STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 15, 2001
v	No. 222461 Kent Circuit Court
HAROLD DEMOND WIMBLEY, a/k/a DEMOND TATE, Defendant-Appellant.	LC No. 98-012030-FH

Before: Neff, P.J., and Doctoroff and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver 50 or more but less than 225 grams of a mixture containing cocaine, MCL 333.7401(2)(a)(iii). He was sentenced as a second habitual offender, MCL 769.10, to a term of twelve to forty years' imprisonment. He appeals as of right. We affirm.

Defendant first argues that his statements to the police should have been suppressed because they were coerced by promises of leniency.

When reviewing a trial court's determination of voluntariness, this Court is required to examine the entire record and make an independent determination of the issue as a question of law. *People v Wells*, 238 Mich App 383, 386; 605 NW2d 374 (1999). The voluntariness of a confession is determined by examining the police conduct involved under the totality of the circumstances. *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988); *Wells*, *supra* at 387.

Defendant's reliance on *People v Conte*, 421 Mich 704, 739; 365 NW2d 648 (1984), for the proposition that "a confession induced by a law enforcement official's promise of leniency is involuntary and inadmissible," is misplaced. In response to a similar claim, this Court, in *People v Givans*, 227 Mich App 113, 119-120; 575 NW2d 84 (1997), stated:

> Defendant has misread *Conte*. In the lead opinion in that case, three justices (WILLIAMS, KAVANAGH, AND LEVIN) did support a rule that a confession obtained by a law enforcement official's promise of leniency automatically renders the confession involuntary and inadmissible. See *id.* at 739.

> However, four justices (BOYLE, RYAN, BRICKLEY, AND CAVANAGH), and hence a majority of the Court, rejected this rule. These four held that a defendant's inculpatory statement is not inadmissible per se if induced by a promise of leniency. Rather, a promise of leniency is merely one factor to be considered in the evaluation of the voluntariness of a defendant's statements.

Considering the totality of the circumstances surrounding defendant's statements, and deferring to the trial court's superior ability to judge the credibility of the witnesses, *People v Etheridge*, 196 Mich App 43, 57; 492 NW2d 490 (1992), we conclude that defendant's statements were voluntary.

Defendant also claims that the charges against him should have been dismissed, or his statements suppressed, because the police reneged on an alleged agreement whereby he could "work off" his charges by acting as an informant. Defendant maintains that he fulfilled his end of the agreement by setting up transactions that resulted in the prosecution of several other individuals. Because defendant failed to raise this issue in the trial court, appellate relief is not warranted absent a showing of plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Initially, because the police do not have the authority to grant immunity from prosecution, the remedy for any failure by the police to adhere to an unauthorized promise of leniency or immunity would be suppression of evidence, not dismissal of the charges. *People v Gallego*, 430 Mich 443, 452; 424 NW2d 470 (1988). In any event, it is not plainly apparent from the record that defendant cooperated with the police in good faith. On the contrary, the record demonstrates that defendant admittedly lied to the police about transactions that were to occur, and later refused to turn himself in on the warrants. Thus, no plain error has been shown.

Defendant next argues that the warrantless seizure of cocaine from his motel room was not authorized under the plain view exception to the warrant requirement, because the discovery was not "inadvertent." We disagree. Because defendant did not preserve this issue by raising it in the trial court, he must demonstrate a plain error that affected his substantial rights. *Carines*, *supra*. Here, defendant has not demonstrated any error.

"The plain view doctrine allows police officers to seize, without a warrant, items in plain view if the officers are lawfully in a position from which they view the item, and if the item's incriminating character is immediately apparent." *People v Champion*, 452 Mich 92, 101; 549 NW2d 849 (1996). There is no "inadvertence" requirement to the plain view doctrine. *Id*. at 101 n 6. Thus, for purposes of the plain view exception, it is immaterial whether Officer Frederick knew before entering defendant's motel room that he would probably find cocaine. Officer Frederick, having received defendant's express permission and consent to enter the motel room, was lawfully in a position from which he was able to observe the cocaine in plain view. Further, based on Frederick's experience and education as an officer, its incriminating character was "immediately apparent." Therefore, Officer Frederick could properly seize the cocaine. *Id.* at 102.

Next, defendant argues that the trial court clearly erred in finding that he had been advised of his *Miranda*[1] rights before giving his first statement at the motel. Defendant further argues that, although he admittedly received his *Miranda* rights before giving the second statement, that statement should still be suppressed as the fruit of the improperly obtained first statement. We disagree.

Conflicting testimony was presented regarding whether Officer Frederick orally advised defendant of his *Miranda* rights before defendant gave his first statement at the motel. Although defendant denied being advised of his rights, Officer Frederick maintained that the requisite advice was given. The trial court resolved this credibility dispute in favor of Officer Frederick. Because we defer to the trial court's superior opportunity to judge the credibility of the witnesses, *Etheridge*, *supra* at 57, we find no clear error in the trial court's determination that defendant was advised of his *Miranda* rights before giving his first statement at the motel. *People v Kaslowski*, 239 Mich App 320, 323; 608 NW2d 539 (2000); *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997). Because the first statement was properly obtained, defendant's "fruit of the poisonous tree" argument with respect to his second statement must fail. *People v Raper*, 222 Mich App 475, 481; 563 NW2d 709 (1997).

Next, defendant argues that he was denied a fair trial because the prosecutor made an improper comment to the jury and, although the trial court sustained defendant's objection to the remark, it refused to reinstruct the jury on the prosecutor's burden of proof, his right to remain silent and the presumption of innocence. We disagree. A preserved, nonconstitutional error is not a ground for 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." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999), quoting MCL 769.26.

Considering that the challenged remarks were responsive to defense counsel's remarks during closing argument, *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992), that the trial court sustained defense counsel's objection at the time, and that the court had just recently instructed the jury on the prosecutor's burden of proof, defendant's right to remain silent, and the presumption of innocence, it is not more probable than not that a different outcome would have resulted had the court repeated the instructions as requested. *Lukity*, *supra*. Accordingly, reversal is unwarranted.

Next, defendant was not entitled to a preliminary examination on the misdemeanor charge of possession of marijuana, MCL 767.42(1). Because defendant was bound over on the felony charge of possession with intent to deliver cocaine, the trial court had jurisdiction to try defendant on both the felony and the misdemeanor marijuana charge. *People v Bidwell*, 205 Mich App 355, 358; 522 NW2d 138 (1994).

---

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

Finally, the record does not factually support defendant's claim that the trial court refused to permit defendant to accept a plea offer on the basis that it was untimely.

Affirmed.

/s/ Janet T. Neff
/s/ Martin M. Doctoroff
/s/ Kurtis T. Wilder