

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAMAR EDWARD TATE,

Defendant-Appellant.

UNPUBLISHED

December 12, 2006

No. 264234

Wayne Circuit Court

LC No. 05-001502-01

Before: Owens, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession with intent to deliver less than 50 grams of cocaine within 1,000 feet of school property, MCL 333.7410(3), possession with intent to deliver less than 50 grams of heroin within 1,000 feet of school property, MCL 333.7410(3), felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to two to forty years' imprisonment for both the possession with intent to deliver less than 50 grams of cocaine on school property and possession with intent to deliver less than 50 grams of heroin on school property convictions, 1½ to 5 years' imprisonment for both the felon in possession of a firearm and carrying a concealed weapon convictions, and five years' imprisonment for the felony-firearm conviction. Defendant was sentenced to serve his possession with intent to deliver, felon in possession of a firearm, and carrying a concealed weapon sentences consecutive to his felony-firearm sentence. We amend defendant's carrying a concealed weapon sentence to be served concurrently with his felony-firearm sentence and affirm in all other respects.

On appeal, defendant argues that the evidence is insufficient to support his possession with intent to deliver and felony-firearm convictions. We disagree. Due process requires the evidence to show guilt beyond a reasonable doubt to sustain a conviction. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). In determining the sufficiency of the evidence, this Court reviews the evidence de novo in the light most favorable to the prosecution. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). The Court does not consider whether any evidence existed that could support a conviction, but rather, must determine whether a rational trier of fact could find that the evidence proved the essential elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992), citing *People v Hampton*, 407 Mich 354, 366; 285 NW2d 284 (1979).

Here, there was testimony that when police officers entered the upper unit of the dual residence to execute the search warrant, defendant ran across the living room and through the kitchen towards the stairs. One officer saw defendant drop an item onto the ground as he was running and alerted the other officers. A second officer then picked up this item, which contained 1.42 grams of material containing rocks of crack cocaine wrapped individually in 160 Ziploc bags, .11 grams of material containing heroin packaged in twenty lotto packets and a plastic sandwich bag containing 2.20 grams of marijuana. The second officer's recovery of the package occurred within moments of the first officer's observation. While defendant testified that he was in the lower unit when the search warrant was executed and possessed no narcotics, it was the jury's role to assess credibility, *Wolfe, supra* at 514-515, and the officer's testimony provided sufficient evidence to support defendant's possession with intent to deliver convictions.

There was also sufficient evidence to support defendant's felony-firearm conviction. The testimony regarding the drugs together with the testimony that police found a gun in defendant's waistband when he was searched just after running from police and discarding the drugs established that defendant possessed a firearm during the commission or attempted commission of a felony. MCL 750.227b; *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

Defendant next argues that the prosecutor's reference to defendant's failure to provide a statement to police and the trial court's sua sponte instruction on this issue denied him a fair trial. We disagree. We review prosecutorial misconduct claims on a case by case basis, examining the remarks in context to determine whether a defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A prosecutor may not use evidence of a defendant's silence after he was arrested or given *Miranda*¹ warnings for impeachment or substantive evidence "unless it is used to contradict the defendant's trial testimony that he made a statement or that he cooperated with police." *People v Solmonson*, 261 Mich App 657, 664; 683 NW2d 761 (2004), citing *Doyle v Ohio*, 426 US 610, 619 n 11; 96 S Ct 2240; 49 L Ed 2d 91 (1976), and *People v Dennis*, 464 Mich 567, 573 n 5; 628 NW2d 502 (2001).

Although Officer Corey Solomon advised defendant of his constitutional rights following his arrest, the prosecutor asked Solomon if he was "able to obtain a statement from the defendant." Solomon answered, "No." Although this reference to defendant's post-*Miranda* silence constituted plain error, *Solmonson, supra* at 664, defendant has failed to show that this error affected his substantial rights. First, the trial court provided a sua sponte instruction that defendant's decision not to provide a statement to police could not be held against him. Given that juries are presumed to follow their instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), any error created by the prosecutor's question was cured by the instruction, *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003). Second, in light of the other evidence against defendant, this error was not outcome determinative. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2s 67 (2001).

Defendant further claims that the trial court's sua sponte instruction to the jury denied him a fair trial by partially attributing the improper reference to defendant's failure to make a

¹ See *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

statement to defense counsel. This argument fails. “A trial court is required to instruct the jury on the law applicable to the case and to present the case to the jury in a clear and understandable manner.” *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001), aff’d 468 Mich 272 (2003). Even if the instructions are somewhat imperfect, reversal is not required as long as the instructions “fairly presented the issues to be tried and sufficiently protected the defendant’s rights.” *Aldrich*, *supra* at 124.

In the instant case, although the trial court did not directly refer to defense counsel during its instruction, the court did state that the jury had heard questions and answers regarding defendant’s silence during both direct and cross-examination. Although defense counsel did not refer to defendant’s silence during her cross-examination of Solomon, defense counsel did, in fact, refer to defendant’s silence during her re-direct examination of defendant. Therefore, the court’s *sua sponte* instruction was not improper. *Katt*, *supra* at 310.

Defendant next argues that defense counsel’s failure to object to the prosecutor’s reference to his silence denied him the effective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show that counsel’s performance fell below an objective standard of reasonableness, and that a reasonable probability exists that, but for counsel’s errors, the result of the proceedings would have been different. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Here, it appears that defense counsel’s failure to object to the prosecutor’s reference to defendant’s silence was a matter of trial strategy because defense counsel later raised this issue as it related to defendant’s mistrust of the police. Therefore, defense counsel’s failure to object was not objectively unreasonable. *Effinger*, *supra* at 69. Further, given that the prosecutor’s line of questioning was not outcome determinative, as noted above, it follows that defense counsel’s failure to object to the line of questioning was also not outcome determinative. *Id.*

Defendant next argues that defense counsel’s failure to move for the admission of a receipt into evidence denied him the effective assistance of counsel. We disagree. A defense counsel’s failure to call witnesses or present other evidence may amount to ineffective assistance of counsel “only if the failure deprives the defendant of a substantial defense.” *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996). “A defense is substantial if it might have made a difference in the outcome of the trial.” *Id.*

Here, defendant claimed that before he returned to the dual residence where he was arrested, he had purchased food at Little Caesar’s as well as groceries and plastic grocery bags from Food Basics. Defendant claimed that he had three receipts from these purchases, but that the police confiscated two of them after searching him. At trial, defense counsel presented defendant with one of the receipts, but did not move for its entry as evidence. Later, during its deliberations, the jury requested to see this receipt. However, the trial court denied this request because the receipt was never entered into evidence.

Defense counsel’s failure to move for the admission of the receipt as evidence did not constitute ineffective assistance of counsel because the failure did not deprive defendant of a

substantial defense. The jury heard defendant's testimony. Further, the receipt could only show, at most, that defendant bought plastic grocery bags before both he and the police arrived at the dual residence. In addition, this fact would have done nothing to rebut the officers' testimony that defendant was in the upper unit of the dual residence, fled upon seeing them, dropped narcotics onto the floor, and was carrying a fully-loaded handgun. Thus, the failure to move for the admission of the receipt did not deny defendant a substantial defense, and consequently, did not affect the outcome of the trial. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004) *Effinger, supra* at 69.

Defendant also claims that defense counsel's failure to investigate witnesses and documentary evidence prejudiced him. However, there is no support in the record for this assertion. Further, defendant has not specified any witnesses or documentary evidence that defense counsel failed to investigate. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments." *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). Notwithstanding this, given the incriminating testimony offered against defendant, any failure would not have deprived defendant of a substantial defense. *Hyland, supra* at 710. Therefore, defense counsel's failure was objectively reasonable and not outcome determinative. *Effinger, supra* at 69.

Defendant next argues that the trial court erred by imposing a consecutive sentence for his felony-firearm and carrying a concealed weapon convictions. The prosecution concedes the error and we agree. Although "a defendant is not guilty of felony-firearm if the underlying felony is the carrying of a concealed weapon . . . the presence of a second underlying felony allows defendant's felony-firearm conviction to stand." *People v Cortez*, 206 Mich App 204, 207; 520 NW2d 693 (1994), citing MCL 750.227b(1).² From this "it follows that the felony-firearm sentence may run consecutively only to that second underlying felony." *Id.* Here, the trial court sentenced defendant to serve his carrying a concealed weapon sentence consecutive to his felony-firearm sentence as well. This was error. We order defendant's sentences amended accordingly. MCR 7.216(A)(1) and (7); *Cortez, supra* at 207.

Affirmed as modified.

/s/ Donald S. Owens
/s/ Helene N. White
/s/ Joel P. Hoekstra

² MCL 750.227b(1) provides: "A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony, except a violation of section . . . 227 [carrying a concealed weapon] . . . is guilty of a felony, and shall be imprisoned . . . [u]pon a second conviction under this section . . . for 5 years."