STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 25, 2011
v	No. 299268 Marquette Circuit Court
TERRY ROBIN GREEN, Defendant-Appellant.	LC No. 07-044977-FH

Before: STEPHENS, P.J. and SAWYER and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right following his jury trial conviction for possession with intent to deliver over 50 grams of cocaine, MCL 333.7401(2)(a)(*iii*), and conspiracy to deliver less than 50 grams of heroin, MCL 750.157a; MCL 333.7401(2)(a)(*iv*). Defendant was sentenced as a habitual offender, MCL 769.10, to concurrent terms of 12 to 30 years' imprisonment. Because defendant was on parole for an armed robbery conviction when the two controlled substance offenses occurred, the two sentences are being served consecutively to the term that remains for the armed robbery conviction. We affirm.

I. BASIC FACTS

While incarcerated at Ojibway Correctional Facility, defendant shared a cell with Vernell Dickson. On June 26, 2006, defendant was released from prison on parole and moved in with his mother, Sherry Decker. Ojibway Correctional Facility Inspector Donald Majurin began to suspect that drugs were being smuggled into the prison because of a conversation he overheard while randomly monitoring prisoners' phone calls. Majurin testified that he was able to use phone and prison records to determine that Dickson had made the phone call to the residence where defendant was living while on parole. Because the prison records every phone call made by a prisoner, Majurin stated that he was then able to go back and listen to all of the previous calls Dickson had made to defendant's phone number. The conversations contained many "prison slang" references.

A few weeks after being released, defendant asked a friend, Jamie Burnside, to drive him back to the prison because he did not have a driver's license. Burnside and defendant stopped at a Holiday gas station where defendant purchased a plastic soda cup. Once at the prison, defendant handed Burnside a cup marked with an "X" to toss in the trash can just outside the doors to the prison lobby. Burnside stated that she believed the cup contained drugs. Burnside

left after briefly speaking with a corrections officer about obtaining a visitor's application and dropped the cup in the trash can. The cup was confiscated by an officer conducting perimeter security. It contained over 20 small packets containing heroin and marijuana. Defendant's DNA was found on the cup's straw.

On September 8, 2009, a search warrant was executed at defendant's residence. Defendant's mother, her boyfriend, Robert Barry, and defendant's girlfriend, Amy Gauthier, were at the residence when it was searched. Barry was taking trash out to the curb at the time the officers arrived. Both Gauthier and Barry told the officers that defendant had fled the home when he saw the officers. The officers searched the trash and recovered rubber gloves with the fingers cut off, two empty plastic packages for rubber gloves, and numerous clear plastic bags that were missing a corner. In the upstairs master bedroom belonging to defendant's mother, officers found marijuana inside a baggie and smoking pipe. In the common area of the basement, officers discovered $759 and a blender that appeared to contain shredded marijuana. A pair of blue jean shorts lying on the floor contained a bag with 0.80 grams of cocaine and defendant's Michigan identification card. In the basement bedroom officers found defendant's parole paperwork and a picture of defendant with a woman and a baby on top of the entertainment center. A plastic bag with a white, powdery residue was found behind the entertainment center. Officers discovered a box of sandwich bags, a digital scale, a wallet with a business card from defendant's parole officer inside, a plastic gift card, a plate, and a $20 bill in the bedroom dresser. The gift card and the $20 bill both tested positive for cocaine. A plastic bag with 5.19 grams of cocaine and a larger bag that contained rice and two smaller bags were also discovered in a dresser drawer. Defendant's fingerprints were found on the larger bag. One of the smaller bags within the larger bag held 22.74 grams of cocaine; the other held 23.09 grams of cocaine.

