STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 17, 2013
v	No. 306339 Muskegon Circuit Court
REGINALD DEWAYNE NELSON, Defendant-Appellant.	LC No. 10-059619-FH

Before: SERVITTO, P.J., and WHITBECK and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for possession with intent to deliver 50 to 450 grams of cocaine, MCL 333.7401(2)(a)(*iii*), second subsequent offense, MCL 333.7413(1)(a); possession of marijuana with intent to deliver, MCL 333.7401(2)(d)(*iii*); and possession of a firearm by a felon (felon in possession), MCL 750.224f. Defendant was sentenced as third-offense habitual offender, MCL 769.11, to concurrent prison terms of life imprisonment without the possibility of parole[1] for his second conviction of possession with intent to deliver 50 to 450 grams of cocaine, four to eight years' imprisonment for his possession with intent to deliver less than five kilograms of marijuana conviction, and four to ten years' imprisonment for his felon-in-possession conviction. On appeal, defendant raises issues in an appellate brief prepared by appellate counsel and in a pro se supplemental brief pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4. For the reasons below, we affirm defendant's convictions and sentences.

[1] The judgment of sentence does not indicate that defendant's life sentence was nonparolable. However, MCL 333.7413(1), which sets forth the penalty for subsequent controlled substance offenses such as the one of which defendant was convicted, mandates that a defendant who is convicted of one of the enumerated subsequent controlled substance offense "shall be imprisoned for life and shall not be eligible for probation, suspension of sentence, or parole during that mandatory term[.]" Thus, defendant's life sentence is without the possibility of parole.

I. SUFFICIENCY OF THE EVIDENCE

First, defendant argues that there was insufficient evidence to support his controlled substance convictions because the prosecution was unable to establish that defendant had constructive possession of the drugs. We disagree.

Claims of insufficient evidence are reviewed de novo on appeal. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). While the articulated standard of review is de novo, appellate review of a claim for sufficiency of the evidence is deferential to the trial court. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). For instance, "[w]e examine the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt." *Ericksen*, 288 Mich App at 196. Additionally, a reviewing court must defer to credibility determinations drawn by the jury. *Nowack*, 462 Mich at 400.

In determining whether the prosecution presented sufficient evidence to sustain a conviction, due process requires that the evidence show guilt beyond a reasonable doubt. *Jackson v Virginia*, 443 US 307, 315, 318-319; 99 S Ct 2781; 61 L Ed 2d 560 (1979), overruled on other grounds by *Schlup v Delo*, 513 US 298; 115 S Ct 851; 130 L Ed 2d 808 (1995). The only argument defendant raises with regard to either offense is that the prosecution did not present sufficient evidence for the jury to find, beyond a reasonable doubt, that he possessed the drugs.[2] "A person need not have actual physical possession of a controlled substance to be guilty of possessing it. Possession may either be actual or constructive." *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992). In determining the issue of possession, constructive or otherwise, "[t]he essential question is whether the defendant had dominion or control over the controlled substance." *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). As recognized by our Supreme Court in *Konrad*,

> In the foremost discussion of what is necessary to have dominion or control over drugs, Judge Posner explained that a defendant "need not have them literally in his hands or on premises that he occupies but he must have the right (not the legal right, but the recognized authority in his criminal milieu) to possess them, as the owner of a safe deposit box has legal possession of the contents even though the

[2] Although defendant does not challenge the remaining elements of the offenses, the evidence was sufficient for a rational jury to find, beyond a reasonable doubt, that defendant committed both controlled substance offenses. Lab testing confirmed that the controlled substances were cocaine and marijuana, respectively, and that the respective weights for the drugs met the statutory requirements. MCL 333.7401(2)(a)(*iii*) and (2)(d)(*iii*). Additionally, there was evidence that defendant intended to deliver the drugs, because testimony showed that the manner in which the drugs were packaged was indicative that they were meant to be sold. See *Wolfe*, 440 Mich at 524.

> bank has actual custody." [*Id.*, quoting *United States v Manzella*, 791 F 2d 1263, 1266 (CA 7, 1986).]

A person's mere presence, by itself, at a location where contraband is found does not establish constructive possession. *Wolfe*, 440 Mich at 520. "Instead, some additional connection between the defendant and the contraband must be shown." *Id.* "[C]onstructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband." *Id.* at 521.

Contrary to defendant's assertions, the evidence was sufficient for a rational jury to find, beyond a reasonable doubt, that defendant constructively possessed the cocaine and marijuana. Defendant leased the home at which the cocaine and marijuana were found, and after he stopped making lease payments, he was not evicted and was still allowed to possess the home. There was also testimony that only those who control a house where large quantities of drugs were found typically have access to that house and defendant admitted that he went to the house on occasion. See *Wolfe*, 440 Mich at 521 (noting that evidence that a defendant controls the location at which drugs are found is circumstantial evidence that the defendant constructively possessed the drugs). Further, the utilities were registered to defendant, mail addressed to defendant was delivered to that address, and several documents containing defendant's name were found at the house. See *People v Hardiman*, 466 Mich 417, 423; 646 NW2d 158 (2002) (noting that mail addressed to the defendant at a particular residence was circumstantial evidence that the defendant had constructive possession of the drugs found at that residence). These documents were found in a room with scales used to weight drugs and Inositol used to cut cocaine. Size 12 shoes were also found in the home and there was evidence that defendant wore size 12 shoes. See *id.* (noting that finding the defendant's clothing near the area where the drugs are recovered is circumstantial evidence that the defendant constructively possessed the drugs). There was also evidence that the white Blazer, which defendant occasionally drove, was seen at the house shortly before the drugs were seized. Moreover, defendant fled the jurisdiction immediately after the house was searched, which is probative of his consciousness of guilt. See *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Additionally, with regard to the cocaine, defendant's fingerprint was on a plate that tested positive for cocaine residue. And, he could not be excluded as a donor to DNA found on a glove that contained cocaine residue. Accordingly, the totality of the circumstances demonstrates that there was "a sufficient nexus" between defendant and the cocaine and marijuana. *Wolfe*, 440 Mich at 521.

Defendant, however, argues that because other individuals had access to the home, it was rational for the jury to believe that anyone could have possessed the drugs, and that there was a reasonable doubt as to whether he had exclusive possession of the drugs. But "possession may be joint, with more than one person actually or constructively possessing a controlled substance." *Wolfe*, 440 Mich at 520. Thus, even if others had access to the drugs or possessed the drugs, the evidence was nonetheless sufficient for a rational jury to find that defendant had constructive possession of the drugs. Therefore, we conclude that there was sufficient evidence to support defendant's drug convictions.

II. IDENTITY OF CONFIDENTIAL INFORMANT

Next, defendant argues that the trial court's decision to allow the identity of the confidential informant to remain confidential denied defendant his right to a fair trial as well as his right to confront witnesses against him. We disagree.

We review for an abuse of discretion the invocation of privilege to protect the identity of a confidential informant. *People v Underwood*, 449 Mich 871; 535 NW2d 484 (1995). Additionally, we review for clear error the trial court's findings of fact, if any, related to a request for production of a confidential informant. See *People v Lucas*, 188 Mich App 554, 573; 470 NW2d 460 (1991).

Under the "informer's privilege," "the people are [generally] not required to disclose the identity of confidential informants." *People v Cadle*, 204 Mich App 646, 650; 516 NW2d 520 (1994), overruled in part on other grounds *People v Perry*, 460 Mich 55; 594 NW2d 477 (1999). In *Underwood*, 447 Mich at 704, quoting *Roviaro v United States*, 353 US 53, 59-61; 77 S Ct 623; 1 L Ed 2d 639 (1957) (emphasis in original), our Supreme Court explained the informer's privilege as follows:

> What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law . . . . The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.
>
> The scope of the privilege is limited by its underlying purpose . . . . *A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.*

Thus, the privilege does not apply when the informant can provide information that "is either relevant and helpful to [the] defendant's defense or essential to a fair determination of [the] defendant's guilt." *Id.* at 709.

The proper procedure for determining whether a confidential informant should be disclosed is an *in camera* hearing at which the trial court examines the confidential informant outside of the defendant's presence. *Underwood*, 447 Mich at 706. In order to warrant an *in camera* hearing, the defendant must show "a possible need for the informant's testimony." *Id.* at 706-707.

Defendant is unable to demonstrate a possible need for an *in camera* hearing, and as such, the trial court did not abuse its discretion when it denied defendant's motion for one. Defendant argues that he should have been permitted to call the confidential informant as a witness so that the informant could testify that he was at the house with the approval of a person who was not defendant. Defendant argues that if someone else let the confidential informant into the home at the time he saw the drugs, the jury could have believed that someone else, not defendant, possessed the drugs. However, the informant's statements contained in the affidavit did not indicate that someone other than defendant let the informant into the house, or that anyone else besides defendant had authority over the house. Even if the confidential informant could have testified that someone other than defendant had authority over the house, defendant was unable to demonstrate a possible need for the informant's testimony because defendant presented evidence that other people had authority to enter the house as they pleased. Thus, unlike in *Underwood*, 447 Mich at 707-708, the informant's testimony was not the only way that defendant could admit evidence of his proposed theory of defense. Further, whether defendant had exclusive possession of the drugs was irrelevant because, as previously discussed, for the purposes of a controlled substance offense, "possession may be joint, with more than one person actually or constructively possessing a controlled substance." *Wolfe*, 440 Mich at 520.

Defendant also argues that he was denied his right to confront an adverse witness when the detective lieutenant testified concerning statements made by the confidential informant. We disagree. Because defendant failed to preserve this issue for appellate review, our review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, a defendant must establish that there is an error that is plain, i.e., clear or obvious; and that the error affected defendant's substantial rights, meaning defendant must show that the error affected the outcome of the lower court proceedings, i.e., defendant was prejudiced. *Id.* A plain error affecting substantial rights warrants reversal only if it "resulted in the conviction of an actually innocent defendant or . . . 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings . . . .'" *Id.*, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

"The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004), quoting US Const, Am VI. "The Confrontation Clause prohibits the admission of all out-of-court testimonial statements unless the declarant was unavailable at trial and the defendant had a prior opportunity for cross-examination." *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007). "A statement by a confidential informant to the authorities generally constitutes a testimonial statement[,]" and a defendant's right of confrontation is violated when out-of-court statements made by confidential informants are introduced at trial, and the statement is offered to prove the truth of the matter asserted therein. *Id.* at 10-11. However, "a statement offered to show why police officers acted as they did is not hearsay" because it is not offered for the truth of the matter asserted. *Id.* at 11.

Here, the confidential informant's statements to the police officers were testimonial, as the purpose of the statements was to establish that defendant possessed and sold drugs, which would be relevant to a subsequent criminal prosecution. See *People v Garland*, 286 Mich App 1, 10; 777 NW2d 732 (2009) (noting that statements are testimonial if the primary purpose is to

establish or prove past events that are relevant to criminal prosecution). Additionally, the context of the prosecutor's questions to the detective lieutenant demonstrates that the confidential informant's statements were offered for the truth of the matter asserted, i.e. that defendant sold drugs. See *People v McPherson*, 263 Mich App 124, 134; 687 NW2d 370 (2004) (explaining that in determining whether statements were offered for the truth of the matter asserted or for non-hearsay purposes, this Court looks at the context in which the statements were elicited at trial). Immediately before the prosecutor elicited the testimony, defendant's trial counsel attacked the credibility of the investigation into defendant, and implied that defendant was not connected to the house. The prosecutor responded by eliciting testimony that the confidential informant was reliable and that the informant told police officers that defendant sold drugs at the house. In context, this testimony did not establish why the police took certain actions; instead, at the time the detective lieutenant testified, the only logical purpose for which the confidential informant's statements were offered was to prove that defendant sold the drugs at the house.

However, although the Confrontation Clause barred the confidential informant's statements, defendant is not entitled to relief under plain error review because he cannot demonstrate prejudice. *Carines*, 460 Mich at 763. As previously discussed, the evidence against defendant was substantial, and the testimony regarding the confidential informant's statements would not have changed the outcome of the case. Moreover, the testimony regarding the confidential informant's statements was brief, and in light of the rest of the evidence against defendant, it was not particularly damaging. See *People v Borgne*, 483 Mich 178, 199-202; 768 NW2d 290 (2009) (finding that where the evidence against defendant is substantial, and the error is only minor, the defendant does not establish plain error affecting substantial rights). Thus, the trial court did not plainly err when it admitted the detective lieutenant's testimony.

III. PROSECUTORIAL MISCONDUCT

Next, defendant argues that the prosecutor violated defendant's right of confrontation when he argued that the confidential informant's out-of-court statements were evidence that defendant lived in and controlled the house in question. We disagree.

Because defendant failed to preserve this issue for appellate review by objecting to the challenged prosecutorial statements at trial, our review is for plain error affecting substantial rights. *People v Unger (On Remand)*, 278 Mich App 210, 235; 749 NW2d 272 (2008). "The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). "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." *Id.* at 135. Moreover, a prosecutor is "free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *Unger*, 278 Mich App at 236. However, where evidence is admissible for one purpose but not another, a prosecutor commits misconduct by using the evidence for the improper purpose. See *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997).

Defendant suggests that the prosecutor compounded the violation of his right of confrontation discussed in Issue II, *supra*, by mentioning the confidential informant's hearsay statements during closing argument. We disagree.

Here, when read in context, the prosecutor did not use the confidential informant's statements for the truth of the matter asserted, i.e., that defendant sold cocaine; rather, the prosecutor used the confidential informant's statements during closing argument to show why the police took action in the case at bar. Indeed, unlike on redirect examination of the detective lieutenant where the prosecutor elicited the confidential informant's out-of-court statements for the purpose of showing defendant's guilt, here, the prosecutor in closing argument simply used the statements to summarize the actions taken by police officers, and to establish how the investigation led to defendant. This was not an improper purpose. See *Chambers*, 277 Mich App at 10-11. Accordingly, although the initial elicitation of the testimony violated defendant's right of confrontation, the prosecutor's use of the statements during closing argument was for a proper purpose, and did not amount to a continuing violation of defendant's right of confrontation. Thus, defendant has failed to establish plain error affecting substantial rights.

IV. OTHER ACTS EVIDENCE

Next, defendant argues that evidence of his 2002 controlled substance conviction was inadmissible under MRE 404(b)(1) because it was not relevant for establishing a proper, non-propensity purpose. We disagree.

A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). However, if the trial court's decision involves a preliminary issue of law where a constitutional provision, statute, or rule of evidence determines admissibility, then it is subject to de novo review. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010).

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible under MRE 404(b)(1), evidence of other bad acts must be relevant and offered for a proper purpose, and its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Upon request, the trial court may provide a limiting instruction to the jury under MRE 105. *Id*.

Here, the prosecution offered the evidence of defendant's previous controlled substance conviction to prove defendant's knowledge that the substances found in his home were controlled substances and to show that he intended to distribute the drugs, which are both proper purposes under MRE 404(b)(1).

To prove that the evidence was relevant, the prosecution bore the burden to establish that the evidence was material and had probative value. "Materiality refers to whether the fact was truly at issue." *People v McGhee*, 268 Mich App 600, 610; 709 NW2d 595 (2005). "It is well

established in Michigan that all elements of a criminal offense are 'in issue' when a defendant enters a plea of not guilty." *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998). Because defendant was charged with possession with intent to deliver controlled substances and pled not guilty, the prosecution was required to prove defendant's intent to distribute as an element of his offenses, as well as his knowledge that the substances were in fact controlled substances. *McGhee*, 268 Mich at 610. Thus, the other acts evidence was material to prove defendant's knowledge and intent, which were at issue.

With regard to the evidence's probative value, the evidence must "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. "[T]he proffered evidence truly must be probative of something *other* than the defendant's criminal propensity to commit the crime." *Crawford*, 458 Mich at 390 (emphasis in original). Here, the fact that defendant knowingly possessed cocaine in 2002 was relevant to refute defendant's claim that he had no knowledge that the drugs were in the house and to negate his innocent intent. Under the doctrine of chances,

> as the number of incidents of an out of-the-ordinary event increases in relation to a particular defendant, the objective probability increases that the charged act *and/or* the prior occurrences were not the result of natural causes . . . . If a type of event linked to the defendant occurs with unusual frequency, evidence of the occurrences may be probative, for example, of his criminal intent or of the absence of mistake or accident because it is objectively improbable that such events occur so often in relation to the same person due to mere happenstance. [*People v Mardlin*, 487 Mich 609, 616-617; 790 NW2d 607 (2010) (emphasis in original).]

Defendant provided innocent explanations in both the case involving the other acts evidence and in the charged offense for why police officers found drugs in areas with which he was associated. Indeed, the fact that defendant possessed illegal drugs in the past, despite claiming he lacked any knowledge of the drugs, makes it less likely that defendant acted accidentally or innocently in the instant case when he denied possessing the drugs that were found at the house. See *McGhee*, 268 Mich App at 611.

Further, the probative value of the other acts evidence was not substantially outweighed by the danger of unfair prejudice. All relevant evidence is prejudicial to an extent, but "[e]vidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Crawford*, 458 Mich at 398. The evidence here was not offered to prove defendant's criminal propensity; rather it was offered to refute defendant's claim that he lacked knowledge and intent, and thus, it was not marginally probative. Any danger that the jury would give the evidence undue weight was overridden by the trial court's limiting instruction, which generally will "suffice to enable the jury to compartmentalize evidence and consider it only for its proper purpose." *Id.* at 399 n 16.

Accordingly, the trial court did not abuse its discretion when it admitted evidence of defendant's prior controlled substance conviction.

V. CONSTITUTIONALITY OF MCL 333.7413(1)(B)

Next, defendant contends that the mandatory life sentence set forth in MCL 333.7413(1)(a) for individuals convicted of a second or subsequent listed controlled substance offense is cruel or unusual under the Michigan Constitution. However, this Court has already decided the issue raised by defendant and determined that a mandatory punishment of life without parole in MCL 333.7413(1) for a second or subsequent controlled substance offense was not cruel or unusual punishment. *People v Poole*, 218 Mich App 702, 716-717; 555 NW2d 485 (1996). Accordingly, we are bound under the rule of stare decisis to honor the precedential effect of *Poole*. MCR 7.215(C)(2). Consequently, we reject defendant's challenge to the constitutionality of MCL 333.7413(1)(a).

VI. STANDARD 4 BRIEF ISSUES

A. INEFFECTIVE ASSISTANCE OF COUNSEL

First, defendant argues that defense counsel was ineffective for failing to subpoena his marketing professor at Baker College as an alibi witness. We disagree.

Because defendant failed to preserve this issue for appellate review by moving for a *Ginther*[3] hearing or a new trial, our review is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). A defendant is denied effective assistance of counsel in violation of the Sixth Amendment if "counsel's performance fell below an objective standard of reasonableness, . . . [and] the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994), citing *Strickland v Washington*, 466 US 668, 692; 104 S Ct 2052; 80 L Ed 2d 674 (1984). There is a presumption of effective assistance of counsel, and to show that counsel's performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that his counsel's conduct constituted reasonable trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Prejudice under the *Strickland* standard requires "the defendant [to] show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Id.* Where a defendant claims, as does defendant in the case at bar, that trial counsel's failure to call a witness at trial entitles him to a new trial, the defendant must demonstrate that trial counsel's failure to introduce the evidence deprived him of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

At trial, defendant called the registrar as a witness, who testified that defendant was enrolled in classes at Baker College on the day the search warrant was executed. However, on cross-examination, the registrar testified that the attendance records showed that defendant did

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

not attend class that evening. Defendant argues that the trial counsel was ineffective for failing to call his professor, who allegedly would have testified that he was in class that day.

Generally, "[c]ounsel's decision whether to call a witness is presumed to be a strategic one for which this Court will not substitute its judgment." *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Furthermore, there is no evidence that the professor would have been able to verify defendant's attendance at class on the day the search warrant was executed; therefore, defendant fails to establish the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999) (stating that "defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel). Moreover, even assuming that trial counsel was ineffective for failing to investigate the professor and that he should have called her as a witness, defendant is not entitled to relief because he cannot establish prejudice. Defendant's characterization of the professor as an alibi witness is misguided. Her testimony would not have exculpated defendant by establishing that he was at a different location at the time the offenses were committed. Rather, at most, defendant alleges that the professor would have offered testimony that defendant was in class on the day the police officers executed the search warrant, and that he was not in the vehicle that they followed. The professor's testimony would have had no effect on the documentary and forensic evidence connecting defendant to the house where the drugs were found. Therefore, even assuming trial counsel's performance was objectively unreasonable for failing to investigate and call the professor as a witness, defendant is not entitled to relief because he cannot establish "a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Carbin*, 460 Mich at 600.

B. PROSECUTORIAL MISCONDUCT

Next, defendant argues that the prosecutor committed misconduct and denied defendant a fair trial when he asked defendant whether the prosecution's witnesses lied. Additionally, defendant argues that the trial counsel was ineffective for failing to object to the prosecutor's improper questions. We disagree.

Because defendant failed to preserve these issues for appellate review, our review of the challenged prosecutorial statements is for plain error affecting substantial rights, *Unger*, 278 Mich App at 235, and our review of defendant's ineffective assistance of counsel claim is limited to mistakes apparent on the record. *Jordan*, 275 Mich App at 667.

Some of the prosecutor's questions that defendant cites were not improper, such as the prosecution's questions to defendant about whether the police fabricated certain evidence. Defendant testified to this on direct or insinuated as much. The prosecutor is permitted to respond to issues raised by the defendant. *Brown*, 279 Mich App at 135. With regard to the prosecution's questions about whether certain witnesses lied, "[i]t is generally improper for a witness to comment or provide an opinion on the credibility of another witness, because credibility matters are to be determined by the jury." *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). However, because defendant's theory of the case was that the prosecution's witnesses lied and he repeatedly suggested this throughout the trial, he was not harmed when the prosecutor asked him about the credibility of those witnesses. See *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001) (noting that where the defendant maintains throughout trial

that certain witnesses are lying, he does not suffer prejudice when the prosecutor asks him if a witness lied). Furthermore, defendant is not entitled to relief because any potential prejudice caused by the prosecution's questions could have been cured by a timely request for a curative instruction. *Unger*, 278 Mich App at 235.

With regard to defendant's accompanying claim of ineffective assistance of counsel, defense counsel was not ineffective for failing to object to the prosecutor's questions because, as previously discussed, the prosecutor's statements did not rise to the level of misconduct or deprive defendant of a fair trial, and therefore, defense counsel was not ineffective for failing to make meritless objections. *Ericksen*, 288 Mich App at 201.

C. APPOINTMENT OF EXPERT WITNESS

Finally, defendant argues that the trial court erred in denying his motion to provide him the requisite funds to retain DNA and fingerprint experts at the county's expense after he learned that the prosecution intended to present DNA and fingerprint evidence against him. We disagree.

We review "for an abuse of discretion a trial court's decision whether to grant an indigent defendant's motion for the appointment of an expert witness." *People v Carnicom*, 272 Mich App 614, 616; 727 NW2d 399 (2006). As to defendant's unpreserved claim that the amount of funds provided by the trial court for a DNA expert was insufficient, our review is for plain error affecting substantial rights. *Carines*, 460 Mich at 763.

The trial court may, but is not required upon demand, to provide an indigent defendant with funds to retain an expert witness. *People v Tanner*, 469 Mich 437, 442; 671 NW2d 728 (2003). As explained by this Court in *Carnicom*:

> MCL 775.15 authorizes payment for an expert witness, provided that an indigent defendant is able to show that there is a material witness in his favor within the jurisdiction of the court, without whose testimony he cannot safely proceed to trial . . . . If the defendant makes this showing, the judge, in his discretion, may grant funds for the retention of an expert witness. A trial court is not compelled to provide funds for the appointment of an expert on demand. [*Carnicom*, 272 Mich App at 617 (internal quotation marks and citations omitted).]

"To obtain appointment of an expert, an indigent defendant must demonstrate a nexus between the facts of the case and the need for an expert. It is not enough for the defendant to show a mere possibility of assistance from the requested expert." *Id.* (internal citation omitted). The defendant bears the burden of demonstrating that the proposed expert's testimony "would likely benefit the defense"; without such a showing, the trial court does not abuse its discretion in denying the defendant's request. *Id.*

With regard to defendant's request for a fingerprint expert, the trial court did not abuse its discretion in denying defendant's request because defendant failed to establish that the proposed expert's testimony would likely benefit him. At trial, defendant did not offer any indication beyond his own speculation that a fingerprint expert could have provided him with information

that would have been beneficial to his defense. Indeed, defendant's proposed expert had not even evaluated the fingerprint evidence at the time defendant alleged that the expert testimony would have been beneficial to him. And, on appeal, defendant offers no suggestion, other than his assertion that his own expert "could have came to a different conclusion," that a fingerprint expert could have offered evidence that would have been helpful to his case.

With regard to defendant's argument that the trial court failed to provide him with sufficient funds to conduct an adequate DNA test when it only authorized $1,500 for such testing, defendant has not established plain error requiring reversal. Defendant does not allege what could have been done differently had the trial court provided him with additional funding for his DNA expert. His speculation that another expert witness could have offered testimony that would have been helpful to his defense is not enough to entitle him to relief. See *Tanner*, 469 Mich at 443-444; *Carnicom*, 272 Mich App at 618-619. Defendant's expert reviewed the DNA testing performed in the case and testified that she "absolutely" approved of the testing done by the prosecution's expert witnesses. Because his own expert agreed with the findings reached by the prosecution's expert witnesses, defendant cannot establish the requisite "nexus between the facts of the case and the need for" additional expert testing or for additional funding for expert testing. See *Carnicom*, 272 Mich App at 617-619.

Affirmed.

/s/ Deborah A. Servitto
/s/ William C. Whitbeck
/s/ Donald S. Owens