

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARRY MICHAEL SPARKMAN II,

Defendant-Appellant.

UNPUBLISHED

December 21, 2006

No. 262859

Macomb Circuit Court

LC No. 04-003495-FH

Before: Borrello, P.J., and Neff and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for delivery of a controlled substance, MCL 333.7401(2)(b)(i) (ecstasy), conspiracy to deliver a controlled substance, MCL 750.157A and MCL 333.7401(2)(b)(i) (ecstasy), and unarmed robbery, MCL 750.530. Defendant was sentenced to 51 months to 20 years' imprisonment for the delivery of a controlled substance conviction, 51 months to 20 years' imprisonment for the conspiracy to deliver a controlled substance conviction, and 19 months to 15 years' imprisonment for the unarmed robbery conviction. We affirm.

Defendant first argues that the evidence was insufficient to support his convictions and that the verdict was against the great weight of the evidence. In reviewing the sufficiency of the evidence, this Court must view the evidence de novo in the light most favorable to the prosecutor, and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). Questions of credibility and intent should be left to the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Considering the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient to infer intent. *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004).

Further, determining whether a verdict is against the great weight of the evidence requires a review of the entire body of proofs. The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). If the evidence conflicts, issues of credibility should ordinarily be left for the trier of fact. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998).

Defendant was convicted of delivering ecstasy. “‘Deliver’ or ‘delivery’ means the actual, constructive, or attempted transfer from 1 person to another of a controlled substance, whether or not there is an agency relationship.” MCL 333.7105(1); see also *People v Schultz*, 246 Mich App 695, 703-704; 635 NW2d 491 (2001). The amount and nature of the controlled substance are elements of a delivery offense under MCL 333.7401. *People v Mass*, 464 Mich 615, 626; 628 NW2d 540 (2001). Knowledge of the amount of a controlled substance involved is not an element of a charge of delivery. *Id.*

To be convicted of conspiracy to deliver a controlled substance, the people must prove that:

(1) the defendant possessed the specific intent to deliver the statutory minimum as charged, (2) his coconspirator possessed the specific intent to deliver the statutory minimum as charged, and (3) the defendant and his coconspirator possessed the specific intent to combine to deliver the statutory minimum as charged to a third person. *Mass, supra* at 623-624, citing *People v Justice (After Remand)*, 454 Mich 334, 349; 562 NW2d 652 (1997). The prosecutor must prove only that the defendant cooperated in furthering the conspiracy’s objective with knowledge that a conspiracy existed. *People v Meredith (On Remand)*, 209 Mich App 403, 412; 531 NW2d 749 (1995).

The elements of unarmed robbery are: (1) a felonious taking of property from another, (2) by force, violence, assault, or putting in fear, and (3) being unarmed. MCL 750.530; *People v Johnson*, 206 Mich App 122, 125-126, 520 NW2d 672 (1994).

In this case, Joshua Neal testified that defendant agreed to sell him 20 pills of ecstasy. When Neal arrived to complete the deal, defendant and codefendant Christopher Mahlebashian directed him to another location where Mahlebashian purchased the pills and delivered them to Neal. Neal also testified that, back at the original site of the deal, Mahlebashian ripped the pills out of his hands while defendant struck Neal in the jaw. Through binoculars, Detective Mark Berger observed defendant strike Neal. After the police stopped defendant’s car, Detective Ron Lehman observed Mahlebashian make a throwing motion. Pills were recovered near defendant’s vehicle and in the direction of Mahlebashian’s throwing motion. Another pill, similar to those recovered near the car, was found in defendant’s car, and it tested positive for ecstasy.

Defendant correctly points out that Neal received a plea bargain in another case on the basis of his cooperation with the police and that Neal had been told by a friend that defendant robbed him in the past. The 14 pills recovered near the car were not tested for ecstasy and Neal’s testimony differed from Lehman’s testimony regarding some minor facts. Neal’s testimony also suggests that defendant and Mahlebashian stood to make only a \$20 profit on the sale. No money was recovered from defendant.

Viewing the above evidence in a light most favorable to the prosecution, we conclude that sufficient evidence was presented for a rational trier of fact to conclude that defendant delivered a controlled substance, conspired with Mahlebashian to deliver the controlled substance and robbed Neal of the pills. Defendant’s argument on appeal rests on claims that the prosecution’s witnesses were lying, but, as noted above, questions of credibility should be left to the trier of fact to resolve. *Avant, supra* at 506. After reviewing the entire body of proofs we also conclude that the evidence does not preponderate so heavily against the verdict that it would

be a miscarriage of justice to allow the verdict to stand. Although some evidence conflicts, issues of credibility should ordinarily be left for the trier of fact. *Lemmon*, *supra* at 642-643. The jury found Neal credible and, while Neal was receiving a deal and his testimony clashed with the testimony of the police officers in a couple of instances, there seems to be no basis for overturning defendant's convictions since Neal testified about the sale and the robbery, Berger observed the robbery, and Lehman recovered the pills.

Defendant also argues that prosecutorial misconduct denied him a fair trial. This Court reviews preserved claims of prosecutorial misconduct case by case, examining the conduct in context to determine whether the defendant received a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002). The propriety of a prosecutor's conduct depends on all the facts of a case. *Id.*

Defendant asserts that all of the prosecution witnesses were lying. Prosecutors have a constitutional obligation to report to the defendant and to the trial court whenever government witnesses lie under oath. *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998). "Michigan courts have also recognized that the prosecutor may not knowingly use false testimony to obtain a conviction . . . and that a prosecutor has a duty to correct false evidence." *Id.*

Defendant identifies only two specific instances of false testimony. First, defendant argues that Lehman falsely testified that he lost sight of Neal's car for only 30 seconds after it drove into the party store parking lot and that the next thing that Lehman heard over the radio was that Neal's car was on its way back to the Red Roof Inn. Defendant does not cite to the record for that testimony and there does not appear to be any such testimony. Lehman testified that Neal's car was parked by the party store and that he could not see what was going on because it was dark. Lehman did not testify regarding how long Neal remained parked.

Second, defendant argues that Neal falsely testified that he was not receiving a deal for testifying. It is not clear, however, that Neal's testimony was false. Neal repeatedly testified, even after being confronted regarding his lawyer's actions, that he did not know about any deal, and no evidence established that he did know of it. Assuming that the testimony was false, the prosecutor's failure to correct it did not deny defendant a fair trial. Neal was fully cross-examined regarding the deal and the letter discussing the deal was admitted into evidence. The existence of the deal was fully established and the jury still convicted defendant. On the basis of the evidence presented at trial, we conclude that prosecutorial misconduct did not deny defendant a fair trial.

Defendant also argues that an incompetent police investigation denied him his due process rights. Defendant's argument, however, misses the critical distinction between the failure to disclose evidence and the failure to develop evidence. *People v Coy*, 258 Mich App 1, 22; 669 NW2d 831 (2003). Where the police fail to develop evidence, "the lack of evidence will tend to injure their case more than defendant's since the prosecution has the burden of proving guilt beyond a reasonable doubt." *People v Stephens*, 58 Mich App 701, 705; 228 NW2d 527 (1975). Therefore, while defendant was displeased with how the investigation was conducted, he was not denied his due process rights because of the police's failure to gather more evidence.

Defendant next argues on appeal that he was denied the effective assistance of counsel. Although defendant moved for a new trial on the basis of ineffective assistance of counsel below, his motion was denied and this Court's review of this claim is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003). Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002); *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

To prevail on a claim of ineffective assistance of counsel, a defendant must make two showings. First, the defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, the defendant was denied his Sixth Amendment right to counsel. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *LeBlanc, supra* at 578. Second, the defendant must show that the deficient performance prejudiced the defense. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Carbin, supra* at 599-600. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockett*, 237 Mich App 74, 76; 601 NW2d 887 (1999). 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. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Defendant argues that trial counsel was ineffective because he did not let defendant testify, for failing to move to suppress defendant's prior criminal record to allow defendant to testify without fear that the record would come out, and for failing to obtain all discovery materials for trial preparation from defendant's first attorney. Nothing in the record, however, suggests that defendant wished to testify, that defendant had a criminal record or that trial counsel failed to obtain any discovery material. As discussed above, this Court's review of defendant's ineffective assistance of counsel claim is limited to mistakes apparent on the record. *Riley, supra* at 139.

Defendant also argues that trial counsel was ineffective for failing to cross-examine the prosecution's witnesses regarding the false testimony that defendant drove his vehicle into Balch's vehicle. The prosecution agreed, at the start of the trial, to drop the assault charge against defendant that was based on that vehicle contact, but that dismissal does not establish that the testimony was false. Moreover, decisions regarding whether to question witnesses are presumed to be matters of trial strategy and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *Garza, supra* at 255; *Rockett, supra* at 76. We therefore conclude that because defendant cannot show that trial counsel was deficient under an objective standard of reasonableness, he was not denied the effective assistance of counsel.

Defendant next argues that the trial court erred by admitting the 14 untested pills into evidence. A challenge to a trial court's evidentiary ruling is reviewed for an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d (2000).

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402. Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence

to the action more probable or less probable than it would be without the evidence. MRE 401; *Sabin, supra* at 57. Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *Sabin, supra* at 58. Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *People v Taylor*, 252 Mich App 519, 521-522; 652 NW2d 526 (2002).

In this case, the trial court admitted the 14 untested pills. The jury was told that the pills had not been tested and that only the one tested pill had affirmatively been proven to be ecstasy. The toxicologist who tested the one pill testified that it was standard procedure to test only one pill out of a group of pills if all the pills appeared to be the same. The toxicologist testified that prior to trial she had not opened the evidence bag containing the 14 pills recovered from outside the car, but upon examination of those pills on the stand, she stated that they appeared to be similar to the one she tested. We agree with the trial judge that the procedure followed here is surprisingly sloppy. Clearly it would have been better procedure to test at least one pill from each evidence bag, assuring that the pills found outside the car and the pill found inside were the same. However, given that the judge instructed the jury that the 14 pills had not been tested, we conclude that it was not an abuse of discretion to admit the pills. They were clearly relevant to the charged crimes and defendant was not unfairly prejudiced by their admission.

Defendant's final issue is whether the cumulative effect of the errors discussed above denied him a fair trial. This Court reviews this issue 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 individual errors in the case would not. *Id.* at 388. Reversal is warranted only if the effect of the errors was so seriously prejudicial that the defendant was denied a fair trial. *Id.*

Absent the establishment of errors, there can be no cumulative effect of errors meriting reversal. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999). Prejudicial error has not been identified in this case. As discussed above, the errors that defendant alleges occurred are not errors at all. Therefore, we conclude that defendant was not denied a fair trial based on the cumulative effect of errors in his case.

Affirmed.

/s/ Stephen L. Borrello
/s/ Janet T. Neff
/s/ Jessica R. Cooper