STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 24, 2013
v	No. 310325 Oakland Circuit Court
MARCUS MANDELLE KELLEY, Defendant-Appellant.	LC No. 2011-236105-FH

Before: SAAD, P.J., and SAWYER and JANSEN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of delivery of 50 grams or more, but less than 450 grams, of cocaine, MCL 333.7401(2)(a)(*iii*), two counts of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(*iv*), and one count of conspiracy to deliver 50 grams or more, but less than 450 grams, of cocaine, MCL 750.157a; MCL 333.7401(2)(a)(*iii*). He was sentenced, as a fourth habitual offender, MCL 769.12, to 9 to 40 years' imprisonment for each count. We affirm defendant's convictions and sentences and remand to correct a clerical error on the judgment of sentence.

This case arises from defendant's having sold crack cocaine to a police informant on four occasions from January 26, 2011, to February 3, 2011. Defendant first argues that the prosecution presented insufficient evidence on the element of identity to sustain his convictions. We disagree.

In criminal cases, due process requires that the evidence must have shown the defendant's guilt beyond a reasonable doubt. *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010). This Court examines the lower court record de novo, in the light most favorable to the prosecution, to determine whether a rational trier of fact could have found that the evidence proved each element of the crime beyond a reasonable doubt. *Id.*

The elements of delivery of 50 grams or more, but less than 450 grams, of cocaine are (1) defendant's delivery; (2) of 50 grams or more, but less than 450 grams; (3) of cocaine or a mixture containing cocaine; (4) with knowledge that he was delivering cocaine. *People v Collins*, 298 Mich App 458, 462; 828 NW2d 392 (2012) (applying the same elements to delivery of heroin). Identity is an element of every offense. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). Circumstantial evidence and reasonable inferences arising therefrom may constitute proof of the elements of the crime. *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010).

Defendant argues that the prosecution presented insufficient evidence on the element of identity. Michael Zion, the informant who purchased crack cocaine from defendant, testified that he recognized defendant's voice on the telephone each time a purchase was arranged. On four occasions, he personally saw defendant hand him what a laboratory would confirm to be crack cocaine. Immediately before two of the exchanges, Zion witnessed defendant weighing and packaging the drugs. During the fourth transaction, Zion lingered about five feet away in defendant's kitchen while defendant "cooked" cocaine to convert it from powder form to crystalline or "rock" form. Before the first purchase, at a gas station, Oakland County Sheriff's Office Detective Mark Ferguson identified defendant as the driver and only passenger of the car in which the exchange was made. As he listened to each transaction using a recording device Zion carried with him, Ferguson identified defendant's voice, and observed that he heard nothing that sounded like "anything other than a drug deal."

Defendant notes that Zion was motivated by an interest in seeking leniency for his own shoplifting offense and appeared nervous at trial, but the jury was presumably aware of each, and the jury is the ultimate arbiter of witnesses' credibility. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). Defendant argues that, because Ferguson admitted that he did not perform a "detailed" search of Zion's car, which would have taken "days," before and after each purchase, there was a substantial likelihood that Zion had hidden contraband in his car. Assuming defendant were correct, the question is one of the weight of the evidence, which the jury is meant to resolve. See *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012).

Generally, a person "who conspires together with 1 or more persons to commit an offense prohibited by law" may be "punished by a penalty equal to that which could be imposed if he had been convicted of committing the crime he conspired to commit . . . ." MCL 750.157a(a); *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001). Zion's testimony that defendant directed one of the men in the house to physically search Zion, and that the man acquiesced, was sufficient to sustain defendant's conviction for conspiracy to deliver more than 50 grams, but less than 450 grams, of cocaine, MCL 750.157a; MCL 333.7401(2)(a)(*iii*), because defendant's instruction and the other man's compliance could reasonably have been interpreted as having been motivated by the desire to protect the retail narcotics business in which the men were engaged.

Defendant argues, in his Standard 4 brief, that he received ineffective assistance of counsel. We disagree.

To preserve a claim of ineffective assistance of counsel, the defendant must move, in the trial court, for a new trial or an evidentiary hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). Failure to do so limits this Court's review to errors apparent on the record. *Id.* Defendant's claims that his trial counsel failed to object to Ferguson's testimony regarding the contents of audio recordings, failed to investigate and call potential witnesses, and failed to file a motion for speedy trial violations were each raised in his motion for a new trial and are preserved. However, his claim that his trial counsel did not consult him before filing a motion to suppress evidence and agreed to have two charges dismissed is not preserved, as that argument is raised for the first time on appeal. "Whether [a] defendant was denied the effective assistance of counsel presents a mixed question of fact and constitutional law. We review for clear error a

circuit court's findings of fact. We review de novo questions of constitutional law." *People v Vaughn*, 491 Mich 642, 650; 821 NW2d 288 (2012).

The United States and Michigan Constitutions guarantee criminal defendants the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Meissner*, 294 Mich App 438, 459; 812 NW2d 37 (2011). "To establish ineffective assistance of counsel, defendant must first show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Uphaus*, 278 Mich App 174, 185; 748 NW2d 899 (2008).

Defendant must overcome a strong presumption that counsel's actions were the product of sound trial strategy. *People v Brown*, 294 Mich App 377, 388; 811 NW2d 531 (2011). Defense counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," *Vaughn*, 491 Mich at 670, and is given "wide discretion in matters of trial strategy," *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). "Decisions regarding whether to call or question witnesses are presumed to be matters of trial strategy." *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). Declining to raise objections can often be consistent with sound trial strategy, and effective assistance does not require trial counsel to make futile objections. *People v Unger*, 278 Mich App 210, 242, 256-257; 749 NW2d 272 (2008).

Defendant argues that his trial counsel was ineffective for failing to object when Ferguson testified, on direct examination and redirect examination, with respect to what he heard while audio of the narcotics transactions was transmitted using a hidden recording device. Defendant contends that Ferguson's answers were hearsay. Because none of the answers to which defendant refers were hearsay, as explained below, trial counsel was not ineffective for failing to raise a futile objection. *Unger*, 278 Mich App at 256-257.

Defendant argues that his trial counsel was ineffective for failing to call a potentially exculpatory witness. He states that he received "a written letter from the girlfriend of [Zion]" that "could establish[] that defendant and [Zion] . . . kn[e]w each other[, w]hich was in direct contrast to testimony given by [Zion]." In fact, Zion testified that he established communication with Ferguson *because* he knew defendant. He said that defendant would sell him crack cocaine, and that defendant's name was "Marc," each of which turned out to be correct. The letter, then, would have established nothing of import. Even if it did, defendant has not rebutted the presumption that failure to call Zion's girlfriend as a witness was a matter of trial strategy. See *Russell*, 297 Mich App at 716.

Defendant also argues that his trial counsel failed to introduce, at trial, the fact that the license plate on the car defendant was seen driving was associated with a different make and model and registered to an out-of-state owner. Here, too, the underlying issue is meritless, as explained below; counsel's failure to present this information to the jury was presumptively a decision of trial strategy, and defendant has not rebutted that presumption. See *Brown*, 294 Mich App at 388.

Defendant argues that his trial counsel failed to assert his right to a speedy trial. Criminal defendants have a constitutionally guaranteed right to a speedy trial. US Const, Am VI; Const 1963, art 1, § 20. See also MCL 768.1; MCR 6.004(A); *People v Williams*, 475 Mich 245, 261; 716 NW2d 208 (2006). Whether a defendant has been denied the right to a speedy trial is determined by application of a test that balances four factors: (1) the length of delay, (2), the reason for delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. *Id.* at 261-262. The time for judging whether a defendant's constitutional right to a speedy trial has been violated runs from the date of the defendant's arrest, and prejudice is presumed following a delay of 18 months or more. *Id.* "A delay that is under eighteen months requires a defendant to prove that the defendant suffered prejudice." *People v Cain*, 238 Mich App 95, 112; 605 NW2d 28 (1999)

Defendant was arrested on February 3, 2011, and the first day of trial was February 6, 2012, a delay of about 12 months. Because the delay between defendant's arrest and the first day of trial was less than 18 months, there is no presumption of prejudice, and defendant has not explained how he was prejudiced by the delay. Thus, his constitutional right to a speedy trial was not violated. "Failing to advance a meritless argument . . . does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

With respect to the 180-day rule, MCR 6.004(D) provides:

> (1) [T]he inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint. . . .

See also MCL 780.131(1); *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860 (2003). Because "the purpose of the statutory 180-day rule [is] to dispose of untried charges against prison inmates so that sentences may run concurrently," the rule "applies only to those defendants who, at the time of trial, are currently serving in one of our state penal institutions, and not to individuals awaiting trial in a county jail." *McLaughlin*, 258 Mich App at 643. Because defendant was held on bond at the Oakland County Jail before trial, he was not entitled to relief under MCL 780.131(1), and his trial counsel was not obligated to pursue a meritless argument. *Ericksen*, 288 Mich App at 201.

Defendant claims that his trial counsel provided ineffective assistance by filing a motion to suppress evidence based on an invalid warrant and stipulated to the dismissal of two charges without consulting defendant. Attorneys must consult with their clients on "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal," *Florida v Nixon*, 543 US 175, 187; 125 S Ct 551; 160 L Ed 2d 565 (2004), but "[t]he adversary process could not function effectively if every tactical decision required client approval," *Taylor v Illinois*, 484 US 400, 418; 108 S Ct 646; 98 L Ed 2d 798 (1988). Further, this issue is not preserved for appellate review, and defendant has not shown that his substantial rights were affected by any error, or that he was prejudiced by the stipulation his trial counsel procured. See *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999). Far from being ineffective, counsel's motion to suppress evidence and the ensuing dismissal of two charges from the general information were to defendant's gain.

Defendant argues, in his Standard 4 brief, that police and prosecutorial misconduct deprived him of a fair trial. We disagree.

"Generally, an issue is not properly preserved unless a party raises the issue before the trial court and the trial court addresses and decides the issue." *People v Cameron*, 291 Mich App 599, 617; 806 NW2d 371 (2011). "In order to preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object." *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Because defendant raises this issue for the first time on appeal, it is not preserved for appellate review.

"Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights." *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011). A plain error affects a defendant's substantial rights if the error affected the outcome of the proceedings. *Vaughn*, 491 Mich at 665. "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." *Unger*, 278 Mich App at 235. Reversal is not required "where a curative instruction could have alleviated any prejudicial effect. Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements." *Id.*

POLICE MISCONDUCT

The exclusionary rule "reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also evidence later discovered and found to be derivative of an illegality or 'fruit of the poisonous tree.'" *People v Frazier*, 478 Mich 231, 247 n 17; 733 NW2d 713 (2007). The rule is "a harsh remedy designed to sanction and deter police misconduct where it has resulted in a violation of constitutional rights." *Id.* at 247-248 (internal citations and quotations omitted). This "judicially created rule is not designed to act as a personal constitutional right of the aggrieved party," and "[a]pplication of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *Id.* at 248-249 (internal citations and quotations omitted).

Defendant's first misconduct-related argument is that Ferguson falsely testified that he checked the license plate number of the car he saw defendant driving on the day of the first arranged purchase against a law-enforcement database. Defendant maintains that, had Ferguson actually looked up the license plate number, he would have found that number associated with a different make and model car registered to an Ohio owner. Because the license plate number on which Ferguson performed a search is not in the lower court record, it is not possible to determine the veracity of Ferguson's testimony. However, Ferguson did say that it was highly unusual for "drug dealers" to use automobiles registered in their real names. When the prosecutor asked him, "So the fact that that Cadillac didn't register to [defendant] didn't give you any cause for concern?", Ferguson responded, "[I]n the . . . richer communities, sometimes a car comes back to the seller . . . but [in] Pontiac, never." Had the jury heard evidence that the license plate on the silver Cadillac was registered to another owner, it would have processed that information in light of Ferguson's statement, based on his 12 years' experience investigating dealers of narcotics, that such dealers rarely used cars registered to them. Therefore, defendant cannot show that he was prejudiced by any error.

Defendant argues that Ferguson falsely claimed, in the affidavit accompanying the search warrant, that he had supervised a narcotics purchase from defendant "within 48 hours" of the date of the February 3, 2011, affidavit, when the last purchase he had overseen as of the date of the affidavit was on January 28, 2011. Defendant filed a motion to suppress "all evidence seized pursuant to the [search w]arrant . . . ," executed immediately following the February 3, 2011, purchase, raising the same issue. The parties filed a stipulation dismissing counts four (delivery of less than 50 grams of cocaine, MCL 333.7401[2][a][*iv*]), and seven (resisting and obstructing a police officer, MCL 750.81d[1]) of the general information.

However, defendant has not shown that Ferguson included any deliberately false statements in his affidavit accompanying the search warrant. "The defendant has the burden of showing, by a preponderance of the evidence, that the affiant knowingly and intentionally, or with a reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to the finding of probable cause." *People v Waclawski*, 286 Mich App 634, 701; 780 NW2d 321 (2009). Because the body of the affidavit was printed, and the signature and date were handwritten, the affidavit's statement that "[t]he last purchase [was] within the past 48 hours" may have been accurate when typed. Even if the statement was an intentional falsehood and necessary to the finding of the probable cause, defendant has not met his burden, under the plain-error test, of showing that any error affected the outcome of the trial, because no issue related to the search warrant was raised during trial.

PROSECUTORIAL MISCONDUCT

"Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Defendant claims, first, that the prosecution knew or should have known that Ferguson gave false and/or misleading testimony regarding the car registration. As explained above, however, defendant has not shown that any of Ferguson's testimony was false or misleading. Therefore, there was nothing for the prosecution to rectify.

Defendant makes two arguments with respect to the forensic laboratory tests on the crack cocaine Zion purchased from defendant. The first is that Zion "states that he was buying cocaine, but the only thing presented in evidence was 'crack.'" To the extent this is a serious argument,[1] its premise is factually inaccurate, since Zion testified that he told Ferguson he "could purchase crack cocaine." Defendant's second argument with respect to the laboratory tests on the crack cocaine is that each exhibit contained minute discrepancies between the amount Ferguson and Zion said they arranged to purchase and the weight of each exhibit according to the laboratory technician. This argument fails for several reasons. The technician testified that the weight of each exhibit was reduced in order to test a small sample therefrom. There is no record of Ferguson or anyone else having weighed the purchases immediately after Zion turned them over, so no reliable comparison can be made between the amounts Zion requested from

[1] Cocaine, in all of its forms, is a schedule two controlled substance. Michigan law does not distinguish between powdered cocaine and crack cocaine for the purpose of delivery of a controlled substance. MCL 333.7214(a)(*iv*).

defendant and what he actually received, though, perhaps not coincidentally, the differences were in the seller's favor in each case. None of the discrepancies was so substantial that it would have triggered a lower maximum penalty. Finally, the jury heard Ferguson's and Zion's testimony regarding the amounts of crack cocaine they arranged to purchase, and it heard the laboratory technician's testimony regarding the weight of each of the four samples. Questions concerning the weight of the evidence are to be resolved by the finder of fact. *Eisen*, 296 Mich App at 331.

Defendant argues that the prosecution should have prevented Ferguson from describing hearsay statements from the audio recordings of the four narcotics transactions Ferguson overheard in real time. Hearsay is an out-of-court *statement* offered to prove the truth of its assertion. MRE 801(c); *People v Grissom*, 492 Mich 296, 325 n 3; 821 NW2d 50 (2012). Defendant cites the following portions of Ferguson's testimony on direct examination and redirect examination:

> *Q.* Okay. And again, you were listening in to the deal?
>
> *A.* Yes.
>
> * * *
>
> *Q.* Okay. Now, on this particular day, on February 3rd, you were listening to the transaction?
>
> *A.* Yeah. . . . I heard over the recording device that they were, I guess, searching [Zion] or they were getting hanky with him[.] I heard them throw him against the wall[;] at that point I was getting a little nervous.
>
> * * *
>
> *Q.* Now, when you were listening to any of those narcotics transactions, were you able to hear voices?
>
> *A.* Yes.
>
> * * *
>
> *Q.* Were you able to identify the defendant's voice?
>
> *A.* Oh, without a doubt, yes.
>
> *Q.* Now, did anything that you heard on either of those four deals . . . sound [like] anything other than a drug deal?
>
> *A.* No.

Because none of Ferguson's responses contain any of Zion's statements, they were not hearsay. For that reason, the prosecutor's questions were not misconduct.

Defendant's final ineffective-assistance argument is that the prosecution suppressed phone records that would have allowed him to refute allegations that the narcotics purchases were initiated by phone contact between defendant and Zion. Defendant does not explain why he could not have subpoenaed the records, there is no record evidence that the prosecution withheld any exculpatory evidence, and defendant proposes no alternative explaining how the transactions were actually initiated. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *People v Schumacher*, 276 Mich App 165, 178; 740 NW2d 534 (2007).

Defendant argues, in his Standard 4 brief, that the cumulative effect of several errors deprived him of a fair trial. We disagree.

"We review this issue to determine if the combination of alleged errors denied defendant a fair trial." *Dobek*, 274 Mich App at 106. "The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit reversal, but the cumulative effect of the errors must undermine the confidence in the reliability of the verdict before a new trial is granted." *Id*. However, if no errors have been established, "there can be no cumulative effect of errors meriting reversal." *Id.*

Defendant argues he was denied effective assistance of counsel, the "controlled buys" were improperly executed, Ferguson and Zion provided false testimony with respect to the affidavit supporting the search warrant and the vehicle registration[2] that the prosecution did not cure, and Ferguson and the prosecution improperly suppressed the registration information that would have shown that the car defendant was seen driving was not registered to him. All of these issues were addressed in the preceding discussion. Because each argument lacks merit, there is no cumulative effect of errors that requires reversal.

Defendant's convictions and sentences are affirmed. We remand with instructions to correct the judgment of sentence to reflect defendant's minimum sentences of nine years, not nine months. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Kathleen Jansen

[2] Defendant claims that "Ferguson . . . claimed to see defendant driving [the car] on one occasion and state[d] the same vehicle was parked in the driveway during each alleged controlled buy," but does not explain how that testimony was false, and, if it was false, how defendant was prejudiced by it.