II. EXPERT TESTIMONY

Defendant first argues that the trial court erred by qualifying Inspector Majurin as an expert on prison slang. We disagree. The qualification of a witness as an expert and the admissibility of his testimony are in the trial court's discretion and will not be reversed on appeal absent an abuse of that discretion. *People v Smith*, 425 Mich 98, 106; 387 NW2d 814 (1986); *People v Steel*, 283 Mich App 472, 480; 769 NW2d 256 (2009); *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). An abuse of discretion exists if the decision results in an outcome outside the range of principled outcomes including when evidence is admitted that is inadmissible as a matter of law. *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546. Underlying issues of law are reviewed de novo. *Dobek, supra*, 274 Mich App at 93.

Defendant contends that the trial court erred by qualifying Majurin as an expert witness because he lacked specific training in prison slang and the methods he based his testimony on were unreliable. Testimony from an expert witness is governed by MRE 702, which provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the

> product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

These qualifications are to be applied broadly by a trial court. *Grow v WA Thomas Co*, 236 Mich App 696, 713; 601 NW2d 426 (1999). In other words, "a proposed expert should not be scrutinized by an overly narrow test of qualifications." *People v Whitfield*, 425 Mich 116, 123; 388 NW2d 206 (1986). The relative perception of an expert's expertise is a credibility matter for the trier of fact, not a consideration for a court in deciding whether to admit the proffered evidence. *Whitfield*, 425 Mich at 123-124. Still, a trial court must act as the gatekeeper for expert testimony and ensure that expert testimony is based on reliable knowledge. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004). "While the exercise of this gatekeeper role is within a court's discretion, a trial judge may neither 'abandon' this obligation nor 'perform the function inadequately.'" *Id*., quoting *Kumho v Tire Co Ltd v Carmichael*, 526 US 137, 158-159; 119 S Ct 1167; 143 L Ed 2d 238 (1999) (Scalia, J., concurring).

Citing *Kumho* and *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), defendant argues that the court erred in admitting Majurin's testimony given the absence of data underlying his opinions. Michigan has incorporated the standards for reliability that the United States Supreme Court first articulated in *Daubert* into MRE 702 to assist trial courts with their gatekeeper role. *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010). Four factors should be considered when evaluating the reliability of scientific testimony: (1) whether the theory or technique could be tested; (2) whether the theory had been subject to peer review and publication; (3) the known or potential error rate of the theory or technique; and (4) whether the theory or technique had been generally accepted in the scientific community. *Daubert*, 509 US at 593-594. The *Kumho* Court "conclude[d] that *Daubert's* general principles apply to the expert matters described in Rule 702." *Kumho*, 526 US at 149.

However, the *Kumho* Court also noted that *Daubert* need not be employed in every instance where expert testimony is being admitted. *Kumho*, 526 US at 150 ("We agree with the Solicitor General that '[t]he factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony."'). "The trial court must have the same kind of latitude in deciding *how* to test an expert's reliability and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether or not* that expert's relevant testimony is reliable." *Id.* at 152 (emphasis in original).

Majurin was qualified as an expert witness in prison slang to assist the jury with the recorded conversations between Dickson and defendant. Majurin testified that his understanding of prison slang is based on his 20 years of experience working for the Michigan Department of Corrections and two years of experience as an inspector, as well as unspecified training. As a prison inspector, Majurin conducted all of the investigations of prisoners and officers. His job also required him to communicate extensively with prisoners, who had their own jargon. Majurin knew of the slang terms that were common within the prison system and kept lists for common terms. He also had a contact that would assist him whenever he was unsure of a meaning, since prison slang frequently changes. This experience satisfied the requirement under

MRE 702 that an expert's testimony is based on "knowledge, skill, experience, training or education."

Given the type of expert testimony provided by Majurin, the *Daubert* analysis need not be used to determine the reliability of the evidence. For comparison, it is generally accepted that drug-related law enforcement officers possess specialized knowledge from their training and experience that can assist a lay jury's understanding of evidence in a controlled substance case. See, e.g., *People v Williams* (*After Remand*), 198 Mich App 537, 542; 499 NW2d 404 (1993) (finding no error where police officer was qualified as an expert witness to testify how innocuous household items can have an alternative use in illicit drug trade). Majurin's experience in understanding the alternative, drug-related meanings of words and language commonly used inside a prison is similar. Because prison slang was not within the layman's common knowledge, Majurin's testimony was useful to the jury and the trial court did not abuse its discretion in admitting the testimony.

