

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTWON LAMONT BIFFLE,

Defendant-Appellant.

UNPUBLISHED

April 9, 2009

No. 280344

Oakland Circuit Court

LC Nos. 2006-211368-FH;

2006-211549-FH

Before: Murray, P.J., and Gleicher and M.J. Kelly, JJ.

PER CURIAM.

The prosecution charged defendant in two separate cases, circuit court docket numbers 2006-211368-FH and 2006-211549-FH, which the trial court consolidated and tried together. In circuit court number 2006-211368-FH, a jury convicted defendant of delivering between 50 and 450 grams of cocaine on September 21, 2006, MCL 333.7401(2)(a)(iii), possessing between 25 and 50 grams of cocaine on October 5, 2006, MCL 333.7403(2)(a)(iv), and conspiring with codefendant Mark Christian to deliver or possess with intent to deliver between 50 and 450 grams of cocaine between August 1, 2006 and October 5, 2006, MCL 333.7401(2)(a)(iii); MCL 750.157a.¹ The trial court sentenced defendant as a third habitual offender, MCL 769.11, to concurrent terms of 18 to 40 years in prison for these convictions.

In circuit court number 2006-211549-FH, the same jury convicted defendant of two counts of delivering less than 50 grams of cocaine on August 15, 2006 and August 29, 2006, MCL 333.7401(2)(a)(iv), and conspiring with codefendant Emmanuel Madden to deliver or possess with intent to deliver less than 50 grams of cocaine between August 1, 2006 and October 5, 2006, MCL 333.7401(2)(a)(iv); MCL 750.157a.² The trial court sentenced defendant as a

¹ Christian was charged with conspiracy to deliver or possess with intent to deliver between 50 and 450 grams of cocaine, delivery of between 50 and 450 grams of cocaine, and delivery of less than 50 grams of cocaine. Christian pleaded guilty to these charges before defendant's trial and the trial court sentenced him to a three-year term of probation.

² The prosecution charged Madden with conspiracy to deliver or possess with intent to deliver less than 50 grams of cocaine, delivery of less than 50 grams of cocaine, and possession with intent to deliver less than 50 grams of cocaine. Madden pleaded no contest to these charges and the trial court sentenced him to a two-year term of probation.

third habitual offender to concurrent terms of 18 to 40 years in prison for each conviction. Defendant appeals as of right. We affirm defendant's convictions and sentences, but for the sentence imposed with respect to Count 3 in circuit court # 2006-211368-FH, with respect to which we remand for further proceedings.

I. Ineffective Assistance of Counsel

Defendant first complains that his cocounsel at trial, Howard Siegrist and H. Wallace Parker, provided ineffective assistance in several respects. Whether a defendant has received the effective assistance of counsel presents "a mixed question of fact and constitutional law." *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). This Court considers de novo the involved issues of constitutional law, but reviews for clear error any underlying factual findings by the trial court. *Id.* at 484-485.

To establish ineffective assistance of counsel, a defendant generally must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that he was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 302-303, 308-327; 521 NW2d 797 (1994). With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate the reasonable probability that but for counsel's errors the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair and unreliable. *Id.* at 312, 326-327; *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). The defendant must overcome the strong presumptions that his counsel rendered effective assistance and that his counsel's actions represented sound trial strategy. *Id.* at 714-715.

A

Defendant first criticizes the soundness of Siegrist's pretrial motion to suppress defendant's custodial statements, in which defendant admitted to selling Christian cocaine four times and confirmed many other details of the charged cocaine transactions. Siegrist theorized that the trial court could exclude the statements if it found that the police fabricated them. Siegrist suggested that in reaching a determination regarding whether defendant made the custodial statements, the trial court could entertain the results of a polygraph test administered to defendant. Ultimately, the trial court rejected this proposal. Even were we to assume, as the trial court believed, that Siegrist's claims lacked legal support, nothing in the record suggests that Siegrist's arguments negatively impacted defendant's right to a fair trial. *Rodgers, supra* at 714. Siegrist made his arguments outside the presence of the jury, which was not yet empanelled, and the record gives rise to no reasonable inference that the arguments biased the trial court against defendant. To the contrary, the trial court demonstrated a willingness to consider Siegrist's positions if he supported them with relevant authority. Our review of the record indicates that the trial court remained impartial and unbiased throughout the trial. Because Siegrist's presentation of the motion to suppress occasioned no prejudice to defendant, we reject this claim of ineffective assistance.

B

Defendant insists that Siegrist ineffectively failed to pursue a *Walker*³ hearing to evaluate the voluntariness of his custodial statements. He suggests that the trial court would have presumed involuntariness because the police did not record his interview on audiotape or videotape and he refused to sign the waiver of constitutional rights form. “A statement obtained from a defendant during a custodial interrogation is admissible only if the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights.” *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003). The prosecutor bears the burden of proving voluntariness by a preponderance of the evidence, taking into account the following nonexhaustive list of relevant factors:

“(T)he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.” [*Id.*, quoting *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).]

The available record gives rise to no indication that defendant involuntarily waived his Fifth Amendment rights when he offered his custodial statements. The record substantiates that defendant, currently 31 years of age, successfully graduated from high school. As reflected by defendant’s status as a third habitual offender, he had prior contact with the police before giving the custodial statements at issue in this case. The police interview lasted for 30 to 40 minutes, a relatively short duration. Defendant received a form documenting his *Miranda*⁴ rights and initialed the waiver form. The interviewing detectives did not record the interview because the interview room lacked recording capabilities. But both participating detectives denied that they abused defendant physically or threatened him with abuse. Nothing in the record suggests that defendant experienced abuse or threatened abuse, that he felt “injured, intoxicated or drugged, or in ill health when he gave the statement,” or that the police “deprived [him] of food, sleep, or medical attention.” *Akins, supra* at 564. Given the overwhelming evidence of voluntariness, and the extremely high likelihood that the trial court would have denied a motion to suppress, Siegrist was not ineffective for failing to pursue a groundless motion to suppress premised on an involuntariness contention. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

³ *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965).

⁴ *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

C

Defendant additionally avers that Siegrist failed to inform him of the outcome of the motion to suppress his custodial statements. According to defendant, he believed Siegrist's representations that the defense would prevail at trial because he (1) did not understand that his custodial statements would be used against him, and (2) assumed that the court would admit his polygraph test results at trial.

Defendant suffered no prejudice arising from Siegrist's purported failure to explain the import of the trial court's ruling at the motion to suppress hearing because the record reflects that defendant appeared at the hearing with counsel and heard the trial court reject Siegrist's position that polygraph test results would not preclude the admissibility of defendant's custodial statements at trial. *Rodgers, supra* at 714. Defendant also knew or should have known that the prosecutor could introduce his custodial statements against him at trial because he initialed the waiver of rights form communicating this information. Furthermore, defendant knew or should have understood that the court would not admit the polygraph test results at trial because the court so advised Siegrist at the suppression hearing, and Siegrist acknowledged this fact.

In a related complaint, defendant asserts that Siegrist neglected to inform him before trial of the wealth of evidence incriminating him. However, the record belies defendant's expression of unawareness that substantial evidence against him existed. Defendant appeared at his preliminary examination, where three officer members of the narcotics team that participated in and surveyed several cocaine transactions testified in detailed fashion concerning their observations of the charged offenses. With respect to defendant's similar complaint that Siegrist unreasonably expected him to "easily prevail at trial," we observe that Siegrist and Parker presented at trial several alibi witnesses, including defendant, in support of his position that he had no involvement in the charged drug sales or conspiracy. Siegrist's and Parker's presentation of an alibi defense did not fall below an objective standard of reasonableness in criminal defense representation, and this Court will not evaluate Siegrist's expectations for success with the benefit of hindsight. *Grant, supra* at 485. Although defendant claims that he would have pleaded guilty if Siegrist had accurately evaluated the case, our review of the trial court record reveals no evidence of any plea offer, and defendant does not articulate any such offer on appeal. Consequently, defendant has not demonstrated that he suffered prejudice arising from Siegrist's alleged mistaken evaluation of the case. *Rodgers, supra* at 714.

Defendant similarly maintains that his attorneys failed to disclose the possibility that he could seek a *Cobbs*⁵ agreement. No evidence in the trial court record tends to substantiate that the court would have accepted a *Cobbs* agreement containing lesser sentences than those eventually imposed. Furthermore, the prosecution denies that it ever offered defendant a *Cobbs* agreement. In summary, defendant has neither overcome the strong presumption that his counsel reasonably conducted his defense, nor demonstrated how any prejudice would have altered the outcome of the proceedings or deprived him of a fair trial. *Grant, supra* at 485-486; *Rodgers, supra* at 714.

⁵ *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

D

Defendant next avers that Siegrist conducted himself in an incompetent and bizarre fashion, citing Siegrist's remark near the end of the pretrial suppression hearing, "[H]ave a nice blood test, your Honor." Siegrist's sentiment presumably intended to wish the court well on a personal matter, does not amount to conduct falling below an objective standard of reasonableness, and did nothing toward rendering defendant's trial unfair. *Grant, supra* at 485-486; *Rodgers, supra* at 714.

E

Defendant also characterizes Siegrist as ineffective for "object[ing] without basis" to the admission of the cocaine that Christian sold to undercover Detective-Sergeant Scott Salter. Early during the trial when the prosecution moved to admit the cocaine, the first prosecution exhibit, an objection to its admissibility did not qualify as groundless; the cocaine arguably lacked foundation because no evidence had yet connected it to defendant. *People v Furman*, 158 Mich App 302, 331; 404 NW2d 246 (1987) (observing that a proper foundation for the admission of physical evidence requires that the evidence be what it is purported to be and also have a connection with the crime or the accused). Siegrist's objection seeking to dissociate defendant from the cocaine remained consistent with his planned alibi defense. Although the trial court overruled Siegrist's objection, his performance did not fall below an objective level of reasonableness, and this Court will not in hindsight second-guess Siegrist's strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Furthermore, because the trial court instructed the jury that its rulings on the parties' objections should not influence the jury's interpretation of the evidence, defendant endured no imaginable prejudice arising from Siegrist's overruled objection. *People v Lueth*, 253 Mich App 670, 687; 660 NW2d 322 (2002) (noting that a jury presumably follows the trial court's instructions).

F

Concerning defendant's suggestion that Siegrist failed to comprehend basic information regarding the case, he cites two transcript excerpts. First, shortly after Siegrist began cross-examining Detective Sergeant Salter, he made several incorrect references to Christian as "Christenson." We discern no conceivable prejudice to defendant arising from Siegrist's minor name misstatement, especially in light of the fact that after the prosecution corrected Siegrist, he properly referred to Christian. Second, in the course of questioning a chemist, who testified that she had detected cocaine in the samples the police provided her, Siegrist inquired how her testing of items purportedly relevant to defendant could have occurred in April 2007 if the police investigation of defendant began "no earlier than August 15, of 2007[?]" Siegrist's lone misstatement of 2007 instead of 2006 likewise did not occasion any prejudice to defendant, primarily because he and Parker accurately elicited evidence supporting the defense positions that (1) Detective-Sergeant Salter did not personally meet with defendant in the course of purchasing cocaine on August 1, 2006, August 15, 2006, August 29, 2006, September 21, 2006, or October 5, 2006, and (2) two of defendant's coworkers recalled working with him six days a week between summer 2006 and October 2006. *Rodgers, supra* at 714.

G

Defendant next challenges Siegrist's effectiveness for not supporting a motion to dismiss duplicate conspiracy charges with legal authority. The record reflects that Siegrist did cite an authority indecipherable in the transcript, but that the trial court rejected it as "old law." Regardless, had Siegrist pursued the motion with more relevant authority, it still would have failed.

It appears from the record that Siegrist intended to raise a double jeopardy argument against the two conspiracy charges. With regard to codefendant Christian, the prosecution charged defendant and Christian with conspiring to deliver or possess with intent to deliver between 50 and 450 grams of cocaine from August 1, 2006 to October 5, 2006.⁶ The prosecution introduced some evidence tending to establish that defendant and Christian shared the specific intent to further a single scheme or plan—an ongoing operation to supply cocaine to Christian's new buyer, undercover Detective-Sergeant Salter. To further this ongoing operation, defendant provided Christian, in total, over 100 grams of cocaine on August 1, 2006, August 15, 2006, August 29, 2006, and September 21, 2006. Other evidence concerning the police search of defendant's fiancée's condominium on October 5, 2006 showed that he possessed 27.72 grams of cocaine, which the prosecution urged defendant intended for future delivery. The prosecution thus appropriately charged defendant for conspiring with Christian to deliver or possess with intent to deliver between 50 and 450 grams of cocaine over the time period at issue. *People v Justice (After Remand)*, 454 Mich 334, 351-358; 562 NW2d 652 (1997), citing *People v Porterfield*, 128 Mich App 35; 339 NW2d 683 (1983).

However, the prosecution could not have included defendant's charged conspiracy with Madden in the charge against defendant for delivery or possession with intent to deliver between 50 and 450 grams of cocaine. The record contains no evidence that Madden knew of the full scope of defendant and Christian's ongoing operation to sell to Detective-Sergeant Salter. The evidence demonstrated that Madden only had involvement on August 15, 2006, when he agreed to deliver 27.58 grams of cocaine because defendant could not make it to the meeting with Christian. The prosecution thus properly charged defendant separately for conspiring with Madden to deliver or possess with intent to deliver less than 50 grams of cocaine.

Because the two conspiracy charges involved different coconspirators, Christian and Madden, and different quantities of cocaine, between 50 and 450 grams and less than 50 grams, they did not constitute the same offense under the "same elements" test, and did not infringe on defendant's constitutional double jeopardy protections. *United States v Dixon*, 509 US 688, 696-

⁶ A conviction of conspiracy to deliver or possess with the intent to deliver cocaine requires the prosecutor to prove: "(1) the defendant possessed the specific intent to deliver the statutory minimum as charged, (2) his coconspirators possessed the specific intent to deliver the statutory minimum as charged, and (3) the defendant and his coconspirators possessed the specific intent to combine to deliver the statutory minimum as charged to a third person." *People v Justice (After Remand)*, 454 Mich 334, 349; 562 NW2d 652 (1997).

697; 113 S Ct 2849; 125 L Ed 2d 556 (1993); *People v Smith*, 478 Mich 292, 315-316; 733 NW2d 351 (2007). Consequently, Siegrist was not ineffective for failing to further develop this meritless argument with relevant authority. *Ackerman, supra* at 455.

In a related contention, defendant insists that Siegrist should not have pursued the motion to dismiss after he withdrew it and the trial court denied it. The record reveals no hint that Siegrist's manner of presenting the motion, which occurred outside the jury's presence, biased the trial court against defendant. The trial court delayed ruling on Siegrist's motion on several occasions, but when the prosecution rested and the trial court ultimately denied the motion, Siegrist deferred to the court's decision. Absent defendant's demonstration of prejudice, Siegrist was not ineffective on this ground. *Grant, supra* at 485-486; *Rodgers, supra* at 714.

H

Defendant asserts that Siegrist and Parker failed to pursue discovery requests, specifically Parker's motion for a Bill of Particulars. Parker's motion intended to clarify before trial the nature and dates of the charged offenses. The record reflects that both Parker and Siegrist sought and received this clarification during separate motion hearings. Because defendant inaccurately complains that counsel failed to pursue the motion, we reject this claim of ineffectiveness.

I

Defendant alleges that his counsel inexcusably failed to impeach Detective-Sergeant Salter's and Detective Brian Bastianelli's trial testimony with certain facts revealed during the preliminary examination. Siegrist elicited testimony from Detective-Sergeant Salter making clear that he never purchased cocaine from defendant directly, and only dealt with Christian. Parker cross-examined Christian at length in an attempt to discredit his identification of defendant as his supplier on the grounds that Christian was a long-term drug addict, and that Christian had a strong motive to testify against defendant, specifically that he hoped to receive a very lenient sentence in exchange for his trial testimony. Parker also sought to undermine Detective Bastianelli's identification of defendant at trial by highlighting the more than 200-foot distance from which Bastianelli had observed defendant, eliciting that the Chevy Tahoe defendant allegedly had driven had darkly tinted windows, and reminding Bastianelli of his preliminary examination account that on one occasion he observed only a brown-skinned arm inside the Tahoe exchange suspected cocaine for cash. In summary, defense counsel diligently sought to challenge the trial testimony identifying defendant, in a fashion that remained consistent with his alibi defense, and we will not second guess his attorneys' sound trial strategies in these regards. *Rice, supra* at 445. Furthermore, even absent Detective-Sergeant Salter's and Detective Bastianelli's trial testimony, sufficient evidence existed for the jury to reasonably find defendant guilty of all the charged offenses beyond a reasonable doubt because Christian testified to his drug transactions with defendant on the charged dates, and defendant confirmed the cocaine sales in his custodial statement.

J

Defendant contends that Siegrist and Parker failed to offer at trial an exculpatory statement by Madden. Madden handwrote a brief note stating in its entirety, "I got a rid [sic] by my sill [sic] and went to dill [sic] with mark sold him a oz[.] I had 5 grams in the house Terase

she did not no [sic] it was there.” Madden was unavailable to testify at defendant’s trial because he invoked his Fifth Amendment right against self-incrimination. Nonetheless, Madden’s out-of-court statement against his penal interest may have avoided the hearsay rule and been admissible at trial. *People v Barrera*, 451 Mich 261; 547 NW2d 280 (1996). But defendant has not established any significant prejudice from his counsels’ failure to offer Madden’s statement. The statement would not have exculpated defendant, given that Madden confirmed Christian’s and Detective Bastianelli’s testimony that Madden delivered cocaine to Christian on one occasion. Madden’s additional statement that he stored five grams in a house does not discount or weaken the evidence connecting 27.72 grams of cocaine in defendant’s fiancée’s condominium to defendant. And given the wealth of evidence against defendant, he cannot show any reasonable probability that the outcome of his trial would have differed but for his counsels’ failure to offer Madden’s statement, or that the failure deprived him of a fair trial. *Grant, supra* at 486; *Rodgers, supra* at 714.

K

Defendant lastly asserts as ineffectiveness Siegrist’s and Parker’s failure to request an addict-informer jury instruction with respect to Christian. A trial court should read the addict-informer credibility instruction “where the testimony of the addict-informant is the only evidence linking the defendant to the alleged offense.” *People v Griffin*, 235 Mich App 27, 40; 597 NW2d 176 (1999) (internal quotation omitted), overruled on other grounds in *People v Wright*, 477 Mich 1121; 730 NW2d 720 (2007), and *People v Thompson*, 477 Mich 146, 148; 730 NW2d 708 (2007).

Defense counsels’ alleged neglect in requesting the addict-informer instruction did not fall below an objective standard of reasonableness. The trial court would have refused to read the addict-informer instruction in this case, primarily because Christian’s testimony had corroboration at trial by abundant evidence, including defendant’s custodial statement and the testimony of Detective-Sergeant Salter and Detective Bastianelli. *Griffin, supra* at 40. Consequently, defense counsel were not ineffective for making a groundless request for the addict-informer instruction. *Ackerman, supra* at 455.⁷

II. Mere Presence Jury Instruction

Defendant next maintains that the trial court erred in refusing to read the jury the mere presence instruction, CJI2d 8.5. We consider de novo questions of law arising from jury instructions, but review for an abuse of discretion the “trial court’s determination whether a jury instruction is applicable to the facts of the case.” *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). We review jury instructions in their entirety to determine whether “they fairly present the issues for trial and sufficiently protect the defendant’s rights.” *People v McLaughlin*,

⁷ Defendant additionally submits in his appellate brief that Siegrist argued with the trial court. Defendant fails to cite instances from the record substantiating this claim, and offers no explanation how Siegrist’s behavior deprived him of a fair trial. Therefore, defendant has abandoned this argument on appeal. *People v Kevorkian*, 248 Mich App 373, 388-389; 639 NW2d 291 (2001).

258 Mich App 635, 668; 672 NW2d 860 (2003). “The instruction to the jury must include all elements of the crime charged . . . and must not exclude from jury consideration material issues, defenses or theories if there is evidence to support them.” *People v Moldenhauer*, 210 Mich App 158, 159; 533 NW2d 9 (1995) (internal quotation omitted). A trial court’s failure to give a requested instruction constitutes error requiring reversal only if the requested instruction “(1) is substantially correct, (2) was not substantially covered in the charge given to the jury, and (3) concerns an important point in the trial so that the failure to give it seriously impaired the defendant’s ability to effectively present a given defense.” *Id.* at 159-160.

The mere presence instruction provides, “Even if the defendant knew that the alleged crime was planned or was being committed, the mere fact that (he / she) was present when it was committed is not enough to prove that (he / she) assisted in committing it.” CJI2d 8.5. Even assuming that the charged controlled substance offenses render potentially appropriate a mere presence jury instruction, the content of this instruction substantially appeared in the charge given to the jury. *Moldenhauer, supra* at 159-160. The trial court advised the jury that defendant’s knowledge of the cocaine’s existence or presence did not suffice to prove possession, which required that he exercise control over the cocaine or have the right to control it. The court also advised the jury, “A finding that he was merely with other people who were members of a conspiracy, is not enough by itself to prove [defendant] was also a member.” Moreover, the mere presence instruction, which assumes that defendant was present with others during the commission of the charged offenses, would have contradicted defendant’s alibi defense theory. Given the contradiction, the mere presence instruction would not have been “substantially correct.” *Id.* We thus conclude that the trial court did not abuse its discretion in rejecting defendant’s request that it read the mere presence instruction.

III. Error in Judgment of Sentence

Lastly, we observe that the judgment of sentence the trial court entered in circuit court number 2006-211368-FH incorrectly documents in Count 3 that the jury convicted defendant of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv). The trial transcript and the jury’s verdict form consistently reflect that the jury actually found defendant guilty in Count 3 (number 2006-211368-FH) “of the lesser-included offense of Possession of Less Than 50 Grams of a Mixture Containing a Controlled Substance, Cocaine,” MCL 333.7403(2)(a)(iv). Accordingly, we “remand for the limited purpose of correcting the judgment of sentence” in this lone regard. *People v Avant*, 235 Mich App 499, 521; 597 NW2d 864 (1999). The trial court should also consider whether the accurately stated conviction in Count 3 under MCL 333.7403(2)(a)(iv) requires individualized resentencing.

We affirm defendant’s convictions and sentences in all respects, but for Count 3 in circuit court number 2006-211368-FH, concerning which we remand to the circuit court for ministerial correction of Count 3 in the judgment of sentence, and for resentencing if the court finds a different sentence warranted by law for the conviction under MCL 333.7403(2)(a)(iv). We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly