STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 6, 2010
v	No. 290760 Midland Circuit Court
TONY DEWAYNE WALKER, Defendant-Appellant.	LC No. 08-003834-FH

Before: MURRAY, P.J., and SAAD and M.J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), and one count of possession with intent to deliver less than 50 grams of cocaine, also in violation of § 7401(2)(a)(iv). For his convictions, defendant was sentenced as a second habitual offender, MCL 769.10, to 12 months in the Midland County jail followed by 36 months' probation. Defendant was to serve both the jail and probation terms consecutive to his 90-day sentence for contempt of court. We affirm.

I. BACKGROUND

A successful sting operation underlies the instant appeal. The operation began when Jason Curley agreed to cooperate with the Bay Area Narcotics Enforcement Team (BAYANET)–a multi-jurisdictional drug task force of state police, city police and sheriff's deputies–in apprehending defendant, Curley's narcotics supplier. Having initially verified with defendant during a telephone call in the presence of BAYANET officers that defendant had powder and crack cocaine for sale, Curley executed two "controlled purchases" from defendant under BAYANET'S supervision. On both occasions, a BAYANET officer escorted Curley to an apartment complex where Curley entered an apartment alone and purchased cocaine from defendant using bills whose serial numbers BAYANET officers had previously recorded. Curley obtained eight grams of crack cocaine for $275 during the first controlled purchase and a six-gram mixture of powder and crack cocaine for $300 during the second.

After the second controlled purchase, Curley informed officers that defendant had shown him crack stored in his freezer, and BAYANET officers subsequently obtained a search warrant. During the execution of that warrant, defendant arrived home and was arrested. In defendant's front pocket, police found $1,508. In a backpack inside the vehicle in which defendant arrived, officers found $615. Inside the apartment, officers discovered 12 grams of crack cocaine in the

freezer as well as scales typically used in drug trafficking. Several hundred dollars were also found in the bedroom. Significantly, all of the bills used in the first controlled purchase were recovered from the backpack, and all of the bills used in the second controlled purchase were found on defendant's person and in the bedroom. Following his arrest, defendant waived his *Miranda*[1] rights and indicated that although he did not sell drugs out of the apartment, he was the "hookup" for his roommates, who were drug dealers. Defendant was charged with the aforementioned offenses and his trial commenced.

Notably, at the close of the prosecution's case-in-chief, the parties met in the court's chambers where defense counsel renewed his previously filed motion to withdraw from the case on the grounds that defendant refused to share information and that defendant wanted to fire him. When the court denied the motion and gave defendant the option of proceeding *in propria persona*, defendant repeatedly asserted his right to hire his own attorney, threatened to walk out of the courtroom, and accused the trial court of "screwing [him] over." Following this contentious exchange, the court held defendant in contempt of court and removed defendant from chambers in handcuffs. Back in the courtroom, when defendant expressly refused to allow the trial to proceed peacefully, the court removed defendant to a separate room where he could observe the trial over video. When, in accord with defendant's wishes, defense counsel subsequently called defendant to testify by way of video feed, defendant repeatedly stated he was declaring a mistrial and that he wanted "no representation; I don't want to represent myself neither [sic]." With defendant refusing to testify, the attorneys proceeded to closing arguments, and the jury, after being duly instructed, returned a verdict of guilty on all counts. The instant appeal ensued.

II. DEFENDANT'S BRIEF

A. INEFFECTIVE ASSISTANCE OF COUNSEL

On appeal, defendant first argues that defense counsel's failure to adequately prepare and investigate his case denied him the effective assistance of counsel. Claims of ineffective assistance of counsel involve a question of law, which this Court reviews de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because defendant failed to move for a new trial or evidentiary hearing and establish a record of facts pertaining to his allegations, our review is limited to mistakes apparent on the existing record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004); *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998). The United States and Michigan Constitutions guarantee a defendant the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. To establish ineffective assistance of counsel, a defendant must show that his counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that the representation so prejudiced the defendant that, but for counsel's error, the result of the proceedings would have been different. *People v Noble*, 238 Mich App 647, 662; 608 NW2d 123 (1999).

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Underlying the lack of preparation and investigation claims are defendant's assertions that counsel failed to obtain the information necessary to mount a defense by failing to investigate defendant's leads regarding alibi witnesses and that counsel was "egregiously tardy" in visiting defendant. At the outset, we note that defendant provides not a single citation to the record in support of these arguments as required by MCR 7.212(C)(7), and it is certainly not incumbent upon this Court to scour the record to find the necessary factual support on defendant's behalf.[2] *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990).

In any event, the record is utterly devoid of any reference to alibi witnesses or counsel's tardy visits with defendant and contains no reference revealing counsel's failure to subpoena witnesses or showing counsel's negative references to defendant's relationship with his prior attorney as defendant now claims.[3] On the contrary, our review of the record reveals that it was defendant who in fact withheld information from defense counsel and it was defense counsel who conducted himself in accord with professional norms respecting defendant's decisions and vigorously advocating defendant's position throughout trial despite defendant's egregious behavior. Thus, defendant has not only failed to establish a factual predicate showing that defense counsel's investigation and preparation were inadequate, *People v Hoag*, 460 Mich 1, 6-7; 594 NW2d 57 (1999), but also defendant has failed to show how defense counsel's lack of preparedness and failure to investigate alibi witnesses resulted in prejudice, *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). We find defendant's argument on this matter completely meritless.

B. RIGHT TO CONFRONTATION AND FAIR TRIAL

Defendant next argues that the court violated his rights under the Confrontation Clause and his right to a fair trial by excluding him from the courtroom, holding him in contempt of court, and refusing to declare a mistrial. To the extent defense counsel raised an issue under the Confrontation Clause below, our review is de novo, *People v Smith*, 243 Mich App 657, 682; 625 NW2d 46 (2000), otherwise, our review of that issue is for plain error affecting substantial rights, *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). However, we review the court's issuance of its contempt order and denial of defendant's motion for a mistrial for an abuse of discretion, and review any related questions of law de novo. *People v Dennis*, 464

[2] The prosecution cites throughout its brief instances of defense counsel's interactions with defendant pertaining to witness lists and police reports, as well as the actions of defendant's prior defense counsel that would undermine defendant's claims on appeal. However, the prosecution's citations do not correspond to the record currently before us.

[3] The attorney representing defendant at trial was appointed after the attorney representing defendant during his preliminary examination was permitted to withdraw from this case. To the extent defendant's ineffective assistance claim may be construed as implicating his prior attorney, it is not supported by the record. Specifically, the record reveals that defendant's prior attorney provided a rigorous cross examination of witnesses at defendant's preliminary examination, vouched for defendant's trustworthiness and accountability before the court set a bond, entered defendant's plea as "stand[ing] mute," and requested a *Cobbs* evaluation on defendant's behalf – all before filing a motion to withdraw due to a "breakdown . . . [that was] irreconcilable." See *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

Mich 567, 572; 628 NW2d 502 (2001); *Johnson v White*, 261 Mich App 332, 345; 682 NW2d 505 (2004).

1. DEFENDANT'S REMOVAL FROM THE COURTROOM AND CONTEMPT OF COURT

The Confrontation Clause of the United States Constitution, made applicable to the states through the Due Process Clause of the Fourteenth Amendment, guarantees a criminal defendant the right to be present in the courtroom during every stage of trial and to confront the witnesses against him. US Const, Am VI, Am XIV; *Illinois v Allen*, 397 US 337, 338; 90 S Ct 1057; 25 L Ed 2d 353 (1970); *People v Staffney*, 187 Mich App 660, 663; 468 NW2d 238 (1991). The right to be present at trial is also protected in Michigan by statute, MCL 768.3, which provides that "[n]o person indicted for a felony shall be tried unless personally present during the trial . . . ." These guarantees of presence in the courtroom are not absolute, however, and may be waived by a defendant's improper or disruptive behavior. *People v Krueger*, 466 Mich 50, 54 n 9; 643 NW2d 223 (2002).

Here, after the trial court offered defendant the option of proceeding *in propria persona* or with the aid of defense counsel, defendant argued with and repeatedly interrupted the court, threatened to walk out of the courtroom, and told the trial court that it "wasn't finished screwing [him] over" and that he would show the court "what's fair here." Even after these outbursts, the court did not remove defendant from the courtroom until defendant informed the court he would not sit peacefully while the trial proceeded. Defendant's pledge later came to fruition when, after he was called to testify, defendant stated to the jury over a video transmission that he was declaring a mistrial, had fired his attorney, and that he did not consent to represent himself. It was at this point that defendant declined to testify and the court, after asking defendant a second time whether he in fact wished to waive his right to testify, cut the volume to the video transmission.

On these facts, plain error is nonexistent. Indeed, as our Court has observed, "it is essential to the proper administration of criminal justice that dignity, order, and decorum be the 'hall-marks' of court proceedings[,]" *Staffney*, 187 Mich App at 664 (citation omitted), and clearly defendant's behavior was disruptive of these ends. It is also noteworthy that the court provided defendant numerous opportunities to observe proper decorum and remain in the courtroom, but defendant declined and informed the court that he would not sit peacefully through the proceedings. Also, the court instructed the jury that defendant's absence from the courtroom had no bearing on his guilt or innocence. That defendant would now argue that the court further erred in not permitting his physical presence in the courtroom during closing argument strains credulity in light of the court's observation that defendant refused even to watch the proceedings over video.[4] Nor do we find that defendant's right to confront the witnesses against him was violated where no additional witnesses testified following defendant's removal from the courtroom. In short, the Confrontation Clause provides no refuge for defendant.

[4] We are unaware, as is defendant's appellate counsel apparently, of how defendant's history of legal proceedings against him in Midland County explains his disorderly conduct where the record is devoid of any such evidence.

We also reject defendant's challenge to the court's finding him in criminal contempt of court. *In re Contempt of Dougherty*, 429 Mich 81, 118 (RILEY, C.J., dissenting); 413 NW2d 392 (1987) (a defendant is guilty of criminal contempt where the court's purpose is to preserve its authority by punishing past misconduct through the imposition of an unconditional and fixed sentence). Indeed, defendant's behavior–especially his disrespectful comments directed at the court and his declaration to the jury that he was declaring a mistrial–provides exemplary instances of the type of willful disregard and disobedience of the court's decisions that are required to sustain a finding of criminal contempt. *DeGeorge v Warheit*, 276 Mich App 587, 592; 741 NW2d 384 (2007) (To be guilty of criminal contempt, "a willful disregard or disobedience of a court order must be clearly and unequivocally shown, and must be proven beyond a reasonable doubt.") (citation omitted). Therefore, we find no error in defendant's removal from the courtroom and no abuse of discretion in the court finding defendant in contempt.

2. MISTRIAL

In arguing the court erred in denying his motion for a mistrial, defendant reiterates in large part his arguments underlying his claim of ineffective assistance of counsel. To the extent defendant bases his claim on those grounds, we reject it for the reasons previously stated. Similarly, the court properly denied defense counsel's motion for a mistrial premised on the Confrontation Clause where there was no violation of those rights.

Defendant also takes issue with the court's finding that his request to hire new counsel in the middle of trial was a dilatory tactic given that defendant had declined many prior opportunities to employ his own attorney and the court's failure to inquire into the adequacy of defense counsel's representation of defendant. However, in light of defendant's repeated disrespectful comments directed at the trial court combined with his disruptive behavior and express refusal to permit the trial to proceed peacefully, it was well within the trial court's discretion to deny a motion for substitute counsel. *Staffney*, 187 Mich App at 667. "'We will not condone or allow a defendant to perpetrate chaos at his own trial and then obtain a mistrial on the basis of prejudice.'" *Id*., quoting *People v Siler*, 171 Mich App 246, 256; 429 NW2d 865 (1988). Finally, we decline to address defendant's claim that the court erred in failing to declare, *sua sponte*, that defense counsel's representation of defendant rose to the level of an infringement of defendant's constitutional right to the effective assistance of counsel where defendant has cited no authority in support of that position. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). The refusal to grant a mistrial was a prescient exercise of discretion given the circumstances in this case.

C. INSUFFICIENT EVDIENCE

Defendant next contends there was insufficient evidence to sustain his convictions of delivery and possession of less than 50 grams of cocaine. Due process requires the evidence to show guilt beyond a reasonable doubt to sustain a conviction. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). In determining the sufficiency of the evidence, this Court reviews the evidence de novo in the light most favorable to the prosecution. *People v Tombs*, 472 Mich 446, 459 (opinion by KELLY, J.); 697 NW2d 494 (2005). The Court does not consider whether any evidence existed that could support a conviction, but rather, must determine whether a rational trier of fact could find that the evidence proved the essential elements of the crime

beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992), citing *People v Hampton*, 407 Mich 354, 366; 285 NW2d 284 (1979).

"[T]o support a conviction for possession with intent to deliver less than fifty grams of cocaine, it is necessary for the prosecutor to prove four elements: (1) that the recovered substance is cocaine, (2) that the cocaine is in a mixture weighing less than fifty grams, (3) that defendant was not authorized to possess the substance, and (4) that defendant knowingly possessed the cocaine with the intent to deliver." *Wolfe*, 440 Mich at 516-517. Similarly, the elements of delivery of less than 50 grams of cocaine are (1) delivery; (2) of less than 50 grams of cocaine; (3) which defendant knew was cocaine; and, (4) defendant was not legally authorized to deliver cocaine. MCL 333.7401(2)(a)(iv). "Delivery" means "the actual, constructive, or attempted transfer from 1 person to another of a controlled substance, whether or not there is an agency relationship." MCL 333.7105(1).

Defendant's sufficiency challenge crumbles under the evidence presented against him. Lab tests confirmed that the substances recovered from the controlled purchases and the freezer were cocaine in amounts of less than 50 grams. And defendant's words and actions demonstrate his knowledge of the nature of these substances and create the reasonable inference that he was not authorized to possess or sell them. In particular, defendant informed Curley over the phone that he had cocaine for sale, measured the substance with scales typically used in drug trafficking before completing the sale, showed Curley where additional cocaine was stored for later sale, and admitted he was a "hookup" for other drug dealers. When these facts are considered in conjunction with the recovery of bills actually used in the sale to Curley, the inference that defendant delivered less than 50 grams of cocaine on two occasions as defined by statute is nothing if not reasonable.

Similarly, this evidence demonstrates that defendant possessed and intended to sell the cocaine in the freezer to Curley. Indeed, besides the direct evidence of defendant's showing and offering it to Curley, the fact that defendant acknowledged his ownership of items in the apartment during the officers' search arguably shows sufficient indicia of control over the area to create the reasonable inference that defendant had constructive possession of items in his apartment–in this case, his freezer. *People v Sammons*, 191 Mich App 351, 371; 478 NW2d 901 (1991) (constructive possession may be found where a defendant "knowingly has the power and intention to exercise dominion or control over a substance, either directly or through another person, or if there is proximity to the substance together with indicia of control."); see also *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995) (dominion and control means the person had the right to possess the narcotics).

Before moving on, we note that defendant's challenge to the officers' and Curley's credibility provides defendant no traction at this juncture. Indeed, it is the role of the jury rather than this Court to determine witness credibility, *Wolfe*, 440 Mich at 514-515, and we will not overturn a jury verdict simply because defendant brings forth a "setup" theory on these grounds for the first time on appeal. Sufficient evidence abounds in this case.

D. SENTENCING

While defendant asserts he is entitled to resentencing because his minimum sentence was based on facts not proven to a jury beyond a reasonable doubt, he acknowledges that our Supreme Court has already decisively ruled on this issue contrary to his position. See *People v McCuller*, 479 Mich 672, 676, 698; 739 NW2d 563 (2007) (under Michigan's indeterminate sentencing scheme, a sentencing court does not violate *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), by engaging in judicial fact-finding to score the Offense Variables to determine a defendant's minimum sentence); see also *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). We are bound to follow Supreme Court precedent and thus find no merit in this constitutional challenge to defendant's sentence.

III. DEFENDANT'S STANDARD 4 BRIEF

Defendant's standard 4 brief consists of a lengthy narrative reiterating in various forms all the issues previously presented on appeal, including ineffective assistance of counsel based on lack of preparation and the failure to call alibi witnesses, an attack on witness credibility, and challenges to both the court's exclusion of defendant from the courtroom and refusal to permit defense counsel to withdraw from the case. As this opinion already addresses each issue in full, no further elaboration is necessary. Nevertheless, before concluding we would be remiss if we did not highlight that defendant's standard 4 brief is completely devoid of any citation whatsoever to the record or to any legal authority. Consequently, defendant has abandoned all issues as presented in that brief. *Kevorkian*, 248 Mich App at 389.

Affirmed.

/s/ Christopher M. Murray
/s/ Henry William Saad
/s/ Michael J. Kelly