STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 23, 2004
v	No. 244206 Calhoun Circuit Court
MICHAEL DEAN CARAWAY, Defendant-Appellant.	LC No. 01-004982-FC

Before: Sawyer, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of delivery of 650 or more grams of cocaine, MCL 333.7401(2)(a)(i). He was sentenced to a minimum term of twenty years' imprisonment and a maximum of "life or any term of years." He appeals as of right. We affirm defendant's conviction and remand for resentencing.

Defendant first argues that he is entitled to resentencing because the sentence imposed by the trial court violated MCL 769.9(2). We agree.

The trial court sentenced defendant to a minimum term of twenty years' imprisonment and to a maximum of "life or any term of years." MCL 769.9 provides:

> (1) The provisions of this chapter relative to indeterminate sentences shall not apply to a person convicted for the commission of an offense for which the only punishment prescribed by law is imprisonment for life.
>
> (2) In all cases where the maximum sentence in the discretion of the court may be imprisonment for life or any number or term of years, the court may impose a sentence for life or may impose a sentence for any term of years. If the sentence imposed by the court is for any term of years, the court shall fix both the minimum and the maximum of that sentence in terms of years or fraction thereof, and sentences so imposed shall be considered indeterminate sentences. *The court shall not impose a sentence in which the maximum penalty is life imprisonment with a minimum for a term of years included in the same sentence.* [Emphasis added.]

The trial court's sentence violates the plain language of MCL 769.9(2). Resentencing is required. *People v Boswell*, 95 Mich App 405, 410-411; 291 NW2d 57 (1980).

Defendant additionally argues that his statements to the police were inadmissible hearsay and, thus, the trial court erroneously admitted his confession into evidence. This allegation of error is unpreserved because defendant did not object to the admission of his confession at trial. *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995). Accordingly, we review this issue for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). A defendant's statements are not hearsay and are admissible as admissions of a party opponent. MRE 801(d)(2). See *People v Kowalak (On Remand)*, 215 Mich App 554, 556-557; 546 NW2d 681 (1996). Therefore, defendant has not shown plain error.

Defendant next argues that his conviction was based on the false testimony of Detective Pompey and that the prosecutor's failure to correct Pompey's false testimony denied him his right to due process. This issue is also unpreserved because it was never raised before or decided by the trial court. *Connor, supra*. Therefore, it is reviewed for plain error. *Carines, supra*.

A prosecutor may not knowingly use false testimony to obtain a conviction and may not allow false testimony to stand uncorrected. *People v Lester*, 232 Mich App 262, 276-277; 591 NW2d 267 (1998). See also *People v Wiese*, 425 Mich 448, 453-454; 389 NW2d 866 (1986). Where false testimony is elicited or stands uncorrected, a new trial may be required, but only if the false testimony "could in any reasonable likelihood have affected the judgment of the jury." *Lester, supra* at 280.

In this case, Pompey testified about the items recovered from Cox's home during the execution of a search warrant. He stated that "another" half kilogram of cocaine was observed and located. Pompey later testified that he took a picture of the half kilogram, which was located in a cupboard in Cox's kitchen. On appeal, both the prosecutor and defendant agree that the cocaine recovered from Cox's residence weighed 130 grams and was not equal to half a kilogram. Clearly, Pompey provided incorrect testimony as to the amount of cocaine recovered from Cox's house. Further, it is undisputed that the prosecutor did not correct Pompey's misstatements. It is also undisputed that the prosecutor had a laboratory report, which contained the correct weight of the cocaine. Thus, she possessed the information to correct the misstatement. We note, however, that nothing in the record shows that Pompey deliberately misstated the evidence, that the prosecutor knowingly ignored the misstatement, or that the prosecutor knowingly used this false testimony to obtain a conviction. The prosecutor's focus was directed principally at the amount of money recovered in Cox's house, not the amount of cocaine recovered. And, the laboratory report reflecting the correct weight of the cocaine was admitted into evidence for the jury's consideration. Therefore, the correct weight was available to the jury. Nevertheless, we agree with defendant that plain error exists because Pompey offered false testimony, which went uncorrected.

This plain error does not require a new trial, however, because there is no reasonable likelihood that Pompey's misstatement regarding the amount of cocaine found in Cox's house affected the jury's verdict. Defendant confessed that he and Sinclair purchased half a kilogram of cocaine from Cox. The most important item recovered from Cox's house was approximately $15,000 in cash, which was found in a diaper-wipe box. Pompey identified the cash in photographs and testified that it was significant because it was consistent with the amount of

money necessary to purchase a half kilogram of cocaine. The fact that cocaine was found in Cox's house was also significant because it confirmed that he was involved with the commodity of cocaine. The amount of cocaine recovered was not as significant as the fact that cocaine was found. The sum of $15,000, along with the finding of any amount of cocaine, supported that Cox recently sold half a kilogram of cocaine, which was consistent with defendant's confession. Accordingly, we conclude that Pompey's uncorrected misstatement regarding the amount of cocaine found in Cox's house did not affect defendant's substantial rights and, therefore, does not require a new trial. *Lester, supra*; *Carines, supra*.

Defendant additionally challenges the effectiveness of trial counsel. He raises numerous claims of error, including that counsel failed to properly investigate the case and potential witnesses, that counsel failed to properly notify the prosecutor about defense witnesses, that counsel failed to challenge defendant's confession, that counsel failed to object to testimony that the police had dealt with defendant on other matters in the past, that counsel failed to object to Pompey's false testimony, that counsel failed to seek disclosure of defendant's statements to the police, that counsel failed to object to the prosecution's expert testimony, that counsel failed to object to evidence of Sinclair's other bad acts, that counsel failed to object to the prosecutor's improper voir dire and arguments, that counsel failed to object when the prosecutor elicited a witness' opinion about his wife's veracity, that counsel's defense of poverty was unsound, and that counsel should have called defendant to testify as a witness. Our review of this issue is limited to errors apparent on the record because no *Ginther*[1] hearing was held below.[2] *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). It is presumed that counsel was effective and defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

We have considered the plethora of alleged errors by counsel and conclude that defendant has failed to meet his burden of demonstrating that he was deprived of a fair trial. The majority of his allegations are briefed in a cursory fashion with little explanation or rationalization as to why counsel's performance should be found deficient. Furthermore, defendant has made no attempt to argue or show that, but for the alleged errors, there is a reasonable probability that the outcome of his trial would have been different. For that reason alone, he has failed to meet his

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

[2] On June 6, 2003, defendant filed a supplemental brief on appeal, raising numerous issues and requesting a new trial or, in the alternative, remand for a hearing on the claims of ineffective assistance of counsel. Defendant also filed two separate motions to remand in June 2003. Those motions were denied by this Court. *People v Caraway*, unpublished order of the Court of Appeals, issued July 23, 2003 (Docket No. 244206).

burden of demonstrating that he did not receive the effective assistance of counsel. Reversal is not warranted. *Pickens, supra*.

We will address, however, some of defendant's more significant challenges. First, defendant claims that counsel should have challenged his confession on grounds that it was involuntary and that an audio or video recording should have been made. Voluntariness is determined by examining the totality of all the circumstances surrounding a statement to determine if it was the product of an essentially free and unconstrained choice by its maker. *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). The list of factors to be considered includes

> the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Id*. at 334 (citations omitted).]

A promise of leniency is also a factor to consider. *People v Shipley*, 256 Mich App 367, 373; 662 NW2d 856 (2003). The absence or presence of any one factor is not conclusive on the issue of voluntariness. *Cipriano*, *supra*. "The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made." *Id*.

The record as developed does not support defendant's claim that his confession was involuntary. Defendant was taken into custody on the night of September 13, 2001, and was taken to the Southwest Enforcement Team (SWET) headquarters in an undisclosed location. He was apprised of his *Miranda*[3] rights, indicated that he understood his rights, and indicated that he was willing to waive them.[4] Defendant's interview took place within ten minutes after he was placed in custody, and it lasted less than one hour. There was no evidence that defendant was too young or unintelligent to understand his rights. Nor was there evidence that defendant was promised leniency. In fact, the interview "went sour" after defendant was informed that the officers did not have authority to make him a deal. Further, defendant did not appear to be under the influence of intoxicants, he was not handcuffed, he was not under arrest for anything related

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

[4] At trial, Pompey paraphrased the warnings he gave to defendant. He did not testify to a verbatim recitation, and the issue of the warnings was not fully explored at trial. While defendant challenges the paraphrased version on appeal, arguing that it was incomplete and inaccurate, the record does not support his claim that Pompey failed to accurately and adequately apprise him of his rights on September 13, 2001.

to SWET's investigation, and he was in a calm atmosphere. From this record, we cannot conclude that a suppression motion would have been successful. Counsel is not required to make a meritless motion. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

In addition, defendant argues that counsel should have challenged his confession because no audio or video recording was made. There is no requirement that a police interview be recorded and comprehensively presented to the jury. Indeed, this Court has expressly rejected the argument that police interviews must be recorded. *People v Fike*, 228 Mich App 178, 183-186; 577 NW2d 903 (1998). Counsel was not required to make a meritless motion. *Darden*, *supra*.

Defendant also argues that counsel chose an ill-conceived defense, specifically that he was too poor to be a drug dealer. Defense counsel offered witness Paul Heise to testify that defendant lived with Heise and his family for a period of time. Heise never saw any evidence that defendant was a drug dealer. Defendant never had any paraphernalia or other drug items. Further, defendant never had large amounts of cash, which one would normally expect a drug dealer to have. Heise's wife offered similar testimony when called as a prosecution witness. Counsel's decision to defend the case by arguing that defendant did not exhibit the outward signs of a drug dealer was a matter of trial strategy, which we will not second guess. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). We acknowledge that, after Heise testified, the prosecutor called defendant's former girlfriend as a rebuttal witness to testify that defendant always had lots of money and bought her presents. Nevertheless, reversal is not required because "even if defense counsel was ultimately mistaken [with respect to strategy], this Court will not assess counsel's competence with the benefit of hindsight." *Id*. The fact that the defense failed does not compel a conclusion that counsel was ineffective.

We next address defendant's argument that counsel did not properly investigate his case or the potential witnesses on his behalf. The record does not support defendant's claim that counsel failed to prepare for defendant's case. Moreover, defendant has not identified any witnesses who should have been called, nor has he identified any exculpatory evidence that was left undiscovered or omitted from jury consideration. Decisions regarding what evidence to present and whether to call or question witnesses are matters of trial strategy. This Court will not substitute its judgment for that of counsel regarding matters of strategy. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Defendant additionally argues that he wanted to testify, that he was not aware of his right to testify, and that counsel improperly refused to call him as a witness. Defendant has not developed a record to explain the nature of the testimony he would have offered if called as a witness, and he does not attempt to discuss or explain how his testimony would have affected the outcome of trial. Under the circumstances, defendant has not demonstrated that counsel's failure to call him as a witness constituted ineffective assistance of counsel. *Stanaway*, *supra*.

Defendant next raises several allegations of prosecutorial misconduct. These allegations were not preserved with an appropriate objection at trial and, therefore, are reviewed for plain error. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001), citing *Carines*, *supra*. "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

Defendant first argues that the prosecutor's comments and questions during voir dire require reversal. Specifically, he contends that it was improper for the prosecutor to explain the concept of reasonable doubt, to inform the jury that he was charged as an aider and abettor, and to explain the concept of aiding and abetting to the jury. Defendant does not explain or rationalize his position that the prosecutor's voir dire questions and comments were improper, and he fails to cite any authority to support his positions. A defendant may not simply announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Therefore, we decline to consider this issue further.

Defendant next asserts that the prosecutor's opening statement improperly bolstered its case. The purpose of an opening statement is to inform the jury what the advocate proposes to show. *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976). The prosecutor's statement in this case outlined the evidence and testimony that the prosecutor believed the jury would hear. The prosecutor did not make improper statements to bolster its case. Further, we disagree with defendant's claim that the prosecutor improperly vouched for defendant's guilt during her opening statement. After summarizing the evidence that she expected the jury would hear, the prosecutor stated:

> And I would submit to you that without this Defendant's knowledge and without his actions of creating this large amount of cocaine, there would be no delivery. The delivery was shortly after this Defendant, quote, "stepped on it," and turned it into the amount of cocaine that you're going to see.

The use of phrases such as "I believe" or "I submit" does not automatically constitute improper vouching. See *People v Reed*, 449 Mich 375, 398-399; 535 NW2d 496 (1995). The pertinent inquiry is whether the prosecutor was trying to vouch for the defendant's guilt. *Id*. The prosecutor did not improperly vouch for defendant's guilt in this case. Her opening statement properly outlined the evidence, and she merely advanced her position that the evidence, as summarized, would prove her theory of the case. Additionally, the jury was instructed, both before opening statement and after closing argument, that the arguments of the attorneys were not evidence. Thus, there was no plain error.

Defendant next argues that the prosecutor improperly vouched for his guilt by making the following statement during closing argument:

> I would submit that you also got to see something in this courtroom during the course of this trial that you have never knowingly seen and probably will never knowingly see again, and that is a major drug dealer. And when you look at Mike Caraway, that is exactly what you are looking at in this case. He is a major drug dealer.

As observed by our Supreme Court in *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), "[p]rosecutors are accorded great latitude regarding their arguments and conduct. They are free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case." *Id*. at 282 (citations and internal quotation marks omitted). Moreover,

> prosecutors may use "hard language" when it is supported by the evidence and are not required to phrase arguments in the blandest of all possible terms. Emotional language may be used during closing argument and is "an important weapon in counsel's forensic arsenal." [*People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996).]

The challenged portion of the closing argument was not improper. It was "hard language" that was supported by the evidence and reasonable inferences arising therefrom. The evidence revealed that the amount of cocaine involved in this case was indicative of a serious drug dealer, that defendant and Sinclair paid $15,000 for a half kilogram of cocaine, and that they turned the half kilogram into a whole kilogram. It was reasonable to infer that defendant was a major drug dealer. There was no plain error. And, as previously discussed, the jury was explicitly instructed on two occasions that the attorneys' arguments were not evidence. Thus, any prejudice resulting from the argument was effectively cured.

Finally, defendant argues that the prosecutor relied on Pompey's false testimony and "deliberately" misled the jury with respect to the amount of cocaine found in Cox's house. During closing argument, the prosecutor mentioned Pompey's incorrect testimony about the amount of cocaine found in Cox's house. She did not highlight or focus on that information, however, and the record does not suggest that she deliberately and knowingly misstated the facts. Further, any prejudice caused by the incorrect testimony could have been cured by a timely objection. *Schutte*, *supra*. More importantly, the amount of cocaine found in Cox's house was not significant to the outcome of this case. Therefore, we conclude that the prosecutor's erroneous reliance on Pompey's incorrect testimony was not plain error requiring reversal. *Aldrich*, *supra*.

Defendant additionally argues that a new trial is required because the trial court failed to ascertain on the record whether he knowingly and intelligently waived his right to testify. This issue is not preserved because it was never raised before or decided by the trial court. *Connor*, *supra*. Therefore, our review is limited to plain error. *Carines*, *supra*. A trial court has no duty to ascertain on the record whether a defendant has intelligently and knowingly waived his right to testify. *People v Bell*, 209 Mich App 273, 277; 530 NW2d 167 (1995). Plain error has not been shown.

Defendant also challenges the reasonable doubt instruction provided to the jury. Because defendant did not object to the court's instruction, this issue is reviewed only for plain error. *Carines*, *supra*. The court provided a definition of reasonable doubt to the jury that was almost a verbatim reading of CJI2d 3.2(3). Defendant recognizes this, but argues that CJI2d 3.2 is erroneous and inadequate because it fails to include language requiring proof of guilt to a moral certainty. Defendant additionally complains that CJI2d 3.2 improperly fails to explain that a reasonable doubt is the type of doubt that would cause a juror to hesitate in making an important decision in life. Defendant's argument is without merit. In *People v Snider*, 239 Mich App 393, 420-421; 608 NW2d 502 (2000), this Court held that it is not error to use CJI2d 3.2 when instructing the jury, even though the instruction fails to contain language requiring proof of guilt to a moral certainty. The trial court's use of the standard jury instruction to define reasonable doubt was not plain error requiring reversal.

Finally, defendant argues that the cumulative effect of many errors denied him his right to a fair trial. We disagree. We have found no errors of consequence, which cumulatively denied defendant a fair trial. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999); *People v Miller (After Remand)*, 211 Mich App 30, 43-44; 535 NW2d 518 (1995).

We affirm defendant's conviction and remand for resentencing. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Richard A. Bandstra