STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JESSE L. DANIELS,

Defendant-Appellant.

UNPUBLISHED
January 18, 2002

No. 223292
Monroe Circuit Court
LC No. 98-029397-FH

Before: Cooper, P.J., and Cavanagh and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of five counts of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), and one count of conspiracy to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv). Defendant was sentenced to 60 to 240 months' imprisonment on each count as a fourth habitual offender, MCL 769.12. We reverse.

Defendant first argues that the trial court abused its discretion by denying his motion for separate trials on the individual counts. We agree. A trial court's decision to deny a defendant's motion for severance is reviewed for an abuse of discretion. *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997).

A trial court is without discretion to deny a timely motion for severance of unrelated charges. MCR 6.120(B); *People v Tobey*, 401 Mich 141, 153; 257 NW2d 537 (1977). "On the defendant's motion, the court must sever unrelated offenses for separate trials." MCR 6.120(B); *People v Daughenbaugh*, 193 Mich App 506, 509; 484 NW2d 690 (1992); mod 441 Mich 867 (1992). Offenses are considered related if they are based on the (1) same conduct, or (2) a series of connected acts or acts constituting part of a single scheme or plan. MCR 6.120(B). MCR 6.120(B) is a codification of our Supreme Court's decision in *Tobey, supra.* In *Tobey*, the Court stated that:

> "[S]ame conduct" refers to multiple offenses "as where a defendant causes more than one death by reckless operation of a vehicle." "A series of acts connected together" refers to multiple offenses committed "to aid in accomplishing another, as with burglary and larceny or kidnapping and robbery." "A series of acts . . . constituting parts of a single scheme or plan" refers to a situation "where a cashier made a series of false entries and reports to the

> commissioner of banking, all of which were designed to conceal his thefts of money from the bank." [*Tobey, supra* at 151-152.]

The Court in *Tobey* then went on to specifically hold that drug deals to an undercover officer made twelve days apart were not considered a series of connected acts. *Id*. at 152. The Court further stated that "[t]he fact that here there is but one seller and one purchaser cannot alone 'connect' acts twelve days apart." *Id*. Moreover, the Court did not consider the acts part of a common scheme or plan because the officer always called for the narcotics and affirmatively initiated the purchases. *Id.* at 153.

Solely on the basis of the Supreme Court's findings in *Tobey*, we find that the facts in the present case indicate that defendant had the right to severance of at least three of his six counts. The three drug offenses that occurred on May 19, 1998, can be joined as a series of connected acts. These purchases took place the same night, at the same place, and with the same people. In fact, the first two purchases were part of the same overall transaction and the third purchase, later that evening, was actually set up during the first transaction. Thus, there was a scheme or plan to continue to sell drugs that evening to Officer Velliquette.

However, while the transactions on May 22, 1998, and June 15, 1998, were similar in character, they were not connected to the May 19, 1998 transactions or part of a common scheme or plan. Similar to *Tobey, supra* at 153, the record indicates that Officer Velliquette initiated all of the cocaine purchases on these dates. Rather, the only connection between these transactions is the fact that the same people and place were involved. Thus, according to *Tobey*, defendant had a right to severance of these offenses.

Because MCR 6.120(B) and *Tobey* mandate severance, the trial court should have granted defendant's motion. Accordingly, we reverse defendant's convictions and remand for new trials.

Because defendant's remaining issues may arise on retrial, we will discuss them briefly.

Defendant's second issue on appeal is that the trial court abused its discretion in denying defense counsel's motion to withdraw and defendant's request for substitution of counsel. We disagree. This Court reviews a trial court's decision to deny a defense attorney's motion to withdraw and a request for substitution of trial counsel for an abuse of discretion. *People v Echavarria*, 233 Mich App 356, 368-369; 592 NW2d 737 (1999).

The trial court must consider the following factors in making this decision:

> (1) whether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was negligent is asserting his right, (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision. [*Id.* at 369.]

Upon reviewing the record, it is clear that the relationship between defendant and his counsel was strained. However, in light of the other factors that must be considered we cannot

say that the trial court abused its discretion. Defendant was negligent in failing to assert his right to counsel earlier than the day of trial. Although defendant's right to choose counsel is an essential element of the Sixth Amendment right to assistance of counsel, this right is not absolute. *People v Krysztopaniec*, 170 Mich App 588, 598; 429 NW2d 828 (1988). Further, the defendant's right to alternate counsel is balanced with the public's interest in the prompt and efficient administration of justice in order to determine whether the defendant's right to choose counsel has been violated. *Id.* To grant defense counsel's motion on the morning of trial would have been extremely disruptive to the trial proceedings. Moreover, the trial court was convinced that defendant was purposely refusing to cooperate with his counsel as a delay tactic.[1] Defendant also fails to demonstrate any prejudice resulting from the trial court's decision. Indeed, defense counsel indicated to the trial court that he would continue to represent defendant to the best of his ability. For these reasons, we find no abuse of discretion by the trial court.

Next, defendant asserts that his sentence was disproportionate. We disagree. We review whether an habitual offender's sentence violated the principle of proportionality for an abuse of discretion. *People v Edgett*, 220 Mich App 686, 694; 560 NW2d 360 (1996). However, "the guidelines have 'no bearing' with regard to whether an abuse has occurred." *Id.* A trial court does not abuse its discretion when it sentences an habitual offender within the statutory limits established by the Legislature and the underlying felony, in the context of a defendant's previous felonies, evidences an inability to conform to society's laws. *People v Hansford*, 454 Mich 320, 326; 562 NW2d 460 (1997).

The Legislature has authorized limits for fourth habitual offenders. MCL 769.12(1)(a). The trial court sentenced defendant to consecutive terms, as a fourth habitual offender, of 60 to 240 months' imprisonment on each count. According to MCL 769.12(1)(a) "[i]f the subsequent felony is punishable upon a first conviction by imprisonment for a maximum term of 5 years or more or for life, the court . . . may sentence the person to imprisonment for life or for a lesser term." Defendant's sentences fell within the limits authorized by the Legislature for a fourth habitual offender. Further, the trial court did not abuse its discretion in finding defendant unable to conform to the laws of society. The trial court properly considered defendant's background in determining the sentences, as well as defendant's previous convictions of armed robbery, receiving and concealing stolen property, and felonious assault. While these convictions were old, the trial court noted that they were also assaultive and serious. The trial court also noted the trial testimony demonstrating that there was an intention to open a "supermarket" for various narcotics. Thus, we find that the trial court exercised proper discretion in sentencing defendant.

Defendant also contends that the prosecution's misconduct is error that requires reversal. We disagree. Specifically, defendant claims that the prosecutor vouched for the credibility of a police witness. We review unpreserved constitutional issues for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 764, 774; 597 NW2d 130 (1999).

A prosecutor may not vouch for a witness' credibility or suggest that the government has special knowledge that a witness testified truthfully. *People v Knapp*, 244 Mich App 361, 382;

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[1] We note that this was defendant's third attorney.

624 NW2d 227 (2001). However, a prosecutor may argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997).

During his closing argument, the prosecutor stated:

> So let's look at the testimony in the case and essentially it comes from Det. Velliquette who *I submit to you is quite credible* and his testimony very believable and should be believed.

This comment constituted improper vouching because the prosecutor gave an opinion regarding Officer Velliquette's truthfulness. However, this error did not affect defendant's substantial rights by prejudicing the outcome of the proceedings. Officer Velliquette testified to five drug transactions that took place with defendant. The suspected cocaine from these transactions tested positive at the lab and was admitted into evidence before the jury. Moreover, the trial court specifically instructed the jury that it was their duty to weigh the credibility of witnesses and that the lawyers' statements and arguments should not be considered as evidence. Thus, this statement did not affect defendant's substantial rights.

Defendant further purports that he was denied effective assistance of counsel. We disagree. Because defendant did not request a Ginther[2] hearing, this Court's review is limited to errors apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). An unpreserved constitutional error only warrants reversal when it was a plain error affecting a defendant's substantial rights. *Carines, supra* at 764, 774.

To establish ineffective assistance of counsel, defendant must prove: (1) that his counsel's performance was so deficient that he was denied his Sixth Amendment right to counsel and he must overcome the strong presumption that counsel's performance was not sound trial strategy; and (2) that this deficient performance prejudiced him to the extent that, but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Defendant claims that he was prejudiced by his defense counsel's failure to object to the prosecution's reference to Officer Velliquette's credibility. However, we find that counsel's failure to object to this statement did not amount to ineffectiveness, because, as previously noted, the challenged remarks failed to deprive defendant of his substantial rights and because the lack of an objection may have been trial strategy. *Carines, supra* at 774; *People v Ullah*, 216 Mich App 669, 685; 550 NW2d 568 (1996). Nonetheless, the jury was instructed that it was their duty to weigh a witnesses' credibility and that the lawyers' statements and arguments were not evidence. See *People v Mette*, 243 Mich App 318, 330-331; 621 NW2d 713 (2001)

Lastly, defendant claims that the trial court abused its discretion by refusing to let defense witness Poisson testify at trial. We disagree. We review a trial court's decision to exclude evidence for an abuse of discretion. *People v Brownridge*, 459 Mich 456, 460; 591 NW2d 26 (1999).

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[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

It is inherently prejudicial for a witness, who is substantially related to the criminal episode at issue, to testify at trial when the trial judge knows that the witness will assert the Fifth Amendment privilege. *People v Poma,* 96 Mich App 726, 733; 294 NW2d 221 (1980). If such a witness invokes the Fifth Amendment privilege at trial, critical weight will be added to the prosecution's case, because "his 'statement' is thus admitted without opportunity for the defendant to engage in necessary confrontation and cross-examination." *Id.* at 730-731. Accordingly, in a hearing outside the presence of the jury, the trial court must explain the self-incrimination privilege to the witness and determine if the witness actually has a legitimate privilege. *Id.* at 732.

As a codefendant, Poisson was substantially related to the criminal episode. For this reason, the trial court held a hearing outside of the jury's presence to determine whether Poisson understood the ramifications of asserting his privilege or testifying on behalf of defendant. Poisson's counsel informed the trial court that Poisson was advised of his right to remain silent under the Fifth Amendment, and that counsel had strongly advised him not to testify on defendant's behalf. The trial court also instructed Poisson on his Fifth Amendment rights and the potential ramifications of his testimony to his own pending criminal trial. Poisson repeatedly told the trial judge that he refused to waive his right not to testify and that he would invoke his Fifth Amendment privilege when necessary. Thus, we find that the trial court properly exercised its discretion in not allowing Poisson to testify on behalf of defendant.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ Jane E. Markey