STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 13, 2004
v	No. 245226 Jackson Circuit Court
ABDULLAH KINTE MILLS, Defendant-Appellant.	LC No. 02-002359-FH

Before: O'Connell, P.J., and Jansen and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction following a jury trial for possession of 50 or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii) (before its amendment by 2002 Public Act 665 raising the higher end to 450 grams). The trial court sentenced defendant to a term of 10 to 20 years in prison. We affirm.

Defendant claims his defense attorney provided him with ineffective assistance of counsel in seven different ways. We disagree. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). "To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Id.* Our Supreme Court stated the standard as follows:

> A convicted person who attacks the adequacy of the representation he received at his trial must prove his claim. To the extent his claim depends on facts not of record, it is incumbent on him to make a testimonial record at the trial court level in connection with a motion for a new trial which evidentially supports his claim and which excludes hypotheses consistent with the view that his trial lawyer represented him adequately. [*People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999), quoting *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973).]

"If the record does not contain sufficient detail to support defendant's ineffective assistance claim, then he has effectively waived the issue." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

Defendant first contends that his trial counsel should have moved for the suppression of certain evidence because the arresting officers lacked probable cause. We disagree. While police officers must generally obtain a warrant, they "may arrest a person *without* a warrant if a misdemeanor is committed in [their] presence or if there is reasonable cause to believe a felony was committed and that the person arrested committed it." *People v Manning*, 243 Mich App 615, 622; 624 NW2d 746 (2000). The arresting officer "may rely on a tip, rather than direct observation, as long as the tip is reasonably corroborated by other matters within the officer's knowledge." *People v Levine*, 461 Mich 172, 182; 600 NW2d 622 (1999). In the instant case, a tip from a confidential informant led to defendant's arrest. The record shows that the information provided by the informant was reasonably corroborated by other matters within the arresting officers' knowledge. Several of the telephone calls that the informant made to arrange the delivery of drugs were made in the presence of an officer. The officers also corroborated the informant's description of defendant's vehicle before making the arrest. Based on the totality of the circumstances, the officers had probable cause to believe that defendant was committing a felony when they arrested him. *Id.* at 179, 182.

Because the officers had probable cause to arrest defendant, a motion to suppress the evidence discovered in the subsequent search of his person would have failed. Therefore, defendant's attorney was not ineffective for failing to file a futile motion to suppress. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

Defendant next argues that his attorney provided ineffective representation because he failed to present any witnesses and advised defendant not to take the stand on his own behalf. First, there is nothing in the record indicating that defense counsel advised defendant not to testify. Thus, there is no basis for review of that claim. Furthermore, trial counsel's decisions "regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *Davis*, *supra* at 368. Defendant fails to name any witnesses, other than himself, who should have been called to testify. As in *Davis*, the record does not contain any information concerning what defendant or other potential defense witnesses would have said had they testified. *Id.* at 369. Because defendant has not shown how any additional testimony would have benefited his case, he cannot overcome the presumption that his attorney's failure to call witnesses constituted sound trial strategy.

Defendant also contends that his trial counsel was ineffective because he failed to argue the defense of entrapment. We disagree. Defendant alleges that he was the victim of sentencing entrapment, which "may occur where outrageous government conduct overcomes the will of a defendant predisposed to deal only in small quantities of drugs, for the purpose of increasing the amount of drugs and the resulting sentencing imposed against that defendant." *People v Ealy*, 222 Mich App 508, 510-511; 564 NW2d 168 (1997), quoting *United States v Stavig*, 80 F3d 1241, 1245 (CA 8, 1996), quoting *United States v Aikens*, 64 F3d 372, 376 (CA 8, 1995).

Defendant fails to allege impermissible conduct on the part of the police in this case. The informant contacted the police and the officers had never dealt with her before the instant case. The record contains no evidence supporting defendant's contention that the informant coerced him into carrying more cocaine in order to increase the severity of the charges against him. Defendant failed to supplement the record with any evidentiary support for his entrapment claim,

so we will not find that his trial counsel was ineffective for failing to raise the issue. *People v Emerson*, 203 Mich App 345, 349; 512 NW2d 3 (1994).

Next, defendant contends that his attorney erred in failing to challenge any jurors for cause or to exercise any peremptory challenges. We disagree. He asserts that his counsel refused to remove a juror whose son was a drug addict, and failed to challenge several other jurors who admitted having friends or family who worked in law enforcement. Decisions regarding jury selection "generally involve matters of trial strategy, which we normally decline to evaluate with the benefit of hindsight." *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001), citations omitted. All the jurors at issue stated that they could put aside any prejudice stemming from their outside relationships, so defendant fails to demonstrate that a different jury pool would reasonably have led to a different result. *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001).

Defendant also asserts that his trial counsel erred in failing to request a downward departure from the ten-year minimum sentence imposed by the former MCL 333.7401(2)(a)(iii). Under the former version of MCL 333.7401(4), the trial court could depart from this minimum if it made recorded findings that there were "substantial and compelling" reasons to deviate from the mandatory minimum. *People v Fields*, 448 Mich 58, 62; 528 NW2d 176 (1995). Only factors that were "objective and verifiable," however, could be used to determine whether such reasons exist. *Id.*

Defendant contends that counsel should have argued for a downward departure on the grounds that he was duped into carrying the cocaine and that police acted to increase his sentence by manipulating the quantity of drugs involved. However, defendant's claim that he was duped does not constitute the sort of objective and verifiable factor that may support a downward departure. *Id*. at 62. And as noted above, the record contains no evidence that the police took any action to increase the amount of drugs carried by defendant. Furthermore, the trial court specifically found, based on defendant's prior conviction for maintaining a drug house, that no reason to deviate from the prescribed minimum existed. Because the request would have been futile, defendant's counsel did not provide ineffective assistance by failing to argue for a departure from the statutory minimum. *Ish*, *supra* at 118-119.

Defendant next argues that his trial counsel provided ineffective assistance because he represented conflicting interests and he appeared distracted during the trial. Although defendant now attempts to submit an affidavit concerning these issues, he failed to move for an evidentiary hearing in the trial court, so he cannot now present new information. MCR 7.210(A); *People v McMillan*, 213 Mich App 134, 141; 539 NW2d 553 (1995). Because defendant has failed to establish a factual predicate for his claim, we have no basis for finding that he received ineffective representation due to a conflict of interest or because of his attorney's mental distress. *Hoag*, *supra* at 6.

In addition to the above claims, defendant contends that the cumulative effect of these instances of ineffective assistance of counsel asserted above were prejudicial to his case. "The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not warrant reversal." *Id.* at 388. But these must be errors of consequence and seriously prejudice the defendant, so this argument traditionally involves a trial court's errors,

not the errors of trial counsel. *Id.* Nevertheless, because no errors were found in the instant case, no cumulative effect exists. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Based on the record presented, trial counsel's representation of defendant did not fall below the objective standards of reasonable professional conduct. *Harmon, supra* at 531. Therefore, we find that defendant did not receive ineffective assistance of counsel.

Defendant also contends that the trial court violated his constitutional right to confront opposing witnesses when it allowed a police officer to testify about some of the confidential informant's statements. We disagree. Defendant's bare hearsay objection failed to preserve the constitutional aspect of this issue, so we review it for plain error. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003). An out of court statement introduced to show its effect on a listener does not constitute hearsay under MRE 801(c). *People v Byrd*, 207 Mich App 599, 603; 525 NW2d 507 (1994). Such a statement "is not offered for a hearsay purpose because its value does not depend upon the truth of the statement." *People v Lee*, 391 Mich 618, 642; 218 NW2d 655 (1974), citing McCormick, Evidence, § 228, pp 464-465.

In the instant case, the trial court exercised its discretion and overruled defendant's hearsay objection to Trooper Bundshuh's testimony concerning his informant's claim that she arranged a delivery of cocaine. The court allowed the testimony for the purpose of explaining the officer's subsequent actions. Because the trial court admitted the statements for the limited purpose of showing their effect on Trooper Bundshuh, they do not constitute testimony derived from an absent witness. Therefore, we do not find a plain violation of the Confrontation Clause.

Affirmed.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Christopher M. Murray