

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HARRY EARL PERRY,

Defendant-Appellant.

UNPUBLISHED

November 21, 2006

No. 260152

Calhoun Circuit Court

LC No. 04-000362-FH

Before: Murphy, P.J., and Meter and Davis, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of 50 to 224 grams of a controlled substance (cocaine), MCL 333.7403(2)(a)(3); three counts of possession of a firearm during the commission of a felony, MCL 750.227b; possession or use of a firearm by a convicted felon, MCL 750.224f; and possession of a controlled substance (marijuana) with intent to deliver, MCL 333.7401(2)(d)(3). The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11, to 120 to 480 months in prison for possession of a controlled substance, 24 to 120 months for possession or use of a firearm by a convicted felon, 36 to 96 months for possession of a controlled substance with intent to deliver, and two years for each count of felony-firearm. Defendant appeals as of right. We affirm.

On February 3, 2003, the Battle Creek Police Department executed a search warrant for defendant's home and property. After being taken into custody, defendant waived his right to remain silent, and detectives interrogated him in a large walk-in closet. During the interview, defendant confessed to having many guns and drugs in the home. Upon searching defendant's home, police recovered over twenty different firearms and large quantities of cocaine and marijuana.

Defendant first asserts on appeal that he was deprived of the effective assistance of counsel when counsel failed to file motions challenging the legality of the search warrant, the admissibility of defendant's statements to the police, and the alleged violation of the knock-and-announce rule. We disagree. A determination whether a defendant has been deprived of effective assistance of counsel is a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Factual findings are reviewed for clear error, while constitutional determinations are reviewed de novo. *Id.* Effective assistance of counsel is presumed, and a defendant has a heavy burden of proving otherwise. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). In order to establish ineffective assistance of

counsel, the attorney's performance must have been "objectively unreasonable in light of prevailing professional norms," and it must be shown that "but for the attorney's error or errors, a different outcome reasonably would have resulted." *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001).

Defendant first claims that counsel was ineffective for failing to challenge the legality and the basis of the search warrant. A search warrant may not be issued unless probable cause exists to justify the search. US Const, Am IV; Const 1963, art 1, § 11; MCL 780.651. Probable cause exists when the facts and circumstances would allow a person of reasonable prudence to believe that the evidence of a crime or the contraband sought is in the stated place. See *People v Kazmierczak*, 461 Mich 411, 417-418; 605 NW2d 667 (2000). Probable cause must be based on facts presented to the issuing magistrate by oath or affirmation. See *id.* at 417 n 3. If it is determined that an affiant has knowingly or with reckless disregard for the truth inserted false material into an affidavit and that the false material was necessary for a finding of probable cause, the search warrant must be quashed and the fruits of the search excluded at trial. *People v Melotik*, 221 Mich App 190, 200; 561 NW2d 453 (1997). A defendant may "challenge the truthfulness of factual statements" in an affidavit supporting a search warrant, even though there is a presumption that the affidavit is valid. *People v Turner*, 155 Mich App 222, 226; 399 NW2d 477 (1986).

"To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons." [*Id.* at 226-227, quoting *Franks v Delaware*, 438 US 154, 171; 98 S Ct 2674; 57 L Ed 2d 667 (1978).]

Here, defendant has not asserted how the affidavit used to obtain the search warrant ran contrary to the law. Defendant has not claimed or supported that the legality and basis for the search warrant were subject to a meritorious challenge. In fact, defendant admits to not knowing the content of the search warrant. Defendant's argument is based on speculation that the warrant affidavit may have contained false information. Under the circumstances, defendant has not met the burden of showing, by a preponderance of the evidence, that the affiant for the search warrant knowingly and intentionally, or with a reckless disregard for the truth, inserted false material into the affidavit. *People v Williams*, 240 Mich App 316, 319-320; 614 NW2d 647 (2000). Defendant has thus not demonstrated that his counsel's conduct in failing to challenge the legality and basis of the search warrant fell below an acceptable standard of reasonableness. His claim of ineffective assistance of counsel fails.

Defendant next contends that his counsel was ineffective for failing to challenge the admissibility of the statements defendant made to the police. "Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights." *People v Harris*, 261 Mich App 44, 55; 680 NW2d 17 (2004). In determining whether a statement is voluntary, courts are to examine the defendant's age, experience, education, background, and intelligence; the nature of the

questioning; and whether the defendant was injured or intoxicated when he made the statements. *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003).

Three different officers testified that defendant was read his *Miranda*¹ rights and that defendant understood and voluntarily waived those rights. Additionally, an advice of rights form was filled out, indicating that defendant understood and voluntarily waived his rights. Defendant's signature was not provided because he was handcuffed; however, in the space for defendant's signature, the words "signed" and "handcuffed and yes" were written. Moreover, the advice of rights form was signed by two different detectives, acting as witnesses. Like defendant's claims regarding the search warrant, defendant's claim is based on broad allegations. There is no evidence in the lower court record to suggest or support that defendant's statements were not voluntary. Therefore, counsel was not ineffective for failing to challenge the admissibility of these statements. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (counsel is not required to advocate a meritless position).

