

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRY LEE WHITEHORN,

Defendant-Appellant.

UNPUBLISHED

August 21, 2008

No. 278899

Allegan Circuit Court

LC No. 06-015025-FH

Before: Cavanagh, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial conviction of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), for which he was sentenced as a second drug offender, MCL 333.7413(2), to a term of 40 months to 40 years in prison. We affirm. This appeal has been decided without oral argument. MCR 7.214(E).

Defendant was convicted of delivering cocaine to a police informant, Ben Drake. Detective Craig Gardiner testified that he worked with Drake to arrange a controlled buy from defendant. Gardiner overheard Drake's telephone conversation with defendant, during which Drake and defendant set up a meeting at the riverfront. Gardiner provided Drake with \$100 in recorded bills. Gardiner searched Drake before the meeting, followed him as he rode on a bicycle to the riverfront, and observed defendant arrive in the area as a passenger in a car. Defendant's vehicle stopped and a man identified as Leslie Haist approached and exchanged something with defendant through the window.¹ The car then spun around and came back. Drake approached the passenger side and Gardiner observed his hand go in and out of the car, consistent with a drug transaction. Afterward, defendant's car left the area.

Gardiner followed Drake to a designated meeting place. At the meeting place, Drake gave Gardiner a baggie of crack cocaine. After the meeting, the police stopped the car in which defendant was riding and arrested him on an unrelated outstanding warrant. Defendant was carrying \$630, including the recorded bills that Gardiner had given to Drake before the

¹ The jury acquitted defendant of an additional charge of delivering cocaine to Haist.

transaction. While defendant waited in the back of a police car, he made recorded statements in which he recognized that he had been caught delivering cocaine. Drake did not testify at trial.

Defendant testified that he met with Drake because Drake owed him \$100. He claimed that he spoke briefly with Haist and then received the money from Drake that was owed. He denied engaging in any drug transactions. Defendant also attempted to explain away his recorded statements in the police car.

Defendant's sole argument on appeal relates to the following colloquy during the testimony of Detective Gardiner:

Q. When you got to the meet[ing] spot then what happened?

A. I met with Mr. Drake, he got off the bike, he handed me a baggie that had a white rock in it, it looked like cocaine to me from all the cocaine that I've seen, [and he] said that [h]e bought it from Terry Whitehorn—

[*DEFENSE COUNSEL*]: I object your Honor as to hearsay.

THE COURT: Sustained.

Defendant argues that he was denied a fair trial because the jury was not told to disregard this hearsay testimony. He also argues that he was prejudiced because the jury was not informed that the trial court's act of sustaining the objection meant that the objectionable testimony was excluded. He asserts that defense counsel was ineffective for not moving to strike the testimony.

To establish ineffective assistance of counsel, a defendant must show his counsel's representation "fell below an objective standard of reasonableness" and must "overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). A defendant must also demonstrate prejudice, i.e., "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" *Id.* at 302-303 (citation and internal quotations omitted).

Counsel's failure to move to strike Gardiner's hearsay testimony concerning Drake's statement that he "bought it from Terry Whitehorn" was likely a strategic decision designed to avoid highlighting the objectionable portion of Gardiner's response. See *People v Griffin*, 235 Mich App 27, 37; 597 NW2d 176 (1999), overruled on other grounds *People v Thompson*, 477 Mich 146; 730 NW2d 708 (2007). Moreover, even assuming arguendo that the jury was not aware that the court's ruling meant that the testimony should not be considered, there is no reasonable probability that the result of the proceeding would have been different had counsel asked that the testimony be stricken. *Toma*, *supra* at 302-303. The substance of the hearsay statement was cumulative to Gardiner's own account of his observations and to other properly admitted evidence in this case. We perceive no ineffective assistance of counsel.

Defendant contends that Gardiner's hearsay statement was prejudicial because it corroborated Gardiner's own account of what occurred. However, because Gardiner, himself, was the source of the challenged hearsay testimony, we conclude that there was no prejudice.

After all, if the jury had not found Gardiner's own testimony and observations about the controlled buy to be credible, then it would have equally discredited his hearsay testimony regarding the alleged statement by Drake. In short, Gardiner's hearsay testimony concerning Drake's alleged statement did not make Gardiner's own account more credible than it would have been in the absence of the challenged hearsay.

Contrary to defendant's argument, the trial court's failure to strike the testimony and give a curative instruction was not plain error. The court may have concluded that defense counsel preferred not to draw the jury's attention to the statement. See, e.g., *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). Moreover, the absence of an instruction to disregard Gardiner's hearsay testimony concerning Drake's alleged statement did not affect defendant's substantial rights because, as previously explained, there is no reasonable likelihood that the testimony affected the outcome of trial. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly