STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 15, 2009
v	No. 279338 Wayne Circuit Court
SIRVAN RAYSHA MARTIN, Defendant-Appellant.	LC No. 06-013758-01

Before: Servitto, P.J., and Fort Hood and Stephens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver 450 or more but less than 1,000 grams of cocaine, MCL 333.7401(2)(a)(ii), possession of 450 or more but less than 1,000 grams of cocaine, MCL 333.7403(2)(a)(ii), possession with intent to deliver less than five kilograms of marijuana, MCL 333.7401(2)(d)(iii), possession of marijuana, MCL 333.7403(2)(d), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to 15 to 30 years' imprisonment for each cocaine-related conviction, one to four years' imprisonment for the possession with intent to deliver marijuana conviction, six months to one year imprisonment for the possession of marijuana conviction, and two years' imprisonment for the felony-firearm conviction. He appeals as of right. We vacate defendant's convictions and sentences for possession of cocaine and possession of marijuana, but affirm in all other respects.

Defendant's convictions arise from a November 1, 2006, drug raid of a home located at 11385 Penrod in Detroit. Police officers had previously conducted surveillance of the home and made controlled purchases of cocaine at the residence using an informant. Defendant was the target of their investigation and was observed conducting suspected narcotics transactions. When the police arrived in a raid van, defendant ran inside the home and jumped out a window, breaking the windowpane. Police officers recovered $880 in cash from defendant as well as photographs of defendant, a medical prescription containing his name, seven baggies of marijuana, and $1,300 in cash from inside his vehicle. Officers also recovered from the basement of the home a large bag of crack cocaine, an AK-47 assault rifle, drug paraphernalia, and several bags of marijuana along with a safe containing $20,440 in cash, a small amount of marijuana, and a large amount of cocaine.

Defendant first argues that he was denied the effective assistance of counsel. We disagree. Because defendant failed to raise this issue in a motion for a new trial or evidentiary

hearing in the trial court, and this Court denied his motion to remand to move for an evidentiary hearing, our review is limited to errors apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Moorer*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004). With respect to the prejudice requirement, a defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *Moorer, supra* at 75-76. A defendant must also overcome the strong presumption that counsel's actions constituted sound trial strategy. *Toma, supra* at 302.

Defendant contends that defense counsel was ineffective for failing to seek suppression of the evidence seized pursuant to the search warrant because the warrant was issued without probable cause. "A magistrate may issue a search warrant only when it is supported by probable cause." *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001). Probable cause exists when all the facts and circumstances would lead a reasonable person to believe that evidence of a crime will be found in the place sought to be searched. *Id.* In reviewing a magistrate's determination of whether probable cause existed to support the issuance of a search warrant, "'a reviewing court is simply to ensure that the magistrate had a substantial basis for . . . concluding that probable cause existed.'" *People v Keller*, 479 Mich 467, 475; 739 NW2d 505 (2007), quoting *Illinois v Gates*, 462 US 213, 238; 103 S Ct 2317; 76 L Ed 2d 527 (1983) (internal quotations and citation omitted). Further, pursuant to MCL 780.653, a magistrate's finding of probable cause to issue a search warrant "shall be based upon all the facts related within the affidavit made before him or her." An affidavit may be based on information supplied by an unnamed informant if the affidavit contains "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).

Defendant argues that the affidavit provided no indication that the informant spoke with personal knowledge of the information alleged, or that the informant was credible or the information reliable. To the contrary, the affidavit stated that, within the previous month, "informant 448" informed the police that a person known as "Van" was involved in drug trafficking activity at an address on Penrod Street in Detroit. The informant indicated that "Van" drove a newer model full-size Chevy van. Police officers transported the informant to 11385 Penrod Street, the location at which the informant admitted purchasing narcotics from "Van" previously. The informant identified "Van's" vehicle parked in the driveway of the home. A Secretary of State and LEIN search revealed that defendant lived at the Penrod residence, and the informant identified a picture of defendant as the person known as "Van." The affidavit further indicated that, within the previous few weeks, police officers conducted surveillance of the home and witnessed defendant engage in hand-to-hand transactions with the occupants of several vehicles, which were indicative of narcotics trafficking. Police officers also observed defendant leave the residence in the Chevy van. Moreover, the affidavit stated that police officers made a controlled purchase of narcotics from defendant with the aid of a confidential informant within the previous two weeks.

Further, the affidavit indicated that, within the previous 24 hours, defendant was observed conducting a narcotics transaction at the residence with the driver of a beige Cadillac. Finally, the affidavit stated that, within the next 48 hours, the police would instruct "informant 448" to contact defendant via cell phone and arrange to purchase narcotics. The affidavit indicated that police officers would conduct a search of the residence only if defendant told the informant that he had the narcotics and instructed the informant to come to the house to make the purchase.

The affidavit provided a substantial basis for a magistrate to conclude that there existed probable cause to believe that narcotics and drug trafficking paraphernalia would be found at the residence. Moreover, the affidavit demonstrates that the informant spoke with personal knowledge, was credible, and provided reliable information. The police officers' surveillance of the residence and defendant's activity corroborated the informant's allegations. Secretary of State and LEIN records also connected defendant with the residence, and the informant identified a photograph of defendant as the person known as "Van" from who the informant had previously purchased narcotics. The informant was also able to point out defendant's vehicle. The success of the controlled narcotics purchase established that the informant's information was reliable. See *People v Head*, 211 Mich App 205, 209; 535 NW2d 563 (1995). In addition, the information was not stale considering that the affidavit alleged ongoing criminal activity rather than a single criminal episode. See *People v Russo*, 439 Mich 584, 605; 487 NW2d 698 (1992).

Defendant contends that the affiant's use of the terms "they" and "them" shows that the informant was not speaking from personal knowledge. It appears, however, that the use of the plural terms was to conceal the gender of the confidential informant. We note that during trial Sergeant Richard Novakowski also referred to the informant as "them." Defendant also argues that there is no indication in the affidavit that the controlled buy was conducted using the same informant previously referenced in the affidavit and that there is no information establishing the credibility or reliability of the second confidential informant. Defendant's argument is misplaced because the affidavit reflects the identified affiant's personal knowledge of the controlled purchase. The information regarding the controlled purchase was thus not obtained from an unnamed informant. Because the search warrant was not issued without probable cause, defense counsel was not ineffective for failing to seek suppression of the evidence seized pursuant to the warrant. Defense counsel does not render ineffective assistance by failing to assert futile arguments. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant next argues that he was denied due process and a fair trial when the trial court instructed the jury on an aiding and abetting theory that the evidence did not support. We disagree. We review for an abuse of discretion a trial court's determination whether a jury instruction applies to the facts of a case. *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *People v Brown*, 279 Mich App 116, 144; 755 NW2d 664 (2008).

Generally, jury instructions must fairly present the issues to be tried and sufficiently protect a defendant's rights. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). The instructions must include all elements of the charged offenses, and must not exclude relevant issues, defenses, and theories if supported by the evidence. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). Under MCL 767.39, a person who procures, counsels, aids, or

abets the commission of a crime may be convicted and sentenced as if the person committed the offense directly. *People v Norris*, 236 Mich App 411, 419; 600 NW2d 658 (1999). "To establish that a defendant aided and abetted a crime, the prosecutor must prove that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the principal in committing the crime, and (3) the defendant intended the commission of the crime or knew the principal intended its commission at the time he gave aid or encouragement." *Id.* A jury may be instructed on aiding and abetting when "(1) more than one person was involved in committing a crime, and (2) the defendant's role in the crime may have been less than direct participation in the wrongdoing." *People v Bartlett*, 231 Mich App 139, 157; 585 NW2d 341 (1998).

The trial court did not err by instructing the jury on an aiding and abetting theory. Defense counsel argued during his opening statement that defendant did not possess the marijuana, cocaine, and firearm recovered from the Penrod residence. Rather, counsel argued that those items were found in the possession of others. In accordance with this argument, the evidence showed that defendant's mother and John Hightower were inside the residence during the execution of the search warrant. Police officers found Hightower in the basement. During closing argument, defense counsel contended that Hightower was in the basement near the drugs and firearm and in possession of the safe at the time of the raid. Moreover, defense counsel elicited testimony that defendant lived at a different address. Thus, contrary to defendant's argument, the evidence showed that more than one person may have been involved in committing the offenses. Accordingly, the trial court's decision to instruct the jury on an aiding and abetting theory was not outside the range of reasonable and principled outcomes. *Brown, supra* at 144.

Defendant next argues that his convictions of possession and possession with intent to deliver the same substance violate his double jeopardy protections. We agree. Applying the *Blockburger*[1] "same elements" test, each offense does not contain an element that the other does not. See *People v Smith*, 478 Mich 292, 305, 316; 733 NW2d 351 (2007); *McGhee, supra* at 622. The prosecutor concedes that defendant's convictions of possession of 450 or more but less than 1,000 grams of cocaine and possession of marijuana must be vacated. We therefore vacate defendant's cocaine and marijuana possession convictions and sentences. "[I]t is an appropriate remedy in a multiple punishment double jeopardy violation to affirm the conviction of the higher charge and to vacate the lower conviction." *People v Herron*, 464 Mich 593, 609; 628 NW2d 528 (2001).

Defendant next argues that the prosecutor committed misconduct by eliciting evidence that the police had made controlled narcotics purchases and observed defendant engaging in narcotics transactions at the Penrod residence. Because defendant did not object to the introduction of the evidence or argue that the prosecutor was acting improperly below, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999); *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). Reversal is warranted only if the error resulted in conviction despite

[1] *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932).

defendant's actual innocence or if it seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of his innocence. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

Defendant maintains that evidence of his prior drug sales and drug trafficking activity at the Penrod residence was inadmissible under MRE 404(b), which governs the admission of other acts evidence. We hold that this evidence was properly admissible under the res gestae exception to MRE 404(b). This exception allows the admission of evidence of other bad acts when they are so connected to the charged offense that their admission is necessary for the jury to hear the "complete story." *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). In *Sholl*, our Supreme Court recognized that "'[i]t is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some antecedent event from which the fact or event in question follows as an effect from a cause.'" *Id.*, quoting *State v Villavicencio*, 95 Ariz 199; 388 P2d 245 (1964). In other words,

> "[e]vidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime." [*Sholl*, *supra* at 742, quoting *Villavicencio*, *supra* at 201.]

Thus, MRE 404(b) does not preclude the admission of evidence intended to give the jury an intelligible presentation of the full context in which disputed events occur. *Sholl*, *supra* at 741.

Here, evidence of defendant's drug trafficking and activity that occurred at the residence was properly admitted to explain why the police were investigating defendant and why they executed a drug raid of the house. Sergeant Scott Murray testified that the police had received information regarding defendant and conducted surveillance of the house before the raid. Defendant was observed conducting suspected narcotics transactions in front of the house. In addition, Sergeant Novakowski testified that defendant was the target of the investigation and was named in the search warrant. This evidence told the "complete story" surrounding the offenses and explained why the police were executing a drug raid of the home and why they focused their investigation on defendant. Thus, the evidence was properly admitted under the res gestae exception to MRE 404(b) and the prosecutor did not engage in misconduct by eliciting such evidence. Moreover, because the evidence was properly admitted, defense counsel was not ineffective for failing to object to its admission. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Defendant next argues that he was denied a fair trial when the prosecutor erroneously advised the jury regarding constructive possession. We disagree. Because defendant did not preserve this issue by objecting to the prosecutor's argument, our review is limited to plain error affecting his substantial rights. *Carines*, *supra* at 763; *Knapp*, *supra* at 375.

"When reviewing a claim of prosecutorial misconduct, we examine the pertinent portion of the record and evaluate a prosecutor's remarks in context." *People v Cox*, 268 Mich App 440, 451; 709 NW2d 152 (2005). "A prosecutor's clear misstatement of the law that remains uncorrected may deprive a defendant of a fair trial." *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002).

Reviewing the prosecutor's remarks in context, it is apparent that the prosecutor did not instruct the jury on the requirements of constructive possession, but rather, merely provided examples to illustrate the concept of constructive possession. The prosecutor argued as follows:

> Now, there are all couple principles [sic], other theories. You'll hear the term possession and you'll hear a jury instructions [sic] from Judge Berry about what we mean by possession.
>
> Of course obviously if someone has in their possession a pen you can see that somehow how [sic] I might own or possess that pen, but there's a second facet to that and it is constructive possession and the Court will define that for you in a few minutes.
>
> The perfect example I can give you of a constructive possession scenario is most of you are probably familiar with a safety deposit box. Well, even though you don't have it at your house if it's at the bank and you placed your things in it you still possess that, even though you don't have it in your hands.
>
> The same thing that some of you that might have drove to court this morning or yesterday and maybe you were here a little bit late and you parked in that secret spot that really wasn't the place you were suppose[d] to be parking and you get back and that little flag that's on the windshield wiper, that ticket, even though you weren't there, that ticket belongs to you now, right?
>
> That's another example of constructive possession. Possession does not have to mean that he had it on his person. He had to have a reasonable access to it and that is the question, if he had reasonable access to it.

Thus, the prosecutor did not instruct the jury on the law and in fact indicated that the trial court would instruct the jury on the legal requirements of constructive possession soon thereafter.

In any event, to the extent that the prosecutor's remarks could be considered erroneous, any error was harmless because the trial court correctly instructed the jury regarding constructive possession. See *Grayer*, *supra* at 358-359. The court instructed the jury that defendant possessed the cocaine "only if he had the control over it or had the right to control it either alone or together with someone else." Further, the trial court instructed the jury that it must follow the law as stated by the court and disregard any contrary statements of the law that the attorneys may have made. These instructions were sufficient to cure any erroneous statement that the prosecutor may have made. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Thus, because any error did not prejudice defendant, he has failed to demonstrate a reasonable probability that, but for counsel's failure to object to the prosecutor's remarks, the result of the proceeding would have been different. *Toma*, *supra* at 302; *Moorer*, *supra* at 75-76. Further, defendant has failed to show that the cumulative effect of the prosecutor's remarks and questioning denied him a fair trial.

Defendant next contends that the trial court erred by failing to sua sponte instruct the jury regarding the limited use of the MRE 404(b) evidence. Although defendant waived appellate

review of this issue by expressly approving the trial court's instructions, *People v Lowery*, 258 Mich App 167, 173; 673 NW2d 107 (2003), defendant's argument is meritless in any event. As previously discussed, the evidence involving defendant's narcotics transactions and drug activity conducted at the Penrod residence was admissible under the res gestae exception to MRE 404(b). Thus, it did not constitute MRE 404(b) evidence and no limiting instruction was warranted.

Defendant next argues that he was denied his rights to a fair trial and a trial by jury when Sergeant Murray testified that the search warrant was approved by a prosecutor and a judge before its execution. Because defendant did not preserve this issue by objecting to the challenged testimony, our review is limited to plain error affecting his substantial rights. *Carines*, *supra* at 763; *Knapp*, *supra* at 375.

Defendant contends that the evidence involving the prosecutorial and judicial approval of the search warrant subverted his presumption of innocence and improperly bolstered the prosecutor's case. Our Supreme Court has recognized that "the presumption of innocence is at the core of our criminal process and fundamental to defendant's understanding of a trial." *People v Saffold*, 465 Mich 268, 276; 631 NW2d 320 (2001) (internal quotations and citation omitted). The record does not support defendant's argument. Sergeant Murray testified as follows:

> *Q*. Now, tell us, is there a process that an officer would have to go through to achieve a search warrant for a particular location?
>
> *A*. Yes.
>
> *Q*. And what is that process, please?
>
> *A*. First, the officer has to – if he works for me he's going to get it approved through me that he's gained probable cause to believe that a search warrant can be obtained and then the officer needs to contact the prosecutor and from the prosecutor, if the prosecutor deems that there's probable cause to believe that a search warrant should be granted, then the officer has to take the following step and go see a Judge and in front of the Judge, the Judge reads the search warrant and determines there's probable cause to believe the search warrant should be granted and if there is, then the Judge has the officer swear to the contents that all the information is true and accurate.
>
> *Q*. And in the body of that search warrant would your investigation be contained in that?
>
> *A*. Yes.
>
> Sometimes not all your investigation is contained inside this search warrant because you try to keep your informant as clean as possible, meaning that you don't want to right away tip your hand to your suspect that you're looking for as to who your informant is.
>
> *Q*. And you're speaking in a normal kind of setting, correct?

A. Correct.

Q. A general kind of setting, correct?

A. Correct.

Q. Now, you are not the affiant of the search warrant in this particular case?

A. No, sir, I'm not.

Q. But were you made aware of the fact that a Judge had signed a search warrant in this particular case?

A. Yes, sir.

Sergeant Murray's testimony did not bolster the prosecutor's case or subvert defendant's presumption of innocence. Rather, Sergeant Murray explained the procedure for obtaining a search warrant and indicated that the procedure had been followed before the execution of the warrant in this case. Accordingly, defendant's argument lacks merit.

In any event, any error did not affect defendant's substantial rights considering the overwhelming evidence against defendant. Police officers received information regarding defendant's drug trafficking activity from a confidential informant and observed defendant conducting narcotics transactions at the residence. When the police arrived in a raid van, defendant ran inside the house and jumped out a window. Police officers recovered $880 in cash from defendant as well as seven baggies of marijuana and $1,300 in cash from his vehicle. During questioning, defendant expressed regret that he had "brought all the aggravation and the police department to his mother's house." Moreover, he made incriminating statements during several telephone conversations while he was incarcerated before trial. Thus, even if Sergeant Murray's testimony regarding the approval of the search warrant was erroneous, defendant has failed to establish that his substantial rights were affected.

Finally, defendant argues that the cumulative effect of his attorney's errors mandate a new trial. Although one error may not warrant a new trial, the cumulative effect of several errors combined may require reversal. *People v Unger*, 278 Mich App 210, 258; 749 NW2d 272 (2008). Because we have found no individual errors, however, there can be no cumulative effect of such errors warranting reversal. *Id.*

In sum, we vacate defendant's convictions and sentences for possession of 450 or more but less than 1,000 grams of cocaine and possession of marijuana, but affirm in all other respects.

Affirmed in part and vacated in part.

/s/ Deborah A. Servitto
/s/ Karen M. Fort Hood
/s/ Cynthia Diane Stephens