

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAPREE SHAHEB GAMBLE,

Defendant-Appellant.

UNPUBLISHED

June 10, 2008

No. 276034

Jackson Circuit Court

LC No. 05-007197-FH

Before: Gleicher, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

A jury convicted defendant of possession of 50 or more but less than 450 grams of cocaine, MCL 333.7403(2)(a)(iii), and the trial court sentenced him as an habitual offender, third offense, MCL 769.11, to a prison term of 15 to 40 years. Defendant appeals as of right. We affirm.

Defendant's conviction arises from the seizure of cocaine on February 9, 2005, by Jackson Police Officer Sergio Garcia and other members of the Jackson Narcotics Enforcement Team while investigating an anonymous tip that drugs were inside an apartment. Upon arriving at the apartment, Officer Garcia smelled the odor of burning marijuana. Another officer knocked on the door and announced that he was the maintenance man. According to Officer Garcia's trial testimony, Lekia Lewis opened the door and began to exit the apartment. Upon seeing Officer Garcia, Lewis shoved him and tried to return to the apartment and shut the door. Officer Garcia and other officers entered the apartment behind Lewis. Lewis, defendant, and two other men were secured in the living room. After Lewis consented to a search of the apartment, a digital scale and cocaine in rock and powder forms were found in the kitchen. A thumbprint on a plastic sandwich bag containing cocaine was later identified as belonging to defendant.

Lewis was initially included in defendant's witness list, dated August 28, 2006, but was ultimately called as a prosecution witness on November 28, 2006, which was the first day of trial, pursuant to an immunity agreement dated that same day. The immunity agreement precluded the prosecutor from charging Lewis with perjury. Lewis testified that the cocaine in the apartment belonged to defendant, that defendant is the father of her young daughter, and that defendant had a residence of his own but spent approximately half of his time at her apartment. Defendant testified that he was at the apartment on February 9, 2005, because Lewis invited him over for dinner and to visit his daughter. Defendant conceded that he must have touched the sandwich

bag containing his thumbprint, but testified that the cocaine did not belong to him. The jury found defendant guilty of possessing the cocaine.

II

Defendant first argues that he was denied the effective assistance of counsel by defense counsel's failure to move to suppress the cocaine evidence. He asserts that defense counsel should have at least moved to join codefendant Lewis's motion to suppress in a separate case against her so that he could appeal the trial court's adverse ruling.

Because defendant did not raise this issue in a motion for a new trial or request for a *Ginther*¹ hearing, our review is limited to errors apparent from the record.² *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's error, the result of the proceeding would have been different. *Id.* at 667. "Effective assistance is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant's reliance on Lewis's trial testimony to establish defendant's standing to raise a Fourth Amendment challenge to the search of the apartment is misplaced. In this regard, we may not assess defense counsel's performance with the benefit of hindsight. *People v Rocky*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Although defense counsel had a duty to make a reasonable investigation, or to make a reasonable decision that an investigation was unnecessary with respect to this evidentiary matter, the reasonableness of defense counsel's actions must be evaluated in light of defendant's own statements or actions. *Strickland v Washington*, 466 US 668, 691; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Defendant's present claim of standing is contradictory to his testimony at trial that he was a mere visitor in the apartment. See *People v Parker*, 230 Mich App 337, 340-341; 584 NW2d 336 (1998) (defendant lacked standing to contest a search of an apartment because the evidence established that he was a mere visitor and did not have a legitimate expectation of privacy). Defendant has not shown that defense counsel acquired information during his pretrial investigation of the case that would support defendant's standing to contest the search of the apartment at or before trial. Therefore, defendant's ineffective assistance of counsel claim fails.

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

² Because the full transcript of the suppression hearing in Lewis's separate case was not filed in the trial court, we will not consider defendant's claim to the extent that he relies on portions of that transcript that were not filed below. Further, we will not consider the credibility determinations made by the trial court when denying Lewis's motion. Rather, we shall confine our review to the evidence at defendant's trial. Further, while this Court is not in a position to make credibility determinations on appeal, we note that there is nothing about Officer Garcia's trial testimony that raises concerns about the physical plausibility of Lewis shoving him after she opened the door to the apartment. There is nothing about that testimony that defies indisputable physical facts or realities. See *People v Lemmon*, 456 Mich 625, 643; 576 NW2d 129 (1998).

See *People v Carbin*, 463 Mich 590, 600-601; 623 NW2d 884 (2001) (defendant has the burden of establishing factual predicate for claim).

Further, to the extent that defendant challenges the validity of Lewis's consent to search by attacking the legality of the police conduct directed at Lewis, defendant has not established his standing to seek exclusion of the evidence on this ground. The mere fact that a person is damaged as a consequence of a search and seizure directed at someone else does not confer standing to object to the admission of evidence. See *Alderman v United States*, 394 US 165, 171-173; 89 S Ct 961; 22 L Ed 2d 176 (1969). Codefendants are not accorded any special standing. *Id.* at 172; *United States v Williams*, 354 F3d 497, 511 (CA 6, 2003); *People v Atkins*, 96 Mich App 672, 678; 293 NW2d 671 (1980). "Fourth Amendment rights are personal in nature and may not be asserted vicariously." *People v Armendarez*, 188 Mich App 61, 71; 468 NW2d 893 (1991).

Defendant has not shown that a motion to suppress the evidence, or a belated request to join in Lewis's previously denied motion, would have been anything but futile. Defense counsel is not ineffective for failing to make futile motions. *Rodgers, supra* at 715.

III

Next, defendant argues that the trial court abused its discretion by denying his request at trial for an opportunity to obtain a copy of a letter that Lewis allegedly wrote to him while he was incarcerated in jail. We disagree.

The trial court had discretion to prohibit the evidence because defense counsel failed to provide the proposed letter to the prosecution during discovery. MCR 6.101(J). All relevant circumstances may be considered in determining an appropriate remedy for a discovery violation. *People v Greenfield (On Reconsideration)*, 271 Mich App 442, 454 n 10; 722 NW2d 254 (2006); see also *Taylor v Illinois*, 484 US 400, 414-415; 108 S Ct 646; 98 L Ed 2d 798 (1988). In general, "[a] trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes." *People v Young*, 276 Mich App 446; 740 NW2d 347 (2007). The record discloses that defense counsel waited until after Lewis finished testifying to bring this issue to the attention of the trial court, even though he had learned about the letter one week earlier. Counsel failed to offer an adequate explanation for the delay or a specific purpose for the letter evidence. Under the circumstances, the trial court did not abuse its discretion in denying defendant's request.

Defendant also argues that the trial court abused its discretion by not allowing him to testify regarding the contents of the letter. A trial court's decision to exclude evidence is reviewed for an abuse of discretion, but any preliminary questions of law bearing on the admissibility of evidence is reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). The proponent of evidence has the burden of establishing a proper foundation for its admissibility. *People v White*, 208 Mich App 126, 131; 527 NW2d 34 (1994). Under MRE 103(a)(2), the substance of any excluded evidence must be shown by offer of proof, unless it is apparent from the context in which questions are asked.

The trial court sustained the prosecutor's hearsay objection when defendant attempted to testify regarding the contents of the letter in response to defense counsel's question, "[s]he

indicates to you that she thought you had taken up with someone else?” Although the record is adequate to satisfy the requirement in MRE 103(a)(2) that the substance of the proposed testimony be disclosed, defense counsel failed to offer a permissible nonhearsay purpose of the proposed testimony. Therefore, the trial court did not abuse its discretion by excluding it.

To the extent that defendant now argues that the proposed testimony was relevant to show Lewis’s bias or impeach her credibility by use of a prior inconsistent statement, the claim is unpreserved because neither purpose was identified in an offer of proof at trial. *People v Hackett*, 421 Mich 338, 352; 365 NW2d 120 (1984). Therefore, defendant must show a plain error affecting his substantial rights. MRE 103(d); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant has failed to establish either a plain error or that his substantial rights were affected. “Bias” refers to the relationship between a party and a witness that might lead a witness to slant testimony for or against a party. *People v Layher*, 464 Mich 756, 762-763; 631 NW2d 281 (2001). Although evidence of bias is almost always relevant, *id.* at 763, evidence of a witness’s written statement may still be excluded for failure to satisfy foundational requirements, such as authentication, or because of the rule against hearsay. *People v Jenkins*, 450 Mich 249, 260; 537 NW2d 828 (1995). Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. MRE 801(c). Based on the limited offer of proof made at trial, it is not apparent that defendant’s proposed testimony would have been probative of Lewis’s bias against defendant, or that other foundational requirements for its admissibility would be satisfied.

Similarly, we are not persuaded that defendant’s proposed testimony regarding the contents of the letter would have been admissible to impeach Lewis’s trial testimony. Given defendant’s failure to demonstrate that Lewis was subject to cross-examination regarding the contents of the letter or that she made her statements under oath, defendant’s reference to MRE 801(d)(1)(A) is misplaced.³

Further, defendant has not shown any basis for allowing his proposed testimony for impeachment purposes, given that defense counsel never sought to cross-examine Lewis regarding the letter. The mere fact that Lewis denied knowledge of defendant’s involvement with an unidentified woman in Battle Creek, while she was in prison, did not establish a foundation for defendant’s proposed testimony.⁴ Under MRE 613(b), “[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to

³ MRE 801(d)(1) provides that a statement is not hearsay if the “declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant’s testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.”

⁴ We note that the trial court specifically asked defense counsel during his cross-examination of Lewis if he could provide the name of the woman, but that defense counsel declined to provide this information.

interrogate the witness thereon, or the interests of justice otherwise require.” A proper foundation under this rule requires that the proponent of the evidence “elicit testimony inconsistent with the prior statement, ask the witness to admit or deny making the first statement, then ask the witness to admit or deny making the later, inconsistent statement, allow the witness to explain the inconsistency, and allow the opposite party to cross-examine the witness.” *Barnett v Hidalgo*, 478 Mich 151, 165; 732 NW2d 472 (2007). Extrinsic evidence is not allowed to impeach the witness on a collateral matter. *Id.*

We also reject defendant’s newly raised claim that he was denied his constitutional right to present a defense by the exclusion of the contents of the letter. The right to present a defense may be limited by established rules of procedure and evidence designed to assure fairness and reliability in the ascertainment of guilt or innocence. *People v Toma*, 462 Mich 281, 294; 613 NW2d 694 (2000). Therefore, defendant’s failure to demonstrate procedural or evidentiary error is dispositive of this claim.

Finally, we find no merit to defendant’s claim that the trial court’s ruling served to limit his right to cross-examine Lewis. The right of cross-examination guarantees a defendant a reasonable opportunity to test the truth of a witness’s testimony. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). In this case, the trial court did not impose limitations on defense counsel’s ability to cross-examine Lewis about prior statements bearing on her relationship with defendant or any other matter probative of credibility. Further, defense counsel was afforded an opportunity to impeach Lewis’s credibility by cross-examining her regarding her prior guilty plea, which she tendered pursuant to a plea agreement, as well as her testimony that she lied under oath in earlier proceedings to protect defendant because she believed that he would face a lengthy prison sentence if he were convicted. Further, the jury was informed that Lewis was testifying pursuant to an immunity agreement and anticipated that the prosecutor would provide favorable information to the parole board so that she could be released from prison at the earliest possible time. Lewis testified that she initiated contact with the prosecutor through her brother and by letter, offering to testify as a prosecution witness, because she believed that she was going to be called as a defense witness, she was trying to make changes in her life, and, although she still loved defendant, she did not want to lie again. Considering the record as a whole, defendant was not deprived of his right of cross-examination. We find no error, plain or otherwise.

Because defendant has failed to demonstrate any error, it is unnecessary to consider defendant’s request for a remand for a hearing to determine whether he was prejudiced by the exclusion of the letter. In passing, we note that this Court previously denied defendant’s motion to remand regarding this issue. Although enlargement of the record on appeal is generally not permitted, *People v Warren*, 228 Mich App 336, 356; 578 NW2d 692 (1998), rev’d in part on other grounds, 462 Mich 415 (2000), we note that even if we were to consider the copy of the letter submitted by defendant in support of the motion, it would not alter our conclusion that defendant has failed to demonstrate any basis for relief. The letter is consistent with Lewis’s trial testimony that she still loved defendant. We are not persuaded that the letter would be material to Lewis’s credibility, even if a proper foundation for its admission could be established.

IV

Defendant next argues that he is entitled to resentencing because he was sentenced on the basis of inaccurate information. We disagree. To properly preserve a challenge to the trial court's statements suggesting that defendant was involved in dealing cocaine, defendant should have moved for resentencing. MCR 6.429(C); MCL 769.34(10). Absent a proper motion, we limit our review to whether defendant has established a plain error affecting his substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

It appears that the trial court overstated defendant's employment income as approximately \$3,000 a year based on his trial testimony, inasmuch as defendant estimated that his income for 2004 was "probably anywhere from fifteen hundred to two thousand dollars." Defendant testified that he received additional money and other assistance, such as the use of a vehicle, from relatives when he needed it. He claimed to have possessed \$340 in cash when the police entered Lewis's apartment on February 9, 2006, because Lewis gave him approximately \$320, although he did not know why she would give him the money. Regardless of the sources of assistance provided to defendant and his outstanding child support obligations, it was reasonable for the trial court to infer from evidence that defendant was living well in relation to his employment income.

In any event, the trial court's decision indicates that it considered defendant's limited employment income as additional support for its conclusion that defendant was dealing in cocaine. There was other evidence to support the trial court's conclusion, including the scale found in the apartment, which Officer Garcia testified was the type of scale used to break down cocaine into smaller quantities for street sales. Further, consistent with the information in the presentence report, the trial court observed that the total quantity of cocaine seized was approximately 119 grams. Intent to deliver can be inferred from the amount of cocaine possessed. *People v Ray*, 191 Mich App 706, 708; 479 NW2d 1 (1991). Therefore, the trial court's belief that the circumstances were suggestive of defendant's involvement in dealing cocaine was not plain error. Resentencing on this ground is not warranted.

We also reject defendant's challenges to the length of his sentence. Because the minimum sentence is within the guidelines range and defendant has not established either a scoring error or that the sentence was based on inaccurate information, we must affirm the sentence. MCL 769.34(10). Further, the sentence does not violate the Eighth Amendment prohibition against cruel and unusual punishment. *People v Drohan*, 264 Mich App 77, 91-92; 689 NW2d 750 (2004). Finally, the trial court's statement that it was imposing a sentence within the guidelines range was sufficient to satisfy the articulation requirement. *People v Conley*, 270 Mich App 301, 312-313; 715 NW2d 377 (2006). It was not necessary for the trial court to explain why it was imposing a sentence at a particular point within the guidelines range.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra