STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 17, 2008
v	No. 272732 Oakland Circuit Court
ALAN EDWARD WATSON, Defendant-Appellant.	LC No. 2005-204038-FC

Before: White, P.J., and Hoekstra and Schuette, JJ.

PER CURIAM.

Defendant was convicted by a jury of conspiracy to deliver or possess with intent to deliver 1,000 or more grams of cocaine, MCL 750.157a, and possession with intent to deliver 1,000 or more grams of cocaine, MCL 333.7401(2)(a)(i). He was sentenced as a second habitual offender, MCL 769.10, to concurrent prison terms of 135 months to 45 years for each conviction. He appeals as of right. Because we find no error in the trial court's decision to admit the statements of a nontestifying codefendant or in the admission of other evidence of defendant's drug activities, that the evidence produced at trial was sufficient to support defendant's conviction and not against the great weight of the evidence, and that defendant's claims of ineffective assistance on the basis of these issues and for failure to call a witness are without merit, we affirm.

I. Appellate Counsel's Issues

Defendant first argues that the admission of statements from a nontestifying codefendant violated his constitutional right of confrontation. Because defendant failed to raise this Confrontation Clause issue below, the issue is not preserved. Accordingly, we review the issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A defendant has the right to confront the witnesses against him. *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007); see also US Const Am VI; Const 1963, art 1, § 20. "The Confrontation Clause prohibits the admission of all out-of-court testimonial statements unless the declarant is unavailable at trial and the defendant had a prior opportunity for cross-examination." *Chambers, supra* at 10. The Confrontation Clause is not implicated, however, if the statements of the declarant are not testimonial. *Davis v Washington*, 547 US 813; 126 S Ct 2266; 165 L Ed 2d 224 (2006); see also *People v Walker (On Remand)*, 273 Mich App 56, 60;

728 NW2d 902 (2006). "Testimonial" statements include prior trial testimony, pretrial statements that the declarant could reasonably expect to be used in a prosecutorial manner, and statements made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. *People v Jambor (On Remand*), 273 Mich App 477, 487; 729 NW2d 569 (2007).

The statements at issue here were made during casual conversation among alleged conspirators. The statements were not made under circumstances that would lead an objective witness reasonably to believe that the statements would be available for use at a later trial, nor of the sort one would reasonably expect to be used in a prosecutorial manner. See *People v Bauder*, 269 Mich App 174, 180-182; 712 NW2d 506 (2005). Accordingly, their admission did not violate defendant's rights under the Confrontation Clause.

Further, the trial court did not abuse its discretion in determining that the statements were admissible under MRE 801(d)(2)(E), as statements by a coconspirator during the course and in furtherance of the conspiracy. See *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998) (the decision whether evidence is admissible is a matter within the discretion of the trial court and will be reversed only where there is a clear abuse of that discretion). Contrary to defendant's assertion, other circumstantial evidence offered at trial established by a preponderance of the evidence the existence of a conspiracy to deliver or possess with the intent to deliver cocaine. See *People v Martin*, 271 Mich App 280, 316-317; 721 NW2d 815 (2006). Specifically, there was evidence that Samuel Mora came to Detroit in May 2005, transporting bags of marijuana that he gave to William Berry. After his arrival, William and defendant both took Mora to the airport in defendant's vehicle, storing Mora's rental car at the home of defendant's girlfriend, "Bee" Whittaker. Mora returned to Detroit in July 2005, bringing a large quantity of drugs and meeting with William and his brother, Cresswell Berry, at Whittaker's home. According to a police officer conducting surveillance on the home at that time, Mora greeted each of the men, including defendant, and they all went into the home together. After a brief time in the house the men returned outside. Defendant and the Berry brothers convened at defendant's car and took turns reaching into the console area, where drugs packaged for distribution were later found. Mora then handed Cresswell Berry a backpack later found to contain a large quantity of cocaine, while William Berry and defendant appeared to act as lookouts. When additional police officers arrived to conduct a raid of Whittaker's home, the Berry brothers and defendant fled.

Additionally, there was evidence concerning extensive telephone contact between all of the men during the time frame of the conspiracy, including calls between defendant and Mora. Mora's phone number was also found in defendant's wallet. In light of this evidence, it was reasonable for the trial court to conclude that there was sufficient independent proof of a conspiracy to admit the statements under MRE 801(d)(2)(e).

We also reject defendant's related ineffective assistance of counsel issue. Counsel objected on the basis of hearsay, but the trial court properly overruled her objection. Further, because the testimony did not violate defendant's right of confrontation, any objection on that ground would have been futile. Counsel is not required to make a futile objection. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Defendant next argues that reversal is required because of the admission of other drug evidence, contrary to MRE 404(b) and the trial court's pretrial order suppressing other drug evidence. We disagree.

Initially, we reject defendant's argument that the trial court's suppression order precluded evidence related to the May 2005 events involving the transportation and delivery of marijuana. The scope of the trial court's suppression ruling did not extend to the May 2005 events. Additionally, those events predated the July 25, 2005, search of the Fenmore residence, which was the basis for the motion to suppress, so there would not have been any basis for suppressing the May 2005 events based on the July 25, 2005, search. Therefore, the trial court's suppression order was not violated.

Defendant also argues that his conviction must be reversed because the evidence of the May 2005 events was inadmissible under MRE 404(b), which prohibits evidence of "other crimes, wrongs, or acts to prove the character of a person in order to show action in conformity therewith." We do not agree.

Before trial, the trial court granted the prosecutor's motion to expand the charged conspiracy to include the events in May 2005. Because defendant was charged with a conspiracy that was alleged to have taken place from May 2005 through July 2005, defendant's involvement with codefendant Mora and the other alleged coconspirators in transporting marijuana during this time frame did not constitute an "other" crime, wrong, or act to which MRE 404(b) applies. Rather, defendant's activities during this time period were a part of the conspiracy with which he was charged, and were thus admissible independent of MRE 404(b). Accordingly, the trial court did not abuse its discretion in admitting that evidence. *Starr*, *supra* at 494.

Defendant also argues that evidence that drugs were found in his vehicle on the day of his arrest, following a police raid, was inadmissible under MRE 404(b). Because defendant did not object to this evidence at trial, our review is limited to plain error affecting defendant's substantial rights. *Carines*, *supra* at 763; *People v Ackerman*, 257 Mich App 434, 446; 669 NW2d 818 (2003).

No plain error is apparent from the use of this evidence because the prosecutor referred to it only for the purpose of showing defendant's knowledge of the drugs, a permissible purpose under MRE 404(b)(1), not for the improper purpose of proving character in order to show action in conformity therewith. Additionally, because the cocaine in defendant's car was packaged for distribution, it was relevant to the issue of defendant's intent to distribute the cocaine. Furthermore, the evidence was linked to the events surrounding the police raid on July 25, which led to the charged offenses. Shortly before the raid, the police observed defendant and the other conspirators taking turns reaching inside toward the center console of defendant's vehicle, which is where the cocaine was found. The jury was entitled to hear the "complete story" of the events immediately preceding the police raid, which led to the charged offenses. See *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978). The evidence was also relevant to show defendant's association with the other men in the charged conspiracy. Thus, the evidence was admissible as part of the res gestae of the crime, independent of MRE 404(b), to give the jury an intelligible

presentation of the full context in which the disputed events took place. *Id*.; see also *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). For these reasons, admission of the evidence did not amount to plain error.[1]

We also reject defendant's argument that defense counsel was ineffective because she stated that defendant was charged with a marijuana offense. Defendant relies on an isolated statement as support for his argument. Although the prosecutor attributes the statement to a transcription error by the court reporter, a corrected transcript has not been filed. Regardless, we are satisfied that defendant was not prejudiced by the alleged misstatement. In her surrounding remarks, defense counsel referred to the fact that defendant was not charged with a marijuana offense. Further, the jury was informed that defendant was only charged with an offense involving cocaine and it was instructed accordingly. Under the circumstances, there is no reasonable likelihood that the jury was misled by any isolated misstatement. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

II. Defendant's Supplemental Brief

In a pro se supplemental brief, defendant argues that his conspiracy conviction is against the great weight of the evidence and that the evidence was insufficient to support his convictions. Because defendant did not preserve his great weight argument by raising it in a motion for a new trial, we review that issue for plain error affecting defendant's substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

A new trial may be granted if the jury's verdict is against the great weight of the evidence. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). The evidence must preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Id*. In determining whether sufficient evidence has been presented to sustain a conviction, an appellate court is required to view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

A conspiracy exists where two or more persons combine with the intent to accomplish an illegal objective. *Martin*, *supra* at 317. Circumstantial evidence and reasonable inferences arising from the evidence may be used to establish a conspiracy. *Id*.

The evidence did not preponderate heavily against a finding of a conspiracy. The evidence indicated that codefendant Mora came to Detroit in May 2005, transporting bags of marijuana that he gave to codefendant William Berry. Defendant and Berry thereafter drove Mora to the airport for his return trip home. Mora later returned and picked up his rental car from defendant's alleged residence on Fenmore Street. During this time, defendant and the others drove around town, engaging in conversation suggestive of their trafficking in illegal

[1] Because defendant has failed to show that this evidence was inadmissible, we reject his related argument that defense counsel was ineffective for failing to object to its admission. *Torres*, *supra* at 425.

drugs. Mora returned to Detroit two months later, again bringing a large quantity of drugs, which he brought to the Fenmore residence. Immediately before the police raid, the men greeted each other and met inside the Fenmore home. Defendant and the Berry brothers thereafter convened at defendant's car and took turns reaching inside toward the center console, where cocaine packaged for distribution was later found. As Mora handed Cresswell Berry a backpack that contained a large amount of cocaine, William Berry and defendant acted as lookouts. When the police arrived, the Berry brothers and defendant fled. The prosecutor also introduced phone records showing continued phone contact between defendant and the other alleged conspirators.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to support defendant's conspiracy conviction. Further, the jury's verdict is not against the great weight of the evidence.

Finally, defendant argues that defense counsel was ineffective for failing to call Ethel Whittaker as a witness at trial. According to Whittaker's affidavit, defendant was her longtime boyfriend, but was not a resident at the Fenmore Street address. Whittaker also expressed that she did not believe that defendant would be involved in illegal activity.

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. *Id*. at 76-77. Ineffective assistance of counsel can take the form of failure to call witnesses only if it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

Even if Whittaker would have testified consistent with her affidavit, defendant has not overcome the presumption that defense counsel made a strategic decision not to call her, nor has he shown that her absence deprived him of a substantial defense. Whittaker did not claim that she had personal knowledge of any of the events surrounding the charged offenses. Although Whittaker averred that defendant was not a resident of her home, much of the evidence linking defendant to the other conspirators involved events, conduct, or telephone conversations that occurred away from the residence. Further, Whittaker admitted in her affidavit that defendant visited her house every day and occasionally slept over. Thus, her testimony would have established defendant's daily presence at, and access to, the residence. Furthermore, defense counsel called defendant's sister to testify that defendant did not live at the Fenmore residence, so the failure to call Whittaker did not deprive defendant of this defense. For these reasons, we find no merit to this ineffective assistance of counsel claim.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Bill Schuette