Defendant also argues that his counsel was ineffective for failing to file a pretrial motion to suppress evidence on the ground that it was seized in violation of the knock-and-announce statute. The Michigan knock-and-announce statute provides:

The officer to whom a warrant is directed, or any person assisting him, may break any outer or inner door or window of a house or building, or anything therein, in order to execute the warrant, if, after notice of his authority and purpose, he is refused admittance, or when necessary to liberate himself or any person assisting him in the execution of the warrant. [MCL 780.656.]

However, if "police officers have a basis to conclude that evidence will be destroyed or lives will be endangered by delay", or if events indicate that compliance with the knock-and-announce statute would be a useless gesture, "strict compliance with the statute may be excused." *People v Polidori*, 190 Mich App 673, 677; 476 NW2d 482 (1991).

Nothing in the lower court record suggests or supports that the police violated the knock-and-announce rule. Moreover, even if there was a violation, "the discovery of the evidence in the present case was inevitable, regardless of the [alleged] illegalities on the police officers' entry into defendant's home." *People v Stevens*, 460 Mich 626, 646; 597 NW2d 53 (1999). The knock-and-announce rule

is not meant to allow the defendant the time to destroy the evidence. In the present case, the police did not exceed the scope of the search warrant. Therefore, they would have discovered the contested evidence, unless the defendant had been afforded the opportunity to destroy the evidence. The timing of the police officers' entry into the home in no way affected the inevitability of the discovery of the evidence. [*Id.* at 647.]

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

A motion to exclude evidence under the knock-and-announce rule would have been without merit, and ineffective assistance of counsel has not been established. *Snider, supra*.

Defendant next argues that the trial court violated the United States and Michigan constitutions when sentencing defendant. We review unpreserved sentencing errors for plain error affecting substantial rights. *People v Meshell*, 265 Mich App 616, 638; 696 NW2d 754 (2005).

Defendant committed the crimes for which he was convicted before March 1, 2003, the date the sentencing structure for controlled substance cases was amended. As such, the prior sentencing structure was applicable to defendant's case. *People v Doxey*, 263 Mich App 115, 122; 687 NW2d 360 (2004). At the time defendant committed the instant offenses, MCL 333.7403(2)(a)(iii) provided a mandatory minimum sentence of ten years for defendant's crime of possession of 50 to 224 grams of cocaine. Because there was a mandatory minimum sentencing requirement under the statute, no error occurred here. See MCL 769.34(2)(a). Defendant was sentenced to the mandatory ten years for his cocaine conviction in accordance with the applicable statute. In addition, we find no error with regard to the minimum sentences imposed for the marijuana conviction and for the felon in possession of a firearm conviction. Finally, we note that trial court properly exercised its discretion in imposing the maximum sentences with regard to defendant's convictions, given defendant's status as a repeat offender. There is simply no merit to the laundry list of alleged errors in the sentencing that defendant raises in his appellate brief.

Defendant next asserts that there was insufficient evidence to convict him of several of his charges. We review a challenge to the sufficiency of the evidence in a jury trial by viewing the evidence in the light most favorable to the prosecution and determining "whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997).

Defendant specifically challenges the sufficiency of the evidence as it relates to the possession of firearms and cocaine. The elements of the crime of felon in possession of a firearm are: (1) the defendant was in possession of a firearm and (2) the defendant had previously been convicted of a specified felony. MCL 750.224f(2). The elements of felony-firearm are: (1) the possession of a firearm (2) during the commission of, or the attempt to commit, a felony. MCL 750.227b; *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

Defendant first argues that two firearms found in a trailer on his property were not his, and that he did not ever have actual or constructive possession of them. However, defendant fails to account for the twenty firearms that were found in his own bedroom in his home. Defendant admitted to the police at the time of interrogation, and he testified at trial, that he had an array of firearms in his bedroom and throughout his house. The guns in the bedroom provide sufficient evidence to satisfy the possession element of both firearm charges.

To sustain a conviction for the crime of unlawful possession of 50 to 224 grams of cocaine, the prosecution must show that: (1) the defendant possessed a controlled substance, (2) the substance possessed was cocaine, (3) the defendant knew he was possessing cocaine, and (4) the substance was in a mixture that weighed between 50 and 224 grams. MCL

333.7403(2)(a)(3). There was sufficient evidence to support that defendant had constructive possession of all of the cocaine found on his property. A person can constructively possess a controlled substance, in the absence of physical possession, by exercising dominion or control over the drug with knowledge of its presence and character. *People v McKinney*, 258 Mich App 157, 165-166; 670 NW2d 254 (2003). The evidence supported that defendant knew about the cocaine in his home. He confessed that there was cocaine in a locked cabinet and told the police that he thought the key was in his pants pocket. The rest of the cocaine was found in a crawl space in the basement. Defendant owned, possessed, and stayed at the home. Under these circumstances, it was reasonable for the jury to find that defendant knew of and possessed all of the cocaine in his cabinet and basement.

Defendant additionally argues that he was denied due process of law when the prosecution introduced evidence of his prior bad acts into trial. This argument is unpreserved because an objection was not made at trial. Unpreserved issues are reviewed for plain error affecting defendant's substantial rights, and this requires a showing of prejudice. *People v Carines*, 460 Mich 750, 757, 763-764; 597 NW2d 130 (1999). To establish prejudice, it must be shown that an error affected the outcome of the trial court proceedings. *People v Jones*, 468 Mich 345, 356; 662 NW2d 376 (2003). Reversal is warranted only if a plain error resulted in a conviction of an actually innocent defendant or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence. *Carines, supra*.

MRE 404(b) states:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Use of bad-acts evidence for character purposes is improper. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998).

In this case, the prosecution did not introduce evidence of defendant's other bad acts. During direct examination of a detective regarding the topics discussed during defendant's interrogation, the detective indicated that they probably, in addition to other topics, discussed counterfeit twenty-dollar bills and digital satellite cards that may have been pirated.

Based on the record, we find that the statement was not improper character evidence introduced to show that defendant had a propensity to commit crime and acted in conformity therewith. Further, even if the evidence was improperly admitted, reversal would not be required. Defendant has failed to demonstrate that the challenged testimony affected the outcome of his case. *Carines, supra*. The statement was cursory and was not made for improper

character purposes, and the evidence against defendant was overwhelming. Reversal is not required because any error in the disputed statement did not affect the outcome of the case. *Id.*²

Next, defendant argues that he was denied due process and a fair trial when the prosecution engaged in alleged prosecutorial misconduct by referring to the defense raised by defendant's attorney as a "diversion." This issue is unpreserved and is reviewed under a plain error standard. *Id.*

A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury. *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988). "When the prosecutor argues that the defense counsel himself is intentionally trying to mislead the jury, he is in effect stating that defense counsel does not believe his own client;" this, in turn, "undermines the defendant's presumption of innocence." *People v Wise*, 134 Mich App 82, 102; 351 NW2d 255 (1984). However, an otherwise improper argument is often not error requiring reversal if made in response to a defendant's argument. The "prosecutor's comments must be considered in light of defense arguments." *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

Here, the prosecutor commented in rebuttal that defense counsel's argument about the alternate use of a triple beam scale was a "diversion." The prosecutor explained that regardless of the use of the triple beam scale, there was no explanation for all of the firearms, marijuana, and cocaine found on defendant's property. The prosecution did not assert that defendant's entire defense was a diversion or a distraction, but merely pointed in rebuttal to a single argument being diversionary. When reviewed in context, the prosecutor's comment was not improper. There was no plain error.

Defendant next argues on appeal that he is entitled to resentencing because his sentence was improperly enhanced on the basis of judicial factfinding. We review unpreserved sentencing errors for plain error affecting substantial rights. *Meshell, supra*. Defendant claims that several offense variables were incorrectly scored because they were scored based on facts not proven for or determined by a jury. Defendant specifically argues that Michigan's sentencing scheme is unconstitutional and violates the principles established in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Defendant's argument has no merit. Any judicial "fact finding" that may have occurred in the scoring of the offense variables did not violate the principles of *Blakely, supra*. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006).

Defendant's final argument on appeal is that he was denied the effective assistance of counsel when his attorney failed to make objections to the introduction of other-acts evidence, prosecutorial misconduct, and improper information on which defendant was sentenced. We disagree. The presumption is that counsel provided effective assistance, and the defendant has a heavy burden of proving otherwise. *Rodgers, supra*. In order to establish ineffective assistance

² Defendant makes broad allegations concerning additional bad-acts evidence. His allegations are nonspecific and inadequately briefed; accordingly, we deem them abandoned for purposes of appeal. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006).

of counsel, the attorney's performance must have been "objectively unreasonable in light of prevailing professional norms," and it must be shown that "but for the attorney's error or errors, a different outcome reasonably would have resulted." *Harmon, supra*.

Defendant has not met his burden of proof. It is axiomatic that trial counsel is not ineffective for failing to advocate a meritless or futile objection. *Snider, supra* at 425. Any objection to the scoring of offense variables based on *Blakely, supra*, would have been meritless. Likewise, an objection to the challenged prosecutorial rebuttal argument would have been without merit. Further, we find that, if defense counsel objected to the MRE 404(b) evidence, at best a curative instruction would have been given. This would have drawn more attention to the disputed testimony. Thus, the failure to object was likely a matter of trial strategy, which we will not second guess. *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999). Defendant has not demonstrated that counsel's failure to object fell below an objective standard of reasonableness.

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Alton T. Davis