STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 20, 2006
v	No. 259897 Muskegon Circuit Court
BRIAN DEANGELO SANDERS, a/k/a BRIAN DEANGLO SANDERS, Defendant-Appellant.	LC No. 04-050108-FC

Before: Talbot, P.J., and Owens and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii). The trial court sentenced defendant, as an habitual offender, third offense, MCL 769.11, to 35 months to 8 years' imprisonment. We affirm.

Defendant first contends that the trial court erred in denying his motion to suppress the statements he made to police because the statements were not made voluntarily. We review de novo a trial court's determination that a statement of an accused was made voluntarily. *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005). However, we will not disturb the trial court's factual findings following a *Walker*[1] hearing unless the findings are clearly erroneous. *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003). A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that a mistake has been made. *Id.* at 564.

"The use of an involuntary statement coerced by police conduct offends due process under the Fourteenth Amendment." *People v Wells*, 238 Mich App 383, 386; 605 NW2d 374 (1999), citing *Culombe v Connecticut*, 367 US 568, 601-602; 81 S Ct 1860; 6 L Ed 2d 1037 (1961). Whether a statement was made voluntarily depends upon the totality of the circumstances. *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). "The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made." *Id.* at 334.

[1] *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965).

The uncontroverted evidence presented at the *Walker* hearing in this case indicates that police officers executed a search warrant at 743 Allen Street, where defendant stayed "on and off." Defendant was not present when officers arrived. Police seized one pound of marijuana and approximately $25,000 cash from inside the home. Police also seized marijuana, and over 1,000 grams of cocaine, from the interior and trunk of a white Cadillac that was in the driveway. During the search, a detective called defendant from 743 Allen Street, using defendant's wife's cellular telephone. The detective told defendant that police were executing a search warrant at the house and that they would like to ask him some questions. Defendant arrived at the house voluntarily. He was handcuffed and brought into the house where he was questioned in one of the bedrooms. A detective read defendant his *Miranda*[2] rights before asking him any questions. Defendant understood his rights and agreed to talk to the detective. Defendant admitted during the questioning that the marijuana in the home belonged to him and that he sold marijuana occasionally. He also told police that half of the $25,000 recovered in the home belonged to him and that some of that money came from selling marijuana. He denied that the drugs in the Cadillac belonged to him. He claimed that his cousin, Anthony Johnson, had borrowed the Cadillac and returned it shortly before the police executed the search warrant. Nothing in the record supports that defendant's age or intelligence level affected the voluntariness of his statements. Defendant was not detained for an appreciable amount of time before the questioning, and he was not subjected to prolonged or repeated questioning. In fact, the interrogation lasted only 15 to 20 minutes. Further, nothing in the record indicates that defendant was injured, intoxicated, drugged, or in ill health when he gave his statements. And, it does not appear that he was deprived of food, sleep, or medical attention, or that he was physically abused or threatened with abuse. Finally, it was clear that defendant, who had previous experience with the police, was advised of his *Miranda* rights before questioning. Based on the totality of the circumstances, we conclude that defendant made the statements freely and voluntarily. *Cipriano, supra* at 334. Therefore, the trial court did not err in denying defendant's motion to suppress the statements.

Defendant next contends on appeal that the trial court erred in denying his motion to suppress the contraband seized during the execution of the search warrant because the search warrant affidavit did not establish probable cause for the warrant. We disagree.

We review de novo a trial court's decision on a motion to suppress. *People v Echavarria,* 233 Mich App 356, 366; 592 NW2d 737 (1999). The trial court's findings of fact regarding the motion to suppress are reviewed for clear error. *Id.* A search executed pursuant to a warrant is valid if the warrant is based on probable cause. *People v Hellstrom,* 264 Mich App 187, 192; 690 NW2d 293 (2004). "Probable cause 'exists where there is a 'substantial basis' for inferring a 'fair probability' that contraband or other evidence of a crime will be found in a particular place.'" *Id.,* quoting *People v Kazmierczak,* 461 Mich 411, 417-418; 605 NW2d 667 (2000).

Michigan's search warrant act, MCL 780.651 *et seq.*, provides, in pertinent part:

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

> The magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her. The affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains 1 of the following:
>
> * * *
>
> (b) If the person is unnamed, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable. [MCL 780.653.]

"When reviewing a magistrate's decision to issue a search warrant, this Court must evaluate the search warrant and underlying affidavit in a commonsense and realistic manner." *Echavarria, supra* at 366, citing *People v Poole*, 218 Mich App 702, 706; 555 NW2d 485 (1996). "This Court must then determine whether a reasonably cautious person could have concluded, under the totality of the circumstances, that there was a substantial basis for the magistrate's finding of probable cause." *Id* at 366-376. "A magistrate's 'determination of probable cause should be paid great deference by reviewing courts.'" *People v Whitfield*, 461 Mich 441, 446; 607 NW2d 61 (2000), quoting *People v Russo*, 439 Mich 584, 604; 487 NW2d 698 (1992)(citation omitted).

We conclude that the search warrant affidavit provided sufficient facts from which the magistrate could have concluded that the informant was credible and that the information supplied was based on the informant's personal knowledge. Specifically, the affidavit indicated that police previously used the informant to make 19 controlled buys and that the buys resulted in 13 search warrants and 23 arrest warrants. The affidavit also indicated that the informant went to 743 Allen Street to make a crack cocaine controlled buy. Detectives observed the informant come into contact with a black male in the driveway at 743 Allen Street. The informant told the affiant that, after he asked to purchase crack cocaine from the man, the man went inside 743 Allen Street. He later came back out with crack cocaine. The informant also told the affiant that the man said he could come back and buy additional quantities of crack cocaine. The substance that the informant purchased at 743 Allen Street subsequently tested positive for cocaine. Thus, the affidavit satisfied the requirements of MCL 780.653(b), and a reasonably cautious person could have concluded, under the totality of the circumstances, that there was a substantial basis for the magistrate's finding of probable cause. *Echavarria, supra* at 366-367. Because the search warrant was based on probable cause, the search was valid. *Hellstrom, supra* at 192. Therefore, the trial court did not err in denying defendant's motion to suppress the contraband.

Defendant next contends on appeal that the informant's testimony was essential to his defense and, therefore, the trial court erred in denying his motion to produce the informant. We review a trial court's denial of a motion to produce a confidential informant for an abuse of discretion. *People v Darryl Thomas*, 174 Mich App 411, 416; 436 NW2d 687 (1989); *People v Rodriguez*, 65 Mich App 723, 728-729; 238 NW2d 385 (1975). An abuse of discretion exists only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling. *People v Laws*, 218 Mich App 447, 455; 554 NW2d 586 (1996). We review a trial court's findings of fact regarding a motion to produce an informant for clear error. *People v Lucas*, 188 Mich App 554, 573; 470 NW2d 460 (1991).

Generally, the identity of an informant is protected by an "informer's privilege." *People v Underwood*, 447 Mich 695, 703; 526 NW2d 903 (1994). However, the applicability of the informer's privilege depends on the particular circumstances of each case. "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." *Id.* at 704, quoting *Roviaro v United States*, 353 US 53, 60-61; 77 S Ct 623; 1 L Ed 2d 639 (1957). Thus, in determining whether the identity of an informant must be disclosed, this Court must consider "the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Id.* at 705, quoting *Roviaro, supra* at 62. If a defendant demonstrates "a possible need for the informant's testimony," the trial court should conduct a hearing in camera to determine whether the informant's testimony is relevant and helpful to the defendant's defense or essential to a fair determination of defendant's guilt. *Id.* at 706-707.

Defendant was charged with possession with intent to deliver marijuana and possession with intent to deliver 1,000 grams or more of cocaine. We agree with defendant that, if the informant testified that the man who sold him the cocaine at 743 Allen Street was not defendant, the testimony would have had significance regarding the cocaine charge. Thus, defendant established "a possible need for the informant's testimony." Accordingly, the trial court erred in failing to conduct a hearing in camera to determine whether the informant's testimony was relevant and helpful to the defendant's defense or essential to a fair determination of defendant's guilt. *Underwood, supra* at 706-707.

Nevertheless, reversal is not warranted. The jury returned a verdict of not guilty on the cocaine charge. And, although defendant was convicted of possession with intent to distribute marijuana, the record does not reveal that the informant purchased marijuana from defendant or any other individual at 743 Allen Street. Therefore, the informant's testimony would have had no significance regarding the marijuana charge for which defendant was convicted. Furthermore, in light of defendant's admission that the marijuana belonged to him and that he occasionally sold marijuana, the informant's testimony would have had no effect on the verdict. Thus, the error was harmless beyond a reasonable doubt. See *People v Minor*, 213 Mich App 682, 688-689; 541 NW2d 576 (1995).

Defendant next contends that the trial court erred in denying his motion for a mistrial. A trial court's denial of a motion for a mistrial is reviewed for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). "A trial court should grant a mistrial 'only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial.'" *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005), quoting *People v Ortiz-Kehoe*, 237 Mich App 508, 513-514; 603 NW2d 802 (1999).

At the preliminary examination, one officer testified that police did not conduct pre-raid surveillance at 743 Allen Street. At trial, however, the same officer testified that police did conduct pre-raid surveillance at 743 Allen Street. On the third day of trial, plaintiff tendered to defendant the daily reports and activity logs of officers, which confirmed that police conducted pre-raid surveillance at 743 Allen Street. Defendant moved for a mistrial, arguing that the reports undermined his opening statement wherein he indicated that police were not at 743 Allen Street before the raid and, therefore, they did not know whether defendant had access to the Cadillac. The trial court concluded that the late disclosure of the information was not grounds

for a mistrial because the reports and logs did not indicate in any way that defendant was at 743 Allen Street during the pre-raid surveillance.

Upon request, a prosecuting attorney must provide a defendant with any police report and interrogation records concerning the defendant's case, except so much of a report as concerns a continuing investigation. MCR 6.201(B)(2). Moreover,

> [a] defendant has a due process rights of access to certain information possessed by the prosecution. *Brady v Maryland*, 373 US 83; 83 S Ct 1995; 10 L Ed 2d 215 (1963). In order to establish a *Brady* violation, a defendant must prove (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 Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). [*People v Fox (After Remand)*, 232 Mich App 541, 549; 591 NW2d 384 (1998).]

In the instant case, defendant failed to establish a *Brady* violation. The prosecutor, who was unaware of the reports until the third day of trial, did not suppress evidence. Moreover, the reports were not favorable to defendant. They merely indicated that officers conducted pre-raid surveillance at 743 Allen Street. They did not contain specific information about the officers' observations during the surveillance, and did not exculpate or inculpate defendant. Furthermore, defendant failed to demonstrate that, if the evidence was disclosed to the defense sooner, a reasonable probability existed that the outcome of the proceedings would have been different. Thus, defendant's due process rights were not implicated. See *People v Banks*, 249 Mich App 247, 254-255; 642 NW2d 351 (2002) (holding that the prosecution's inadvertent failure to produce a report that neither inculpated nor exculpated defendant did not render the trial unfair or create a reasonable probability that the result of the proceeding would have been different).

We note that discrepancies between the officer's preliminary examination testimony and trial testimony existed independently of discrepancies highlighted by the daily reports. Defendant was able to thoroughly explore those discrepancies on cross-examination and cast doubt on the officer's testimony regarding surveillance. Therefore, contrary to defendant's assertion, his credibility and case were not completely destroyed by the late disclosure. *Banks*, *supra* at 253-254. Moreover, defendant failed to demonstrate that he was prejudiced in any way by the late disclosure. A violation of a discovery order does not require reversal where the defendant fails to show any prejudice. *People v Loy-Rafuls,*; 198 Mich App 594, 597-598; 500 NW2d 480 (1993), rev'd in part on other grounds, 442 Mich 915 (1993). Because the late disclosure was not prejudicial and did not impair defendant's ability to get a fair trial, the trial court did not abuse its discretion in denying defendant's motion for a mistrial. *Bauder, supra* at 195; *People v Wells*, 238 Mich App 383, 390-391; 605 NW2d 374 (1999).

Defendant also asserts that the trial court erred in failing to provide a missing evidence instruction regarding the officers' reports. However, defendant did not request the instruction at trial. "The failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless the instruction is requested by the accused." MCL 768.29; *People v Young*, 472 Mich 130, 139; 693 NW2d 801 (2005).

Defendant next contends on appeal that he was denied a fair trial because of prosecutorial misconduct. Defendant preserved this issue by objecting to the prosecutor's comments during closing argument. See *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005). A preserved claim of prosecutorial misconduct is reviewed de novo. *Id.*

> Generally, "[p]rosecutors are accorded great latitude regarding their arguments and conduct." They are "free to argue the evidence as it relates to [their] theory of the case." Nevertheless, prosecutors should not resort to civic duty arguments that appeal to the fears and prejudices of jury members or express their personal opinions of a defendant's guilt, and must refrain from denigrating a defendant with intemperate and prejudicial remarks. Such comments during closing argument will be reviewed in context to determine whether they constitute error requiring reversal. [*People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995) (citations and footnotes omitted).]

