STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALLAN W. FERGUSON,

Defendant-Appellant.

UNPUBLISHED
October 20, 1998

No. 206851
Oakland Circuit Court
LC No. 96-149222 FH

Before: Hoekstra, P.J., and Cavanagh and O'Connell, JJ.

PER CURIAM.

Following a one-day bench trial, defendant was convicted of possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Defendant was sentenced to two to twenty years' imprisonment. He appeals as of right from his conviction. We affirm.

I

Defendant first argues that the trial court abused its discretion in admitting a police officer's hearsay testimony as relaying the excited utterances of the victim about the incident. Defendant contends that the victim's statements are not excited utterances because they were made at the hospital long after the victim was under the stress of excitement caused by the incident. We disagree. MRE 803(2) allows the admission of statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." To be admissible pursuant to this exception, two primary requirements must be satisfied: (1) there must be a startling event, and (2) the resulting statement must be made while under the excitement caused by that event. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998); *People v Straight*, 430 Mich 418, 423-424; 424 NW2d 257 (1988). While the time that passes between the event and the statement is an important factor in determining whether the declarant was still under the stress of the events when the statement was made, the focus of the exception is on the declarant's "lack of capacity to fabricate, not the lack of time to fabricate." *Smith, supra* at 551. The trial court may consider all the circumstances bearing on spontaneity

and lack of deliberation in making the determination. *People v Kowalak (On Remand)*, 215 Mich App 554, 559; 546 NW2d 681 (1996). Several physical factors such as shock, unconsciousness, and pain may prolong the period in which the risk of fabrication is reduced to a minimum. *Smith*, *supra* at 552, quoting 5 Weinstein, Evidence (2d ed), § 803.04[4], pp 803-24. See also *Straight*, *supra* at 425. The trial court's determination whether the declarant was still under the stress of the event is given wide discretion. *Smith*, *supra* at 552, citing McCormick, Evidence (3d ed), § 297, p 857.

In the present case, there is little doubt that the victim's statement arose out of a startling event. As a result of a heroin overdose, the victim was rendered unconscious, stopped breathing and had to be resuscitated by paramedics. The question is whether the victim was still under the stress of the events when she made the statements to the police officer. Here, the officer spoke to the victim in the intensive care unit shortly after she had suffered an overdose, stopped breathing, recently regained consciousness, and was taken to the hospital. The victim was shaking, wearing an oxygen mask, had difficulty breathing, and could not finish her sentences because she was crying. These circumstances are convincing that the victim was still under the stress caused by being on the brink of death; therefore, we agree with the trial court that her statements were reliable and find no abuse of discretion in their admission.

II

Next, defendant argues that there was insufficient evidence to support his conviction. In reviewing the sufficiency of the evidence in a bench trial, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995). To support a conviction for possession with intent to deliver less than 50 grams of heroin, the prosecutor must prove that (1) the recovered substance is heroin, (2) the heroin is in a mixture weighing less than fifty grams, (3) defendant was not authorized to possess the substance, and (4) defendant knowingly possessed the heroin with the intent to deliver it. *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748, amended 441 Mich 1201 (1992).

Here, defendant challenges the sufficiency of the evidence only with respect to the fourth element – that he knowingly possessed heroin with the intent to deliver. Specifically, defendant argues that he cannot be convicted of delivering heroin to the victim by injection because he purchased the heroin with the victim's money. According to defendant, the heroin belonged to the victim because he purchased it with proceeds obtained from the sale of the victim's property; therefore, he was only the procuring agent for the victim. Defendant's argument lacks merit. This Court has recognized that the "procuring-agent" defense was abrogated by newer controlled substance statutes and particularly by MCL 333.7105(1); MSA 14.15(7105), which defines "delivery" as "the actual, constructive, or attempted transfer from 1 person to another of a controlled substance, *whether or not there is an agency relationship*" (emphasis added). *People v Potra*, 191 Mich App 503, 510-511; 479 NW2d 707 (1991); *People v Williams*, 54 Mich App 448; 221 NW2d 204 (1974). Because the procuring-agent defense to the charge has no merit, defendant has failed to show how the evidence in this case was insufficient.

III

Next, defendant argues that the trial court should have granted his motion to suppress the syringe, tin foil, and heroin residue found in the motel room because the search was not justified under the emergency aid exception to the warrant requirement. In *People v Davis*, 442 Mich 1, 25-26; 497 NW2d 910 (1993), our Supreme Court discussed the emergency aid exception and delineated the following two-part test for when the police may enter a dwelling without a warrant: (1) the police must "reasonably believe that a person within is in need of immediate aid" and "must possess specific and articulable facts that lead them to this conclusion; and (2) "the entry must be limited to the justification therefor, and the officer may not do more than is reasonably necessary to determine whether a person is in need of assistance, and to provide that assistance." Here, the police had specific and articulable facts that the victim was in need of immediate aid. Additionally, the officer testified at the preliminary examination that in looking around the area in the motel room where she was standing, she was responding to a request of the paramedics to find out what the victim had ingested. Therefore, her action was reasonably necessary to provide assistance to the victim.

However, even assuming that admission of the evidence constituted error, we conclude that it was harmless error. In cases where a defendant alleges the erroneous admission of evidence, overwhelming evidence of guilt will ordinarily lead to the conclusion that the error was harmless. MCL 769.26; MSA 28.1096; *People v Mateo*, 453 Mich 203, 214; 551 NW2d 891 (1996). Here, the victim testified unequivocally at trial that defendant had purchased heroin and had injected her with it. Additionally, the victim's medical records, which were admitted at trial, confirmed her testimony by revealing that her blood contained heroin and that she had been treated for an acute heroin overdose. Therefore, even if the contested evidence had not been admitted at trial, it is unlikely that defendant would have been acquitted in light of the remaining evidence of his guilt.

IV

Next, defendant argues that the trial court erred in allowing the prosecutor to amend the information from possession of a controlled substance, morphine, to possession with intent to deliver less than 50 grams of heroin when defendant was not bound over on such a charge. Defendant contends that remand to the district court was mandatory because the amendment added a new charge and was not simply a change as to form. We disagree. The trial court has discretion to allow amendments to the information at any time before, during, or after trial. MCL 767.76; MSA 28.1016; *People v Ellis*, 224 Mich App 752, 756; 569 NW2d 917 (1997). An amendment to the information adding a new charge is proper where (1) the proofs presented at the preliminary examination were sufficient to bind defendant over on the new charge, and (2) the requested amendment does not cause unacceptable prejudice to defendant because of unfair surprise, inadequate notice, or insufficient opportunity to defend. *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993).

Here, the amended charge added the element of "intent to deliver" and identified the controlled substance as heroin. See *Wolfe, supra* at 516-517 (delineating elements of possession with intent to deliver less than 50 grams of a controlled substance). The victim's testimony at the preliminary examination that defendant had purchased heroin and injected her with it on two occasions on the

evening of the incident was sufficient to support a bindover on the new charge. See *People v Justice (After Remand)*, 454 Mich 334, 344; 562 NW2d 652 (1997) ("[p]robable cause signifies evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt"); *People v Reigle*, 223 Mich App 34, 37; 566 NW2d 21 (1997) (stating that the prosecutor need not prove each element beyond a reasonable doubt but must present "some evidence" of each element).

Moreover, the amendment did not unacceptably prejudice defendant in his defense. The victim testified at the preliminary examination that defendant had injected her with heroin and there is no indication that counsel's questioning or strategy at the preliminary examination would have been different had he known of the amended charge. Also, the trial did not begin until six months after the amendment, giving defendant ample time to prepare to meet the charge. Therefore, the trial court did not abuse its discretion in permitting the prosecutor to amend the information to reflect the new charge.

V

Next, defendant argues that the trial court erred in relying exclusively on the preliminary examination transcripts in deciding his motion to suppress evidence. We disagree. In general, a trial court may not rely exclusively on the preliminary examination transcripts to decide a defendant's motion to suppress the evidence; however, counsel may agree to have a motion to suppress decided on the basis of the preliminary examination transcripts. MCR 6.110(D); *People v Kaufman*, 457 Mich 266; 577 NW2d 466 (1998). After a thorough review of the record, we conclude that counsels' comments and actions before and during the preliminary examination indicate an agreement between the parties that the motion would be decided on the basis of the testimony elicited at the preliminary examination. Although defendant requested an evidentiary hearing as alternative relief in his written motion to suppress, he also indicated in the same motion that he "specifically incorporates by reference herein, as though fully set out in its entirety, the Preliminary Examination Transcripts Volumes I and II." Similarly, at the pretrial hearing, defendant and the prosecution based their arguments upon the testimony at the preliminary examination. Finally, when the court relied on the preliminary examination transcripts to make its decision, defendant neither reiterated his request for an evidentiary hearing nor objected to the basis for the court's decision. Therefore, because it appears that defense counsel conceded to having the trial court rely exclusively on the preliminary examination transcripts in deciding the motion to suppress evidence, we find no error.

VI

Next, defendant argues that the verdict contravened the great weight of the evidence because the only evidence suggesting that he injected the victim with heroin was elicited from the victim herself. A trial court may grant a new trial only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). Defendant correctly states that the verdict in this case depended heavily upon the credibility of the victim because she was the only witness who could testify that defendant injected her with drugs; however, the question of a witness' credibility is generally an insufficient ground for granting a new trial. See *Lemmon, supra* at 643-647. The trial judge in this case had the duty to

determine the credibility of the witnesses and arrive at a decision of whom to believe. *People v Carigon,* 128 Mich App 802, 810; 341 NW2d 803 (1983). The trial judge was fully apprised of the inconsistencies in her testimony yet found her to be credible. We defer to the conclusion of the trial judge who was present in the court room to observe the testimony of the witness.

In a related argument, defendant argues that the trial court abused its discretion in refusing to admit evidence that would have impeached the victim's credibility. Specifically, after eliciting testimony from the victim that she fabricated a story to her friends that she was suffering from cancer, the court refused to allow further questions from defense counsel as to how the victim shaved her head and eyebrows to carry out the story. However, this issue is unpreserved for appellate review because defendant did not include it in his statement of the questions presented. MCR 7.212(C)(5); *People v Yarbrough,* 183 Mich App 163, 165; 454 NW2d 419 (1990). Nevertheless, we find that the trial court did not abuse its discretion in disallowing the contested line of questioning. As the trial court noted, it had already received the information that was pertinent to the victim's credibility, namely, that she had fabricated a story. The manner in which she carried out her story was immaterial.

VII

Next, defendant argues that the police lacked probable cause to arrest him and should not have detained him because they had not yet searched the motel room. In support of his argument, defendant relies on the holding in *People v Summers,* 407 Mich 432; 286 NW2d 226 (1979); however, the holding in *Summers* was reversed by the United States Supreme Court, which stated that "evidence that a citizen's residence is harboring contraband is sufficient to persuade a judicial officer that an invasion of the citizen's privacy is justified, it is constitutionally reasonable to require that citizen to remain while officers of the law execute a valid warrant to search his home." 452 US 692, 704-705; 101 S Ct 2587; 69 L Ed 2d 340 (1981). In *People v Champion,* 452 Mich 92, 115; 549 NW2d 849 (1996), our Supreme Court stated that "[p]robable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." See also MCL 764.15; MSA 28.874. Here, the officers found evidence in the motel room rented by defendant that implicated him in the commission of a felony. As previously discussed, the evidence was not seized during a search incident to defendant's arrest but was seized pursuant to the emergency aid exception to the warrant requirement. Therefore, we find no merit in defendant's argument that his arrest was illegal.

VIII

Last, defendant argues that because he was unable to post bond while awaiting trial on the instant offense and was on a parole hold for an unrelated conviction, he is entitled to eleven months credit for time served prior to the imposition of the sentence in this case. Defendant contends that he is entitled to sentence credit pursuant to MCL 769.11b; MSA 28.1083(2), which states that "[w]henever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted,

the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing."

However, defendant is not entitled to sentence credit because he was on parole at the time he committed the instant offense and was being held on a parole hold while awaiting trial. See *People v Stewart*, 203 Mich App 432, 433; 513 NW2d 147 (1994). MCL 791.238; MSA 28.2308 precludes a parolee from receiving credit for time served while being held on a parole detainer. *Id.* See also MCL 768.7a(2); MSA 28.1030(1)(2) ("If a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense."). Therefore, the trial court correctly noted that credit for time spent in jail prior to defendant's sentence for the instant offense was to be applied against the remaining portion of defendant's sentence for the paroled offense and was a matter for the Department of Corrections.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell