S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 19, 2006
v	No. 260959 Oakland Circuit Court
RICKY FRANKLIN, Defendant-Appellant.	LC No. 94-131215-FC

Before: Murray, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Following a jury trial in November 1995, defendant was convicted of conspiracy to possess with intent to deliver 650 or more grams of cocaine, MCL 750.157a and MCL 333.7401(2)(a)(i),[1] and sentenced to life imprisonment. In November 2004, the trial court determined that defendant was denied an opportunity for an appeal by right because of the ineffective assistance of his former appellate counsel. Defendant now appeals as of right, challenging the trial court's February 16, 2006, denial of his motion for a new trial or an evidentiary hearing. In a pro se supplemental brief, defendant further challenges the trial court's denial of a directed verdict motion and the admissibility of certain in-court identification testimony at trial. We affirm.

I

Defendant was convicted of conspiring with a number of individuals to process cocaine and transport it to other locations for sale. The prosecution presented evidence that defendant was running the cocaine operation, but used lower level dealers to sell the cocaine in exchange for a share of the profits. Most of the testimony regarding cocaine sales involved activities in the area of a housing project known as East Park Manor in Muskegon Heights.

Vicki Diggs testified that she met defendant at East Park Manor in January 1989. Two of defendant's companions did most of the talking. They told Diggs that she could make money by

[1] MCL 333.7401(2)(a)(i) was amended by 2002 PA 665 to increase the proscribed amount to 1,000 grams.

letting individuals sell crack cocaine out of her apartment. Diggs agreed to this arrangement until about April 1989.

Other testimony indicated that crack cocaine continued to be sold in the East Park Manor area after April 1989. On December 11, 1989, a Muskegon County Sheriff's deputy stopped a vehicle occupied by Aaron Banks, Amir Wilson, Kato Peterson, and Ronald Gardner for a traffic violation near East Park Manor. Approximately 222 grams of cocaine packaged in plastic bags was seized from inside a hotplate in the trunk of the vehicle. The parties stipulated that a laboratory report indicated that latent prints on the hotplate and a plastic bag were made by defendant's left hand.

Gardner testified that he became involved in the December 11, 1989, trip after being contacted by defendant. He saw defendant and Banks put "dope" in the hotplate before they departed in Gardner's vehicle for the Muskegon area. Gardner made two earlier trips for defendant. He drove Gerald Hill and other individuals to the Muskegon area. He watched or assisted defendant cook and cut crack cocaine, including one occasion in Oak Park in which defendant cooked some cocaine and then gave it to "T-Bone" (Terrance Moore).

Peterson testified that the December 11, 1989, trip was his second trip to the Muskegon area in December 1989. He had asked defendant for permission to go on the first trip, and defendant told him that he did not care. Peterson was accompanied by Wilson and two other individuals, one of whom supplied crack cocaine for Peterson to sell out of East Park Manor. Before the second trip on December 11, 1989, a meeting with defendant took place at Banks's house.

Southfield Police Lieutenant Theodore Quisenberry testified that he was assigned to conduct an investigation following an incident on July 5, 1990. Defendant and five other individuals (Hill, Moore, Wilson, Robert Johnson, and Kevin Jackson) were indicted by a grand jury in December 1990, but the investigation continued. Efforts to find and arrest defendant were not successful. Southfield Police Detective James Adamczyk testified that he received information that defendant was in the custody of the Detroit Police Department in January 1994. Defendant had an Ohio identification card with the name "Marion Terrell." When Detective Adamczyk interviewed defendant about this case, defendant denied being part of any organization. Rather, he stated, "everybody did their own thing. He had told them about Muskegon, and they all went there on their own."

II

On appeal, defendant first claims that he is entitled to a new trial or an evidentiary hearing because defense counsel was ineffective for injecting an alleged murder-for-hire plot into the trial after the trial court ruled to suppress this evidence.

In general, we review the trial court's ultimate ruling on a motion for a new trial for an abuse of discretion and its factual findings in support of its decision for clear error. *People v Cress,* 468 Mich 678, 691; 664 NW2d 174 (2003). The trial court "may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." MCR 6.431(B). But because a claim of ineffective assistance of counsel presents a constitutional question of law, we review de novo the

trial court's ruling that the record does not support defendant's claim of ineffective assistance. *People v Matuszak,* 263 Mich App 42, 48; 687 NW2d 342 (2004). Because the trial court did not conduct an evidentiary hearing, our review is limited to errors apparent from the record. *People v Wilson,* 242 Mich App 350, 352; 619 NW2d 413 (2000).

> For a defendant to establish a claim that he was denied his state or federal constitutional right to the effective assistance of counsel, he must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). As for deficient performance, a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). As for prejudice, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . . ." *Id.* at 167. [*People v Toma,* 462 Mich 281, 302-303; 613 NW2d 694 (2000).]

Upon de novo review, the trial court did not err in finding no record support for defendant's claim of ineffective assistance. The fact that defense counsel, with the prosecution's agreement, had successfully moved to exclude testimony from Andrew Bernard regarding an alleged plot to murder the Muskegon county prosecutor is not dispositive of whether defense counsel performed below an objective standard of reasonableness when cross-examining Bernard.

It is apparent from Bernard's testimony on direct examination by the prosecutor that he claimed to be an accomplice to drugs sales in the area of East Park Manor. Indeed, the trial court instructed the jury to treat Bernard as an accomplice when considering his testimony. Bernard testified that, while residing in the Muskegon area, he sold crack cocaine for several people from the Detroit area, including Moore. He denied knowing defendant, but indicated that Moore, who was also known to Bernard as "Bones," once told him that he had to "get some more dope from his man, Rick." Bernard further testified that he was currently serving a prison sentence, which he later explained arose from a parole violation for an earlier conviction that he committed by walking away from a corrections center.

There is no basis in the record for concluding that defense counsel's cross-examination of Bernard, regarding when he became a prosecution witness and whether prosecutors from Muskegon County offered him a deal to testify, was objectively unreasonable. Evidence that an accomplice received rewards for testimony is probative of the accomplice's credibility. See *People v Atkins,* 397 Mich 163, 173-174; 243 NW2d 292 (1976). And while we agree with the trial court that Bernard volunteered information about the alleged murder plot, his initial testimony that prosecutors offered not to charge him with "conspiracy to murder" was responsive to defense counsel's proper question regarding the nature of his deal.

The record also indicates that defense counsel undertook to cross-examine Bernard regarding the deal offered to him after Bernard testified that the deal involved the conspiracy to commit murder. Although defense counsel did not ask for details regarding the murder plot, Bernard eventually testified, on cross-examination, that "[a]ctually, what happened was, as I was

sitting in the office, he [Muskegon County Prosecutor], he tried to intimidate me. . . . He said well, what brought this about that got me into this situation was the one that tried to do the hit was Bones. Bones was connected to this. So what they did is they knew Bones was under arrest here. They, the Prosecution in Muskegon County, called Oakland County and this is how this whole thing came about." Further, while the trial court later allowed the prosecutor, on redirect examination, to elicit some details regarding the conspiracy to commit murder, Bernard provided no testimony suggesting that defendant was involved in the murder plot.

On this record, defendant has not overcome the strong presumption that defense counsel's actions constituted sound trial strategy under the circumstances. *Toma, supra* at 302. Even if defense counsel's performance could be considered deficient, it is apparent that defendant was not prejudiced by defense counsel's actions. *Id.* at 302-303. The trial court did not abuse its discretion in denying defendant's motion for a new trial on this ground.[2]

Defendant next claims that the trial court erred in denying his motion for a new trial or an evidentiary hearing regarding whether a prosecution witness, Jeremiah Perry, gave perjured testimony. We disagree. Michigan courts are reluctant to grant new trials based on recantation testimony. *People v Canter,* 197 Mich App 550, 560; 496 NW2d 336 (1992). Such testimony is traditionally regarded as suspect and untrustworthy. *People v Barbara,* 400 Mich 352, 362-363; 255 NW2d 171 (1977).

> 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, supra* at 692 (citations omitted).]

Here, as with Bernard, the trial court instructed the jury to treat Perry as an accomplice when evaluating his testimony. Perry testified that defendant paid him to drive to Muskegon Heights approximately four times in 1989. After defendant told Perry that he could earn more money by selling drugs, Perry started selling cocaine, which was supplied by defendant, with Banks. Perry further testified that he was with defendant on two occasions when defendant obtained cocaine from Jackson. Jackson was also known to Perry as "Fat Kev." On one occasion, someone named "April" brought the cocaine to Jackson's house in Detroit. Perry indicated that he was testifying pursuant to a deal that he would not be charged if he cooperated and told the truth.

As the trial court found, the only evidence that defendant offered to support his claim that Perry gave perjured testimony was an unauthenticated copy of an August 2, 2002, affidavit in

---

[2] We are also unpersuaded that the case should be remanded for an evidentiary hearing. An evidentiary hearing is only necessary if a defendant establishes that the claim of ineffective assistance of counsel depends on facts not of record. See *People v Hoag,* 460 Mich 1, 6; 594 NW2d 57 (1999); see also *People v McMillan,* 213 Mich App 134, 141-142; 539 NW2d 553 (1995). Here, defendant has not demonstrated that an evidentiary hearing is necessary.

which Perry purported to recant testimony at Jackson's separate trial on the conspiracy charge, with respect to Perry's observations of Jackson's two transactions with defendant, and an October 21, 2002, affidavit of Jackson's sister, April, in which she denied being present and participating in the two transactions.

Defendant offered no evidence that any action was taken in Jackson's case, with respect to the unauthenticated copy of Perry's August 2, 2002, affidavit, or that Perry was willing to testify in support of defendant's motion for a new trial, filed three years later in November 2005. In any event, the trial court did not abuse its discretion in holding that defendant would not be entitled to a new trial under the standards discussed in *Cress, supra,* even if defendant could successfully present his proposed new evidence at an evidentiary hearing.

Perry's testimony that Jackson supplied cocaine to defendant was cumulative of Gardner's testimony, although Gardner referred to Jackson as both "Kevin Smith" and "Fat Kev." Moreover, the essence of a conspiracy is an agreement between two or more persons to commit a criminal act. *People v Cotton,* 191 Mich App 377, 392-393; 478 NW2d 681 (1991). It is not necessary that each coconspirator have full knowledge of the extent of the conspiracy. *People v Hunter,* 466 Mich 1, 7; 643 NW2d 218 (2002). Although Jackson was a named coconspirator in the grand jury indictment against defendant, defendant's conspiracy conviction was not dependent on establishing that Jackson participated in the conspiracy. In light of the overwhelming evidence that defendant was a member of the conspiracy, defendant's proposed new evidence does not make a different result probable on retrial. *Cress, supra* at 692. Therefore, we affirm the trial court's denial of defendant's motion for a new trial without conducting an evidentiary hearing.

III

In his pro se supplemental brief, defendant argues that the trial court abused its discretion in denying his motion to strike Southfield Police Sergeant Paul Bourlier's in-court identification of defendant on the ground that it was the result of a suggestive pretrial identification procedure We disagree.

Error may not be predicated upon a ruling to admit evidence unless a substantial right of a party is affected and a timely objection or motion to strike appears on the record. MRE 103(a)(1). To timely object to testimony, an objection should be interposed between the question and answer. *People v Jones,* 468 Mich 345, 355; 662 NW2d 376 (2003). But to properly preserve a claim of suggestiveness, a defendant should move to suppress the identification. See *People v Lee,* 391 Mich 618, 626-627; 218 NW2d 655 (1974); *People v Daniels,* 163 Mich App 703, 710-711; 415 NW2d 282 (1987). A trial court should conduct an evidentiary hearing unless it is apparent that the defendant's challenge is insufficient to raise a constitutional infirmity or the defendant fails to substantiate the alleged infirmity with factual support. *People v Johnson,* 202 Mich App 281, 285; 508 NW2d 509 (1993). To establish that a pretrial identification procedure violates due process, the defendant must prove that it was so suggestive, in light of the totality of the circumstances, that it led to a substantial likelihood of misidentification. *People v Kurylczyk,* 443 Mich 289, 302; 505 NW2d 528 (1993). If the trial court finds an impermissively suggestive identification procedure, the identification is inadmissible unless an independent basis is established that is untainted by the suggested pretrial procedure. *Id.* at 303. The trial court's findings are reviewed for clear error. *Id.* at 303.

Because defendant did not move for an evidentiary hearing or object to the in-court identification until after Sergeant Bourlier identified him at trial, we deem defendant's challenge to the admissibility of Sergeant Bourlier's identification testimony unpreserved. *Jones, supra* at 355. In general, an unpreserved evidentiary issue is considered by an appellate court under the plain error doctrine in *People v Carines,* 460 Mich 750, 763; 597 NW2d 130 (1999). *Jones*, *supra* at 355. But because defendant moved to strike the testimony, we have considered defendant's challenge to the trial court's denial of that motion under the abuse of discretion standard applicable to evidentiary rulings generally. *People v Lukity,* 460 Mich 484, 488; 596 NW2d 607 (1999). We review de novo preliminary questions of law bearing on the trial court's ruling. *Id.*

The testimony elicited from Sergeant Bourlier concerned a specific incident on July 5, 1990, that resulted in Hill's arrest in connection with crack cocaine seized from behind an auto parts store. Sergeant Bourlier testified that defendant and Hill were passengers in a vehicle that he stopped on July 5, 1990. He allowed them to walk to a party store while he conducted his business with the driver of the vehicle. He watched them enter and exit the party store, and observed that defendant returned to the vehicle, while Hill walked to the auto parts store with a large package. Having become suspicious, Sergeant Bourlier checked the driver and defendant for weapons and outstanding warrants before releasing them. He also watched as defendant and the driver briefly returned to the area after they were released. Sergeant Bourlier further testified that he arrested Hill and, about one month later on August 8, 1990, when a preliminary hearing was conducted for Hill, saw defendant depart in a vehicle from the courthouse.

Although defendant's trial was not conducted until more than five years later in November 1995, we are not persuaded that defense counsel established any basis for the trial court to strike Sergeant Bourlier's in-court identification at trial. Without an evidentiary hearing, the trial court had only Sergeant Bourlier's testimony on cross-examination that he recalled seeing a photograph of defendant two or three years earlier and that it "may have" assisted him in making an identification to evaluate defendant's claim that the identification should be stricken. Sergeant Bourlier indicated that he also saw photographs of other people, but gave no indication that he was asked to view a photographic lineup.

After the trial court denied the motion to strike, Sergeant Bourlier testified that defendant provided his name, birth date, and an address during the traffic stop. Sergeant Bourlier did not provide additional testimony regarding the photograph, but indicated that an assistant prosecutor pointed out the vehicle and told him that he believed that it was occupied by defendant at the time of Hill's preliminary examination. Other testimony elicited by defense counsel from Lieutenant Quisenberry indicated that defendant was supposed to appear at Hill's preliminary examination as a witness.

Based on Sergeant Bourlier's testimony, defendant has failed to establish support for his claim that Sergeant Bourlier's in-court identification violated his right to due process. Defendant's claim is belied by the absence of any evidence that Sergeant Bourlier viewed the photograph or was directed to the vehicle at Hill's preliminary examination as part of an identification procedure. Although due process protects a defendant from identification procedures that create a very substantial likelihood of irreparable misidentification, "the absence of any police identification procedure whatsoever necessarily dooms any attempt to exclude a

subsequent in-court identification allegedly derived from that procedure." *United States v Pagan,* 829 F Supp 88, 91 (SD NY, 1993).

Further, this case is unlike a situation where lay observers, or even police witnesses, of a sudden crime are asked to identify suspected participants. Rather, the circumstances described in Sergeant Bourlier's testimony reflect an alert officer who had an opportunity to observe defendant during a traffic stop and to obtain information directly from defendant regarding his identity. Notwithstanding Sergeant Bourlier's uncertainty whether viewing a photograph affected his ability to identify defendant in court, his testimony raises no cause for suspecting the reliability of his identification. Cf. *Commonwealth v Russell,* 19 Mass App Ct 940; 472 NE2d 1368 (1985) (officer's in-court identification upheld where the officer examined a photograph to confirm his tentative identification of the defendant, which was made during a crime that he watched carefully, and there was no cause for suspecting the reliability of the identification or disapproving the officer's common-sense course of checking his observations before causing charges to be initiated against the defendant); *Hunter v State,* 202 Ga App 195, 196; 413 SE2d 526 (1991) (where officer was given the name of an individual from whom he purchased cocaine, and then viewed a photograph to confirm the identity, no viable basis existed for suppressing the officer's identification testimony).

Therefore, the trial court did not abuse its discretion in denying defendant's motion to strike Sergeant Bourlier's in-court identification testimony. *Lukity, supra* at 488. Further, we find nothing in Sergeant Bourlier's testimony after the trial court's ruling that provides a basis for finding a plain due process error. *Jones, supra* at 355; *Carines, supra* at 763. Whether Sergeant Bourlier's identification testimony was credible was a matter for the jury to decide. *People v Davis,* 241 Mich App 697, 700; 617 NW2d 381 (2000).

We find that defendant has abandoned his additional claim that he was prejudiced by Diggs's testimony, regarding her recollection of photographs that she viewed, by failing to include this claim in the statement of the question presented. *People v Brown,* 239 Mich App 735, 748; 610 NW2d 234 (2000). In any event, defense counsel did not object to the prosecution's redirect examination of Diggs regarding the photographs. Further, defendant has not established a plain error. *Jones, supra* at 355; *Carines, supra* at 763.

Next, defendant argues that the trial court failed to employ the proper standard when ruling on his motion for a directed verdict. Although we agree that MCR 6.419(E), formerly MCR 6.419(D), required the trial court to state its reasons for denying the motion on the record, a trial court does not sit as a trier of fact when deciding a motion for a directed verdict. The trial court must determine whether the evidence, viewed in a light most favorable to the prosecution, is sufficient for a trier of fact to find the essential elements of the crime proven beyond a reasonable doubt. *People v Aldrich,* 246 Mich App 101, 122; 631 NW2d 67 (2001). Because our review is de novo, however, *id.*, any error by the trial court in failing to explain its decision on the record was harmless.

Here, defense counsel did not move for a directed verdict until the close of all evidence at trial. Further, like defense counsel's motion at trial, defendant's pro se argument on appeal merely asserts that the evidence was insufficient. "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 with little or no citation of supporting authority." *People v Kelly,*

231 Mich App 627, 640-641; 588 NW2d 480 (1998). Nor may an appellant leave it to this Court to search for factual support to sustain or reject a position. *People v Norman,* 184 Mich App 255, 260; 457 NW2d 136 (1990). Because defendant does not address the elements of conspiracy or attempt to explain which elements he believes lack evidentiary support, we conclude that defendant has abandoned his claim that he was entitled to a directed verdict of acquittal.

Next, defendant argues that the prosecutor engaged in misconduct by knowingly presenting Sergeant Bourlier's perjured testimony at trial. We agree that a prosecutor may not knowingly present false testimony to obtain a conviction. *People v Lester,* 232 Mich App 262, 277; 591 NW2d 267 (1998). Here, however, defendant failed to raise this specific issue in the trial court and there is no record support for defendant's claim. Thus, defendant cannot establish the threshold requirement of plain error necessary for relief with respect to this unpreserved issue. *Jones, supra* at 355; *Carines, supra* at 763.

Finally, defendant argues that he was denied his right to the effective assistance of counsel because the trial transcripts are inconsistent with videotapes of the trial. Defendant seeks a remand for an evidentiary hearing or a new trial.

We have limited our review of defendant's claim to the record presented to the trial court in support of defendant's motion for a new trial. *People v Robinson,* 390 Mich 629, 631-632 n 1; 213 NW2d 106 (1973). Defendant has not substantiated his claim that he was denied the effective assistance of counsel. *Toma, supra* at 302-303. We agree that an insufficient record may impede the right to appeal if it does not allow for evaluation of a defendant's claims on appeal. *People v Federico,* 146 Mich App 776, 799; 381 NW2d 819 (1985). In order to overcome the presumption that certified trial transcripts are inaccurate and be entitled to relief, a defendant must satisfy the following requirements:

> (1) seasonably seek relief; (2) assert with specificity the alleged inaccuracy; (3) provide some independent corroboration of the asserted inaccuracy; [and] (4) describe how the claimed inaccuracy in transcription has adversely affected the ability to secure postconviction relief pursuant to subchapters 7.200 and 7.300 of our court rules. [*People v Abdella,* 200 Mich App 473, 476; 505 NW2d 18 (1993) (footnotes omitted).]

The record supports the trial court's determination that defendant did not meet his burden under *Abdella.* In the motion for a new trial, defendant's appellate counsel relied on a statement prepared by defendant to summarize the alleged inaccuracies,[3] but sought an opportunity to corroborate or withdraw defendant's claimed inaccuracies at a hearing. Defendant's appellate counsel specifically asserted in the motion that he had not confirmed whether there were

[3] Although defendant's statement is undated, we note that it was filed in the lower court record with earlier letters written by defendant to the Oakland Circuit Court, dated December 27, 1999, and January 5, 2000.

inconsistencies between the transcripts and the videotapes of the trial, and there was no indication that he was denied an opportunity to view the videotapes.

Defendant's statement, by itself, does not satisfy the requirements in *Abdella.* It was not in the form of an affidavit. Further, it did not detail the specific testimony in the transcript pages that allegedly were "altered" or reflect that defendant viewed any videotapes to determine inaccuracies. At best, defendant alleged that a defense objection to jury instructions was inaccurately transcribed and that trial transcripts accurately reflected that the traffic stop underlying Officer Bourlier's testimony occurred on July 5, 1990, but that the prosecution and trial witnesses actually (and falsely) stated that the date was July 5, 1989.

Based on this record, the trial court did not abuse its discretion in denying defendant's motion without conducting an evidentiary hearing. *Cress, supra* at 691; *Abdella, supra.*

Affirmed.

/s/ Christopher M. Murray
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood