STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 16, 2019
v	No. 343390 Tuscola Circuit Court
EDWARD DONTAE FORTE, Defendant-Appellant.	LC No. 17-014153-FC

Before: TUKEL, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of delivery of a controlled substance causing death, MCL 750.317a, and delivery of a controlled substance less than 50 grams, MCL 333.7401(2)(a)(*iv*). The trial court sentenced defendant as a second-offense habitual offender, MCL 769.10, to concurrent prison terms of 15 to 40 years for the delivery causing death conviction and 15 to 30 years for the delivery less than 50 grams conviction. Defendant appeals as of right, and we affirm.

On April 19, 2017, Emily Dennis died of an overdose. She had several drugs in her system, including fentanyl, hydrocodone, morphine, and Xanax. It was determined that the combination of drugs caused her death, as each contributed to the slowing of her brain, heart, and breathing. Earlier that day, Dennis had purchased heroin from defendant.

I. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the evidence was insufficient to convict him of delivery of a controlled substance causing death because the evidence did not demonstrate that the drugs he sold to Dennis killed her. This Court reviews de novo a challenge to the sufficiency of the evidence. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). Due process requires that evidence of every element of a crime be proved beyond a reasonable doubt in order to sustain a criminal conviction. *People v Hampton*, 407 Mich 354, 366; 285 NW2d 284 (1979), citing *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970). To determine if the prosecutor produced evidence sufficient to support a conviction, this Court considers "the evidence in the light most favorable to the prosecutor" to ascertain " 'whether a rational trier of

fact could find the defendant guilty beyond a reasonable doubt.' " *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010), quoting *People v Hardiman*, 466 Mich 417, 429; 646 NW2d 158 (2002). Direct and circumstantial evidence, as well as all reasonable inferences that may be drawn, are considered to determine whether the evidence was sufficient to sustain the defendant's conviction. *Hardiman*, 466 Mich at 429.

MCL 750.317a provides, in relevant part:

> A person who delivers a schedule 1 or 2 controlled substance . . . to another person in violation of . . . MCL 333.7401 . . . that is consumed by that person or any other person and that causes the death of that person or other person is guilty of a felony punishable by imprisonment for life or any term of years.

MCL 750.317a "punishes an individual's role in placing a controlled substance in the stream of commerce, even when that individual is not directly linked to the resultant death." *People v Plunkett*, 485 Mich 50, 60; 780 NW2d 280 (2010). In order to convict a defendant of delivering a controlled substance causing death, the prosecutor must prove beyond a reasonable doubt "(1) the defendant's *act* of delivering a controlled substance in violation of MCL 333.7401 and (2) the *effect* that a person died as a result of consuming the controlled substance." *People v McBurrows*, 322 Mich App 404, 413; 913 NW2d 342 (2017). "Thus, MCL 750.317a is properly understood as providing a penalty enhancement when a defendant's criminal *act*—the delivery of a controlled substance in violation of MCL 333.7401—has the *result* or *effect* of causing a death to any other individual." *Id*.

The evidence established that on April 19, 2017, Dennis drove with Tyler Meffer, who had past dealings with defendant, to meet defendant and purchase heroin from him. Meffer stated that Dennis bought a gram of heroin for $140 from defendant at around 4:00 p.m. while they were parked next to defendant in Saginaw. After driving roughly an hour to the home of Dennis's boyfriend, Adam Maxson, Maxson prepared the heroin and injected himself as well as Dennis. Maxson believed that the heroin was stronger than usual; he had a seizure and after hiding the drugs and paraphernalia, was transported via ambulance to a hospital. Dennis and Maxson returned to Maxson's home at about 10:17 p.m. Maxson's memory of what occurred next at the home was "fuzzy," but he recalled that he awoke around midnight to find Dennis lying next to him, unresponsive. The drugs and paraphernalia he had hidden were back on the table, and Maxson surmised that he must have injected her again. Efforts to revive Dennis were unsuccessful.

