STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 21, 2010
v	No. 283025 Oakland Circuit Court
BRIAN TIMOTHY MCKINNEY, Defendant-Appellant.	LC No. 2006-211600-FH

Before: Meter, P.J., and Borrello and Shapiro, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(ii), one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and one count of driving while license suspended (DWLS), MCL 257.904(1). He was sentenced to time served for the DWLS conviction and to prison terms of one to four years each for the marijuana convictions, with one of those sentences to be served consecutively to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

I. Background

On June 9, 2006, defendant was arrested for DWLS after Bloomfield Township police officers conducted a traffic stop of defendant's Cadillac Escalade, which was occupied solely by defendant. During a protective pat-down search of defendant before he was placed in a patrol vehicle, $1,145 in cash was found in his pockets. Because the vehicle was being impounded, it was also searched. A gun was seized from the center console of the vehicle. In addition, five gallon-size ziplock bags full of marijuana were found inside a "Louis Vuitton" box in the rear hatch of the Escalade.

Bloomfield Township Detective James Gallagher, a member of the Oakland County Narcotics Enforcement Team, determined that the vehicle was registered to Michael Davis. Gallagher also interviewed defendant, who stated that the vehicle was owned by a cousin, Darien Johnson, and that he had a permit for the gun.

After the interview, police officers executed a search warrant for drug-trafficking records and other evidence at the two-story home where defendant said he resided with his girlfriend. A woman was present in the house when the search warrant was executed. Because marijuana was

observed in plain view in the basement, a second search warrant was obtained to search the house for narcotics. Approximately seven pounds of marijuana, which was packaged similarly to the marijuana found in the vehicle, was found in the basement. An additional 35 grams of marijuana was found in a laundry room. Among other items found in the house were "Louis Vuitton" boxes, a box containing $3,482, a cash counting machine, and a digital scale. Although there was no evidence that marijuana was being grown on the premises, a book entitled "Indoor Marijuana Horticulture" was found in the master bedroom.

Defendant testified that he resided with his girlfriend, Cory Hardaway, at the time of his arrest, but that a friend, Cedrick Leonard, also stayed in the home. Defendant denied any knowledge of the marijuana found in the Escalade and in his home. He testified that Leonard used the Escalade shortly before he drove it and was stopped by the police. Leonard testified that he used the vehicle to pick up 12 pounds of marijuana before defendant was arrested. He claimed that, after returning to defendant's home, he took the marijuana to the basement. He stated that he then put five pounds in a "Louis Vuitton" box that he found in the basement and placed it in the Escalade, without defendant's knowledge. Leonard denied having any drugs in the laundry room in the house.

II. Prosecutorial Misconduct

Defendant argues that reversal is required because of numerous instances of prosecutorial misconduct. In general, a claim of prosecutorial misconduct is a constitutional question that we review de novo. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Any factual findings made by the trial court are reviewed for clear error. *Id*. Where a defendant fails to make a contemporaneous objection and request for a curative instruction with respect to the alleged misconduct, we limit our review to whether defendant has shown plain error affecting his substantial rights, i.e., affecting the outcome of the proceedings. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008); see also *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999), and *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), abrogated on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). "The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *Brown*, 279 Mich App at 134.

Defendant first argues that the prosecutor impinged on his Fifth Amendment right to refrain from self-incrimination and his Sixth Amendment right to counsel by eliciting testimony from Detective Gallagher regarding his request for a lawyer at the end of the custodial interview. Because defendant failed to object to the testimony, we review this issue under the plain-error doctrine. A plain error is an error that is clear or obvious. *Schutte*, 240 Mich App at 720. Where alleged misconduct is based on evidentiary matters, the appropriate focus is whether the prosecutor acted in bad faith. See *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007).

> [P]rosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence. The prosecutor is entitled to attempt to introduce evidence that he legitimately believes will be accepted by the court, as long as that attempt does not prejudice the defendant. [*People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999) (citation omitted).]

We find no merit to defendant's claim that the prosecutor's questioning of Detective Gallagher implicated defendant's Sixth Amendment right to counsel. Indeed, the Sixth Amendment right to counsel does not attach until the initiation of adversarial judicial proceedings. *People v Hickman*, 470 Mich 602, 607; 684 NW2d 267 (2004). However, it may constitute a denial of due process under *Doyle v Ohio*, 426 US 610; 96 S Ct 2240; 49 L Ed 2d 91 (1976), for the prosecutor to use a defendant's post-arrest silence where a defendant has been given his *Miranda*[1] warnings. *People v Borgne*, 483 Mich 178, 184-188; 768 NW2d 290 (2009), aff'd on reh ___ Mich ___; 771 NW2d 745 (September 11, 2009). Under *Miranda*, the police must advise a suspect of his right to remain silent, that anything he says may be used against him, and that he has the right to the presence of counsel during questioning. *People v Dennis*, 464 Mich 567, 572-573; 628 NW2d 502 (2001).

In this case, the prosecution asserts that the rule of completeness justified Detective Gallagher's testimony regarding how the interview ended. It is appropriate for a police officer to delineate both the beginning and the end of an interview so that the jury will know that the testimony is complete. See *People v McReavy*, 436 Mich 197, 214-216; 462 NW2d 1 (1990). However, there is a distinction between eliciting testimony regarding the fact that the defendant ended an interview and eliciting testimony that the defendant expressly asserted a *Miranda* right to do so. Although silence may be interpreted in different ways, an affirmative assertion of the privilege against self-incrimination raises a clear inference of culpability and is necessarily more prejudicial than simply noting that a defendant stopped answering questions. *United States v Andujar-Basco*, 488 F3d 549, 556 (CA 1, 2007). The court in *Andujar-Basco* stated that "*Miranda* draws no distinction between a mid-interrogation assertion of the privilege against self-incrimination and an immediate post-arrest assertion" and that "the words the defendant uses to assert the privilege are themselves protected by it." *Id*. at 557. The court went on to hold that the Fifth Amendment barred testimony concerning an explicit mid-interrogation assertion of *Miranda* rights, but that the error arising from the testimony did not affect the defendant's substantial rights. *Id*. at 557-558.

Similarly, under the circumstances of this case, the prosecutor committed plain error by eliciting Detective Gallagher's testimony regarding defendant's explicit words to invoke his *Miranda* right to counsel. Nonetheless, defendant has not established that the error affected his substantial rights. *Borgne*, 483 Mich at 197. Factors that we consider in evaluating prejudice include the extent of the prosecutor's comments, the extent to which the prosecutor attempted to tie the improper testimony to defendant's guilt, and the relative strength of other evidence against defendant. *Id*. at 197-198.

Here, the evidence against defendant was strong and the prosecutor's questioning was brief. Further, the prosecutor did not make any attempt to tie Detective Gallagher's testimony regarding how the interview ended to defendant's guilt. Additionally, we note that defense counsel also elicited from defendant why he requested a lawyer. Defendant testified that he wanted a lawyer because another officer, who was present during the interview, went into a "tirade" about selling drugs after he said that the "marijuana was not mine." Examined in its

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

entirety, the record does not support a finding that defendant was prejudiced by Detective Gallagher's earlier testimony that defendant requested a lawyer. Therefore, we find no error requiring reversal.

Defendant next argues that the prosecutor improperly attempted to shift the burden of proof to him by asking him on cross-examination whether his girlfriend and Johnson would be coming in to testify on his behalf. This claim of misconduct is unpreserved because it was not raised until after the prosecutor elicited defendant's "no" responses to whether the girlfriend and Johnson would be testifying. "[T]o be timely, an objection should be interposed between the question and the answer." *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

Further, defendant has shown neither bad faith nor prejudice arising from the prosecutor's cross-examination, at least with respect to the question about Johnson. *Noble*, 238 Mich App at 660-661. Although it is impermissible for a prosecutor to attempt to shift the burden of proof to a defendant, *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003), "[w]here a defendant's testimony alludes to the possibility that an absent 'witness' would exculpate the defendant, the prosecutor is entitled to explore the credibility of such testimony," *People v Fields*, 450 Mich 94, 108; 538 NW2d 356 (1995).[2]

Defense counsel objected to the prosecutor's questioning concerning whether Johnson would be telling the jury that the Escalade was his vehicle. It appears that the prosecutor was attempting to undermine defendant's claim on direct examination that he came into possession of the Escalade from Johnson, a longtime friend. Although the prosecutor also asserted in response to the objection that the questions were intended as "discovery," it is not apparent that the prosecutor's purpose was to shift the burden of proof, or that she otherwise acted in bad faith.

Even if the prosecutor's line of questioning constituted plain error, the questioning with regard to Johnson and the girlfriend ceased when the trial court sustained defense counsel's objection. Moreover, while the trial court found no need to explicitly repeat its earlier jury instruction that defendant did not have the burden to produce evidence when sustaining the objection,[3] it later instructed the jury that "[t]he Prosecutor must prove each element of the crime beyond a reasonable doubt. The Defendant is not required to prove his innocence or to do anything." The court's instructions were adequate to dispel any prejudice arising from the questioning. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *Abraham*, 256 Mich App at 279.

We also reject defendant's claim that the prosecutor committed misconduct in her questioning of Detective Gallagher with respect to a Lasermax box for a weapon's laser sight,

[2] We also note that in general, otherwise improper prosecutorial remarks do not require reversal where they are responsive to issues raised by defense counsel. *Schutte*, 240 Mich App at 721.

[3] The court somewhat reiterated the instructions when sustaining the objection. It stated: "Well, I've already instructed the jury that the defendant does not have to produce any evidence. That the burden is on the Prosecutor and that instruction will also be given to you before you deliberate."

which was found during the search of defendant's home. We consider this issue unpreserved because defense counsel only objected to the prosecutor's offer to admit a photograph of the Lasermax box. "An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground." *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996), lv den 455 Mich 869 (1997).

The only testimony elicited by the prosecutor before defense counsel's objection was Detective Gallagher's description of a laser sight as something that is installed on a weapon. He testified that "you'll see it in a lot of movies. You can just point a gun at somebody or at a wall or whatever it is and you'll see a red dot where the bullet's gonna go." Defendant has not established that the prosecutor acted in bad faith or that he was prejudiced by the brief questioning. *Noble*, 238 Mich App at 660-661. Indeed, the record shows that defense counsel later elicited from defendant that he purchased the gun found in the Escalade, along with a laser sight and an extra clip, for his protection because his investment company purchases properties in areas that are not safe. Defendant testified that he "got kinda carried away. I was in the store and the guy was telling me all the little gadgets that could go on it, so I was like what the heck, just put it on there. I mean it didn't hurt." Although the prosecutor's theory was that defendant carried the gun for a different purpose, considering the record as whole, we are unable to conclude that the prosecutor's earlier questioning of Detective Gallagher regarding the laser sight amounts to outcome-determinative plain error. *Unger*, 278 Mich App at 235; *Schutte*, 240 Mich App at 720.

Defendant also argues, for the first time on appeal, that the prosecutor engaged in misconduct by suggesting in closing argument that the jury take the marijuana evidence that was seized from the Escalade during the traffic stop and smell it during deliberations. Defendant suggests that this was impermissible because there was insufficient evidence to indicate that the marijuana smelled the same at trial as it did when seized. While the prosecutor did not point out all of the possible differences in the odor-producing circumstances of the marijuana, the prosecutor did argue, based on Detective Perry Dare's testimony, that the odor of marijuana becomes more faint over time. The prosecutor asked the jury to "[s]mell the marijuana, go through the packaging material, look at everything."

The prosecutor was free to argue the evidence and all reasonable inferences arising from it as it related to her theory of the case. *Schutte*, 240 Mich App at 721. We are not persuaded that differences in the odor-producing circumstances of the marijuana in the courtroom and the Escalade rendered the odor extrinsic evidence. See *United States v Dunn*, 961 F Supp 249, 251-252 (D Kan, 1997) (federal district court found a defendant's claim that odor of properly admitted marijuana evidence constituted extraneous information to be unsupported, and found that the presence of the evidence created no unfair prejudice where the defendant was able to argue differences in the odor-producing circumstances to the jury). Defendant has not met his burden of establishing error, let alone an outcome-determinative plain error. *Unger*, 278 Mich App at 235; *Schutte*, 240 Mich App at 720. Indeed, we simply cannot conclude that this "odor evidence" affected the outcome of the proceedings.

Defendant also argues that the prosecutor engaged in misconduct by cross-examining defense witness Leonard regarding his alleged prior criminal record. Defendant's failure to show that the prosecutor acted in bad faith or that he was prejudiced by the cross-examination is

dispositive of this unpreserved claim. *Noble*, 238 Mich App at 660-661. As defendant concedes, MRE 609(a)(1) provides that

> [f]or the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross examination, and . . . the crime contained an element of dishonesty or false statement . . . .

There is record evidence that the prosecutor did not learn that Leonard would testify as a defense witness until the day before trial. Although the record does not indicate that the prosecutor acquired any public records regarding Leonard's alleged criminal history, the prosecutor's cross-examination indicates that she made use of LEIN (Law Enforcement Information Network) information in an effort to elicit Leonard's admission that he was convicted on July 30, 2007, for making a false report of a misdemeanor to the police. While Leonard denied the conviction, he admitted that he "gave police a false name."[4]

Considering that the prosecutor had LEIN information to conduct the cross-examination, we are unable to conclude that the prosecutor acted in bad faith by attempting to elicit Leonard's admission to the alleged prior conviction. Moreover, even if the prosecutor committed plain error when questioning Leonard or in commenting on his testimony, we would not reverse. Regardless of any prior conviction, Leonard's admission that he gave a prior false statement was admissible to undermine his credibility. Considered in light of the other evidence introduced by the prosecutor to attack Leonard's credibility, the strong evidence linking defendant to the marijuana, and the jury instructions provided by the trial court, defendant has not established the requisite outcome-determinative plain error to warrant appellate relief. *Unger*, 278 Mich App at 235; *Schutte*, 240 Mich App at 720.

We also reject defendant's claim that the prosecutor's rebuttal argument regarding Leonard's possible motives to falsely claim ownership of the marijuana warrants reversal. "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." *Schutte*, 240 Mich App at 721.

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[4] While this aspect of the issue is not addressed by defendant, we further note that the prosecution concedes on appeal that Leonard's alleged prior conviction was referred to in both closing and rebuttal argument. The prosecutor asserted in closing argument that Leonard was "convicted in 2007 of filing a false police report. . . . Lying about something to the police." While defense counsel did not object, he responded in his closing argument that "it also is clear that he [Leonard] gave a name that was not his own, a misdemeanor." The prosecutor replied in rebuttal by proposing to clarify that "[h]e was convicted for false report of a misdemeanor. Alleging that something happened, that did not happen." Although there is evidence that the prosecutor argued facts not in evidence, the trial court later instructed the jury that "[t]he lawyers statements and arguments are not evidence" and "[t]he lawyer's questions to the witnesses are also not evidence. You should consider the questions only as they give meaning to the witness' answers."

In general, otherwise improper prosecutorial remarks do not require reversal where they are responsive to issues raised by defense counsel. *Id.* "The doctrine of invited response is used as an aid in determining whether a prosecutor's improper remarks require the reversal of a defendant's conviction. It is used not to excuse improper comments, but to determine their effect on the trial as a whole." *Jones*, 468 Mich at 353. Under this doctrine, "the proportionality of the response, as well as the invitation, must be considered to determine whether the error, which might otherwise require reversal, is shielded from appellate relief." *Id.*

It is apparent that the prosecutor's challenged remarks were responsive to and, in fact, invited by defense counsel's following argument:

> [Y]ou can bet that as soon as [Leonard] left this Courtroom he was arrested. He didn't have to. Why? What was in it for him, except for what he knew. Now, I'm not gonna tell you that [the prosecutor] can't get up here and speculate what was in it for him. Maybe he did it because he was paid to do it. . . . Maybe he's an underling. Maybe he's not a big time dope dealer and he's just here faking it. They're gonna hear maybes.

Contrary to defendant's argument on appeal, the prosecutor did not respond by arguing that Leonard was in fact bribed or intimidated to provide testimony; instead, she suggested that Leonard might have been paid or threatened.

This case is distinguishable from *People v Tyson*, 423 Mich 357, 376, 377 NW2d 738 (1985), in which the Supreme Court reversed a defendant's conviction because the prosecutor attacked the credibility of a defendant's expert witness on a critical issue in closing argument by arguing that the witness was paid to testify, without any evidentiary support for the argument. The speculative nature of the prosecutor's remarks in this case were made known to the jury. Considering their responsive nature, this unpreserved claim affords no basis for reversal. *Schutte*, 240 Mich App at 721.

Next, defendant argues that the prosecutor improperly engaged in gamesmanship by asking Detective Gallagher whether he saw defendant talk to individuals who were seated in the courtroom on the first day of the trial. The record reflects that Detective Gallagher did nothing more than indicate that he saw defendant talk to "a couple" during a break. Defense counsel thereafter objected to the relevancy of the prosecutor's line of questioning, and the trial court instructed the prosecutor to move on. The prosecutor remarked that the questions were intended to "confirm in the event any of those people testified that the Defendant had discussions with them during the trial." Given the brief nature of the exchange, we are not persuaded that the prosecutor's conduct amounts to an outcome-determinative plain error. *Schutte*, 240 Mich App at 720.

Next, the fact that the prosecutor cross-examined Leonard on the next day of trial regarding whether he was in the courtroom during testimony, in violation of a sequestration order, does not demonstrate misconduct, inasmuch as the trial court specifically permitted the cross-examination when allowing Leonard to be called as a defense witness. *Noble*, 238 Mich

App at 660-661. Further, considering Leonard's testimony that a court clerk did not ask him if he was a witness and that he was not present for any testimony on the first day of trial,[5] we are not persuaded that the prosecutor engaged in misconduct by calling the clerk to rebut the testimony and to show that Leonard was in the courtroom during at least the morning session.

Ultimately, the purpose of sequestering a witness is to prevent the witness from coloring testimony to conform with other testimony and to aid in the detection of testimony that is not candid. *People v Meconi*, 277 Mich App 651, 654; 746 NW2d 881 (2008). Considering the record as a whole, defendant has not substantiated his unpreserved claim that the prosecutor attempted to impeach the credibility of his defense without an evidentiary basis for doing so. Moreover, we note that a prosecutor may argue that a witness is not worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). There being no plain error, we find no basis for reversal on this ground. *Schutte*, 240 Mich App at 720.

In sum, defendant was not deprived of a fair and impartial trial. Whether considered singularly or in the aggregate, we find no actual errors that warrant appellate relief. *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995).

III. Ineffective Assistance of Counsel

Defendant argues that defense counsel was ineffective. Because defendant did not raise this issue in a motion in the trial court, our review is limited to errors apparent from the record. *Unger*, 278 Mich App at 253. There is a strong presumption of effective assistance. *Id*. Defendant must show that counsel's performance fell below an objective standard of reasonableness and must also show prejudice. *Brown*, 279 Mich App at 140. "To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). The defendant must also show that the result of the proceeding was fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

Defendant first argues that defense counsel was ineffective for failing to ensure that the sequestration order was complied with. The record does not support this claim. Although defense counsel indicated that he could not see what was happening behind him when he was questioning a witness, the record discloses that defense counsel repeatedly took steps to ensure that Leonard complied with the sequestration order by speaking with him and having him leave the courtroom. Defendant has failed to establish that defense counsel's efforts to ensure compliance with the sequestration order fell below an objective standard of reasonableness.

Defendant next contends that defense counsel's performance was deficient because counsel failed to object to, and failed to request a curative instruction with respect to, the testimony that defendant requested a lawyer during the interview conducted by Detective Gallagher. We have already concluded that defendant was not prejudiced by the testimony.

[5] Leonard admitted being in the courtroom during defendant's testimony on the second day of trial, before he was called to testify.

Also, considering that defense counsel undertook to elicit from defendant a nonculpable explanation for why he requested a lawyer, defendant has not overcome the strong presumption that defense counsel's performance consisted sound trial strategy. *Carbin*, 463 Mich at 600; see also *Unger*, 278 Mich App at 242 (declining to raise an objection may be consistent with sound trial strategy).

Defendant next argues that defense counsel was ineffective for asking Detective Gallagher a question that led him to give an opinion on the ultimate issue of possession. In general, decisions regarding the questioning of witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). While Detective Gallagher answered defense counsel's questions regarding the post-arrest interview by expressing his belief that the marijuana found in the Escalade belonged to defendant, we conclude that defendant has not shown that the questions were unsound trial strategy. Further, the record shows that defense counsel successfully moved to strike the testimony regarding Detective Gallagher's personal belief, and that the trial court later instructed the jury not to consider stricken testimony. Under these circumstances, we cannot find either deficient performance or prejudice.

Finally, defendant argues that defense counsel was ineffective for failing to object to the various unpreserved claims of prosecutorial misconduct discussed in section II, *supra*. In light of our conclusion in section II that there were no errors that, singularly or cumulatively, operated to deny defendant a fair trial, we likewise conclude that counsel's failure to object did not deprive defendant of the effective assistance of counsel.

IV. Search Warrant

Defendant next argues that his convictions should be reversed because the search warrant for his home was invalid. In considering this issue, we find merit to the prosecution's argument that defendant has not sufficiently briefed this issue. MCR 7.212(C)(7) provides, in part:

> As to each issue, the argument must include a statement of the applicable standard or standards of review and supporting authorities. Facts stated must be supported by specific page references to the transcript, the pleadings, or other document or paper filed with the trial court.

Merely incorporating a motion or brief filed in the trial court, as defendant has done here, is inadequate, especially where the record indicates that the trial court conducted a hearing pursuant to *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978), to resolve defendant's claim that Detective Gallagher misrepresented information in the search warrant affidavit for the first warrant executed at defendant's home.

Nonetheless, this Court has discretion to address issues that have been inadequately briefed. See *Van Buren Charter Twp v Garter Belt, Inc*, 258 Mich App 594, 632; 673 NW2d 111 (2003). Therefore, we shall consider defendant's argument.

We review a trial court's ruling at a suppression hearing for clear error, but conclusions of law are reviewed de novo. *Unger*, 278 Mich App at 243. A search warrant may only be issued based on probable cause. *Id*. at 244. An appellate court will review an issuing

magistrate's determination that probable cause exists by asking "only whether a reasonably cautious person could have concluded that there was a 'substantial basis' for the finding of probable cause." *Id*., quoting *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992). A "substantial basis" requires a fair probability that contraband or evidence will be found in a particular place. *People v Mullen*, 282 Mich App 14, 22; 762 NW2d 170 (2008). Under *Franks*, *supra*, the validity of the warrant may be challenged on the basis that a false statement necessary to the finding of probable cause was knowingly or intentionally, or with reckless disregard for the truth, included in the supporting affidavit. *Id*. Material omissions may also result in the warrant's being invalid. *Id*. at 24.

Defendant's motion challenged the probable cause for the first search warrant obtained by Detective Gallagher on the ground that there was no evidence that he possessed the marijuana found in the Escalade. However, the circumstances of the traffic stop set forth in Detective Gallagher's affidavit provided sufficient probable cause to believe that defendant possessed the marijuana. Possession of a controlled substance may be actual or constructive. *People v Wolfe*, 440 Mich 508, 520; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Defendant's motion also claimed that Detective Gallagher's affidavit (1) falsely stated that defendant was arrested for possession with intent to deliver marijuana and felony-firearm, (2) falsely stated that Detective Gallagher is the "Officer in Charge of an on going narcotics investigation" at a particular address in West Bloomfield Township, and (3) failed to mention that defendant was not the registered owner of the Escalade. However, considering that the focus of the *Franks* hearing and the trial court's decision was on Detective Gallagher's statement regarding the ongoing investigation, and considering the way defendant has briefed this issue on appeal, we shall limit our review to that claim.

We find no clear error in the trial court's determination that defendant failed to sustain his burden of showing that Detective Gallagher knowingly or recklessly made a false statement essential to a finding of probable cause. Detective Gallagher explained at the *Franks* hearing that he considered the traffic stop to be the start of the investigation. He was informed that a narcotics arrest was made, and continued the investigation by interviewing defendant and confirming his home address. He indicated that his training and experience, as set forth in the affidavit, was a basis for his decision to further investigate the home by obtaining a search warrant for drug-trafficking records and other evidence.

While it is clear from Detective Gallagher's testimony that there was no investigation being conducted of defendant's home before the traffic stop, we must review a search warrant affidavit in a commonsense and realistic manner. *Mullen*, 282 Mich App at 27. A reasonably cautious person would not have concluded that the use of the word "ongoing" to describe the nature of the investigation in the affidavit was material. Read in a commonsense and realistic manner, the affidavit indicates that it was the discovery of the marijuana during the traffic stop, and the investigation that followed, that formed the basis for probable cause. Moreover, it was not necessary that the search warrant affidavit set forth *direct* evidence linking a crime to defendant's residence. See, e.g., *United States v Whitner*, 219 F3d 289, 297-298 (CA 3, 2000) (explaining that evidence of drugs is likely to be found where dealers reside). The trial court appropriately considered the information regarding Detective Gallagher's experience to conclude that probable cause existed, even if the statement regarding the ongoing investigation were excluded. *People v Darwich*, 226 Mich App 635, 639-640; 575 NW2d 44 (1997). Considered

along with the other facts and circumstances presented in the affidavit, we find no error in the trial court's decision to uphold the validity of the search warrant. Accordingly, it is unnecessary to address the prosecution's claim that the good-faith exception to the exclusionary rule adopted in *People v Goldston*, 470 Mich 523; 682 NW2d 479 (2004), would apply if the search warrant were to be deemed invalid.

Affirmed.

/s/ Patrick M. Meter
/s/ Stephen L. Borrello
/s/ Douglas B. Shapiro