

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODERICK DEWAYNE LEE,

Defendant-Appellant.

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UNPUBLISHED

December 14, 2004

No. 248427

Oakland Circuit Court

LC No. 1999-166151-FC

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHEDRICK LEE,

Defendant-Appellant.

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No. 248428

Oakland Circuit Court

LC No. 1999-166152-FC

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMAR LEWIS GARVIN,

Defendant-Appellant.

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No. 248954

Oakland Circuit Court

LC No. 1999-166168-FC

Before: Whitbeck, C.J., and Saad and Talbot, JJ.

PER CURIAM.

Defendants Roderick Lee, Shedrick Lee, and Demar Garvin were jointly tried before a single jury. The jury convicted each defendant of conspiracy to deliver or possess with intent to deliver 650 or more grams of a controlled substance.<sup>1</sup> The trial court sentenced each defendant

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<sup>1</sup> MCL 750.157a and MCL 333.7401(2)(a)(i).

to a prison term of 30 to 60 years. Roderick Lee appeals as of right in Docket No. 248427, Shedrick Lee appeals as of right in Docket No. 248428, and Garvin appeals as of right in Docket No. 248954. We affirm.

### I. Basic Facts And Procedural History

Defendants' convictions arise from allegations that, from 1985 through 1998, they, along with other family members and associates, engaged in a long-term, widespread cocaine and heroin trafficking conspiracy in Michigan and, at times, transported drugs from out of state. Roderick Lee and his brother Nathaniel Lee allegedly led and equally controlled the purported Lee family organization. Shedrick Lee, another Lee brother, allegedly transported large quantities of drugs from out of state for the organization, although another codefendant, Joe Abraham, was allegedly the organization's primary supplier. Roderick Lee and Nathaniel Lee, in turn, allegedly supplied numerous individuals, including Garvin, who sold to third parties.

Helen Alexander testified that she purchased cocaine from Roderick Lee, Shedrick Lee, and Nathaniel Lee. According to Alexander, for six months in 1987, she allowed Nathaniel Lee to use her house to "cook up" and sell drugs, in exchange for drugs and money. Alexander stated that in 1987 and 1988, she bought crack cocaine from Shedrick Lee and that in 1989 and 1990 she bought approximately three grams of crack cocaine from Roderick Lee bimonthly. Alexander testified that she observed Roderick Lee give drugs to another woman in exchange for shoplifted items. Alexander indicated that she participated in several drug transactions with Roderick Lee at various Pontiac houses owned by the Lee brothers.

Ralph McMorris testified that, in the mid-1980s until the mid-1990s, he bought cocaine from Roderick Lee and Nathaniel Lee who were major drug dealers in Pontiac. McMorris stated that he typically bought smaller quantities from street sellers but that if he wanted larger quantities, the street sellers went to Roderick Lee or Nathaniel Lee. On four or five occasions, according to McMorris, he bought from half an ounce to three ounces of cocaine directly from Roderick Lee. McMorris also testified that on several occasions in 1994, he gave Roderick Lee and Nathaniel Lee stolen clothing in exchange for cocaine.

LaMark Northern testified that he first received cocaine from Roderick Lee in 1987 or 1988, and also received cocaine from Garvin who purchased his cocaine from Roderick Lee and others. Northern said that on one occasion, in approximately 1989, he bought half a kilogram of cocaine from Roderick Lee for \$14,500. According to Northern, for years, beginning in approximately 1993, he routinely received cocaine and heroin from Roderick Lee and Garvin, totaling more 650 grams, that he broke down into smaller quantities and sold to third parties in the Pontiac area. Northern testified that Roderick Lee and Garvin supplied him with drugs until he was arrested.

Marvin Smith testified that, in 1995, he bought half an ounce of cocaine from Garvin at Northern's house, and purchased additional drugs from Garvin on two occasions. According to Smith, on one occasion he and Northern combined their money and bought eighteen ounces of cocaine from Garvin.

Eric Lee, who is the nephew of Shedrick, Roderick, and Nathaniel Lee, testified that he began working for Roderick Lee in 1989, and continued selling cocaine and heroin for his uncles

until 1996.<sup>2</sup> Eric Lee testified that Roderick Lee and Nathaniel Lee led the Lee organization and were equally in control. According to Eric Lee, in 1989 Nathaniel Lee lived with Eric Lee's mother and kept more than a kilogram of cocaine in their apartment. Eric Lee stated that when he was fourteen years old, he began stealing portions of the cocaine to sell. He said that after his activities were discovered, Roderick Lee began supplying him weekly with cocaine to sell. Eric Lee testified that he initially began with half-ounce amounts that eventually grew to over half a kilogram.

Eric Lee testified that in 1993, Roderick Lee sent him to Muskegon to oversee the operation there because of payment problems. According to Eric Lee, four other Lee relatives and associates were selling drugs for Roderick Lee in Muskegon at the time. Eric Lee said that in 1990 or 1991 he observed Roderick Lee supply these same four men with cocaine to sell in Pontiac. Eric Lee indicated that during the two years that he remained in Muskegon, Roderick Lee supplied him with a quarter of a kilogram of cocaine thirty or forty times, and approximately half a kilogram of cocaine twice. Eric Lee testified that, in turn, he distributed the drugs to certain individuals for sale to third parties, and also sold drugs himself. Eric Lee stated that when he returned to Pontiac, he sold heroin for Roderick Lee, who supplied him with one or two grams of heroin several times a week. Eric Lee testified that, on one occasion, he observed over a kilogram of powder cocaine and over a kilogram of crack cocaine at Roderick Lee's apartment and that Roderick Lee was in the process of converting the powder into crack cocaine. Eric Lee said that Roderick Lee stopped supplying him with drugs after he was allegedly robbed of a large sum of money that he owed Roderick Lee for cocaine and heroin.

Eric Lee stated that, over the years, he observed large quantities of drugs being delivered to Roderick Lee and Nathaniel Lee. He testified that he observed Roderick Lee and one Joe Abraham together and believed that the delivery individuals were "running" for Abraham. Eric Lee indicated that Shedrick Lee also obtained cocaine for the organization from other states. Eric Lee noted that Shedrick Lee had urged him to obtain his driver's license, which he believed was for drug trafficking purposes. Eric Lee indicated that, on one occasion, Shedrick Lee offered him \$5,000 to accompany him to New York City to purportedly obtain drugs.

Eric Lee testified the he was supplied with more than 650 grams of cocaine for sale and distribution to third parties. Eric Lee indicated that Roderick Lee also supplied drugs to several other people, including Garvin, Louis Laws, Willie Lee, and Northern. According to Eric Lee, in 1994 or 1995, he heard Garvin tell Roderick Lee that his prices were too high. Eric Lee indicated that, in 1995, he saw approximately three ounces of cocaine on Garvin's counter and that in 1997, he went to Garvin's house and observed him weighing about half a kilogram of cocaine on a triple beam scale. Eric Lee stated that he distributed drugs for Roderick Lee to Northern and Mike Robinson in exchange for \$3,500. Eric Lee stated that he also saw Menion Stimage and Anthony Hardy, who were drug dealers, go into Roderick Lee's house on several occasions empty handed and leave carrying paper bags and that Johnny Stanley, Laws' uncle, also told him on several occasions that Stanley sold cocaine for Roderick Lee.

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<sup>2</sup> Eric Lee was unavailable for trial, so the trial court admitted his preliminary examination testimony.

Over the years, defendants had several police contacts. In June 1987, an undercover officer twice bought cocaine from Shedrick Lee for \$125 and \$250. After each buy, the officer inquired about purchasing a larger amount of cocaine, and Shedrick Lee replied that he would receive a large shipment in about a week.

In April 1988, the police confiscated \$1,223.60 and a pager from Garvin. In February 1989, the police confiscated \$1,540 and a pager from Garvin and also retrieved a package of cocaine that he threw out of a car window. In February 1992, the police confiscated \$900 from Garvin. In June 1992, the police confiscated \$1,366 and a pager from Garvin. In April 1993, the police confiscated \$1,300 that Garvin had attempted to conceal. In June 1994, Garvin was arrested while carrying \$1,480 and a pager.

In November 1993, the police executed a search warrant at a home occupied by Garvin and Stanley Berkette. Inside the house, police officers saw Garvin attempting to hide a loaded .45 automatic gun in a heating vent. On Garvin's person, the police found \$765, a pager, and a tally sheet. The police also found approximately half a gram of cocaine in a plastic baggie, 1.5 grams of rock cocaine, approximately twenty-eight grams of crack cocaine, over a pound of marijuana, a triple beam scale containing cocaine residue, various drug-packaging materials, two pistols, more than \$10,000, and a sheet of names, phone numbers, and money denominations.

In September 1994, the police executed a search warrant at a suspected drug house and confiscated cocaine and various drug-weighing and packaging materials. While there, Adams called and, in response to an officer's request to buy cocaine, said that he could obtain two ounces from "Big Nate's" house. Adams provided directions to a house that belonged to Roderick Lee. During the execution of a search warrant, the police found numerous weapons and ammunition, a large amount of money, a digital scale, and more than 116 grams of cocaine.

In October 1994, Pennsylvania police stopped a car for erratic driving. The driver, Shedrick Lee, falsely identified himself as "Nathaniel Lee," and indicated that he was driving from New York to Detroit. Shedrick Lee was driving Nathaniel Lee's car. A subsequent search of the vehicle revealed nearly three kilograms of cocaine and more than six grams of heroin hidden in a secret compartment underneath the vehicle. The police also confiscated nearly \$1,000 from Shedrick Lee and an additional \$1,350 from a duffel bag inside the car. A drug enforcement special agent opined that, based on Shedrick Lee's explanation of the transaction, he was a courier for a larger drug organization, and had a previous relationship with his out-of-state source. Eric Lee testified that the cocaine found in the car was a delivery for Roderick Lee and Nathaniel Lee and that both were very angry that Shedrick Lee was captured because they lost money.

In 1995, Laws worked for law enforcement and named Roderick Lee as one of his narcotics suppliers. In January and February 1995, Laws successfully engaged in two controlled buys of a quarter of an ounce of heroin from Roderick Lee.

In June 1998, the police executed a search warrant at Garvin's house. The police found a small electronic scale, various drug-packaging materials, three-eighths of an ounce of heroin, cocaine residue, small chips of crack cocaine, marijuana, \$21,249, a loaded .380 caliber semi-automatic handgun, a loaded .22 revolver, and sheets containing numbers.

In September 1998, search warrants were executed for ten homes in the Pontiac area purportedly connected to the Lee family organization, and numerous individuals allegedly involved in the organization were arrested. When Garvin was arrested, the police found \$1,860, and a pager on his person. There was evidence that Garvin did not file any personal income tax returns from 1987 through 1998.

Abraham was also arrested. In a statement made to the police, Abraham admitted that he received large quantities of cocaine from out of state, which he brokered to different drug organizations, including the Lee brothers and Joseph Steins. Abraham indicated that he supplied “the Pontiac group” with drugs once or twice a week for two or three years, and that Roderick Lee and Garvin came to his area to purchase drugs. Abraham explained that the drug transactions added up to between fifteen and twenty multi-kilogram drug deals. Abraham admitted that, on one occasion, he sold twenty kilograms of cocaine to Roderick Lee for \$500,000. Phone records confiscated from the search of Abraham’s residence showed several calls between his residence and Roderick Lee’s residence.

Antonio James, a drug runner for Steins, testified that he picked up cocaine from Abraham in quantities of between one and three kilograms for a couple of years. According to James, in 1996 he saw a shipment of between twenty and twenty-five kilograms of cocaine delivered to Abraham’s house. James testified that, in 1996 or 1997, he heard Abraham brag to Steins that his “Pontiac boys,” Roderick Lee and Nathaniel Lee, were selling more drugs than the Steins organization.

## II. Roderick Lee’s Issues in Docket No. 248427

### A. Grand Jury Indictment

#### (1) Standard Of Review

Roderick Lee, an African-American man, argues that the trial court erred in refusing to quash his grand jury indictment, because the grand jury composition violated his Fourteenth Amendment right to equal protection and his Sixth Amendment right to a jury drawn from a fair cross-section of the community. We review constitutional questions de novo.<sup>3</sup>

#### (2) The Grand Jury

The Oakland Circuit Court ordered that a seventeen-member citizens’ grand jury be impaneled to investigate, inter alia, conspiracies regarding controlled substances. A grand jury venire of 124 persons was chosen from all the district courts in Oakland County. Subsequently, Roderick Lee and several other individuals were indicted for conspiracy to deliver 650 or more grams of a controlled substance. Roderick Lee moved to dismiss the indictment and for further discovery, challenging the racial composition of the grand jury. The trial court granted the request for additional discovery. Following a review, the trial court found that the grand jurors were randomly selected from pre-approved district court jurors in proportion to the population of

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<sup>3</sup> *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

each district in the county, as determined by the 1990 census, which was the most current data regarding the race and ethnicity of Oakland County. The trial court stated that, in Oakland County:

district and circuit court venires are created on a “next come-next served” basis. Allocations for circuit and district court venires are interspersed throughout the year. Thus, the allocation to district court venires does not fully deplete the available source list before jurors are allocated to circuit court venires.

The trial court concluded that Oakland County’s jury selection method “does not systematically exclude racial/ethnic minorities,” and that the information regarding the composition of the grand jury venire demonstrated that the grand jury was drawn from a fair cross-section of the community.

### (3) The Right To Equal Protection

The Equal Protection clause guarantees to a defendant a jury whose members are selected by nondiscriminatory methods.<sup>4</sup> Members of the defendant’s race shall not be excluded from the jury venire on account of race.<sup>5</sup> In *People v Glass (After Remand)*,<sup>6</sup> the Michigan Supreme Court held:

There is no right to have a particular grand jury reflect the precise racial composition of a community. Furthermore, discriminatory effect is insufficient to establish a violation of the Fourteenth Amendment; defendant must show discriminatory intent . . .

In order to establish a prima facie case of racial discrimination in the selection of a grand jury under the Fourteenth Amendment, in addition to showing discriminatory purpose, defendant must show that the grand jury selection procedure resulted in a “substantial underrepresentation of his race” . . . The defendant must show 1) that he belongs to a recognizable, distinct class singled out for different treatment under the laws as written or as applied; 2) that there was significant underrepresentation of that distinct class over a significant period of time; and 3) that the selection procedure was susceptible of abuse or that it was not racially neutral. [Citations omitted.]

We conclude that Roderick Lee has not presented a prima facie case of discrimination under the Fourteenth Amendment. Initially, Roderick Lee has not alleged that there was a discriminatory purpose underlying the grand jury selection process. Further, although the first requirement is satisfied because Roderick Lee is African-American, he has not satisfied the second requirement of demonstrating a degree of underrepresentation over a significant period of

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<sup>4</sup> *Batson v Kentucky*, 476 US 79, 85-86; 106 S Ct 1712; 90 L Ed 2d 69 (1986).

<sup>5</sup> *Id.*

<sup>6</sup> *People v Glass (After Remand)*, 464 Mich 266, 284-285; 627 NW2d 261 (2001).

time. Roderick Lee failed to proffer any evidence of the racial composition of his grand jury or other grand juries over any period of time. Additionally, Roderick Lee failed to demonstrate that the selection procedure is susceptible to abuse or was not racially neutral. The mere fact that, after Roderick Lee's grand jury indictment, Oakland County adopted a new "state of the art" jury selection procedure does not prove that the procedure in place at the time of Roderick Lee's indictment was not racially neutral. In sum, Roderick Lee is not entitled to relief on this basis.

#### (4) A Jury Drawn from a Fair Cross-Section of the Community

The Sixth Amendment guarantees a criminal defendant an impartial jury drawn from a fair cross-section of the community.<sup>7</sup> Although the fair cross-section requirement does not guarantee that any particular jury actually chosen must mirror the community, "jury wheels, pools or names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof."<sup>8</sup>

In *Glass*,<sup>9</sup> the Michigan Supreme Court recognized that a preliminary question exists whether the fair cross-section requirement applies to state grand jury venires. In this case, as in *Glass*, we need not decide whether the fair cross-section requirement applies to state grand jury venires because Roderick Lee has failed to allege a cognizable fair cross-section claim.

In order to establish a prima facie violation of the fair cross-section requirement, the defendant must show

(1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.<sup>10</sup>

The first requirement is satisfied because Roderick Lee contends that African-Americans were systematically excluded from the jury venire.<sup>11</sup> Regarding the second requirement, Roderick Lee must show that the number of African-Americans in the jury venire is not fair and reasonable in relation to the number of African-Americans in Oakland County. There are three methods typically used to determine whether the representation of the group is fair and reasonable in relation to the number of such persons in the community: (1) the absolute disparity

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<sup>7</sup> *Taylor v Louisiana*, 419 US 522, 527; 95 S Ct 692; 42 L Ed 2d 690 (1975); see also *People v Hubbard (After Remand)*, 217 Mich App 459, 472; 552 NW2d 493 (1996).

<sup>8</sup> *People v Smith*, 463 Mich 199, 203, 214-215; 615 NW2d 1 (2000) (Cavanagh, J., concurring), quoting *Taylor*, *supra* at 538.

<sup>9</sup> *Glass*, *supra* at 287.

<sup>10</sup> *Smith*, *supra* at 203, 215, quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).

<sup>11</sup> *Smith*, *supra* at 215.

test, (2) the comparative disparity test, and (3) the standard deviation test.<sup>12</sup> These tests should be used on a case-by-case basis, and the courts should consider the results of all the tests.<sup>13</sup>

Roderick Lee presented no evidence that there was any disparity between the number of jury-eligible African-Americans and the actual number of African-American prospective jurors generally selected to the Oakland Circuit Court jury pool list. Indeed, Roderick Lee does not contest the trial court's finding that there was no record kept of race of the jurors. Further, even if Roderick Lee could show that his particular jury was underrepresented by minorities, "[m]erely showing one case of alleged underrepresentation does not rise to a 'general' underrepresentation that is required for establishing a prima facie case."<sup>14</sup>

Lastly, even if Roderick Lee could satisfy the second requirement, he must demonstrate that the underrepresentation of African-Americans in the jury venire "was systematic, 'that is, inherent in the particular jury-selection process utilized.'"<sup>15</sup> Roderick Lee has failed to present a cogent argument discussing the jury selection process and how systematic underrepresentation of African-Americans is inherent in that system. Additionally, the trial court fully explained the jury selection process, which consists of the random selection of pre-approved district court jurors in proportion to the population of each district in the county, as determined by the most current data regarding the race and ethnicity of Oakland County. The system used does not appear to systematically exclude African-Americans from the jury venires. Therefore, Roderick Lee has failed to establish a prima facie case of a violation of the fair cross-section requirement. In this regard, we decline Roderick Lee's request to remand for a hearing. It is not apparent that further discovery would aid Roderick Lee, and he has failed to sufficiently argue the need for a hearing.

## B. Effective Assistance of Counsel

### (1) Standard Of Review

Roderick Lee argues that defense counsel was ineffective for failing to call witnesses who would have challenged the credibility of prosecution witnesses Eric Lee and Northern, thereby supporting an acquittal. Because Roderick Lee failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record.<sup>16</sup>

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<sup>12</sup> *Id.* at 203-204.

<sup>13</sup> *Id.* at 204.

<sup>14</sup> *People v Williams*, 241 Mich App 519, 533; 616 NW2d 710 (2000).

<sup>15</sup> *Smith, supra* at 224.

<sup>16</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).



## (2) Legal Standards

Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise.<sup>17</sup> To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different.<sup>18</sup> A defendant must also overcome the presumption that the challenged action or inaction was trial strategy.

A trial counsel's decisions concerning what witnesses to call and what evidence to present are matters of trial strategy.<sup>19</sup> "In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to call [the] witnesses deprived him of a substantial defense that would have affected the outcome of the proceeding."<sup>20</sup> "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."<sup>21</sup>

## (3) Applying The Legal Standards

We conclude that Roderick Lee has failed to demonstrate how the proffered witnesses were invaluable to his defense or how their testimony would have impacted the outcome of the trial. Specifically, Roderick Lee argues that, if called, Juana McCarver would have corroborated his wife's testimony and contradicted Eric Lee's testimony about where Roderick Lee resided in January 1989. We find that the proposed witness' testimony would have been cumulative and, given the evidence presented against Roderick Lee and the alleged duration of the conspiracy, would have been of little significance in this case. Roderick Lee has failed to overcome the presumption that defense counsel, as a matter of trial strategy, reasonably refrained from presenting this seemingly insignificant and cumulative testimony.

Roderick Lee also contends that, if called, Kenneth Lee would have contradicted the part of Eric Lee's testimony concerning Roderick Lee supposedly accompanying Eric Lee to Kenneth Lee's Muskegon home. At trial, Eric Lee testified that Kenneth Lee, a relative of the Lee brothers, sold drugs for Roderick Lee in Pontiac and Muskegon. In light of this fact, defense counsel could have reasonably surmised that calling Kenneth Lee would have been futile, given a reasonable anticipation that Kenneth Lee would contradict Eric Lee's testimony in order to

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<sup>17</sup> *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

<sup>18</sup> *Id.*

<sup>19</sup> *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

<sup>20</sup> *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

<sup>21</sup> *Rockey, supra* at 76-77.

deny his own criminal culpability. As previously indicated, “[t]his Court will not substitute its judgment for that of counsel regarding matters of trial strategy.”<sup>22</sup>

Roderick Lee also asserts that Marvin Smith, who testified at trial, provided an affidavit that cast doubt on Northern’s testimony. It is unclear what Roderick Lee is asserting that defense counsel failed to do in relation to Smith. Smith’s affidavit simply contradicts his own trial testimony, and states that Northern “asked [him] to lie.” Moreover, Smith’s trial testimony primarily involved Garvin’s drug dealings, as opposed to Roderick Lee’s. Additionally, to the extent that Roderick Lee is suggesting that defense counsel failed to sufficiently attack Northern’s credibility, defense counsel called two witnesses who specifically testified in that regard. Charles Williams testified that Northern said that he accused Roderick Lee and Garvin of being his suppliers to gain a lighter sentence. Dwayne Madden testified that Northern routinely supplied him with drugs, and denied that the Lee brothers were involved in drug trafficking. Accordingly, this claim is without merit.

We also reject Roderick Lee’s claim that defense counsel was ineffective for failing to properly question Eric Lee regarding his refusal to testify. We note that Eric testified before a grand jury and at several preliminary examinations of several coconspirators, and gave critical evidence against the Lee family organization. Subsequently, Eric Lee claimed that he could not recall any details about the alleged drug trafficking conspiracy or his grand jury testimony. Eric Lee invoked his Fifth Amendment privilege not to testify and the trial court admitted Eric Lee’s preliminary examination testimony at trial.

Roderick Lee acknowledges that defense counsel questioned Eric Lee but simply states that the inquiry “was insufficient.” Furthermore, Roderick Lee offers no examples of questions that defense counsel failed to ask. Additionally, Roderick Lee does not dispute that Eric Lee, who asserted his Fifth Amendment privilege as justification for not testifying, was “unavailable” for purposes of MRE 804(b)(1) or that the trial court abused its discretion in admitting Eric Lee’s prior testimony.

In sum, Roderick Lee’s contention that he was deprived of a substantial defense by defense counsel’s failure to call or adequately question certain witnesses does not overcome the presumption that counsel’s decisions were a matter of sound trial strategy. Further, given the overwhelming evidence in this case, Roderick Lee cannot demonstrate that there is a reasonable probability that, but for counsel’s inaction, the result of the proceeding would have been different.<sup>23</sup> Roderick Lee is not entitled to a new trial on this basis.

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<sup>22</sup> *Id.*

<sup>23</sup> *Effinger, supra.*

## C. Sentence

### (1) Standard Of Review

Roderick Lee argues that he is entitled to resentencing because the sentencing judge was not the same judge who presided at his trial. Because Roderick Lee failed to timely object to the second judge imposing sentence or move to remand for a hearing regarding the visiting judge's availability, this issue is unpreserved. Accordingly, we review the issue for plain error affecting defendant's substantial rights.<sup>24</sup>

### (2) Legal Standards

Generally, the same judge who presided over the defendant's trial, provided that the judge is reasonably available, should sentence a defendant.<sup>25</sup> Here, Roderick Lee's trial was presided over by a visiting judge, who was assigned to handle criminal matters until September 30, 2002, and civil cases until December 31, 2002. Roderick Lee was sentenced in February 2003. The visiting judge was not reasonably available to sentence Roderick Lee because he was no longer assigned to the court and, therefore, no longer had authority to act as a circuit court judge at the time of sentencing.<sup>26</sup> Therefore, we conclude that resentencing is not required.<sup>27</sup>

## III. Shedrick Lee's Issues in Docket No. 248428

### A. Sufficiency of the Evidence

#### (1) Standard Of Review

Shedrick Lee argues that the evidence was insufficient to sustain his conviction because there was no evidence of a specific intent or agreement to deliver or possess with intent to deliver 650 or more grams of a controlled substance. When ascertaining whether sufficient evidence was presented at trial to support a conviction, we must view the evidence in a 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.<sup>28</sup> We will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of

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<sup>24</sup> *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

<sup>25</sup> *People v Clemons*, 407 Mich 939; 291 NW2d 927 (1979); *People v Pierce*, 158 Mich App 113, 115-116; 404 NW2d 230 (1987).

<sup>26</sup> See *People v Van Auken (After Remand)*, 132 Mich App 394, 399; 347 NW2d 466 (1984), rev'd in part on other grounds 419 Mich 918 (1984).

<sup>27</sup> We note that the circuit court judge who imposed Roderick Lee's sentence was familiar with the facts of this case because he presided over the trials of Nathaniel Lee, Johnny Stanley, and Louis Laws.

<sup>28</sup> *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

witnesses.<sup>29</sup> Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime.<sup>30</sup> All conflicts in the evidence must be resolved in favor of the prosecution.<sup>31</sup>

## (2) Legal Standards

To support a conviction for conspiracy to deliver a controlled substance, the prosecution must prove that

(1) the defendant possessed the specific intent to deliver the statutory minimum as charged; (2) his coconspirators possessed the specific intent to deliver the statutory minimum as charged; and (3) the defendant and his coconspirators possessed the specific intent to combine to deliver the statutory minimum as charged to a third person.<sup>32</sup>

A conspiracy is a voluntary, express, or implied mutual agreement or understanding between two or more persons to commit a criminal act or to accomplish a legal act by unlawful means.<sup>33</sup> To prove the intent to combine with others for an unlawful purpose, it must be shown that the intent, including knowledge, was possessed by more than one person.<sup>34</sup> For intent to exist, the defendant must know of the conspiracy, know of the objective of the conspiracy, and intend to participate cooperatively to further that objective.<sup>35</sup> Direct proof of a conspiracy is not essential; rather, proof may be derived from the circumstances, acts, and conduct of the parties, and inferences may be made because such evidence sheds light on the coconspirators' intentions.<sup>36</sup>

## (3) Applying The Legal Standards

We conclude that, viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to conclude that the conspiracy was proven beyond a reasonable doubt. The evidence, if believed, indicated that Shedrick Lee and his brothers, Roderick Lee and Nathaniel Lee, knowingly cooperated with others to further a drug trafficking scheme to possess and deliver numerous kilograms of cocaine. There was evidence that

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<sup>29</sup> *Id.* at 514.

<sup>30</sup> *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996).

<sup>31</sup> *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

<sup>32</sup> *People v Mass*, 464 Mich 615, 629-630, 633; 628 NW2d 540 (2001), citing *People v Justice (After Remand)*, 454 Mich 334, 349; 562 NW2d 652 (1997).

<sup>33</sup> *People v Blume*, 443 Mich 476, 481, 485; 505 NW2d 843 (1993); *People v Cotton*, 191 Mich App 377, 392-393; 478 NW2d 681 (1991).

<sup>34</sup> *Blume, supra* at 482.

<sup>35</sup> *Id.* at 485.

<sup>36</sup> *Justice (After Remand), supra* at 347; *Cotton, supra*.

Shedrick Lee went out of state to pick up cocaine for the organization and, on one occasion, offered Eric Lee \$5,000 to accompany him to New York City. In 1994, Shedrick Lee was arrested in Pennsylvania, en route to Michigan, while driving Nathaniel Lee's car. A search of the vehicle revealed nearly three kilograms of cocaine and more than six grams of heroin hidden in a secret compartment underneath the vehicle. A jury could reasonably infer that the amount of cocaine at issue was not for personal use, but intended for distribution to third parties. The police also confiscated nearly \$1,000 from Shedrick Lee, and an additional \$1,350 from a duffel bag inside the car. A drug enforcement special agent opined that Shedrick Lee was a courier for a larger drug organization, and had a previous relationship with his out-of-state source. There was testimony that Roderick Lee and Nathaniel Lee were angry that Shedrick Lee was caught because they lost money. There was also evidence that Shedrick Lee twice sold cocaine to an undercover officer and each time indicated that he would soon receive a large delivery of drugs and could sell larger amounts.

Although Shedrick Lee asserts that the evidence was insufficient to establish his participation in a conspiracy, the jury was entitled to accept or reject any of the evidence presented.<sup>37</sup> As previously indicated, we will not interfere with the jury's determination of the weight of the evidence or the credibility of the witnesses.<sup>38</sup> Moreover, a prosecutor need not negate every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides.<sup>39</sup> In sum, viewed in a light most favorable to the prosecution, the evidence was sufficient to sustain Shedrick Lee's conviction of conspiracy to deliver or possess with intent to deliver 650 or more grams of a controlled substance.

#### B. New Trial

Shedrick Lee claims that he is entitled to a new trial because the trial court failed to properly instruct the jury that the prosecution must prove that he specifically intended to conspire to deliver 650 or more grams of cocaine. Shedrick Lee raised this issue before the trial court in a motion for a new trial. Although the trial court agreed with Shedrick Lee's argument that the jury was not properly instructed, the prosecution appealed, and this Court reversed, concluding that the alleged instructional error was harmless beyond a reasonable doubt.<sup>40</sup> The Michigan Supreme Court denied leave to appeal.<sup>41</sup> This Court's holding constitutes the law of the case

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<sup>37</sup> See *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999), and *People v Marji*, 180 Mich App 525, 542; 447 NW2d 835 (1989).

<sup>38</sup> *Wolfe*, *supra*.

<sup>39</sup> *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

<sup>40</sup> See *People v Shedrick Lee*, unpublished opinion per curiam of the Court of Appeals, issued December 17, 2002 (Docket No. 239233).

<sup>41</sup> *People v Shedrick Lee*, 468 Mich 917; 662 NW2d 753 (2001).

with regard to Shedrick Lee's instructional claim and he has not shown that justice would not be served by application of the doctrine in this instance.<sup>42</sup>

### C. Sentence

We also reject Shedrick Lee's final argument that he is entitled to resentencing because the sentencing judge was not the same judge who presided at his trial. Because Shedrick Lee did not timely object to the second judge imposing sentence or move to remand for a hearing regarding the visiting judge's availability, this unpreserved claim is reviewed for plain error affecting substantial rights.<sup>43</sup>

Our discussion of this issue above is equally applicable here. Like Roderick Lee, Shedrick Lee was sentenced after the visiting judge who presided over his trial was no longer assigned to the court. Therefore, because the visiting judge lacked authority to act as a circuit court judge, he was not reasonably available to sentence defendant Shedrick.<sup>44</sup> Resentencing is not required.

## IV. Defendant Garvin's Issues in Docket No. 248954

### A. Admission of Evidence

#### (1) Standard Of Review

Garvin argues that he was denied a fair trial by the admission of irrelevant and prejudicial evidence regarding his participation in "dog fighting," his failure to pay income taxes, and the drug activities of other individuals to whom he was only "tangential[ly]" connected. Garvin raised this issue in a motion for a new trial, which the trial court summarily denied. Because Garvin failed to timely object to this evidence, we review this unpreserved issue for plain error affecting substantial rights.<sup>45</sup>

#### (2) Legal Standards

Generally, all relevant evidence is admissible at trial. Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.<sup>46</sup> Under this broad definition, evidence is admissible if it is helpful in throwing light on any material point.<sup>47</sup> But even if relevant, evidence may be excluded if its probative value is substantially outweighed by the

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<sup>42</sup> *People v Hermiz*, 235 Mich App 248, 254; 597 NW2d 218 (1999).

<sup>43</sup> *Carines*, *supra*.

<sup>44</sup> See *Van Auken (After Remand)*, *supra*.

<sup>45</sup> *Carines*, *supra*.

<sup>46</sup> MRE 401.

<sup>47</sup> *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001).

danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence.<sup>48</sup>

### (3) Applying The Legal Standards

With regard to the evidence of dog fighting, we note that Garvin himself injected his participation in dog fighting as part of his defense. In the opening statement, defense counsel asserted that large amounts of money are exchanged during dogfights. During trial, after an officer testified that more than \$20,000 was found in Garvin's home, defense counsel elicited testimony that large amounts of money are exchanged in dogfights. In closing argument, defense counsel argued that dog fighting, which "is a big money business," was the source of the large sums of money that Garvin possessed on several occasions. Garvin may not "assign error on appeal to something which his own counsel deemed proper at trial."<sup>49</sup> Further, although some potential jurors, during voir dire, expressed contempt for individuals who participate in dog fighting, those individuals were excused, as Garvin acknowledges. Therefore, this claim does not warrant reversal.

Garvin also contends that testimony regarding the "very existence of a grand jury" was prejudicial. The challenged testimony was given by an officer who had incorrectly testified before the grand jury that a substance found in Garvin's home in June 1998 was cocaine, although it was subsequently determined to be heroin. At trial, the officer's testimony was elicited to explain the discrepancy in his former testimony regarding the identity of the substance. We regard it as highly unlikely that Garvin was prejudiced by the officer's isolated and brief reference to his "grand jury" testimony. Moreover, in its final instructions, the trial court instructed the jurors that the fact that Garvin was charged with a crime and was on trial was not evidence and could not be considered by the jury as demonstrating guilt. Juries are presumed to follow their instructions.<sup>50</sup> We conclude that Garvin is not entitled to relief on this basis.<sup>51</sup>

We also reject Garvin's claim that evidence of his failure to file income taxes from 1987 through 1998 was irrelevant and prejudicial. At trial, the prosecution theorized that the large sums of money that Garvin possessed on numerous occasions were drug proceeds. The evidence that Garvin did not pay taxes from 1987 through 1998, and, thus, was likely unemployed during those years, was relevant to the prosecution's theory.<sup>52</sup> Further, the probative value of the evidence was not substantially outweighed by its prejudicial effect.<sup>53</sup>

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<sup>48</sup> MRE 403.

<sup>49</sup> *People v Roberson*, 167 Mich App 501, 517; 423 NW2d 245 (1988).

<sup>50</sup> *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

<sup>51</sup> We note that defense counsel also mentioned the grand jury testimony of various witnesses during closing argument.

<sup>52</sup> MRE 401.

<sup>53</sup> MRE 403.

We further reject Garvin's claim that the evidence concerning the police surveillance of Abraham, and drug transactions involving other individuals, was irrelevant and prejudicial. The challenged evidence was relevant to the conspiracy charge against Garvin. The surveillance of Abraham's home, which showed large amounts of drugs being delivered, was relevant because Abraham was one of the organization's primary sources for drugs, and Garvin had direct dealings with Abraham.

Additionally, although some of the drug transactions were not Garvin's, they were nonetheless relevant to show the existence and scope of a conspiracy between Garvin and numerous other individuals to distribute large quantities of cocaine. The fact that Garvin was not directly linked to or aware of each drug transaction involving each person is inconsequential. It is not "necessary that one conspirator should know all of the conspirators or participate in all of the objects of the conspiracy."<sup>54</sup> Moreover, the trial court instructed the jury that "defendant is not responsible for the acts of other members of the conspiracy unless those acts are part of the agreement or further the purposes of the agreement," and that each defendant is entitled to have his guilt decided individually. Therefore, we conclude that this issue does not warrant reversal.

## B. Other Acts Evidence

### (1) Standard Of Review

Garvin claims that he is entitled to a new trial because the trial court allowed evidence of his "alleged prior bad acts." Because Garvin failed to timely object to this evidence at trial, we review this unpreserved issue for plain error affecting substantial rights.<sup>55</sup>

### (2) Legal Standards

MRE 404(b) prohibits "evidence of other crimes, wrongs, or acts" to prove a defendant's character or propensity to commit the charged crime.<sup>56</sup> But other acts evidence is admissible under MRE 404(b) if it is offered for a proper purpose (that is, one other than to prove the defendant's character or propensity to commit the crime), is relevant to an issue or fact of consequence at trial, and is sufficiently probative to outweigh the danger of unfair prejudice, pursuant to MRE 403.<sup>57</sup> In application, the admissibility of evidence under MRE 404(b) necessarily hinges on the relationship of the elements of the charge, the theories of admissibility, and the defenses asserted.<sup>58</sup>

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<sup>54</sup> *People v Meredith (On Remand)*, 209 Mich App 403, 411-412; 531 NW2d 749 (1995)

<sup>55</sup> *Carines, supra*.

<sup>56</sup> MRE 404(b)(1); see also *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

<sup>57</sup> *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 55, 63-64, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

<sup>58</sup> *VanderVliet, supra* at 75.



### (3) Applying The Legal Standards

Garvin argues that the prosecutor's questioning of a police witness denied him a fair trial because the elicited testimony indicated that he had outstanding warrants. During the prosecutor's direct examination of the officer, the following exchange occurred:

Q. Did you put [Garvin] under arrest?

A. Yes, he was arrested. *Uh, there was [sic] outstanding warrants for his arrest.* (emphasis added).]

The record demonstrates that the witness' response was an unsolicited answer to a properly asked question. The prosecutor merely asked the witness if he arrested Garvin, a question that required an affirmative or negative response. Generally, "an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial."<sup>59</sup> Further, when the testimony is reviewed in context, it appears that the prosecutor was not seeking to establish that Garvin had outstanding warrants, but that, when Garvin was arrested, he possessed a large amount of money. Additionally, the prosecutor did not ask any questions regarding the warrants, or discuss the matter during closing argument. Accordingly, we conclude that his claim does not warrant reversal.

We also reject Garvin's claim that, after an officer indicated that he possessed \$1,223, the officer impermissibly testified that he had known Garvin for several years and had never known him to be employed. Contrary to Garvin's suggestion, the evidence was not offered to show that he had a bad character. Rather, the evidence was probative of his intent to traffic in cocaine, and to assist the jury in weighing the witnesses' credibility. Particularly, it was the prosecution's theory that Garvin engaged in a long-term drug trafficking conspiracy with the Lee family organization and regularly possessed drug earnings. The challenged evidence was probative of Garvin's identity as a distributor of drugs in light of the evidence that, on numerous occasions, he possessed large amounts of unexplained money and also failed to pay income taxes during the alleged duration of the conspiracy. In short, there was a legitimate, material, and contested ground on which to offer the evidence. Moreover, the evidence was not inadmissible simply because the very nature of the evidence is prejudicial. The danger that MRE 404(b)(1) seeks to avoid is that of *unfair* prejudice, and Garvin has not demonstrated that he was unfairly prejudiced.<sup>60</sup> Accordingly, we conclude that this claim does not merit reversal.

#### C. Sufficiency of the Evidence

##### (1) Standard Of Review

Garvin argues that the evidence was insufficient to sustain his conviction because there was no evidence of a specific intent or agreement to deliver or possess with intent to deliver 650

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<sup>59</sup> *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

<sup>60</sup> See *Starr*, *supra* at 499.

or more grams of a controlled substance. As noted above, when ascertaining whether sufficient evidence was presented at trial to support a conviction, we must view the evidence in a 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.<sup>61</sup> We will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses.<sup>62</sup> Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime.<sup>63</sup> All conflicts in the evidence must be resolved in favor of the prosecution.<sup>64</sup>

## (2) The Evidence

Viewed in a light most favorable to the prosecution, we conclude that the evidence was sufficient to enable a rational trier of fact to conclude that the conspiracy was proven beyond a reasonable doubt. The evidence, if believed, indicated that Garvin knowingly cooperated with other members of the Lee family organization to further a drug trafficking scheme to possess and deliver numerous kilograms of cocaine. There was testimony that, on one occasion, Garvin, Roderick Lee, and Northern purchased between eight and ten kilograms of cocaine from Abraham, and divided it between them. Abraham admitted that he sold multiple kilograms of cocaine to Roderick Lee and Garvin for the Lee organization. There was also evidence that Garvin and Northern pooled their money and bought cocaine from Abraham and once bought a full kilogram. Northern testified that Garvin provided him with cocaine multiple times, which he sold to third parties. Smith, a cocaine addict and dealer, also bought cocaine from Garvin several times. On one occasion, Eric Lee saw Garvin weighing about half a kilogram of cocaine in his house. On another occasion, Eric Lee saw approximately three ounces of cocaine on Garvin's counter. A jury could reasonably infer that the amount of cocaine at issue was not for personal use, but was intended for distribution to third parties.

Additionally, in 1993 the police executed a search warrant at Garvin's residence and found approximately .5 grams of cocaine in a plastic baggie, 1.5 grams of rock cocaine, more than twenty-eight grams of crack cocaine, a triple beam scale, various drug packaging material, cocaine residue, weapons, ammunition, more than \$20,000, and a tally sheet. In 1998 the police again searched Garvin's residence, and found a small electronic scale, various drug packaging items, cocaine residue, tally sheets, three-eighths of an ounce of heroin, small chips of crack cocaine, more than \$21,000, and a loaded weapon. There was also evidence that, on several occasions, Garvin possessed large amounts of money, although he was not employed during the alleged duration of the drug trafficking conspiracy.

Despite this evidence, Garvin asserts that the evidence demonstrated that he was operating alone. However, the jury was entitled to accept or reject any of the evidence

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<sup>61</sup> *Wolfe, supra* at 515.

<sup>62</sup> *Id.* at 514.

<sup>63</sup> *Truong (After Remand), supra* at 337.

<sup>64</sup> *Terry, supra* at 224 Mich App 447, 452; 569 NW2d 641 (1997).

presented<sup>65</sup> and we will not interfere with the jury's determination of the weight of the evidence or the credibility of the witnesses.<sup>66</sup> In sum, viewed in a light most favorable to the prosecution, we conclude that the evidence was sufficient to sustain Garvin's conviction of conspiracy to deliver or possess with intent to deliver 650 or more grams of a controlled substance.

#### D. Jury Instructions

Garvin argues that the trial court erred by reading the standard jury instruction on conspiracy, which states that the jury only has to find a conspiracy between "defendant and someone else," see CJI2d 10.1, and does not specify the "name of the specific conspirator." But the record reflects that defense counsel expressed satisfaction with the trial court's instruction. Because any objection was waived, there is no error to review.<sup>67</sup> Although Garvin states that this issue is preserved, the transcript cite provided does not reflect an objection to the challenged instruction.

Moreover, we note that Garvin relies on this Court's decision in *People v Smith*,<sup>68</sup> to support his claim that the trial court's omission requires reversal. But unlike the situation in *Smith*, the evidence in this case could not lead the jury to be confused about the identity of Garvin's coconspirators. Instead, the record supports a finding that both Garvin and the jury were clearly aware that Garvin was charged with conspiring with numerous named members of the Lee organization, and that the prosecutor attempted to establish the existence of a conspiracy between Garvin and those individuals. In fact, Garvin and two of his alleged coconspirators, Roderick Lee and Shedrick Lee, were jointly tried before a single jury. Therefore, we conclude that the instructions fairly presented the issues to be tried.

#### E. Sentence

We reject Garvin's claim that he is entitled to resentencing because the sentencing judge was not the same judge who presided at his trial. Because Garvin did not timely object to the second judge imposing sentence or move to remand for a hearing regarding the visiting judge's availability, this unpreserved claim is reviewed for plain error affecting substantial rights.<sup>69</sup> Garvin was sentenced along with Roderick Lee and Shedrick Lee after the visiting judge who presided over their trial was no longer assigned to the court. As we held with respect to the

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<sup>65</sup> *Perry, supra* at 63.

<sup>66</sup> *Wolfe, supra*.

<sup>67</sup> See *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002).

<sup>68</sup> *People v Smith*, 85 Mich App 404; 271 NW2d 252 (1978), rev'd in part on other grounds 406 Mich 945 (1979).

<sup>69</sup> *Carines, supra*.

previous defendants, because the visiting judge was not reasonably available to impose sentence, resentencing is not required.<sup>70</sup>

## F. Drug Profile Evidence

### (1) Standard Of Review

Garvin's final claim is that the trial court allowed improper drug profile evidence. Although Garvin suggests that this issue is preserved, the record does not show that he argued that improper drug profile evidence was presented. Because Garvin failed to object to the admission of this evidence, we review this unpreserved issue for plain error affecting substantial rights.<sup>71</sup>

### (2) The Evidence

At trial, there was evidence that, during the course of the alleged conspiracy, two raids were conducted at Garvin's residence. In November 1993, the police found approximately half a gram of cocaine in a plastic baggie, 1.5 grams of rock cocaine, approximately twenty-eight grams of crack cocaine, a triple beam scale containing cocaine residue, five plastic baggies missing their corners, a white powdery residue consistent with cocaine in the microwave, and a sheet of names, phone numbers, and money denominations. An officer, who was a member of the Narcotics Enforcement Team and had executed more than five hundred search warrants, testified that, given the evidence and the absence of paraphernalia for ingestion of cocaine, the amount of cocaine at issue was not consistent with personal use.

In June 1998, the police found sheets of paper with numbers on them, a box cutter, a sock containing three corner-tie plastic baggies with a white substance consistent with heroin, half of a kilo press, a pager, a small electronic scale, a "chore boy," a white powder consistent with a cutting agent, small chips of cocaine, \$21,249 in a plastic bag under a bed, and a loaded weapon. An officer, who was qualified as an expert in the methods of drug trafficking, testified that, given this evidence, the drugs were likely intended for distribution.

### (3) Legal Standards

"Drug profile evidence has been described as an 'informal compilation of characteristics often displayed by those trafficking drugs.'"<sup>72</sup> Drug profile evidence may be admitted if: (1) it is offered as background or modus operandi evidence, and not as substantive evidence of guilt; (2) other evidence is admitted to establish the defendant's guilt; (3) the appropriate use of the profile evidence is made clear to the jury; and (4) no expert witness is permitted to opine that, based on the profile, the defendant is guilty, or to compare the defendant's characteristics with

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<sup>70</sup> See *Van Auken (After Remand)*, *supra*.

<sup>71</sup> *Carines*, *supra*.

<sup>72</sup> *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999).

the profile in a way which suggests guilt.<sup>73</sup> The admission of drug profile evidence is subject to a harmless error analysis.<sup>74</sup>

#### (4) Applying The Legal Standards

We conclude that Garvin has failed to demonstrate plain error affecting his substantial rights. The expert testimony was not improper because the testimony was offered as background or modus operandi evidence relating to the issues of possession with intent to deliver drugs and not as substantive evidence of guilt, other evidence of Garvin's guilt was offered, and the experts did not specifically offer an opinion concerning his guilt. Expert police testimony regarding the quantity of drugs found and the packaging is permitted to show that the defendant intended to sell the drugs and not simply use them for personal consumption.<sup>75</sup> To the extent that Garvin argues that he is entitled to a new trial because the trial court failed to properly instruct the jury on the proper use of drug profile evidence, the record reflects that defense counsel expressed satisfaction with the court's instructions. Therefore, any objection in that regard was waived.<sup>76</sup>

Moreover, even if the admission of the evidence was erroneous, Garvin cannot demonstrate that the evidence prejudiced the outcome of the trial. The challenged testimony was of comparatively minor importance considering the totality of the evidence against Garvin. As discussed above, there was substantial other evidence supporting Garvin's conviction. Therefore, reversal is not warranted on this basis.

Affirmed.

/s/ William C. Whitbeck  
/s/ Henry William Saad  
/s/ Michael J. Talbot

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<sup>73</sup> *People v Williams*, 240 Mich App 316, 320-321; 614 NW2d 647 (2000).

<sup>74</sup> *Id.* at 321.

<sup>75</sup> See *People v Ray*, 191 Mich App 706, 708; 479 NW2d 1 (1991).

<sup>76</sup> See *Carter*, *supra*; *Ortiz*, *supra*.