STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 20, 2008
v	No. 279184 Muskegon Circuit Court
HUGO LOAIZA RODRIGUEZ, Defendant-Appellant.	LC No. 06-053511-FC

Before: Hoekstra, P.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

Defendant Hugo Loaiza Rodriguez pleaded guilty to possession with intent to deliver 50 or more but less than 450 grams of cocaine[1] and delivery of less than 50 grams of cocaine.[2] A jury subsequently and separately convicted Rodriguez of conspiracy to deliver 450 to 999 grams of cocaine.[3] The trial court sentenced Rodriguez as an habitual offender, third offense[4] to concurrent terms of 10 to 40 years' imprisonment for possession with intent to deliver 50 or more but less than 450 grams of cocaine, 10 to 40 years' imprisonment for delivery of less than 50 grams of cocaine, and 25 to 60 years' imprisonment for conspiracy to deliver 450 to 999 grams of cocaine, with 314 days credit for time served. Rodriguez appeals as of right. We affirm.

I. Basic Facts And Procedural History

A. Basic Facts

On June 6, 2006, Detective Keith Stratton worked with the West Michigan Enforcement Team (WEMET) as a control officer for a controlled narcotics buy. (A control officer oversees the handling and investigation of drug activities. One method of investigation is to send a

[1] MCL 333.7401(2)(a)(*iii*).

[2] MCL 333.7401(2)(a)(*iv*).

[3] MCL 750.157a.

[4] MCL 769.11.

confidential informant to purchase drugs with prerecorded money, which is called a "control buy.") On this particular day, Detective Stratton used Larry Girard as a confidential informant and conducted a controlled buy to purchase drugs from Rodriguez. In Detective Stratton's presence, Girard placed a call to Rodriguez setting up a time to go purchase drugs. Detective Stratton gave Girard $500 in prerecorded money, dropped him off 200 yards from Rodriguez's house and watched him enter the house. When Girard was in the house, Tracy Fitch, Rodriguez's wife, told Girard that Rodriguez was not there and then placed a call to Rodriguez. A short time later, a white truck and a blue van arrived at the house. Rodriguez was a passenger in the white truck, and James Hiester drove the blue van.

Rodriguez and Hiester entered the house, and Girard told Rodriguez that he wanted to purchase an ounce of cocaine for $500. Hiester handed Rodriguez a small bag of cocaine, and Rodriguez then handed the drugs to Girard. After Girard left the house, he gave the package of cocaine to Detective Stratton to be processed.

Later, second, third, and fourth controlled buys were arranged. During each controlled buy, Detective Stratton again gave Girard $500 of prerecorded cash and dropped him off near Rodriguez's house. On the second buy, Girard asked for Rodriguez, but Fitch told Girard that Rodriguez was in jail for a traffic violation and that she was handling his business. Fitch placed a call to Hiester and asked him in coded language to bring an ounce of cocaine. Hiester arrived, and shortly thereafter, Fitch brought Girard the drugs. Fitch told Girard that she and Rodriguez were saving up the money to purchase another kilo of cocaine in Chicago. On the third buy, Fitch told Girard that she did not have enough cocaine to meet the demand, but she could give him a smaller amount of pure cocaine for $250. After both buys, Girard gave the cocaine to Detective Stratton. On the forth and last buy, Rodriguez was out of jail and Girard set up a time to purchase $250 of cocaine. When Girard arrived, Rodriguez told him that the cocaine was not ready because it was being prepared at Hiester's house. Under Detective Stratton's direction, and with the same procedures as before, Girard later returned to Rodriguez's home. Girard gave $250 dollars to Fitch, who then gave it to Rodriguez. Fitch left the home and went to a nearby store where, after a few minutes, she met Hiester. Fitch then returned to Rodriguez's home and shortly thereafter Girard returned to Detective Stratton with the cocaine. The total amount of cocaine recovered from these four controlled buys was approximately 79 grams.

Detective Stratton then obtained search warrants for Rodriguez's and Hiester's homes. While searching Hiester's property, the police found packages of cocaine, digital scales, cutting agents, and large plastic baggies inside a blue tool chest. Detective Stratton testified that scales are used to measure the cocaine into sellable quantities. In addition, the police found sufficient packaging materials to handle a kilogram of cocaine. The police recovered cocaine in three different areas of Hiester's property including one area with 4.52 grams, another area with approximately nine ounces (255.145 grams), and the last area with 1.40 grams.

At Rodriguez's residence, the police found four pounds of the cutting agent dimethyl sulfonium. Police detained Rodriguez during a traffic stop when they became concerned that he would return home as they were executing the search warrant. A search of Rodriguez at the traffic stop revealed $180 of the $250 that Girard had given to Fitch to facilitate the fourth buy.

B. Procedural History

On the first day of the trial, after the jury was sworn in and dismissed for the evening, Rodriguez indicated that he wished to enter a plea of guilty to two of the counts against him, despite the fact that his counsel had advised him against pleading and there was not a plea agreement in place. The trial court placed Rodriguez under oath and confirmed that he understood the rights he was surrendering and that his plea was voluntary. Afterwards, the following dialogue took place:

> THE COURT: Now, I also want to make sure that the record is clear that you understand that in the course of this guilty plea you're going to have to be asked some questions that are going to let me know whether or not there is a fact basis to accept your plea.
>
> DEFENDANT: Yes, your honor.
>
> THE COURT: And it is possible, it is possible, I'm not saying that it will happen but it is possible that your answers to those questions may be incriminating and may be used against you in this trial on Count I, do you understand that?
>
> DEFENDANT: Yes, your Honor. The reason that I want to plead guilty is because I don't want to lie in trial.
>
> THE COURT: Well I don't want you to commit perjury either but just as long as you clearly understand that the prosecutor is going to ask that all of these statements that you're going to make be used against you to convict you of the more serious charge here of conspiracy and they may be admissible. As long as you clearly understand that.

The trial court explained the different types of pleas available, and Rodriguez then pleaded guilty to possession with intent to deliver 50 or more but less than 450 grams of cocaine and to delivery of less than 50 grams of cocaine. Rodriguez admitted that he possessed 50 to 450 grams of cocaine between February 1, 2006, and June 27, 2006 and that he intended to deliver it to someone else. In addition, Rodriguez admitted that on June 27, 2006, he sold cocaine for $250 to Girard. Rodriguez stated that he gave the cocaine to Hiester, who gave it to Fitch, who delivered it to Girard, and that Girard left the money for him. The trial court accepted Rodriguez's plea.

At the trial on the remaining count of conspiracy to deliver, Fitch testified that she had lived with Rodriguez off and on from February 1, 2006, to June 27, 2006. She testified that she went on two trips with Rodriguez to Chicago to pick up cocaine. On the first trip, she was unaware of Rodriguez's intention to purchase drugs. On the second trip, Rodriguez and Fitch took Hiester with them to Chicago to purchase cocaine. In Chicago, Rodriguez stopped at a Walgreen's store and walked inside. After a few minutes, the side door to the van opened and somebody dropped a package on the floor. Hiester picked up the package and set it on the floor next to his seat, and Rodriguez returned to the van. Fitch overheard them discussing that it was a kilogram of cocaine and that it would be stored at Hiester's house. Fitch testified that she would take the cutting agent to Hiester's house and would place calls to Hiester telling him where to

deliver drugs, but this was all done at Rodriguez's direction. Fitch further testified that she saw the second package containing the kilogram of cocaine and that they used the cutting agent to make the one kilogram of cocaine into two kilograms of mixture.

Hiester's testimony was introduced as an audiotape of his testimony at the preliminary examination because he was unavailable at the time of trial. In his testimony, Hiester stated that he met Rodriguez a few months before they were arrested when Rodriguez offered him an opportunity to make money by picking up and delivering cocaine. During his time working with Rodriguez, he, Rodriguez, and Fitch drove to Chicago to purchase a kilogram of powder cocaine from one of Rodriguez's connections. In Chicago, they drove to a drugstore and picked up a kilogram of cocaine. Hiester testified that they took the kilogram of cocaine back to Rodriguez's house and "cut" it making it into two kilograms. Then the two kilograms were taken to Hiester's house to package. Hiester testified that Rodriguez would give him instructions on where and how much cocaine to deliver. After Hiester delivered all of the two kilograms of cocaine, Rodriguez made a smaller purchase of seven ounces. According to Hiester, he, Rodriguez, and Fitch went through the same process of "cutting" the cocaine in order to double the amount and police recovered nine ounces of this last batch from Hiester's house. Hiester stated that they were preparing to make another trip to Chicago to pick up another kilogram of cocaine.

Christopher Atkinson, Rodriguez's cellmate, testified that Rodriguez admitted going to Chicago and purchasing a kilogram of cocaine. Atkinson also testified that Rodriguez admitted to purchasing five or seven ounces of cocaine in Whitehall or Rothbury and turned it into 14 ounces with the cutting agent. The police seized nine of those ounces when they searched Hiester's property.

Rodriguez attacked Atkinson's testimony by showing that there were many similarities to the police report that was in their cell at the time. Rodriguez testified that he does go to Chicago often to visit his son but not to buy cocaine. Rodriguez admitted that he purchased five ounces of cocaine and turned it into 14 ounces, but he denied that he ever purchased anything as high as a kilogram. Rodriguez testified that he obtained the drugs that were used for the controlled buys with Girard from someone locally. Rodriguez stated he only purchased three ounces and turned it into six ounces. For the first buy, Rodriguez admitted that he called Hiester and told him to bring the cocaine to his house. For the fourth buy, Rodriguez testified that he directed Fitch to give the cocaine to Girard. For the two controlled buys that took place while he was in jail, Rodriguez testified that most of the cocaine used belonged to him. As noted above, the jury convicted Rodriguez of conspiracy to deliver and this appeal ensued.

II. MRE 410

A. Standard Of Review

Rodriguez argues that the trial court misconstrued MRE 410. He asserts that statements made during a plea proceeding are inadmissible against a defendant in a subsequent proceeding. According to Rodriguez, the trial court, over his objection, not only admitted evidence of his guilty plea but also permitted a witness to restate his verbatim statements with respect to that plea at the subsequent conspiracy trial. Rodriguez asserts that this error was outcome determinative because the jury rejected the prosecution's evidence of over 1000 grams of cocaine and relied solely on his prior admission as a basis for the conviction. Therefore,

according to Rodriguez, we must reverse his conspiracy conviction. The proper construction and interpretation of a rule of evidence presents a question of law.[5] This Court reviews questions of law de novo.[6]

B. The Provisions Of MRE 410

MRE 410 provides:

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
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> (1) A plea of guilty which was later withdrawn;
>
> (2) A plea of nolo contendere, except that, to the extent that evidence of a guilty plea would be admissible, evidence of a plea of nolo contendere to a criminal charge may be admitted in a civil proceeding to support a defense against a claim asserted by the person who entered the plea;
>
> (3) Any statement made in the course of any proceedings under MCR 6.302 or comparable state or federal procedure regarding either of the foregoing pleas; or
>
> (4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.
>
> However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

C. Waiver

Rodriguez focuses his argument on the third section of MRE 410, claiming that the statements he made during the plea proceeding were protected from being used in the subsequent proceeding. However, we need not reach this issue because Rodriguez waived his right to the protections of MRE 410. The Michigan Supreme Court in *People v Stevens* held that "a criminal defendant may waive the right not to have statements made during the course of plea negotiations used against him."[7] In *Stevens*, no plea was entered, but during plea negotiations,

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[5] See *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002).

[6] *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998).

[7] *People v Stevens*, 461 Mich 655, 666; 610 NW2d 881 (2000).

the defendant was told his statements could be used in subsequent proceedings. Here, the trial court plainly explained to Rodriguez the possibility that the prosecution would use his admissions against him at trial. In addition, Rodriguez's counsel advised him against pleading. Rodriguez testified that he understood all of the warnings, but he insisted on entering a plea for two of the counts. Clearly, Rodriguez has waived any applicable MRE 410 protections.

III. Probative Value Versus Unfair Prejudice

A. Standard Of Review

Rodriguez argues that the trial court abused its discretion by admitting the evidence of his pleas and, by so doing, it denied him a fair trial. According to Rodriguez, the danger of "unfair prejudice" substantially outweighed the probative value of the evidence obtained during the plea proceedings. He notes that MRE 403 prohibits evidence that is marginally probative but will be given undue weight by the jury. He concedes that this evidence was certainly relevant, but argues that there were much less prejudicial ways to establish proof of the conspiracy. He asserts that, by producing his statements made at the plea proceedings, the prosecution allowed the jury to give them undue weight. Therefore, according to Rodriguez, we must reverse his conspiracy conviction. This Court reviews a trial court's evidentiary decisions for an abuse of discretion.[8] A trial court abuses its discretion only when its decision falls outside the principled range of outcomes.[9]

B. Balancing Probative Value Against Unfair Prejudice

Rodriguez claims that the charges against him were so interrelated, that when the trial court admitted the evidence obtained in the plea proceeding, it was impossible for the jury to not infer guilt. Therefore, he concludes that the trial court should not have admitted the evidence, as it was unfairly prejudicial. Evidence that is otherwise relevant may be excluded under MRE 403 if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Although all relevant evidence is prejudicial, evidence presents a danger of unfair prejudice only when it threatens the fundamental goals of accuracy and fairness embodied in MRE 403.[10] In addition, "[e]vidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury."[11]

Here, after the plea proceeding, the remaining charge to be proven by the prosecution was conspiracy to deliver 450 to 999 grams of cocaine. Detective Stratton was present at the plea proceeding and testified that he heard Rodriguez admit under oath that he possessed 50 to 450

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[8] *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002).

[9] *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).

[10] *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995).

[11] *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

grams of cocaine with the intent to deliver it. In addition, Detective Stratton testified that Rodriguez admitted giving drugs to Hiester, who gave them to Fitch, who sold them to Girard.

We conclude that the trial court did not abuse its discretion in admitting the challenged statements over the MRE 403 objection. When weighing the probative value of the statements, the trial court stated: "I frankly can't think of anything more relevant than, and more probative, than a defendant's admissions under oath that he engaged in conduct that was part of a conspiracy that's being charged in Count I." The trial court agreed that there was prejudice but it was not unfairly prejudicial because Rodriguez was repeatedly warned of the consequences. The trial court admitted the evidence because it found that the statements were highly probative toward proving the elements of conspiracy. We observe that the admissions were not superfluous details that would unduly sway the jury, but as the trial court found, each of the statements was directly relevant and probative to an element of the conspiracy charge. Rodriguez's admissions went toward the agreement, criminal purpose, and specific intent elements of conspiracy. Each of the admissions was of high probative value and, while damaging to Rodriguez's case, we cannot say that the danger of unfair prejudice substantially outweighed their probative value.

IV. Ineffective Assistance Of Counsel

A. Standard Of Review

Rodriguez advances several arguments regarding ineffective assistance of counsel at trial. First, he asserts that his trial counsel did not specifically object to the trial court admitting his statements, which were clearly prohibited by MRE 410. Second, he asserts that his trial counsel failed to object to several hearsay statements that Detective Stratton offered. He argues that these errors clearly prejudiced and changed the outcome of the proceeding and that, therefore, we must reverse his conviction for conspiracy. The issue of ineffective assistance of counsel is generally a mixed question of fact and constitutional law.[12] We review the findings of fact by the trial court for clear error, and we review questions of constitutional law de novo.[13] However, this Court's review is limited to mistakes apparent on the record because the trial court made no findings of fact and reached no conclusions.[14]

B. Legal Standards

We consider a constitutional claim of ineffective assistance of counsel using the standard established in *Strickland v Washington*,[15] which requires the defendant to show that his attorney's performance fell below an objective standard of reasonableness and was so prejudicial

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[12] *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

[13] *Id*.

[14] *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

[15] *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed2d 674 (1984).

that he was denied a fair trial.[16] A defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances.[17] With regard to prejudice, a defendant must show "a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different."[18]

C. Rodriguez's Plea Hearing Admissions

Rodriguez argues that trial counsel's performance was ineffective because he failed to object to the admission of Rodriguez's admissions made during the plea proceedings. The claim has no merit. When the prosecution first informed the trial court of his intention to use the evidence at trial, Rodriguez's trial counsel objected to admission of the evidence. Rodriguez argues that his counsel argued MRE 403 instead of objecting because the clear language of MRE 410 forbade the testimony. However, defense counsel mentioned MRE 410 and attempted to distinguish Rodriguez's case from a case presented by the prosecutor, showing that MRE 410 was inapplicable. Thus, Rodriguez has not established the factual predicate for his allegation of error where his trial counsel raised the issue of MRE 410.[19]

More importantly, this Court has held that defense counsel will not be faulted for failing to make futile or meritless objections.[20] Thus, even if defense counsel's discussion of MRE 410 during objection was not precisely the challenge now being raised, Rodriguez waived any protections under MRE 410, and his counsel's objection would have been futile. Therefore, defense counsel was not ineffective.

D. Detective Stratton's Testimony

Rodriguez argues that trial counsel was ineffective for failing to object to repeated incidents of hearsay during Detective Stratton's testimony. This claim also has no merit. Rodriguez refers to five incidents where defense counsel allowed Detective Stratton to testify to possible hearsay statements without objection. Therefore, the threshold question is whether Detective Stratton's challenged statements were admissible.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[21] Hearsay is not admissible except as provided by the rules of evidence.[22]

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[16] *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

[17] *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997).

[18] *Id*. at 167.

[19] See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

[20] *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

[21] MRE 801(c).

[22] MRE 802.

In the first incident, Detective Stratton testified that in his presence Girard placed calls to Rodriguez and Fitch, both of which were not answered. Rodriguez claims that this is hearsay because it was never established how Detective Stratton knew that Girard was actually calling him or Fitch. The definition of hearsay includes "nonverbal conduct of a person, if it is intended by the person as an assertion."[23] Here, Detective Stratton testified that he picked up Girard, performed a routine search of his person, and then watched him place both calls. Detective Stratton's testimony relaying Girard's conduct in calling Rodriguez and Fitch is hearsay because the testimony was being offered to prove that Girard made telephone calls to Rodriguez and Fitch to purchase drugs. Although it is unclear, it appears that Girard made the telephone calls in Detective Stratton's presence. Girard's nonverbal conduct of placing calls was an assertion that he telephoned Rodriguez and Fitch to purchase cocaine. Defense counsel should have objected to the hearsay.

However, defense counsel's failure to object to this hearsay was not prejudicial to Rodriguez. Before Detective Stratton testified, Girard testified that he had made telephone calls to Rodriguez and Fitch to purchase cocaine. In addition, Rodriguez testified that he sold Girard cocaine after receiving a telephone call placing the order. Therefore, defense counsel's error in failing to object to Detective Stratton's testimony did not prejudice Rodriguez. Rodriguez cannot demonstrate that but for counsel's failure to object to the outcome of trial would have been different.[24]

In the second incident, Detective Stratton testified that when Girard went into the house for the first controlled buy, Fitch called Rodriguez to tell him that Girard wanted to buy cocaine. Detective Stratton testified that Rodriguez said it was okay and arrived with Hiester, who was assisting Rodriguez, to deliver the drugs. These statements are hearsay as they were made outside of trial and were offered to prove the truth of the matter. Because they may fall within the exception to the hearsay rule as statements by a co-conspirator made during the course and in furtherance of the conspiracy,[25] counsel's failure to object did not fall below an objective standard of reasonableness.[26]

Moreover, Rodriguez's claim must fail because he cannot show that these errors were prejudicial to his case. The contested testimony was not unique to Detective Stratton. Girard and Fitch provided similar, matching testimony in regard to this incident. Thus, Rodriguez cannot demonstrate that, but for counsel's failure to object, the outcome of trial would have been different.[27]

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[23] MRE 801(a).

[24] *Mitchell*, *supra* at 167.

[25] MRE 801(d)(2)(E).

[26] *Toma*, *supra* at 302.

[27] *Mitchell*, *supra* at 167.

In the third incident, Detective Stratton testified that during the second controlled buy, Fitch told Girard that Rodriguez was in jail, but that she was handling his business. This is hearsay because it is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. However, this issue was directly ruled on when defense counsel objected to Girard's testimony on the same matter. The trial ruled that the testimony met an exception to the hearsay rule because they were statements by a co-conspirator made during the course and in furtherance of the conspiracy.[28] Therefore, it would have been futile for defense counsel to object on the same matter.[29]

In the fourth incident, Detective Stratton testified that Fitch called Hiester and "in coded terminology" asked him to bring an ounce of cocaine to her house. However, this statement was obtained from a tape recorder attached to Girard as he entered the house for the second controlled buy. Detective Stratton was testifying regarding what could be heard on the audiotape and was not testifying to prove the truth of the matter asserted. Further, Rodriguez's claim must fail because he cannot show that any error was prejudicial to his case. Both Girard and Fitch testified that on the second controlled buy Fitch called Hiester and asked him to bring cocaine to the house. Thus, how he did so was not necessarily relevant, and Rodriguez cannot demonstrate that but for his counsel's performance, the outcome of trial would have been different.[30] And the trial court issued a curative instruction to the jury telling them not to consider any testimony that Detective Stratton gave about Fitch handling money or cocaine. The jury is presumed to follow the instructions that the trial court gives it.[31]

In the fifth incident, Detective Stratton testified that on the fourth controlled buy, Rodriguez told Girard that the cocaine was not ready to be sold. Here, defense counsel objected to the proffered testimony, and the trial court ruled that it was double hearsay. The prosecutor then elicited the information in another way. Therefore, trial counsel was effective because he properly raised the issue and it was decided by the trial court. His conduct did not fall below an objective standard of reasonableness.[32]

In sum, we conclude that Rodriguez did not have ineffective assistance of counsel at trial. Regardless of counsel's conduct with respect to each of the statements, Rodriguez cannot demonstrate that any of the errors were prejudicial to his case. Girard introduced much of the hearsay testimony before Detective Stratton testified. After Detective Stratton's testimony, Rodriguez and Fitch testified directly to the same incidents.

Further, the primary issue at the trial level was the amount of cocaine Rodriguez sought to deliver. Rodriguez pleaded guilty to selling drugs via Fitch and Hiester to Girard during the

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[28] MRE 801(d)(2)(E).

[29] *Thomas*, *supra* at 457.

[30] *Mitchell, supra* at 167.

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

[32] *Toma*, *supra* at 302.

four controlled buys. Therefore, Detective Stratton's testimony could not have prejudiced him on those charges and none of his objections to Detective Stratton's testimony concerned the overall amount. Rodriguez himself testified to delivery of 567 grams of cocaine. Therefore, even if defense counsel committed error in failing to object to the hearsay statements, we cannot conclude that, but for the failure to object, the outcome of the trial would have been different.[33]

V. Sufficiency Of The Evidence

A. Standard Of Review

Rodriguez asserts that there was insufficient evidence to support his conviction. He argues that the prosecution failed to prove that he conspired to deliver 450 to 999 grams of cocaine. He notes that conspiracy is a specific intent crime and the prosecution must prove that a defendant conspired to deliver at least 450 grams of cocaine. The talk of "kilos" was merely puffery because the evidence at trial showed at most 79 grams. He asserts, therefore, that we must reverse his conviction for conspiracy.

We review de novo challenges to the sufficiency of the evidence.[34] In order to satisfy due process in a criminal case, a defendant's conviction must be based on evidence sufficient to justify the trier of fact's conclusion that the defendant is guilty beyond a reasonable doubt.[35] The reviewing court must consider the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.[36] "'Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.'"[37] Therefore, on review, we make all reasonable inferences and credibility choices in support of the jury verdict.[38]

B. Rodriguez's Arguments

The jury convicted Rodriguez under MCL 750.157(a), which provides that "[a]ny person who conspires together with 1 or more persons to commit an offense prohibited by law, or to commit a legal act in an illegal manner is guilty of the crime of conspiracy." In order to sustain a conviction, the prosecution must show a conspiracy where the defendant specifically intended to deliver the amount required for the offense underlying the conspiracy.[39] Therefore, in order to

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[33] *Mitchell*, *supra* at 167.

[34] *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006), aff'd 482 Mich 851 (2008).

[35] *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

[36] *People v Moorer*, 262 Mich App 64, 76-77; 683 NW2d 736 (2004), citing *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

[37] *Nowack*, *supra* at 400, quoting *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

[38] *Id*.

[39] *People v Mass*, 464 Mich 615, 638-639; 628 NW2d 540 (2001).

sustain Rodriguez's conviction of conspiracy to receive 450 to 999 grams of cocaine, there must be sufficient evidence to support a reasonable fact-finder in concluding that he specifically agreed to receive at least 450 grams of cocaine.

Rodriguez argues that the prosecution's evidence fails to support a conviction for such a large quantity of cocaine. Rodriguez was originally charged with conspiring to deliver over 1000 grams of cocaine and much of the evidence that the prosecution introduced went to satisfy that amount. However, Rodriguez requested that the jury receive instructions for lesser-included offenses of over 450 to 999 grams and 50 to 450 grams. In his plea, Rodriguez admitted to selling 79 grams of cocaine drugs to Girard. Rodriguez is in essence arguing that the jury split the difference between his admission and the prosecution's evidence and found him guilty of an amount for which there is no evidence.

