STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 10, 2009
v	No. 280645 Oakland Circuit Court
LAVICO MONSENIOR DYE, Defendant-Appellant.	LC No. 2006-210088-FH

Before: Saad, C.J., and Davis and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession with intent to deliver between 50 and 450 grams of cocaine, MCL 333.7401(1)(a)(iii), possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(iv), felon in possession of a firearm, MCL 750.224f, and three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a second habitual offender, MCL 769.13, to 6½ to 30 years in prison for the possession with intent to deliver cocaine conviction, 6½ to 30 years in prison for the possession with intent to deliver heroin conviction, two to seven years in prison for the felon in possession conviction, and two years in prison for each of the felony-firearm convictions. We affirm.

This case arises out of the execution of search warrant at defendant's home. During the search a shotgun, cocaine, heroin, and items of drug paraphernalia were found throughout defendant's bedroom. When questioned about the items, defendant told the police that the drugs were his, alone, and did not belong to his wife.

Defendant first argues on appeal that the trial court erred in excluding testimony regarding defendant's stepfather, who resided with defendant at the time of the raid, as inadmissible hearsay. According to defendant, his sister should have been permitted to present testimony from which it could be inferred that the stepfather was a drug dealer and user, and that the drugs found at defendant's home belonged to the stepfather. Our review of the record, however, reveals that the trial court allowed some of the testimony sought to be admitted and excluded certain testimony because it was not relevant evidence, not because it was inadmissible hearsay. See MRE 402. The trial court indicated, "I—I'm not going to allow it. I think it's too tenuous" and "No, it's not relevant." Thus, this argument is meritless.

Defendant next argues, in a supplemental brief, that the prosecutor committed misconduct when she appealed to the jurors' sympathy during her closing argument by repeatedly invoking the plight of defendant's children. We review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). "Further, [this Court] cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect." *Id*. at 329-330.

Defendant's two children were present in the home during the execution of the search warrant. Police officers testified that the children were calm, playing video games, and talking with some of the officers. Defendant argues that the prosecutor intentionally invoked the children's presence as a means to sway the jury from deciding the case based solely on the evidence. We disagree.

A prosecutor may use emotional language during a closing argument, but must refrain from inflammatory statements meant only to arouse prejudice and must argue from the evidence presented in the case. *People v Unger*, 278 Mich App 210, 241; 749 NW2d 272 (2008); *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003); *People v Lee*, 212 Mich App 228, 247; 537 NW2d 233 (1995). Additionally, appeals to the sympathy of a crime's victim are prohibited. *Unger, supra* at 237. "The test for prosecutorial misconduct is, viewing the alleged misconduct in context, whether the defendant was denied a fair and impartial trial." *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003).

In the first instances cited by defendant, the prosecutor was merely reviewing the evidence for the jury. The testimony at trial indicated that the children were present during the search. The prosecutor merely mentioned this fact and did not make any inflammatory or emotional comments regarding it.

In the remaining instances cited by defendant, the prosecutor's comments were made during her rebuttal argument. Defendant does not point out that these comments were made in direct response to defense counsel's comments regarding the children in *his* closing argument. Most prominently, defense counsel complained that the execution of the search warrant in front of defendant's children was "emasculating." The prosecutor responded to this by arguing that any blame for such emasculation should fall at the feet of defendant because of his behavior – as identified in the evidence – as opposed to the police officers executing the warrant. Moreover, the prosecutor's statements were based on the evidence. Defendant does not explain why the prosecutor's comments would sway the jury, but merely asserts that mentioning the children was improper. We find no basis for concluding that the prosecutor committed misconduct.

Defendant next argues in his supplemental brief that the trial court erred in declining to suppress his statements to police. We disagree. This Court reviews de novo the questions of whether defendant waived his constitutional rights and gave a statement voluntarily. *People v Tierney*, 266 Mich App 687, 707-708; 703 NW2d 204 (2005). A trial court's findings of fact are reviewed for clear error. *Id.* at 708.

A statement obtained during a custodial interrogation is admissible only if the defendant voluntarily, knowingly and intelligently waives his Fifth Amendment rights. *People v McBride*, 273 Mich App 238, 249, 253-254; 729 NW2d 551 (2006), rev'd in part on other grounds 480 Mich 1047 (2008). Here, defendant not only contends that he was trying to exercise his right to counsel and that any statement he provided to the police was involuntary, but also disavows making any admissions to the police.

At the *Walker*[1] hearing defendant unequivocally stated that he made no incriminating statements to police. The trial court thus determined that there was no Fifth Amendment issue (there being no statement) and concluded the hearing without making a ruling on the voluntariness of the alleged statement. In *People v Tate*, 471 Mich 959; 690 NW2d 702 (2005), our Supreme Court held that a defendant has the right to challenge both the authenticity and the voluntariness of a statement. In *Tate*, the defendant contended that he was coerced into making a handwritten statement, but that the prosecution was attempting to introduce a different, typed statement. *Id*. Nevertheless, the Court remanded to the trial court for a *Walker* hearing with regard to the typewritten statement that the defendant denied ever making. *Id*. Similarly, in this case, defendant denies ever making the statements to which the officer testified. Under *Tate*, defendant was entitled to a *Walker* hearing as to the authenticity of those statements.

However, this error is subject to a harmless error analysis. *People v McRunels*, 237 Mich App 168, 184-185; 603 NW2d 95 (1999). A constitutional error is harmless if it is clear, beyond a reasonable doubt, the same verdict would have been reached absent the error. *People v Shepherd*, 472 Mich 343, 348; 697 NW2d 144 (2005). In this case, where defendant completely denied making the statement, the only evidence presented regarding the circumstances surrounding the alleged making of the statement is the officer's testimony. The officer testified that he did not coerce or intimidate defendant and that his questioning of defendant was calm and straightforward. Because defendant denies ever making the statement, he presents no basis for concluding that his statement was involuntary. Moreover, evidence was presented that a gun, digital scale, and drugs were found in the home upon execution of a search warrant. Absent defendant's statements, then, the same verdict likely would have been reached. Thus, the trial court's error was harmless.

Defendant next argues in his supplemental brief that the prosecutor denigrated defense counsel during her closing arguments. We disagree. An unpreserved claim of prosecutorial misconduct is reviewed for outcome-determinative plain error. *Carines, supra* at 763; *Unger, supra* at 235.

The prosecutor is free to argue the evidence and all reasonable inferences arising there from. *Unger, supra* at 236. The prosecutor may not, however, suggest that defense counsel is intentionally trying to mislead the jury or question the veracity of defense counsel. *Id*. Finally, "An otherwise improper remark may not rise to an error requiring reversal when the prosecutor

[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

is responding to the defense counsel's argument." *People v Watson*, 245 Mich App 572, 593; 629 NW2d 411 (2001).

Defendant cites ten examples that he claims demonstrate denigration by the prosecutor. Defendant does not generally expound upon why the examples demonstrate misconduct by the prosecutor, but leaves it to this Court to divine any errors. Many of the examples have no discernible relation to defense counsel's intentions or veracity. Further, each comment was made during the prosecutor's rebuttal argument, and in response to defense counsel's closing argument. None of the comments question defense counsel's motives. There is no indication that the prosecutor's statements rise to the level of misconduct.

Defendant next argues in his supplemental brief that the trial court erred in denying his motion to quash the search warrant and suppress evidence. We disagree.

A trial court's ruling on a motion to suppress is reviewed de novo. *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005); *People v Hrlic*, 277 Mich App 260, 262-263; 744 NW2d 221 (2007). A trial court's factual findings in support of its ruling are reviewed for clear error. *Jenkins*, *supra* at 31; *Hrlic*, *supra* at 262-263. Further, an erroneous evidentiary ruling does not require reversal unless it "affirmatively appear[s] that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 488, 495-496; 596 NW2d 607 (1999); MCL 769.26; MRE 103. "A search warrant should be upheld if a substantial basis exists to conclude that there is a fair probability that the items sought will be found in the stated place." *People v Brown*, 279 Mich App 116, 127; 755 NW2d 664 (2008).

Defendant first argues that there was no evidence that the unnamed informant that provided information in support of the search warrant was reliable. Probable cause may be supported by information from an unnamed informant if there exist "affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable." MCL 780.653(b); *People v Keller*, 479 Mich 467, 482; 739 NW2d 505 (2007). Participation in controlled purchases is sufficient to establish the reliability of an informant's statements. *People v Head*, 211 Mich App 205, 209; 535 NW2d 563 (1995).

The search warrant affidavit in this matter contained information that the informant in this case participated in two controlled purchases (one within 30 days and one within 48 hours of the date the affidavit was signed). The affiant observed the informant entering and exiting defendant's house before and after the purchases. He searched the informant before and after the purchases. Further, the affiant attested that the informant made statements against his penal interest to establish his knowledge of drug purchases. Defendant makes only a bare assertion that the informant was not credible and/or reliable. There is no basis to support this contention.

Defendant next argues that because the pre-recorded money used in the controlled purchases was never recovered and presented at trial, the information in the affidavit – based on those purchases – is faulty. Defendant also argues, relatedly, that there was no corroboration for any of the facts in the affidavit.

This Court, when reviewing the magistrate's decision, must determine whether a "reasonably cautious person could have concluded that there was a substantial basis for the

finding of probable cause." *Head*, *supra* at 209. As the magistrate's decision must be based on the entirety of the affidavit (MCL 780.653), the failure to produce the money used in controlled purchases 30 days and 48 hours prior to the execution of the search warrant is not fatal.

Further, "[t]he magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her." MCL 780.653. There is no requirement, then, that an affidavit in support of a search warrant application be supported by corroboration. Probable cause is to be determined on the basis of the facts set forth in the affidavit alone. Because corroboration is not required, defendant's arguments amount to an assertion that the affiant made false statements in the affidavit. In order to prevail on a motion to suppress based on an allegation of false statements, "the defendant must show by a preponderance of the evidence that the affiant had knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit." *People v Williams*, 240 Mich App 316; 319-320; 614 NW2d 647 (2000). In this case, defendant does not make any concrete allegations of false statements, but merely claims that the affidavit must be corroborated. Defendant has not shown by a preponderance of the evidence that the affiant made any false statements. There was no error in the trial court's denial of defendant's motion to quash the search warrant and suppress evidence.

Defendant next argues that the trial court erroneously limited testimony by defendant's sister, Tannika Harris. We disagree.

This Court reviews a trial court's decision to deny or admit evidence for an abuse of discretion. *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007). Preliminary questions of law are reviewed de novo. *Id.* A court abuses its discretion when it selects a course outside of the range of principled outcomes. *People v Shahideh*, 277 Mich App 111, 118; 743 NW2d 233 (2007). Nevertheless, an erroneous evidentiary ruling does not require reversal unless it affirmatively appears that it is more probable than not that the error was outcome determinative. MCL 769.26; MRE 103.

Harris intended on testifying that her and defendant's stepfather, Randy Lundy, had lived with Harris in the year prior to defendant's arrest. Furthermore, Harris wished to testify that she knew Lundy to be a drug user and observed people coming to her house "at odd hours" while Lundy was a resident. She eventually ordered Lundy out of her home. At the time of the execution of the search warrant, Lundy was essentially living in the basement of defendant's home. Defense counsel sought to introduce this testimony to provide an alternative circumstantial inference for the jury that the drugs found in defendant's home were Lundy's.

All logically relevant evidence is admissible at trial, unless otherwise prohibited. MRE 402; *Ackerman*, *supra* at 439. Conversely, irrelevant evidence is not admissible. MRE 402. To be relevant, the evidence must have some tendency to make a fact material to the case more or less probable. MRE 401; *Ackerman*, *supra* at 439. A material fact is one that is "within the range of litigated matters in controversy." *Ackerman*, *supra* at 439. Further, evidence that gives rise to multiple inferences or an inference upon an inference may be relevant and admissible. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

Defendant first argues that because the prosecutor's case hinges upon the circumstantial inference that defendant possessed the drugs because they were in his bedroom, he should be

allowed to raise an alternative circumstantial argument. The test for relevant evidence, however, concerns the evidence's likelihood of making a material fact more or less probable. *Ackerman*, *supra* at 439. Here, the material fact is the possession of the drugs. To be relevant, the testimony must make this fact more or less probable, irrespective of any other evidence relevant to that fact. MRE 401. That defendant views this evidence as a counterpoint to the prosecutor's evidence does not change the threshold question of relevance.

Defendant next argues that Harris's testimony was relevant because it would show that Lundy deals drugs and might have been stashing drugs in defendant's bedroom while he was living there. The evidence proffered by Harris was merely that individuals had come to her house at odd hours while Lundy lived there. She had never heard or seen Lundy sell or buy drugs. She had last seen him in possession of drugs about 17 years ago. She did not even know what kind of drugs he allegedly used. As the trial court suggests, the actual testimony offered by Harris is only tenuously related to the material fact at issue – the possession of drugs found in defendant's bedroom. The trial court concluded that the connection was too tenuous to be relevant. Harris had essentially no present knowledge that would establish that Lundy would be in possession of drugs in defendant's house. We find no basis for concluding that the trial court abused its discretion in making this determination.

Defendant next argues in his supplemental brief that his trial counsel was ineffective. We disagree.

A defendant must move for a new trial or request an evidentiary hearing to preserve an issue of ineffective assistance of counsel on appeal. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Because defendant did not move for a new trial or request an evidentiary hearing, any review of this issue is limited to the existing record. *Id.* Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings are reviewed for clear error, while questions of constitutional law are reviewed de novo. *Id.*

Defendant first argues that defense counsel was ineffective for failing to object to the prosecutor's alleged misconduct, and failing to challenge the validity of the affidavit in support of the search warrant. Because we concluded above that the prosecutor did not commit misconduct and that the affidavit was not defective, defense counsel was not ineffective for failing to raise a futile objection. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Defendant next argues that his trial counsel was ineffective for failing to request a jury instruction regarding defendant's theory of the case. Defendant states that a "mere presence" instruction would have been appropriate because his presence in the house was the only nexus between him and the drugs. Defendant does not actually identify or offer the text of any such proposed instruction. Without understanding what instruction defendant contends defense counsel should have proposed, it is impossible to conclude that defense counsel erred. Defendant was not denied the effective assistance of counsel.

Defendant's final argument in his supplemental brief is that the cumulative effect of the foregoing alleged errors deprived him of his due process of law. Absent the presence of more than one error, there can be no cumulative effect, and no serious prejudice calling into question

the fairness of defendant's trial. *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007); *Ackerman*, *supra* at 454. Because we did not find any errors, this argument is unavailing.

Affirmed.

/s/ Henry William Saad
/s/ Alton T. Davis
/s/ Deborah A. Servitto