STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT CHARLES HALL,

Defendant-Appellant.

UNPUBLISHED
January 20, 2004

No. 240341
Macomb Circuit Court
LC No. 01-000388-FC

Before: Wilder, P.J., and Griffin and Cooper, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver 650 grams or more of cocaine, MCL 333.7401(2)(a)(i); and resisting or obstructing a police officer, MCL 750.479. The trial court sentenced defendant to consecutive terms of imprisonment of one to two years for the resisting or obstructing conviction, and twenty to forty years for the cocaine conviction. He appeals as of right. We affirm.

In January 2001, the police received information regarding alleged drug-trafficking activities at 5969 Cadillac, in Detroit. A suspect connected with the cocaine trafficking subsequently informed the police of a large-scale cocaine dealer operating out of Detroit, known as Puff. The suspect agreed to assist the police as a confidential informant. During the ensuing investigation, the informant entered 5969 Cadillac with $800 in marked money and emerged with an ounce of cocaine. Further surveillance and controlled buys followed, leading to defendant's arrest outside the house several days later. After defendant's arrest, the police searched the 5969 Cadillac residence and uncovered over 800 grams of cocaine hidden inside. Two police officers testified that defendant admitted to owning the cocaine. The jury found defendant not guilty of conspiracy, but convicted him on the remaining charges.

I. Admission of Evidence

Defendant argues that the trial court improperly admitted alleged hearsay statements into evidence. We disagree. A trial court's decision to admit or exclude evidence is reviewed on

appeal for an abuse of discretion.[1] To the extent defendant failed to make a timely objection below, our review is limited to plain error affecting his substantial rights.[2]

Hearsay is defined as an out-of-court statement offered to prove the truth of the matter asserted.[3] In this regard, a statement refers to "an oral or written *assertion* . . . ."[4] As a general rule, hearsay is inadmissible as substantive evidence unless it is offered under one of the exceptions delineated in the Rules of Evidence.[5]

Defendant initially claims that a statement made by Tamika Burnett, which allegedly identified defendant as "Puff," was hearsay. A detective testified that he asked Ms. Burnett during the police raid whether she knew the man approaching the Cadillac residence. The detective then stated that Ms. Burnett admitted knowing the man and *referred* to him as "Puff." We agree with defendant that this testimony was hearsay. And contrary to the trial court's conclusion, it does not fall under MRE 801(d)(1)(C) because Ms. Burnett did not testify at trial. In any event, this error was harmless given defendant's admission that the cocaine belonged to him.

Defendant also takes issue with testimony concerning the informant's alleged previous purchases of cocaine and his phone calls to Puff. While defendant cites several excerpts of testimony to support this argument,[6] he fails to show where any exceptions were taken.[7] In any event, a careful review of these alleged errors fails to reveal any instances of hearsay being admitted into evidence.

To the extent defendant alleges that hearsay was allowed in showing that the informant had telephoned Puff, we note that the trial court sustained defense counsel's objection on this ground. The fact the prosecutor proceeded to elicit testimony that the witness dialed a certain number and heard a conversation involving a "deep voiced male speaking on the other end" does not amount to hearsay.

---

[1] *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001).

[2] *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

[3] MRE 801(c).

[4] MRE 801(a).

[5] MRE 802; see also *People v Tanner*, 222 Mich App 626, 629; 564 NW2d 197 (1997).

[6] Defendant claims that his list of alleged errors is not exhaustive. However, "[a] party may not . . . leave it to this Court to discover and rationalize the basis for the claim." *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000).

[7] Defendant cites a document styled as a motion in limine, but this document fails to preserve this argument. However, the objections in that document pertained to co-conspirators' statements and were based on the danger of unfair prejudice. Further, the motion was not filed until February 6, 2002, after the jury had tendered its verdict.

Alternatively, defendant asserts that the challenged testimony was unfairly prejudicial and should have been excluded pursuant to MRE 403. Again, we note that defendant failed to preserve this argument below. Regardless, we cannot discern any potential for unfair prejudice in this matter, let alone plain error affecting defendant's substantial rights.

II. Defendant's Admissions

Defendant contends that the trial court erroneously failed to grant his motion to suppress defendant's admissions that the cocaine found at 5969 Cadillac belonged to him. During the *Walker*[8] hearing on this matter, the trial court noted that defendant made a knowing and intelligent waiver of his *Miranda*[9] rights. We find no error.

