STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 29, 2004
V	No. 248637 Wayne Circuit Court
SYLVESTER D. JAMERSON, Defendant-Appellant.	LC No. 03-000279-01

Before: Zahra, P.J., and Talbot and Wilder, JJ.

PER CURIAM.

Defendant, Sylvester D. Jamerson,[1] appeals by right his conviction of possession with intent to deliver 225 to 649 grams of cocaine, MCL 333.7401(2)(A)(2), following a jury trial. We affirm.

I. Facts and Proceedings

Defendant's arrest occurred during the execution of a search warrant by the Detroit Police Department Narcotics Team at 1278 Wilson Street in Lincoln Park on December 16, 2002.

Officer Conrad Gains, a narcotics officer from the Detroit Police Department, testified at trial that a team of narcotics officers executed the search warrant at the two-family residence around 7:00 p.m. When Officer Gains opened the door to the upper flat, he observed defendant exiting a bedroom and walking toward the entrance of the flat. Because defendant was described in the warrant, Officer Gains detained defendant and another officer arrested him. In the bedroom defendant was exiting when the officers entered, Officer Gains saw a mattress and suitcase on the floor, a brown jacket hanging on the door, and another jacket hanging in the closet. The flat did not contain any furniture other than that which was in the bedroom, and defendant was the only person in the upper flat.

Officer Myron Weathers testified that he participated in searching the flat and that, in a pocket of the brown jacket hanging on the bedroom door, he found a wallet, a bus ticket from

[1] Defendant's first name also appears in the record as "Srylester."

California to Detroit, a California photo identification card reflecting defendant's photograph and name, and a social security card bearing defendant's name. Without looking in the other pockets of the jacket, Officer Weathers dropped the jacket on the floor. Another officer, Officer Carmen Diaz, testified that he subsequently searched the other pockets of the jacket and discovered a knotted plastic baggie containing several knotted plastic baggies of suspected chunk cocaine. Defendant and the prosecution stipulated that the substance in the baggies Officer Diaz found tested positive for cocaine and weighed 20.54 grams. Officer Diaz stated that, in his experience, the packaging of the cocaine indicated that it was ready for distribution.

Officer Charles Fitzgerald, the officer in charge of the team executing the search warrant, testified that while searching the upper flat, he discovered a knotted baggie of suspected cocaine in the crawl space above the kitchen entryway. The baggie did not have any dust on it, despite the fact that insulation had recently been sprayed in the crawlspace. The parties stipulated that the material Officer Fitzgerald found tested positive for cocaine and weighed 14.17 grams.

Officer Fitzgerald also testified that he observed another officer, Officer Williams, discover a shopping bag in a covered hole in the floor of a second bedroom's closet. According to Officer Fitzgerald, the shopping bag contained several baggies of suspected cocaine, packaged in equal portions, ready to sell. Defendant and the prosecution stipulated that the substance in the bag Officer Williams found tested positive for cocaine and weighed, in total, 238.76 grams. Officer Fitzgerald also stated that all the cocaine discovered in the upper flat, including the cocaine found in the pocket of the brown coat, was the same type of cocaine, appeared to have come from the same batch of crack cocaine, and was packaged similarly in clear plastic knotted baggies.

Officer Darren Johnson testified that, while other officers were searching the flat, he asked defendant why he was in town, and defendant told him that he came to help a friend pull an engine from a car. Officer Johnson also testified that it is significant that defendant came from Los Angeles, California, because California and certain cities in other western states have been known to supply narcotics to the metro-Detroit area. Officer Johnson also testified concerning various methods of making rock cocaine and stated that the cocaine found in the upper flat was consistent in smell, form, color, texture, and packaging. In his opinion, the cocaine was packaged by the same person and appeared to be from the same batch. The amount of cocaine and the form of packaging suggested to Officer Johnson that the cocaine was being sold by someone in the "middle of the higher up echelon of illegal narcotics trafficking." Also, because of the cocaine's strong odor, he opined that the cocaine had been cooked recently.

The defense rested without presenting any witnesses. The trial court, over defendant's objection, instructed the jury on the lesser offense of possession with intent to deliver less than 50 grams of cocaine, in addition to instructing the jury on the charged offense, possession with intent to deliver 225 to 649 grams of cocaine. The jury found defendant guilty of the charged offense.

At sentencing, defendant moved for a new trial because the verdict form provided to the jury did not mention the lesser offense. The trial court denied defendant's motion, stating that after it discharged the jury, the trial court, accompanied by counsel, interviewed the jury off the record and the jury indicated that it considered the lesser offense, as instructed, but did not find defendant guilty of that offense. Additionally, because defendant had objected to the trial court

instructing the jury on the lesser offense, the trial court concluded that defendant suffered no prejudice as a result of the incomplete verdict form. The trial court imposed a sentence of three to forty-five years' imprisonment. Defendant now appeals.

II. Standard of Review

A defendant forfeits review of unpreserved claims of error unless he demonstrates the existence of a plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Generally, we review claims of ineffective assistance of counsel as a mixed question of law and fact. *People v Le Blanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). When the defendant has not raised the issue in the trial court, our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

We review the trial court's denial of a motion for a new trial for an abuse of discretion. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000).

III. Analysis

Defendant first argues that the trial court abused its discretion by failing to grant defendant's request for a new venire. We disagree.

During jury selection, the trial court asked the panel of prospective jurors whether any of them recognized the attorneys, defendant, or any of the named witnesses. One prospective juror identified himself as an Oakland County Sheriff's deputy, stated that he thought defendant looked familiar, and said that he thought he had seen defendant before. At that point, counsel approached the bench, and the trial court, after conferring with counsel, stated:

> To the gentleman who just said he looks familiar, that's often the case. A lot of times people see someone, say you look familiar, you may know someone, something comes to mind that you actually know someone from something. Familiarity may not keep you from being a juror. Most times it ends up they just look[] like another person you know.

The prospective juror at issue was subsequently excused for cause. At the conclusion of jury selection, defendant stated on the record that he had requested a new panel during the discussion at the bench and that the trial court had denied his request.

Defendant now argues that his constitutional right to an impartial jury was violated when the trial court denied his request for a new venire, given that the other prospective jurors would "inevitably" infer that the prospective juror at issue knew defendant from his work in law enforcement and that defendant had a criminal past. Defendant's claim of constitutional error is unpreserved because defendant did not articulate a constitutional basis for his request for a new venire on the record. See *People v Metzler*, 193 Mich App 541, 548; 484 NW2d 695 (1992). Moreover, defendant has failed to establish a plain error that affected his substantial rights. *Carines, supra.* Defendant has not demonstrated that the jury ultimately chosen was not impartial. The trial court instructed the jury that defendant was presumed innocent and that the

jury must base its verdict on the evidence and not allow prejudice to affect its verdict. Jurors are presumed to follow the trial court's instructions. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003), citing *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, defendant has forfeited further review of this issue.

Defendant next argues that his trial counsel rendered ineffective assistance by failing to object to "the run on nature of Officer Darren Johnson's testimony and its cumulative effect." We disagree. Before Officer Johnson testified, defense counsel objected to Officer Johnson's testimony on the basis that it would be cumulative of the other officers' testimony. The trial court overruled the objection. Defendant contends that his trial attorney should have objected again when Officer Johnson (1) testified concerning the significance of the fact that defendant was from Los Angeles, California, and (2) provided hearsay testimony regarding the explanation that evidence technicians had provided for generally finding it difficult to obtain useful fingerprints from plastic baggies.

Defendant failed to raise this issue in the trial court, and our review, therefore, is limited to mistakes apparent on the record. *Rodriguez, supra*. To sustain a claim of ineffective assistance of counsel, defendant must demonstrate that his trial counsel's performance was deficient and that the deficiency prejudiced defendant. *People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003), citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

In order to demonstrate that his counsel's performance was deficient, defendant must overcome the strong presumption that his trial counsel's actions constituted sound trial strategy. *Riley, supra.* Defendant has failed to meet this burden. Defendant has provided no basis for concluding that his attorney did not have valid strategic reasons for declining to raise a second objection to the cumulative nature of Officer Johnson's testimony. Similarly, defendant has failed to show that his trial counsel did not have a strategic basis for not objecting to Officer Johnson's testimony concerning obtaining fingerprints from plastic baggies and the significance of defendant's California residency.

Additionally, defendant fails to demonstrate that he was prejudiced by his trial counsel's failure to object to Officer Johnson's testimony. Defendant states in a conclusory fashion that the jury would have had a reasonable doubt about defendant's guilt if it did not receive Officer Johnson's general testimony concerning crack cocaine and its distribution. We disagree. Even without Officer Johnson's testimony on these issues, the prosecution presented ample evidence to convict defendant.

Defendant next claims that he was denied a fair trial when the prosecution misstated the law to the jury in its closing argument. We disagree. Because defendant failed to object to the prosecution's statement, defendant has forfeited review of this issue unless he demonstrates a plain error that affected his substantial rights. *Carines, supra.*

Defendant bases his argument on the portion of the prosecution's closing argument discussing the elements of the crime charged. The prosecution stated:

> The third element[] of this crime is this stuff is cocaine. You heard about these stipulations. None of you are actually scientists, but you will be able to

> examine them if you like. These are all laboratory analysis. I read from these during that stipulation [sic], and Judge Fresard is going to explain what a stipulation is. . . . So [defendant] is not contesting these results or the weights of the cocaine found in his jacket, the analysis for it was 20.54-grams [sic]. And it tells you the name of the forensic scientist who tested it. What was the conclusion? The material weighed 20.54-grams [sic] and contained cocaine. So that is a third element.
>
> Was this cocaine[?] [H]ere is the first lab analysis that tells you it's cocaine, and you have the other two for the stuff in the closet and crawl space. All the same results: cocaine. That's the third element of this charge.

As defendant contends, the prosecution did not mention in this portion of its argument that in order to convict defendant of the crime charged, the jury must conclude that defendant knew the substance was cocaine. *People v Johnson*, 466 Mich 491, 500; 647 NW2d 480 (2002). This omission does not require reversal. In its discussion of the element of possession, the prosecution stated: " . . . He constructively possessed this cocaine. He had a right to control it. He knew what it was." Accordingly, the prosecution did not entirely omit the knowledge requirement from its argument. Consequently, we disagree with defendant's assertion that the prosecution seriously misstated the law. Nevertheless, the trial court properly instructed the jury on the elements of the crime and instructed the jury that it must apply the law as stated by the trial court, not as stated by the attorneys. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *Abraham, supra* at 279. Defendant, therefore, has failed to demonstrate the existence of a plain error that affected his substantial rights.

Next, defendant asserts that the trial court erred by failing to include a "mere presence" instruction in its instructions on the lesser offense of possession with intent to deliver less than fifty grams of cocaine. We conclude that defendant has waived review of this issue.

Defendant requested that the trial court instruct the jury that it could not find defendant guilty of the crime charged if he was merely present where the cocaine was found. After instructing the jury on the possession element of the crime charged, the trial court stated: "The defendant's presence by itself at the location where drugs are found is not sufficient to prove constructive possession. Some additional connection between the defendant and the contraband must be shown." The trial court did not repeat this instruction when instructing the jury on the lesser offense. Because defendant specifically indicated his satisfaction with the jury instructions, apart from unrelated objections placed on the record prior to the trial court instructing the jury, he has waived any error in the trial court's instructions. *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001). In any event, when instructing the jury on the lesser offense, the trial court stated that: "It is not enough if the defendant merely knew about the substance. The defendant possessed the substance only if he had [control of it] or the right to control it either alone or together with someone else." The trial court's instructions adequately informed the jury of the elements of the crime and defendant's defense. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000).

Finally, defendant contends that the trial court erred by denying his motion for a new trial. We disagree. Defendant cites no legal authority to support his claim that the omission of the lesser offense from the verdict form requires a new trial, and has, therefore, abandoned this

issue. Defendant cannot merely announce his position to this Court on appeal; we will not search for a basis for his claim or authority to support it. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Moreover, after the verdict was announced, the members of the jury were polled, and each member indicated agreement with the verdict.[2]

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder

[2] Because defendant has abandoned this issue, we need not address the trial court's opinion that defendant did not merit a new trial in part because the members of the jury, after their discharge, indicated that they considered the lesser offense. However, we note that

> [o]nce the jury has been officially discharged and left the courtroom, . . . it is error to recall it in order to alter, amend[,] or impeach a verdict in a criminal case. As soon as it departs from the courtroom, the jury's legal duties cease to exist; it no longer functions as a unit charged to perform a solemn task but rather as 12 unsworn members of the community; its relationship to the case has terminated. [*People v Rushin*, 37 Mich App 391, 398-399; 194 NW2d 718 (1971); see also *People v Gabor*, 237 Mich App 501; 603 NW2d 840 (1999).]