STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 27, 2009
v	No. 280847 Oakland Circuit Court
TAMERRA MARIE WASHINGTON, Defendant-Appellant.	LC No. 04-196772-FH

Before: Murphy, P.J., and K.F. Kelly and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), two counts of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), felon in possession of a firearm, MCL 750.224f, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b. This Court previously denied defendant's application for a delayed appeal "for lack of merit in the grounds presented."[1] The case is now before this Court pursuant to our Supreme Court's order, in lieu of granting leave to appeal, remanding the case to this Court for consideration as on leave granted. *People v Washington*, 480 Mich 887; 738 NW2d 724 (2007). Because defendant has not established plain error or ineffective assistance of counsel claim with regard to any of the searches, we affirm.

I. Background

Defendant's convictions arise from the discovery of cocaine, marijuana, and a semi-automatic handgun in a hotel room at the Holiday Inn in the city of Southfield on April 25, 2004. Clifford Green, the front office manager for the hotel, testified that defendant checked in to the hotel on April 24, 2004, between 7:00 and 9:00 p.m. Defendant was alone during check in and did not have any bags. Defendant signed a registration form at the front desk and was assigned room 1007. Green stated that the room was reserved for a two-week period through a prepaid online booking partner, Travelocity.

[1] *People v Washington*, unpublished order of the Court of Appeals, entered April 23, 2007 (Docket No. 273808).

The following day, Green received a call from Travelocity informing him that the company would no longer pay for the reservation because it was not receiving payment on the credit card used to book the hotel stay and that it "believed the credit card was fraudulent." Green requested Travelocity to send him written information via fax confirming the information conveyed to him over the phone. After receiving the fax confirmation, Green attempted to call the room but received no response. Green then went to room 1007 to inform the guest that the hotel needed payment for the room. He knocked on the hotel room door but heard no answer. Unable to contact anyone in the room by phone or in person, Green used a master key to enter the room to see if it was still occupied and if he could obtain any credit card information. On entering, Green observed boxes of shoes stacked in the closet area and shopping bags piled up on the table across the room and along the wall. As he walked further into the room, Green smelled a strong odor of marijuana.

Green then returned to his office and contacted the police because he was concerned about obtaining payment for the room and confronting defendant about the credit card issue. When the police arrived, Green relayed his concerns to them, explained what he had observed in the room, and then let officers into room 1007. Inside the room, in plain view, officers discovered a large bag of marijuana. Immediately thereafter, Green and the police left the room and Green locked the hotel room door. Green then proceeded to the front desk where he "locked out" the hotel room, meaning that if defendant returned to room 1007 her key would no longer allow her access to the hotel room.

The police left the hotel in order to obtain a search warrant. On their way back to the hotel, defendant's vehicle was observed in a gas station parking lot next to the hotel. The police detained defendant, who was in the vehicle. Officers found two keys to the hotel room in her possession and two individually wrapped baggies of marijuana inside the car. Shortly thereafter, police searched room 1007 pursuant to a warrant. Officers discovered cocaine, a cocaine press, a substantial quantity of marijuana, a box of baggies, a gun, a bulletproof vest, a transaction ledger, and a pair of scales inside the room, along with papers and receipts bearing defendant's name.

II. Warrantless Search of Defendant's Hotel Room, Person, and Car

A. Standard of Review

Defendant argues that the initial warrantless search of the hotel room, and the subsequent warrantless searches of her person and automobile were all invalid. Although defendant raised this issue in a post-conviction motion for a new trial, she does not seek a new trial. Instead, she seeks suppression of the evidence discovered in the hotel room, in her automobile, and on her person. Because defendant did not request suppression of the evidence before trial, this issue is unpreserved. We review unpreserved issues for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

B. Hotel Room

Defendant argues that the warrantless search of her hotel room was invalid because she was a lawful occupant of the room with constitutionally protected privacy rights in its contents. She specifically asserts that Green, the hotel manager, had no authority to consent to the police entry and, accordingly, all evidence seized from the room should have been suppressed.

Defendant bears the burden of establishing a Fourth Amendment violation. *People v Lombardo*, 216 Mich App 500, 505; 549 NW2d 596 (1996). For an individual to have standing to challenge a search, there must exist a legitimate expectation of privacy in the place or location searched. *People v Powell*, 235 Mich App 557, 560; 599 NW2d 499 (1999). An expectation of privacy is legitimate if the person had an actual, subjective expectation of privacy and that actual expectation is one that society recognizes as reasonable. *Bond v United States*, 529 US 334, 338; 120 S Ct 1462; 146 L Ed 2d 365 (2000); *People v Perlos*, 436 Mich 305, 317-318; 462 NW2d 310 (1990).

An occupant of a hotel or motel room is entitled to the Fourth Amendment protection against unreasonable searches and seizures. *People v Davis*, 442 Mich 1, 10; 497 NW2d 910 (1993). However, a person who is not legitimately on the premises does not enjoy the same protection. *Rakas v Illinois*, 439 US 128, 141 n 9; 99 S Ct 421; 58 L Ed 2d 387 (1978). With regard to hotel rooms acquired through the fraudulent use of a credit card where the guest's reservation has yet to expire, courts have developed two basic approaches. In *United States v Cunag*, 386 F3d 888 (CA 9, 2004), the court determined that the defendant did not have a reasonable expectation of privacy in the hotel room's contents because he had obtained the room through fraud. *Id*. at 895. Despite the verified fraud, however, the court explained that "even if the occupant of a hotel room has procured that room by fraud, the occupant's protected Fourth Amendment expectation of privacy is not finally extinguished until the hotel justifiably takes 'affirmative steps to repossess the room.'" *Id*.

The second approach is represented in *United States v Wai-Keung*, 845 F Supp 1548 (SD Fla, 1994), in which the court held that the defendants' verified fraudulent use of a credit card to reserve the rooms was sufficient to hold that the defendants had no reasonable expectation of privacy in the rooms' contents. The court reasoned that "[s]ociety should not recognize an expectation of privacy in a hotel room obtained fraudulently, and we do not believe that such an expectation is legitimate or reasonable." *Id*. at 1563. And ultimately held that, "[t]he defendants abandoned any legitimate expectation of privacy the moment they attempted to perpetrate a fraud." *Id*. Thus, under this reasoning, the room automatically reverts to the hotel's possession when the fraud is discovered.

In both *Cunag* and *Wai-Keung*, the hotel discovered and verified the fraud before the warrantless police search. In *United States v Bautista*, 362 F3d 584 (CA 9, 2004), a warrantless search occurred before the fraud was confirmed. The court in that case concluded that the motel had no cause to eject the defendant where, although it appeared the room had been reserved with a stolen credit card, the fraud had not been confirmed and, although the defendant technically had yet to pay for the room, the motel manager had not confirmed his inability to pay. *Id*. at 590.

Here, like both *Cunag* and *Wai-Keung*, Green discovered and verified the fraud before the warrantless police search occurred. Green received the phone call from Travelocity regarding the fraudulent credit card used to pay for the hotel stay through its website. Green requested that Travelocity send him written confirmation of the fraud as well as the fact that the hotel would not be receiving payment for defendant's hotel reservation through Travelocity. Green took no further steps until he received the written fax confirmation of fraud and non-payment from Travelocity.

On receipt of the fax confirming the fraud, Green began an investigation of the fraud while at the same time taking "affirmative steps to repossess the room" from defendant. *Cunag, supra* at 895. Green called defendant's hotel room to inquire about the situation and ask about an alternative method of payment for the room. Green also went to room 1007 and knocked on the door seeking to speak to defendant in person regarding the situation. When there was no response to his knocking, Green entered the room to investigate the fraud and see whether defendant was still occupying the room. After discovering the marijuana odor once in the room, he left and returned to the front desk. Green testified that he called the police in furtherance of his own fraud investigation, to report the fraud to the authorities, and also because he was concerned about a confrontation with defendant if she were to return to the hotel. Green also testified that at that time, defendant would have been evicted from the room due to hotel policy. But defendant had not returned to the hotel at the point.

