STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 24, 2012
v	No. 304760 Oakland Circuit Court
THADDEUS RICHARD KRACZKOWSKI, Defendant-Appellant.	LC No. 2010-230736-FH

Before: DONOFRIO, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession of a firearm during the commission of a felony, MCL 750.227b(1), maintaining a drug house, MCL 333.7405(1)(d), and possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v). Because defendant was not denied the effective assistance of counsel and the evidence was sufficient to support his maintaining a drug house conviction, we affirm.

Defendant's convictions stem from a police search of his residence in Hazel Park. Defendant was tried jointly with his wife, Jamie Kraczkowski, who was not present during the search. Inside the home, police officers found items indicating that defendant resided in the home, including men's clothing that appeared to fit him, pictures of defendant and his wife, and mail addressed to defendant. Police officers also found several rifles and shotguns and 37 packets of cocaine inside the home. Inside a shed behind the residence, the police recovered a first aid kit containing cocaine residue, a digital scale, a manual scale, empty baggies, a sifter, and a bottle of Creatine, a common cutting agent. Defendant made several incriminating statements regarding the drugs and paraphernalia recovered.

Defendant first argues that he was denied the effective assistance of counsel. A claim alleging ineffective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review de novo questions of law and review for clear error a trial court's findings of fact. *Id.* In order to establish ineffective assistance of counsel, a defendant must demonstrate that: (1) "counsel's representation fell below an objective standard of reasonableness[,]" and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). A "defendant has the burden of establishing the factual predicate for his

claim[.]" *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). "Effective assistance of counsel is presumed[,]" and a "defendant bears a heavy burden of proving otherwise." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). A defendant must also overcome the presumption that the challenged action constituted sound trial strategy. *LeBlanc*, 465 Mich at 578. "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." *Rockey*, 237 Mich App at 76-77.

At the outset we note that defendant's reliance on cases in which defense counsel slept through portions of the trial is misplaced. See, e.g., *Burdine v Johnson*, 262 F3d 336, 341 (CA 5, 2001); *Tippins v Walker*, 77 F3d 682, 684 (CA 2, 1996). Here, there is no suggestion that defense counsel slept at any point during trial. Moreover, we are not persuaded by defendant's assertion that his counsel was so "detached" that he was essentially unconscious, thereby completely depriving defendant of counsel. Defendant's arguments involve specific instances in which he claims his attorney was defective or could have been better. Such allegations of specific instances of failure are not examples of "complete" ineffectiveness. See *Bell v Cone*, 535 US 685, 695-697; 122 S Ct 1843; 152 L Ed 2d 914 (2002).

Defendant contends that his attorney rendered ineffective assistance because he was "detached" during trial. Defendant relies on two specific instances of alleged "detachment" that occurred over the course of a five-day trial. Particularly, when it was counsel's opportunity to recross-examine Detective Lisa Pettyes, the following exchange occurred:

> *THE COURT:* Recross, counsel.
>
> *[DEFENSE COUNSEL]:* I'm sorry, your Honor?
>
> *THE COURT:* Recross.
>
> *[DEFENSE COUNSEL]:* Yes, I'm - - your Honor, I was a little detached there for a moment, I'm not sure I remember the precise parameter of the questions that - - that the witness can be - -
>
> *THE COURT:* Counsel, this is your opportunity to recross.
>
> *[DEFENSE COUNSEL]:* Okay.

Although defense counsel stated he was "a little detached," nothing in the record suggests that his momentary detachment deprived defendant of the effective assistance of counsel. After asking for "[o]ne moment, please," defense counsel proceeded to question Detective Pettyes within the scope of the prosecution's redirect. Whatever "detachment" counsel may have been referring to, it is apparent that he was attentive enough during trial to conduct an adequate recross-examination. Moreover, this recross-examination was in addition to an earlier recross-examination that occurred outside the presence of Jamie's jury and in addition to extensive cross-examination. Thus, defendant has failed to establish that counsel's level of attention was objectively unreasonable or that he was in any way prejudiced by counsel's performance. Defendant's specific arguments regarding the issues that defense counsel could have explored during his recross-examination are merely attacks on counsel's trial strategy, and, accordingly,

issues that we will not second guess on appeal. *Rockey*, 237 Mich App at 76-77. Decisions regarding what evidence to present and how to question a witness are matters of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008).

