

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN KEITH HARVEY,

Defendant-Appellant.

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UNPUBLISHED

August 1, 2000

No. 219250

Kent Circuit Court

LC No. 97-012527-FH

Before: Doctoroff, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), fleeing and eluding a police officer, MCL 257.602a; MSA 9.2302(1), and resisting and obstructing a police officer, MCL 750.479; MSA 28.747. He was sentenced as a third habitual offender, MCL 769.11; MSA 28.1083, to ten to forty years' imprisonment for the possession with intent to deliver cocaine offense, one to ten years for the resisting and obstructing offense, and one to four years for the fleeing and eluding offense. The latter two sentences are to be served concurrently, but consecutive to the drug sentence. We affirm defendant's convictions, but remand for further proceedings with regard to sentencing.

Defendant argues that the trial court erred in denying his request at trial to exclude admission of his statements to the police. We disagree.

Contrary to what the trial court believed, a pretrial *Walker*<sup>1</sup> hearing was never conducted to determine the admissibility of defendant's statements. Thus, the trial court erred when it admitted defendant's statements on the basis of its erroneous belief that the statements had previously been ruled admissible at a pretrial *Walker* hearing. Nevertheless, we are satisfied that the statements were properly admitted. First, notwithstanding the time discrepancy in the reports, the officers all agreed that defendant was advised of his *Miranda*<sup>2</sup> rights before he agreed to give the statements at issue. Second,

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<sup>1</sup> *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965)

<sup>2</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

while defendant contends that “testimony presented at [a] pretrial evidentiary hearing establishes that the statements were not voluntary,” a review of the testimony upon which defendant relies establishes that defendant’s statements were voluntarily made. *People v Cheatham*, 453 Mich 1, 27; 551 NW2d 355 (1996). Where a trial court reaches the right result, albeit for the wrong reason, this Court will not reverse. *People v Brake*, 208 Mich App 233, 242 n 2; 527 NW2d 56 (1994).

Next, defendant argues that he was denied a fair trial by prosecutorial misconduct because the prosecutor knowingly presented false testimony regarding the timing of the events surrounding his arrest and his statements to the police.<sup>3</sup> Because defendant failed to object at trial, review is foreclosed unless the prejudicial effect of the prosecutor’s conduct could not have been cured by an appropriate instruction or where failure to review the issue will result in a miscarriage of justice. *People v Ullah*, 216 Mich App 669, 679; 550 NW2d 568 (1996).

We find no merit in this claim. The record does not factually support defendant’s claim that the testimony in question was false. At the evidentiary hearing in the related case, Officer Cornell testified that his interview of defendant was completed at 12:55 p.m. He was not questioned with respect to when defendant was read his *Miranda* rights. At trial, Cornell testified that he was not sure of the exact time that the *Miranda* rights were read to defendant, but that the rights were read prior to the interview. He acknowledged that the time stated on the advice of rights form and the investigative interview form was 12:55 p.m. On the basis of this record, we cannot conclude that the prosecutor presented false testimony.

Next, defendant claims that he was denied his constitutional right to the effective assistance of counsel. Because defendant did not raise this issue in a motion for a new trial or an evidentiary hearing, appellate review is precluded unless the alleged deficiencies in representation are sufficiently detailed in the existing record to allow this Court to reach and decide the claims. *People v Hoag*, 460 Mich 1, 5; 594 NW2d 57 (1999), citing *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973); *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). Although we agree that defense counsel’s performance fell below an objective standard of reasonableness when he made certain allegations during his opening statements but failed to substantiate the allegations at trial, and that counsel’s conduct cannot be explained or excused as trial strategy, *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996); *People v Ho*, 231 Mich App 178, 191; 585 NW2d 357 (1998), after having carefully reviewed the record, we conclude that defendant has failed to show that there is a reasonable probability that, but for the alleged deficiencies, the outcome of trial would have been different or that he was denied his right to a fair trial. *Hoag*, *supra* at 5-6.

Next, defendant claims that the jury was improperly instructed on how it should consider lesser offenses. Defendant failed to object to the court’s instructions at trial and, therefore, failed to preserve this issue for appeal. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). To

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<sup>3</sup> Defendant's argument regarding the prosecutor’s alleged presentation of false evidence appears in both defendant's original appellate brief and his supplemental brief.

avoid forfeiture of this unpreserved issue, defendant must show plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

According to *People v Handley*, 415 Mich 356, 361; 329 NW2d 710 (1982), a jury should be instructed to consider the principal charge first, and should turn to the lesser offenses only if it fails to acquit or convict on the principal charge, *or cannot agree whether the defendant is guilty of the principal charge*. While we agree that the trial court failed to instruct the jury in conformity with *Handley*, defendant has not shown that the error affected his substantial rights, i.e., affected the outcome of the proceedings. *Carines, supra*. Although defendant was entitled to an instruction on the lesser offense of simple possession, the primary defense theory at trial was that defendant did not possess the cocaine and was not involved in any drug transaction. In his statement, defendant admitted that he was in the process of delivering the cocaine when he was stopped by the police. In this context, we are satisfied that the alleged instructional error did not affect the outcome of the proceedings and therefore, did not affect defendant's substantial rights. Thus, appellate relief is not warranted.

Defendant next argues that he is entitled to resentencing because the sentence imposed was based on inaccurate information and was disproportionate. We note that, as an habitual offender, defendant may not challenge the scoring of the sentencing guidelines for the underlying drug offense. *People v Williams*, 223 Mich App 409, 412; 566 NW2d 649 (1997); *People v Edgett*, 220 Mich App 686, 694-695; 560 NW2d 360 (1996). Furthermore, to the extent defendant contends that he was sentenced on the basis of inaccurate information, we disagree. The record amply supports the trial court's determinations that the offense involved circumstances suggesting drug trafficking and that the offense was part of a pattern of illegal conduct from which defendant derived a substantial portion of his income. Further, objectively considered in light of the circumstances of this offense and defendant's prior criminal history, we find that defendant's sentence for possession with intent to deliver cocaine does not violate the principle of proportionality. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990); *People v Green*, 228 Mich App 684, 698; 580 NW2d 444 (1998).

Nonetheless, we agree that defendant was entitled to be sentenced by the judge who presided at his jury trial if he was reasonably available. *People v Robinson*, 203 Mich App 196, 197-198; 511 NW2d 713 (1993); *People v Humble*, 146 Mich App 198, 200; 379 NW2d 422 (1985). The record is silent as to whether Judge Simon, a visiting judge who presided at defendant's trial, was reasonably available at the time defendant was sentenced. Further, there is no indication in the record that defendant waived his right to be sentenced by Judge Simon or was aware that he would be sentenced by Judge Sullivan. Therefore, we remand this case to the circuit court with the direction that defendant be resentenced before Judge Simon, if he is reasonably available. *Robinson, supra* at 197-198, n 1; *Humble, supra*. However, if Judge Simon is not reasonably available, then defendant's sentences are affirmed.

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

/s/ Martin M. Doctoroff

/s/ David H. Sawyer

/s/ Mark J. Cavanagh