# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>February 24, 2009 |
| v | No. 280780<br>Jackson Circuit Court |
| ROMMEL RAY REED,<br><br>Defendant-Appellant. | LC No. 06-004505-FC |

Before: Sawyer, P.J., and Servitto and M. J. Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver 1,000 or more grams of cocaine, MCL 333.7401(2)(a)(i), and conspiracy to possess with intent to deliver 1,000 or more grams of cocaine, MCL 750.157a and MCL 333.7401(2)(a)(i). He was sentenced to concurrent prison terms of 25 to 40 years for each conviction. He appeals as of right. We affirm.

## I. Basic Facts

On October 10, 2006, the police received a radio transmission that a silver Ford 500 and a red Yukon were traveling in tandem on I-94. An officer subsequently pulled over codefendant Erskine Reed's Ford for a traffic violation, and defendant's Yukon continued for less than a mile before stopping at a rest area. The police found two kilograms of cocaine in codefendant Erskine Reed's trunk and a nine-millimeter pistol on his person. Defendant was also stopped for a traffic violation and arrested for having no license on his person. The police seized $1,010 from defendant. In a statement made to the police, defendant initially denied knowing codefendant Erskine Reed, but later admitted that Erskine was his uncle. Defendant stated that two individuals from Battle Creek called him, each requesting one kilogram of cocaine. Defendant had previously obtained two kilograms of cocaine from a house in Detroit. On the day of the planned delivery, defendant conversed with codefendant Erskine Reed, and placed the cocaine in Erskine's trunk. Defendant accompanied Erskine for protection. The video recording of defendant's statement and codefendant Erskine Reed's statement was played for the jury.

## II. Motion to Suppress

Defendant first argues that the trial court clearly erred by denying his motion to suppress his statement to the police because it was induced by promises of leniency and because he was scared. We disagree.

Whether a defendant's statement was voluntary is established by looking at the totality of the circumstances and determining if it was the product of a free and unconstrained choice by its maker. *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988); see also *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). Deference is given to the trial court's assessment of the weight of the evidence and the credibility of the witnesses, and the trial court's findings of fact will not be disturbed unless they are clearly erroneous. *Id.*; *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997). A finding is clearly erroneous if it leaves the reviewing court with a definite and firm conviction that a mistake has been made. *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997).

Whether a statement was voluntary is determined by examining police conduct, while whether it was made knowingly and intelligently depends in part upon the defendant's capacity. *Howard*, *supra* at 538. In *Cipriano*, *supra* at 334, our Supreme Court set forth the following nonexhaustive list of factors that a trial court should consider in determining whether a statement is voluntary:

> The age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.

Any promises of leniency should also be considered. *People v Shipley*, 256 Mich App 367, 373; 662 NW2d 856 (2003). No single factor is conclusive. *Cipriano, supra.*

Defendant argues that his statement was involuntary because it was induced by promises that he would be "cut loose" if he cooperated. At a hearing, defendant and the interrogating officer both testified. Defendant's interview was also videotaped. The video recording shows that, in the midst of talking at the beginning of the interview, the officer told defendant that if he cooperated he could walk out the door that day. The officer also told defendant that this was his only opportunity to help himself with these serious charges, that he could get a deal depending on his level of cooperation, that it was a matter of "damage control" because the police wanted his distributor, and that they wanted to give him an opportunity to help himself even though they did not need his help. Defendant was told that if the same story between him and his uncle "pans

out" they could "make a deal," but it "depends on the information," and that either he or his uncle would be able to deal depending on their level of cooperation.[1] The officer told defendant that if the police could obtain a large quantity of drugs based on the information provided by him, they would be willing to make a deal. Another officer told defendant that the prosecution office had charging authority, and that the police had "no authority to make the charges disappear." Both officers left the room to give defendant a few minutes to decide if he wanted to make a statement and, when the interrogating officer returned, defendant gave his statement. The officer thereafter told defendant that he believed he could provide more information, and that the police would need to recover a large quantity of drugs from Detroit or Battle Creek for him to "get a deal."

Viewing the totality of the circumstances, the trial court did not clearly err in finding that defendant's statement was voluntary. The trial court had an opportunity to evaluate the testimony, view the video recording of the interview, and to evaluate the effect of the police officers' statements. Defendant was advised of his rights before he was questioned and voluntarily, knowingly and intelligently waived those rights, although he refused to sign a written waiver. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Although the officer made promises to defendant, most reflected a promise to make an effort to gain a more lenient outcome depending of the information defendant could provide. As noted, an officer told defendant that the police had no actual charging authority. Thus, the interrogating officer did not make explicit promises to defendant with respect to actual criminal charges and sentencing.

With regard to other factors, the interview was not prolonged. There is no evidence that defendant was threatened or abused, or that defendant was intoxicated, under the influence of drugs, deprived of food or drink, or sleep deprived. Although defendant claims that he was "scared", there is no evidence that his psychological state was altered by fear to a degree that he was unaware or not operating of his own free will. Further, defendant was 33 years old, had a GED, and could read and write. He also had previous experience with the police and the criminal process. Viewing the totality of the circumstances, we are not left with a firm and definite conviction that a mistake was made.

III. Admission of Codefendant Erskine Reed's Statement

Defendant argues that the admission of codefendant Erskine Reed's statement violated his constitutional right of confrontation. Because defendant stipulated to the admission of Erskine Reed's statement, this issue is waived. It is well settled that a party cannot request a certain action of the trial court, stipulate to a matter, or waive objection and then argue on appeal that the resultant action was error. *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001). By intentionally relinquishing a known right, defendant waived the issue and any error was extinguished. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000).

[1] During the hearing, the officer testified that codefendant Erskine Reed received the "deal."

Defendant alternatively argues that defense counsel was ineffective for stipulating to the admission of codefendant Erskine Reed's statement. Because defendant failed to raise this issue in a motion for a new trial or request for an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that the result of the proceeding would have been different but for counsel's error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). A defendant must also overcome the presumption that the challenged action or inaction was sound trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Decisions about defense strategy, including what arguments to make and what evidence to present, are matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Defendant has not overcome the presumption that defense counsel's decision to stipulate to the admission of codefendant Erskine Reed's statement was objectively reasonable strategy. The defense theory was that codefendant Erskine Reed was the actual drug dealer, not defendant, and that defendant had not conspired with Erskine. It is apparent that defense counsel made a tactical decision to support the defense and counteract the evidence against defendant with evidence from codefendant Erskine Reed's confession. For example, during closing argument, defense counsel argued:

> Now we get to the interview from Erskine Reed and the subsequent events. Erskine Reed knew everything. "I don't know the address, but I can take you right there. I can take you right there in Battle Creek. I can take you right there in Detroit." And he did. Officer testified.
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> Well, they're trying [to] portray Erskine Reed as what the officer testified to as a mule. Mules don't know anything. Erskine Reed knew the dope houses: a lot of dope here, a lot of dope there. "I'll take you here." He arranged to have places—I mean, with the JNET team or whatever organization. They raided different places, because he had the knowledge. He had the knowledge.
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> And, when you speak of possession and control, if you recall, on Erskine Reed's confession, he says, "I started to take that dope and just go sell those two kilos and get that money and, oh well." Now, who has control to do that? A mule? I don't think so.
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> * * *
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> The statement towards the end of Mr. Erskine Reed's statement was really interesting, when they mentioned his nephew to him. He says, "He doesn't know why I'm here, does he?" That was interesting to me, in that, like one of the officers replied, "Well, he'd have to be retarded not to know." But, at that time, they had not communicated, so Erskine, we've got to assume didn't—thought that Rommel Reed didn't even know he had the dope in the car. But, of course, he

> was told by other officers, but he says on there, "He doesn't know why I'm here." I mean, he knows I'm here, but he doesn't know the reason I'm here, does he?" And look at that. That's interesting. Why would he say that, if they were in agreement?

"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." *Id.* at 76-77. "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Furthermore, given the overwhelming weight of the evidence produced at trial, no reasonable likelihood exists that defendant would not have been convicted but for trial counsel's action. *Frazier*, *supra*. Therefore, defendant cannot establish a claim of ineffective assistance of counsel.

## IV. Drug-Profile Evidence

Defendant argues that he was denied a fair trial by the impermissible admission of drug-profile evidence. We disagree. A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

"Drug profile evidence has been described as an 'informal compilation of characteristics often displayed by those trafficking drugs.'" *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). Drug-profile evidence may be admitted if (1) it is offered as background or modus operandi evidence, and not as substantive evidence of guilt; (2) other evidence is admitted to establish the defendant's guilt; (3) the appropriate use of the profile evidence is made clear to the jury; and (4) no expert witness is permitted to opine "that, on the basis of the profile, the defendant is guilty," or to "compare the defendant's characteristics to the profile in a way that implies that the defendant is guilty." *People v Williams*, 240 Mich App 316, 320-321; 614 NW2d 647 (2000).

The challenged testimony is not the type of "drug profile evidence" condemned for use as substantive evidence of guilt. See, e.g., *People v Hubbard*, 209 Mich App 234, 241; 530 NW2d 130 (1995), and *Murray*, *supra*. Here, police officers testified, based on their training and experience, that a plain car (to carry the drugs) and a high-profile car (to divert attention) traveling in tandem is a common drug trafficking method, that drugs and money are not normally kept together, that I-94 is a common corridor for transporting drugs in Michigan, and that 2,000 grams of cocaine is indicative of intent to deliver because it is a substantial amount. The officers' testimony regarding methods of drug trafficking, and customary procedures and practices in the drug trade constituted general background for the case. The officers' knowledge of the drug trade was used to help the jury understand the complexity of drug trafficking conspiracies, and the significance of the amount of cocaine at issue. See *People v Ray*, 191 Mich App 706, 708; 479 NW2d 1 (1991) (expert police testimony regarding the quantity of drugs found is permitted to show that the defendant intended to sell the drugs and not simply use them for personal consumption). The officers never expressly opined that defendant must be guilty because he matched a drug profile. In addition, there was substantial other evidence supporting defendant's conviction, including his own statement. Therefore, we reject this claim of error.

## V. Sufficiency of the Evidence

Defendant argues that his conviction for possession with intent to deliver 1,000 or more grams of cocaine must be vacated because there was insufficient evidence that he possessed the cocaine seized from codefendant Erskine Reed's vehicle. We disagree. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514. Rather, "a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The elements of possession with intent to deliver 1,000 or more grams of cocaine are (1) the recovered substance was cocaine, (2) the cocaine was in a mixture weighing more than 1,000 grams, (3) the defendant was not authorized to possess the cocaine, and (4) the defendant knowingly possessed the cocaine with the intent to deliver it. MCL 333.7401(2)(a)(i); *Wolfe, supra* at 516-517. Defendant only argues that there was insufficient evidence that he possessed the controlled substances found in codefendant Erskine Reed's trunk.

Possession of a controlled substance may be either actual or constructive, and may be joint as well as exclusive. *Wolfe, supra* at 519-520. Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband. *Id.* at 520. "The essential question is whether the defendant had dominion or control over the controlled substance." *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). Circumstantial evidence and reasonable inferences arising from the evidence are sufficient to establish possession. *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998).

Viewed most favorably to the prosecution, the evidence was sufficient to enable the jury to conclude beyond a reasonable doubt that defendant constructively possessed the cocaine. Defendant stated that two individuals from Battle Creek called him, each requesting one kilogram of cocaine. Defendant had previously obtained two kilograms of cocaine from a house in Detroit. On the day of the planned delivery, defendant conversed with his uncle, codefendant Erskine Reed, and subsequently placed the two kilograms of cocaine in his uncle's car. Thereafter, the two men left en route to Battle Creek for the purpose of delivering the cocaine. Defendant stated that he accompanied codefendant Erskine Reed for protection. The police observed both men traveling in tandem on I-94, stopped codefendant Erskine Reed's vehicle, and found the two kilograms of cocaine in the trunk. Codefendant Erskine Reed stated that defendant had provided the cocaine for delivery and that he was the driver. When the police stopped Erskine's car, defendant traveled less than one mile before pulling into a rest stop. In addition, in his statement, defendant explained that once they arrived in Battle Creek, he was the person who would have delivered the cocaine to the two individuals, and that his uncle was a driver. This evidence established a basis for the jury to conclude that defendant had constructive possession of the cocaine found in the trunk. The evidence was sufficient to sustain defendant's conviction of possession with intent to deliver 1,000 or more grams of cocaine.

## VI. Prosecutorial Misconduct

Defendant argues that the prosecutor improperly referenced his and codefendant Erskine Reed's prior "bad acts," which were elicited from their respective police statements. We disagree. Because defendant failed to object below to the prosecutor's conduct, this Court reviews his unpreserved claims for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999). This Court will not reverse if the alleged prejudicial effect of the prosecutor's remarks could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant challenges the following emphasized remark made during rebuttal argument:

> We have got the evidence, not only from the officers, but also confirmed overwhelmingly by the confessions that there was an agreement stated by Rommel Reed and by his uncle that the [sic] agreed that morning in Detroit. They loaded up the cocaine. They were taking it to Battle Creek. *They had done it before.* The defendant had many contacts and he got paid large sums of cash to take it back to Detroit. If that's not a conspiracy, then what is? [Emphasis added.]

Evidence was admitted, through defendant and codefendant Erskine Reed's statements, that this was not the first time they had delivered cocaine together. Thus, the prosecutor did not engage in misconduct by referring to that evidence during rebuttal argument. A prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

We reject defendant's related argument that he was denied the effective assistance of counsel because defense counsel failed to object to the prosecutor's remark. Because the remark was not improper, there was no reasonable basis for defense counsel to object. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (counsel is not required to make a futile objection).

## VII. Effective Assistance of Counsel

We also reject defendant's claim that defense counsel was ineffective for failing to challenge the validity of the traffic stop in a motion to suppress. The record does not support defendant's suggestion that defense counsel neglected to follow through. Rather, at the hearing on defendant's motion to quash the information, defense counsel mentioned that there was not a sufficient basis to justify a stop of defendant's Yukon. The trial court indicated that defense counsel had not filed the proper motion to address that issue and granted defense counsel's request for two weeks to file a motion to suppress. As noted by defendant, defense counsel did not file the motion. During trial, officers explained that they were following defendant's vehicle because it was of interest and that his vehicle was subsequently stopped because of a traffic violation. An officer explained that defendant violated "Michigan Motor Vehicle Code, Section 257.653(1), which indicates upon coming to an emergency vehicle with the lights activated, they are to use due care and caution." He further explained that defendant failed to "either move over one lane . . . or simply move over two car lengths," as required.

From the record, it is apparent that after receiving additional information regarding the circumstances of the stop, defense counsel reconsidered the motion. Defendant has not presented any evidence or a viable argument that defense counsel's decision was objectively unreasonable, nor has he demonstrated that, had defense counsel proceeded with the motion, there is a reasonable probability it would have been successful. Consequently, defendant cannot demonstrate that, but for defense counsel's inaction, the result of the proceeding would have been different. *Frazier*, *supra*.

VIII. Scoring of Offense Variables 1 and 2

Defendant argues that he is entitled to be resentenced because the trial court erred in scoring OV 1 (aggravated use of a weapon) and OV 2 (lethal potential of a weapon) of the sentencing guidelines. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A scoring decision "for which there is any evidence in support will be upheld." *Id.* (citation omitted).

MCL 777.31(1)(e) directs a score of five points for OV 1 if a "weapon was displayed or implied." The instructions for OV 1 state that "[i]n multiple offender cases, if 1 offender is assessed points for the presence or use of a weapon, all offenders shall be assessed the same number of points." MCL 777.31(2)(b). For OV 2, the trial court should score five points if the "offender possessed or used a pistol[.]" MCL 777.32(1)(d). Similar to OV 1, the instructions for OV 2 provide that "[i]n multiple offender cases, if 1 offender is assessed points for possessing a weapon, all offenders shall be assessed the same number of points." MCL 777.32(2).

Defendant claims that both OV 1 and OV 2 should be scored at zero points rather than five points because codefendant Erskine Reed possessed the weapon, there was no evidence that defendant gave him the weapon and, at the time of sentencing, codefendant Erskine Reed had not been assessed points for OV 1 and OV 2 because he had not been sentenced. Even if the trial court erred in scoring the two variables, however, the error is harmless. If both OV 1 and OV 2 are scored at zero, defendant's total OV score decreases from 110 to 100 points. With this scoring adjustment, defendant remains in the same OV level VI (100 or more points), and his guidelines range does not change (225 to 375 months or life). MCL 777.62. Because the alleged scoring errors do not affect the appropriate guidelines range, defendant is not entitled to resentencing. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

Affirmed.

/s/ David H. Sawyer
/s/ Deborah A. Servitto
/s/ Michael J. Kelly