Also in support of his "detachment" theory, defendant points to the following exchange involving Detective Robert Nagle's testimony concerning the first aid kit:

> *[THE PROSECUTOR]:* Now, Detective, earlier you were testifying regarding some of the items inside that first aid kit - -
>
> *[DEFENSE COUNSEL]:* Again, I - - I object, your Honor, I'm really - - I'm confused, and maybe it's just me because I didn't eat and it's right before lunch, but I'm a little bit confused - -
>
> *THE COURT:* What's your objection to his question, because, counsel, that's where we are, - -
>
> *[DEFENSE COUNSEL]:* Okay. I don't - -
>
> *THE COURT:* - - the rules are if you have an objection to the question, - -
>
> *[DEFENSE COUNSEL]:* Yes, I do.
>
> *THE COURT:* - - you may raise an objection.
>
> *[DEFENSE COUNSEL]:* Yes, I do.
>
> *THE COURT:* What's the objection?
>
> *[DEFENSE COUNSEL]:* I don't remember the detective earlier testifying about the contents of the kit, so I'm wondering whether it was testimony that he did when I was out of the room, or he never was questioned about that, that's all.
>
> *THE COURT:* People?
>
> *[THE PROSECUTOR]:* I can - - he did, but I can rephrase, your Honor.
>
> *[DEFENSE COUNSEL]:* Thank you, your Honor.

Defendant argues that this exchange establishes that defense counsel was unaware of incriminating evidence being offered during trial. Our review of the record shows that his argument is without merit.

The decision whether to object during trial is a matter of trial strategy. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). Defense counsel appeared to object because he did not believe that Detective Nagle had previously testified regarding the contents of the first aid kit. The record indicates, however, that Detective Nagle did previously describe the items inside the first aid kit. Defendant has not established that defense counsel was entirely ignorant of the first aid kit's existence, as defendant maintains. The record shows that counsel cross-

examined Detective Pettyes regarding the items recovered in the shed, including the first aid kit, and Detective Pettyes testified before Detective Nagle. Counsel also questioned Detective Nagle about the shed and its contents. Although defendant asserts that counsel did not adequately cross-examine Detective Nagle about the kit, the questioning of witnesses and manner of cross-examination are matters of trial strategy. *Horn*, 279 Mich App at 39. Further, in addition to defense counsel's questions, Jamie's attorney asked several questions regarding the first aid kit. Given that Jamie's attorney explored the issue, defense counsel may have reasonably found it unnecessary to reiterate the points addressed, particularly considering the time limits that the trial court placed on the attorneys' questioning. Thus, nothing in the record indicates that counsel's performance was objectively unreasonable or that defendant was prejudiced.

Defendant also asserts that his counsel rendered ineffective assistance because he suffered from "perceptual difficulties." In particular, while cross-examining Officer Michael Iafrate about a photograph of a gun found behind a dresser, the following exchange occurred:

Q. Did you see that photograph lately?

A. Yes, I did.

Q. Was it a photograph of the gun standing up?

A. You'd have to show me which photograph you're speaking of.

* * *

Q. That. Is that a picture of a gun standing up?

A. No, it's a picture of the gun.

Q. A picture of the gun. Let me see it again. I have some perceptual difficulties, especially with three dimensional, please bear with me.

A. Okay.

Q. How does this picture comport with - - and in detail, with what you described?

A. That is the weapon that was behind the dresser.

Q. And you - - you said you knocked it down?

A. No, I did not.

Q. You said it fell down?

A. No, I did not.

Q. You said - -

THE COURT: Counsel, that's it, time is up.

[DEFENSE COUNSEL]: Thank you, your Honor.

Defendant argues that if defense counsel's "perceptual difficulties" made it difficult for him to perceive a picture of a gun, they would also have hindered his ability to properly perceive and identify other photographs used during trial. Defendant's argument lacks merit.

First, Officer Iafrate testified that when he saw the gun in the home, a portion of the gun was sticking up from behind a dresser. According to Officer Iafrate, the photograph that defense counsel showed him depicted the gun behind the dresser but did not depict the gun in a standing-up position. Thus, in context, counsel's comment about "perceptual difficulties" appears to be an effort to show that the weapon was not photographed as it was discovered, standing up behind a dresser. Notably, defense counsel discussed the gun's position in his closing argument. Even if counsel needed a moment to correctly perceive the position of the gun in the photograph, however, this would not have indicated that his performance was below an objective standard of reasonableness. Moreover, nothing indicates that counsel had difficulty perceiving other photographs, as defendant suggests. That argument is purely speculative, and defendant fails to establish prejudice.

Defendant next asserts that defense counsel was ineffective for failing to move for a *Walker*[1] hearing because his statements to Detectives Pettyes and Nagle were involuntary.[2] He also argues that counsel was ineffective for failing to move to suppress the statements on the basis that they were obtained in violation of his *Miranda*[3] protections. The purpose of a *Walker* hearing is to determine the voluntariness of a statement made to the police. *People v Manning*, 243 Mich App 615, 624-625; 624 NW2d 746 (2000). The protections of *Miranda* apply when a defendant is subjected to "custodial interrogation." *People v Herndon*, 246 Mich App 371, 395; 633 NW2d 376 (2001). "Interrogation, for purposes of *Miranda*, refers to express questioning or its functional equivalent." *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995). "In other words, interrogation refers to express questioning and to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 532-533.

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[1] *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965).

[2] Defendant's argument that the trial court erred by refusing to hear his untimely motion to suppress his statements to the police lacks merit. Defendant suggests that his counsel was ineffective for filing an untimely motion for a *Walker* hearing and that the trial court refused to hear the motion because it was untimely. Defendant misrepresents the record. Counsel did not file a motion for a *Walker* hearing. Rather, counsel filed a motion to suppress evidence and for an evidentiary hearing on the basis that some of the police officers involved in the search were Fraser police officers who had operated outside of their jurisdiction. During trial, the trial court prohibited defense counsel from arguing that issue before the jury, stating that the issue was an issue of law and not within the province of the jury. Because counsel did not file a motion for a *Walker* hearing to suppress defendant's statements based on their involuntariness, defendant's assertion that the trial court erred by refusing to hear such a motion lacks merit.

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

Here, defendant was in custody when he made all of the challenged statements. The police arrested him at the home, held him in the home during the search, and then transported him to the jail. When asked if defendant was free to leave, Detective Nagle testified "[a]bsolutely not." Defendant made his first incriminating statement to Detective Nagle in the home after Detective Nagle read defendant his *Miranda* rights. Defendant indicated that he understood those rights and agreed to speak with Detective Nagle. Defendant was free to waive his *Miranda* protections, provided that the waiver was "a voluntary, knowing, and intelligent waiver." *People v Cheatham*, 453 Mich 1, 13; 551 NW2d 355 (1996). Defendant does not argue that his waiver was involuntarily or not knowingly made. After waiving his right to counsel, defendant admitted that two packets of cocaine found in the living room were "for his personal use, that he thought that he had already used them, and that he forgot that they were there[.]" Because defendant made the admission after waiving his *Miranda* rights, and nothing indicates that his statement was involuntary, a motion to suppress the statement or for a *Walker* hearing would not have been successful. Counsel is not ineffective for failing to make futile motions. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Defendant made his second incriminating statement at the jail when Detective Pettyes served him with forfeiture papers indicating the items that the police seized from the home. At some point while at the jail defendant requested an attorney, and it is unclear whether defendant's statement was made before or after he did so. "Once a criminal defendant invokes his right to counsel all interrogation must cease until counsel is made available unless the accused himself initiates further communication." *People v McCuaig*, 126 Mich App 754, 759-760; 338 NW2d 4 (1983). The police, however, are not prohibited from engaging in all communications with the defendant. Rather, only "'police-initiated custodial interrogation'" is prohibited. *People v Kowalski*, 230 Mich App 464, 478; 584 NW2d 613 (1998), quoting *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981). "Interrogation refers to express questioning and to any words or actions on the part of police that the police should know are reasonably likely to elicit an incriminating response[.]" *People v Raper*, 222 Mich App 475, 479; 563 NW2d 709 (1997).

Having seized property from defendant, the police were statutorily required to notify defendant of the property that was seized. See MCL 333.7523. Detective Pettyes testified that her conversation with defendant regarding the seized property was intended to be purely informational. She maintained that when she serves a suspect with forfeiture papers, she reviews the list of items together with the suspect and explains the items on the list. She denied interviewing defendant or asking him any questions. Thus, the record shows that she did not attempt to elicit any incriminating responses from him. During the conversation, defendant, unsolicited, told Detective Pettyes that there were only 20 packets of cocaine recovered from the bedroom instead of 34 as listed on the form. Defendant also volunteered that the cocaine weighed only approximately half of a gram and that "he usually gets $20 for a pack." Because Detective Pettyes was merely informing defendant of the items seized and was not attempting to elicit an incriminating statement from him, the conversation did not amount to an interrogation. *Raper*, 222 Mich App at 479. In addition, nothing in the record indicates that defendant's statements were involuntary. Because a motion for a *Walker* hearing and a motion to suppress the statements as violative of defendant's *Miranda* protections would have been futile, counsel was not ineffective for failing to make such motions. *Fike*, 228 Mich App at 182. We further note that the decision not to file a motion to suppress may have been a matter of trial strategy.

See *id*. Notably, defense counsel focused on the fact that a recording of Detective Pettyes's conversation with defendant had been destroyed in an effort to discredit the prosecution's case.

Defendant's third incriminating statement was made to Detective Nagle in the presence of defendant's attorney after Detective Nagle again advised defendant of his *Miranda* rights. When advised the second time, defendant requested counsel. With counsel present, defendant indicated his disagreement regarding the amount of cocaine that the police seized from the home. Thereafter, his attorney directed him not to say anything further. Because the statement was made in his attorney's presence and was voluntary, a motion to suppress the statement as violative of *Miranda* and a motion for a *Walker* hearing would have been unsuccessful. Accordingly, trial counsel was not ineffective for failing to file such motions. *Fike*, 228 Mich App at 182.

Defendant next asserts that his counsel failed to conduct a pretrial investigation, thereby failing to present a substantial defense. Defendant, however, fails to indicate what was lacking in defense counsel's investigation and fails to identify the substantial defense of which he was deprived. Accordingly, he has abandoned his argument. "The failure to brief the merits of an allegation of error constitutes an abandonment of the issue." *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004). "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[.]" *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Finally, defendant argues that the cumulative effect of all defense counsel's errors denied him the effective assistance of counsel. Because there was no individual error, however, there can be no cumulative effect of multiple errors. See *LeBlanc*, 465 Mich at 591-592. Related to this claim, defendant asserts that counsel conducted incompressible cross-examination and was ignorant of the rules of evidence, thereby denying him a fair trial. By failing to brief the merits of those arguments, however, defendant has abandoned appellate review of the claims. *McPherson*, 263 Mich App at 136; *Kevorkian*, 248 Mich App at 389.

Defendant next contends that the evidence was insufficient to support his conviction for maintaining a drug house. We review de novo claims challenging the sufficiency of the evidence. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). We "must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999) (quotation marks and citation omitted). "Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime." *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005).

MCL 333.7405(1)(d) provides that "[a] person:

> Shall not knowingly keep or maintain a store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place, that is frequented by persons using controlled substances in violation of this article for the purpose of

> using controlled substances, or that is used for keeping or selling controlled substances in violation of this article.

In *People v Thompson*, 477 Mich 146, 155; 730 NW2d 708 (2007), our Supreme Court determined that a person does not "keep or maintain a drug vehicle by engaging in an isolated act of selling drugs out of the vehicle." Rather, "[t]he phrase 'keep or maintain' implies usage with some degree of continuity that can be deduced by actual observation of repeated acts or circumstantial evidence . . . that conduces to the same conclusion." *Id*.

Defendant argues that although there was sufficient evidence to show that he controlled the cocaine, the prosecution failed to establish the continuity element. Viewing the evidence in a light most favorable to the prosecution, defendant's argument lacks merit. The police recovered cocaine from three locations inside the home, i.e., the living room, a bedroom closet, and a locked safe. The fact that drugs were found in three locations suggests more than a one-time use of the premises to store drugs. Rather, the evidence indicates a pervasive and continuing use of the home to store cocaine. In addition, in a shed behind the residence the police found evidence indicating that cocaine was being packaged at the home. Specifically, they found a digital scale, a manual scale, a sifter, a business card that had been folded and creased in the middle, numerous small baggies, capsules that could be used to hold cocaine, and an empty bottle of Creatine, a common cutting agent. Many of the items, including the first aid kit in which they were stored, were coated with a cocaine residue. Expert testimony indicated that the items were indicative of breaking down a larger quantity of cocaine, cutting it with an agent, and preparing to sell it in individual packets.

In addition, defendant admitted in his statement to Detective Pettyes that "he *usually* only gets $20 for a pack." This admission suggests that defendant stored cocaine at the home on a regular basis and that this was not defendant's first foray into packaging and storing cocaine at the home. The police also found several guns in the home, located in the bedroom where most of cocaine was stored, and expert testimony indicated that distributors often have weapons in their homes to protect their drugs and money. The presence of the guns suggests that defendant took precautions to secure the home and protect his stock of cocaine. Such conduct speaks of more than an isolated use of the home to store cocaine. Thus, viewed in a light most favorable to the prosecution, the evidence was sufficient to allow the jury to conclude that defendant used the premises to store cocaine with some degree of continuity. Accordingly, the evidence was sufficient to support his conviction for maintaining a drug house.

Affirmed.

/s/ Pat M. Donofrio
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra