STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 4, 2009
v	No. 283192 Wayne Circuit Court
RAPHAEL APOLLO ROBINSON, Defendant-Appellant.	LC No. 07-014033-FH

Before: Servitto, P.J., and O'Connell and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession with intent to deliver less than five kilograms of marijuana, MCL 333.7401(2)(d)(iii), possession with intent to deliver a schedule four prescription drugs (Darvocet), MCL 333.7401(2)(c), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b(1). He was sentenced to time served (116 days) for the two drug convictions and 18 to 60 months for the felon-in-possession conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. We affirm defendant's convictions and sentences, but remand for correction of the presentence report.

Officers observed what they believed to be several drug transactions at a location owned or operated by defendant. They obtained a search warrant for the location and executed a raid pursuant to the warrant. During the raid, the police found marijuana and a vial of six Darvocet pills on a pool table.

I. Judicial Misconduct

Defendant first argues that various comments by the trial court deprived him of a fair trial. We disagree.

Defendant did not object to the challenged comments at trial. Although defendant observes that some older cases have held that an objection is not necessary to preserve such an issue for appeal, see, e.g., *People v Sterling*, 154 Mich App 223, 231; 397 NW2d 182 (1986), more recent cases have held that an objection is necessary to preserve a challenge concerning the trial court's conduct. See *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995), and *People v Sardy*, 216 Mich App 111, 117-118; 549 NW2d 23 (1996). These post-1990 cases are controlling under MCR 7.215(J)(1). Therefore, because there was no objection at trial, this

issue is unpreserved. We review unpreserved issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

"A defendant in a criminal trial is entitled to a neutral and detached magistrate." *People v McIntire*, 232 Mich App 71, 104; 591 NW2d 231 (1998), rev'd on other grounds 461 Mich 147 (1999). "Judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases do not generally support a challenge for partiality." *Id.* However, a trial court's excessive interference in the examination of witnesses or disparaging remarks directed at defense counsel may demonstrate partisanship that denies a defendant a fair trial. *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). "A trial court[] . . . pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial." *Paquette*, *supra* at 340. "The test is whether the judge's questions or comments may have unjustifiably aroused suspicion in the mind of the jury concerning a witness' credibility and whether partiality quite possibly could have influenced the jury to the detriment of the defendant's case." *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996).

In the present case, the trial court's preliminary comments during voir dire were designed to dispel any misconceptions that the jurors might have from watching television concerning what happens at a trial. The court's remarks were not contrary to law and, therefore, did not amount to plain error. Further, the court instructed the jury to base its verdict only on the properly admitted evidence, and was also told that a reasonable doubt can arise out of a "lack of evidence." Jurors are presumed to have followed the court's instructions unless the contrary is clearly shown. *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994). Defendant has made no such showing here. Thus, defendant has also failed to show that the trial court's comments affected his substantial rights.

Similarly, the trial court's comments about the floor plan evidence were an attempt to control the proceedings and to ascertain the relevance of the testimony. See *Paquette*, *supra* at 341. There was no partiality or bias reflected in the court's comments. Although defense counsel was encouraged to move more quickly and to avoid unnecessary repetitive questioning, he was not prevented from exploring this subject or eliciting the testimony he sought. In addition, the trial court instructed the jury that its questions, comments, and rulings were not meant to reflect an opinion about the case, and that if the jurors believed that the court had such an opinion, they should ignore it. The court's instructions were sufficient to protect defendant's substantial rights.

Similarly, we disagree with defendant's argument that the trial court was being sarcastic or derisive when responding to an objection during closing argument. The court summarized defendant's theory of the case in a shorthand fashion when responding to the prosecutor's objection to defense counsel's closing argument, but did so in the context of explaining to the prosecutor why defense counsel's argument was not improper. Further, the challenged comments show no partiality or bias. We also note that defense counsel seized the opportunity to clarify his theory of the case for the jury. Thus, defendant has again failed to show either a plain error or that his substantial rights were affected.

II. Validity of the Search Warrant

Defendant next argues that the trial court erred in denying his motion to suppress the evidence on the ground that the search warrant affidavit was insufficient to establish probable cause to issue a search warrant. We disagree.

We review a trial court's findings on a motion to suppress for clear error, *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005); *People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1983), but review the trial court's application of constitutional law to the facts de novo. *Williams*, *supra* at 313; *People v Houstina*, 216 Mich App 70, 73; 549 NW2d 11 (1996).

Probable cause sufficient to support a search warrant exists when all the facts and circumstances would lead a reasonable person to believe that evidence of a crime, or the contraband sought, is in the place requested to be searched. *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001). When probable cause is averred in an affidavit, the affidavit must contain facts within the knowledge of the affiant rather than mere conclusions or beliefs. The affiant may not draw his own inferences, but must state the matters that justify the inferences. *People v Martin*, 271 Mich App 280, 298; 721 NW2d 815 (2006), aff'd 482 Mich 851 (2008). The affiant's experience is relevant to the establishment of probable cause. *People v Darwich*, 226 Mich App 635, 639; 575 NW2d 44 (1997). Police officers are presumptively reliable, and self-authenticating details also establish reliability. *Ulman*, *supra* at 509.

Contrary to what defendant argues, the search warrant in this case was not based on anonymous information. Rather, the confidential informant merely caused the police to set up surveillance, and it was the police officer's personal observations during the surveillance that formed the basis for the search warrant. The affiant police officer's personal observations, in light of his experience as a narcotics officer, were sufficient to support a finding of probable cause to believe that drugs and guns may be found on the premises. The fact that there were possible alternative explanations for some of the conduct observed did not detract from a finding of probable cause. Thus, the trial court did not err in denying defendant's motion to suppress.

III. Effective Assistance of Counsel

Defendant next argues that a new trial is required because defense counsel was ineffective. We disagree.

The trial court denied defendant's motion for a new trial on this ground after conducting a *Ginther*[1] hearing. The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to the effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

To establish ineffective assistance of counsel, defendant was required to show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant was also required to overcome the presumption that the challenged conduct might be considered sound trial strategy, and to show that he was prejudiced by counsel's conduct, i.e., that counsel's error may have made a difference in the outcome of the trial. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *Pickens*, *supra* at 312, 314. Where counsel's conduct involves a choice of strategies, it is not deficient. *LaVearn*, *supra* at 216. Every effort must be made to eliminate the distorting effects of hindsight. *Id*.; see also *People v Stanaway*, 446 Mich 643, 688; 521 NW2d 557 (1994).

Defendant first argues that defense counsel was ineffective for introducing prejudicial information that had not been mentioned by the prosecutor. "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." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). In this case, after an unsuccessful motion in limine to preclude evidence of a marijuana-growing operation next door, and after being told that the prosecutor intended to raise the issue at trial, defense counsel made a considered strategy decision to preemptively raise the issue first, in an attempt to minimize the damage to defendant, by eliciting that the keys to the building next door were found in someone else's possession. This was clearly a matter of trial strategy that this Court will not second-guess. The fact that that the strategy did not work does not prove that counsel was ineffective. *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004).

Defendant next argues that counsel was ineffective for failing to call Sherman Wagner to testify. The decision whether to call Wagner was also a matter of trial strategy. *Davis*, *supra* at 368; see also *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Defense counsel's testimony at the *Ginther* hearing indicates that he considered Wagner's potentially valuable testimony, and weighed it against what he felt was a weak prosecution case. He also evaluated Wagner's credibility and demeanor, and considered that Wagner would be incriminating himself not just for the weapon, but for the marijuana-growing operation next door, which affected his credibility. While Wagner's testimony could have provided a substantial defense if the jury believed him, defense counsel questioned how well he'd withstand cross-examination. Counsel made a considered strategy decision not to call Wagner to testify and this Court will not substitute its judgment for that of counsel's. Again, the fact that counsel's strategy was unsuccessful does not establish that counsel was ineffective. *Matuszak*, *supra* at 61.

Defendant also argues that defense counsel was ineffective for failing to object to the trial court's comments discussed above. A failure to object can be a serious error that results in prejudice. See, e.g., *People v Kimble*, 470 Mich 305, 314; 684 NW2d 669 (2004). Here, however, defense counsel made a strategic decision not to object, to avoid appearing confrontational. *Matuszak*, *supra* at 58. Moreover, as previously discussed, the trial court's comments were not inappropriate. Therefore, defendant was not prejudiced by counsel's failure to object.

IV. Sufficiency and Great Weight of the Evidence

Defendant next argues that the evidence was insufficient to support his convictions, or alternatively, that the jury's verdict was against the great weight of the evidence. We disagree.

A. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to support his drug convictions because the drugs were not found on his person, other people had access to the premises, and there was no specific evidence of intent to deliver. He adds that there was insufficient evidence to support the weapons convictions because the evidence showed that the gun was thrown from the window before the police entered the premises and, therefore, the gun could not be linked to him.

The sufficiency of the evidence is evaluated by reviewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find every element of the crime proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). The resolution of credibility disputes is within the exclusive province of the trier of fact, *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990), which may also draw reasonable inferences from the evidence, *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991).

Initially, defendant's possession of a firearm is supported by the direct testimony of a police officer, who testified that he saw defendant pull the weapon out of his waistband and throw it out the window. Viewed most favorably to the prosecution, this testimony was sufficient to support defendant's weapons convictions. The credibility of the police officers' testimony was for the jury to resolve, and this Court will not resolve that issue anew.

With regard to the drug convictions, this Court has stated that "[t]he element of knowing possession with intent to deliver has two components: possession and intent." *People v Brown*, 279 Mich App 116, 136; 755 NW2d 664 (2008). "Because it is difficult to prove an actor's state of mind, only minimal circumstantial evidence is required." *Id*.

The testimony indicated that the drugs were found in plain sight, in the same room where defendant was found, in the premises of defendant's recording studio. An officer testified to having observed four suspected drug transactions during pre-raid surveillance of the premises, including one transaction involving defendant. Viewed in a light most favorable to the prosecution, the evidence supports a reasonable inference that defendant had knowledge of the drugs and a right to possess them, and that the drugs were being held for sale to customers. *People v Konrad*, 449 Mich 263, 271-272; 536 NW2d 517 (1995); see also *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992).

Accordingly, there was sufficient evidence to support each of defendant's convictions.

B. Great Weight of the Evidence

A new trial may be granted where a verdict is against the great weight of the evidence but only where the evidence preponderates heavily against the verdict and a serious miscarriage of

justice would otherwise result. *People v Lemmon*, 456 Mich 625, 642, 647; 576 NW2d 129 (1998). That is not the situation here. While there may have been potential conflicts in the officers' testimony, the testimony was not so far impeached as to be deprived of all probative value. *Id*. at 643-646. Thus, the credibility of the officers' testimony was for the jury to resolve, and the trial court did not abuse its discretion in denying defendant's motion for a new trial on this ground.

V. Sentencing

Defendant lastly argues that he is entitled to resentencing because of erroneous information in his presentence report (PSIR), which suggested that defendant's recording business did not exist as a legitimate corporation.

A trial court has a duty to resolve challenges to the accuracy of information contained in a PSIR. See MCL 771.14(5) and (6). If the court finds that the information is inaccurate or irrelevant, it must be stricken from the report. MCL 771.14(6); *People v Martinez (After Remand)*, 210 Mich App 199, 202; 532 NW2d 863 (1995). However, resentencing is not required if the challenged information did not have a bearing on the defendant's sentence, although information determined to be inaccurate must still be stricken from the PSIR. *Id*. at 202-203.

In the present case, defendant's PSIR contained inaccurate information concerning defendant's business. But in denying defendant's motion for resentencing, the trial court specifically stated that the challenged information had no effect on defendant's sentences. We note that the court sentenced defendant within the sentencing guidelines range and declined to enhance defendant's sentences pursuant to the habitual offender statutes. Thus, defendant was not prejudiced by defense counsel's failure to object at sentencing, and resentencing is not required. However, defendant is entitled to correction of the presentence report and, accordingly, we remand for this limited purpose.

Affirmed and remanded for correction of the presentence report in accordance with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Peter D. O'Connell
/s/ Brian K. Zahra