Defendant argues that the evidence did not demonstrate that the heroin caused Dennis's death because the toxicology reports showed that Dennis had taken a number of other drugs, including fentanyl, hydrocodone, morphine, and Xanax. Defendant is correct that Tuscola Medical Examiner Kanu Virani, M.D., testified to the presence of these drugs. Virani stated that the levels of Xanax (97 nanograms/ml) and fentanyl (12 nanograms/ml) were high and that morphine (18 nanograms/ml) and hydrocodone (19 nanograms/ml) also were present in the blood. Virani elaborated that the Xanax level was toxic, rather than fatal. But Virani also explained that heroin appears as morphine when it enters a body, so the jury could infer that the morphine in Dennis's system was due to the heroin she bought from defendant and ultimately used. Michele Glinn, Ph.D., a forensic toxicology expert, testified that the 18 nanograms/ml of

morphine was not a huge number but that its effect on Dennis depended on how long before testing she took it, as well as her frequency of use, or tolerance. However, Glinn stated that the 12 nanograms/ml of fentanyl was pretty high and associated with unconsciousness, while the 19 nanograms/ml of hydrocodone was in the therapeutic level. Glinn said that the 97 nanograms/ml of Xanax was at the top of the therapeutic range and could have been a toxic but not lethal level. Both medical experts determined that it was the combination of drugs that was fatal, and both explained that there was no way to determine any single drug as the sole cause of death.

The evidence did not demonstrate beyond a reasonable doubt that the heroin Dennis obtained from defendant was *the single cause* of her death. Nonetheless, the evidence demonstrated that the heroin was *a cause* of death. MCL 750.317a states that the controlled substance must "cause[] the death of that person," rather than stating that the controlled substance must be the exclusive or only cause of death. Similarly, *McBurrows*, 322 Mich App at 413, states that the controlled substance must have "the *effect* that a person died as a result of consuming" it, referencing a cause rather than the exclusive cause of death. Given that both medical experts concluded that it was a combination of drugs, including heroin, that killed Dennis, and that there was not a single identifiable drug that caused the death, the evidence was sufficient to allow a jury to conclude beyond a reasonable doubt that the heroin Dennis obtained from defendant caused her death.

It should be noted that defendant's argument only references heroin. However, a reasonable fact-finder also could have found that the heroin defendant supplied contained fentanyl. Michigan State Police forensic scientist Elaine Dougherty stated that the presence of heroin and fentanyl was detected on a spoon from the drug bag Maxson identified as his. Michigan State Police Detective Sergeant Andrew Feehan stated that adding fentanyl to heroin should lengthen and strengthen the effect of the heroin and that it was common to mix or "step on" pure heroin with another substance prior to selling it so that the seller's heroin supply would last longer. Defendant said during a police interview that he thought the heroin he was selling had been "stepped on." Virani testified that fentanyl was highly lethal and that there had been a "several hundred percent increase" in fatal cases of mixing heroin and fentanyl; Glinn also testified that fentanyl is 50 to 100 times more potent than morphine. Glinn stated that illicit drug dealers have been adding fentanyl to heroin, causing frequent overdose fatalities. With this evidence, coupled with the presence of fentanyl in Dennis's system, one could reasonably infer that the heroin that Dennis acquired from defendant contained fentanyl, which contributed to her death.

Defendant also argues that the heroin could not have caused Dennis's death because she took it several hours before her death. Maxson testified that he injected Dennis between 5:00 p.m. and 6:30 p.m. Thus, there were possibly several hours between the time Dennis took the heroin and her death. However, Maxson noted that the spoons and needles that he had put away earlier were back on the table, and he thought that he had probably used heroin with Dennis after they returned from the hospital because he would have been the person retrieving the paraphernalia. Additionally, heroin and a high level of fentanyl remained in Dennis's blood at the time she died. Virani did explain that in 70 to 80 percent of cases, he can tell that the morphine found in the body entered as heroin because the metabolic product 6 MAM is present, but both Virani and Glinn indicated that the absence of 6 MAM did not mean that morphine from heroin could be ruled out. Thus, the absence of 6 MAM did not demonstrate that the heroin was

not active in Dennis's blood at the time of her death. When viewed in favor of the prosecution, a rational juror could have determined that the evidence and reasonable inferences demonstrated beyond a reasonable doubt that the heroin which defendant supplied to Dennis caused her death.

II. SCORING OF OFFENSE VARIABLE 6

Defendant also argues that the trial court improperly assessed offense variable (OV) 6 at 50 points when it should have been assessed at zero points. However, we decline to address this argument because defendant has waived it.

At sentencing, the prosecutor objected to the assessment of OV 6 at zero points, arguing that it should have been assessed at 50 points. At the trial court, defendant did not claim that the OV should have been assessed at zero points; instead, defense counsel simply stated that "we'd be leaving this in the court's discretion." The trial court thereafter scored the OV at 50 points.

Unlike a forfeiture, which is a failure to assert a known right, a waiver is the "intentional relinquishment or abandonment of a known right," and it extinguishes any error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000) (quotation marks and citation omitted). "When defense counsel clearly expresses satisfaction with a trial court's decision, counsel's action will be deemed to constitute a waiver." *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011). In *People v Sardy*, 313 Mich App 679, 719; 884 NW2d 808 (2015), vacated in part on other grounds 500 Mich 887 (2016), this Court determined that a defendant waived an issue for appeal where his trial attorney commented that he would "leave it to the Court's discretion" whether to admit certain testimony. Thus, consistent with *Sardy*, defendant here, by not contesting the scoring of OV 6 and affirmatively allowing the trial court to score the OV as it saw fit, waived his right to appeal the assessment of OV 6.

III. VENUE

Finally, defendant argues that venue was improper and that his trial counsel provided ineffective assistance by failing to object to the venue. Unpreserved claims are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Reversal is warranted only if the plain error resulted in the conviction of an innocent defendant or if "the error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence." *Id.* Claims of ineffective assistance of counsel that are unpreserved are limited to review for errors apparent on the record. *People v Unger*, 278 Mich App 210, 253; 749 NW2d 272 (2008). The constitutional question of whether an attorney's ineffective assistance deprived a defendant of his Sixth Amendment right to counsel is reviewed de novo. *Id.* at 242.

Venue is the location, or forum, at which a trial is held. *People v Webbs*, 263 Mich App 531, 533; 689 NW2d 163 (2004). Venue is generally proper "in the county where the crime was committed." *People v Houthoofd*, 487 Mich 568, 579; 790 NW2d 315 (2010). Where there are "special circumstances where justice demands or statute provides," a trial court may move venue to another county. *Unger*, 278 Mich App at 254. "Venue is a part of every criminal prosecution and must be proved by the prosecutor beyond a reasonable doubt." *Webbs*, 263 Mich App at 533.

Here, defendant sold the controlled substance in Saginaw County. Dennis later died of the drug overdose in Tuscola County, and the trial was held in Tuscola County. The crime of delivery of a controlled substance causing death was complete when the delivery of the drug was complete, rather than when the result of the crime that determines the punishment, the death, occurred. *Plunkett*, 485 Mich at 60; *McBurrows*, 322 Mich App at 413. In *McBurrows*, this Court found that venue was improper in the county where the victim died of a drug overdose when the drug was delivered in a different county. *Id*. at 414. Thus, in this case, venue was proper where the crime occurred: Saginaw County. However, "criminal venue is inherently procedural in nature," and a conviction "cannot be vacated solely on grounds of improper venue." MCL 600.1645[1]; *Houthoofd*, 487 Mich at 591. "[L]ack of proper venue is subject to a harmless error analysis" to determine if the venue error "undermine[d] the reliability of the verdicts." *Houthoofd*, 487 Mich at 590-591; see also MCL 769.26[2]. Here, there is no evidence or argument that the improper venue undermined the reliability of the verdict. Thus, defendant has not shown how any error was anything but harmless.

Regarding defendant's ineffective assistance claim, a defendant's right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963 art 1, § 20. This "right to counsel encompasses the right to the effective assistance of counsel." *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). In order to demonstrate an ineffective assistance of counsel claim, a defendant must show (1) "that counsel's performance was deficient" and (2) "that counsel's deficient performance prejudiced the defense." *People v Taylor*, 275 Mich App 177, 186; 737 NW2d 790 (2007). The performance will be deemed to have prejudiced the defense if it is reasonably probable that but for counsel's error, "the result of the proceeding would have been different." *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). The "effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Assuming counsel's performance fell below an objective level of reasonableness by not objecting to venue, defendant still is not entitled to a new trial because he has not established any prejudice. Here, defendant was convicted on the basis of evidence that (1) he sold heroin to Dennis, (2) Maxson injected Dennis with the heroin, and (3) the heroin, in combination with other drugs, caused Dennis's death. This evidence would not have been altered if heard by a jury

[1] "No order, judgment, or decree shall be void or voidable solely on the ground that there was improper venue." MCL 600.1645.

[2] MCL 769.26 provides: "No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice."

in an adjacent county. Thus, defendant has not established the necessary prejudice in order to succeed on his claim of ineffective assistance of counsel.

Affirmed.

/s/ Jonathan Tukel
/s/ Kirsten Frank Kelly
/s/ Michael J. Kelly