STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 27, 2007
v	No. 264612 Oakland Circuit Court
RANDALL T. LONDON, Defendant-Appellant.	LC No. 2002-184702-FH

Before: Saad, P.J., and Cavanagh and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for the manufacture or distribution of an imitation controlled substance, MCL 333.7341(3), and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to one to two years' imprisonment for the manufacture or distribution of an imitation controlled substance conviction and two years' imprisonment for the felony-firearm conviction. We affirm defendant's convictions. However, we remand to the trial court for articulation of substantial and compelling reasons for its upward departure from the sentencing guidelines.

I. FACTS

On January 3, 2002, Officer Martin Lavin, operating undercover, arranged a cocaine purchase with Aaron Willing and Daniel Potter. Potter called defendant and told him to bring flour in a Ziploc bag to the scene of the purchase and that Potter would pay him $1,500. Defendant agreed and took the flour to the scene of the purchase where Lavin was waiting. Lavin indicated that he wanted to weigh and smell the cocaine. Defendant allowed Lavin to weigh the bag, but he did not let Lavin smell it. Defendant told Lavin that the bag contained "good shit" and that everything was "straight up." After defendant was arrested, he told Lavin that the substance was flour and not cocaine, and subsequent tests by the police later confirmed this. Arresting officers also found a handgun in defendant's jacket.

II. GREAT WEIGHT OF THE EVIDENCE

Defendant's first issue on appeal is whether the jury verdict was against the great of the evidence.

A. Standard of Review

An argument that a verdict is against the great weight of the evidence must be preserved with a motion for new trial under MCR 2.611(A)(1)(e). *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997). Defendant failed to make a motion for new trial in this case, and this issue is therefore unpreserved for appeal. We review unpreserved issues for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

B. Analysis

MCL 333.7341(3) provides that, except as otherwise provided by law, "a person shall not manufacture, distribute, or possess with intent to distribute, an imitation controlled substance." An imitation controlled substance is defined as follows:

> a substance that is not a controlled substance or is not a drug for which a prescription is required under federal or state law, which by dosage unit appearance including color, shape, size, or markings, and/or by representations made, would lead a reasonable person to believe that the substance is a controlled substance. [MCL 333.7341(1)(b).]

But MCL 333.7341(1)(b) "does not apply to a drug that is not a controlled substance if it was marketed before the controlled substance that it physically resembles." *Id*. "'Distribute' means the actual, constructive, or attempted transfer, sale, delivery, or dispensing from one person to another of an imitation controlled substance." MCL 333.7341(1)(a). "'Manufacture' means the production, preparation, compounding, conversion, encapsulating, packaging, repackaging, labeling, relabeling, or processing of an imitation controlled substance, directly or indirectly." MCL 333.7341(1)(c).

In this case, defendant put the flour into the Ziploc bag and drove it to a local pharmacy parking lot in order to either earn $1,500 from Daniel Potter for delivering it, or to pass it off as cocaine and sell it to Potter for $5,500. At the pharmacy parking lot, defendant let Lavin weigh the bag, but refused to let him smell it. Defendant also assured Lavin that the bag contained "good shit" and that everything was "straight up." Defendant had a gun on him. Viewing the evidence in this case, testimony by both Lavin and defendant supported the view that defendant manufactured imitation cocaine by putting the flour in the bag and distributed the imitation cocaine by attempting to sell it to Lavin. The testimony was not devoid of probative value and did not contradict indisputable physical facts or defy physical realties. *People v Lemmon*, 456 Mich 625, 643-644; 576 NW2d 129 (1998). Therefore, the verdict was not against the great weight of the evidence, and, as a result, there was also no plain error affecting defendant's substantial rights.

III. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that he was denied his right to effective assistance of counsel. Again, we disagree.

A. Standard of Review

Defendant failed to move for a new trial or evidentiary hearing on the basis of ineffective assistance of counsel below. Therefore, our review of defendant's ineffective assistance of counsel claim is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo." *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

B. Analysis

To prevail on a claim for ineffective assistance of counsel, a defendant must make two showings. First, the defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, the defendant was denied his Sixth Amendment right to counsel. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *LeBlanc, supra* at 578. "'Second, the defendant must show that the deficient performance prejudiced the defense. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.'" *Carbin, supra* at 599-600, quoting *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Defendant claims that trial counsel was ineffective for several reasons. Defendant first argues that he was denied the effective assistance of counsel when trial counsel failed to object to the admission of the flour into evidence, even though it had been repackaged and one of the factors in defining an imitation controlled substance is how it is packaged. The packaging, however, is only one factor, and Lavin expressly testified that the substance had been repackaged. Any objection to the admission of the substance into evidence would have been futile, and trial counsel is not required to argue a meritless position. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Defendant next argues that trial counsel was ineffective when he failed to secure transcripts from another trial as a potential source of cross-examination material. But, even if defendant can meet the heavy burden of showing that trial counsel's performance was deficient, he would still have to show that, but for trial counsel's error, the result of the proceedings would have been different. *Carbin, supra* at 599-600. Given that nothing in the record establishes what the testimony from the other trial was or suggests that securing the transcripts would have changed the outcome of the proceedings, we conclude that, even if trial counsel's performance had been deficient, defendant was not denied the effective assistance of counsel.

Defendant also argues that trial counsel was ineffective for failing to confront Lavin with his prior testimony at the preliminary examination that the substance did not appear to be cocaine

and for failing to demand that the jury hear the entire recording made from Lavin's wire. As discussed above, this Court will not second-guess trial counsel's professional judgment as to trial strategy. See *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Lavin never contradicted his testimony by claiming that the substance looked like cocaine, and trial counsel specifically objected to the admission of the entire recording because most of it was irrelevant and could have been damaging to defendant. We therefore conclude that trial counsel was not ineffective for failing to confront Lavin.

Defendant next claims that trial counsel's failure to advise him, while acting as standby counsel,[1] constitutes ineffective assistance of counsel. However, this Court has specifically held that "'standby counsel is not 'counsel' within the meaning of the Sixth Amendment.'" *People v Willing*, 267 Mich App 208, 228; 704 NW2d 472 (2005), quoting *United States v Taylor*, 933 F2d 307, 312-313 (CA 5, 1991). Standby counsel "may offer advice, but . . . does not speak for the defendant or bear responsibility for his defense." *Id.* This Court has also stated that "[a]lthough the Michigan Supreme Court has not squarely addressed whether harmless error analysis may be applied in cases in which a defendant had the assistance of standby counsel, it has stated that 'the presence of standby counsel does not legitimize a waiver-of-counsel inquiry that does not comport with legal standards.'" *Id.*, quoting *People v Dennany*, 445 Mich 412, 446; 519 NW2d 128 (1994). Therefore, as far as trial counsel's role as standby counsel is concerned, defendant's ineffective assistance of counsel claim turns on whether defendant made a knowing waiver of counsel and not on the performance or actions of standby counsel.

A knowing waiver is defined as "the 'intentional relinquishment or abandonment of a known right.'" *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (citations omitted). As already concluded, trial counsel was not ineffective before being relieved of his duties by defendant. Defendant became dissatisfied with the method in which trial counsel was asking Lavin questions and requested that the trial court allow him to take over his defense. The trial court then notified defendant of his right to counsel and his right to remain silent. Defendant affirmatively acknowledged that he understood these rights and stated that he still wished to question Lavin himself. Therefore, defendant made a knowing waiver of his right to counsel, and trial counsel was not ineffective.

Finally, defendant claims that trial counsel had a conflict of interest because he represented one of the confidential informants in defendant's case, and because defense counsel's partner represented another confidential informant involved in defendant's case. When claiming ineffective assistance due to defense counsel's conflict of interest, a defendant must show that an actual conflict of interest adversely affected his lawyer's performance. *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). Defendant fails to show how this alleged conflict of interest adversely affected trial counsel's performance. Further, defendant took over his own defense during the questioning of the first witness, and counsel was only acting as standby counsel. Defendant has thus failed to show an actual conflict that caused trial counsel's

[1] Defendant relieved trial counsel of his duties during the trial after becoming dissatisfied with his performance.

performance to fall below an objective standard of reasonableness. Therefore, defendant has presented no error requiring reversal.

IV. SUBSTITUTION OF COUNSEL

Defendant claims that the trial court erred in refusing to grant an adjournment or continuance to allow him to substitute counsel. We disagree.

A. Standard of Review

A trial court's denial of a continuance that affects a defendant's right to counsel of choice will not be disturbed absent an abuse of discretion. *People v Echavarria*, 233 Mich App 356, 368; 592 NW2d 737 (1999).

B. Analysis

When reviewing a trial court's denial of a defendant's motion for a continuance in order to substitute counsel, this Court considers five factors:

> (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 in 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.]

On June 21, 2005, the trial court conducted a *Walker*[2] hearing where trial counsel, Howard Arnkoff, stated that defendant had contacted attorney Marvin Barnett to substitute as counsel. Mr. Barnett had previously indicated to the trial court that defendant's trial would have to be postponed in order for him to adequately prepare. However, the trial court refused this request and indicated that the date of the trial had been made "certain to everyone" well in advance.

Defendant is asserting his constitutional right to counsel; however, defendant has failed to allege or show good cause for trial counsel substitution that would warrant a disruption in the judicial process. Defendant waited until the day of trial to make the motion, and all parties involved would have had to reschedule. Finally, defendant has failed to show that a different result would have occurred had the trial court granted the continuance and allowed the substitution of counsel. Under these circumstances, we conclude that the trial court did not abuse its discretion in refusing to grant defendant's request for an adjournment or continuance to substitute counsel.

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[2] *People v Walker* (*On Rehearing*), 374 Mich 331; 132 NW2d 87 (1965).

V. RIGHT TO A SPEEDY TRIAL

Defendant also argues that he was denied his right to a speedy trial. We disagree.

A. Standard of Review

"A defendant must make a 'formal demand on the record' to preserve a speedy trial issue for appeal." *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999) (citation omitted). Defendant failed to make any such formal demand in this case, so this issue is unpreserved for appeal. Again, we review unpreserved constitutional issues for plain error affecting defendant's substantial rights. *Carines, supra* at 763-764.

B. Analysis

Persons charged with crimes are entitled to a speedy trial and determination of all prosecutions. MCL 768.1. "In determining whether a defendant has been denied a speedy trial, four factors must be balanced: (1) the length of the delay, (2) the reasons for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4) prejudice to defendant from the delay." *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000). "The fourth element, prejudice, is critical to the analysis." *Cain, supra* at 112.

We must first consider the length of the delay. A delay of 18 months or more is presumed prejudicial, and the prosecutor has the burden to rebut that presumption. *Cain, supra* at 112. In this case, defendant was arrested on January 3, 2002, while his trial began on June 21, 2005. That delay of over three years is more than enough to place the burden on the prosecution to rebut the presumption that defendant was prejudiced by the delay.

In assessing the reasons for the delay, each period of delay is examined and attributed to the prosecutor or the defendant. *People v Ross*, 145 Mich App 483, 491; 378 NW2d 517 (1985). Unexplained delays are attributed to the prosecutor. *People v Patterson*, 170 Mich App 162, 167; 427 NW2d 601 (1988). Scheduling delays and delays caused by the court system are also attributed to the prosecutor, but should be given a neutral tint and only minimal weight. *People v Gilmore*, 222 Mich App 442, 460; 564 NW2d 158 (1997). Delays caused by the adjudication of defense motions are attributable to the defendant. *Id*. at 461.

In this case, assigning responsibility for the delay is difficult because no hearing was held on this issue and the record is sparse. Defendant initially had two codefendants. Where multiple defendants' cases are moving through the system together, the greater complexity inherent in such a process makes delay more tolerable for speedy trial purposes. *People v McCline*, 197 Mich App 711, 718; 496 NW2d 296 (1992), rev'd on other grounds 442 Mich 127 (1993). By the time the trial court ordered that defendant be tried by himself, the case was delayed because of defendant's motion to suppress his statements to the police. The hearing on that motion lead to more delays because the trial court, sua sponte, ordered that defendant's competency to stand trial be evaluated. Defendant's trial was also delayed by his substitution of counsel following a breakdown in communications and strategy with his original attorney. We conclude that, outside of the unexplained delays attributed to the prosecutor, all the delays in this case are attributed to defendant or the court itself.

We must also look at the assertion of the right. Failure to promptly assert the right to a speedy trial does not preclude a speedy trial claim, but it is one of the factors to be balanced. *Ross, supra* at 491. In this case, defendant never asserted his right to a speedy trial at any time.

Further, we must examine whether defendant was prejudiced by the delay. A defendant can experience two types of prejudice while awaiting trial. Prejudice to the person results when pretrial incarceration deprives an accused of many civil liberties, while prejudice to the defense occurs when the defense might be prejudiced by the delay. See *Gilmore, supra* at 461-462. As discussed above, prejudice is presumed in this case because of the length of the delay. We conclude however that the prosecution may have overcome that presumption. While defendant spent a significant amount of time in custody before his trial, the bulk of that time was the result of arrests and a conviction separate from this case. Moreover, nothing suggests that the defense was prejudiced by the delay because there were only two witnesses other than defendant and they were always available.

Looking at all of the factors, we conclude there was no plain error affecting defendant's substantial rights as a result of the denial of defendant's right to a speedy trial. While the delay was lengthy, most of the delay is attributed to defendant or given minimal weight. Defendant never asserted his right to a speedy trial and he was not prejudiced by any delay.

VI. PROSECUTORIAL MISCONDUCT

Defendant next asserts that remarks made by the prosecution in closing arguments constitute prosecutorial misconduct. We disagree.

A. Standard of Review

Again, because defendant failed to preserve this issue, our review is for plain error affecting defendant's substantial rights. *Carines, supra* at 763-764.

B. Analysis

Defendant claims the prosecution stated in closing arguments that Lavin had testified that the substance which defendant possessed felt like cocaine when Lavin had offered no such testimony. A prosecutor may not make a statement of fact unsupported by the evidence, but is "free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case." *People v Schultz*, 246 Mich App 695, 710; 635 NW2d 491 (2001). Defendant alleges that the following remarks made by the prosecutor were improper:

> [Officer Lavin] indicated to you that this looks like cocaine, it feels like cocaine and when he tried to smell it to determine whether or not it was cocaine or some sort of controlled substance, the Defendant, Mr. London, wouldn't let him do that at that time. Well, why didn't he want him to do that? Well, because he knew it wasn't real and he knew that if he let him smell it he would know that it wasn't real.

However, it does not appear that the prosecutor is asserting that Lavin actually touched the substance as defendant alleges. The prosecutor explicitly states that defendant did not allow Lavin to touch the substance and is only making a reasonable inference based on the testimony. Further, even if the prosecutor's remarks were improper, the trial court instructed the jury after closing arguments that "[t]he lawyers' statements and arguments are not evidence." Therefore, if there were any error, it would have to be considered harmless.

VII. COMPETENCY

Defendant also argues that the trial court erred because it never ruled on the issue of his competency to stand trial. We disagree.

A. Standard of Review

The determination of a defendant's competence is within the discretion of the trial court. *People v Harris*, 185 Mich App 100, 102; 460 NW2d 239 (1990).

B. Analysis

It violates an incompetent defendant's right to due process to subject him to a criminal trial. *Cooper v Oklahoma*, 517 US 348, 354; 116 S Ct 1373; 134 L Ed 2d 498 (1996). Accordingly, our Legislature has established procedures for determining competency in MCL 330.2020. Under the statutory scheme, a defendant is presumed competent to stand trial, and "shall be determined incompetent to stand trial only if he is incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner." MCL 330.2020(1). Further, "[t]he court shall determine the capacity of a defendant to assist in his defense by his ability to perform the tasks reasonably necessary for him to perform in the preparation of his defense and during his trial." *Id.* The statute requires that "a criminal defendant's mental condition at the time of trial must be such as to assure that he understands the charges against him and can knowingly assist in his defense." *People v McSwain*, 259 Mich App 654, 692; 676 NW2d 236 (2003).

At the *Walker* hearing on June 21, 2005, the prosecution indicated that he and defense counsel had stipulated to the report from the Center for Forensic Psychiatry that found defendant competent to stand trial. Further, defendant was able to draft questions for defense counsel to ask, and defendant took over his own defense in the middle of his trial, indicating that he understood the nature and object of the proceedings against him. Therefore, because the trial court addressed defendant's competency at the Walker hearing, the parties stipulated that defendant was competent, and defendant was able to understand the proceedings and conduct his defense, the trial court did not abuse its discretion in determining that defendant was competent to stand trial.

VIII. SENTENCING CREDIT

We also reject defendant's argument that he was entitled to more jail credit at sentencing.

A. Standard of Review

We review de novo a defendant's claim that he was denied sentencing credit. *People v Givans*, 227 Mich App 113, 124; 575 NW2d 84 (1997).

B. Analysis

Defendant argues that he is entitled to credit for any time he was in custody before his sentencing. The statute providing for credit for time served before sentence because of lack of bond neither requires nor permits sentence credit in cases where defendant is incarcerated as result of charges arising out of unrelated offense or circumstance. *People v Ovalle*, 222 Mich App 463, 468; 564 NW2d 147 (1997). Defendant was incarcerated as a result of charges arising out of an unrelated offense and he is not entitled to credit in this case.

Defendant also argues that the court improperly denied him credit for time he spent in a tether program. However, because defendant's participation in the tether program was not due to his being denied or unable to furnish bond for the offense of which he was convicted, he is not entitled to sentence credit under the sentence credit statute, MCL 769.11b. *People v Reynolds*, 195 Mich App 182, 183; 489 NW2d 128 (1992).

IX. SENTENCING DEPARTURE

Finally, defendant argues that the trial court erred when it failed to articulate substantial and compelling reasons for its upward departure from the sentencing guidelines. We agree.

A. Standard of Review

In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination subject to review for clear error, the determination that the factor is objective and verifiable is reviewed as a matter of law, and the determination that the factor constituted substantial and compelling reason for departure and the amount of the departure are reviewed for an abuse of discretion. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003).

B. Analysis

Under the sentencing guidelines act, MCL 769.31 *et seq*., a trial court must impose a sentence within the guidelines range unless there is a "substantial and compelling" reason for departure and the court states that reason on the record. MCL 769.34(3); *Babcock*, *supra* at 255-256. Here, the prosecution conceded at oral argument that the trial court failed to articulate substantial and compelling reasons for its upward departure. As such, this case must be remanded for that purpose.

We affirm defendant's convictions. However, we remand this case to the trial court for articulation of substantial and compelling reasons for its upward departure from the sentencing guidelines. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Mark J. Cavanagh
/s/ Bill Schuette