

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STANLEY CODY,

Defendant-Appellant.

UNPUBLISHED

March 2, 1999

No. 202039

Kalamazoo Circuit Court

LC No. 96-0069 FH

Before: Whitbeck, P.J., and Cavanagh and Griffin, JJ.

PER CURIAM.

Defendant Stanley Cody was convicted of possession with intent to deliver cocaine in an amount of 225 grams or more but less than 650 grams, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii). Defendant appeals as a matter of right. We affirm.

This case arises from a drug transaction that took place on September 15, 1995. Defendant admitted receiving the drugs from a police officer disguised as a Federal Express employee. However, he contended that he acted out of fear of drug dealers in California who had threatened to harm his son.

Defendant contends that the trial court abused its discretion in allowing evidence of marijuana growing at defendant's house and evidence that he possessed ephedrine. A motion to suppress the evidence of marijuana was filed. However, before the trial court issued its ruling on the motion, defendant indicated he had no objection to the introduction of the evidence. Defendant did not preserve this claim for appeal. *People v Sawyer*, 215 Mich App 183, 195-196; 545 NW2d 6 (1996). When defendant objected at trial to the testimony of the officer who found the marijuana, his objection went to whether the evidence was improper drug profile evidence. An objection on one ground at trial is insufficient to preserve an argument on appeal. *People v Winchell*, 171 Mich App 662, 665; 430 NW2d 812 (1988). Because defendant failed to properly object to any of the evidence, reversal is required only to avoid manifest injustice. *People v Turner*, 213 Mich App 558, 583; 540 NW2d 728 (1995). We see no manifest injustice in admission of evidence that defendant grew marijuana when defendant raised a duress defense and claimed that he had stopped using drugs before the delivery for which he was convicted. In addition, defendant refers to the prosecutor's opening statement. This was not contained in defendant's statement of questions presented; it has not been preserved for appeal.

People v Price, 214 Mich App 538, 548; 543 NW2d 49 (1995). Defendant refers in his statement of questions to a claim of ineffective assistance of counsel. However, he makes no argument on this issue. The issue has been abandoned. *People v Anderson*, 209 Mich App 527, 538; 531 NW2d 780 (1995).

Defendant next argues that the prosecutor committed misconduct by shifting the burden of proof in both his opening statement and closing argument when he commented on defendant's duress defense. Defendant failed to object to either comment. As a result, review of his claim is precluded from review by this Court unless failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Defendant's complaint centers on the prosecutor's opening statement when he said that, given the evidence against defendant, "How does he hope to make you, as reasonable people, find him not guilty?" The prosecutor then told the jury that defendant was raising a duress defense and went on to explain what constituted duress. Where a defendant advances an alternative theory of the case that, if true, would exonerate the defendant, comment on the validity of the theory cannot be said to shift the burden of proving innocence to the defendant. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). In his closing argument, the prosecutor commented on defendant's failure to introduce corroborating evidence. A prosecutor may comment if a defendant who has put on a defense has failed to call corroborating witnesses. *Id.* No manifest injustice exists. Just as in his first argument, defendant refers in his statement of questions to a claim of ineffective assistance of counsel. However, he makes no argument on this issue. The issue is therefore abandoned. *Anderson, supra* at 538.

Defendant contends that the trial court erred in allowing the testimony of several police officers, Kozal, Belen, Matyas, Richardson, and Marcilletti, that defendant fit the profile of a mid-level drug dealer and that items seized in the search of his house were consistent with a mid-level drug operation. We disagree. The record contains no testimony that defendant himself fit a profile. As to the significance of evidence found by police, five witnesses testified about what they found and what it signified. Defendant failed to object to the testimony of two of the witnesses, Belen and Matyas. In addition, defendant's objection at trial to the testimony of Kozal was that it was "an attempt to inflame the jury." This is not the same as his complaint on appeal. *Winchell, supra*, 665. We will not review the testimony of these witnesses in the absence of manifest injustice. *People v Burton*, 219 Mich App 278, 292; 556 NW2d 201 (1996). Kozal testified that the street value of the drugs would be at least \$60,000. We see nothing in this evidence that constitutes drug profile evidence. Belen and Matyas testified as to the marijuana and \$60,000 in cash found in defendant's house, barn, and garage. Belen said that in his opinion, the marijuana was grown for sale. Matyas testified that the money, \$60,000 found in the trunk of a car and \$1,500 found in a tool box, was typical for drug sales. Matyas also testified as to the significance of scales found by police. This testimony was admissible to explain to jurors the significance of the items seized. *People v Hubbard*, 209 Mich App 234, 239; 530 NW2d 130 (1995). Defendant objected to the testimony of Richardson and Marcilletti, the officers who found defendant's marijuana operation and the money. We review the admission of this evidence to determine if the court abused its discretion. *Id.* at 243. Richardson testified that he concluded defendant had a grow operation because of the number of plants, the high-intensity grow lights he found, and the starter trays in the house. This evidence was material because, as a part of his defense, defendant was claiming

that he was not using drugs and had withdrawn from the drug trade. The prosecution was entitled to rebut this claim. Marcilietti testified as to the significance of the scales and the money. This evidence goes to the significance of items found, not to a drug profile. We see no abuse of discretion in the admission of this evidence.

Defendant also argues that the trial court abused its discretion in allowing rebuttal testimony from Kozal, Belen, Matyas, and Kirtley. He acknowledges that he did not object to the testimony of Kozal, Belen, or Matyas. Defendant objected to the testimony of Kirtley, but on the grounds that statements he made to the U.S. Attorney could be rebutted only by cross-examining him. This differs from his argument on appeal. We will grant review in cases of unpreserved error only where the failure to review the question would result in manifest injustice. *People v Hoffman*, 205 Mich App 1, 20; 518 NW2d 817 (1994). The test for admissibility of rebuttal evidence is whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant. *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). Defendant took the stand on his own behalf. The testimony of each of these witnesses went to rebut a material portion of defendant's testimony. We see no manifest injustice.

Defendant contends that the trial court abused its discretion in refusing to depart from the twenty-year minimum sentence. We disagree. First, defendant did not provide this Court with a copy of the presentence investigation report. Accordingly, defendant has not preserved this issue for review. MCR 7.212(C)(6); *People v Oswald*, 208 Mich App 444, 446; 528 NW2d 782 (1995). Even if we review the existing record, though, we would find no error. Defendant was sentenced to a mandatory twenty- to thirty-year term. MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii). The court may depart downward from the minimum term if it finds on the record that there are substantial and compelling reasons to do so. MCL 333.7401(4); MSA 14.15(7401)(4). This Court reviews the trial court's findings concerning the existence or nonexistence of a factor for clear error. *People v Fields*, 448 Mich 58, 77; 528 NW2d 176 (1995). We review a finding that a factor is objective and identifiable de novo as a matter of law. *Id.*, 78. We review the court's conclusion as to whether there are substantial and compelling reasons for a downward departure for abuse of discretion. *Id.* at 78. The court articulated six factors it was considering. Defendant challenges four of those findings. He claims the trial court's conclusion that it could not consider defendant's cooperation with police was clearly erroneous. In view of the totality of factors regarding the offense and offender, we conclude that error, if any, in failing to consider defendant's cooperation with the police was harmless. Despite some assistance, the evidence showed that defendant had lied to police on several occasions during their investigation. In addition, defendant's age, employment record, and criminal history were not substantial and compelling factors. Defendant was forty-two years old at the time of trial. He had a spotty work history, with no recorded income for the seven years before trial. In addition, the drug delivery in this case was clearly one of several defendant had received. Each of these factors was objective and verifiable. *Id.* After thorough review, we conclude that the trial court did not abuse its discretion in ruling that there were not substantial and compelling reasons to depart from the presumptive minimum sentence. *Fields, supra.*

Defendant has filed two briefs in propria persona, each raising one issue. In his first brief, he claims he was denied effective assistance of counsel. We disagree. Defendant did not obtain a hearing to make a testimonial record to support his claim. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Review of his claim is foreclosed unless the record contains sufficient detail to support his position. *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996). Defendant must show that (1) counsel's standard was below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceedings would have been different. *Stanaway, supra* at 687-688. Defendant contends that counsel was ineffective because counsel advised him to testify that he personally used the marijuana he grew. Defendant testified at trial that the marijuana was for his wife's use, to cut her craving for cocaine. The record does not show what else, if anything, counsel advised regarding this testimony. Claims of ineffective assistance must be supported by the record. *People v Armstrong*, 124 Mich App 766, 770; 335 NW2d 687 (1983). We cannot consider this claim. In addition, defendant claims that counsel failed to introduce evidence that the scales seized by police were antiques. In fact, defendant testified that the scales were antiques. The record does not show what else, if anything, could have been admitted. See *Dixon, supra* at 408-409. We cannot conclude counsel was ineffective.

In his second brief in propria persona, captioned "In pro per Issue III," defendant claims the trial court erred in overruling his motion to suppress. We disagree. A trial court's findings in ruling on a motion to suppress are reviewed for clear error; however, the decision to grant or deny a motion to suppress is reviewed de novo. *People v Darwich*, 226 Mich App 635, 637; 575 NW2d 44 (1997). In reviewing the sufficiency of an affidavit, this Court must determine whether the information contained in the document could have caused a reasonably cautious person to conclude that there was a sufficient showing of probable cause that the evidence sought might be found in a particular location. *People v Russo*, 439 Mich 584, 603-604; 487 NW2d 698 (1992). Defendant challenged a search of the Federal Express package that contained the drugs before it was delivered to defendant. He challenges the averments in the affidavit as to a drug-sniffing dog, which detected the drugs while the package was still on the delivery truck. The affidavit contained information as to the dog's certification and the number of drug discoveries it had made. Generally, all that is necessary to find the dog's alert to be reliable is evidence of the dog's training and current certification. *People v Clark*, 220 Mich App 240, 244; 559 NW2d 78 (1996). We see nothing lacking in the affidavit in this case.

Affirmed.

/s/ William C. Whitbeck
/s/ Mark J. Cavanagh
/s/ Richard Allen Griffin