STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDREW STEWART,

Defendant-Appellant.

UNPUBLISHED
May 22, 1998

No. 199590
Ingham Circuit Court
LC No. 96-070755 FH

Before: Gribbs, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Defendant appeals by right from his conviction by a jury of delivery of less than fifty grams of the controlled substance cocaine, MCL 333.7401(1), (2)(a)(iv); MSA 14.15(7401)(1), (2)(a)(iv). We affirm.

I

Defendant first argues that the trial court erroneously admitted a bag of crack cocaine into evidence over defendant's objection. Defendant argues that the prosecution failed to establish "the absence of a mistaken exchange, contamination, or tampering . . . to a reasonable degree of probability or certainty." *People v White*, 208 Mich App 126, 133; 527 NW2d 34 (1994). We disagree. The cornerstone of defendant's attack on the chain of custody is a discrepancy between the testimony of the officer who bought the drug from defendant and the officer who forwarded the cocaine to the lab for analysis, about the quantity of the drug contained in the evidence bag. The first officer testified that he received one rock of crack cocaine from defendant, while the second officer testified that she sealed up two rocks in an evidence envelope. However, the second officer also testified that the field testing procedure often caused the rocks to break or crumble.

In *White, supra*, we noted that the threshold question a court must address when ruling on the admission of items of real evidence is "whether an adequate foundation . . . has been laid under all the facts and circumstances of each individual case. Once a proper foundation has been established, any deficiencies in the chain of custody go to the weight afforded to the evidence, rather than its admissibility." *Id*. at 133. McCormick on Evidence (Hornbook Series: 4th ed, 1992), § 212, p 392,

states: "It should . . . always be borne in mind that foundational requirements are essentially requirements of logic, and not rules of art. Thus, . . . even a *radically altered item of real evidence may be admissible if its pertinent features remain unaltered*." (Emphasis added). We conclude that in its totality, the evidence presented here about the chain of custody established to the requisite degree of certainty that the drug had not been tampered with or exchanged. Accordingly, the trial court did not abuse its discretion when it admitted the cocaine into evidence. *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997).

II

Defendant also asserts that he was denied effective assistance of counsel when his attorney failed to focus on alleged discrepancies between the preliminary examination and trial testimony. To prevail on a claim of ineffective assistance of counsel, a defendant "must show that counsel's performance was below an objective standard of reasonableness under prevailing norms . . . [and] that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Because details of the claimed deficiency are sufficiently apparent on the record, defendant's failure to either move for a new trial or request an evidentiary hearing does not preclude our review of the issue. *People v Juarez*, 158 Mich App 66, 73; 404 NW2d 222 (1987).

The comparisons made by defendant fail to reveal any significant discrepancy between the preliminary examination and trial testimony. For example, defendant asserts that two of the officers involved had conflicting stories about the *time* the evidence bag containing the cocaine was taken into the police department. However, both officers testified that they were uncertain about the time. Such equivocal and qualified testimony does not support the assertion that a significant discrepancy exists on the matter. The same can be said of the difference between two officers' testimony about which of the two was first to enter the Special Operations Division office. Similarly, we do not find any support in our review of the testimony of the officer who bought the rock that he somehow changed his testimony regarding other drug busts that occurred on the night defendant was arrested.

We also find no merit to defendant's contention that the inability of the purchasing officer to specify how long he interacted with defendant shows the officer's attempt to conceal that he was involved in numerous drug busts on the night at issue. As for the previously discussed difference regarding the number of rocks recovered, in light of the absence of evidence pointing to exchange or tampering, it is reasonable to conclude that the discrepancy resulted from an innocuous and commonplace alteration that occurred during the field test. Accordingly, we are unpersuaded that defendant was prejudiced by his counsel's performance. *Strickland v Washington*, 466 US 668, 692; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

III

Finally, defendant argues that the trial court failed to give the jury a proper "reasonable doubt" instruction. Defendant asserts that the trial court's failure to instruct the jury that they must be convinced of defendant's guilt to a "moral certainty" violated his right to due process. Defendant's assertion is

baseless. The reasonable doubt instruction that was given is in all important aspects identical to CJI2d 3.2(3), which does not include the "moral certainty" language. Failure to include this language is not error. See, e.g., *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 522 NW2d 493 (1996).

Affirmed.

/s/ Roman S. Gribbs
/s/ Mark J. Cavanagh
/s/ Henry William Saad