APPENDIX A

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

05-P-1213.

COMMONWEALTH,
vs.
LUIS E. MELENDEZ-DIAZ

July 31, 2007.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

On appeal from judgments on guilty verdicts returned by a jury on indictments charging him with distributing and trafficking in cocaine, see G.L.C. 94C, §§ 32 and 32E, the defendant argues that: (1) he was entitled to required findings of not guilty; (2) the admission in evidence of the drug analysis certificates was inconsistent with *Crawford v. Washington*, 541 U.S. 36 (2004), and violated *Commonwealth v. Lanigan*, 419 Mass. 15 (1994); and (3) his trial counsel was ineffective in failing to file a motion to suppress evidence and to point out to the jury the packaging of the seized cocaine. We affirm the judgments.

1. *The evidence*. At trial, evidence was presented establishing that on five or six occasions over a three month period in the fall of 2001, the loss prevention manager (manager) of a K-Mart store (store) located in Dorchester observed Thomas Wright, the store's human resource manager, make and receive external telephone calls, that is, telephone calls neither placed

to nor received from persons within the store. Immediately after receiving each of these calls, Wright would walk outside and stand by the front entrance to the store. He would then get into a blue, four-door Mercury Sable sedan driven by a Hispanic male and sometimes carrying a passenger. The car would drive away and return about ten minutes later, with Wright exiting the car and going back into the store.

At about 2:30 P.M., on November 15, 2001, the manager reported his observations of Wright's activities to Boston police Detective Robert Pieroway, who immediately went to the store and set up surveillance of the front outside area of the store. It was about 3:00 P.M. when Pieroway saw Wright come out of the store, stand on the sidewalk looking around the parking lot, and after a few minutes, go back into the store. Pieroway next saw a blue Mercury Sable sedan drive past the store, make a U-turn, and drive back to the front of the store, and stop. The driver, codefendant Ellis Montero, was talking on a cell phone and the defendant was in the front passenger seat. Just as Montero arrived at the front of the store, Wright came out and got into the back seat of the car. The manager also saw this activity, which was consistent with what he had seen on prior occasions and had reported to the police.

Once Wright was in the car, Montero drove slowly through the parking lot. A few seconds later, the car was within ten feet of Pieroway, who could see Wright leaning forward between the two individuals in the front seats. When Wright leaned back, Montero stopped, Wright got out of the car and walked back toward the store. Outside the store, Pieroway stopped Wright,

who told Pieroway that he had four bags of cocaine on his person. Pieroway then searched Wright and retried from his front pant pocket a plastic bag in which there were four clear white plastic bags containing a total quantity of 4.75 grams of cocaine having a value of about $320 to $400.[1]

Pieroway immediately advised Boston police Officers Ryan and Anderson, stationed in a cruiser in the parking lot, to arrest the two men in the blue car that was driving away.

Ryan and Anderson stopped the car, arrested Montero and his passenger, the defendant, and frisked them for weapons. In compliance with police procedure, the officers did not search either of the men or the car for contraband as they were only assisting with the stop. A search of the car for contraband would be conducted by drug unit officers. Ryan and Anderson placed the defendant and Montero in the backseat of their cruiser, positioning the defendant directly behind the front passenger seat and Montero behind the driver. The officers then drove to the front of the store where Wright was also placed in the back of the cruiser.

The three men were seated with their hands cuffed behind their backs. Montero was directly behind the driver, the defendant in the middle, and Wright behind the front passenger. During the less than eight minute trip to the police station, the defendant and Montero were "speaking in Spanish," "fidgeting," "making furtive movements in the back," and leaning

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[1] The four bags of cocaine taken from Wright were entered in evidence.

various ways to create space between them, while Wright made no unusual movements and did "nothing." Through the rear-view mirror, Ryan saw Montero and the defendant "jumping around" and felt them kicking the back of the front seats. At one point during the trip, Ryan told them to "knock it off, quit moving around."

During the booking process at the police station, the police recovered two cellular phones and $301 from Montero and a pager and $157 from the defendant. Meanwhile, Anderson returned to the cruiser in which the three men had been transported. He was motivated to do so because of the actions and movements of the defendant and Montero during the trip to the station. Anderson found a fold of money totaling $320 on the ground next to the door used by Montero and the defendant in getting out of the cruiser. Looking in the back area of the cruiser, Anderson found a plastic bag containing nineteen plastic bags of cocaine on the floor in a recess in the partition between the front and back seats on the driver's side of the cruiser.[2]

No one was in the parking lot when Ryan and Anderson arrived at the police station with the three men. Nor was anyone in the lot when Anderson returned to the cruiser and found the money and drugs. Soon after his discovery of the money and the bag containing nineteen other bags, Anderson was joined in the parking lot by Pieroway, who took possession of the nineteen bags which were thereafter analyzed and found to contain a total of 22.16 grams of cocaine.

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[2] The nineteen bags found by Anderson in the backseat area of the cruiser were entered in evidence.

According to Pieroway, the nineteen bags retrieved from the cruiser "appeared to be the same size and same packaging, same look[ ], everything as the four that [he] recovered from . . . Wright." Pieroway also testified that the $320 found by Anderson was the same amount that Wright had paid for his purchase of the four bags of cocaine retrieved from him.

There was also evidence establishing that prior to leaving the police station on the morning of November 15, 2001, Ryan had inspected the cruiser to make certain that there was no contraband on the front or back seats, and that the cruiser was in the possession of only Ryan and Anderson for the entire day. In addition, on that day no one had been in the backseat of the cruiser other than Montero, the defendant, and Wright.

2. *The sufficiency of the evidence*. In contending that he was entitled to a required finding of not guilty on each of the indictments against him, the defendant argues that the evidence was insufficient to show that a drug transaction had taken place on the afternoon of November 15, 2001, or that he was a joint venturer in such a transaction.

We begin our analysis of the defendant's argument with *Commonwealth v. Hernandez*, 439 Mass. 688, 694 (2003), in which the Supreme Judicial Court stated:

> "[T]o prove the defendant guilty as a joint venturer, the Commonwealth was required to prove that he was present at the scene of the crime, had knowledge that another

> intended to commit the crime and shared the intent to commit the crime, and by agreement was willing and available to help the other if necessary. *Commonwealth v. Netto*, 438 Mass. 686, 700[-701] (2003). . . . [Additionally], to prove the defendant guilty of trafficking on a joint venture theory, the Commonwealth must prove (1) that the underlying crime of trafficking in cocaine was committed and (2) that the elements of joint venture defined above were satisfied. See *Rendon-Alvarez v. Commonwealth*, 437 Mass. 40, 44-45 (2002)."

In considering whether the Commonwealth met its burden of proof, we take the evidence and the reasonable inferences that can be drawn therefrom in the light most favorable to the Commonwealth. See *Commonwealth v. Gunter*, 427 Mass. 259, 264-265 (1998), and cases therein cited.

There can be no real question concerning the sufficiency of the Commonwealth's evidence, i.e., the testimony of the manager, Pieroway, Ryan, and Anderson, the surveillance photos taken at the time of the crime, and the similarity of the packaging of the drugs retrieved from Wright and those taken by Anderson from the back of the cruiser, to put to the jury the question of whether the defendant was a willing participant in the distribution of cocaine to Wright. The evidence allows for the reasonable inference that the defendant knew Montero intended to sell drugs to Wright, who had purchased drugs on prior occasions while in the car. The defendant's reliance upon *Commonwealth v. Deagle*, 10 Mass. App.

Ct. 563 (1980), *Commonwealth v. Saez*, 21 Mass. App. Ct. 408 (1986), and *Commonwealth v. McKay*, 50 Mass. App. Ct. 604 (2000), is misplaced as those cases are factually inapposite.

Based upon the evidence presented in the instant matter, a juror could reasonably infer that neither Montero nor Wright, especially Wright, would engage in a criminal transaction in the presence of one "unconnected to the business being conducted." *Commonwealth v. Fernandez*, 57 Mass. App. Ct. 562, 567 (2003). The defendant also possessed a pager, a "traditional accouterment of the illegal drug trade." *Commonwealth v. Gollman*, 436 Mass. 111, 116 (2002). In addition, as earlier related, there was evidence to show that during the ride to the station, Montero and the defendant were seated next to each other conversing in Spanish while "fidgeting," "jumping around," leaning towards opposite windows, and "kicking under the seat." Although, and as the defendant argued before us, such activity could be thought to have been caused by discomfort attributable to their hands being cuffed behind their backs, we think a sinister inference was also reasonably available, that is, the actions of the men were attributable to their attempts to remove contraband and money from their persons. Such an inference is almost inescapable in view of the testimony of Ryan, Anderson, and Pieroway that the money found on the ground next to the door used by Montero in getting out of the cruiser matched the amount paid by Wright for the cocaine found on him, and that the drugs found in the cruiser were packaged in a manner resembling those found on Wright at the time of his arrest.

Based on all the evidence, including the drug analysis certificates concerning the substances taken from Wright and the back of the cruiser, see *Commonwealth v. Verde*, 444 [Mass.] 279, 282-283 (2005),[3] we conclude that the judge did not err in denying the defendant's motion for required findings of not guilty on the indictments charging him with distributing and trafficking in cocaine.

3. *Trial counsel's representation of the defendant*. In claiming that he did not have the effective assistance of counsel at trial, the defendant points to his trial attorney's failure to file a motion to suppress the retrieved drugs and to point out to the jury that the police officers testified "falsely" about the similarities between the packages taken from Wright and from the cruiser.[4]

a. Failure to file a motion to suppress. "It is not ineffective assistance of counsel when trial counsel declines to file a motion with a minimal chance of success." *Commonwealth v. Conceicao*, 388 Mass. 255, 264 (1983), citing *Commonwealth v. Saferian*, 366 Mass. 89, 99 (1974). Even assuming that the

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[3] In *Commonwealth v. Verde, supra,* this court held that certificates of drug analysis did not deny a defendant the right of confrontation and were, therefore, not subject to the holding in *Crawford v. Washington,* 541 U.S. 36 (2004). We see no merit to the defendant's simple assertions that *Verde* is contrary to *Crawford* and that the certificates of drug analysis were accepted in evidence without first satisfying the requirements of *Commonwealth v. Lanigan,* 419 Mass. at 25-26.

[4] The defendant did not file a motion for a new trial, and instead raises the claim of ineffective assistance of counsel for the first time on appeal. See *Commonwealth v. Henley,* 63 Mass. App. Ct. 1, 7-8 (2005).

defendant could challenge the stop and arrest of Wright, but see *Commonwealth v. King*, 389 Mass. 233, 240-241 (1983), such an assumption would gain the defendant nothing.

All the previously recited facts leading up to Wright's arrest establish that the police had probable cause to arrest and search him. As for the drugs and money found in the cruiser and on the ground near the cruiser in the police parking lot, we need say no more than that the defendant could have had no reasonable expectation of privacy with respect to those items. See *Commonwealth v. Paszko*, 391 Mass. 164, 184 (1984); *Commonwealth v. Pina*, 406 Mass. 540, 544-545 (1990).

It is these circumstances upon which we rely in concluding that any motion to suppress the evidence seized by the police had little, if any, chance of success. Therefore, trial counsel's failure to pursue such a motion does not constitute ineffective assistance of counsel.

b. *Failure to stress certain testimony*. We put the best spin possible on the defendant's contention on his claim that if the bags of cocaine taken from Wright and from the back of the cruiser were found to be dissimilar, the defendant could not be found guilty on either of the indictments against him. From that premise flows the defendant's argument that his trial counsel was ineffective by reason of his failure to "point . . . out" the dissimilarities between the recovered packages of cocaine and thereby also show that the police officers' testimony to the contrary was false.

Based on the evidence presented at trial on the clearly framed theories of guilt and the lack thereof, as well as the jury instructions, the jury was well aware of the need to determine whether the packages taken from Wright were similar to those found in the cruiser. In resolving this disputed question of fact, similar or dissimilar, the jury had available to them all the seized packages of cocaine. See notes 1 & 2, *supra*.[5]

It follows from all that we have said that trial counsel's alleged failure to stress any alleged and important dissimilarities in the packages put before the jury does not constitute ineffective assistance of counsel.

Judgments affirmed.

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[5] Prior to oral argument, counsel for the Commonwealth and the defendant filed a joint motion requesting that we exercise our power to order the transmission of the packages of cocaine in evidence to this court. See Mass.R.A.P. 9(b), as appearing in 378 Mass. 935 (1979). Counsel for the defendant filed a renewed motion less than one week before oral argument, which was denied. At oral argument, counsel for the defendant orally reviewed the motion. Because we conclude that the question of similarity was one of fact to be resolved by the jury, we have no occasion to depart from our well established practice to refrain from seeking the transmission of drugs or weapons to this court. Consequently, the motion renewed during oral argument is denied.

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

COMMONWEALTH,
vs.
LUIS E. MELENDEZ-DIAZ

September 26, 2007

Further appellate review denied.

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC-09320

COMMONWEALTH,
vs.
ALBERTO VERDE

May 19, 2005

IRELAND, J.

This appeal raises the question whether, in light of *Crawford v. Washington*, 541 U.S. 36 (2004) (*Crawford*), the confrontation clause of the Sixth Amendment to the United States Constitution requires that laboratory technicians who analyze drugs seized as part of a criminal investigation authenticate their laboratory findings by appearing at a defendant's trial. Because we conclude that a drug certificate is akin to a business record and the confrontation clause is not implicated by this type of evidence, we answer in the negative and affirm the conviction.

After a Superior Court jury convicted the defendant of trafficking in cocaine (in an amount over one hundred but less than 200 grams), the trial judge sentenced the defendant to from ten to twelve years. The defendant appealed, claiming a number of errors, and we transferred this case from the Appeals Court on our own motion.

Facts and procedural background.

We recount the relevant facts, reserving certain details for our discussion. On July 25, 1997, the Worcester police executed a search warrant at the defendant's residence. After receiving the Miranda warnings, the defendant told police he had one-half ounce of cocaine in his pocket, which the police confiscated. In a bureau in the defendant's bedroom, the police found items commonly used in the drug trade, including a "cutting agent," a brown paper bag with "chunks" of "crack" cocaine and "regular" cocaine, a scale, packaging material, and plastic baggies. The police also found $15,615 in cash and a bankbook. These items were photographed before being removed from the bureau drawer. The white powder substances found in the bureau and in the defendant's pocket were analyzed at the University of Massachusetts Medical School laboratory. One substance was determined to be 90.96 grams of cocaine and the substance from the defendant's pocket was determined to be 13.77 grams of cocaine. The analysis of another substance removed from the bureau drawer indicated that it did not contain drugs.

At trial, pursuant to G.L. c. 111, § 113,[1] the Commonwealth introduced two certificates of analysis

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[1] General Laws c. 111, § 13, states in relevant part:

> "The analyst or assistant analyst of the . . . University of Massachusetts medical school shall upon request furnish a signed certificate, on oath, of the result of the [chemical] analysis [of a narcotic drug submitted to it by police authorities] . . . and the presentation of such certificate to the court by any police officer . . . shall be prima facie evidence that all the requirements . . . have been complied with. This

from the University of Massachusetts Medical School laboratory showing the weight of the cocaine. The defendant, in turn, submitted the certificate of analysis of the other substance, indicating that it was not a narcotic but rather lidocaine (the dilutant). Although admitting that he had one-half ounce of cocaine on his person, the defendant testified that he only had twenty-eight grams in his bureau. His defense was that the police mixed lidocaine with the cocaine in the bureau into "a big ball" to arrive at the total amount of 90.96 grams.

The defendant's expert went to the University of Massachusetts Medical School laboratory on the first day of the trial to weigh the drugs himself. The expert testified that the first scale he used was not functioning properly, but that he was able to get an accurate reading from a second scale. The total weight of the cocaine, when weighed by the defendant's expert, was 102 grams. He testified that the difference in the amount from the 104.73 grams determined by the chemist was likely due to the evaporation of a "volatile material" mixed with the cocaine. Although the defendant's expert agreed that the total weight was more than one hundred grams, he testified that he thought the concentration of cocaine stated on the

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> certificate shall be sworn to . . . and the jurat shall contain a statement that the subscriber is the analyst or an assistant analyst of the department. When properly executed, it shall be prima facie evidence of the composition, quality, and net weight of the narcotic or other drug . . . ."

The purpose of G.L. c. 111, § 13, is to reduce court delays and the inconvenience of having the analyst called as a witness in each case. See *Commonwealth v. Claudio*, 26 Mass. App. Ct. 218, 220 n. 1, 525 N.E.2d 449 (1988), *S. C.*, 405 Mass. 481, 541 N.E.2d 993 (1989), and cases cited.

certificate of analysis was misleading. However, he further testified that he could not determine how inaccurate it might be because he "didn't have enough time to really study all the data" and a piece of data was missing regarding how the analyst made the standard concentrations for quantifying the cocaine in the sample.

The laboratory manager at the University of Massachusetts Medical School, a rebuttal witness for the prosecution, testified that the chemist who analyzed the drugs was unavailable to testify because she was on maternity leave. He further testified that he personally examined the test results as to the purity and weight of drugs and he agreed with the results reported on the certificates.

Discussion.

1. *Confrontation clause*. The defendant argues that the admission of the drug certificates of analysis denied him his constitutional right to confrontation because the chemist who analyzed the substances and prepared the certificates did not testify.[2] This issue was presented first to this court in *Commonwealth v. Slavski*, 245 Mass. 405, 140 N.E. 465 (1923), and again nearly fifty years later in *Commonwealth v. Harvard*, 356 Mass. 452, 253 N.E.2d 346 (1969). In both cases, this court held that because the records relating to the analysis of intoxicating liquor or drugs were merely records of primary fact, with no judgment or discretion

[2] The Commonwealth argues that the defendant failed to preserve this issue for appeal because he did not object at trial. We disagree. The failure to object was excusable, as *Crawford v. Washington*, 541 U.S. 36 (2004) (*Crawford*), was decided after the defendant's trial and the filing of his notice of appeal in the Superior Court.

on the part of the analysts, and were admitted only as prima facie evidence, their admission did not violate a defendant's right to confrontation. See *Commonwealth v. Harvard*, *supra* at 461-463, 253 N.E.2d 346; *Commonwealth v. Slavski*, *supra* at 417-418, 140 N.E. 465. The defendant, however, argues that these cases no longer apply because of the United States Supreme Court's recent decision in *Crawford*, *supra* at 61, 68, holding that "testimonial" hearsay statements are barred under the confrontation clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness, regardless of whether the statements are deemed reliable by the court. We disagree with the defendant's proposed application of *Crawford* to evidence of this nature.

Although the Court left "for another day any effort to spell out a comprehensive definition of 'testimonial,' " it provided that the term "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* at 68. The Court noted that "[t]hese are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Id.* However, the Court also recognized that "[t]here were always exceptions to the general rule of exclusion" of hearsay evidence and that several were well established when the confrontation clause was enacted. *Id.* at 56. Specifically, the Court suggested in dictum that a business or official record would not be subject to its holding as this exception was well established in 1791. *Id.*[3]

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[3] It appears as though the *Slavski* decision anticipated the *Crawford* holding. *Commonwealth v. Slavski*, 245 Mass. 405, 413-418, 140 N.E. 465

One acknowledged exception to the confrontation clause is a public record, "an ancient principle of the common law, recognized at the time of the adoption of the Constitution." *Commonwealth v. Slavski*, *supra* at 415, 140 N.E. 465, citing J. Wigmore, Evidence §§ 1395-1398 (1923). See *Commonwealth v. Bergstrom*, 402 Mass. 534, 545, 524 N.E.2d 366 (1988) (noting public records and dying declarations as acknowledged exceptions to confrontation requirements when Massachusetts Constitution was adopted). In addition, it is well established in Massachusetts that "a record of a primary fact made by a public officer in the performance of official duty is or may be made by legislation competent prima facie evidence as to the existence of that fact." *Commonwealth v. Slavski*, *supra* at 417, 140 N.E. 465. However, "records of investigations and inquiries conducted, either voluntarily or pursuant to requirement of law, by public officers concerning causes and effects involving the exercise of judgment and discretion, expressions of opinion, and making conclusions are not admissible in evidence as public records." *Id.*

Certificates of chemical analysis are neither discretionary nor based on opinion; rather, they merely state the results of a well-recognized scientific test determining the composition and quantity of the substance. *Commonwealth v. Harvard*, *supra* at 462, 253 N.E.2d 346. See *Commonwealth v. Westerman*, 414 Mass. 688, 699-700, 611 N.E.2d 215 (1993). Additionally, the certificate is admissible only as prima facie

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(1923). The exhaustive discussion in the *Slavski* decision on the confrontation clause and its well-recognized exceptions, such as dying declarations and public records, closely resembles the discussion of the historical aspects of the confrontation clause in *Crawford*.

evidence of the composition, quality, and weight of the substance, G.L. c. 22C, § 39, which a defendant may rebut if he doubts its correctness, as the defendant did in this case. Accordingly, these drug certificates are well within the public records exception to the confrontation clause.[4]

Furthermore, we do not believe that the admission of these certificates of analysis implicate "the principal evil at which the Confrontation Clause was directed . . . particularly its use of *ex parte* examinations as evidence against the accused." *Crawford*, *supra* at 50. The documentary evidence at issue here has very little kinship to the type of hearsay the confrontation clause intended to exclude, absent an opportunity for cross-examination. *Id.* at 51-53. Rather, it is akin to a business or official record, which the Court stated was not testimonial in nature. *Id.* at 56.

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[4] Other jurisdictions confronting this issue have reached similar conclusions. See *Perkins v. State*, 897 So.2d 457, 462-465 (Ala.Crim.App.2004) (autopsy report admissible under business records exception); *Smith v. State*, Ala. Crim. App., 898 So.2d 907, 910-911 (2004) (autopsy report is business record and not testimonial but should not have been admitted without coroner's testimony because report contained opinion); *People v. Johnson*, 121 Cal. App. 4th 1409, 1411-1413, 18 Cal. Rptr. 3d 230 (2004) (laboratory report is routine documentary evidence that does not violate confrontation clause); *State v. Thackaberry*, 194 Or. App. 511, 516, 95 P.3d 1142 (2004) (laboratory report of urinalysis was "analogous to-or arguably even the same as-a business or official record").

However, two jurisdictions have reached a contrary conclusion. See *Las Vegas v. Walsh*, 120 Nev. 392, 91 P.3d 591, 595, modified, 100 P.3d 658 (Nev.2004) (affidavit made by nurse, pursuant to statute, was testimonial and not admissible to show presence of alcohol in blood because affidavit was prepared solely for prosecution's use at trial); *People v. Rogers*, 8 A.D.3d 888, 891-892, 780 N.Y.S.2d 393 (2004) (blood test report prepared by private laboratory in anticipation of litigation was not admissible as business report).

In this case, the only defense was that, while the defendant possessed cocaine, he did not have more than one hundred grams of cocaine. The defendant was free to rebut the information in the certificate, and indeed did so. The substance itself was available for the defendant's expert to weigh and analyze. Having done so, the defendant's expert testified that there were over one hundred grams of cocaine.[5] He disputed only the purity of the cocaine as recorded on the certificate. Contrary to the defendant's argument, the analyst was not required to testify simply because the defendant offered evidence to rebut the certificate. Rather, as the judge properly instructed, the jury were free to credit this testimony and to discredit the certificate of analysis as they saw fit. Therefore, we conclude the defendant's confrontation rights were not violated.

2. *Other issues*. The defendant also claims errors in the prosecutor's closing statements and argues that his defense counsel was ineffective.

a. *Prosecutor's closing remarks*. The defendant argues that the prosecutor created a substantial risk of

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[5] As long as the mixture contains cocaine (which it did) and weighs in excess of the threshold amount (which it also did), the purity of the cocaine need not be proved to establish the offense of trafficking. G.L. c. 94C, § 32E(*b*)(3). See *Commonwealth v. James*, 30 Mass. App. Ct. 490, 493 n. 4, 570 N.E.2d 168 (1991), *S. C.*, 411 Mass. 1106, 587 N.E.2d 790 (1992). The purity of the substance may be relevant as circumstantial evidence that substances are possessed with an intent to distribute, and not for personal use. See *Commonwealth v. Johnson*, 413 Mass. 598, 603-604, 602 N.E.2d 555 (1992); *Commonwealth v. Sabetti*, 411 Mass. 770, 779, 585 N.E.2d 1385 (1992); *Commonwealth v. Montanez*, 410 Mass. 290, 305-306, 571 N.E.2d 1372 (1991).

a miscarriage of justice by violating the bounds of proper closing argument. Additionally, the defendant argues that these errors were prejudicial in light of two objectionable statements that the prosecutor made during the trial.[6] As no objection was made to the prosecutor's closing argument, we limit our review to whether there was a substantial risk of a miscarriage of justice. See *Commonwealth v. Fitzgerald*, 376 Mass. 402, 416, 381 N.E.2d 123 (1978). We analyze the prosecutor's remarks considering the argument as a whole, the judge's instructions to the jury, and the evidence at trial. *Commonwealth v. Beland*, 436 Mass. 273, 289, 764 N.E.2d 324 (2002), citing *Commonwealth v. Mello*, 420 Mass. 375, 380, 649 N.E.2d 1106 (1995). However, as the defendant fails to cite authority supporting his specific claims of error, these arguments warrant only brief discussion.

First, the defendant argues that the prosecutor improperly vouched for the credibility of two witnesses by commenting on their integrity when telling the jury, "[Y]ou heard from Officer Williams and you heard from Officer Burgos, and I suggest to you that they are two fine police officers who have very calm demeanors

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[6] When the Commonwealth asked the defendant whether his assets had been seized by the State, the judge immediately instructed the jury that the issue had "absolutely nothing to do with this case" and they should "[p]ut [the issue] out of your mind . . . ." Later, the judge sustained the defendant's objection when the Commonwealth asked the defendant how many years he had been selling cocaine. The judge further instructed that the question was improper and excluded. The judge's immediate curative instructions in these instances remedied whatever error (if any) arose in these questions. *Commonwealth v. Lodge*, 431 Mass. 461, 471-472, 727 N.E.2d 1194 (2000).

. . . ." While the characterization of the witnesses as "fine police officers" would have been better left unsaid, it was not reversible error. See *Commonwealth v. Kozec*, 399 Mass. 514, 521, 505 N.E.2d 519 (1987) ("It is not improper to make a factually based argument that, due to the demeanor, disclosed circumstances, and appearance of a witness, a particular witness should be believed or disbelieved"). Moreover, the judge gave detailed instructions on the jury's role in determining the credibility of each witness, specifically instructing them to "use your own good sound common sense and judgment, and . . . come to your own conclusion as to the credibility of any of the witnesses."

The defendant also argues that the prosecutor improperly attempted to shift the burden to him by suggesting that the defendant had a motive to testify. This argument is without merit, as the prosecutor was properly arguing that, having taken the witness stand, the defendant was subject to cross-examination with respect to his underlying motives for testifying.

Next, the defendant argues that the prosecutor erred in attempting to instruct the jury on the elements of the charged offense. Again, this argument is without merit. When the prosecutor began describing the offense of possession to the jury, the judge interrupted to state that he would explain the law to the jury and directed the prosecutor to go ahead with the facts. As the prosecutor did not have the opportunity to state the elements of the crime charged, the defendant was not prejudiced and there was no error.

Last, the defendant argues that the prosecutor misstated the evidence by remarking that the cocaine had been evaporating.[7] As evidenced by the transcript, the prosecutor, in the next sentence, clarified that it was understandable that the volatile substance mixed with the cocaine would eventually evaporate over time. Taken in context, that statement was correct and there was no error.

Having reviewed the closing argument, as well as the judge's instructions to the jury and the relevant portions of the transcript, we conclude that the prosecutor's closing argument as a whole did not create a substantial risk of a miscarriage of justice.

b. *Ineffective assistance of counsel*. The defendant also argues that his defense counsel rendered ineffective assistance by failing adequately to prepare for trial, to pursue certain discovery regarding the procedures and methods used by the Commonwealth to analyze the drug mixture, accurately to recount in her closing argument the expert witness's testimony concerning the changing weight of the drug mixture, and to object to the prosecutor's improper comments and questions during closing argument. We disagree. In order to prevail on a claim of ineffective assistance,

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[7] "Both, both chemists . . . testified they were not surprised that with the passage of four years, that the cocaine has evaporated. And I thought that was a very good example that [the defense expert] used with the perfume, because it makes it comprehendible, it makes it understandable that in fact the cocaine has been mixed with a substance. [The defense expert] called it volatile, as did [the laboratory manager]. That ultimately when it's touched by the air or when it's transferred, when it's weighed, that it eventually evaporates with the passage of time, and that's what happened."

The actual testimony was that there was a "volatile material in the sample" that was evaporating.

the defendant bears the burden of proving that the behavior of counsel fell below that of an ordinary, fallible lawyer and that such failing "likely deprived the defendant of an otherwise available, substantial ground of defence." *Commonwealth v. Saferian*, 366 Mass. 89, 96, 315 N.E.2d 878 (1974). Concerning the first three alleged errors, the defendant has stated, in a cursory fashion without citation to authority, what he perceived to be the errors of his attorney but failed to submit any analysis supporting his claims of error. Accordingly, the defendant failed to show how his counsel's actions fell below the level of an ordinary, fallible attorney or how he was prejudiced. Furthermore, as there was no reversible error in the prosecutor's closing argument, it was not ineffective assistance of counsel to fail to object. See *Commonwealth v. Murphy*, 442 Mass. 485, 509, 813 N.E.2d 820 (2004).

Conclusion.

Because we conclude that the certificates of analysis at issue in this case are akin to a business or official record, and therefore, would not be subject to the holding in the *Crawford* case, and because we find no merit in the other claims of error, we affirm the defendant's conviction.

So ordered.

APPENDIX D

[State's Exhibit 10]

The Commonwealth of Massachusetts
Executive Office of Health and Human Services
Department of Public Health
State Laboratory Institute
305 South Street
Boston, MA 02130-3597
617-983-6622

DATE RECEIVED: 11/19/2001
DATE ANALYZED: 11/28/2001

No. 615742
I hereby certify that the substance
Contained in 2 plastic bags **MARKED**: 615742
Submitted by P.O. FRANK MCDONOUGH of the BOSTON POLICE DEPT.

Has been examined with the following results:
The substance was found to contain:
Cocaine, a derivative of Coca leaves, as defined in Chapter 94 C, Controlled Substance Act, Section 31, Class B.

NET WEIGHT: 2.41 grams
DEFENDANT: MONTERO, ELIS A. ET AL

_____/s/_____/s/_____
Assistant Analysts Della Saunders Michael Lawler

Sworn and subscribed to before me on this day, 12-04-01. I know the subscribers to be assistant analysis of the Massachusetts Department of Public Health.

My Commission Expires 8-25-06 _____/s/_____
NOTARY PUBLIC

Chapter 111, Section 13 of the General Laws
This certificate shall be sworn to before a justice of the Peace or Notary Public, and the jurat shall contain a statement that the subscriber is an analyst or assistant analyst of the department. When properly executed, it shall be prima facie evidence of the composition, quality, and the net weight of the narcotic or other drug, poison, medicine, or chemical analyzed, and the court shall take judicial notice of the signature of the analyst or the assistant analyst, and of the face that he/she is such.

[State's Exhibit 11]

The Commonwealth of Massachusetts
Executive Office of Health and Human Services
Department of Public Health
State Laboratory Institute
305 South Street
Boston, MA 02130-3597
617-983-6622

DATE RECEIVED: 11/19/2001
DATE ANALYZED: 11/28/2001

No. 615743
I hereby certify that the substance
Contained in 2 plastic bags **MARKED**: 615743
Submitted by P.O. FRANK MCDONOUGH of the BOSTON POLICE DEPT.

Has been examined with the following results:
The substance was found to contain:
Cocaine, a derivative of Coca leaves, as defined in Chapter 94 C, Controlled Substance Act, Section 31, Class B.

NET WEIGHT: 2.34 grams
DEFENDANT: MONTERO, ELIS A. ET AL

_____/s/_____/s/_____
Assistant Analysts Della Saunders Michael Lawler

Sworn and subscribed to before me on this day, 12-04-01. I know the subscribers to be assistant analysis of the Massachusetts Department of Public Health.

My Commission Expires 8-25-06 _____/s/_____
NOTARY PUBLIC

Chapter 111, Section 13 of the General Laws
This certificate shall be sworn to before a justice of the Peace or Notary Public, and the jurat shall contain a statement that the subscriber is an analyst or assistant analyst of the department. When properly executed, it shall be prima facie evidence of the composition, quality, and the net weight of the narcotic or other drug, poison, medicine, or chemical analyzed, and the court shall take judicial notice of the signature of the analyst or the assistant analyst, and of the face that he/she is such.

[State's Exhibit 13]

The Commonwealth of Massachusetts
Executive Office of Health and Human Services
Department of Public Health
State Laboratory Institute
305 South Street
Boston, MA 02130-3597
617-983-6622

DATE RECEIVED: 11/19/2001
DATE ANALYZED: 11/28/2001

No. 615741
I hereby certify that the powder
Contained in 19 plastic bags **MARKED**: 615741
Submitted by P.O. FRANK MCDONOUGH of the BOSTON POLICE DEPT.

Has been examined with the following results:
The powder was found to contain:
Cocaine, a derivative of Coca leaves, as defined in Chapter 94 C, Controlled Substance Act, Section 31, Class B.

NET WEIGHT: 22.16 grams
DEFENDANT: MONTERO, ELIS A. ET AL

_____/s/_____/s/_____
Assistant Analysts Della Saunders Michael Lawler

Sworn and subscribed to before me on this day, 12-04-01. I know the subscribers to be assistant analysis of the Massachusetts Department of Public Health.

My Commission Expires 8-25-06 _____/s/_____
NOTARY PUBLIC

Chapter 111, Section 13 of the General Laws
This certificate shall be sworn to before a justice of the Peace or Notary Public, and the jurat shall contain a statement that the subscriber is an analyst or assistant analyst of the department. When properly executed, it shall be prima facie evidence of the composition, quality, and the net weight of the narcotic or other drug, poison, medicine, or chemical analyzed, and the court shall take judicial notice of the signature of the analyst or the assistant analyst, and of the face that he/she is such.