The test for prosecutorial misconduct is whether the prosecutor's conduct rose to the level of denying the defendant a fair and impartial trial. *Id.* at 267 n 7. A prosecutor's statements must not be taken out of context. *Id.* Rather, the court must evaluate the prosecutor's remarks in light of the relationship or lack of relationship they bear to the evidence admitted at trial. *Id.*

During his closing argument, the prosecutor commented on defendant's failure to call his cousin to testify at trial. Defendant contends that the prosecutor's comment improperly shifted the burden of proof of defendant. A prosecutor may not, in an attempt to shift the burden of proof, comment on a defendant's failure to present evidence. *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). However, "it is not error to comment on the failure of the defense to produce evidence on a phase of the defense upon which the defendant seeks to rely." *McGhee, supra* at 634 (citation omitted). "Moreover, attacking the credibility of a theory advanced by a defendant does not shift the burden of proof." *Id.* at 635. In his opening statement, defense counsel stated that the evidence would show that defendant's cousin had the Cadillac the day before the search warrant was executed and, therefore, defendant was not the only person who had control over the vehicle. It is clear that defendant advanced this theory to show that the drugs inside the car did not belong to him. Thus, the prosecutor's remark regarding defendant's failure to secure his cousin's testimony was a proper attack on the credibility of defendant's theory of the case. And, contrary to defendant's argument, the prosecutor's comments on the weaknesses of defendant's case did not impermissibly shift the burden of proof to defendant.

> "[W]here a defendant . . . advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof." [*People v Reid*, 233 Mich App 457, 478; 592 NW2d 767 (1999), quoting *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995) (alterations in original).]

During the prosecutor's rebuttal closing argument, defendant objected to the prosecutor's reference to "the tricks of the trade" used by defense attorneys in criminal trials. The trial court

sustained the objection. However, the prosecutor subsequently referred to "common defense practices" twice during the remainder of his argument. Defendant contends that the prosecutor's comments denied him a fair and impartial trial. A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury, but his remarks must be considered in context with defense counsel's comments. *People v Watson,* 245 Mich App 572, 592-593; 629 NW2d 411 (2001). An otherwise improper remark may not constitute an error requiring reversal if the remark is responsive to defense counsel's argument. *Id.* at 593. In his closing argument, defense counsel stated that the prosecution wanted the jury to make a "quantum leap" to find defendant guilty. In rebuttal, the prosecutor averred that it was a common defense practice to suggest that a defendant cannot be convicted unless the jury is absolutely certain of his guilt. In making this argument, the prosecutor impermissibly suggested that defense counsel was intentionally attempting to mislead the jury. This was improper. Nevertheless, considering that the prosecutor's remark was responsive to defense counsel's argument, we find that it does not constitute an error requiring reversal. *Id.* at 592-593. Additionally, we find no error requiring reversal in the prosecutor's argument that it was a common defense practice to argue that a defendant owned up to conduct for which he was actually guilty. Although the comment was a direct response to defense counsel's closing argument, it again implied that defense counsel was misleading the jury. This was improper. However, viewed in context, it was responsive, and we conclude that any prejudice stemming from the comment was effectively cured by the trial court's instruction that the attorneys' arguments were not evidence.

Defendant next argues that he was deprived of a fair and impartial trial when the prosecutor stated in his closing argument that defendant "didn't man up" and "could have pled." In his opening statement, defense counsel stated that defendant "manned up" and admitted that he had marijuana and sold marijuana. In his closing argument, defense counsel conceded that plaintiff carried his burden of proof on the marijuana charge. Viewing the prosecutor's statements in this context, the prosecutor was arguing that, if defendant really wanted to take responsibility for the marijuana, he could have "manned up" and pleaded guilty to the marijuana charge before trial.

"A prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence." *People v Ackerman,* 257 Mich App 434, 450; 669 NW2d 818 (2003). Although the prosecutor's remark regarding defendant's failure to "man up" was supported by the evidence and reasonable inferences, the comment that defendant "could have pled" was not. There is nothing in the record that indicates that defendant had the option to plead guilty and that the trial court would have accepted the plea agreement. Therefore, the prosecutor's remark was improper. *Id.*.

Nevertheless, the prosecutor's remark does not warrant reversal. The trial court twice instructed the jury that "[a] person accused of a crime is presumed to be innocent." The trial court also instructed the jury regarding the concept of reasonable doubt and instructed that "[t]he defendant is not required to prove his innocence or to do anything." Further, the court instructed the jury that "[t]he lawyers' statements and arguments are not evidence. They are only meant to help you understand the evidence and each side's legal theories." "It is well established that jurors are presumed to follow their instructions." *People v Graves,* 458 Mich 476, 486; 581 NW2d 229 (1998), citing *People v Hana,* 447 Mich 325, 351; 524 NW2d 682 (1994). We

conclude that the trial court's instructions were sufficient to dispel any prejudice arising from the prosecutor's comments. See *People v Carl Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004); *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). Thus, defendant received a fair and impartial trial. *Bahoda, supra* at 281.

Finally, defendant contends that his sentence is not proportionate and that it violates the constitutional prohibition against cruel and unusual punishment. We disagree.

Under the sentencing guidelines, the recommended minimum sentence for defendant's conviction was 5 to 35 months' imprisonment. The trial court sentenced defendant, as an habitual offender, third offense, MCL 769.11, to 35 months to 8 years in prison. Defendant argues that, in sentencing defendant, the trial court failed to consider his background, strong family support, and rehabilitative potential. Therefore, according to defendant, his sentence violates the constitutional prohibitions against cruel and unusual punishment. US Const, Am VIII; Const 1963, art 1, § 16. However, because defendant's sentence was within the sentencing guidelines range, his argument is without merit. MCL 769.34(10); *People v Drohan*, 264 Mich App 77, 91-92; 689 NW2d 750 (2004); *People v McLaughlin*, 258 Mich App 635, 669-671; 672 NW2d 860 (2003).

A minimum sentence that is within the sentencing guidelines' recommended minimum is presumptively proportionate. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994), citing *People v Milbourn*, 435 Mich 630, 646; 461 NW2d 1 (1990); *People v Dukes*, 189 Mich App 262, 266; 471 NW2d 651 (1991). And, a proportionate sentence does not constitute cruel and unusual punishment. *Drohan, supra* at 92.

Further, defendant's argument, raised for the first time on appeal, that he was sentenced in violation of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), is without merit. Our Supreme Court has held that a trial court may consider facts and circumstances not proven beyond a reasonable doubt in imposing a sentence within the statutory range without running afoul of either the Sixth Amendment or the Supreme Court's ruling in *Blakely*. *People v Drohan*, 475 Mich 140, ___; ___ NW2d ___ (2006). Because defendant received a sentence within the statutory guideline range, he has failed to demonstrate plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant also argues that he is entitled to resentencing because the trial court failed to articulate, on the record, its reasons for imposing the sentence. Generally, a trial court must articulate its reasons for imposing a sentence, on the record, at the time of sentencing. *People v Conley*, 270 Mich App 301, 312; 715 NW2d 377 (2006), citing *People v Triplett*, 432 Mich 568, 573; 442 NW2d 622 (1989). However, "[t]he articulation requirement is satisfied if the trial court expressly relies on the sentencing guidelines in imposing the sentence or if it is clear from the context of the remarks preceding the sentence that the trial court relied on the sentencing guidelines." *Id.* at 312, citing *People v Lawson*, 195 Mich App 76, 77-78; 489 NW2d 147 (1992). The trial court in this case acknowledged that the recommended guidelines range was 5 to 35 months' imprisonment. Moreover, the trial court articulated that it was imposing a minimum sentence of 35 months' imprisonment because of defendant's history of selling drugs. Because the trial court expressly relied on the sentencing guidelines in imposing the sentence,

resentencing is not necessary. *Id.* See also *People v Beneson,* 192 Mich App 469, 471; 481 NW2d 799 (1992). Moreover, MCL 769.34(10) provides:

> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence.

Defendant's minimum sentence was within the recommended guidelines range, and he does not argue that the trial court committed any scoring error or relied on inaccurate information at sentencing. Therefore, we must affirm the sentence. *People v Kimble,* 470 Mich 305, 310-311; 684 NW2d 669 (2004).

Affirmed.

/s/ Michael J. Talbot
/s/ Donald S. Owens
/s/ Christopher M. Murray