When a trial court instructs the jury on lesser-included offenses, it creates the possibility that the jury will reach a compromise verdict.[40] The Court cannot speculate regarding the jury's decision making but must review the jury verdict to determine if the evidence supports the conviction.[41] If the evidence supports a greater offense, it will always support the lesser offense.[42] A jury is not held to any rules of logic and possesses the capacity for leniency, and therefore, may render verdicts through compromise or leniency.[43]

Rodriguez's argument that the prosecution failed to show the statutory minimum element has no merit. The prosecution produced strong evidence from which a jury could infer that Rodriguez on at least one occasion purchased a kilogram of cocaine in Chicago. Fitch and Hiester testified that they accompanied Rodriguez on a trip where a kilogram was purchased and brought it back to Michigan to be "cut" and processed for distribution. Detective Stratton testified that a search of Hiester's home produced packaging materials to handle over a kilogram of cocaine. In addition, at Rodriguez's house, there was enough dimethyl sulfonium to cut two kilograms of cocaine. When viewing the evidence in a light most favorable to the prosecution, the jury had sufficient evidence to find Rodriguez guilty of the greater charge of conspiring to deliver over 1000 grams of cocaine. Therefore, the lesser-included charge of 450 to 999 grams also has sufficient evidence.

Further, Rodriguez's testimony alone could provide sufficient evidence to meet the over 450 grams required. Rodriguez's version is that he originally purchased three ounces of cocaine and turned it into six ounces through a cutting process. It was from these six ounces that he, Fitch, and Hiester sold cocaine to Girard during the first three controlled buys. In addition, when that supply ran out, Rodriguez admitted purchasing five ounces of cocaine and turned it into 14 ounces. Nine of the 14 ounces were recovered when the police searched Hiester's property.

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[40] *People v Chamblis*, 395 Mich 408, 426; 236 NW2d 473 (1975), overruled in part on other grounds by *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002).

[41] *Id*.

[42] *People v Veling*, 443 Mich 23, 36; 504 NW2d 456 (1993).

[43] *People v Burgess*, 419 Mich 305, 310; 353 NW2d 444 (1984).

Fitch had delivered five of the ounces to someone earlier. In total, Rodriguez admitted that he and his group delivered or intended to deliver 20 ounces (567 grams) of substances containing cocaine. This amount is well above the 450 grams required to satisfy his conviction.

Viewing this evidence in the light most favorable to the prosecution, we conclude that a rational jury could have found Rodriguez guilty of conspiring to deliver 450 to 999 grams of cocaine.

VI. Sentencing

A. Standard Of Review

Rodriguez argues that the trial court violated his Sixth[44] and Fourteenth Amendment[45] rights when it sentenced him above the statutory minimum. He asserts that the Legislature prescribes sentencing guidelines and when a trial court departs from those guidelines, it violates a defendant's due process right to a jury. He then argues that scoring legislative guidelines to enhance a sentence is constitutionally indistinguishable from departing above the scored range. Here, according to Rodriguez, the trial court enhanced his sentence based on facts that were not proven beyond a reasonable doubt or admitted during his plea. Therefore, he argues that we must remand this case for resentencing. This Court reviews unpreserved constitutional issues for plain error affecting substantial rights.[46]

B. *Blakely v Washington*

Rodriguez relies on *Blakely v Washington*,[47] to contend that he was denied his right to a jury trial because the trial court scored four offense variables based on facts not found by a jury beyond a reasonable doubt. However, the Michigan Supreme Court has determined that *Blakely* is inapplicable to Michigan's indeterminate sentencing scheme in which a trial court sets a minimum sentence but can never exceed the statutory maximum sentence.[48] Accordingly, "[a]s long as the defendant receives a sentence within that statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict."[49]

Rodriguez does not assert that offense variables, OV 13, OV 14, OV 15, and OV 19 were improperly scored based on factual information within the record. Therefore, Rodriguez's assertion that his sentence was improperly enhanced is without merit. The trial court enhanced

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[44] US Const, Am VI.

[45] US Const, Am XIV.

[46] *Carines*, *supra* at 774.

[47] *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed2d 403 (2004).

[48] *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006).

[49] *Id*.

Rodriguez's sentence, but this was permissible because the sentence fell below the statutory maximum.

Affirmed.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Michael J. Talbot