STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAULYS ENRIQUE CHICOPOLO, a/k/a DAULYS ENRIQUE CHICOPOLA,

Defendant-Appellant.

UNPUBLISHED
September 26, 2000

No. 213984
Genesee Circuit Court
LC No. 97-001837-FC

Before: Collins, P.J., and Jansen and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession with intent to deliver 650 grams or more of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i), delivery of 225 grams or more, but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii), and possession with intent to deliver less than fifty grams of heroin, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Defendant was sentenced to life imprisonment for the possession with intent to deliver over 650 grams or more of cocaine conviction, twenty to thirty years' imprisonment for the delivery of 225 grams or more, but less than 650 grams of cocaine conviction, and ten to twenty years' imprisonment for the possession with intent to deliver less than fifty grams of heroin conviction. We affirm.

In early 1997, Flint Police Officer Alan McLeod obtained the cooperation of Richard Johnson in an investigation of illegal drug trafficking. Johnson had agreed to cooperate with police for consideration of a reduced federal drug sentence. Johnson identified defendant as someone engaged in illegal drug activity. Johnson knew defendant through his brother, who had been convicted of illegal drug activities with defendant in 1985.

During a conversation between Johnson and defendant, that was recorded by McLeod, defendant indicated that he could obtain a half kilogram or a kilogram of cocaine. Johnson and McLeod arranged for defendant to bring the drugs to Flint. Johnson provided $850 to defendant to finance defendant's travel to Flint. This money came from the police. On July 16, 1997, defendant arrived in Detroit from Miami and met Johnson in Fenton, Michigan, at the Best Western Hotel. Prior

to meeting defendant at the hotel, Johnson was equipped with an electronic transmitter and was provided $100 to rent a hotel room in which defendant and his travelling companion were to stay.

In the hotel room, defendant presented Johnson with over 1200 grams of cocaine. Defendant gave Johnson a quantity of between 300 and 500 grams of cocaine which appears to be payment for a previous $11,000 debt that defendant owed Johnson. The remaining cocaine was to be purchased by Johnson the next day. After leaving the hotel room, Johnson turned over to the police the room key and the cocaine. Johnson informed the police that defendant had more cocaine and heroin in the room. Thereafter, the police went to the hotel room where McLeod attempted to enter using the room key that was given to him by Johnson. McLeod was unable to enter because the door was dead bolted from the inside, so McLeod identified himself as "Willy," and defendant opened the door. The police entered the hotel room and arrested defendant for delivery of cocaine. Following a search of the room, the police located a package of 696 grams of cocaine and twenty grams of heroin.

Defendant's first issue on appeal is that he was denied the effective assistance of counsel. To preserve an ineffective assistance of counsel claim, a defendant must move for a new trial or an evidentiary hearing before the trial court. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989). Failure to move for a new trial or a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), usually forecloses appellate review unless the appellate record contains sufficient detail to support the defendant's claims. *Id.* In this case, defendant did not move for a new trial nor did he seek an evidentiary hearing before the trial court. Therefore, this Court must review this issue on the basis of the existing record. *Id.*

In order to establish ineffective assistance of counsel, defendant must prove that: (1) trial counsel's performance fell below on objective standard of reasonableness; and (2) but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v Hoag,* 460 Mich 1, 5-6; ____NW2d ____ (1999). Regarding the first element, competent counsel is presumed as a matter of law. *People v Wilson*, 180 Mich App 12; 446 NW2d 571 (1989). A reviewing court starts with a strong presumption that any challenged conduct was sound trial strategy. Appellate courts must remain ever mindful of the stress, intensity and rapid pace of a trial. An appellate court should refrain from substituting its collective judgment reached with the benefit of hindsight, for that of trial counsel, whose judgment was exercised in the heat of trial. As our Supreme Court warned, "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *People v Reed,*449 Mich 375, 396; 535 NW2d 496 (1995).

The second element of an ineffective assistance of counsel claim requires proof from defendant that as a direct consequence of his trial counsel's substandard performance there is "a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *Hoag, supra* at 6 quoting *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). Black's Law Dictionary, Sixth Edition, defines "probability" as:

> Likelihood; appearance of reality or truth; reasonable ground for presumption; … A condition or state created when there is more evidence in favor of the existence of a given proposition than there is against it.

Thus, it is not enough to sustain the high burden placed upon a defendant claiming ineffective assistance of counsel that there exists a possibility that had trial counsel's performance not fallen below minimal professional standards defendant would not have been convicted. Defendant must establish that it is more likely than not that but for counsel's unprofessional errors, he would have been acquitted. It is with this standard in mind that we review defendant's claims of ineffective assistance of counsel.

Defendant argues that trial counsel's performance fell below an objective standard of reasonableness when counsel failed to move for the suppression of the evidence seized from defendant's hotel room based on a warrantless arrest and search. We disagree and conclude that defendant has failed to overcome the presumption of effective assistance of counsel. The police did not have a warrant prior to entering the hotel room where defendant was staying. However, the hotel room was rented by Johnson, not defendant. Defendant testified that he knew Johnson obtained two keys for the room when he registered for the room and defendant was given only one key. Johnson gave the police consent to enter the hotel room when he gave the police the key to the room.

In *United States v Matlock*, 415 US 164; 94 S Ct 988; 39 L Ed 2d 242 (1974), the United States Supreme Court considered the validity of a police search after obtaining consent from a third person. In *Matlock*, the respondent lived in a house with Gayle Graff and her children. *Id*. at 991. After the police arrested the respondent in the front yard of the house, they asked Graff for consent to search the house without asking the respondent. Graff voluntarily consented and the police seized evidence from a bedroom that the respondent and Graff shared. *Id*. The Court, in finding that the police conducted a valid search, stated that "the consent of one who possesses common authority over premises or effects is valid against the absent, nonconsenting person with whom that authority is shared," and that consent may be shown by permission "obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *Id*. at 993. See also *United States v Rizk*, 842 F2d 111, 112-113 (CA 5, 1988) (holding that an informant who reserved, paid and used a hotel room could consent to its search).

In this case, a reasonable argument exists that the search was valid based on consent given by Johnson. Johnson rented the hotel room, retained a key for entry, and gave the key to the police. Therefore, we conclude that the facts in the existing record do not overcome the presumption of effective assistance of counsel. Defendant has failed to establish that had such a motion to suppress been asserted, the evidence in question would have been suppressed.

Defendant also argues that his defense counsel was ineffective when he failed to move for a dismissal based on entrapment. We disagree. In *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995), the court held that defense counsel's choice between two defenses with significant evidentiary problems did not constitute a denial of effective assistance of counsel. Here, defense counsel's strategy was based on a claim of duress. As noted above, we will not substitute our judgment for that of counsel regarding matters of trial strategy. *Rockey*, *supra*, 237 Mich App 76-77. Because

defense counsel's decision to pursue a defense of duress rather than entrapment was a matter of trial strategy, we find that defendant was not denied the effective assistance of counsel on that basis.

Defendant's second issue on appeal is that the evidence seized from defendant's hotel room is the fruit of an illegal search. This Court reviews constitutional questions de novo. *People v Levandoski*, 237 Mich App 612, 619; 603 NW2d 831 (1999). As noted above, there exists substantial legal and factual support from which it may be concluded that the search of defendant's hotel room was consensual. Moreover, this issue has not been properly preserved for review by this Court. Therefore, we decline to address this issue any further.

Defendant's third issue on appeal is that the trial court abused its discretion when it twice denied defendant's motions for a mistrial. We disagree. This Court reviews a lower court's decision regarding a motion for a mistrial for an abuse of discretion. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Ortiz-Kenhoe*, 237 Mich App 508, 513-514; 603 NW2d 802 (1999).

Defendant's two motions for mistrial were both based on testimony that suggested that defendant had previously engaged in illegal drug activities. Specifically, there was testimony that defendant possibly engaged in illegal drug activity in prison, and after he was released from prison, but prior to his activities that resulted in the convictions in this case. Also, Johnson testified that he had an "ongoing conspiracy" with defendant to bring drugs to Flint prior to Johnson's cooperation with the police. The trial court denied both of defendant's motions, but agreed to charge the jury with a curative instruction.

The trial court properly denied defendant's motions for mistrial. The fact that defendant was previously involved in illegal drug activity was not contested at trial. In his opening statement, defense counsel admitted that defendant had a prior drug conviction. Further, defendant testified that he pleaded guilty, in 1985, to drug conspiracy with Johnson's brother. Under the circumstances, we conclude that defendant was not unduly prejudiced by the testimony of McLeod and Johnson concerning defendant's other possible drug related activities. Because defendant admitted to prior drug involvement, we conclude that any testimony relating to possible prior illegal drug activity did not deny defendant a fair trial.

Defendant's last issue on appeal is that the cumulative effect of errors committed during trial denied defendant a fair trial. Where the defendant argues for reversal due to the cumulative effect of error, the test is whether the defendant received a fair trial. *People v Kvam*, 160 Mich App 189, 201; 408 NW2d 71 (1987). "While it is possible that the cumulative effect of a number of errors may constitute error requiring reversal, *People v Dilling*, 222 Mich App 44, 56; 564 NW2d 56 (1997), 'only actual errors are aggregated to determine their cumulative effect,'" *People v Rice (On Remand)*, 235 Mich App 429, 448; 597 NW2d 843 (1999) (citing *People v Bahoda*, 448 Mich 261, 292; 531 NW2d 659 (1995)). In this case, we find that no single alleged error warranted reversal, and defendant received a fair trial.

Affirmed.

/s/ Jeffrey G. Collins
/s/ Kathleen Jansen
/s/ Brian K. Zahra