STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY B. MAVITY a/k/a GEORGE MAVITY,

Defendant-Appellant.

UNPUBLISHED
December 18, 1998

No. 202252
Oakland Circuit Court
LC No. 95-140595 FH

Before: Markey, P.J., and Sawyer and Whitbeck, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant also pleaded guilty to possession of marijuana, MCL 333.7403(2)(d); MSA 14.15(7403)(2)(d). He was sentenced to six months to four years' imprisonment on the felonious assault conviction, two years' imprisonment on the felony-firearm conviction, and three months' imprisonment on the possession of marijuana conviction. Defendant now appeals by right. We affirm.

I

First, defendant argues that the trial court erred in denying his motion to suppress based upon the police officer's entry into his home and subsequent search of his home. We review de novo the trial court's ultimate decision whether to grant a motion to suppress, but we review the court's findings of fact in deciding the motion for clear error. *People v Parker*, 230 Mich App 337, 339; 584 NW2d 336 (1998). *People v Melotik*, 221 Mich App 190, 198; 561 NW2d 453 (1997). A finding of fact is clearly erroneous if, after a review of the entire record, this Court is left with a definite and firm conviction that a mistake has been made. *Parker, supra*.

Defendant argues that he did not consent to the police entering his home. At the evidentiary hearing, Officer Czajkowski testified that while on patrol, he received a dispatch that someone was breaking house windows at 201 Camborne Street. Upon arriving at the scene, the officer saw a broken window in the front of the home and that the front door was open. The officer approached the home,

identified himself as a police officer, and asked defendant to step outside to speak with him. Defendant, who was inside the home, refused to step outside and repeatedly asked the officer to come in. When Officer Czajkowski cautiously entered the home, he encountered defendant lying on the floor pointing a gun at him. Officer Czajkowski quickly left the house, shouting that defendant had a gun. The police surrounded the home. Approximately five minutes later, defendant surrendered. Following defendant's arrest, Officer Czajkowski entered the home to determine whether any other individuals who may have been in the home were safe. Upon his entry, the officer saw a bag of suspected marijuana and three magazines of ammunition, in plain view. Subsequently, while defendant was at the police station, but before he received his *Miranda* rights, he answered in the affirmative when the police asked whether they could search his residence.

Generally, in order to search a dwelling for evidence of a crime, the police must have probable cause to search and a warrant based upon that probable cause. *People v Davis*, 442 Mich 1, 10; 497 NW2d 910 (1993). Two, among several, exceptions to the warrant requirement are consent and the community caretaking function. *Id.* at 10-12. The consent exception to the warrant requirement allows a search and seizure when consent is unequivocal and specific, and freely and intelligently given. *People v Malone*, 180 Mich App 347, 355; 447 NW2d 157 (1989). The validity of a consent depends on the totality of the circumstances, and the prosecutor carries the burden of proving that the person consenting did so freely and voluntarily. *Id.* at 355-356. After review of the record, we find that defendant validly consented to the police officer entering his home.

Defendant argues that because he was intoxicated, he did not knowingly consent to the search of his home while he was in custody. He fails, however, to refer this Court to case law indicating that intoxication at any level is sufficient to invalidate consent freely and voluntarily given. A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim. *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992).

He also argues that his consent was invalid because he was not given his *Miranda*[1] warnings before the police sought his consent. *Miranda* warnings are not required to obtain a valid consent, however. *People v Reed*, 393 Mich 342, 366; 224 NW2d 867 (1975). See also *People v Brown*, 127 Mich App 436, 443; 339 NW2d 38 (1983). Accordingly, we find the fact that defendant did not receive his *Miranda* warnings before consenting to the search is of no consequence to the validity of his consent.

Furthermore, upon review of the record, we find that the trial court did not clearly error in concluding that defendant knowingly consented to the search of his home. The record contains evidence that Lieutenant Collins spoke with defendant in his cell in the presence of Officer Jaklik, and defendant was able to answer all questions in a coherent manner, despite the fact that defendant testified he did not recall the discussion because he was an alcoholic and had been drinking for days. Because resolution of this issue involves issues of witness credibility, we find that the trial court was in the best position to judge credibility, and we will not disturb those findings.

The prosecution also countered defendant's position by arguing that the community caretaking exception to the warrant requirement applies. We agree.

The community caretaking exception applies to police duties that are separate from the duty to investigate and solve crimes, and it is only invoked when police are not engaged in crime solving. *Davis*, supra at 20-21, 24-25. Rendering immediate aid to an individual is a duty that falls within the community caretaking exception. *Id*. at 23-24. Before a police officer can enter a dwelling to render aid to a person in distress, however, the police must "reasonably believe" that someone is in need of immediate aid. *Id.* at 25. The Michigan Supreme Court requires that a search conducted pursuant to the community caretaking exception must be '"totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."' *In re Forfeiture of $176,598*, 443 Mich 261, 274; 505 NW2d 201 (1993), quoting *Cady v Dombrowski*, 413 US 433, 441; 93 S Ct 2523; 37 L Ed 2d 706 (1973). The caretaking exception to the warrant requirement does not require the police to possess probable cause because the police are not engaging in crime solving activities. *Davis, supra* at 11-12, 22.

Upon reviewing the record, we find that the trial court's ruling was not clearly erroneous and that the police officer had reason to believe an individual may have been in the home in need of medical attention. Accordingly, the marijuana and ammunition were properly admitted into evidence. We therefore also find the trial court properly denied defendant's motion to suppress.

II

Finally, defendant argues that the prosecutor improperly argued to the jury that defendant should have been charged with either assault with intent to murder or with intent to do great bodily harm, and other various crimes, but that these charges were not brought, and the jury could not find defendant guilty of the higher charges. Defendant objected to the argument; therefore, we review the issue to determine whether defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

During closing arguments, the prosecutor twice informed the jury that defendant was charged with a lesser crime and not with several other more serious felonies for which he could have been charged. We strongly admonish the prosecutor for pursuing this line of argument. This argument could, in the right circumstances, inflame the jury into believing that a defendant is escaping greater charges and to find that defendant not guilty of the lesser charged offense would be an additional tragedy. This is not a tactic that this Court condones. Nevertheless, although these prosecutorial arguments were improper, we find, that here the comments constituted harmless error.

A nonconstitutional error is harmless if it is highly probable that the error did not contribute to the verdict. *People v Graves*, 458 Mich 476, 482-483; 581 NW2d 229 (1998). Here, the evidence established that the police responded to a dispatch regarding a man breaking house windows and found defendant inside the house. Despite the officer's requests that defendant step outside of the house, defendant refused and instead repeatedly invited the officer in. The officer, very cautiously, entered the

home and saw defendant lying on the floor pointing a .9 mm semi-automatic weapon at him. We find that there was overwhelming evidence in support of the jury's verdict. Moreover, defendant failed to request an instruction that would have cured the improper arguments by the prosecutor.

Defendant further argues that he was denied a fair and impartial trial based on several additional improper arguments by the prosecutor. Because defendant failed to object to the prosecutor's remarks at trial, review is precluded unless a miscarriage of justice will result. *People v Dunham*, 220 Mich App 268, 274; 559 NW2d 360 (1996). After reviewing the record, we find that a miscarriage of justice will not result if this Court declines to review the remaining allegations of prosecutorial misconduct in light of the overwhelming evidence of guilt.

We affirm.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ William C. Whitbeck

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