III. HEARSAY

Defendant next argues that the trial court erred in allowing Detective Scott Johnson to testify about statements that Amy Gauthier and Robert Barry made when officers arrived to execute the search warrant. We agree that the trial court impermissibly allowed Johnson to testify regarding the witnesses' prior inconsistent statements. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *Dobek*, 274 Mich App at 93.

Gauthier testified as follows:

> *Q.* [by the prosecutor] Ms. Gauthier, I want to direct your attention back to 2006. Were you present at 424 Quarry Road at the time when there was a search of that house?
>
> *A.* Yes.
>
> *Q.* And can you tell us who was in the house at the time the police arrived?
>
> *A.* Myself, Sherry Decker, my son Taylor, and Janen.
>
> *Q.* And where was Terry Robin Green?
>
> *A.* I have no idea.
>
> *Q.* He wasn't in the house?
>
> *A.* No.
>
> *Q.* Did you give a statement previously in this matter?
>
> *A.* No.

Q. Did you talk to the police after this happened at the time of the search?

A. No.

Q. You didn't talk to them?

A. No.

Q. Are you still carrying on a relationship with Mr. Green?

A. Yes.

Q. You were visiting him, still in prison?

A. Yes.

Q. Are you in love with him?

A. Yes.

Q. You don't recall telling the police that Terry ran out of the patio door, as they were approaching to do the search?

A. No.

Q. That never happened?

A. No.

That was the extent of Gauthier's testimony.

Similarly, Robert Barry testified:

Q. [by the prosecutor] And can you tell us, when you left the house to take out the garbage, was the defendant in the house there?

A. I have no idea.

Q. You have no idea.

A. If he was in the house when I bring the garbage out, no, I don't know.

Q. Was he in the house that day?

A. Yes, I seen him that day.

Q. Okay. And so when you went out – at the time you went out to take the garbage out, was he in the – in the residence?

A. I don't know.

Q. Did you talk to the police right after the search?

A. I believe so, yeah.

Q. And did you tell the police that Terry Green was in the house when you left to put the garbage out?

A. I don't recall that. I know I said he was in the house.

Q. Okay. Well, was he in the house?

A. That day, yes. But right before I put the garbage out?

Q. Right.

A. I don't know about that.

Q. So if they have a statement from you that says Terry was in the house when you left to put the garbage out, that's not accurate?

A. I don't know if he was in the house when I went to put the garbage out. I seen him that morning --

Q. Okay.

A. – or during that day.

Q. Okay.

A. What time I don't exactly know.

Q. Okay. But you don't know where he was when you left to take the garbage out?

A. I have no idea.

As with Gauthier, Barry provided no other salient testimony.

Over defense counsel's objection, Detective Johnson testified:

Q. [by the prosecutor] What did [Amy Gauthier] tell you about the presence of Mr. Green in the house at the time the police came to do the search warrant?

A. When I asked her – when we came to the house today [sic], she said Terry ran out the patio window – or the patio door.

Q. Is that the upstairs --

A. Upstairs.

Q. – door or downstairs door?

A. Upstairs kitchen area, there a patio door.

Q. And, similarly, did you interview Robert Barry about the presence of Terry Robin Green in the house at the time the search commenced?

A. Yes, I did.

Q. What did he tell you about the presence of Mr. Green in the house when he left to take the garbage out?

* * *

A. He said that Terry was – the defendant was in the house when he went to put the garbage out.

Extrinsic evidence of a prior inconsistent statement can be admissible under MRE 613(b)[1] to impeach a witness, even if the prior inconsistent statement tends to directly inculpate the defendant. *People v Kilbourn*, 454 Mich 677, 682; 563 NW2d 669 (1997). However, "[a] prosecutor may not use an elicited denial as a springboard for introducing substantive evidence under the guise of rebutting the denial." *People v Stanaway*, 446 Mich 643, 693; 521 NW2d 557 (1994). "A prosecutor cannot use a statement that directly tends to inculpate the defendant under the guise of impeachment when there is no other testimony from the witness for which his credibility is relevant to the case." *Kilbourn*, 454 Mich at 682. This narrow rule applies only when the substance of the statement is relevant to a central issue and the witness has not provided any other relevant testimony to which their credibility can be attacked. *Id.* at 683.

In this case, Gauthier's and Barry's combined testimony occupies less than seven pages in the extensive record. They both denied previously stating that defendant was in the residence when police arrived to execute the search warrant. The few other details the witnesses provided were Gauthier's relationship with defendant, whether Gauthier or Barry lived at the residence, and who was present when the residence was searched. None of these facts were in dispute. Thus, Gauthier's and Barry's prior inconsistent statements, which inculpated defendant by indicating he fled from the residence where the drugs were located, were erroneously admitted.

[1] MRE 613(b) provides, in relevant part, that "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require."

Nevertheless, we find that the error was harmless. "In order to overcome the presumption that a preserved nonconstitutional error is harmless, a defendant must persuade the reviewing court that it is more probable than not that the error in question was outcome determinative," meaning that the error "undermined the reliability of the verdict. In making this determination, the reviewing court should focus on the nature of the error in light of the weight and strength of the untainted evidence." *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000). Besides Johnson's testimony, there was other evidence that defendant fled. At the time the officers entered the basement of the home, no one was there, yet the TV was on and a nearby window was open with its screen lying in the yard. There was no question that defendant resided in the home and was seen there earlier in the day. His fingerprints were found on many of the items. Moreover, the jury did not have to find that defendant had been in the residence immediately prior to the search in order to find him guilty.

IV. DEFENDANT'S STANDARD 4 BRIEF

A. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the evidence presented at trial was insufficient to support the verdict. We disagree. In determining whether the evidence is sufficient to support a conviction, we review the evidence in the light most favorable to the prosecution to determine whether "any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992).

Defendant first challenges whether the possession with intent to deliver more than 50 grams of cocaine conviction is supported by sufficient evidence because he was not the only adult living in the residence where the drugs were found and no evidence was presented that he had ever delivered any type of controlled substance. To convict defendant of the charge, the prosecutor had to prove that (1) the substance was cocaine, (2) the cocaine weighed over 50 grams but less than 449 grams, (3) defendant was not authorized to possess the substance, and (4) defendant knowingly possessed the cocaine with the intention of delivering it. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). Actual possession of the controlled substance does not have to be shown; constructive possession is enough to support a conviction. *People v Johnson*, 466 Mich 491, 500; 647 NW2d 480 (2002). "Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between defendant and the contraband." *Johnson*, 466 Mich at 500. Only minimal circumstantial evidence is required to prove a defendant's intent. *McGhee*, 268 Mich App at 624.

It is undisputed that the cocaine weighed 51.82 grams. Defendant asserts that he did not have control or dominion over the cocaine because simply being in a physical location is not enough to sustain a conviction for possession. Although this assertion is true, ample evidence was presented at trial to establish a nexus between the cocaine and defendant.

A bag of cocaine was found in a pair of shorts in which defendant's identification card was found. Although the card listed a different address, defendant had indicated to parole officials that he lived at the residence in issue. Burnside testified at trial that the basement bedroom belonged to defendant. This testimony was corroborated by a picture of defendant with

a woman and a child that was found in the basement bedroom along with defendant's parole paperwork. It was in this bedroom that officers found the other three bags of cocaine in a dresser. In the top dresser drawer, a wallet with a business card for defendant's parole agent was discovered near one of the other bags of cocaine. The dresser drawer also contained a large plastic bag with two smaller bags of cocaine inside it. Defendant's fingerprints were found on the larger bag. Together, this evidence supports the finding that defendant had constructive possession of the cocaine.

Sufficient evidence was also presented to prove defendant's intention to deliver the narcotics. Officers found a digital scale, a plastic gift card, a plate, and a box of sandwich bags in the same dresser drawer that they found the wallet and one bag of cocaine. A can of baking powder was also found nearby. Together, these items can be used to cut and package the cocaine for sale. Once the narcotics have been packaged for distribution, the unused portion of the plastic sandwich bag can be torn or cut off. Numerous baggies with corners cut or torn off were found in the trash.

Defendant also claims that insufficient evidence was presented at trial to support the conspiracy to deliver charge. "The gist of the offense of conspiracy lies in the unlawful agreement between two or more persons." *People v Sutherlin*, 116 Mich App 494, 500; 323 NW2d 456 (1982). To support the conviction, the prosecution had show that (1) the defendant possessed the specific intent to deliver less than 50 grams of heroin, (2) his coconspirator also possessed the specific intent to deliver less than 50 grams of heroin, and (3) the defendant and his coconspirator possessed the specific intent to work together to deliver less than 50 grams of heroin to a third person. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002). Circumstantial evidence of the parties' circumstances, acts, and conduct can be used to prove that there was an agreement. *Sutherlin*, 116 Mich App at 500.

The conspiracy to deliver conviction was supported by sufficient evidence. At trial, excerpts from the recorded conversations between Dickson and someone at defendant's phone number were played for the jury. Specific details from these conversations were corroborated by other evidence, such as the "X" that was found on the bottom of the cup found in the garbage at the correctional facility. Evidence also showed how defendant played an active role in the delivery, because he borrowed the car that was used to make the delivery from a female friend when his mother would not loan him her car. Additionally, defendant instructed Burnside on how to deliver the drugs and what she should say to prison officials. Although Burnside was alone when she made the delivery to the prison, defendant waited for her in a nearby wooded area and the pair drove back to Marquette together.

Furthermore, physical evidence showed defendant's role in the drug smuggling plot. Defendant's DNA was found on the straw with disposable cup that was used to hide the drugs. Rubber gloves found in the trash at defendant's residence matched rubber fingertips used to package the drugs found in the prison trash. This evidence, when viewed in the light most favorable to the prosecution, supports the conclusion that defendant conspired with Burnside and Dickson to deliver drugs to the prison.

B. INTRODUCTION OF EVIDENCE

Defendant next claims that the trial court erred in allowing the introduction of an index that briefly described the contents of each recorded phone conversation for the jury. We disagree. Again, the trial court's decision to admit evidence is reviewed for an abuse of discretion. *Dobek*, 274 Mich App at 93.

Defendant argues that the index was prejudicial because it did not just direct the jury to specific CDs; rather, the index interpreted the conversations because the prosecutor included summaries after each title based on Majurin's interpretation of the conversations. We find there is little danger the jury gave undue weight to the "index" when they had the ability to listen to and consider the actual conversations, as well as read the transcripts of those conversations. The "index" provided summary information for the jury to quickly navigate through the recordings and locate a clip they wanted to hear. It would have been clear to the jury what the actual conversation was and what the summation was. Indeed, if the provided summaries were determined to be at odds with the content, that could serve to undermine the prosecution in the eyes of the jurors.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant argues that he was denied the effective assistance of counsel because trial counsel failed to challenge the underlying methodology Inspector Majurin used to evaluate the phone conversations. We disagree. Whether a defendant has been denied the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). When reviewing claims of ineffective assistance of counsel this Court reviews the trial court's factual findings for clear error and its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Defendant failed to preserve the issue by moving for an evidentiary hearing;[2] as such, review is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

To establish a claim of ineffective assistance of counsel, defendant bears the heavy burden of showing that counsel's performance was deficient and that he was prejudiced by the deficiency. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). "[A] defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

Defendant claims that trial counsel should have challenged whether Inspector Majurin's testimony met the reliability requirements under *Daubert*. However, as noted above, the *Daubert* analysis need not be used to determine the reliability of the evidence. Trial counsel is not required to make futile motions or arguments. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

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[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Affirmed.

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Kirsten Frank Kelly