

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VALIANT LEON WHITE, JR.,

Defendant-Appellant.

UNPUBLISHED

March 1, 2012

No. 300692

Wayne Circuit Court

LC No. 10-004590-FH

Before: SAAD, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

Defendant Valiant Leon White, Jr. appeals by right his jury convictions of possession with intent to deliver 50 grams or more but less than 450 grams of cocaine, MCL 333.7401(2)(a)(iii), possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(iv), and possession with intent to deliver less than five kilograms of marijuana, MCL 333.7401(2)(d)(iii). The trial court sentenced defendant, as a second habitual offender, MCL 769.10, to serve 120 to 360 months in prison for the possession of cocaine conviction, 120 to 360 months for the possession of heroin conviction, and 24 to 72 months for the possession of marijuana conviction. Because we conclude there were no errors warranting relief, we affirm.

This case has its origins in a traffic stop. Detroit police officers—in two separate vehicles—pulled defendant over after observing him speeding and driving erratically. As one officer approached defendant’s car, he saw defendant drop a trash bag to the floorboards. The officer testified that he saw a baggie filled with white substance protruding from the trash bag. A later search of defendant’s car revealed additional cocaine, heroin, and marijuana hidden in the driver’s door panel. In response to the prosecutor’s case, defendant testified that he was not speeding or driving erratically. He also said that the car was not his; he was just driving it to the repair shop for friends. He also stated that he was unaware that the car had drugs in it. After hearing the testimony, the jury rejected defendant’s theory of the case and convicted him as stated above. However, the jury did acquit defendant of an additional charge of reckless driving.

Defendant argues that the trial court erred when it refused to hold an evidentiary hearing to determine whether the police officers had probable cause to pull him over. This Court reviews a trial court's decision to hold an evidentiary hearing for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216-217; 749 NW2d 272 (2008). "An abuse of discretion occurs when the [trial] court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Id.* at 217.

Ordinarily, a trial court should hold an evidentiary hearing before deciding a motion to suppress evidence. *People v Kaufman*, 457 Mich 266, 273; 577 NW2d 466 (1998). Both parties, however, may agree to allow the trial court to decide a motion to suppress on the record from the preliminary examination. *Id.* at 276. It is not required that the agreement be explicit; it may be implied from the circumstances. See *id.* at 270-276 (holding that the defendant's trial lawyer and the prosecutor impliedly agreed to have the motion to suppress on the record from the preliminary examination by basing their comments on the preliminary examination). Further, under MCR 6.110(D), a trial court may rely on the preliminary examination in deciding the merits of a motion to suppress. *Kaufman*, 457 Mich at 275-276.

Although defendant argues that he "clearly demanded an evidentiary hearing," the record shows that his trial lawyer impliedly agreed to allow the trial court to decide the merits of the motion to suppress on the record of the preliminary examination. In his motion to suppress, defendant requested a hearing, but did not specifically request an evidentiary hearing. He also did not state that he would present witnesses or other evidence to supplement the record at the hearing. Further, in the motion to suppress physical evidence, defendant referred to the officers' testimony at the preliminary examination. From the exchange between defendant's lawyer and the trial court, it is also evident that defendant's lawyer permitted the trial court to determine the merits of defendant's motion to suppress on the record of the preliminary examination. Even during his remarks regarding defendant's motion to quash, defendant's lawyer relied on testimony from the preliminary examination in arguing that the traffic stop was illegal. And neither the prosecution nor defendant's lawyer objected to the trial court's reference to the preliminary examination in denying the motions. Therefore, we conclude that both parties impliedly agreed to allow the trial court to determine the motion to suppress on the record from the preliminary examination. Accordingly, the trial court did not abuse its discretion.

Defendant next argues that the prosecutor committed misconduct that deprived him of a fair trial by failing to provide him with the felony complaint and arrest warrant. Specifically, defendant argues that there is no evidence that the complaint was properly filed and that the failure to provide him with the complaint and arrest warrant deprived him the ability to contest their validity. This Court reviews de novo claims of prosecutorial misconduct to determine whether a defendant was denied a fair and impartial trial. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

Under MCR 6.104(D), if an accused is arrested without a warrant, the prosecutor must file the complaint "at or before the time of arraignment." "On receiving the complaint and on finding probable cause, the court must either issue a warrant or endorse the complaint . . ." *Id.* Here, the record shows that the felony complaint was filed prior to the arraignment and, upon receiving the felony complaint, the magistrate issued an arrest warrant for defendant on the same day. A complaining witness and the magistrate signed the felony complaint and the magistrate

signed the arrest warrant. The record also shows that defendant was arraigned the next day, and pleaded not guilty to the charges against him. During the preliminary examination, the charges against defendant were placed on the record along with the factual allegations that supported the charges. Therefore, the prosecutor complied with MCR 6.104(D). Defendant had ample opportunity to challenge the validity of the complaint and the charges at the arraignment and preliminary examination.

Defendant also alleges that the prosecutor did not comply with the trial court's instruction at the hearing to provide defendant with the felony complaint and arrest warrant. Defense counsel filed a pretrial motion to dismiss the charges against defendant because the prosecution failed to provide defendant the felony complaint and arrest warrant prior to the preliminary examination. At the motion hearing, the trial court instructed the prosecutor to provide defendant the documents and concluded that defendant suffered no prejudice. And there is nothing in the record to suggest that the prosecutor did not comply. Moreover, although defendant argues that he never had the opportunity to contest the underlying probable cause that supported the charges, the record shows that his lawyer vigorously attacked the validity of the stop and tried to have the drug evidence suppressed. Therefore, it is plain that defendant had the opportunity to challenge the probable cause that supported the charges. Defendant failed to establish that the prosecutor's alleged failure to give him a copy of the complaint and warrant prejudiced him. *Brown*, 279 Mich App at 134.

Defendant also argues that the felony complaint was forged. However, defendant did not raise this issue before the trial court and there is nothing in the record to suggest that the documents were forged or contained fraudulent statements. Consequently, defendant has not established plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant next argues that the officers' reasons for the traffic stop were pretextual. As such, the trial court erred when it concluded otherwise. This Court reviews de novo a trial court's decision on a motion to suppress, but reviews the factual findings underlying the decision for clear error. *People v Beuschlein*, 245 Mich App 744, 748; 630 NW2d 921 (2001).

"Both the United States and Michigan Constitutions guarantee the right against unreasonable searches and seizures." *Id.* at 749. In order to make a valid traffic stop, an officer "must have an articulable and reasonable suspicion that a vehicle or one of its occupants is subject to seizure for a violation of law." *People v Williams*, 236 Mich App 610, 612; 601 NW2d 138 (1999). "The reasonableness of an officer's suspicion is determined on a case-by-case basis in light of the totality of the facts and circumstances and specific reasonable inferences he is entitled to draw from the facts in light of his experience." *People v Jones*, 260 Mich App 424, 429; 678 NW2d 627 (2004). The observation of a traffic violation provides sufficient cause to justify a traffic stop. *People v Kazmierczak*, 461 Mich 411, 420 n 8; 605 NW2d 667 (2000).

At the preliminary examination and at trial, officer Kristopher Richardson testified that he observed defendant driving recklessly and at high speeds. Accordingly, he had a reasonable suspicion that defendant was violating traffic laws. Further, Sergeant Myron Weathers testified at trial that defendant was driving erratically and that he believed that the driver may have been intoxicated. "[E]rratic driving can give rise to a reasonable suspicion of unlawful intoxication so

as to justify an investigatory stop by a police officer.” *People v Christie*, 206 Mich App 304, 309; 520 NW2d 647 (1994). These officers’ observations were then conveyed to other officers, who were traveling separately, and they stopped defendant. Under these facts, the officers’ could lawfully stop defendant.

After stopping defendant, Richardson observed defendant throw a black plastic bag. As Richardson approached, he was able to see, in plain view, a clear plastic bag, which he believed contained cocaine, hanging out of the black plastic bag. On the basis of Richardson’s observations and experience as a narcotics officer, he had probable cause to believe that the vehicle contained contraband. Because there was probable cause to believe that the car contained contraband, the officers could lawfully search the car. *Kazmierczak*, 461 Mich at 422-423. Consequently, the trial court did not err when it denied defendant’s motion to suppress the drug evidence.

Defendant next argues that his rights were violated when his arraignment was unreasonably delayed. This Court reviews a defendant’s constitutional due process claim de novo. *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007). A defendant arrested without a warrant must be arraigned before a magistrate without unnecessary delay to determine if there is probable cause that he committed the charged crime. *People v Manning*, 243 Mich App 615, 622; 624 NW2d 746 (2000). To comport with the Fourth Amendment’s promptness requirement, there must be a judicial determination regarding probable cause within 48 hours of arrest. *Riverside County v McLaughlin*, 500 US 44, 56; 111 S Ct 1661; 114 L Ed 2d 49 (1991). A delay greater than 48 hours is presumptively unreasonable and the burden then shifts to the government to establish that exceptional circumstances existed to warrant the delay. *Manning*, 243 Mich App at 628. A shorter delay may also be unreasonable if the defendant establishes that the delay was unreasonable. *Riverside County*, 500 US at 56. A delay would be unreasonable if it was “for the purpose of gathering additional evidence to justify the arrest” or was “motivated by ill will against the arrested individual” or occurred “for delay’s sake.” *Id.*

Defendant was arraigned within 48 hours of his arrest; hence, his arraignment was presumptively reasonable. *Id.* Defendant argues that the arraignment was unreasonably delayed by the prosecution to allow for the fabrication of evidence. But he has provided no evidence beyond his conclusory statements to that effect in support of his claim. Therefore, we cannot conclude that his due process rights were violated.

Defendant next argues that the trial court abused its discretion by denying his motion to quash, his motion to dismiss the charges, his motion for reconsideration of his motion to adjourn to allow for an independent laboratory analysis of the evidence, and his motion to exclude the testimony of officers Richardson and Rodriguez for violating a sequestration order at the preliminary examination. This Court reviews a trial court’s discretionary decisions for an abuse of discretion. See *People v Perkins*, 280 Mich App 244, 248; 760 NW2d 669 (2008). We also review a trial court’s decision to exclude a witness’ testimony as a sanction for violating a sequestration order for an abuse of discretion. *People v Roberts*, 292 Mich App 492, ___; ___NW2d___ (2011).

With regard to his motion to quash, defendant argues that the trial court should have granted his motion because the officers did not have probable cause to stop him. He also argues that the trial court should have dismissed the charges as a sanction for the unreasonable delay in his arraignment and because the prosecutor failed to give him a copy of the complaint and warrant. However, as already stated, there was probable cause to believe that defendant committed traffic violations, and, for that reason, the officers' stop was lawful. Likewise, defendant's arraignment was timely and, even if defendant did not receive a copy of the complaint and warrant, he had an adequate opportunity to challenge the charges.¹ Accordingly, the trial court did not err when it denied defendant's motion to quash and motions to dismiss.

Defendant next argues that the trial court abused its discretion when it initially granted his motion to allow independent testing, but then denied his motion for a 45 day adjournment to have the independent laboratory conduct the testing. Defendant has abandoned this claim of error by failing to support this argument by citation to the record and legal authority. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Nevertheless, we conclude that the trial court did not abuse its discretion in denying defendant's motion. The record shows that defendant highlighted the discrepancy between the Michigan State Police report and the Detroit Police report regarding the weight of the seized narcotics. The prosecutor indicated that it would rely on the Michigan State Police report, which provided that one packet of heroin weighed .03 grams despite the fact that the Detroit Police report indicated that the heroin weighed 11 grams. The prosecution explained that the Michigan State Police only tested one heroin packet, which accounted for the weight difference. Based on this information, the trial court believed that defendant would not be disadvantaged.

To sustain a conviction for possession with intent to deliver less than 50 grams of heroin, the prosecutor had to prove that defendant knowingly possessed less than 50 grams of heroin with the intent to deliver. *People v Plunkett*, 485 Mich 50, 59; 780 NW2d 280 (2010). Even if there was a weight discrepancy between the two reports, the reports both establish that the heroin weighed less than 50 grams. Because defendant did not contest the determination that the substance was heroin, we conclude there would be no advantage in having the substance independently tested to determine the actual total weight. Given the way that the heroin was packaged, the jury could reasonably conclude that the heroin was intended for distribution and, therefore, any discrepancy between the weight identified in the reports and the weight determined through independent testing could not have affected the outcome. The trial court did not abuse its discretion in denying defendant's motion for reconsideration to adjourn for independent testing.

¹ We also find no merit to defendant's contention that the failure to disclose the complaint and warrant deprived him of evidence. The complaint and warrant merely outlined the factual bases for the charges—they were not exculpatory or favorable evidence. See *Schumacher*, 276 Mich App at 176.

With regard to the sequestration sanction, defendant argues that the trial court should have excluded officers Richardson and Rodriguez from testifying as a sanction for violating a sequestration order during the preliminary examination. The purpose of sequestering a witness is to “prevent him from ‘coloring’ his testimony to conform with the testimony of another.” *People v Stanley*, 71 Mich App 56, 61; 246 NW2d 418 (1976). If a witness violates a sequestration order there are three sanctions that the trial court may impose to remedy the violation. *People v Meconi*, 277 Mich App 651, 654; 746 NW2d 881 (2008). The trial court may, at its discretion, hold the witness that violated the order in contempt, permit cross-examination of the witness regarding the violation, or preclude the witness from testifying. *Id.* However, exclusion is a severe sanction that should be used sparingly. *Id.*

Defendant argues that the officers violated the district court’s sequestration order at the preliminary examination. The record shows that the district court ordered witnesses to wait in the hallway until they were called to testify. Defendant does not allege nor do the facts support the conclusion that the witnesses violated this order by staying in the courtroom. Defendant does, however, allege that the officers violated the sequestration order by discussing the case in the hallway. Defendant provided an affidavit by a witness that observed the officers discussing defendant’s case. Witnesses are not automatically placed on notice that they may not discuss the case when excluded from the courtroom. *Stanley*, 71 Mich App at 61. A trial court may order witnesses not to discuss testimony outside of the courtroom, but the failure to do so will not automatically warrant relief. *Id.* at 62-63. The record shows that defendant did not request a cautionary instruction. Therefore, we conclude that there was no sequestration violation.

Even if we were to conclude otherwise, defendant still failed to show that any error prejudiced his trial. See *People v King*, 215 Mich App 301, 309; 544 NW2d 765 (1996). At the heart of defendant’s claim is his belief that the officers fabricated their testimony regarding the grounds for the traffic stop. Yet, the record from the preliminary examination shows that the officers’ account of the stop varied. Thus, even assuming that a violation of a sequestration order at a preliminary examination could warrant the sanction of preclusion at trial, the record does not support the conclusion that the officers colluded to confirm their testimony. Defendant failed to establish prejudice and the trial court did not err in denying his motion to exclude the officers’ testimony.

Defendant next argues that his trial lawyer was ineffective. Specifically, he argues that his trial lawyer should have investigated a witness, objected to the admission of evidence, requested a directed verdict, and should have had the narcotics independently tested. Because the trial court did not hold an evidentiary hearing on this issue, our review is limited to mistakes that are apparent on the record. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). In order to establish ineffective assistance of counsel, defendant must show that his trial lawyer’s performance fell below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for the errors, the result of the proceedings would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). This Court presumes that defendant received effective counsel and the defendant bears a heavy burden to prove otherwise. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009).

Defendant argues that defense counsel should have located the owners of the car he was driving at the time of the stop in order to confirm his story. Defendant bears the burden to establish the factual predicate for his ineffective assistance claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Yet, he failed to offer any evidence that the witnesses would have actually testified and failed to establish what their testimony would have been, let alone that it would have been favorable. Accordingly, defendant has not established the factual predicate of his claim.

Defendant also argues that defense counsel should have requested a directed verdict on the ground that there was insufficient evidence to convict him of the charges. As we discuss below, it is beyond reasonable dispute that there was sufficient evidence to support the charges against defendant. Therefore, defendant's trial lawyer cannot be faulted for failing to move for a directed verdict. See *Brown*, 279 Mich App at 142. Defendant's claim that his lawyer should have objected to evidence is similarly without merit. "A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive the defendant of a fair trial." *Id.* at 141. Here, defendant does not identify what evidence defense counsel should have objected to and on what grounds the evidence would be inadmissible. Therefore, he is not entitled to any relief.

Lastly, defendant argues that defense counsel was ineffective for failing to have the narcotics independently tested. As we already explained, given the evidence adduced at trial, any discrepancies between the actual weight of the heroin and that stated in the police reports could not have affected the outcome of the trial. Accordingly, defendant cannot establish prejudice. *Uphaus*, 278 Mich App at 185.

We shall next address defendant's claim that there was insufficient evidence to prove beyond a reasonable doubt that he possessed the narcotics. In reviewing a sufficiency of the evidence challenge, this Court reviews the record de novo and in the light most favorable to the prosecution to determine whether a reasonable jury could have found that the elements of the crime were proved beyond a reasonable doubt. *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006). The prosecution can establish the elements of a crime from circumstantial evidence and reasonable inferences arising therefrom. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Along with the weight requirement, to sustain a conviction of possession with intent to deliver, the defendant must have knowingly possessed the controlled substance, must have intended to deliver that substance to someone else, and must have known that what the substance was. See *People v Johnson*, 466 Mich 491, 499-500; 647 NW2d 480 (2002). Here, defendant only challenges the proof that he knowingly possessed the narcotics at issue. The element of possession requires a showing that a defendant has "'dominion or right of control over the drug with knowledge of its presence and character.'" *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000), quoting *People v Maliskey*, 77 Mich App 444, 453; 258 NW2d 512 (1977). A defendant may be in actual or constructive possession and possession may be exclusive or jointly shared. *People v McKinney*, 258 Mich App 157, 166; 670 NW2d 254 (2003). "Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between defendant and the contraband." *Johnson*, 466 Mich at 500. Circumstantial evidence and the inferences arising therefrom are sufficient to prove possession. *People v*

McGhee, 268 Mich App 600, 623; 709 NW2d 595 (2005). Further, “only minimal circumstantial evidence is required.” *Id.*

Here, the record shows that defendant was the driver and sole occupant of the car at issue. As Richardson approached the car, he saw defendant throw a black plastic bag on the floorboards. After he reached the car, Richardson saw a clear plastic bag that appeared to contain cocaine hanging out of the black bag. Richardson then retrieved the bag and concluded that, based on his experience as a narcotics officer, it contained bulk cocaine. As the search continued, Rodriguez observed that the window switch panel on the driver’s side door was visibly loose. He then opened the panel and located cocaine, heroin, and marijuana. Rodriguez testified that the narcotics were packaged in a manner consistent with the sale of drugs, not personal use. On the basis of this testimony, a rational trier of fact could conclude that defendant possessed the cocaine, heroin, and marijuana. Accordingly, there was sufficient evidence to support defendant’s convictions.

Defendant next argues that, because he was acquitted of reckless driving, he cannot be guilty of the possession charges. The Double Jeopardy Clauses of the United States and Michigan Constitutions protect defendants against successive punishments for the same offense and multiple punishments for the same offense. *People v Ford*, 262 Mich App 443, 447; 687 NW2d 119 (2004). The purpose of the double jeopardy protections against multiple punishments is to protect the defendant from receiving more punishment than intended by the Legislature. *People v Calloway*, 469 Mich 448, 451; 671 NW2d 733 (2003). Two separate offenses will not constitute the “same offense” if one of the offenses contains an element that the other does not. *People v Smith*, 478 Mich 292, 324; 733 NW2d 351 (2007). Defendant concedes that the reckless driving charge and the remaining possession with intent to deliver charges are legally distinct offenses. Consequently, this claim is without merit.

Defendant next argues that the prosecution improperly offered tainted evidence at trial, paraded the narcotics evidence in front of the jury, and opened the narcotics packages intentionally close to the jury, which allowed for the jury to smell the narcotics. In reviewing a claim for prosecutorial misconduct, this Court must determine whether a defendant was denied a fair and impartial trial. *Brown*, 279 Mich App at 134. Defendant bears the burden to show that the alleged prosecutorial misconduct resulted in a miscarriage of justice. *Id.*

Defendant alleges that the narcotics evidence offered by the prosecution was tainted evidence but offers nothing in support of his allegations, and specifically, fails to indicate how the evidence was tainted. Additionally, there is nothing in the record to suggest that the prosecution “paraded” the narcotics packages in front of the jury or that the prosecution opened the evidence packages that contained the narcotics near the jury. Defense counsel did not object to the alleged activity or state on the record that the activity occurred. Because there is no evidence to support defendant’s allegation that the prosecution offered tainted evidence at trial or engaged in any of the activities described by defendant, we conclude that there was no prosecutorial misconduct.

Finally, defendant argues that independent testing was necessary in the present case because the narcotics evidence admitted at trial was tainted and, further, there were inconsistencies between the Michigan State Police report and the Detroit Police report. As previously noted, defendant failed to offer any evidence regarding his allegations that the narcotics evidence was tainted. Further, defendant failed to supplement his brief with any of the reports that he alleges have been forged and altered. Since there is nothing in the record to support defendant's allegations, we conclude that defendant failed to establish plain error. *Carines*, 460 Mich at 763. Nevertheless, as discussed above, the trial court did not abuse its discretion in denying defendant's motion to adjourn the trial to allow for independent testing based on the inconsistencies in the Michigan State Police report and Detroit Police report.

There were no errors warranting relief.

Affirmed.

/s/ Henry William Saad

/s/ Kirsten Frank Kelly

/s/ Michael J. Kelly