for mistrial, casting doubt on whether the jury heard the comment and concluding that the jury charge during voir dire and the charges read to the jury prior to deliberation will sufficiently make the jury understand that each defendant has an absolute right not to testify and that no inferences of guilt may be held against a defendant who elects not to testify.

Defendants' argument is without merit. In the course of raising the issue, defense counsel admitted not hearing the offending statement at the time it was made. Thus, the record militates against concluding that the trial court clearly erred in concluding that the jury very likely did not hear the comment. In any event, we assume as we must that the jury instructions remedied the error to the extent one or more jurors heard the comment. Appellate relief is not warranted.

(c) Claims that the prosecution denigrated the defense

Defendants next complain that the prosecutor:

> accused Defendants of presented [sic] a case made up of "haze and smoke" and of attempting to distract the jurors through the use of "sound and fury" and "bombastic antics." He accused counsel of presenting evidence "designed to distract you from the truth in this case." And he asked that the jury not rely on the "smoke and haze and innuendo and insinuation" presented by the defense.

None of these prosecutorial comments drew any defense objections. Thus, this claim of error is forfeited. Further, this argument fails on its face, in that none of the polemics presented above is so extreme as to step into improper argument. A prosecutor need not confine argument to the '"blandest of all possible terms.'" *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989), quoting *People v Cowell*, 44 Mich App 623, 628-629; 205 NW2d 600 (1973). The prosecutor's unobjected-to statements that defendants present as improper disparagement of the defense were not so extreme as to defy the remedy of a curative instruction, or to have put defendants at the risk of suffering manifest injustice. *Launsburry, supra.*

III. CONCLUSION

The order granting a new trial is reversed. The judgment of acquittal setting aside Puertas' conviction for conspiracy to deliver cocaine is affirmed. Defendants' remaining convictions are affirmed. This case is remanded for entry of judgments of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Brian K. Zahra

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED September 27, 2002
v JOSEPH EDMUND PUERTAS, Defendant-Appellant/Cross-Appellee.	No. 224173 Oakland Circuit Court LC No. 98-157485-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee/Cross-Appellant,	
v JAMES MICHAEL TALLEY, Defendant-Appellant/Cross-Appellee.	No. 224286 Oakland Circuit Court LC No. 98-157489-FH

Before: Whitbeck, P.J., and Holbrook, Jr., and Zahra, JJ.

WHITBECK, P.J. (*concurring*).

I concur in the result the majority reaches in this case. I also agree with the reasoning the majority used in concluding that the trial court should have instructed the jury pursuant to CJI 2d 4.14, but its failure to do so was not error requiring reversal, and that Michigan continues to adhere to the bilateral conspiracy rule as explained in *People v Anderson*.[1] I write separately to explain two features of this case that, in my view, require further attention.

First, the expert scientific evidence concerning how and why the drug dogs alerted plainly would have passed the test the United States Supreme Court articulated in *Daubert v*

[1] *People v Anderson*, 418 Mich 31, 35; 340 NW2d 634 (1983).

Merrell Dow Pharmaceuticals, Inc.[2] However, Michigan does not use the *Daubert* test. Rather, as the majority notes, Michigan applies the "general acceptance" test[3] stated in *People v Davis*[4] and *Frye v United States*,[5] which is designed to make only scientific evidence with a trustworthy basis admissible.[6] In some instances, a valid argument can be made that the *Davis-Frye* test has failed to keep pace with the significant growth and change in the sciences over the last half-century, which *Daubert* largely accommodates. Nevertheless, the differences between the language used in MRE 702 and FRE 702, the rules respectively governing scientific evidence in Michigan's courts and the federal courts, presently justify using the *Davis-Frye* rule in Michigan. More accurately, this textual difference supports the distinct evidentiary tests until the Michigan Supreme Court changes MRE 702 or directs us to interpret it differently.[7]

In my view, the record is not particularly clear with respect to whether the evidence passed the *Davis-Frye* test. As a matter entrusted to the trial court's discretion,[8] I am hesitant to say that the trial court, which acknowledged the *Davis-Frye* standard in its ruling, committed error requiring reversal. Rather, I note that *Davis-Frye* requires more than the casual appearance that the evidence has some relationship to scientific principles for it to be admissible. I also suggest that, despite the reasoning in *United States v U S Currency, $22,474*,[9] Judge Neff's concurrence in *People v Humphreys*[10] raises important questions regarding the evidence used in this case because of the logical relationship between the drug residue necessary to emit the chemicals the dogs detect. In other words, while a dog may only alert to chemicals emitted by cocaine, and not the cocaine itself, the widespread contamination of American currency may very well affect when these particular chemicals are also present, thereby diminishing the value of the alert as evidence that drugs had once been present in that place.

I also have concerns regarding the alleged police corruption in this case. I completely agree that, as the majority recognizes, this Court has an obligation to address the technical, legal grounds governing whether the prosecutor's failure to give the State Police report following the inquiry into the alleged corruption to the defense was an error requiring a new trial. With respect to those technical questions, I agree that the rule articulated in *Brady v Maryland*[11] has not

[2] *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

[3] *People v McMillan*, 213 Mich App 134, 136; 539 NW2d 553 (1995), citing *People v Young (After Remand)*, 425 Mich 470, 473, 479-480; 391 NW2d 270 (1986).

[4] *People v Davis*, 343 Mich 348, 372; 72 NW2d 269 (1955).

[5] *Frye v United States*, 54 US App DC 46, 47; 293 F 1013 (1923).

[6] *Nelson v American Sterilizer Co (On Remand)*, 223 Mich App 485, 491; 566 NW2d 672 (1997).

[7] *McMillan, supra* at 137, n 2.

[8] See *People v Bahoda*, 448 Mich 261, 288-289; 531 NW2d 659 (1995).

[9] *United States v U S Currency, $22,474*, 246 F3d 1212, 1216 (CA 9, 2001).

[10] *People v Humphreys*, 221 Mich App 443, 453-454; 561 NW2d 868 (1997) (Neff, J., concurring).

[11] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

evolved to the point that would breach the wall[12] between the investigation into the criminal wrongdoing of Joseph Puertas and James Talley and the State Police investigation. Thus, the majority correctly concludes that the prosecutor did not commit a *Brady* violation by failing to share the information about the report the State Police generated as part of the police corruption investigation. There is a good argument to be made that the trial court would have acted within its discretion if it had imposed a lesser sanction for the failure to provide the State Police report pursuant to the discovery order. However, to the extent that the discovery order did not explicitly govern the product of this other investigation, Puertas and Talley knew about the State Police report, and they did not establish that they had exhausted other means of acquiring the report, a new trial was too severe a sanction to order in this case.

Nevertheless, in focusing on these technical questions, one cannot ignore the substance of the controversy that the report represents and, to some degree, records. In my view, the information in the State Police report favorable to the prosecutor in this case did not nullify the effect the report had in casting the prosecutor's case in a poor light. Instead, it raised more questions than it answered.

I accept as a basic premise that, to carry out their legitimate role in law enforcement, officers must often work with people who, at best, lack a moral compass, and, at worst, are indistinguishable from the criminals under investigation. The law anticipates these pragmatic alliances. However, it cannot be emphasized too much that the law, as accommodating as it may be, still expects that even close and lengthy dealings with criminals will not diminish the integrity of officers; the officers act as an indispensable check against whatever impulse to act improperly might spring up in an informant. As a result, it is not the fact that Joe Sweeney worked as an informant in this case that disturbs me, even though his volunteerism appears to have been first motivated by a hard-to-believe altruistic inclination to help his brother "work off" drug possession charges. Rather, it disturbs me greatly that Deputy Ken Everingham, the law enforcement officer designated to ensure that Sweeney acted properly in the controlled buys at the Megabowl, admitted to lying at the preliminary examination in this case when he said that he was present during certain controlled purchases. Equally disturbing is Everingham's claim that Sergeant Kenneth Quisenberry instructed him and another officer to falsify their reports concerning the Megabowl investigation and to submit time logs to suggest that they had been working the case when they were not actually present. It is also disturbing to learn that Everingham purportedly paid Sweeney for transactions he never observed, and that other law enforcement agents had sincere doubts about Sweeney's trustworthiness, especially when conducting unobserved controlled buys.

Without a doubt, the State Police took the correct action in investigating this alleged malfeasance by the investigators involved in the Megabowl case. Ultimately, the officer in charge of the State Police corruption investigation concluded that there was an insufficient basis to substantiate Everingham's allegations. However, as with a jury verdict of acquittal, the

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[12] It bears mentioning that members of the prosecutor's office in this case played more than a passive role in the State Police investigation, when they consulted and shared information with the State Police.

investigating officer's conclusion was not equivalent to a factual determination that Quisenberry, Sweeney, Everingham, and the rest were actually innocent of misconduct.

In the end, one particular comment mentioned in the State Police report provides a meaningful glimpse into the reason why the result in this case, though necessary, is a difficult one to reach. According to an officer who had worked with Detective Sergeant Gary Miller, the officer who assisted Quisenberry in investigating Puertas and Talley, Miller had said, "judges expect police officers to lie" when urging this other officer to "flower up" an affidavit for a warrant. Whether Miller actually said this is irrelevant. The point is that judges explicitly rely on police officers and others who work on behalf of the law *not to lie*. True, a healthy skepticism helps when deciding any factual matter. Still, should the day ever dawn when judges routinely expect officers to lie, then our criminal justice system, as challenged as it may be at times, will truly be in great difficulty.

/s/ William C. Whitbeck