STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SANDY UNDERWOOD,

Defendant-Appellant.

UNPUBLISHED
August 17, 2001

No. 221863
Wayne Circuit Court
LC No. 99-002706

Before: Doctoroff, P.J., and Murphy and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv). Defendant was sentenced, as a third habitual offender, MCL 769.11, to six to forty years in prison. We affirm.

Defendant first argues that he was denied due process because he was never properly arraigned on the felony information. We disagree. Generally, an issue must be raised before and addressed by the trial court in order for the issue to be preserved on appeal. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Here, defendant failed to raise this issue before the trial court. However, a criminal defendant may obtain relief based on an unpreserved constitutional error if the error is plain and affected the defendant's substantial rights, in that it affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is warranted only where the error either resulted in the conviction of an actually innocent person or seriously affected the fairness, public reputation or integrity of the proceedings. *Id*. Whether defendant was denied due process is a question of law that we review de novo on appeal. *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998).

Arraignment is a fundamental due process right, ensuring that the defendant knows the nature and cause of the accusations being made against him. *People v Thomason*, 173 Mich App 812, 814-815; 434 NW2d 456 (1988). Additionally, it is at the arraignment that the information is read to the accused; after the reading, the defendant has the opportunity to enter a plea to the charges contained in the information. MCR 6.113(B). Where the record does not reveal that the defendant was arraigned, the conviction must be set aside. *Thomason*, *supra* at 815.

First, defendant asks this Court to take judicial notice under MRE 201 that the name of his defense counsel at the April 5, 1999 arraignment hearing does not appear in the State Bar

Journal. However, defendant is incorrect on this point, and we take judicial notice that the name of this attorney indeed appears in the 1999 State Bar Journal.

Next, defendant asserts that the trial transcript fails to demonstrate that defendant was physically present in court on April 5, 1999, the date of his arraignment on the felony information. However, defendant offers no authority to support his proposition that a mere assertion after the fact that a defendant was not present for the arraignment invalidates an otherwise valid proceeding. Defendant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997).

In any event, the trial record indicates that defendant was properly arraigned on April 5, 1999. Defendant was informed of the charges brought against him in accordance with MCR 6.113.[1] Additionally, defendant's attorney waived the reading of the information at that time, and the trial court entered defendant's plea of not guilty. Finally, the record indicates that defendant's arraignment hearing was essentially repeated at a second proceeding on April 9, 1999, and defendant does not contest his physical presence at the April 9, 1999 hearing. Therefore, any error that may have resulted from defendant's April 5, 1999 arraignment hearing is harmless.

Next, defendant asserts that the trial court administered a defective oath to the jury, denying defendant due process of law and infringing upon defendant's right to a trial by jury. Defendant asserts that the allegedly defective jury oath constitutes structural error, requiring automatic reversal of his conviction. Again, defendant failed to raise this issue before the trial court, and, therefore, we review this claim only for plain error. *Carines, supra* at 763-764. Additionally, the interpretation and application of court rules and statutes are questions of law that we review de novo. *In Re Contempt of Tanksley*, 243 Mich App 123, 127; 621 NW2d 229 (2000).

A defendant's right to be tried by an impartial jury is a constitutional guarantee. *People v Pribble*, 72 Mich App 219, 224; 249 NW2d 363 (1976). The jury oath is administered in order to insure that the jurors pay attention to the evidence, observe the credibility and demeanor of the witnesses and conduct themselves at all times as one would expect of those holding such a responsible position. *Id*. The process of swearing in jurors is controlled by MCR 6.412(F), which states that after the jury is selected, but before trial begins, the court must have the jurors sworn and should give them appropriate pretrial instructions.

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[1] At the April 5, 1999, proceeding, the trial court clerk indicated that defendant was charged with two counts of possession with intent to deliver less than fifty grams of a controlled substance. However, the clerk's statement appears to have been in error. The felony information, dated February 16, 1999, indicates that defendant was actually charged with two counts of possession with intent to deliver less than fifty grams of heroin, MCL 533.7401(2)(a)(iv), and one count of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), for a total of three counts of possession with intent to deliver a controlled substance.

Defendant asserts on appeal that because his jury was sworn in using the Michigan statutory version of the jury oath, MCL 768.14, rather than the jury oath located at CJI2d 2.1 and suggested by MCR 6.412(F), he was denied his full due process rights. When resolving an apparent conflict between a statute and a court rule, the court rule prevails if it governs practice and procedure. *People v Strong*, 213 Mich App 107, 112; 539 NW2d 736 (1995). In order to determine whether a conflict exists between a statute and a court rule, both are read according to their plain meaning. *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 722; 575 NW2d 68 (1997).

Here, a reading of the applicable statute and court rule reveals no conflict. Both versions of the jury oath impress upon the jurors the solemn duty to try the defendant justly, in accordance with the evidence presented in the case and the laws of the State of Michigan. Additionally, a plain reading of MCR 6.412(F) does not indicate that a trial court is required to use the version of the jury instruction presented in CJI2d 2.1.[2] In contrast, the statute explicitly states that the jury oath contained within it "*shall* be administered to the jurors for the trial of all criminal cases." MCL 768.14 (emphasis added). This interpretation of MCR 6.412(F) is also consistent with our holding that an oath is *any* attestation by which a person is bound in conscience to perform an act faithfully and truly. *Pribble, supra* at 225. Furthermore, the Michigan Criminal Jury Instructions do not have the official sanction of our Supreme Court, and their use is not required by the trial court. *People v Stephan*, 241 Mich App 482, 495; 616 NW2d 188 (2000). The trial court did not err when it administered the statutory version of the jury oath at defendant's trial.

Next, defendant asserts that he was denied the effective assistance of counsel when his trial counsel failed to object to the alleged hearsay testimony of a witness. Because defendant failed to raise his claim of ineffective assistance of counsel before the trial court in a motion for a new trial or an evidentiary hearing, our review is limited to errors apparent on the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *People v Noble*, 238 Mich App 647, 661-662; 608 NW2d 123 (1999). In order for this Court to reverse a defendant's conviction on the basis of ineffective assistance of counsel, defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness, and so prejudiced defendant that he was denied his right to a fair trial. *Id*. at 662. For the defendant to establish prejudice, he must demonstrate a reasonable probability that, but for trial counsel's error, the result of the trial would have been different. *Id.* We do not second-guess trial counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

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[2] The comment to MCR 6.412(F) notes that "an appropriate version of the jury oath" is provided in the Michigan Criminal Jury Instructions; however, the language of the rule does not limit a court to the jury oath provided in CJI2d 2.1. Further, the staff comments accompanying the court rules are not dispositive on the meaning of the rules. *People v Austin*, 209 Mich App 564, 568; 531 NW2d 811 (1995), rev'd on other grounds 455 Mich 439 (1997).

Defendant asserts that he was denied the effective assistance of counsel because trial counsel failed to object when Officer Jagst, testifying on the witness stand, repeated a statement allegedly made to him by Officer Cistrunk regarding Cistrunk's alleged discovery of drug evidence on defendant. Defendant argues that Jagst's testimony was hearsay, admitted to bolster Cistrunk's testimony. However, Cistrunk himself provided testimony at trial that was identical to Jagst's alleged hearsay testimony. We have held that improperly admitted hearsay testimony constitutes harmless error when it is merely cumulative of other admitted testimony. *People v Lee*, 177 Mich App 382, 392; 442 NW2d 662 (1989). Therefore, defendant was not prejudiced by defense counsel's failure to object to Jagst's testimony, and his claim of ineffective assistance of counsel fails.

Next, defendant contends that trial court abused its discretion where it failed to recognize that a breakdown with defendant's appointed counsel required substitution and an adjournment of the trial. The decision regarding substitution of defense counsel is within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). An abuse of discretion occurs when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

An indigent defendant is guaranteed the right to counsel; however, he does not have the right to have the attorney of his choice appointed simply by requesting that his original trial counsel be replaced. *Mack, supra* at 14. Appointment of substitute counsel is warranted only where a showing of good cause is made, and where substitution will not unreasonably disrupt the judicial process. *Id.* Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed trial counsel with respect to a fundamental trial tactic. *Id.*

Here, no evidence of good cause for substitution of trial counsel is present on the record. Trial counsel was present on the day of trial, and indicated her ability to proceed with the case. Defendant claimed that his attorney failed to contact him in advance of the trial; however, his attorney documented for the court her many efforts to contact defendant by telephone and defendant's beeper. Defendant also complained to the trial court that his attorney did not believe him, and that his counsel did not have his best interests at heart. However, as we recently noted, "defendant's mere allegation that he lacked confidence in his trial counsel is not good cause to substitute counsel." *People v Traylor*, 245 Mich App 460, 463; 628 NW2d 120 (2001). Defendant's argument on this point fails.

Defendant next asserts that the trial court plainly erred where it provided the jury with the standard criminal jury instruction on reasonable doubt, CJI2d 3.2. Ordinarily, a party may claim error in the giving of jury instructions, or failure to give jury instructions, only if the party objects on the record before the jury retires to consider the verdict. MCR 2.516(C). Here, defendant failed to object on the record, and, therefore, he is entitled to relief only if he can demonstrate plain error. *Carines*, *supra* at 763-764.

We review claims of instructional error de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). In order to pass scrutiny, a reasonable doubt instruction, when read in its entirety, must leave no doubt in the mind of the reviewing court that

the jury understood the burden that was placed upon the prosecutor and what constituted a reasonable doubt. *Id.* Here, defendant claims that CJI2d 3.2 failed to properly convey to the jurors the "moral certainty" needed to find defendant guilty beyond a reasonable doubt. However, a trial court commits no error by giving an instruction on reasonable doubt that does not contain language expressly requiring guilt to a moral certainty. *Snider, supra* at 420-421.

Defendant contends that our reasoning in *Snider* conflicts with an earlier statement by our Supreme Court that reasonable doubt requires "moral certainty," citing *People v Justice (After Remand)*, 454 Mich 334, 344; 562 NW2d 652 (1997). However, defendant's reliance on *Justice* is misplaced. A careful examination of *Justice* reveals that the language cited by defendant is actually a portion of a quotation taken from a 1973 District of Columbia Court of Appeals case, cited by our Supreme Court in order to clarify the differences between "probable cause" and "reasonable doubt." *Justice*, *supra*, 454 Mich 344, citing *Coleman v Burnett*, 155 US App DC 302, 316-317; 477 F2d 1187 (1973). There is no support in *Justice*, explicit or otherwise, for defendant's contention that the *Snider* ruling conflicts with our Supreme Court's holding on this issue.

Defendant also asserts that CJI2d 3.2 fails to clarify the "nebulous" nature of reasonable doubt. However, we have determined that CJI2d 3.2 provides an adequate instruction regarding the concept of reasonable doubt. *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999); *Hubbard, supra* at 488.

Finally, defendant contends that he was denied his right to a fair trial by the cumulative weight of the alleged errors. We disagree. We review a cumulative error claim to determine if the combination of alleged errors denied the defendant a fair trial. *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001). The cumulative effect of several minor errors may warrant reversal even where the individual errors in the case would not warrant reversal. *Cooper*, *supra* at 659-660. However, because defendant failed to demonstrate error on any single issue in this case, his argument lacks merit. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Affirmed.

/s/ Martin M. Doctoroff
/s/ William B. Murphy
/s/ Brian K. Zahra