STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 24, 2013
v	No. 311055 Oakland Circuit Court
ARSENIO DEANDRE HENDRIX, Defendant-Appellant.	LC No. 2011-236092-FH

Before: SAAD, P.J., and SAWYER and JANSEN, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of delivery of more than 50 grams, but less than 450 grams, of cocaine, MCL 333.7401(2)(a)(*iii*), and conspiracy to deliver more than 50 grams, but less than 450 grams, of cocaine, MCL 750.157a; MCL 333.7401(2)(a)(*iii*). He was sentenced to 53 months to 20 years' imprisonment for each conviction. We affirm.

This case arises from four controlled purchases of crack cocaine from January 26, 2011, to February 3, 2011. Defendant first argues that the trial court abused its discretion when it denied defendant's motion for a new trial on the basis of newly discovered evidence. We disagree.

In reviewing a trial court's decision to grant or deny a motion for a new trial based on newly discovered evidence, this Court reviews the trial court's factual findings for clear error, and the ultimate decision for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). "A new trial may be granted to [defendants] . . . whenever their substantial rights are materially affected" by "[m]aterial evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at trial." MCR 2.611(A)(1)(f); *People v Cox*, 268 Mich App 440, 448-450; 709 NW2d 152 (2005). "For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." *Cress*, 468 Mich at 692 (internal quotations omitted).

Defendant argues that his motion for a new trial should have been granted on the basis of the signed statement of a codefendant, Anthony Paul, that defendant "was not present during the

drug sale on February 3rd. He was not in the house or involved in [the sale. He] did not throw [Michael Zion, the police informant,] against the wall or pat him down. [Defendant] walked into the house only [sic] before the police came in." During defendant's bench trial, Richard Crawford and defendant each testified that, after Crawford, Paul, and defendant returned to Marcus Kelley's house from the liquor store because they had forgotten to ask their friends what they wanted to drink, Paul went in the house to use the bathroom, leaving defendant and Crawford in the Impala, and remained there. Crawford and defendant testified that Paul sat in the front passenger seat during that trip. Each witness for the defense, then, knew at the time of trial of Paul's presence in the car, and presumably of his ability to exculpate defendant. Setting aside the question whether Paul's unnotarized, undated statement constitutes cognizable evidence for the purpose of defendant's motion for a new trial—and whether defendant's "walk[ing] into the house only before the police came in" is capable of an exculpatory interpretation—nothing in Paul's statement could not have been inferred by the testimony defendant and Crawford gave. If Paul was in the house, and Crawford and defendant each testified that neither of them were in the house during the sale, then Paul's statement that defendant was not in the house would have been cumulative, contrary to the second prong of the *Cress* test. *Cress*, 468 Mich at 692.

At the hearing on defendant's motion for a new trial, the trial court conceded that defendant satisfied the first *Cress* prong, which is that "the evidence itself, not merely its materiality, was newly discovered." However, newly available evidence does not necessarily constitute newly discovered evidence sufficient to warrant a new trial. *People v Terrell*, 289 Mich App 553, 570; 797 NW2d 684 (2010). In *Terrell*, the defendant argued that exculpatory posttrial statements of a codefendant constituted newly discovered evidence sufficient to warrant a new trial. *Id.* at 554. This Court reversed the trial court's order granting a new trial:

> Defendant and [the codefendant] had known each other since childhood. [The codefendant] testified that he and defendant were close friends. According to [the codefendant], he was present with defendant at the scene of the shooting. Even if [the codefendant] and defendant never had a conversation about [the codefendant's] testimony before or during their trial, defendant was certainly aware at all times that [the codefendant] had the ability to provide his proffered testimony. Therefore, the record clearly leads us to conclude that defendant knew or should have known before trial that [the codefendant] could have provided the testimony.
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> In holding that newly available evidence does not constitute newly discovered evidence sufficient to warrant a new trial, we note that our holding does not preclude the possibility that a codefendant's posttrial or postconviction exculpatory statements might qualify as newly discovered evidence under MCR 6.431(B). There may be cases in which such evidence does indeed constitute newly discovered evidence. However, in this case, defendant knew or should have known that his codefendant could offer material testimony regarding defendant's role in the charged crime; therefore, defendant cannot claim that he "discovered" that evidence only after trial. Consequently, because defendant knew or should have known that his codefendant could offer material testimony about defendant's role in the charged crime, his inability or unwillingness to

> procure that testimony before or during trial should not be redressed by granting him a new trial. [*Id.* at 570.]

The facts in this case are similar. Defendant and Paul are cousins, and Paul and defendant do not dispute that they were in relatively close proximity when the February 3, 2011, sale of crack cocaine occurred, such that defendant knew of Paul's potential to serve as a witness. In the language of *Terrell*, because "defendant was certainly aware at all times that [Paul] had the ability to provide his proffered testimony," defendant "knew or should have known before trial that [Paul] could have provided the testimony" described in Paul's posttrial statement. *Terrell*, 289 Mich App at 570. Therefore, the trial court erred when it found that Paul's statement constituted newly discovered evidence.

Defendant's inability to satisfy the third and fourth prongs of the *Cress* test follows from the flaws in his arguments with respect to the first two prongs. The third prong is that defendant "could not, using reasonable diligence, have discovered and produced the evidence at trial." *Cress*, 468 Mich at 692. Because Paul was a codefendant, and defendant knew of his presence near the scene of the crack cocaine purchase, Paul's testimony was not "newly discovered," see *Terrell*, 289 Mich App at 570, and, therefore, defendant cannot show that he would not have discovered that testimony in the exercise of reasonable diligence. The fourth *Cress* prong is that "the new evidence makes a different result probable on retrial." *Cress*, 468 Mich at 692. Given that Paul's statement, to the extent it can be deciphered, was cumulative, it would not have resulted in defendant's acquittal.

Defendant next argues, in his Standard 4 brief, that there was insufficient evidence to sustain a guilty verdict of conspiracy to deliver more than 50 grams, but less than 450 grams, of cocaine, under an aiding and abetting theory because the evidence required speculative inferences in order to convict him. We disagree.

In criminal cases, due process requires that the evidence must have shown the defendant's guilt beyond a reasonable doubt. *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010). This Court examines the lower court record de novo, in the light most favorable to the prosecution, to determine whether a rational trier of fact could have found that the evidence proved each element of the crime beyond a reasonable doubt. *Id.*

Although defendant is serving his two identical sentences concurrently, he challenges the sufficiency of the evidence only with respect to the conspiracy charge. The elements of delivering 50 grams or more, but less than 450 grams, of cocaine are (1) defendant's delivery; (2) of 50 grams or more, but less than 450 grams; (3) of cocaine or a mixture containing cocaine; (4) with knowledge that he was delivering cocaine. MCL 333.7401(2)(a)(*iii*); *People v Collins*, 298 Mich App 458, 462; 828 NW2d 392 (2012) (applying the same elements to delivery of heroin). Generally, a person "who conspires together with 1 or more persons to commit an offense prohibited by law" may be "punished by a penalty equal to that which could be imposed if he had been convicted of committing the crime he conspired to commit . . . ." MCL 750.157a(a); *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001).

Zion testified that defendant was in the kitchen in Kelley's house when Zion first entered. Defendant left, "walking back and forth through the hallway of the house," until Kelley, who

was "cooking" the powder cocaine into crack cocaine, called defendant back into the kitchen to search Zion. Defendant threw Zion against a wall, patted him down, and told him, "Hope I ain't got to slit your throat." Defendant took the money Zion received from Oakland County Sheriff's Office Detective Mark Ferguson off the kitchen table and talked to Kelley about the quality of the cocaine. Ferguson testified that he recovered two $50 bills from defendant, each of which matched the photocopied money that Ferguson gave to Zion for the arranged purchase. Troy Police Officer Candice Rushton, who was performing surveillance on the house, testified that, after the car carrying defendant, Crawford, and Paul arrived at the house for the third time, defendant went inside the house.

This evidence was sufficient to sustain defendant's conviction of conspiracy to deliver more than 50 grams, but less than 450 grams, of cocaine, MCL 333.7401(2)(a)(*iii*). Zion's testimony that Kelley directed defendant to physically search Zion, and that defendant acquiesced, could reasonably have been interpreted as the requisite mutual understanding necessary to imply a conspiracy to commit a criminal offense. Defendant's having taken the purchase money from the table, and his discussion with Kelley relating to the crack cocaine, further establish defendant's involvement in the operation.

Defendant next argues, in his Standard 4 brief, that the trial court clearly erred in its scoring of prior record variables (PRVs) 2 and 7 because it relied on inaccurate information. We disagree.

To be preserved for appellate review, an issue challenging the scoring of the sentencing guidelines must have been raised at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in this Court. MCL 769.34(10); MCR 6.429(C); *People v Jones*, 297 Mich App 80, 83; 823 NW2d 312 (2012). Because defendant challenges the scoring of two PRVs for the first time on appeal, this issue is not preserved. Unpreserved claims are reviewed for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999). A plain error affects a defendant's substantial rights if the error affected the outcome of the proceedings. *People v Vaughn*, 491 Mich 642, 665; 821 NW2d 288 (2012).

MCL 777.52 provides:

> (1) Prior record variable 2 is prior low severity felony convictions. Score prior record variable 2 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
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> * * *
>
> (d) The offender has 1 prior low severity felony conviction[:] 5 points
>
> (2) As used in this section, "prior low severity felony conviction" means a conviction for any of the following, if the conviction was entered before the sentencing offense was committed:
>
> (a) A crime listed in offense class E, F, G, or H.

Carrying a concealed weapon, MCL 750.227, is a class E felony. MCL 777.16m. Defendant pleaded guilty to that offense on February 17, 2009, and was sentenced to one-year probation under the Holmes Youthful Trainee Act (HYTA). Assignments to youthful trainee status under the HYTA are included for the purpose of scoring PRV 2. MCL 777.50(4)(a)(*i*); *People v Williams*, 298 Mich App 121, 125; 825 NW2d 671 (2012). Therefore, defendant's argument that the trial court relied on inaccurate information when it scored PRV 2 at 5 points is without merit.

Defendant argues that the trial court relied on inaccurate information in scoring 10 points for PRV 7, concerning subsequent or concurrent felony convictions, MCL 777.57. However, he does not elaborate on that argument. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *People v Schumacher*, 276 Mich App 165, 178; 740 NW2d 534 (2007). MCL 777.57 provides:

> (1) Prior record variable 7 is subsequent or concurrent felony convictions. Score prior record variable 7 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
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> * * *
>
> (b) The offender has 1 subsequent or concurrent conviction[:] 10 points
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> (2) All of the following apply to scoring record variable 7:
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> (a) Score the appropriate point value if the offender was convicted of multiple felony counts or was convicted of a felony after the sentencing offense was committed.

Defendant was convicted by bench trial of delivery of more than 50 grams, but less than 450 grams, of cocaine, MCL 333.7401(2)(a)(*iii*), and conspiracy to deliver more than 50 grams, but less than 450 grams, of cocaine, MCL 750.157a; MCL 333.7401(2)(a)(*iii*), each offense a felony. The trial court's scoring of PRV 7 was supported by the record evidence.

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Kathleen Jansen