STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD C. JAMES,

Defendant-Appellant.

UNPUBLISHED
October 2, 2001

No. 215407
Wayne Circuit Court
Criminal Division
LC No. 97-009702

Before: Owens, P.J., and Holbrook, Jr. and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of 225 grams or more, but less than 650 grams, of cocaine, MCL 333.7403(2)(a)(*ii*), delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(*iv*), and possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(*v*).[1] The trial court initially sentenced defendant to prison terms of twenty to thirty years, one to twenty years, and one to four years for his convictions, respectively. However, these sentences were immediately set aside and the trial court sentenced defendant as a second habitual offender, MCL 769.10, to a single term of twenty to thirty years' imprisonment. Defendant appeals as of right. We affirm.

Defendant argues that the trial court erred when it refused to sever count 1 from the remaining two counts. Defendant argued below that severance was appropriate under either MCR 6.120(B) or MCR 6.120(C). MCR 6.120(B) states that a trial court, upon request by a defendant, must sever unrelated offenses for separate trials. MCR 6.120(B) further states that 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." In the instant matter, the record indicates that all three counts involved defendant's possession of cocaine on November 7, 1997, for purposes other than his personal use. It may be fairly inferred from the facts that counts 2 and 3 arose from defendant's contemporaneous possession of the large amount of cocaine kept at his accomplice's house—the substance of count 1. At the very least, it was the arrest for counts 2

[1] For ease of reference, the counts will be referred to herein as follows: MCL 333.7403(2)(a)(*ii*) ("count 1"); MCL 333.7401(2)(a)(*iv*) ("count 2"); and MCL 333.7403(2)(a)(*v*) ("count 3").

and 3 that led to the police investigation that led to the charges in count 1. Accordingly, we do not believe that the trial court erred by finding that the offenses were related under the court rule.

Nevertheless, even related offenses may be severed where "appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense." The trial court rejected defendant's contention that the multiple counts would lead to juror confusion or prejudice to the defendant. A trial court's refusal to sever charges under MCR 6.120(C) is reviewed for an abuse of discretion. *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997). Because the subject matter of each count was so straightforward, we do not believe that the multiple counts carried any potential for confusion among the jurors. Moreover, refusing to sever the counts did not prejudice defendant because, even if the counts had been severed, evidence of the facts behind the other counts would still have been admissible at each of the trials. See *id.* Accordingly, we conclude that the trial court did not err by denying defendant's motions for severance.

Defendant next argues that the trial court deprived him of his constitutional right to present a defense when it precluded certain testimony from a defense witness. The excluded testimony was offered to show that a detective involved in this case had allegedly violated the constitutional rights of the witness two years before the trial. Defendant suggested that the evidence was relevant because it tended to show that the detective was "out to get" defendant.

The Fourteenth and Sixth Amendments of the US Constitution guarantee a defendant in a criminal proceeding "a meaningful opportunity to present a complete defense." *Crane v Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636, 645 (1986), quoting *California v Trombetta*, 467 US 479, 485; 104 S Ct 2528; 81 L Ed 2d 413 (1984). However, as the Court explained in *Crane, supra* at 689-690, an evidentiary ruling does not ordinarily rise to the level of a constitutional violation:

> We acknowledge also our traditional reluctance to impose constitutional constraints on ordinary evidentiary rulings by state trial courts. In any given criminal case the trial judge is called upon to make dozens, sometimes hundreds, of decisions concerning the admissibility of evidence. As we reaffirmed earlier this Term, the Constitution leaves to the judges who must make these decisions "wide latitude" to exclude evidence that is "repetitive . . . , only marginally relevant" or poses an undue risk of "harassment, prejudice, [or] confusion of the issues." *Delaware v Van Arsdall*, 475 US 673, 679; 89 L Ed 2d 674; 106 S Ct 1431 (1986). Moreover, we have never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability--even if the defendant would prefer to see that evidence admitted. *Chambers v Mississippi*, 410 US 284, 302, 35 L Ed 2d 297, 93 S Ct 1038 (1973). Nonetheless, without "signal[ing] any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures," we have little trouble concluding on the facts of this case that the blanket exclusion of the proffered testimony about the circumstances of petitioner's confession deprived him of a fair trial. [*Id*., at 302-303, 35 L Ed 2d 297, 93 S Ct 1038.]

We review evidentiary decisions for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

Here, the trial court excluded the witness' testimony about the incident and resulting lawsuit on the basis of relevancy. Only relevant evidence—evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence—is properly admissible. MRE 401, 402. The trial court concluded that the evidence was too remote in time to be relevant. We agree. Moreover, as noted above, the incident involved a police officer and a third party, and did not involve any conduct directed at defendant. Thus, we are not persuaded that the trial court abused its discretion by excluding evidence of the alleged incident. *Lukity, supra at 488.* We also reject defendant's claim that the trial court's evidentiary ruling deprived defendant of his constitutional right to present a defense. The trial court's ruling did not amount to a blanket exclusion of all evidence questioning the detective's credibility or suggesting that the detective fabricated the charges against defendant. Accordingly, the trial court did not deprive defendant of his constitutional right to present a defense.

Defendant next argues that the trial court erred when it admitted a statement of codefendant Derrick Glenn as a prior consistent statement under MRE 801(d)(1)(B). The prosecution concedes, and we agree, that the statement was not admissible under that rule. See *People v Lewis*, 160 Mich App 20, 29-30; 408 NW2d 94 (1987). On the other hand, the prosecution argues that the statement was admissible under MRE 106 because defense counsel referred to portions of Glenn's statement during cross-examination. Under MRE 106, however, an entire document is not admissible merely because the opposing party refers to portions of it. Instead, the test is whether the remaining parts of the document "ought in fairness" to be considered contemporaneously with the portions mentioned. *People v Herndon*, ___ Mich App ___; ___ NW2d ___ (Docket No. 216239, issued 6/15/2001), slip op at 21, n 85. We are not persuaded that the prosecutor has sufficiently explained why "fairness" required that the entire statement be admitted.

However, even if it was error to admit Glenn's statement under MRE 801(d)(1)(B), and the statement was not admissible under MRE 106, reversal is not required. Because Glenn testified, the jury was able to evaluate his testimony, which did not vary from his statement in any significant way. In other words, the statement did not reveal any critical facts that the jury did not hear from Glenn himself. To the extent that Glenn's statement tended to show that he was credible and was not lying in order to obtain a deal with the prosecutor, this was cumulative to the detective's testimony that Glenn was cooperative and assisted in locating the cocaine in Glenn's home before any agreement was made. Thus, under these circumstances, any prejudice caused by the admission of the statement was minimal and did not affect the outcome. *People v McCray,* 245 Mich App 631, 642-643630 NW2d 633 (2001); *People v Rodriguez,* 216 Mich App 329, 332; 549 NW2d 359 (1996). Therefore, reversal is not warranted. *Lukity, supra* at 495-496.

Defendant also argues that the trial court erred by not suppressing evidence obtained during a search of his apartment, after it had previously ordered suppression of evidence obtained during a search of his parents' home. We disagree.

Probable cause to search defendant's apartment was not dependent upon the information obtained from the search of defendant's parents' home. According to the affidavit offered in support of the search warrant for defendant's apartment, the search warrant was based on Glenn's statements and the circumstances surrounding defendant's arrest. The affidavit established that Glenn had personal knowledge of the relevant facts, which is all that is required when the affiant is a named informant. MCL 780.653; *People v Powell*, 201 Mich App 516, 522; 506 NW2d 894 (1993). The fact that Glenn was a suspect in this case was disclosed in the affidavit; however, this does not preclude reliance on the information he provided. See MCL 780.653. Moreover, after redacting any of the tainted information relating to the search of defendant's parents' home, the affidavit still established probable cause to search defendant's apartment. *People v Griffin*, 235 Mich App 27, 42-43; 597 NW2d 176 (1999). We note that defendant's address was not discovered because his apartment keys were found in his parents' home. Rather, Glenn provided the police with defendant's address. Accordingly, the trial court did not err in denying defendant's motion to suppress the evidence obtained from his apartment.

Alternatively, defendant argues that, even if the search of his apartment was constitutional, the trial court abused its discretion in admitting certain evidence obtained during the search of the apartment. The evidence included a scale, marijuana, and other drug-related paraphernalia. Defendant argues that the evidence should have been excluded because it was only marginally relevant and unduly prejudicial.

Under MRE 403, relevant evidence may be excluded if the probative value is substantially outweighed by the danger of unfair prejudice. *People v Sabin (After Remand)*, 463 Mich 43, 57-58; 614 NW2d 888 (2000). Unfair prejudice does not mean any prejudice, but "refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock." *People v Goree*, 132 Mich App 693, 702-703; 349 NW2d 220 (1984). See also *People v Vasher*, 449 Mich 494, 501-502; 537 NW2d 168 (1995). The jury was instructed that the evidence found in defendant's apartment was associated only with the personal use of drugs, and the prosecution did not improperly use the evidence. Defendant has not shown that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. Consequently, the trial court did not abuse its discretion by refusing to exclude the evidence. *Lukity, supra* at 488.

Defendant also claims that he was denied his constitutional right to effective assistance of counsel based on several purported errors. There is a strong presumption that counsel was effective. *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). To overcome this presumption, defendant must establish that "(1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms, and (2) a reasonable probability exists that, but for counsel's unprofessional error, the outcome of the proceedings would have been different." *Id.* The burden is on defendant to produce factual support for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant contends that defense counsel was ineffective for failing to secure the appearance of a witness, Gerald Gregory, at a suppression hearing. It is not apparent from the

trial record what efforts, if any, defense counsel made to secure the witness's presence at the hearing. In the absence of a factual record regarding counsel's efforts, or lack thereof, we do not believe that defendant has met his burden of proof in regard to his contention that defense counsel was ineffective for not producing this witness. Similarly, the record does not support defendant's claim that one of his attorneys was ineffective because he waited until the time of trial to review the exhibits. Defendant was represented by two attorneys at trial and there was no showing that defendant's other attorney had not reviewed the exhibits before trial. Therefore, defendant has not shown that he was prejudiced by his second attorney's failure to review the exhibits ahead of time.

Defendant also argues that his attorneys were ineffective because they failed to call a locksmith as a witness, thereby depriving him of a substantial defense. Where there is a claim that counsel was ineffective for failing to raise a defense, a defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). A substantial defense is one that might have made a difference in the trial's outcome. *Id.* We are reluctant to substitute our judgment for that of trial counsel in matters of trial strategy, and ineffective assistance of counsel will not be found merely because a strategy backfires. *People v Duff*, 165 Mich App 530, 545-546; 419 NW2d 600 (1987), quoting *People v Strong*, 143 Mich App 442, 449; 372 NW2d 335 (1985). From the facts adduced at the evidentiary hearing and the trial court record, it is apparent that defense counsel was aware of the possibility that the key found in defendant's apartment was generic and that many keys might open the firebox. In fact, counsel made that argument at trial. However, this does not explain the presence of the key in defendant's apartment. In the absence of an "alibi" for the key, we are not persuaded that the outcome would have changed based solely on the testimony of a locksmith that multiple keys would open the firebox.

Defendant further claims that his attorneys were ineffective for failing to call Theresa DeMarti as a witness. The decision regarding what witnesses to call is a matter of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). As noted above, we typically refrain from substituting our judgment for that of trial counsel. *Duff, supra* at 545-546. The testimony at the evidentiary hearing established that defense counsel made a strategic decision not to call DeMarti as a witness, concluding that her testimony would not have substantially benefited the defense and that her credibility was dubious. Thus, defendant has failed to overcome the presumption that the decision not to call DeMarti as a witness was sound trial strategy.

Next, defendant argues that he was denied a fair trial because of twenty-seven instances of prosecutorial misconduct. The test for prosecutorial misconduct is whether defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267, ns 5-7; 531 NW2d 659 (1995). Claims of prosecutorial misconduct are decided case by case. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). After reviewing each of the individual claims of misconduct, we conclude that appellate relief is not warranted. Only a few of the alleged instances of prosecutorial misconduct actually rose to that level. Of these, none were egregious

enough for us to conclude that defendant was denied a fair trial—whether considered separately or cumulatively.[2]

Finally, defendant argues that he was denied a fair trial due to the cumulative effect of multiple errors. Although a single error in a trial may not necessarily provide a basis for granting a new trial, it is possible that the cumulative effect of multiple minor errors may add up to error requiring reversal. *People v Anderson*, 166 Mich App 455, 472-473; 421 NW2d 200 (1988). The test is whether the cumulative effect of the errors deprived the defendant of a fair and impartial trial. *People v Taylor*, 185 Mich App 1, 10; 460 NW2d 582 (1990). Although there were some errors in this case, we are satisfied that defendant received a fair trial.

Affirmed.

/s/ Donald S. Owens
/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Talbot

[2] Defendant further argues that trial counsel was ineffective for not objecting to the many claimed instances of prosecutorial misconduct. Even assuming that counsel could have properly objected to some of the unchallenged remarks, defendant has failed to show that there is a reasonable likelihood that the result of the trial would have been different but for counsel's failure to object. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).