STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 2, 2015
v	No. 321829 Oakland Circuit Court
JASON ELIJAH HUTCHONS, Defendant-Appellant.	LC No. 13-248137-FH

Before: METER, P.J., and CAVANAGH and WILDER, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession with intent to deliver 50 to 449 grams of cocaine, MCL 333.7401(2)(a)(iii), possession of amphetamine, MCL 333.7403(2)(b)(ii), and possession of marijuana, MCL 333.7403(2)(d). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 99 months to 40 years for his possession with intent to deliver cocaine conviction, 2 to 15 years for his possession of amphetamine conviction, and 174 days for his possession of marijuana conviction, with 174 days of jail credit. We affirm.

I

On October 25, 2013, police officers executed a search warrant at defendant's residence, a two-story house with an apartment located on the top floor. Defendant rented the southwest bedroom on the first floor of the house, where he was lying in bed when Detective Steven Richter and other officers, including the officer in charge, Officer Kurt Bearer, entered the residence. Defendant's girlfriend was in the bedroom as well, standing near the bed with her purse in hand. While searching the bedroom, the officers discovered in the top drawers of a dresser documents addressed to defendant and defendant's girlfriend, and certificates in defendant's name and his girlfriend's name. Among those items were a Florida identification card in defendant's name, which was attached to a temporary Michigan identification card, and bills addressed to defendant from Verizon and Consumers Energy. In the middle of the bedroom floor sat a window-sized air conditioner. After being alerted to the air conditioner by a canine officer, Bearer searched the inside of the unit and found "a large baggy" containing cocaine and a cellophane wrapper with amphetamine pills inside.

In the living room, Richter found a small bag of cocaine and a larger bag of marijuana inside a drawer of a coffee table. The drugs were near a digital scale, which Richter testified is

"usually indicative of a person [who] is a seller as opposed to a consumer" because it is important "to be very accurate" when selling, whereas a personal user can "eye-ball what he wants to use."

After the evidence was seized, Bearer spoke with defendant, who was in custody, in the bathroom across from the bedroom. Defendant did not appear to be under the influence of alcohol or narcotics. Bearer testified that he read defendant his *Miranda*[1] rights from a department-issued form and allowed defendant to review the form himself before their conversation. Defendant told Bearer that he had been renting for the past year the bedroom where the cocaine and amphetamines were found. Defendant admitted that the drugs were his and that he sold cocaine. Defendant also claimed that the pills and marijuana were for his personal use. No one else was present during this unrecorded interview. Defendant was not asked to provide a written statement, and he did not offer to provide one.

Following his arraignment, defendant waived his right to a preliminary examination. Before trial, the cocaine, amphetamine pills, and marijuana that had been recovered from defendant's residence were inadvertently destroyed. A forensic toxicology chemist[2] at the Oakland County Sheriff's Office Crime Lab had already tested the substances. Before the jury was selected, defendant moved to dismiss the case based on the fact that the physical evidence was not present. When the trial court asked if the defense had requested independent testing, defense counsel explained that he did not seek an independent examination because he found the laboratory reliable and because he would have the opportunity to cross-examine the laboratory technician at trial.[3] The trial court denied the motion to dismiss, stating that it was the laboratory reports, not the ability to actually see the substances, that would have the most value for the jury in determining the nature of the substances. Additionally, the trial court noted that there may have been grounds for dismissal if the destruction of the evidence had left defendant without an opportunity to have the substances independently examined, but that was not the case here.

At trial, Bearer testified that, even without defendant's confession, the cocaine in defendant's possession was consistent "with [an] intent to deliver" as opposed to personal use based on his training and experience. He explained that an intent to deliver could be inferred from the sheer amount of cocaine discovered, as it would be too costly for most people to purchase that much cocaine at one time for personal use. Bearer estimated the street value of the cocaine to be approximately $6,400, and it was possible that it was worth more if it was mixed with something. Bearer also testified that, in his experience, someone with that amount of cocaine would not store it in someone else's bedroom.

Defendant did not testify at trial. Defense counsel initiated the following discussion in order to place defendant's decision not to testify on the record:

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

[2] We will refer to the forensic toxicology chemist as the "laboratory technician" in this opinion.

[3] Defense counsel did cross-examine the laboratory technician during the trial.

[*DEFENSE COUNSEL*]: Mr. Hutchons, you and I—you've sat through this trial, and you understand the nature of what you're being charged with, am I correct?

[*DEFENDANT*]: Yes, sir.

[*DEFENSE COUNSEL*]: And you understand one of your Constitutional rights as it relates to this trial is, you have an absolute right to remain silent, or you have an absolute right to testify in this trial, you understand?

[*DEFENDANT*]: Yes, sir.

[*DEFENSE COUNSEL*]: And at this point in time, you and I have had some discussions. And at this point in time, we have decided that you are not going to testify in this trial, am I correct?

[*DEFENDANT*]: Correct.

[*DEFENSE COUNSEL*]: And, again, you understand that by remaining silent or not testifying, nobody can use that against you, am I correct?

[*DEFENDANT*]: Correct.

[*DEFENSE COUNSEL*]: And nobody—I have not threatened you or made any promises to you in order for you to invoke your right to remain silent, am I correct?

[*DEFENDANT*]: That's correct.

[*DEFENSE COUNSEL*]: You're doing this voluntarily?

[*DEFENDANT*]: Correct.

[*DEFENSE COUNSEL*]: Freely and orally?

[*DEFENDANT*]: Yeah.

II

On appeal, defendant raises four claims of ineffective assistance of counsel. To preserve a claim that his or her counsel was ineffective, a defendant must move in the trial court for a new trial or a *Ginther*[4] hearing. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). Defendant's claims are not preserved for appeal because he did not move for a new trial or a *Ginther* hearing in the trial court, and this Court denied his motion to remand for a new trial or a

[4] *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

Ginther hearing.[5] Accordingly, our review is limited to errors apparent from the trial court record. *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). "A claim of ineffective assistance of counsel is a mixed question of law and fact. A trial court's findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo." *Id*., citing *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

> To establish ineffective assistance of counsel, the defendant must show that (1) defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and (2) there is a reasonable probability that defense counsel's deficient performance prejudiced the defendant. A defendant was prejudiced if, but for defense counsel's errors, the result of the proceeding would have been different. [*People v Putman*, ___ Mich App ___, ___; ___ NW2d ____ (2015) (Docket No. 318788); slip op at 4 (quotation marks and citations omitted).]

"A defendant must also show that the result that did occur was fundamentally unfair or unreliable." *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012).

A defendant bears a heavy burden of proving ineffective assistance of counsel because there is a strong presumption that defense counsel provided adequate representation. *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012). Likewise, a "[d]efendant . . . bears the burden of establishing the factual predicate for his claim." *Putman*, ___ Mich App at ___; slip op at 4 (citations omitted).

A

First, defendant argues that defense counsel was ineffective by failing to challenge Bearer's testimony that defendant admitted that the drugs belonged to him and that he sold cocaine, asserting that defense counsel should have brought a motion to suppress the confession before trial. We disagree.

To the extent that defendant's claim is based on his allegation that he never made the purported confession, any request for a motion to suppress on that basis would have been futile. The question of whether a statement was voluntary and the question of whether a statement was actually made in the first instance are separate and discrete inquiries. *People v Neal*, 182 Mich App 368, 371; 451 NW2d 639 (1990); see also *People v Tate*, 471 Mich 959; 690 NW2d 702 (2005) (reaffirming the proposition that there are two separate inquiries by recognizing that a "defendant ha[s] the right to challenge both the authenticity and the voluntary nature of [a] . . . confession"). Although the question of whether a statement was voluntarily made is properly within the purview of the trial court at a *Walker* hearing,[6] the question of whether a statement

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[5] *People v Hutchons*, unpublished order of the Court of Appeals, entered November 13, 2014 (Docket No. 321829).

[6] In *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965), the Michigan Supreme Court held "that when a defendant contends that statements that had been made were

was actually made is solely a question of fact for the jury. *Neal*, 182 Mich App at 371-372. In this case, the jury was instructed that it could not consider defendant's out-of-court statement unless it first determined that defendant actually made the statement. It is apparent from the jury's verdicts that the jury concluded that the statement was accurate. Thus, defendant's claim of ineffective assistance arising from defense counsel's failure to file a motion to suppress must fail, as "[c]ounsel is not required to advocate a meritless position," *People v Dunigan*, 299 Mich App 579, 589; 831 NW2d 243 (2013), and the question of whether defendant actually made the statement was a factual question to be decided at trial.

Defendant argues in the alternative that defense counsel should have sought a *Walker* hearing for the purpose of determining whether the confession was voluntary. Specifically, defendant argues that there is some question regarding the voluntariness of the statement because it was taken "within an hour of breaking down the door," which occurred while defendant was still in bed, and because the confession was taken in a bathroom without anyone else present and without being recorded or reduced to writing.

In *People v Tierney*, 266 Mich App 687, 708; 703 NW2d 204 (2005), this Court noted the following non-exhaustive factors to consider when determining whether a statement was made voluntarily:

> In determining voluntariness, the court should consider all the circumstances, including: "[1] the age of the accused; [2] his lack of education or his intelligence level; [3] the extent of his previous experience with the police; [4] the repeated and prolonged nature of the questioning; [5] the length of the detention of the accused before he gave the statement in question; [6] the lack of any advice to the accused of his constitutional rights; [7] whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; [8] whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; [9] whether the accused was deprived of food, sleep, or medical attention; [10] whether the accused was physically abused; and [11] whether the suspect was threatened with abuse." No single factor is determinative. "The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made." [Citations omitted.]

In the instant case, defendant was old enough to rent his own living space. There is no evidence in the record that defendant was of an education or intelligence level that interfered with his ability to understand his rights or his ability to voluntarily choose to make a statement about the offenses. See *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). As a fourth habitual offender, it is evident that defendant had prior experience with law enforcement, and his previous convictions were also drug-related. Although the record does not indicate how long defendant was questioned, there is no suggestion that the questioning was prolonged, as it

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involuntary, the trial court must conduct a hearing outside the presence of the jury to determine the issue of voluntariness." *People v Manning*, 243 Mich App 615, 624-625; 624 NW2d 746 (2000).

occurred at defendant's home immediately after the police located the drugs and took defendant into custody. The record also indicates that defendant was read and shown his *Miranda* rights before he answered Bearer's questions. Because the confession was made at the scene of the arrest, there is no evidence of any delay in taking defendant before the magistrate. In addition, Bearer testified that defendant did not appear to be intoxicated or under the influence of narcotics during the interview. Because the questioning took place at defendant's home immediately after he was taken into custody, it is clear that defendant was not deprived of food, sleep, or medical attention before he gave his statement to Bearer. Finally, the record includes no indication that defendant was physically abused or threatened by Bearer or any other officer at the scene. Thus, we find no evidence in the record that defendant's statement was involuntary. Accordingly, any request for a *Walker* hearing by defense counsel to establish the involuntariness of the confession would have been futile. See *Tierney*, 266 Mich App at 708. Therefore, given that trial counsel is not required to advocate a meritless position, *Dunigan*, 299 Mich App at 589, we conclude that defense counsel's failure to file a motion to suppress and seek a *Walker* hearing regarding the voluntariness of defendant's confession did not fall below an objective standard of reasonableness, see *Putman*, ___ Mich App at ___; slip op at 4.

Furthermore, under the second prong of the test, there is not a reasonable probability that, but for defense counsel's purported deficiency, the jury would not have convicted defendant, as the record includes overwhelming evidence in support of defendant's convictions independent of the confession. *Id*. Possession of a controlled substance occurs when an individual "exercises dominion and control over it." *People v Bylsma*, 493 Mich 17, 31; 825 NW2d 543 (2012). "A person need not have actual physical possession of a controlled substance to be guilty of possessing it. Possession may be either actual or constructive." *Id* (quotation marks and citation omitted). "[T]he essential inquiry into possession is whether there is a sufficient nexus between the defendant and the contraband, including whether the defendant exercised a dominion and control over the substance." *Id*. (quotation marks and citations omitted). Defendant's possession of the controlled substances was established by the fact that the vast majority of the drugs in this case, including all of the amphetamines, were located in the bedroom rented by defendant, where defendant was physically present when the police entered the residence, and where several documents and forms of identification in defendant's name were also located. As such, the drugs were discovered in an area of the house where defendant exercised dominion and control, which demonstrated "a sufficient nexus between . . . defendant and the contraband" to find that he had constructive possession of the controlled substances. See *id.* at 33.

Moreover, "[a]n intent to deliver may be proven by circumstantial evidence and also may be inferred from the amount of [the] controlled substance possessed" by the defendant. *People v Williams*, 268 Mich App 416, 422; 707 NW2d 624 (2005) (quotation marks and citation omitted). Here, a digital scale was found on the premises in the vicinity of the cocaine and marijuana, which is consistent with the practice of weighing portions for sale prior to the transaction, as Richter explained. Further, officers discovered over 60 grams of cocaine, which, according to Bearer, is an amount consistent with intent to deliver, not personal use. Thus, because there was extensive evidence in support of defendant's convictions aside from defendant's confession, defendant has failed to demonstrate that he was prejudiced by defense counsel's purported errors. *Putman*, ___ Mich App at ___; slip op at 4. Accordingly, defendant's claim of ineffective assistance arising from defense counsel's failure to move for the suppression of defendant's confession must fail.

B

Second, defendant argues that defense counsel provided ineffective assistance when he advised defendant to waive his right to a preliminary examination. We disagree.

Defendant asserts that he waived his right to a preliminary examination in light of defense counsel's erroneous advice that "he was only facing a year in jail." Even if this allegation is true, defendant has failed to establish that he was prejudiced by defense counsel's purported error. *Id*. The jury found that defendant was guilty beyond a reasonable doubt on all charges, which demonstrates that sufficient evidence existed to bind over defendant on those charges, as only probable cause, not guilt beyond a reasonable doubt, is required for a magistrate to bind over a defendant for trial following a preliminary examination. *People v McGee*, 258 Mich App 683, 698; 672 NW2d 191 (2003) ("Because this defendant's conviction was based on proof beyond a reasonable doubt, we can surmise that had a preliminary examination been conducted, defendant would have been bound over to circuit court for trial since the lesser standard of probable cause is used at preliminary examination.").

Additionally, defendant asserts on appeal that he was prejudiced because had he exercised his right to a preliminary examination, defense counsel "may have become aware of the issues with the chain of custody, and the alleged confession, and the errors at trial in this matter may have been avoided." However, as explained in this opinion, defendant has failed to establish that he was prejudiced by defense counsel's purported errors related to the admission of defendant's confession and failure to challenge the chain of custody of the evidence that was seized from defendant's residence. Thus, even if defense counsel's performance arguably fell below an objective standard of reasonableness, defendant has failed to establish that defense counsel's advice to waive his right to a preliminary examination constituted ineffective assistance of counsel.

C

Third, defendant argues that defense counsel provided ineffective assistance when he failed to seek an independent laboratory analysis of the seized contraband and failed to object to the contents of the laboratory report, and the laboratory technician's testimony, based on deficiencies in the chain of custody of the evidence. We disagree.

First, with regard to defense counsel's failure to seek an independent analysis of the seized contraband, defense "[c]ounsel always retains the duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary," *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012) (internal quotation marks and citation omitted), and a failure to conduct a reasonable investigation may constitute ineffective assistance of counsel, *People v McGhee,* 268 Mich App 600, 626; 709 NW2d 595 (2005). However, defense counsel's closing arguments, manner of cross-examining the witnesses, and decisions regarding what evidence to present are all presumed to be matters of trial strategy. *People v Bosca*, ___ Mich App ___, ___; ___ NW2d ___ (2015) (Docket No. 317633); slip op at 16; see also *In re Ayres,* 239 Mich App 8, 23; 608 NW2d 132 (1999). We do not second-guess defense counsel's judgment with respect to matters of trial strategy or evaluate defense counsel's

performance with the benefit of hindsight. *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012).

Defense counsel noted, while the trial court was considering defendant's motion to dismiss, that he did not seek an independent examination of the substances seized from the residence because he believed that the laboratory was reliable and because he would have the opportunity to cross-examine the laboratory technician. Likewise, defense counsel did, in fact, cross-examine the laboratory technician during the trial. Defendant has identified nothing in the record that rebuts the presumption that defense counsel's decision not to seek an independent analysis was reasonable and constituted sound trial strategy. See *Trakhtenberg*, 493 Mich at 52. Thus, especially in light of defense counsel's explanation for why he did not to seek independent testing, defendant has failed to establish that defense counsel's performance fell below an objective standard of reasonableness. *Putman*, ___ Mich App at ___; slip op at 4.

Moreover, under the second prong of the test, there is not a reasonable likelihood that the outcome of the trial would have been different but for defense counsel's failure to seek independent testing, especially in light of defendant's confession and the results of the laboratory tests, which confirmed that the substances seized from the residence were, in fact, cocaine, amphetamines, and marijuana. *Id*. Likewise, there is no indication that defense counsel's failure to seek independent testing undermined the outcome of the trial. See *People v Grant*, 470 Mich 477, 493; 684 NW2d 686 (2004) ("The failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome."). Thus, defendant has failed to establish ineffective assistance of counsel on that basis.

Second, defendant has not established that defense counsel's failure to cross-examine the witnesses regarding the chain of custody of the drugs seized from the residence and failure to present an argument to the jury regarding the chain of custody constituted ineffective assistance of counsel. If an adequate foundation for the admission of "cocaine and other relatively indistinguishable items of real evidence" has been established, a break or gap in the chain of custody goes to the weight of the evidence; it does not require exclusion of the evidence. *People v White*, 208 Mich App 126, 130-133; 527 NW2d 34 (1994); see also *People v Mitchell*, 493 Mich 883; 822 NW2d 224 (2012). "Rather, such evidence may be admitted where the absence of a mistaken exchange, contamination, or tampering has been established to a reasonable degree of probability or certainty." *Id*. at 133.

In the instant case, Bearer testified that he discovered the cocaine and amphetamines that were inside the air conditioner in the bedroom. Richter testified that he discovered the cocaine and marijuana that were located in the drawer of the coffee table, which were subsequently shown to Bearer. Bearer also testified that all of the evidence seized from the residence was turned over to him, and he prepared a report that specified the evidence tag numbers that were assigned to each of the substances that were removed from the residence. Additionally, he stated that the evidence was sealed and sent to the Oakland County Crime Lab after a field test was performed on the substances. According to the laboratory technician's testimony, she tested the contraband after obtaining it from the vault and learning that it was received by the office assistant, and the evidence tag numbers on the substances that she tested matched the evidence tag numbers in Bearer's report. Thus, we find that the evidence admitted at trial established "a reasonable degree of probability or certainty" that the substances tested by the laboratory

technician were the drugs seized from the residence, and were not exchanged, contaminated, or tampered with, and provided an adequate foundation for admission of the testimony of the laboratory technician and the laboratory report. *Id*. at 130-133. Accordingly, defense counsel's failure to challenge the chain of custody of the drugs did not fall below an objective standard of reasonableness, *Putman*, ___ Mich App at ___; slip op at 4, as counsel was not required to advocate a meritless position, *Dunigan*, 299 Mich App at 589, and defendant has not overcome the presumption that defense counsel's decisions regarding his closing arguments and manner of cross-examining the witnesses constituted sound trial strategy, *Bosca*, ___ Mich App at ___; slip op at 16; see also *In re Ayres,* 239 Mich App at 23.

Further, in light of the significant evidence in the record indicating that the substances tested by the laboratory technician were the substances seized from defendant's residence, there is not a reasonable probability that the outcome of the proceeding would have been different but for defense counsel's failure to challenge the chain of custody, *Putman*, ___ Mich App at ___; slip op at 4, or that defense counsel's purported error deprived defendant of a fair trial, *Lockett*, 295 Mich App at 187. Thus, defendant has failed to establish that he received ineffective assistance when defense counsel failed to challenge the chain of custody of the evidence.

D

Finally, defendant asserts that he received ineffective assistance when defense counsel "convinced" defendant not to testify at trial, as the decision to refrain from testifying "was not [defendant's] sole decision." We disagree.

"A defendant's right to testify in his own defense arises from the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution. Although counsel must advise a defendant of this right, the ultimate decision whether to testify at trial remains with the defendant." *People v Bonilla–Machado*, 489 Mich 412, 419; 803 NW2d 217 (2011) (citations omitted). However, defense counsel may advise defendant not to testify, and that advice is presumed to be sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). If a defendant "decides not to testify or acquiesces in his attorney's decision that he not testify, 'the right will be deemed waived.' " *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985).

There are no grounds to conclude that defense counsel obstructed defendant's decision regarding whether to testify or otherwise violated defendant's right to testify. While under oath, defendant expressly confirmed that he was freely and voluntarily making the decision to not testify. Contrary to defendant's characterization of defendant's and defense counsel's statements, there is no indication in the lower court record that defendant did not freely and voluntarily decide not to testify or that defense counsel improperly influenced defendant's decision. See *Petri*, 279 Mich App at 410 (stating that our review of unpreserved claims of ineffective assistance is limited to errors apparent from the trial court record). Further, there is no evidence in the lower court record rebutting the strong presumption that trial counsel's advice not to testify was sound trial strategy. See *Tommolino*, 187 Mich App at 17. In addition, under the second prong of the test, defendant has not demonstrated that there is a reasonable probability that the outcome of the trial would have been different if he had testified, *Putman*, ___ Mich App at ___; slip op at 4, or that "the result that did occur was fundamentally unfair or unreliable,"

Lockett, 295 Mich App at 187. Accordingly, defendant has failed to establish that defense counsel provided ineffective assistance.

Affirmed.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder