

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDALL LYNN REEVES,

Defendant-Appellant.

UNPUBLISHED
November 1, 2007

No. 269503
Cass Circuit Court
LC No. 05-010361-FH

Before: Hoekstra, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of methamphetamine, MCL 333.7403(2)(b)(i), possession of a firearm by a person convicted of a felony, MCL 750.224f, maintaining a drug house, MCL 333.7405(d), and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to concurrent terms of 23 months to 10 years' imprisonment for the possession of methamphetamine conviction, 23 months to 5 years' imprisonment for the felon in possession conviction, and 16 months to 2 years' imprisonment for the maintaining a drug house conviction, to be preceded by a term of two years' imprisonment for the felony-firearm conviction. Defendant, acting in propria persona, appeals his convictions and sentences as of right. We affirm defendant's convictions and sentences, but remand for correction of the judgment of sentence.

A. Conspiracy

The several charges in this matter were consolidated for trial with a separately charged count of conspiracy to manufacture methamphetamine. The jury deadlocked on the conspiracy charge, and the trial court granted a mistrial with regard to that case. Asserting that the conspiracy charge that was consolidated and tried along with the charges for which defendant was convicted and are now before us in this appeal were, in part, based on events that were previously brought against defendant and were dismissed as part of a plea bargain, defendant argues that double jeopardy protections precluded the consolidated conspiracy charge. Based on this claim, defendant then proceeds to argue that this allegedly improperly presented evidence of conspiracy unfairly prejudiced him in the convictions that are the subject of this appeal.

Whether there is merit to defendant's double jeopardy claim is difficult, if not impossible, to determine on the record before us. Nonetheless, even accepting that this unpreserved double jeopardy challenge has merit, we find that defendant has failed to establish plain error arising

from the collateral evidentiary claim presented in this appeal in light of the overwhelming evidence offered by the prosecutor in support of the remaining charges with which defendant was convicted, including the physical evidence of drugs and drug paraphernalia discovered at defendant's home and the testimony of various persons who purchased or used such substances at that location. See *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

B. Hearsay

Defendant also argues that the trial court erred in failing to admit the prior statement of an unavailable witness who claimed ownership of the shotgun supporting defendant's felon in possession and felony-firearm convictions and asserted that defendant was not aware of the presence of the weapon at the house. We do not agree.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). Here, the trial court properly concluded that the statement at issue constituted inadmissible hearsay. MRE 802. Indeed, it was a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted, i.e., that the shotgun actually belonged to the declarant and that defendant did not know that it was in his house. MRE 801(c). The statement did not, as argued by defendant on appeal, qualify as non-hearsay under MRE 801(d)(1) because the declarant was not subject to cross-examination concerning the statement. Moreover, while the declarant was unavailable as a witness within the meaning of MRE 804(a)(1) because he invoked his privilege against self-incrimination, the statement did not qualify as former testimony under the exception provided for under MRE 804(b)(1) because the witness' invocation of that right at the prior hearing deprived the prosecutor of the opportunity to cross-examine him concerning the statement. Finally, the statement was not admissible under the "catchall exception" of MRE 803(24). Hearsay to be admitted under MRE 803(24) must, among other requirements, possess "equivalent circumstantial guarantees of trustworthiness" that traditional exceptions enjoy. MRE 803(24). Here, the trial court determined that the volunteered nature of the statement, in conjunction with the lack of any opportunity for the prosecution to cross-examine the witness concerning the statement, obviated any finding of circumstantial trustworthiness and thus precluded its admission under MRE 803(24). Because the trial court's decision in this regard falls within the range of reasonable and principled outcomes, see *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003), it did not abuse its discretion in denying defendant's request to admit the prior statement.

C. Other Investigation

Defendant next argues that reference to a homicide investigation connected to the search warrant yielding the evidence on which his convictions are based constituted error requiring reversal. However, he has failed, as required by MCR 7.212(C)(7), to provide any citation to the record in support of this argument and our review of the record has failed to reveal any instance where the homicide investigation was expressly referenced. Accordingly, this issue is not properly presented for our review and we decline to address it. *People v Milstead*, 250 Mich App 391, 404 n 8; 648 NW2d 648 (2002).

D. Ineffective Assistance

Defendant also argues that he was denied the effective assistance of counsel. Defendant did not timely move for a new trial and evidentiary hearing; therefore, this issue is unpreserved. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). Our review of unpreserved claims of ineffective assistance of counsel is limited to errors apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). To prove ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that there is a reasonable probability that, but for that deficient performance, the result of the trial would have been different. *People v Matuszak*, 263 Mich App 42, 57-58; 687 NW2d 342 (2004).

We find defendant's claim of ineffective assistance with regard to the consolidated conspiracy case to be without merit because, as already discussed, he has failed to show any prejudice arising from the allegedly improper charge. *Id.* Defendant's claim that his counsel's performance with regard to admission of the hearsay statement discussed above was deficient is also without merit. As also already discussed, defense counsel sought admission of the statement and the trial court properly denied the request. The fact that defense counsel's attempt to introduce the statement was not successful does not render his attempt ineffective assistance. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Defendant's assertion that his counsel failed to provide constitutionally effective assistance by failing to ensure that the related homicide investigation was not referenced is also meritless. As discussed above, a review of the record provided to this Court reveals no instances where the homicide investigation was expressly referenced, and there was thus nothing to which defense counsel could have objected. A defendant's counsel is not ineffective for failing to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

In challenging his counsel's performance at trial, defendant also asserts that the felon in possession and felony-firearm charges should not have been brought before the jury and makes an obscure reference concerning defense counsel's failure to call a particular witness. However, defendant has not made any arguments or cited any authority to support these assertions. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). Accordingly, defendant has abandoned these allegations of error.

E. Sentencing

Defendant next makes several arguments concerning his sentence. Contrary to defendant's assertion, however, the trial court did not depart from the recommended minimum sentence range under the legislative guidelines. Rather, defendant's sentences fall within the minimum guidelines ranges as scored. Accordingly, defendant's claim that there was an improper, upward departure is without merit. Further, because the statutory maximums for the convicted offenses were not exceeded, defendant's right to a jury determination of the facts supporting his sentencing was not violated. *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004); *People v Drohan*, 475 Mich 140, 156, 164; 715 NW2d 778 (2006).

Defendant correctly argues, however, that the trial court erred in failing to apply to his felony-firearm sentence credit for 240 days served in jail while awaiting trial. MCL 769.11b provides that

[w]henver any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

Here, the judgment of sentence indicates that the trial court awarded defendant 240 days credit against his possession of methamphetamine, felon-in-possession, and maintaining a drug house sentences, but did not award him credit against his felony-firearm sentence. Because defendant's felony-firearm sentence must be served first, see MCL 750.227b(2), any credit for time served should be applied against the felony-firearm sentence, as opposed to the other sentences. *People v Cantu*, 117 Mich App 399, 403; 323 NW2d 719 (1982). Accordingly, remand is necessary for the ministerial task of correcting the judgment of sentence. *Id.*

F. Evidentiary Hearing

Lastly, defendant requests that this Court remand this matter for an evidentiary hearing to develop factual support for a number of his claims on appeal. We deny this request because it is untimely and is not supported by affidavit or other offer of proof regarding the facts to be established at a hearing. MCR 7.211(C)(1)(a).

Affirmed, but remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Christopher M. Murray