STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 19, 2017
v	No. 334970 Oakland Circuit Court
JERRY WORD, Defendant-Appellant.	LC No. 2015-254122-FH

Before: METER, P.J., and SAWYER and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions of two counts of possession of a controlled substance less than 25 grams (cocaine and heroin), MCL 333.7403(2)(a)(v),[1] three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. Defendant was sentenced to one month to 10 years' imprisonment for each of the controlled substance convictions and the felon-in-possession conviction, and two years' imprisonment for each of the three felony-firearm convictions. For the reasons discussed below, we affirm.

I. FACTS

Defendant was arrested during the early morning hours of April 2, 2015, after the night clerk at a Holiday Inn Express, at which defendant had been staying, called the police to report that she saw defendant, through a window at another room, waving a handgun and talking to himself. Southfield Police Officer, Christopher Clark, testified that when he arrived at the hotel, he saw defendant through the window, holding a handgun, thrusting forward with the handgun, and jumping around like he was nervous and jittery. When other officers arrived at the hotel, they went to defendant's room, knocked on his door, and announced their presence. When defendant opened the door and stepped into the hallway, Officer Michael Raby saw a small table

[1] Defendant was initially charged with the manufacture or delivery of less than 50 grams of a controlled substance (cocaine), MCL 333.7401(2)(a)(*iv*), but the jury ultimately convicted defendant of possession of less than 25 grams of a controlled substance (cocaine).

in defendant's room on which he saw a crack pike, white powder and a "chore boy"[2] When defendant stepped into the hallway, Officer Raby entered the room to check for anyone who had been harmed or threatened by defendant and to make sure that there was no other armed individual in the room. While walking through the room, Officer Raby saw other drugs and paraphernalia in plain view at a second location. These included: crack cocaine, a second crack pipe, and a container of baking soda that held a glass tube in it. He also saw that the pillow had what appeared to be bullet holes. He then searched the bed coverings where he found additional bullet holes and a handgun.

In all, the police found six grams of powder cocaine, two grams of crack cocaine, and six grams of heroin. The police also found $4,941 in defendant's possession.

Defendant testified at trial. In his testimony, he stated that he began using crack cocaine in 2014, during a period of marital difficulties with his ex-wife, and that eventually, he moved out of his home and began living in various hotels. Defendant admitted that the items taken from his room at the hotel belonged to him, including a crack pipe. He confirmed that the "corner ties" in the room belonged to him, and that he had some cocaine in his room, however, he disputed ownership of one of the corner ties by stating that it was "questionable." Defendant testified that the glass tube in the box of baking soda was a "cigar tool," but he stated that he used it "to cook up some cocaine in that." He further testified that although he had a gun in his room, he did not intend to commit a crime with the gun.

II. FOURTH AMENDMENT SEARCH AND SEIZURE

On appeal, defendant first contends that the trial court erred by denying his motion to suppress the evidence collected from his room at the hotel because the police searched his room without first obtaining a search warrant. Under the circumstances of this case, we find no constitutional violation.[3]

"The Fourth Amendment of the United States Constitution and article 1, § 11 of the Michigan Constitution protect against *unreasonable* searches and seizures." *People v Barbarich*, 291 Mich App 468, 472; 807 NW2d 56 (2011). "Generally, searches or seizures conducted without a warrant are presumptively unreasonable and, therefore, unconstitutional." *Id*. "Thus, in order to show that a search was legal, the police must show either that they had a warrant, or that their conduct fell under one of the narrow, specific exceptions to the warrant requirement."

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[2] Officer Raby explained that a "chore boy" was "like steel wool but it's like copper in color." According to the officer it is "used like a filter for the crack pipe. You put the chore boy in and put the rock in on top of that so that the rock doesn't fall through into the pipe and --[.]"

[3] "We review de novo the circuit court's ultimate ruling on a motion to suppress evidence. However, we review its factual findings for clear error." *People v Barbarich*, 291 Mich App 468, 471; 807 NW2d 56 (2011) (citation omitted). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.* (quotation marks and citation omitted).

People v Davis, 442 Mich 1, 10; 497 NW2d 910 (1993). Further, "an occupant of an [sic] hotel or motel room is also entitled to the Fourth Amendment protection against unreasonable searches and seizures." *Id*. citing *Stoner v California*, 376 US 483, 489-490; 84 S Ct 889; 11 L Ed 2d 856 (1964).

Two recognized warrant exceptions apply in this case. The first applicable exception is the plain view doctrine which "allows a police office to seize items in plain view if the officer is lawfully in the position to have that view and the evidence is obviously incriminating." *People v Galloway*, 259 Mich App 634, 639; 675 NW2d 883 (2003). "An item is obviously incriminatory, meaning its incriminating nature is immediately apparent, if without further search the officers have probable cause to believe the items are seizable." *People v Mahdi*, 317 Mich App 446, 462; 894 NW2d 732 (2016) (quotation marks and citation omitted).

The plain-view exception to the warrant requirement is applicable here because before even entering the room, an officer observed several incriminating items in plain view, including a crack pipe, a chore boy, and a corner tie containing what appeared to be narcotics. The incriminating nature of narcotics and narcotics paraphernalia was also immediately apparent. Similarly, while searching defendant's room for other occupants or victims, Officer Raby discovered the other narcotics and narcotics paraphernalia lying in plain view.

The Michigan Supreme Court has held that "immediately apparent means that without further search the officers have probable cause to believe the items are seizable." *People v Champion*, 452 Mich 92, 102; 549 NW2d 849 (1996) (quotation marks and citation omitted). The plain view exception to the warrant requirement allowed the police to seize the items from defendant's room. The officers were not required to be absolutely certain that the items were being used to commit a crime before seizing them. A reasonably prudent person, viewing the totality of the circumstances, could conclude that the items were being used in the commission of a crime. According, the items were properly seized.

The second applicable exception is the exigent circumstances exception which requires probable cause that the premises to be searched contains evidence or suspects and that the circumstances constituted an emergency leaving no time for a warrant. *Davis*, 442 Mich at 24. To qualify under the exception, "[t]he police must . . . establish the existence of an actual emergency on the basis of specific and objective facts indicating that immediate action is necessary to (1) prevent the imminent destruction of evidence, (2) protect the police officers or others, or (3) prevent the escape of a suspect." *People v Snider*, 239 Mich App 393, 408; 608 NW2d 502 (2000) (citation omitted).

Police were called to the hotel when the desk clerk viewed defendant in his room, waiving a gun, and talking. The officers also viewed defendant holding the gun, thrusting it forward, and jumping around like he was nervous and jittery. While outside defendant's room, they heard several thuds, "banging noise," and a "deep thud kind thing," which Officer Clark explained that it was like "you hit a pillow or something or you hit something that's like a body hit kind of thing." The officers had sufficient reason to conclude that the room might contain an

injured or threatened individual in need of immediate rescue and so, their entry was not improper. While in the room, Officer Raby observed crack cocaine, a crack pipe, baking soda, and a pillow with bullet holes and powder burns in plain view.[4] The officers' actions fell within the exigent circumstances and plain view exceptions to the warrant requirement. Accordingly, the trial court did not err by failing to suppress the evidence obtained from defendant's hotel room.

III. RIGHT TO COUNSEL

Defendant next contends that he was constructively denied the assistance of counsel when the trial court denied his request for substitution of counsel on the first day of trial. He argues that he was entitled to substitute counsel because there had been a complete breakdown in the relationship between defendant and defense counsel, and the trial court failed to inquire into the breakdown of the relationship. We disagree.[5]

The federal and State constitutions grant the right to counsel in all criminal prosecutions. US Const, Am VI; Const 1963, art 1, § 20. While an indigent defendant is guaranteed the right to counsel, a defendant is not necessarily guaranteed the attorney of his or her choice. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001), and is not entitled to substitution of appointed counsel merely because the defendant is dissatisfied with appointed counsel. *People v Bradley*, 54 Mich App 89, 95; 220 NW2d 305 (1974). However, a defendant is entitled to substitution of defense counsel if the discharge of the first attorney is for (1) good cause and (2) does not disrupt the judicial process. *People v Buie (On Remand)*, 298 Mich App 50, 67; 825 NW2d 361 (2012).

Good cause may exist when (1) the defendant and appointed counsel develop a legitimate difference of opinion regarding a fundamental trial tactic, (2) there has been a breakdown in communication and in the attorney-client relationship, or when (3) defense counsel has shown a lack of diligence or interest. *People v McFall*, 309 Mich App 377, 383; 873 NW2d 112 (2015). A defendant's mere lack of confidence in counsel or general unhappiness in counsel is not sufficient to establish good cause. *Id*. "Counsel's decisions about defense strategy, including what evidence to present and what arguments to make, are matters of trial strategy, and disagreements with regard to trial strategy or professional judgment do not warrant appointment of substitute counsel." *People v Strickland*, 293 Mich App 393, 398; 810 NW2d 660 (2011) (citations omitted).

On the first day of trial, defense counsel informed the court that defendant had some complaints that came up the day before trial. Specifically, counsel told the court that defendant

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[4] Officer Raby explained that baking soda was "used in the manufacturing of crack cocaine."

[5] A trial court's decision regarding a defendant's request for substitution of appointed counsel is reviewed for an abuse of discretion. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). A trial court abuses its discretion if its decision falls outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

wanted the case remanded to the district court for a new preliminary examination because according to defendant, the officer who testified during the preliminary examination perjured himself when he testified about the quantity of the drugs recovered from defendant's hotel room.[6] However, as counsel pointed out, the discrepancy was without material legal significance because each of the possible quantities of the controlled substances fell within the charged amounts. Counsel advised the court that he was fully prepared to try the case. The court informed defendant that the discrepancy is not a ground to remand the case back to the district court, rather, counsel could attack the officer's credibility during cross-examination. Thereafter, the following exchange occurred:

> [*Defendant*]. Technically, your Honor, I really wouldn't like to have [defense counsel] as my attorney because he has not discussed the case with me. He has not indicated what defenses we're going to be using and how those defenses are going to be used. And he hasn't been that cooperative with me.
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> *The Court*. Well, [defendant], this would be the fourth attorney that I've appointed for you. You've found fault with every attorney.
>
> [*Defendant*]. No, no, I didn't.
>
> *The Court*. Well, enough so that either you asked them to be dismissed or they asked to be dismissed.
>
> [*Defendant*]. They asked—yeah, they asked to be dismissed.
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> *The Court*. [Defense counsel], from my perspective, has done an excellent job. The motion that he has brought have been right on point. And so, I'm not going to appoint yet another attorney to represent you. We're here. We're ready to go. So we'll pull a panel right now.
>
> [*Defendant*]. Okay, your Honor. Well, let the record reflect that I'm being tried with an attorney that I do not want.
>
> *The Court*. The record will reflect that.

When defendant asserted that his counsel did not discuss the case with him, did not indicate what defenses were going to be used, and had not been cooperative with him, the trial

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[6] Defense counsel explained that he had just learned that defendant filed a motion for remand to the district court for a new preliminary examination on the basis that there was a discrepancy regarding the total mass of the seized narcotics between Officer Rochon's preliminary examination testimony and the findings of the toxicology lab. However, counsel explained that he did not believe that discrepancy was relevant because defendant was charged with possessing less than 25 grams of cocaine and heroin, and manufacturing less than 50 grams of cocaine, and either measurement of mass did not impact those charges.

court was obligated to "hear his claim and, if there is a factual dispute, take testimony and state his findings and conclusions." *People v Ginther*, 390 Mich 436, 442; 212 NW2d 922 (1973). In the present case, the court did not determine whether defendant's allegations were true and did not ask trial counsel to address the concerns. Rather, the court dismissed the request on the grounds that three other attorneys had previously been appointed for defendant, and that defense counsel had done "an excellent job." However, "[a] judge's failure to explore a defendant's claim that his assigned lawyer should be replaced does not necessarily require that a conviction following such error be set aside. *Ginther*, 390 Mich at 442. This is especially so where, as will be discussed in the treatment of defendant's standard IV brief, trial counsel proceeded to adequately represent defendant, was familiar with the facts of the case, thoroughly cross examined witnesses, and acted diligently to protect defendant's rights.[7]

IV. STANDARD 4 BRIEF

A. INEFFECTIVE ASSISTANCE OF COUNSEL

In his Standard 4 brief, defendant contends that trial counsel was ineffective for failing to consult defendant on trial strategy, for failing to obtain discovery from the prosecution, for failing to object to the admission of evidence during trial, and for arguing to the jury that defendant was guilty during his closing arguments. These arguments are without merit.[8]

A criminal defendant has the fundamental right to effective assistance of counsel. *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984). "However, effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Schrauben,* 314 Mich App 181, 190; 886 NW2d 173 (2016). "To establish that a defendant's trial counsel was ineffective, a defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Id.*

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[7] Defendant also contends on appeal that he was constructively denied the assistance of counsel. A constructive denial of counsel occurs when "counsel is provided but does nothing, that is, no actual assistance for the accused's defence [sic] is provided, in that counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. . . ." *People v Mitchell*, 454 Mich 145, 154; 560 NW2d 600 (1997), citing *United States v Cronic*, 466 US 648, 654, 659; 104 S Ct 2039; 80 L Ed 2d 657 (1984) (quotation marks and citation omitted). Given counsel's performance, this argument is without merit.

[8] To preserve a claim of ineffective assistance of counsel, a defendant must file a motion for a new trial or a *Ginther*[8] hearing to develop a record to support the claim. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Because defendant did not move for a new trial, nor did he request a *Ginther* hearing, our review is limited to the mistakes apparent from the record. *People v Heft*, 299 Mich App 69, 83; 829 NW2d 266 (2012).

Defendant argues that his trial counsel failed to consult with him regarding his case, but he has not provided any support for this claim with an offer or proof in form of an affidavit, nor has he explained how his counsel's actions prejudiced him. Rather, defendant has merely restated the grounds for his trial request for substitution of counsel. Therefore, defendant has failed to carry his burden to demonstrate that his trial counsel was ineffective in this regard. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Additionally, defendant argues that his trial counsel was ineffective for: (1) failing to obtain discovery in order to allow defendant to examine the narcotics seized from his room, (2) failing to obtain "toxicology reports" developed by the prosecution's expert witnesses, and (3) failing to object to the admission of the seized narcotics into evidence and the associated testimony of Officer Raby and Southfield Police Officer Kenneth Rochon concerning the discovery and collection of that evidence. Defendant asserts that the police provided perjured testimony during his trial regarding the quantity of narcotics seized from his room at the hotel.

Defendant has failed to explain how he was prejudiced or how his trial counsel erred by failing to pursue defendant's theory regarding the total mass of the narcotics. Indeed, the source of the discrepancy between the two measurements was revealed during trial, as Officer Rochon testified that he measured the narcotics seized from defendant's room in their packaging, and that the toxicology lab measured only the narcotics. Additionally, although defendant testified that the powder cocaine seized from his room did not belong to him, he admitted that the other drugs taken from the room, including the crack cocaine, belonged to him. Considering that defendant was ultimately convicted of possessing less than 25 grams of cocaine and had admitted during trial that he possessed a crack cocaine rock, defendant has failed to demonstrate how he was prejudiced by counsel's failure to pursue defendant's theory that the powder cocaine did not belong to defendant.

Defendant also argues that trial counsel's request for an instruction on possession of a controlled substance as an alternative to the manufacturing/delivery charge prejudiced him because he was convicted of that alternative charge. Defendant relies on *People v Gridiron (On Rehearing)*, 190 Mich App 366, 369-370; 475 NW2d 879 (1991), amended 439 Mich 880 (1991). However, that case does not support his claim. In *Gridiron*, counsel's request for an instruction on the alternative charge of possession was held ineffective because "there exists no rational reason why a defendant charged with possession with intent to deliver would want an instruction on simple possession unless a simple possession conviction would carry a lesser penalty." *Gridiron*, 190 Mich App at 369 (quotation marks and citation omitted). In defendant's case, the lesser included offense of possession did carry a lesser penalty. Possession of a controlled substance provides for a maximum penalty of four years' imprisonment, MCL 333.7401(2)(a)(*v*), while the manufacture of a controlled substance carries a maximum penalty of 20 years' imprisonment, MCL 333.7401(2)(a)(*iv*).

In a related argument, defendant contends that he was denied the effective assistance of counsel because trial counsel stated during closing arguments that defendant was guilty of some charges. However, this approach was a reasonable strategy and was successful.

In his testimony, defendant admitted that the crack cocaine, the crack pipe, the push rod, corner ties from a baggie with residue on it baking soda, and a cigar tool recovered from the

room belonged to him. He also admitted to cooking cocaine in the hotel room and smoking it with the crack pipe. Defendant asserted that he intended to personally use the rock of crack cocaine found in the hotel. Defendant also admitted that the effect of the drugs causes him to be "somewhat deranged" and admitted having the gun. During closing arguments, trial counsel argued that defendant was guilty of possession of less than 25 grams of cocaine, not manufacturing of less than 50 grams of cocaine, because defendant had no intent to sell the crack cocaine to other people. Counsel also argued that defendant was also guilty of possession of heroin and felon-in-possession but was not guilty of felony-firearm because defendant was not in a proper state of mind at that time, and thus, he could not knowingly possess a firearm. Accordingly, defendant's trial counsel's losing argument was in accord with defendant's trial testimony and resulted in an acquittal on the manufacturing charge. Defendant has not shown that counsel's actions were not sound trial strategy.

B. PROSECUTORIAL MISCONDUCT

Defendant contends that the prosecutor secretly colluded with defendant's trial counsel to secure defendant's convictions, and the prosecutor used false evidence and perjured testimony during trial. We disagree.[9]

The role and responsibility of a prosecutor is to seek justice, not merely to convict. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). A defendant's opportunity for a fair trial can be jeopardized when a prosecutor turns from this responsibility by interjecting issues broader than the guilt or innocence of the accused. *Id.* at 63-64. Prosecutorial misconduct issues are decided on a case-by-case basis. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Dobek*, 274 Mich App at 63.

The only evidence defendant provides in support of his claim that the prosecutor and his trial counsel colluded with one another is that trial counsel did not object to the admission of the evidence taken from defendant's room. Defendant contends that because the collusion between his trial counsel and the prosecutor was the result of a secret agreement, there is little evidence of collusion in the record. Beyond failing to demonstrate that his trial counsel improperly colluded with the prosecutor, defendant's contention disregards the actions trial counsel undertook to undermine the prosecution's case. Defendant's trial counsel moved to suppress the evidence collected from defendant's room at the hotel, adequately represented defendant's interests by his thorough cross examination of the witnesses, and argued successfully to the jury that defendant

[9] Where issues of prosecutorial misconduct are preserved, this Court reviews them de novo to determine whether the defendant was denied a fair and impartial trial. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004). Because defendant failed to object to the alleged prosecutorial errors, we review the unpreserved issues for plain error affecting defendant's substantial rights. *Id.* If plain error is shown, reversal is only warranted when it resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

was not guilty of manufacture or delivery of a controlled substance; rather, consistent with defendant's testimony, that defendant was guilty of possession of controlled substance. We find no record evidence of any collusion between the prosecutor and trial counsel.

Similarly, we find no merit in defendant's contention that the prosecutor used false evidence and false testimony because there was inconsistent testimony regarding the total mass of narcotics recovered from defendant's room during the preliminary examination and during the trial. "It is well established that 'a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction. . . .' " *People v Smith*, 498 Mich 466, 475-476; 870 NW2d 299 (2015) (citation omitted). However, it is defendant's burden to demonstrate that the evidence or testimony was in fact false. See *People v Bass*, 317 Mich App 241, 272; 893 NW2d 140 (2016) (holding that the defendant failed to show that the testimony elected by the prosecution was actually false). "Although an inconsistent prior statement may be a mechanism to impeach a witnesses' credibility at trial, it is not definitive evidence that the trial testimony is false." *Id*. at 275.

Notably, during the preliminary examination, Officer Rochon testified that a total of 14 grams of narcotics were recovered from defendant's room. A report completed by the police toxicology lab stated there was a lesser quantity. During trial, Officer Rochon explained that the discrepancy resulted from his measuring the narcotics in their packaging while the toxicology department measured the narcotics alone. Defendant has provided no evidence to support his claim that the narcotics evidence was false other than the aforementioned inconsistent testimony regarding the total mass of the narcotics. Therefore, defendant's claim of false evidence and testimony fails because he has failed to carry his burden to demonstrate that the evidence or testimony was in fact false.

Affirmed.

/s/ Patrick M. Meter
/s/ David H. Sawyer
/s/ Douglas B. Shapiro