STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD ALEXANDER CAMPBELL,

Defendant-Appellant.

UNPUBLISHED
September 19, 2024

Nos. 362588; 362589
Kent Circuit Court
LC Nos. 20-004992-FH; 20-005835-FH

Before: N. P. HOOD, P.J., and O'BRIEN and REDFORD, JJ.

PER CURIAM.

In Docket No. 362588, defendant appeals as of right his jury-trial convictions of discharging a firearm from a vehicle, MCL 750.234a(1)(a); possession of a firearm by a felon (felon-in-possession), MCL 750.224f; carrying a concealed weapon (CCW), MCL 750.227; and assault and battery, MCL 750.81. This opinion will refer to the discharging a firearm from a vehicle, felon-in-possession, and CCW charges collectively as "the firearm charges." The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to serve concurrent prison terms of $7^1/_2$ to 25 years for discharging a firearm from a vehicle, felon-in-possession, and CCW, and 60 days incarceration for assault and battery.

In Docket No. 362589, defendant appeals as of right his jury trial convictions of possession with the intent to deliver methamphetamine, MCL 333.7401(2)(b)(*i*); and possession with the intent to deliver marijuana, MCL 333.7401(2)(d)(*iii*). This opinion will refer to these charges collectively as "the drug charges." The trial court sentenced defendant as a fourth-offense habitual offender to serve concurrent terms of imprisonment of 13 to 40 years for each of these convictions. This Court consolidated the appeals to advance the efficient administration of the appellate process.[1]

[1] *People v Campbell*, unpublished order of the Court of Appeals, entered August 24, 2022 (Docket Nos. 362588 and 362589).

For reasons explained herein, we affirm in part, vacate in part, and remand to the trial court for a new trial on the firearm charges.

I. BACKGROUND

On May 30, 2020, at approximately 2:30 p.m., Ashley Taylor, who was pregnant at the time, stopped to get gas at a gas station in Grand Rapids. Taylor pulled behind a Range Rover that was at a gas pump. When the Range Rover finished pumping gas and pulled forward, Taylor pulled up to the gas pump and got out of her car. As she was pumping gas, defendant got out of the Range Rover and told her that she needed to move because he had been waiting to use the lane to exit the gas station.[2] Defendant approached Taylor and pulled the nozzle out of her car's gas tank; Taylor put the nozzle back in and told defendant that it would only take two minutes to fill her tank. She finished, replaced the nozzle in the gas pump, and was beginning to walk around to the driver's side of her car when defendant "body checked" her, causing her to hit the side of her car. Defendant continued to follow Taylor as she walked around the front of the car toward the driver's door, and he then punched her in the side of her head.

Jxn Hoogeveen, who was also at the gas station, saw defendant punch Taylor, and walked up to defendant and told him to stop. Defendant walked around the front of his Range Rover, "snuck up" on Hoogeveen, and started fighting with him. The Range Rover's passenger, Sacouy Merriweather, jumped out of the vehicle and joined the fight. After a couple seconds, defendant and Merriweather backed up, and Merriweather pulled out a firearm. The two got back into the Ranger Rover, and, as the car was pulling out of the gas station, Merriweather fired several shots out of the passenger window toward Hoogeveen's car. One shot hit the windshield of Hoogeveen's car, and one shot hit the passenger-side door.

Within minutes of leaving the gas station, the Range Rover was found abandoned and still running. The Grand Rapids Police Department (GRPD) officer who found the Range Rover cleared the vehicle and searched it for evidence related to the shooting and for "safety reasons," i.e., to see if there were guns in the vehicle. The officer found a shell casing in the front passenger seat, two scales in the center console, and a red duffle bag in the backseat. The duffle bag contained four bags of marijuana; boxes of clear, plastic sandwich baggies; and multiple rubber bands. Meanwhile, Merriweather was arrested in a nearby backyard with a large amount of cash and a live rifle round in his pants pocket. Defendant was identified a few days later and arrested as he left his apartment on June 11.

Following a preliminary examination, defendant was bound over on the firearm charges stemming from the gas-station shooting and the assault and battery of Taylor. Approximately one month later, defendant was separately charged and bound over on the drug charges stemming from the discovery of marijuana and crystal methamphetamine in the red duffel bag. Defense counsel moved unsuccessfully to quash the bindover of the firearm charges and to suppress the drugs recovered from the duffel bag. At some point, the two cases were joined for trial.

[2] Defendant apparently wanted to use the gas lane to back out onto the road even though he could have instead just driven forward to pull out of the gas station.

Among the witnesses at defendant's combined trial were two experts in the area of digital-evidence analysis. Detective Thomas Heikkila testified at length about his extraction and analysis of the data from the cell phones found in the passenger compartment of the Range Rover and in the red duffel bag. Det. Heikkila's testimony established that Merriweather's phone showed multiple "affiliations" with defendant and multiple incoming phone calls from defendant at about the time of the gas-station incident. Detective Demetrios James Vakertzis explained how the date that an image or video was created could be determined by looking at the metadata embedded in the image or video. Through his testimony, the prosecution introduced into evidence images taken three days before the gas-station incident. One showed an assault rifle and a red bag. The other showed the same firearm and, in the background, a "gallon size of marijuana [sic]" and defendant.

Detective Robert Zabriskie testified that he monitored defendant's social media accounts and found many instances of defendant and Merriweather being involved in activities together. Det. Zabriskie testified that another name associated with defendant's Facebook account was a page called "organized crime, CEO." Defendant posted a lot of rap videos on YouTube and snippets of videos on social media. Det. Zabriskie testified about three images that illustrated that defendant and Merriweather continued a close association after the gas-station incident: (1) a screen shot from defendant's Facebook page depicting Merriweather with a gun and defendant counting cash; (2) a screen shot of an image posted by Merriweather showing him with a wad of cash in his pocket while with defendant; and (3) a collage of photographs, each featuring defendant and Merriweather, and an accompanying message in which Merriweather wished defendant a happy birthday and indicated that he was always following close behind with a 30-round clip to have defendant's back. Det. Zabriskie also testified about evidence from defendant's phone that suggested that defendant was selling weapons, marijuana, and methamphetamine. Det. Zabriskie testified that none of the witnesses at the gas station to whom he spoke said that they saw defendant with a gun in his hand or that he discharged the firearm. The detective also acknowledged that he had not examined any of the cash or weapons in defendant's videos and could not determine whether they were real or fake.

After unsuccessfully moving for a directed verdict, the defense called Merriweather to the stand. Merriweather testified that he fired the weapon at the gas station, and he did not think that anyone else at the gas station had a firearm. He said that he did not know anything about defendant's confrontation with Taylor until Hoogeveen came up to his window and started yelling. He thought that Hoogeveen was talking to him, so he got out of the car to protect himself. He said that he brandished his weapon at Hoogeveen because he was scared, but he did not know whether defendant saw him brandish his weapon. When he and defendant got back into defendant's car and began to leave the gas station, Merriweather looked back and saw Hoogeveen throwing his hands up and yelling; Merriweather was scared, so he fired his gun in the direction of the gas station to get Hoogeveen to back off. Merriweather testified that defendant was frustrated and angry that he had fired the weapon. After the shooting, Merriweather threw the guns out the car window "somewhere." Merriweather said that he also put the bag of methamphetamine in the duffel bag; he did not think that defendant saw him do that. After that, Merriweather jumped out of the vehicle.

Merriweather testified that defendant was like an uncle to him; defendant had a record label to which Merriweather was signed, and he and defendant "do music" together. Defendant paid all the expenses for a video and might give Merriweather $50 for his part in it. Merriweather denied

that he carried guns to protect defendant or that he sold drugs for defendant. Merriweather denied that defendant had any kind of control over him. He said that defendant did not run his life and did not tell him what to do. He acknowledged on cross-examination that one of his first calls from jail was to his girlfriend and that he told her that he was not worried because defendant would bond him out. Merriweather explained that he expected that defendant would want to help one of his artists get out of jail, but he did not know who bonded him out.

Merriweather testified that he did not see defendant with marijuana or crystal meth on May 30, that he had never seen defendant with the scales found in the Range Rover, that he did not believe that the scales belonged to defendant, and that he believed that the red duffel bag belonged to defendant's fiancée, Tshura McKinney. McKinney confirmed during her testimony at trial that the duffel bag and the marijuana inside it belonged to her. On redirect examination, Merriweather testified that defendant's rap videos used fake guns, cash, and sometimes jewelry. In response to a question from the trial court, Merriweather said that he obtained both of the guns that he had on the day of the shooting from a friend.

The prosecution recalled Det. Zabriskie to provide testimony rebutting Merriweather's claim that he had never helped defendant sell drugs. The detective testified about messages showing that Merriweather and defendant worked together to sell drugs the week before defendant's trial.

After defendant was convicted and sentenced, he moved for a *Ginther*[3] hearing or a new trial on the basis that defense counsel was ineffective for failing to object to the consolidation of the two cases and for failing to object to inadmissible evidence, thereby denying him a fair trial. The trial court denied defendant's motion. Addressing the joinder issue, the trial court reasoned that the two cases arose from a series of connected acts because evidence from the shooting was necessary to explain why police searched defendant's vehicle and found drugs. The court accordingly concluded that defense counsel was not ineffective for failing to move for severance of the cases because, given the fact pattern, any motion for severance would have been futile. As to defendant's assertion that defense counsel should have objected to certain evidence, the trial court concluded that all the challenged evidence was admissible, so any objection to it would have been futile.

Defendant now appeals.

II. INEFFECTIVE ASSISTANCE

Defendant contends that defense counsel rendered constitutionally ineffective assistance by failing to object to the joinder of the assault-and-battery and firearm charges with the drug charges, or to move for their severance of the same under MCR 6.120.

Whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). When a defendant is granted an evidentiary hearing to address an ineffective-assistance claim, the

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

trial court first makes findings of fact based on the evidence presented at the hearing, then determines "whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id*. But when, as in the present case, there was no evidentiary hearing, this Court's review is limited to mistakes apparent on the record. See *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012). This Court reviews a trial court's factual findings—if there are any—for clear error and its constitutional determinations de novo. *LeBlanc*, 465 Mich at 579.

To establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. See *Smith v Spisak*, 558 US 139, 149; 130 S Ct 676; 175 L Ed 2d 595 (2010); *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Chenault*, 495 Mich 142, 150; 845 NW2d 731 (2014) (quotation marks and citation omitted). Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

A. FAILURE TO MOVE FOR SEVERANCE OF CHARGES

Joinder and severance of charges against a single defendant are governed by MCR 6.120(B), which provides in relevant part:

> On its own initiative, the motion of a party, or the stipulation of all parties, except as provided in subrule (C), the court may join offenses charged in two or more informations or indictments against a single defendant, or sever offenses charged in a single information or indictment against a single defendant, when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense.
>
> (1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on
>
> (a) the same conduct or transaction, or
>
> (b) a series of connected acts, or
>
> (c) a series of acts constituting parts of a single scheme or plan.

If the offenses are not related as defined in Subrule (B)(1), MCR 6.120(C) mandates severance on a defendant's motion. If the trial court consolidates the charges on its own initiative, it must provide the parties an opportunity to be heard. MCR 6.120(B)(3). In the present case, there is no record of how the charges in the two underlying cases were consolidated for trial.

This Court has affirmed that charges were related for purposes of MCR 6.120(B) when they arose from acts that were temporally and geographically proximate, shared similar characteristics or similar means of commission, and were materially connected. For example, in

People v Abraham, 256 Mich App 265, 268, 272; 662 NW2d 836 (2003),[4] the defendant argued that the trial court denied him a fair trial when it failed to sever the charges of first-degree murder and assault with intent to commit murder arising from the fatal shooting of one victim and the nonfatal shooting of another victim. Affirming, this Court held that the shootings were related "because the shootings occurred within a couple of hours of each other in the same neighborhood, with the same weapon, and were part of a set of events interspersed with target shooting at various outdoor objects." *Id*. at 272. This Court added that "the same witnesses testified to a single state of mind applicable to both offenses." *Id*. Because the shootings were related under MCR 6.120(B), severance was not mandatory. *Id*.

People v Girard, 269 Mich App 15; 709 NW2d 229 (2005), provides an example of acts that were materially connected and, therefore, related for purposes of MCR 6.120(B).[5] In *Girard*, this Court held that joinder of charges for possession of child sexually abusive material and charges for first-degree criminal sexual conduct was appropriate because the charges arose from the defendant's use of "child [sexually abusive material] for stimulation before and during his sexual abuse of the complainant, and, thus, the use of child [sexually abusive material] was part of his modus operandi." *Id*. at 18.

The firearm charges and the drug charges in the present case were not "connected acts" of the type described in *Abraham* and *Girard*. The gas-station shooting and possession of the drugs were not part of a set of events that were similar or that shared similar characteristics or similar means of commission, as was the case in *Abraham*, nor is there any evidence that the shooting facilitated or otherwise factored into the possession of drugs (or vice versa), as was the case in *Girard*. "Each incident comprised an isolated event, and neither depended for its furtherance or success upon the other." *Byrd v United States*, 551 A2d 96, 99 (DC, 1988).[6] There was no evidence of any shared characteristics or means of commission or of any material connection between the firearm charges arising from the gas-station shooting and the drug charges arising from the drugs that happened to be found in the vehicle that fled from the shooting.

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[4] At the time *Abraham* was decided, the court rule governing severance stated:

> (B) Right of Severance; Unrelated Offenses. On the defendant's motion, the court must sever unrelated offenses for separate trials. For purposes of this rule, two offenses are related if they are based on
>
> (1) the same conduct, or
>
> (2) a series of connected acts or acts constituting part of a single scheme or plan. [*Abraham*, 256 Mich App at 271, quoting MCR 6.120(B), as adopted October 1, 1989.]

[5] The version of MCR 6.120(B) in effect when *Girard* was decided was the same version in effect when *Abraham* was decided. See footnote 4.

[6] We find this principle persuasive and applicable in this case. See *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

Still, joinder may be appropriate when there is a "large area of overlapping proof." *People v Williams*, 483 Mich 226, 237; 769 NW2d 605 (2009) (discussing applications of the analogous federal rule, FR Crim P 8(a)). See, e.g., *United States v Graham*, 275 F3d 490 (CA 6, 2001) (holding that the joinder of weapons charges with drug charges was proper when evidence relating to the weapons charges was duplicative of evidence related to the drug charges inasmuch as the indictment alleged that members of the conspiracy to commit violent acts against the United States planned to finance their conspiracy by engaging in drug trafficking); *United States v Wirsing*, 719 F2d 859, 863 (1983) (holding that joinder of charges arising from conspiracy to distribute drugs with tax-evasion charges was proper because the government alleged that the income that the defendant did not report was derived from his illegal drug activity). However, the only overlapping area of proof in the present case is the undisputed fact that drugs were discovered in the vehicle that defendant drove away from the gas-station shooting; there is no evidence that the gas-station shooting was drug related. Because neither state nor federal caselaw supported joinder under these circumstances, severance would have been mandated on defendant's motion, see MCR 6.120(B)(1), and defense counsel's failure to so move fell below an objective standard of reasonableness under prevailing professional norms.

B. PREJUDICE IN DOCKET NO. 362588

Defendant's argument that he was prejudiced by defense counsel's failure to move for severance has merit with respect to defendant's convictions of the firearm charges in Docket No. 362588.[7]

Joining the firearm charges and the drugs charges allowed the prosecution to depict defendant as a drug dealer who also possessed and sold weapons, and who was the "boss" of Merriweather. Admitted into evidence were photographs from defendant's cell phone and Facebook pages that showed weapons, none of which was established as the weapon used in the shooting; still photographs from rap music videos that showed defendant with packaged marijuana; and social media photographs that showed defendant and Merriweather with guns, drugs, money, or some combination of the three. Photographs may be used to corroborate other evidence, *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), and may even provide evidence of intent, see *People v Gayheart*, 285 Mich App 202, 227; 776 NW2d 330 (2009). However, even relevant photographs are inadmissible when their probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *Mills*, 450 Mich at 76.

Assuming without deciding that some of the drug-related evidence admitted during defendant's combined trial may have been relevant to the firearm charges, any relevance that the evidence had was substantially outweighed by the danger of unfair prejudice arising from the implication that defendant was a drug dealer with a bad character and a propensity to commit criminal acts. The prosecutor's closing argument rather explicitly relied on this characterization—she argued that Merriweather pulled the gun at the gas station "for defendant" because "it's for his boss, you know, Mr. Organized Crime, CEO, the head of his rap company, and apparently his boss not only is a rapper but is a drug dealer." This characterization was also used to substantively

[7] Defendant does not challenge his conviction of assault and battery.

establish the firearm charges against defendant. The last link in the chain of reasonable inferences establishing that defendant aided and abetted Merriweather discharging a firearm from a vehicle was defendant's purported authoritarian control over Merriweather, evidence for which rested primarily on photographs, text messages, and social media posts depicting defendant as a drug kingpin and Merriweather as his henchman. This depiction, and the relationship it implied, was critical to the prosecution's argument that Merriweather's act of discharging a weapon from a vehicle was attributable to defendant, as well as to whether defendant had the right to exercise control over the weapons that Merriweather possessed while at the gas station, and whether defendant knew, or should have known, that Merriweather possessed a firearm when he got into defendant's car.

As stated, defense counsel's failure to seek severance of the unrelated charges under MCR 6.120 fell below an objective standard of reasonableness under prevailing professional norms. This error allowed the prosecution to present evidence in the combined trial that was highly prejudicial to the extent that it portrayed defendant as a drug dealer with a propensity for criminal activity, including gun violence. But for this error, there is a reasonable probability that the result of the proceedings would have been different with respect to defendant's convictions of the firearm charges. See *Trakhtenberg*, 493 Mich at 51. For this reason, in Docket No. 362588, we affirm defendant's unchallenged conviction of assault and battery; vacate his convictions of discharging a firearm from a vehicle, felon-in-possession, and CCW; and remand for a new trial on the firearm charges.[8]

C. PREJUDICE IN DOCKET NO. 362589

It cannot be said, however, that defense counsel's failure to move for severance was outcome-determinative as it related to the drugs charges. Defendant was convicted of two counts of possession with the intent to deliver a controlled substance—one count for marijuana and one count for methamphetamine. There was no dispute at trial that defendant possessed and used the Range Rover. The red duffel bag found in the back of the Range Rover contained marijuana, methamphetamine, unused packaging materials, and two phones. These phones had the same number as a third phone that belonged to defendant and was found in the driver's side door. The duffel bag also contained mail addressed to defendant at his home and a headband of the type that defendant wore in some of his rap music videos. In addition, two scales were found in the vehicle's center console. An officer testified that, viewed together, these items suggested that the drugs were being used for distribution rather than simply for personal use.

Defendant's severance argument as to the drug charges appealed in Docket No. 362589 are therefore without merit.

[8] In light of this conclusion, we need not address defendant's remaining arguments on appeal in Docket No. 362588 as they relate to the firearm charges.

III. SUPPRESSION OF EVIDENCE

Defendant argues that the drug evidence should have been suppressed because (1) the warrantless search of his vehicle was unconstitutional under the Fourth Amendment of the United States Constitution and (2) the search of his zipped duffel bag was an invalid inventory search in that it violated GRPD policy about inventory searches. We disagree.

Appellate courts review de novo questions of constitutional law. *LeBlanc*, 465 Mich at 579.

The United States and Michigan Constitutions protect persons from unreasonable searches and seizures. See US Const, Am IV; Const 1963, art 1, § 11; *Herring v United States*, 555 US 135, 136; 129 S Ct 695; 172 L Ed 2d 496 (2009); *People v Slaughter*, 489 Mich 302, 310-311; 803 NW2d 171 (2011). Warrantless searches are considered unreasonable per se "subject only to a few specifically established and well-delineated exceptions." *Katz v United States*, 389 US 347, 357; 88 S Ct 507; 19 L Ed 2d 576 (1967). Two such exceptions to the warrant requirement are the automobile exception and the exigent-circumstances exception. The automobile exception allows warrantless searches of automobiles when there is probable cause to believe that evidence of a crime will be found in the vehicle. See *id*. Under such circumstances, " 'a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained.' " *People v Levine*, 461 Mich 172, 179; 600 NW2d 622 (1999), quoting *United States v Ross*, 456 US 798, 809; 102 S Ct 2157; 72 L Ed 2d 572 (1982). "This ability to search without a warrant extends to closed containers in the vehicle that might contain the object of the search . . . ." *People v Kazmierczak*, 461 Mich 411, 422; 605 NW2d 667 (2000). The exigent-circumstances exception allows police to search without a warrant "in cases of actual emergency if there are specific and objective facts indicating that immediate action is necessary to (1) prevent the imminent destruction of evidence, (2) protect the police officers or others, or (3) prevent the escape of a suspect." *People v Chowdhury*, 285 Mich App 509, 526; 775 NW2d 845 (2009) (quotation marks and citation omitted).

In the present case, exigent circumstances justified the warrantless search of defendant's automobile. Defendant and Merriweather had just been involved in the discharge of a firearm at a local gas station. Witnesses provided a description of the vehicle involved and its license plate, as well as photographs of defendant. Within minutes of the shooting incident, police located Merriweather but not the gun used in the shooting. The vehicle was also located; it was abandoned and running. A missing gun and a missing accomplice may provide exigent circumstances justifying a warrantless search. See *People v Esters*, 417 Mich 34, 51; 331 NW2d 211 (1982) (LEVIN, J., dissenting, RYAN and FITZGERALD, JJ., concurring).[9]

[9] Of the six justices who participated in the *Esters* decision, four justices agreed that the search of the defendant's vehicle was permissible under the Fourth Amendment—one on the basis of the automobile exception, two on the basis of exigent circumstances, and one on the basis of both. Justice FITZGERALD concurred with both the lead opinion (which concluded that the automobile exception applied) and Justice LEVIN's separate opinion (which concluded that the exigent circumstances justified the search). *Esters*, 417 Mich at 57, 61.

The gravamen of defendant's argument on appeal is not that the warrantless search of his car was impermissible but, rather, that the warrantless search of his duffel bag was impermissible. However, when exigent circumstances exist, the authority to search without a warrant extends to closed containers. See *Kazmierczak*, 461 Mich at 422 (automobile exception); *Chowdhury*, 285 Mich App at 526 (exigent circumstances). In the present case, Merriweather did not have the gun that he used at the gas station when police arrested him, and nothing indicated that the police saw or suspected that Merriweather had disposed of the gun. Under these circumstances, it was reasonable for police to open the duffel bag in search of the gun.

Defendant nevertheless contends that opening the duffel bag during an inventory search violated the GRPD policy requiring locked compartments or containers to be noted in an inventory report but not opened. This violation of departmental policy, he contends, rendered the inventory search unconstitutional. See *People v Toohey*, 438 Mich 265, 284; 475 NW2d 16 (1991) (explaining that, "[t]o be constitutional, an inventory search *must* be conducted in accordance with established department procedures . . . and *must not* be used as a pretext for criminal investigation"). Defendant contends that because the prosecution did not establish that the duffel bag was searched in accordance with GRPD policy, the trial court should have suppressed the drugs. However, inasmuch as exigent circumstances justified the warrantless search of the duffel bag, this Court need not consider whether the drugs were discovered under a proper inventory search. See *Esters*, 417 Mich at 52 (explaining that, because the search was proper under the automobile exception to the warrant requirement, the Court did not need to consider whether it was proper as a routine inventory search).

IV. OTHER-ACTS EVIDENCE

Defendant asserts that he was denied his right to a fair trial when the prosecution elicited testimony from his fiancée that he sold marijuana.

We review de novo preliminary questions of law, such as whether a rule of evidence precludes admissibility. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). We review for an abuse of discretion a trial court's decision to admit evidence. *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013). A trial court abuses its discretion when it makes an error of law in the interpretation of a rule of evidence. *People v Jackson*, 498 Mich 246, 257; 869 NW2d 253 (2015). Nevertheless, "[a] preserved error in the admission of evidence does not warrant reversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *Burns*, 494 Mich at 110 (quotation marks and citation omitted).

As a general rule, evidence of other crimes, wrongs, or acts, i.e., other-acts evidence, is not admissible to prove a defendant's character or propensity to commit such acts. MRE 404(b)(1).[10] However, other-acts evidence is admissible if offered for a proper purpose, relevant, and the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

[10] The Michigan Rules of Evidence were substantially amended on September 20, 2023, effective January 1, 2024. See ADM File No. 2021-10, 512 Mich lxiii (2023). We rely on the version of the rules in effect at the time of defendant's 2022 trial.

People v VanderVliet, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). A proper purpose is one that requires the fact-finder to make an intermediate inference other than one about a defendant's character or criminal propensity. *Id*. at 87. For instance, if material, other-acts evidence may be admitted to prove "motive, intent, preparation, scheme, plan or system in doing an act knowledge, identity, or absence of mistake or accident . . . ." MRE 404(b)(1).

At issue is the admissibility of McKinney's testimony that she "possibly could have" told the police that defendant sold marijuana. The trial court ruled that McKinney's testimony was neither character evidence nor other-acts evidence, and that if McKinney told police that defendant sold marijuana, "that's not another bad act . . . that's what she's saying that he does to make money." The court alternatively reasoned that, if McKinney's testimony was other-acts evidence, it was admissible because it showed intent, or absence of mistake, or defendant's scheme or plan.

We disagree with the trial court to the extent it reasoned that McKinney's contested testimony was not other-acts evidence. Defendant was charged with possession with intent to distribute a controlled substance, i.e., marijuana. For the jury to return a guilty verdict, it had to find beyond a reasonable doubt that defendant possessed marijuana, that he knew that marijuana was a controlled substance, and that he intended to deliver the marijuana to someone else. There is no evidence that defendant had any kind of license to legally sell marijuana. Therefore, McKinney's testimony that she may have told police that defendant sold marijuana was evidence of another crime, wrong, or act, and its admissibility was subject to the analysis in *VanderVliet*.

The trial court did not abuse its discretion when it alternatively ruled that McKinney's testimony was admissible under MRE 404(b)(1). The prosecution argued that McKinney's testimony was offered to prove defendant's motive for possessing the marijuana in the red bag and his intent to distribute it. See MRE 404(b)(1). Therefore, the testimony at issue was offered for a proper purpose.

McKinney's testimony was also relevant. Other-acts evidence is relevant if it tends to make any fact that is of consequence to the action more or less probable than it would be without the evidence. See *People v Denson*, 500 Mich 385, 401; 902 NW2d 306 (2017). The proffered other-acts evidence must be probative of something *other* than "the character of a person in order to show that action in conformity therewith." MRE 404(b)(1). McKinney's testimony was related to whether defendant intended to deliver the marijuana in the red bag to someone else, which was a fact of consequence in the action. McKinney's testimony also made defendant's possession and motive for possessing the marijuana found in the red bag, and his intent to distribute the marijuana, more probable than it would have been without her testimony.

Lastly, MRE 403 did not bar the admission of McKinney's testimony. Otherwise admissible evidence will be barred under MRE 403 if the danger of undue prejudice substantially outweighs the probative value of the other-acts evidence. *VanderVliet*, 444 Mich at 74-75. Evidence is unfairly prejudicial if it presents a danger that marginally probative evidence will be given undue or preemptive weight by the jury, *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001), or if it would be inequitable to allow use of the evidence, *People v Waclawski*, 286 Mich App 634, 672; 780 NW2d 321 (2000). McKinney's testimony was more than marginally probative of defendant's intent and not likely to be given undue or preemptive weight in light of

the other evidence of marijuana distribution found in defendant's Range Rover, such as scales and packaging materials.

Defendant implies that the statement that McKinney made to the police after defendant's June 11 arrest was not relevant to anything that happened on May 30. However, although police interviewed McKinney after defendant's June 11 arrest, defendant was arrested on a warrant issued in the present case. The substance of McKinney's testimony was that she told police that defendant sold marijuana because she was afraid to tell the police that the marijuana found in the red duffel bag on May 30 belonged to her, thus making her testimony relevant to the marijuana found on May 30.

Defendant also asserts that the probative value of McKinney's testimony was substantially outweighed by the danger that it would be viewed as propensity evidence, particularly considering that the trial court said that selling marijuana was "what [defendant] does." The trial court's comment does not change the earlier analysis of whether the probative value of McKinney's testimony was substantially outweighed by the risk of unfair prejudice. The jury also never heard the court's comment as it was made at the start of the second day of trial before the jury entered the courtroom.

Because McKinney's testimony was offered for a proper purpose, was relevant, and its probative value was not substantially outweighed by unfair prejudice, the trial court did not abuse its discretion by admitting McKinney's testimony under MRE 404(b).

V. PROSECUTORIAL MISCONDUCT

Defendant also asserts a claim of prosecutorial misconduct based on the prosecutor's questioning the truthfulness of her own witness, McKinney, and statements made during closing argument in which the prosecutor assailed defendant's character.

For unpreserved claims of prosecutorial misconduct, this Court examines whether the claimed error amounted to plain error that affected the defendant's substantial rights. See *People v Gibbs*, 299 Mich App 473, 482; 830 NW2d 821 (2013). The test for prosecutorial misconduct is whether the criminal defendant has been denied a fair trial. *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002). The defendant bears the burden of demonstrating that prosecutorial misconduct resulted in a miscarriage of justice. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

McKinney testified that she lied to police when she told them that defendant sold marijuana because she was scared to admit that the marijuana in the duffel bag belonged to her. Defendant contends that when a witness admits on direct examination that she lied to the police about a defendant's prior bad acts, it is highly prejudicial for the prosecutor to delve into the details of the supposedly untruthful statements regarding the defendant's prior bad acts. *People v Carner*, 117 Mich App 560, 568-570; 324 NW2d 78 (1982). Defendant further contends that, after McKinney admitted that she lied, the prosecutor's continued direct examination was an improper attempt to elicit propensity evidence against defendant. See *People v Wilder*, 502 Mich 57; 917 NW2d 276 (2018). Defendant's arguments are without merit.

McKinney testified that she lied when she said that defendant sold marijuana because the marijuana belonged to her and she was scared. The prosecutor asked questions about McKinney's purchase and ownership of the marijuana, her relationship to the red duffel bag and its contents, her use of the Range Rover, the relationship between defendant and Merriweather, whether she had any contact with Merriweather after his arrest, and the consequences of lying under oath. On redirect examination, the prosecutor asked McKinney about her purchase of a car a few weeks before defendant was arrested; the prosecutor's questions seemed to imply that McKinney did not need to drive the Range Rover that the marijuana was found in because she had her own car. The prosecutor's questions in the present case did not evoke testimony about any prior bad acts that defendant may have committed. Rather, the questions enabled the jury to assess the credibility of McKinney's testimony that the marijuana in the duffel bag found in the Range Rover belonged to her rather than to defendant. See MRE 607 (indicating that any party may attack the credibility of a witness). Viewing the prosecutor's examination of McKinney as a whole, it cannot be said that defendant has met his burden of demonstrating error, let alone error that resulted in a miscarriage of justice.

With respect to the prosecutor's closing argument, defendant asserts that the prosecutor committed misconduct by arguing his character rather than his culpability. Having read the prosecutor's comments as a whole and in relationship to the evidence admitted at trial, we cannot say that defendant has met his burden of demonstrating error, let alone error that resulted in a miscarriage of justice. See *Brown*, 279 Mich App at 134-136.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Noah P. Hood
/s/ Colleen A. O'Brien