Defendant asserts that his statements were involuntary because the officers "threatened" him by mentioning that he faced a penalty of life imprisonment. While involuntary statements are inadmissible, we note that voluntariness is "determined solely by examining police conduct."[10] The fact the police informed defendant that he faced a life sentence for trafficking in large amounts of cocaine was not a gratuitous threat in this case, but a statement of fact. And defendant, with a previous drug-related conviction on his record, should have been disposed to this fact without undue emotional response. There is also no indication that the police improperly promised defendant leniency for his cooperation. Because defendant has failed to identify any police misconduct in connection with his admissions, he has not shown that they were improperly admitted.

Defendant notes the trial court's acknowledgment that credibility questions existed regarding defendant's motives for offering information. However, we note that the trial court was responding to a motion for a directed verdict, not one for suppression of the evidence. In making these comments, the court properly recognized the existence of a question for jury resolution. Defendant further suggests that it was error to allow the police witnesses to paraphrase his statements. However, defendant fails to cite any authority for the proposition that a police officer must relay a defendant's admissions verbatim. This concern goes to weight, not admissibility.

III. Sufficiency of the Evidence

Defendant next challenges the sufficiency of the evidence regarding the charges brought against him. In sufficiency of the evidence claims, we review the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.[11]

---

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

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

[10] *People v Abraham*, 234 Mich App 640, 645; 599 NW2d 736 (1999).

[11] *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).

A. Possession of Cocaine at 5969 Cadillac

Defendant initially asserts that there was insufficient evidence to support a finding that he was in possession of the cocaine seized from 5969 Cadillac. We disagree. The record shows that defendant possessed a key to the house where the cocaine was discovered. More importantly, two police officers testified that defendant claimed ownership of the cocaine inside the house. To the extent defendant claims the police officer's testimony concerning defendant's admission was incredible, we note that we will not interfere with the jury's role in determining the credibility of witnesses.[12] Viewing this evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could find that defendant was guilty beyond a reasonable doubt of possession of cocaine.[13]

B. Conspiracy

Defendant next claims that there was insufficient evidence to justify submitting the conspiracy charge to the jury. We disagree. Our Supreme Court has held that a defendant may not "complain when he is acquitted of a charge that is improperly submitted to a jury, as long as the defendant is actually convicted of a charge that was properly submitted to the jury."[14] Appellate relief in such situations may be warranted only where "1) logically irreconcilable verdicts are returned, or 2) there is clear record evidence of unresolved jury confusion, or 3) . . . where a defendant is convicted of the next-lesser offense after the improperly submitted greater offense."[15] There is nothing logically inconsistent in the jury's verdict in this case and defendant fails to cite any evidence of jury confusion. Further, neither of the offenses defendant was convicted of may properly be characterized as a "next-lesser offense" after conspiracy.

C. Resisting or Obstructing an Officer

Defendant argues that his conviction for resisting an officer was unsupported by the evidence. Specifically, he opines that the arrest was unlawful and that the extent of his resistance did not constitute a sufficient threat to the police. We disagree.

At the time of defendant's arrest, MCL 750.479 provided for criminal penalties applicable to persons "who shall knowingly and willfully . . . obstruct, *resist*, oppose, assault, beat or wound any . . . person or persons authorized by law to maintain and preserve the peace, in their *lawful* acts, attempts and efforts to maintain, preserve and keep the peace . . . ."[16] In Michigan, an individual may use reasonable force to prevent or resist an illegal arrest.[17] It is

[12] *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

[13] *Hunter*, *supra* at 6.

[14] *People v Graves*, 458 Mich 476, 486-487; 581 NW2d 229 (1998).

[15] *Id.* at 488.

[16] Emphasis added, amended by 2002 PA 270.

[17] *People v Krum*, 374 Mich 356, 361; 132 NW2d 69 (1965).

undisputed that the police in this case did not have a warrant for defendant's arrest. Under MCL 764.19, therefore, the arresting officer was required to "inform the person arrested of his authority and the cause of the arrest, except when the person arrested is engaged in the commission of a criminal offense, or if he flees or if he forcibly resists arrest before the officer has time to inform him."

Defendant claims that the police failed to inform him why he was under arrest. He further notes that the officers were not in full police uniforms. Nevertheless, there was testimony that a marked police car was in the area and that the arresting officer was wearing overalls, a raid vest, and hat, all of which said "police." The record further reveals that Detective Amos Horton began the confrontation by announcing that he and his colleagues were the police, and that defendant promptly attempted to flee. During the ensuing struggle to handcuff defendant, Detective Horton claimed that he repeatedly yelled at defendant to "get down" and informed him that he was under arrest. A reasonable trier of fact could conclude from this evidence that defendant's resistance was in progress as the police moved to arrest him, and that this relieved the police of any immediate duty to explain why defendant was under arrest.

Defendant's claim that his resistance did not rise to the level punishable under MCL 750.479 is meritless. The statute makes it unlawful to "resist" or "oppose" an officer in the performance of his or her duties. The fact that the police officers were not physically harmed is immaterial.

IV. Great Weight of the Evidence

Defendant alternatively argues that the trial court erroneously rejected his argument that the verdict was against the great weight of the evidence. A trial court's decision on a motion for a new trial is reviewed for an abuse of discretion.[18]

In challenging the trial court's decision on this motion, defendant essentially repeats his arguments challenging the sufficiency of the evidence advanced above. However, "[a] trial judge does not sit as the thirteenth juror in ruling on motions for a new trial and may grant a new trial only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand."[19] And in the absence of exceptional circumstances, the trial court may not substitute its view of witness credibility in place of the jury's determination.[20] Accordingly, we reject defendant's general credibility challenges and find that the trial court properly deferred to the jury's verdict.

V. Prosecutorial Misconduct

Defendant next claims he was denied a fair trial due to several instances of alleged prosecutorial misconduct. We disagree. Prosecutorial misconduct claims are reviewed case by

---

[18] *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

[19] *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998).

[20] *Id*. at 642.

case, examining any remarks in context, to determine if the defendant received a fair and impartial trial.[21] Because defendant failed to object to these alleged instances of misconduct, our review is limited to plain error affecting his substantial rights.[22] "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction."[23] We further note that the trial court instructed the jury to decide the case solely on the evidence, and that the remarks of counsel were not evidence. Jurors are presumed to follow their instructions.[24]

A. Miscellaneous Remarks

Defendant cites several of the prosecutor's remarks in opening statement and closing argument that he claims injected irrelevant or prejudicial evidence. A prosecutor enjoys wide latitude in fashioning arguments and may argue the evidence and all reasonable inferences arising from it.[25] But a prosecutor is prohibited from arguing facts not in evidence to the jury.[26] Additionally, a prosecutor may not vouch for the credibility of a witness by conveying that he has some special knowledge that the witness is testifying truthfully.[27]

Defendant initially suggests that the prosecutor improperly commented that police officers investigating narcotics trafficking are doing dangerous work. A review of this comment shows that the prosecutor was simply providing background attendant to his theory of the case. The prosecutor's description of how undercover narcotics investigators typically try to infiltrate illegal drug operations was also appropriate. The same obviously holds for the prosecution's description of the alleged conspiracy, defendant's different addresses and identification cards, and the police operations that led to the investigation and arrest of defendant. A jury is entitled to hear the "complete story" of the matter in issue.[28]

Defendant also asserts that the prosecutor brought out irrelevant and prejudicial hearsay evidence regarding Puff. However, he fails to specify what irrelevant, prejudicial, or hearsay evidence was admitted; let alone prove those defects in order to show that the prosecutor's remarks were improper.[29] Defendant further fails to explain how the prosecutor acted improperly by eliciting testimony from Detective Shannon Sims regarding the fact he informed

---

[21] *People v Aldrich,* 246 Mich App 101, 110; 631 NW2d 67 (2001).

[22] *Carines*, *supra* at 763-764.

[23] *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

[24] *Graves, supra* at 486.

[25] *People v Bahoda,* 448 Mich 261, 282; 531 NW2d 659 (1995).

[26] *Schutte, supra* at 721.

[27] *People v Knapp,* 244 Mich App 361, 382; 624 NW2d 227 (2001).

[28] *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996).

[29] MCR 7.212(C)(7); see also *People v Sean Jones (On Rehearing),* 201 Mich App 449, 456-457; 506 NW2d 542 (1993).

other officers that he was going to have the informant call Puff to purchase a half kilo of powder cocaine. Similarly, we note that the fact the prosecutor asked a police witness to explain why he associated the cream-colored Cadillac with the Cadillac residence was also not improper. Defendant has not shown how any of these statements amounted to plain error affecting his substantial rights.[30]

To the extent defendant asserts that the prosecutor discussed exhibits that had been ruled inadmissible, we note that the exhibits in question were actually introduced by defense counsel during the cross-examination of a police witness. Accordingly, the prosecutor's comments in this regard resulted in no prejudice to defendant. Moreover, the trial court admonished the jury to disregard any testimony or reference to these withdrawn exhibits.[31]

Defendant also takes issue with the prosecutor's elicitation of testimony regarding defendant's fingerprints. A police sergeant testified that he received a set of fingerprints bearing defendant's name. He claimed that he checked the prints through the Automated Fingerprint Identification System, and that the prints "came back to an Isadore L. Hall." Defendant argues that this testimony improperly implied that the police already had defendant's prints on file. However, that implication received no emphasis and defendant has failed to show how this affected the outcome of the trial.

B. Other Bad Acts

Defendant next asserts that the prosecutor introduced evidence of uncharged "bad acts." We note, however, that defendant provides no citation to the record to show where this occurred. Accordingly, we decline to review this alleged error on appeal.[32]

C. Denigration of the Defense

Defendant additionally claims that the prosecutor improperly denigrated the defense. It is considered improper for a prosecutor to denigrate the defense with intemperate and prejudicial remarks.[33] In this regard, defendant asserts that the prosecutor repeatedly accused defense counsel of trying to confuse the jury. Although a prosecutor is free to argue from the evidence that certain defense witnesses are lying, the prosecutor may not go so far as to chastise defense counsel and the entire defense.[34] After reviewing the alleged instances of misconduct cited by defendant, we find the prosecutor's statements about confusion to be characterizations of a

---

[30] *Carines, supra* at 763-764.

[31] See *Graves, supra* at 486.

[32] MCR 7.212(C)(7); *Mackle, supra* at 604 n 4.

[33] See *Bahoda, supra* at 283; *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996).

[34] *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988).

perceived defense tactic. These statements did not cross the line into prosecutorial misconduct. A prosecutor need not confine argument to the blandest possible terms.[35]

D. Cumulative Effect

Defendant argues that the cumulative effect of these prosecutorial misdeeds operated to deny him a fair trial. Because defendant did not bring any actual prosecutorial misconduct to light, this argument must fail.[36]

VI. Venue

Defendant further argues that the trial court improperly determined that venue was proper in Macomb County. We disagree. "Due process requires that trial of criminal prosecutions should be by a jury of the county or city where the offense was committed, except as otherwise provided by the Legislature."[37] While venue is not an element of a crime, it a necessary part of the prosecutor's case.[38] A trial court's decision with regard to venue in a criminal proceeding is subject to review de novo.[39]

It is undisputed that defendant was arrested outside of Macomb County. It is also undisputed that the majority of seized cocaine was found outside of Macomb County. However, "[w]henever a felony consists or is the culmination of 2 or more acts done in the perpetration thereof, said felony may be prosecuted in any county in which any one of said acts was committed."[40] In this case, there was evidence that a police informant assisted two individuals in purchasing a large amount of cocaine from the Cadillac residence. The police understood these individuals to be drug traffickers operating in Macomb County. After the individuals obtained the cocaine, the police followed them into Macomb County. It was at this point that the police apprehended one of the individuals attempting to flee from a vehicle. The police discovered a bag of cocaine nearby.

"[T]he place of commission of an act is not limited to the place of the defendant's physical presence. An act that has effects elsewhere that are essential to the offense is, in effect, committed in the place where the act has its effects."[41] Although the two customers completed the cocaine transaction in Detroit, they drove cocaine into Macomb County. We consider this to

---

[35] *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

[36] See *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999).

[37] *People v Fisher*, 220 Mich App 133, 145; 559 NW2d 318 (1996).

[38] *People v Swift*, 188 Mich App 619, 620; 470 NW2d 491 (1991).

[39] *Fisher*, *supra* at 145.

[40] MCL 762.8; see also *People v Meredith (On Remand)*, 209 Mich App 403, 409; 531 NW2d 749 (1995).

[41] *Fisher*, *supra* at 152.

be a sufficient connection with defendant's drug trafficking activities. Thus, venue was proper in Macomb Country.[42]

VII. Motion for Mistrial

Defendant next opines that the trial court erred in declining to grant a mistrial. We disagree. A trial court's decision regarding a mistrial motion is reviewed on appeal for an abuse of discretion.[43] "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant, and impairs his ability to get a fair trial."[44]

At the close of proofs, defense counsel expressed concern that the trial court had "made disparaging remarks" in connection with certain aspects of his performance. He then moved the trial court for a mistrial on the grounds that there had been laughter and whispering from the jurors. The trial court initially granted defendant's motion for a mistrial. However, after questioning each juror separately, the trial court determined that there had been no premature deliberations and concluded that the jury remained impartial and attentive.

In contrast to the trial court's conclusions, defendant contends that the information received from the jurors "showed a lack of attention, formed opinions, and improper talk in the jury room." We do not agree with this characterization. Rather, after carefully reviewing the record we find that the jurors showed that they were prepared to render fair judgment. To the extent one juror admitted dozing for a second, we note that he denied missing any facts critical to the case and otherwise assured the court the he would stay awake and remain fair and impartial. And while some jurors expressed frustration with the unexpected length of the trial and the repetitiveness of some of the material presented, defendant fails to set forth any statements revealing frustration of a sort that was prejudicial to defendant. We conclude that the minimal irregularities concerning the jurors in this instance did not prejudice defendant's rights or impair his ability to get a fair trial.[45]

VIII. Effective Assistance of Counsel

Defendant further claims that he received ineffective assistance of counsel. We disagree. Absent a *Ginther*[46] hearing, our review is limited to plain error on the existing record affecting his substantial rights.[47]

---

[42] MCL 762.8.

[43] *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999).

[44] *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) (citations omitted).

[45] See *id*.

[46] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[47] *Carines*, *supra* at 763-764; *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise.[48] To establish ineffective assistance of counsel, defendant must prove: (1) that his counsel's performance was so deficient that he was denied his Sixth Amendment right to counsel; and (2) that this deficient performance prejudiced him to the extent there is a reasonable probability that but for counsel's error, the result of the proceedings would have been different.[49] Defendant must also overcome the strong presumption that his counsel's performance was sound trial strategy.[50]

Defendant essentially asserts that he was denied the effective assistance of counsel given defense counsel's failure to object to the alleged instance of prosecutorial misconduct discussed above. Because we found no instances of prosecutorial misconduct, defendant has failed to establish that but for counsel's inaction, the outcome of the proceedings would have been different. Defense counsel is not required to make frivolous or meritless motions.[51]

IX. Motion for New Trial

Defendant makes a general claim that the trial court erred in denying his motion for a new trial. However, this argument consists of a single paragraph and simply repeats the assertions of error raised and rejected above. Accordingly, defendant has failed to show that the trial court erred in denying his motion for a new trial.

X. Consecutive Sentencing

Defendant ultimately contends that the trial court improperly imposed consecutive sentences for his two convictions. We disagree. Consecutive sentences are permitted when specifically authorized by statute.[52] Here, defendant's cocaine conviction triggers the provision in MCL 333.7401(3) that imprisonment "shall be imposed to run consecutively with any term of imprisonment imposed for the commission of *another felony*."[53] A "felony" is often differentiated from a "misdemeanor" by the fact that it calls for punishment in excess of one years' incarceration.[54]

At the time of defendant's resisting arrest conviction, resisting arrest was described as "a *misdemeanor*, punishable by imprisonment in the state prison not more than two [2] years . . ."[55] However, in *People v Daniel*, this Court concluded that self-styled misdemeanors

---

[48] *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

[49] *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

[50] *Id*. at 600.

[51] *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

[52] *People v Brown*, 220 Mich App 680, 682; 560 NW2d 80 (1996).

[53] Emphasis added.

[54] Black's Law Dictionary (7th ed).

[55] MCL 750.479 (emphasis added), amended by 2002 PA 270. We note that the current version
(continued…)

punishable by up to two years' imprisonment should be treated as felonies for purposes of invoking consecutive sentencing under MCL 333.7401(3).[56] Accordingly, the trial court properly imposed consecutive terms of imprisonment in this instance.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin
/s/ Jessica R. Cooper

(…continued)

of the statute describes the crime as a felony. MCL 750.479(2).

[56] *People v Daniel*, 207 Mich App 47, 55-56; 523 NW2d 830 (1994).