Once Green received the fraud confirmation from Travelocity stating it would not be providing payment for the room, Green's entry into room 1007 as part of his investigation of the situation was not improper under the Fourth Amendment. See *People v McKendrick*, 188 Mich App 128, 141; 468 NW2d 903 (1991) ("[T]he Fourth Amendment proscribes only government action and is not applicable to a search or seizure, even an unreasonable one, conducted by a private person not acting as an agent of the government or with the participation or knowledge of any government official.") With regard to the warrantless police search, it is unnecessary to determine which approach should be applied here: the *Wai-Keung* approach where the hotel room automatically reverts back to the hotel once the fraud is verified, *Wai-Keung, supra* at 1563, or the stricter *Cunag* approach where after the fraud is verified, the hotel must take affirmative steps to repossess the room before the defendant's Fourth Amendment expectation of privacy is extinguished, *Cunag, supra* at 895. We need not determine which of the two approaches should be applied because the facts as set out in the record before us satisfy either test.

Under the *Wai-Keung* approach, the verified fraudulent use of a credit card to reserve the room alone is sufficient to hold that defendant had no reasonable expectation of privacy in the room's contents. *Wai-Keung, supra* at 1563. Likewise, in addition to confirming the fraud, Green engaged in affirmative steps to show the hotel management's intent to regain possession and control of the room because the reservation period for the room had not expired at the time the fraud was discovered. *Cunag, supra* at 890, 895. Again, Green both called the room and knocked on the door of the room in attempts to investigate the fraud and communicate with defendant. He also entered the room with his master key to verify if defendant was still occupying the room and to gather information about the fraud. Green even went as far as to call the police to investigate the fraud and then invited them into the hotel room after they arrived on hotel premises to investigate. Contemporaneous with showing the police out of the hotel room, Green locked out defendant and secured the room pursuant to hotel policy. All of Green's actions after receiving the fraud confirmation fax through the point of showing the police into and out of the hotel room culminating with locking defendant out of the room represent affirmative steps taken to regain control and possession of the fraudulently acquired room by hotel management. *Id.*

In sum, defendant's argument that the warrantless search of her hotel room was invalid because she was a lawful occupant of the room with constitutionally protected privacy rights in

its contents fails under both the *Wai-Keung* and *Cunag* approaches. Accordingly, because defendant was not a lawful occupant of the hotel room at the time of the warrantless search under either of the approaches, she has not shown plain error and appellate relief is not warranted. *Carines*, *supra* at 763.

C. Person and Car

Defendant also argues that the police lacked a reasonable basis to stop her and search her person. She further argues that the police had no probable cause to search her car. Generally, an investigatory stop must be justified by a particularized suspicion, based on some objective manifestation, that one person has been, is, or is about to be engaged in some type of criminal activity. *United States v Arvizu*, 534 US 266, 273; 122 S Ct 744; 151 L Ed 2d 740 (2002); *People v Dunbar*, 264 Mich App 240, 247; 690 NW2d 476 (2004). The determination whether reasonable suspicion exists must be made case by case under the totality of the circumstances, and is to be based on common sense and inferences about human behavior. *People v Jenkins*, 472 Mich 26, 32; 691 NW2d 759 (2005). In determining the existence of reasonable suspicion, a court should consider the objective facts regardless of whether the officers subjectively relied on them, and deference should be given to the experience of law enforcement officers and their assessments of criminal modes and patterns. *People v Oliver*, 464 Mich 184, 196, 200; 627 NW2d 297 (2001).

Defendant was the registered guest of a hotel room and the manager gave her name to Officer Taylor. Officer Taylor testified that his attention was drawn to defendant because her car, which was at the gas station next to the hotel, appeared to match the vehicle description of the person who checked into the hotel room.[2] When he first saw defendant, she was getting out of the car, but then she got back in when she appeared to notice the police. Even without considering the marijuana observed during the warrantless search of the hotel room, the information provided by the hotel manager and defendant's actions on seeing the police provided reasonable suspicion that defendant had been engaged in illegal activity, either credit card fraud or marijuana possession. Thus, the investigatory stop of defendant to determine her identity was lawful.

During the stop, Officer Taylor asked defendant for identification. The driver's license she produced confirmed that she had rented the hotel room. A *Terry*[3] pat-down search revealed two keys to the hotel room in defendant's pocket. The pat-down was reasonable to ensure the officer's safety. With regard to defendant's car, a canine unit swept the exterior of the car and alerted near the driver's door seam. Such a sweep does not constitute a search. *Illinois v Caballes*, 543 US 405, 409-410; 125 S Ct 834; 160 L Ed 2d 842 (2005); *People v Jones*, 279 Mich App 86, 91; 755 NW2d 224 (2008), lv pending. The dog's alert gave the police probable

[2] Defendant suggests that Officer Taylor could not have obtained a description of her vehicle from the hotel manager because the manager testified at the preliminary examination that he did not record defendant's vehicle information at check-in. However, defendant does not suggest that Officer Taylor obtained this information through improper means.

[3] *Terry v Ohio*, 392 US 1, 19; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

cause to search the interior of the car for narcotics under the automobile exception to the warrant requirement. *People v Clark*, 220 Mich App 240, 243; 559 NW2d 78 (1996). Accordingly, the searches of defendant's person and car were lawful.

D. Effective Assistance of Counsel

1. Standard of Review

Because there was no evidentiary hearing regarding defendant's ineffective assistance of counsel claim, our review is limited to mistakes apparent from the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, a defendant must show that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the result of the proceedings would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005).

2. Hotel Room

Defendant argues that trial counsel was ineffective for failing to challenge the warrantless search of the hotel room. As explained previously, defendant's argument that the warrantless search of her hotel room was invalid because she was a lawful occupant of the room with constitutionally protected privacy rights in its contents fails under both the *Wai-Keung* and *Cunag* approaches. Accordingly, it is not apparent from the record that defense counsel's failure to pursue a motion to suppress the warrantless search of the hotel room was objectively unreasonable, or that there is a reasonable probability that such a motion would have been successful had it been pursued.

Defendant alternatively requests that this Court remand this case for an evidentiary hearing "if necessary." Although remand for an evidentiary hearing may be appropriate when development of a factual record is necessary, it is incumbent on the defendant to make a sufficient offer of proof setting forth the facts to be established at such a hearing. See MCR 7.211(C)(1); *People v Williams*, 275 Mich App 194, 200; 737 NW2d 797 (2007). Here, defendant has not identified any additional facts to be established at any hearing on remand. Accordingly, we deny defendant's request for a remand.

3. Person and Car

Defendant also argues that trial counsel was ineffective for failing to pursue his challenge to the warrantless searches of her person and car. Because we have concluded that the searches of defendant's person and car were lawful, we conclude that trial counsel was not ineffective for failing to pursue these issues. Counsel is not required to make a futile motion. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

III. Right to Present a Defense

Defendant argues that the trial court's refusal to admit all portions of her statements from a formal police interview violated her constitutional right to present a defense, that defense being that her boyfriend set her up. Although defendant argued below that she should be permitted to introduce her statements because the prosecution had introduced some (i.e., she preserved an objection based on the rule of completeness), she did not raise any constitutional claim. An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Accordingly, this issue is not preserved and our review is limited to plain error affecting defendant's substantial rights. *Carines, supra* at 763-764.

In *People v Unger (On Remand)*, 278 Mich App 210, 249-250; 749 NW2d 272 (2008), this Court stated:

> Few rights are more fundamental than that of an accused to present evidence in his or her own defense. *Chambers v Mississippi*, 410 US 284, 602; 93 S Ct 1038; 35 L Ed 2d 297 (1973). "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Holmes v South Carolina*, 547 US 319, 324; 126 S Ct 1727; 164 L Ed 2d 503 (2006) (internal quotation marks and citations omitted). This Court has similarly recognized that "[a] criminal defendant has a state and federal constitutional right to present a defense." [*People v*] *Kurr*, [253 Mich App 317, 326; 654 NW2d 651 (2002).]
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> However, an accused's right to present evidence in his defense is not absolute. *United States v Scheffer*, 523 US 303, 308; 118 S Ct 1261; 140 L Ed 2d 413 (1998); *Crane v Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 L Ed 636 (1986). "A defendant's interest in presenting . . . evidence may thus 'bow to accommodate other legitimate interests in the criminal trial process.'" *Scheffer, supra* at 308 (citations omitted). States have been traditionally afforded the power under the constitution to establish and implement their own criminal trial rules and procedures. *Chambers, supra* at 302-303.
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> Like other states, Michigan has a legitimate interest in promulgating and implementing its own rules concerning the conduct of trials. Our state has "broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Scheffer, supra* at 308, quoting *Rock v Arkansas*, 483 US 44, 56; 107 S Ct 2704; 97 L Ed 2d 37 (1987).

The trial court allowed defendant to elicit evidence of her statements that were related to the subject matter of the statements introduced by the prosecutor, but excluded defendant's remaining statements as inadmissible hearsay. Defendant does not dispute that the excluded statements qualified as inadmissible hearsay. Defendant argues, however, that Michigan's hearsay rule should not have been permitted to serve to exclude the statements. Defendant correctly states that there is a body of case law that holds, generally, that a defendant's

constitutional right to present a defense may trump procedural and evidentiary rules. However, of critical importance in the cases addressing hearsay statements in the context of a defendant's right to present a defense is the reliability or trustworthiness of the statements. See, e.g., *Rock, supra* at 61-62; *Green v Georgia*, 442 US 95, 97; 99 S Ct 2150; 60 L Ed 2d 738 (1979); *Chambers, supra* at 300-301; *United States v Fowlie*, 24 F3d 1059, 1068-1069 (CA 9, 1994); *Gacy v Welborn*, 994 F2d 305, 316 (CA 7, 1993). See also *Scheffer, supra* at 309.

Here, defendant sought to introduce her own uncorroborated, self-serving, out-of-court statements made to a police officer after she was arrested. Defendant offered no evidence to establish the reliability of her statements. Further, defendant was not prohibited from presenting her defense through her own testimony, or from presenting other witnesses who were privy to the information contained in her statements. Under the circumstances, the exclusion of defendant's statements did not infringe on her constitutional right to present a defense. Accordingly, defendant has not established plain error.

IV. Sufficiency of the Evidence

Defendant argues that there was insufficient evidence to support her conviction for possession with intent to deliver the marijuana found in her car because the amount was so small that it could not support an inference that she intended to sell it. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). "[C]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000). It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

"An actor's intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998) (citations omitted). "Intent to deliver has been inferred from the quantity of narcotics in a defendant's possession, from the way in which those narcotics are packaged, and from other circumstances surrounding the arrest." *People v Wolfe*, 440 Mich 508, 524; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Police discovered a significant amount of marijuana, packaging material, and a tally sheet in defendant's hotel room. The fact that defendant checked into the hotel room, that police found personal belongings bearing her name in the room, and that police found two room keys on her person all connected her to the room. The marijuana in the car was individually packaged in small bags. Viewed in a light most favorable to the prosecution, the evidence was sufficient to

enable a rational trier of fact to find beyond a reasonable doubt that defendant possessed the marijuana in the car with an intent to sell it.

Affirmed.

/s/ William B. Murphy
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio