

Order

Michigan Supreme Court
Lansing, Michigan

October 28, 2015

Robert P. Young, Jr.,
Chief Justice

147978

Stephen J. Markman
Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 147978
COA: 310200
Grand Traverse CC:
12-011354-FC

CARLOS CHANTI BRAGG,
Defendant-Appellant.

By order of October 28, 2014, the application for leave to appeal the September 12, 2013 judgment of the Court of Appeals was held in abeyance pending the decision in *People v Lockridge* (Docket No. 149073). On order of the Court, the case having been decided on July 29, 2015, 498 Mich 358 (2015), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REVERSE in part the judgment of the Court of Appeals, and we REMAND this case to the Grand Traverse Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *Lockridge*. On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

We do not retain jurisdiction.



s1019

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 28, 2015


Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
September 12, 2013

v

CARLOS CHANTI BRAGG,

Defendant-Appellant.

No. 310200
Grand Traverse Circuit Court
LC No. 12-011354-FC

Before: SAAD, P.J., and K. F. KELLY and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession with intent to deliver less than 50 grams of heroin and possession with intent to deliver less than 50 grams of cocaine, both violations of MCL 333.7401(2)(a)(iv). Defendant was sentenced as a habitual offender, fourth offense, MCL 769.12, to serve 5 to 20 years in prison for each of the two convictions. Defendant received no credit for time served because he was on parole at the time of the instant offenses. Finding no errors warranting reversal, we affirm defendant's convictions and sentences.

I. BASIC FACTS AND PROCEDURAL HISTORY

A homeowner complained to police about unwanted individuals outside of her home. When officers responded, they observed a female and a male standing outside the residence, later identified as Melissa Metzger and Terrance Pickard. Defendant was sitting in the backseat of a BMW parked outside of the residence. Officers conducted a search of the vehicle and seized a purse on the front passenger-side floorboard, which contained cocaine, heroin paraphernalia and a small bag of marijuana. Officers additionally seized a five-gram "baggy" of what was later determined to be marijuana that was lodged between the driver's seat and the center console. Finally, officers seized a small bag containing crack cocaine from Metzger's coat pocket. Metzger was placed under arrest for the items found in the purse, Pickard was arrested for outstanding warrants unrelated to the instant case, and defendant was arrested for the baggy of marijuana lodged between the driver's seat and the center console because it was only accessible from the backseat, where defendant had been sitting.

The pat-down following defendant's arrest did not reveal any weapons or drugs. However, an officer specifically requested that other law-enforcement officers conduct a strip search of defendant upon his arrival at Grand Traverse County Jail based on the homeowner's

accusation that defendant “crotches his narcotics,” i.e., hides his drugs in his groin area. After arriving at the facility and the issue of the strip search was again discussed, defendant stated that “you don’t need to check me down there. I don’t have anything down there.” Defendant was then placed in a holding cell.

Defendant had arrived at the jail at 1:18 p.m. and the strip search was conducted at approximately 2:00 p.m. The strip search revealed no contraband. However, two packages of drugs were subsequently found in an area directly behind the bench upon which defendant had been sitting. One package was wedged in the bracket of the seat.¹ The jury was able to view surveillance videos of defendant sitting on the bench. The specific bracket on the bench was empty when defendant sat down. Once he was seated, defendant pulled his arms inside his shirt, fidgeted and repositioned his arms underneath his shirt, and placed his hands behind his back and reached down his pants. At one point, defendant leaned back against the wall, and his hands appeared to “hug the wall below the bench.” Defendant subsequently leaned forward, and a white object located on a bracket between the wall and the bench was visible that was not previously visible.

The jury found defendant not guilty of possession of marijuana, MCL 333.7403(2)(d). The jury found defendant guilty of possession with intent to deliver less than 50 grams of heroin, guilty of possession with intent to deliver less than 50 grams of cocaine, and guilty of two counts of bringing a controlled substance into a jail facility (cocaine and heroin), MCL 801.263(1). However, the charges regarding bringing a controlled substance into a jail were dismissed prior to sentencing. Defendant was sentenced as outlined above and now appeals as of right, raising a number of issues in both an appellate brief and a Standard 4 brief.

II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that the evidence was insufficient to support his convictions. We disagree.

A claim of insufficient evidence is reviewed de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). “[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and 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 was convicted of possession with intent to deliver less than 50 grams of heroin and possession with intent to deliver less than 50 grams cocaine.

¹ One package contained heroin, and the other package contained cocaine. The heroin package consisted of 37 individual “bindles” of heroin and one heroin “rock.” The cocaine package consisted of 33 individually wrapped “rocks” of cocaine. Including the packaging, the heroin package weighed 15 grams and the cocaine package weighed 20 grams.

To convict a defendant of possession with intent to deliver, the prosecution must prove (1) that the recovered substance is a narcotic, (2) the weight of the substance, (3) that the defendant was not authorized to possess the substance, and (4) that the defendant knowingly possessed the substance intending to deliver it. The element of knowing possession with intent to deliver has two components: possession and intent. [*People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005) (citation omitted).]

On appeal, defendant challenges the fourth of these elements, arguing that he had neither possession of the drugs nor the intent to deliver.

“Possession is a term that signifies dominion or right of control over the drug with knowledge of its presence and character.” *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 500 (2000) (internal quotation marks and citation omitted). The video recording showed defendant acting suspiciously while sitting on the bench, particularly the way he kept shifting his arms underneath his shirt and pants. Moreover, the video recording did not show an object on the bench before defendant sat down, yet a white object located on a bracket between the wall and the bench was present after he was escorted away, suggesting that defendant possessed the drugs immediately prior to placing them behind him.

Additionally, although two packages were found and only one was wedged in the bracket, it is reasonable to infer that the same person was responsible for both packages. The two packages were located along the same bracket. While it is possible that a second person coincidentally placed the second package of drugs in the area, it was the role of the jury to weigh the plausibility of the competing stories. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998).

There was also sufficient evidence that defendant possessed the drugs with the specific intent to deliver. *People v Danto*, 294 Mich App 596, 601; 822 NW2d 600 (2011). Intent to deliver “may be inferred from all of the facts and circumstances,” including “the quantity of the controlled substance in the defendant’s possession and from the way in which the controlled substance is packaged.” *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998); see also *People v Williams*, 268 Mich App 416, 422-423; 707 NW2d 624 (2005). It is only necessary to intend delivery to one other person to be convicted of possession with intent to deliver. *Williams*, 268 Mich App at 422.

The heroin package to contained 37 individual “bindles” of heroin and one heroin “rock.” The cocaine package consisted of 33 individually wrapped “rocks” of cocaine. A police officer opined that, in his experience as a narcotics officer, a typical user would not possess dozens of individual packages of cocaine and heroin.

Accordingly, there was sufficient evidence to sustain defendant’s convictions.

III. BRINGING CONTROLLED SUBSTANCES INTO A JAIL FACILITY

On appeal, defendant essentially argues that the trial court erred in failing to dismiss the counts charging defendant with bringing controlled substances into a jail facility. We generally review for an abuse of discretion a denial of a motion to dismiss. *People v Stephen*, 262 Mich

App 213, 218; 685 NW2d 309 (2004). However, because such a motion was never brought, our review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). We conclude that any error regarding submission of the counts to the jury was remedied when the convictions were dismissed prior to sentencing.

Defendant was charged with and convicted of two counts of bringing a controlled substance into a jail, MCL 801.263(1). Before defendant was sentenced, however, the charges were dismissed after the prosecution conceded that the charges violated MCL 801.265(2), which provides:

If a violation of [MCL 801.263] involving a controlled substance constitutes the delivery, possession with intent to deliver, or possession of or other action involving a controlled substance that is punishable by imprisonment for more than 5 years under [MCL 333.7401], the person shall not be prosecuted under this [statute] for that violation.

Defendant argues that submission of the counts to the jury warrants a new trial because of the possibility of a compromise verdict. A compromise verdict is “[a] verdict which is reached only through the surrender of conscientious convictions as to a material issue by some members of the jury in return for a relinquishment by other members of their like settled opinion on another issue, the result not commanding the approval of the whole panel.” *Niemi v Ford Motor Co*, 127 Mich App 811, 813-814; 339 NW2d 651 (1983), quoting 76 Am Jur 2d, Trial, § 1139. “When jurors give up their beliefs to settle on a common ground with other jurors, who may have also abandoned their convictions in the interest of agreement, a compromise verdict results. When jurors forsake their convictions simply to reach a verdict, the defendant has not been found guilty beyond a reasonable doubt by all members of the jury.” *People v Ramsey*, 422 Mich 500, 515; 375 NW2d 297 (1985).

Here, nothing suggests that the submission of the counts to the jury resulted in a compromise verdict. No “logically irreconcilable verdicts” were returned, *People v Graves*, 458 Mich 476, 488; 581 NW2d 229 (1998) (in the context of an erroneous instruction), as the jury’s verdict clearly indicates that it believed defendant possessed the heroin and cocaine packages in the jail. Nor were the charged offenses varying degrees of the same crime. *Id.* While it is true that the jury acquitted defendant of possession of marijuana, the charge involved a wholly distinguishable set of facts from the other counts. Rather than mutually surrendering strongly held beliefs in order to reach consensus, the record strongly suggests that the members of the jury simply were convinced that defendant was guilty of the remaining crimes charged. Accordingly, defendant’s substantial rights were not compromised by the fact that the jury considered the later-dismissed counts of bringing a contraband substance into a jail facility.

IV. EXPERT TESTIMONY

Defendant argues that the trial court erred in admitting Police Officer Hamilton’s expert testimony about the typical actions of drug dealers. We disagree. Defendant did not object to admission of the officer’s testimony on the ground that he did not qualify as an expert, as required. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004); see also *People v Allen*, 39 Mich App 483, 493; 197 NW2d 874 (1972), rev’d on other grounds 390 Mich 383 (1973).

Unpreserved claims of error are reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 763.

MRE 702 reads as follows:

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.

Defendant argues that the subject matter of Hamilton's expert testimony was inadmissible under MRE 702 or, alternatively, even if the subject matter was admissible under MRE 702, Hamilton did not have the knowledge or experience required for expert qualification.

In *People v Ray*, 191 Mich App 706; 479 NW2d 1 (1991), the defendant was convicted of possession with intent to deliver less than 50 grams of cocaine. *Id.* at 707. The trial court qualified a police officer as an expert witness "on the basis of his training and experience with observing drug use and drug trafficking." *Id.* at 708. The officer testified that the quantity and street value of the crack cocaine possessed by the defendant indicated that the defendant intended to sell the crack cocaine. *Id.* at 708-709. The officer also testified that a typical user of crack cocaine generally possesses one or two rocks of crack cocaine, whereas the defendant in *Ray* was found to possess six rocks of crack cocaine. *Id.* The Court held that the officer's testimony "was sufficient for a jury to infer that [the] defendant had an intent to deliver." *Id.* at 709.

Hamilton was trained in narcotics enforcement, had two years of experience working as a deputy for the Traverse Narcotics Team, and was involved in other narcotics cases while working in other capacities for the Grand Traverse Sheriff's Office. Thus, we conclude that defendant's argument that Hamilton's testimony was inadmissible under MRE 702 or that Hamilton did not have the knowledge and experience to render an opinion to be without merit. To the extent that defendant challenges the persuasiveness and probative value of Hamilton's testimony given the facts of this case, such considerations are for the jury. *Lemmon*, 456 Mich at 637.

V. JAIL TIME CREDIT

Defendant argues that the trial court erred in failing to grant defendant credit for 135 days served in jail between his arrest and sentencing. We disagree. Defendant did not object to credit for time served at sentencing, as required. *People v Meshell*, 265 Mich App 616, 638; 696 NW2d 754 (2005). Unpreserved claims of error are reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 763.

"MCL 769.11b, the jail credit statute, is not applicable when a parolee is convicted and sentenced to a new term of imprisonment for a felony committed while on parole because, once arrested for the new felony, the parolee continues to serve out the unexpired portion of his or her earlier sentence." *People v Armisted*, 295 Mich App 32, 50; 811 NW2d 47 (2011). When a

parolee serves time in jail before sentencing, the parolee is entitled to credit for time served “against the sentence on which parole was granted.” *People v Johnson*, 283 Mich App 303, 309; 769 NW2d 905 (2009). Defendant was entitled to credit for 135 days served against the prior sentence, not the sentence for the instant offenses.

Defendant argues that failure to grant him credit for time served against the instant sentence violates due process, equal protection, double jeopardy, and the right to trial by jury. In *People v Idziak*, 484 Mich 549; 773 NW2d 616 (2009), our Supreme Court held that failure to grant credit for time served against the newer sentence does not violate equal protection or double jeopardy. *Id.* at 552. And in *People v Jackson*, 291 Mich App 644; 805 NW2d 463 (2011), this Court extended *Idziak* to conclude that failure to grant credit for time served against the newer sentence does not violate due process. *Id.* at 650.

Defendant also argues that failure to grant him credit for time served against the instant sentence violates his right to trial by jury because he is “punished” for exercising the right. Defendant reasons that had he immediately pleaded guilty, most of the 135 days served in jail would have been credited against the prior sentence, so he would ultimately spend fewer days incarcerated. “A sentencing judge may not take into consideration [a] defendant’s refusal to plead guilty in determining the term of the sentence.” *People v Travis*, 85 Mich App 297, 303; 271 NW2d 208 (1978).

In *Idziak*, the defendant argued that failure to grant credit for time served against the newer sentence violated equal protection because it “result[ed] in a disparity among parole violators based on the choice between a guilty plea and a jury trial.” *Idziak*, 484 Mich at 572. In rejecting this argument, our Supreme Court noted that the Legislature is constitutionally permitted to encourage guilty pleas by offering a benefit in exchange for a guilty plea. *Id.* at 572-573. Failure to grant defendant credit for time served against the instant sentence did not punish him for exercising his right to trial by jury.

VI. SENTENCING ERRORS

Defendant argues that the trial court improperly increased defendant’s minimum sentence on the basis of facts that were not proven beyond a reasonable doubt before a jury and further erred in scoring 10 points for offense variable (OV) 14 and 25 points for OV 19. We disagree.

A. BURDEN OF PROOF

The applicable burden of proof presents a question of law reviewed de novo. *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010).

Defendant argues that under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), the facts underlying the scoring of the OVs and prior record variables (PRVs) needed to be established beyond a reasonable doubt. However, in *People v Drohan* 475 Mich 140; 715 NW2d 778, cert den sub nom *Drohan v Michigan*, 549 US 1037; 127 S Ct 592; 166 L Ed 2d 440 (2006), our Supreme Court held that *Blakely* and *Apprendi* are inapplicable when the sentencing court imposes a sentence that does not exceed the statutory maximum. *Id.* at 164. Here,

defendant was sentenced to within the statutory maximum of 20 years. MCL 333.7401(2)(a)(iv). Thus, the trial court properly applied the preponderance of the evidence standard.

B. OV SCORING

[T]he abuse of discretion standard formerly predominated in sentencing review. But when the Legislature enacted the sentencing guidelines in 1998, it prescribed detailed instructions for imposing sentences, thereby reducing the circumstances under which a judge could exercise discretion during sentencing. Under the sentencing guidelines, the circuit court’s factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews *de novo*. [*People v Hardy/Glenn*, ___ Mich ___ (Docket Nos. 144327 and 144979, decided July 29, 2013) slip op pp 6-7 (footnotes omitted).]

1. OV 14

Under MCL 777.44(1)(a), a trial court assesses 10 points for OV 14 “when the defendant was a leader in a multiple-offender situation.” *People v Lockett*, 295 Mich App 165, 184; 814 NW2d 295 (2012). Defendant argues that the mere fact that he possessed more drugs than Metzger and Pickard does not mean that defendant was the “leader” of the group; instead, it is likely that defendant acted as a “mule” for the actual drug dealer.

A “multiple-offender situation” means “a situation consisting of more than one person violating the law while part of a group.” *People v Jones*, 299 Mich App 284, 286; 829 NW2d 350 (2013). “Leader” means “one who is a guiding or directing head of a group.” *Id.* (internal quotation marks and citation omitted). “The entire criminal episode must be evaluated to determine whether a defendant was a leader.” *Lockett*, 295 Mich App at 184. Consequently, OV 14 is a unique offense variable because “[p]oints must be assessed for conduct extending beyond the sentencing offense,” whereas most of the remaining offense variables are scored using “an offense-specific approach.” *People v McGraw*, 484 Mich 120, 127; 771 NW2d 655 (2009).

The entire criminal episode in this case included defendant, Metzger, and Pickard driving from Detroit to Grand Traverse County while possessing marijuana, cocaine, heroin, and related drug paraphernalia. This three-person drive satisfied the definition of “multiple-offender situation,” and the trial court did not err in so finding. The drugs possessed by defendant had far greater value than the remaining drugs in the vehicle. It was reasonable for the trial court to infer based on this evidence that defendant guided or directed Metzger and Pickard in the drug-distribution plan, so he was the “leader.” *Id.* Accordingly, the trial court did not err in scoring OV 14 at 10 points.

2. OV 19

Under MCL 777.49(a), a trial court assesses 25 points for OV 19 when “[t]he offender by his or her conduct threatened the security of a penal institution or court.” MCL 777.49(a) is not limited “to those instances in which the sentencing offense itself occurred within a court or penal

institution.” *People v Smith*, 488 Mich 193, 200; 793 NW2d 666 (2010). No intent requirement is included in the statutory language.

Defendant argues that he involuntarily brought drugs to the jail after he was placed under arrest and, therefore, had no intent to threaten the security of the penal institution.

Defendant’s argument necessarily involves an interpretation of OV 19. In the context of offense variables “our goal in interpreting a statute is to ascertain and give effect to the intent of the Legislature. The touchstone of legislative intent is the statute’s language. If the statute’s language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written.” *Hardy/Glenn*, slip op p 7 (internal quotations and footnote omitted).

In *People v Ward*, 483 Mich 1071; 765 NW2d 881 (2009), our Supreme Court denied leave to appeal an unpublished order of this Court addressing this very issue. In *Ward*, the police requested a meeting with the defendant at a police station, purportedly to return cash seized from the defendant at a prior traffic stop. *Id.* at 1072 (Young, J., concurring). Actually, however, the police only intended to arrest the defendant in a safe environment for dealing drugs. *Id.* The defendant was arrested in the police station with crack cocaine and heroin on his person. *Id.* The defendant did not inform the arresting officers that he was in possession of the drugs, so the drugs were only discovered after he was transported to the county jail. *Id.* The trial court assessed 25 points for OV 19 because the defendant “threatened the security of a penal institution.” *Id.* at 1073, quoting MCL 777.49(a). This Court denied the defendant’s delayed application for leave to appeal. *People v Ward*, unpublished order of the Court of Appeals, entered November 12, 2008 (Docket No. 288318). Similarly, our Supreme Court denied the defendant’s application for leave to appeal “because we are not persuaded that the questions presented should be reviewed by this Court.” 483 Mich 1071. However, even though the justices purportedly agreed that the matter need not be addressed, three of them felt compelled to comment on the issue.

Justice Young (joined by Justice Corrigan) asserted that the score was correct, noting that OV 19 “plainly does not include an intent element.” *Id.* Thus, “[w]hether defendant intended to threaten the security of a penal institution is irrelevant.” *Id.* at 1072-1073. He further explained:

Defendant could have told the officers that he had the 47 grams of crack cocaine and packets of heroin in his underwear when he was arrested at the station. Instead, he chose to attempt to smuggle this considerable amount of drugs into the county jail. [The dissent] suggests that defendant may be excused from the consequences of that choice “because he wished not to be charged for possession with intent to deliver prohibited substances in addition to his other crimes.” A criminal’s interest in avoiding punishment for his crimes does not, has never, and, hopefully, will never excuse criminal behavior. The law does not require courts to ignore criminal behavior; rather, it assigns consequences. “[T]rying to avoid having drugs ... detected during booking” is deviant behavior for which the law assigned a consequence-25 points for OV 19. That we may be able to theorize a defendant’s motive to conceal his crime does not decriminalize the act. [*Id.* at 1072 (footnotes omitted).]

Chief Justice Marilyn Kelly dissented, explaining that the defendant did not intend to threaten the security of a penal institution. *Id.* at 1073 (Kelly, C.J., dissenting). She reasoned that MCL 777.49(a) implicitly contains an intent element, and the facts of the case showed that the defendant did not intend to bring the drugs into the county jail. *Id.* Justice Kelly opined:

Clearly, defendant should not have been in possession of illegal drugs and should not have taken them to the police station. But his purpose in going there was not to deal drugs. He could hardly be said to have intended to engage in conduct that “threatened the security of a penal institution.” If his behavior can be said to have been a threat, regardless of defendant's intent, it must be conceded that the threat existed only because of a police subterfuge. I believe this crucial fact could make defendant's conduct an insufficient basis for the scoring of OV 19 here. [*Id.* at 1073 (footnotes omitted).]

The facts of the instant case are substantively identical to the facts of *Ward*. In each case, the defendant was arrested with drugs on his person that were only discovered after he was transported to the county jail. The only issue in each case was whether the defendant intended to or voluntarily brought drugs into the county jail. While neither the concurring opinion nor the dissenting opinion in *Ward* may be binding precedent, see *Shawl v Spence Bros, Inc*, 280 Mich App 213, 225; 760 NW2d 674 (2008), we conclude that the concurring opinion better reflects the true import of the statutory language. There is simply no intent requirement.

Additionally, defendant in this case actually told officers that they need not strip search him because “you don’t need to check me down there. I don’t have anything down there.” His conduct was directed at continuing to conceal the presence of drugs. Moreover, Justice Kelly’s strongly-worded dissent focused on police “subterfuge.” Here, there was no such police action. We conclude that *Ward* compels a finding that the trial court properly scored OV 19 at 25 points.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

In a Standard 4 brief, defendant argues that he was denied the effective assistance of counsel due to a conflict of interest as well as due to counsel’s failure to investigate and interview witnesses, failure to file a motion to the admission of evidence, failure to object to hearsay, and failure to object to improper prosecutorial comments.

To preserve an issue of ineffective assistance of counsel, a defendant must move for a new trial or a *Ginther*² hearing. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). We denied defendant’s motion to remand to pursue a *Ginther* hearing. *People v Bragg*, unpublished order of the Court of Appeals, entered July 2, 2013 (Docket No. 310200). As such, our review is limited to “errors apparent on the record.” *Lockett*, 295 Mich App at 186. Whether a defendant received ineffective assistance of counsel presents a question of constitutional law reviewed de novo. *Id.*

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

Under the federal and state constitutions, a criminal defendant has the right to effective assistance of counsel. *People v Carbin*, 463 Mich 590, 599-600 n 7; 623 NW2d 884 (2001), citing US Const, Am VI; Const 1963, art 1, § 20. “To establish ineffective assistance of counsel, a defendant must show (1) that the attorney’s performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney’s error or errors, a different outcome reasonably would have resulted.” *People v Werner*, 254 Mich App 528, 534; 659 NW2d 688 (2002). “A defendant must affirmatively demonstrate that counsel’s performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial.” *Id.*

A. CONFLICT OF INTEREST

Before trial, defendant’s family attempted to hire defense counsel to represent defendant, but his family could not afford defense counsel’s \$20,000 retainer. The very same attorney was subsequently appointed by the court to represent defendant. Defendant argues that this created a conflict of interest, which was evidenced by the fact that counsel informed defendant before trial that he would be convicted because the local community is racist, and failed to interview Metzger, Pickard, and the homeowner.

“To establish a conflict of interest claim, a defendant must demonstrate that an actual conflict of interest existed and that it negatively affected his attorney’s performance.” *People v Smelley*, 285 Mich App 314, 334; 775 NW2d 350 (2009), vacated in part on other grounds 485 Mich 1023 (2010). “[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.” *Cuyler v Sullivan*, 446 US 335, 350; 100 S Ct 1708; 64 L Ed 2d 333 (1980).

Defendant cannot show that defense counsel had a conflict of interest. That defense counsel did not receive a private retainer fee is not a distinguishable “interest” from defense counsel’s court appointment. Defense counsel was obligated to represent defendant regardless of whether he was hired or appointed. It logically follows that because defense counsel did not have two separate interests no “conflict of interest” could have occurred. Further, assuming that defense counsel’s remuneration for the court appointment was less than his requested retainer fee, there is nothing to suggest that an attorney has a conflict of interest simply because he or she receives a lower fee. Defendant was not denied the effective assistance of counsel because of a conflict of interest.

B. RIGHT TO TESTIFY

Defendant has not shown how his alleged lack of communication with defense counsel resulted in a denial of his right to testify. A defendant has the constitutional right to testify in his or her own defense. *People v Bonilla-Machado*, 489 Mich 412, 419; 803 NW2d 217 (2011). “Although counsel must advise a defendant of this right, the ultimate decision whether to testify at trial remains with the defendant.” *Id.* “[I]f [the] 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) (internal quotation marks and citation omitted).

Here, the record shows that defendant discussed the advantages and disadvantages of testifying with defense counsel. In addition, the trial court explained the fundamental advantages and disadvantages of testifying to defendant. After being advised of the right to testify by defense counsel and the trial court, defendant stated on the record that he decided against testifying. Defendant's decision to not testify waived any issue for appellate review.

C. CHAIN OF CUSTODY

With respect to the laboratory results for the cocaine and heroin, "any deficiency in the chain of custody goes to the weight of the evidence rather than its admissibility once the proffered evidence is shown to a reasonable degree of certainty to be what its proponent claims." *People v White*, 208 Mich App 126, 130-131; 527 NW2d 34 (1994). Defendant has not specifically identified the failure in the chain of custody in his Standard 4 brief, but it appears that defendant is challenging the fact that the two packages found in the jail cell were left unattended for several hours on a desk. However, the two packages were in an office that could only be accessed through multiple locked doors. It is reasonable to infer that the contents of the two packages were undisturbed by inmates or other jail staff during this time. Any motion to suppress the laboratory results would have been futile, and counsel is not ineffective for failing to make a futile motion. *People v Fonville*, 291 Mich App 363, 384; 804 NW2d 878 (2011).

D. MOTION TO SUPPRESS

With respect to the video recording, defendant argues that defense counsel should have moved to suppress it because it did not directly show him placing the drugs behind or underneath the bench. Even assuming that the video recording was not direct evidence of the crime, it was highly probative circumstantial evidence. Possession can be proved by circumstantial evidence. *People v Strickland*, 293 Mich App 393, 400-401; 810 NW2d 660 (2011). Any motion to suppress would have been futile. *Fonville*, 291 Mich App at 384.

E. FAILURE TO INVESTIGATE

While investigation is generally a matter of trial strategy, a limited investigation "is reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012) (internal quotation marks omitted and citation). "The failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome." *People v Grant*, 470 Mich 477, 493; 684 NW2d 686 (2004).

Defendant argues that had defense counsel investigated the homeowner, he would have discovered that she never reported drug activity to the police. Thus, defendant argues, the officer's testimony to the contrary would have been impeached. But even assuming the homeowner would have impeached the officer's testimony, and even assuming defense counsel was ineffective for failure to investigate the homeowner, the allegedly inadequate investigation did not undermine confidence in the trial's outcome, especially given the highly incriminating video recording. *Grant*, 470 Mich at 493.

F. BEST EVIDENCE RULE/ RULE OF COMPLETENESS

Defendant argues that defense counsel was ineffective for failing to move to suppress the video recording under the best evidence rule. MRE 1002 provides that “[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, *except as otherwise provided in these rules or by statute.*” (Emphasis added.) MRE 1003 provides that “[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.” Here, the video recording admitted at trial was a duplicate of the original video recording, and defendant does not challenge the authenticity of the original video recording, nor does defendant argue why it was unfair to admit the duplicate in lieu of the original. Any motion to suppress the video recording under the best evidence rule would have been futile. *Fonville*, 291 Mich App at 384.

Defendant also argues that defense counsel was ineffective for failure to move to suppress the video recording under the rule of completeness. MRE 106 is the “rule of completeness.” *People v Fackelman*, 489 Mich 515, 545; 802 NW2d 552 (2011). MRE 106 provides that “[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.”

Defendant’s argument is flawed because application of the completeness doctrine would have only operated to allow the jury to consider *additional* excerpts of the video recording; it would not operate to *exclude* portions or the entirety of the video recording. See *People v McGuffey*, 251 Mich App 155, 161; 649 NW2d 801 (2002) (“MRE 106 does not have any bearing on the admissibility of the testimony that the prosecution introduced, except that it might have allowed [the] defendant to supplement the prosecution’s proofs.”). Any motion to suppress under the rule of completeness would have been futile. *Fonville*, 291 Mich App at 384.

G. HEARSAY

Defendant argues that defense counsel was ineffective for failing to raise a hearsay objection to Police Officer Romanowski’s testimony that he received a report of illegal drug activity, and that defendant was known for “crotching” his drugs.

“‘Hearsay’ is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” MRE 801(c). A statement offered to show the effect on the hearer is not hearsay. *People v Fisher*, 449 Mich 441, 449-450; 537 NW2d 577 (1995).

Romanowski’s testimony was not hearsay because it was admissible to show the effect on the hearer. The report of drug activity was admissible to show why Romanowski first arrived at the homeowner’s residence to investigate defendant, Metzger, and Pickard. That defendant was known for “crotching” his drugs was admissible to show why Romanowski requested that jail staff conduct a strip search on defendant. Accordingly, the challenged testimony was not hearsay, and any objection by defense counsel on the ground that it was would have been futile. *Fonville*, 291 Mich App at 384.

VII. RIGHT TO COUNSEL

In his Standard 4 brief, defendant argues that the trial court erred when it denied his motion for substitute counsel. We disagree. A trial court's decision regarding substitute counsel is reviewed for an abuse of discretion. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). "An abuse of discretion occurs . . . when the trial court chooses an outcome falling outside [the] principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

While a defendant has the constitutional right to retain counsel of choice, "the right to counsel of choice does not extend to defendants who require counsel to be appointed for them." *United States v Gonzalez-Lopez*, 548 US 140, 151; 126 S Ct 2557; 165 L Ed 2d 409 (2006). "Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic." *People v Bauder*, 269 Mich App 174, 193; 712 NW2d 506 (2005) (internal quotation marks omitted and citation).

Even assuming that defendant's request for substituted counsel during voir dire was timely, defendant failed to show "good cause." Defendant has not identified any differences in opinion regarding a fundamental trial tactic. Rather, defendant argues that he was entitled to substitute counsel because defense counsel was skeptical about the outcome of trial. Given the existence of the video recording, defense counsel's opinion about the outcome of trial was wholly reasonable, and he was duty bound to advise defendant of such. MRPC 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.).

And while defendant argues that there was a breakdown in communication, it is apparent that the breakdown was caused by defendant's reluctance to cooperate with defense counsel, as defendant admits on appeal. "A defendant may not purposely break down the attorney-client relationship by refusing to cooperate with his assigned attorney and then argue that there is good cause for a substitution of counsel." *People v Meyers (After Remand)*, 124 Mich App 148, 166-167; 335 NW2d 189 (1983).

VIII. PROSECUTORIAL MISCONDUCT

In his Standard 4 brief, defendant argues that the prosecutor deprived him of a fair and impartial trial by: improperly eliciting police opinion testimony that defendant was the one in the video, improperly eliciting bad acts testimony that defendant was guilty of prior drug activity, and improperly injecting comments during closing. Defendant did not object to any of the allegedly improper conduct and, therefore, we review for plain error affecting substantial rights. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

"The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *People v Rice (On Remand)*, 235 Mich App 429, 434; 597 NW2d 843 (1999). "Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial." *Id.* at 435. "Appellate review of alleged misconduct is precluded absent an objection, unless an objection would not

have cured the prejudice.” *People v McGhee*, 268 Mich App 600, 633-634; 709 NW2d 595 (2005).

A. VIDEO NARRATION

Defendant argues that the prosecutor committed misconduct by introducing Police Officer Monroe’s testimony about the contents of the video recording. Defendant’s argument essentially challenges the scope of Monroe’s testimony.

Monroe properly narrated the video for the jury on the basis of his perception. See *People v Fomby*, 300 Mich App 46; 831 NW2d 887, 890 (2013). Contrary to defendant’s argument, Monroe did not directly testify that the video recording showed defendant place one or two packages of drugs behind the bench. Rather, Monroe testified that the video recording showed defendant place “something” or “the object” behind the bench. Monroe, like any other lay witness, was able to testify in a straightforward manner about the contents of the video recording. See MRE 701.

B. BAD-ACTS TESTIMONY

Defendant argues that the prosecutor committed misconduct by introducing Police Officer Giddis’s testimony that he “crotches” his drugs and Police Officer Hamilton’s testimony that he was previously involved in a drug-distribution operation at a local hotel.

“As a general rule, evidence that tends to show the commission of other criminal acts by a defendant is not admissible to prove guilt of the charged offense.” *People v Williamson*, 205 Mich App 592, 596; 517 NW2d 846 (1994). Giddis’s testimony was admissible for the effect on the hearer. However, Hamilton’s cited testimony was inadmissible bad-acts evidence. Nevertheless, even if the trial court plainly erred in admitting the challenged testimony, reversal is not warranted in light of the overwhelming evidence of defendant’s guilt, including the video recording, which showed defendant place an object behind the bench in the precise location where drugs were discovered a few hours later. *Id.*

C. CLOSING ARGUMENT

Defendant argues that the prosecutor argued facts not in evidence when he stated that the homeowner reported drug activity, defendant was known for “crotching” drugs, and defendant had driven from Detroit to sell drugs. “Although a prosecutor may not argue facts not in evidence or mischaracterize the evidence presented, the prosecutor may argue reasonable inferences from the evidence.” *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001).

Defendant admitted to police officers that he had arrived from Detroit earlier in the day. In addition, Hamilton opined that a person in possession of several individual packages of drugs intended to distribute the drugs. Because the prosecution was permitted to argue reasonable inferences from the evidence, the prosecution appropriately argued that defendant had driven from Detroit to sell drugs.

The prosecution's arguments that the homeowner reported drug activity and that defendant was known for crotching drugs, however, were not used to illustrate the rationale for Romanowski's actions and decisions. *Fisher*, 449 Mich at 449-450. Rather, the prosecution referenced this testimony to support his theory that defendant was guilty of possessing drugs with the intent to distribute. As such, it was improper.

Nevertheless, reversal is not warranted because an objection during the prosecution's closing argument and a proper curative instruction could have eliminated any prejudice. *McGhee*, 268 Mich App at 633-634. Had defendant objected to the prosecution's use of the testimony during closing argument, the trial court would have been obligated to instruct the jury that his prior bad acts involving drugs did not prove that he committed the instant charges. *Williamson*, 205 Mich App at 596. Moreover, defendant's substantial rights were not affected because the video recording provided overwhelming evidence of his guilt.

Affirmed.

/s/ Henry William Saad
/s/ Kirsten Frank Kelly
/s/ Elizabeth L. Gleicher