# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>December 12, 2000 |
| v | No. 215001<br>Oakland Circuit Court |
| VICKIE LYNN HOSKINS, a/k/a VICKIE IVORY,<br><br>Defendant-Appellant. | LC No. 97-155266-FH |

Before: Hoekstra, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Defendant appeals as of right from her jury trial conviction of possession with the intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Defendant was sentenced to three to twenty years' imprisonment. We affirm.

Defendant first contends that the trial court's reversal of the district court's decision to suppress the evidence seized from defendant's apartment was error. "In reviewing a magistrate's decision to issue a search warrant, this Court must evaluate the search warrant and underlying affidavit in a common-sense and realistic manner." *People v Darwich*, 226 Mich App 635, 636-637; 575 NW2d 44 (1997). "This Court must then determine whether a reasonably cautious person could have concluded, under the totality of the circumstances, that there was a substantial basis for the magistrate's finding of probable cause." *Id.*, 637. Probable cause to support a search warrant exists where a person of reasonable caution would conclude that the sought after contraband or evidence of criminal conduct will be found in the place to be searched. *Id.* This Court reviews a trial court's findings of fact in deciding a motion to suppress evidence for clear error and the ultimate decision to suppress evidence is reviewed de novo on appeal. *Id.*

The search warrant at issue here was authorized by a magistrate in the City of Pontiac. The affiant was Sergeant Wendy Keelty of the Pontiac Police Department. The apartment searched was located in Orion Township.

At the preliminary examination, Keelty testified that she was involved in an ongoing investigation of defendant's drug trafficking in the City of Pontiac. She provided no elaboration concerning her knowledge of defendant's activities in Pontiac as a result of that investigation, except that a confidential informant informed her that when defendant moved to Orion

Township, she continued to traffic drugs in the City of Pontiac. Keelty conducted surveillance of defendant in Orion. Keelty, as the affiant, then requested and obtained a search warrant from the Pontiac district court. Prior to the execution of the search warrant, Keelty requested assistance from the Oakland County Sheriff's Department. Several Oakland County deputies accompanied Keelty's Pontiac team to the scene. There was a uniformed deputy in a car, and three or four undercover deputies. The Pontiac officers were not deputized. Keelty and several other Pontiac officers were the only ones that actually entered and searched the apartment, and made the arrests. The deputies remained outside.

During the preliminary examination, defense counsel moved to dismiss the charges against defendant arguing that the actions of the Pontiac Police Department in conducting surveillance and executing the warrant outside of their jurisdiction were done without authority and were, therefore, illegal. The magistrate concluded that all of the alleged criminal activity took place within Orion Township, and the Pontiac police officers did not have county-wide jurisdiction and were not officially deputized by the Oakland County Sheriff's Department. The magistrate held that the search warrant was defective on its face, that the search and defendant's arrest were improper, and dismissed the case. The circuit court reversed this decision and remanded the case for bindover.

As noted above, this Court must evaluate the search warrant and underlying affidavit in a common-sense and realistic manner. *Darwich, supra* at 636-637. The magistrate's determination that the warrant was defective on its face is without merit. The only defect on the warrant appears to be a simple drafting error concerning the address. The magistrate rejected Keelty's statement in the warrant that the execution of the search warrant was essential for the completion of her investigation into alleged criminal violations of the controlled substance act in the City of Pontiac. However, this statement is pertinent to the investigation's nexus to Pontiac, not the issue of probable cause. The information presented in the affidavit was sufficient such that a reasonable person could have concluded, under the totality of the circumstances, that there was a substantial basis for the magistrate's finding of probable cause. *Darwich*, *supra* at 637. Accordingly, the search warrant was valid. The issue, then, is whether the Pontiac police officers were within their legal authority in executing the warrant in Orion Township.

MCL 764.2a; MSA 28.861(1) governs the authority of a peace officer outside of the officer's own bailiwick and provides in pertinent part:

> A peace officer of a county, city, village, or township of this state may exercise authority and powers outside his own county, city, village, or township, when he is enforcing the laws of this state in conjunction with the Michigan state police, or in conjunction with a peace officer of the county, city, village, or township in which he may be, the same as if he were in his own county, city, village, or township.

This Court has held that the purpose of MCL 764.2a; MSA 28.861(1) "is not to protect the rights of criminal defendants, but rather to protect the rights and autonomy of local governments." *People v McCrady*, 213 Mich App 474, 480-481; 540 NW2d 718 (1995). Keelty testified that deputies of the Oakland County Sheriff's Department accompanied the Pontiac

officers to the scene. The deputies were present and ready to assist when the Pontiac officers executed the search warrant. Thus, the Pontiac police officers were acting in conjunction with the Oakland County Sheriff's Department when they executed the valid search warrant. The fact that the Pontiac officers initiated the investigation, and were the ones who actually entered the apartment, does not undermine this conclusion. Accordingly, we hold that the trial court did not err in reversing the decision of the magistrate and remanding the case for bindover.

Defendant next contends that the prosecution violated the 180-day rule. The rule, codified in MCL 780.131(1); MSA 28.969(1)(1), provides in pertinent part:

> Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth against any inmate of a correctional facility of this state a criminal offense for which a prison sentence might be imposed upon conviction, the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint.

When a pretrial delay greater than 180 days occurs, however, the rule is still satisfied if the prosecutor has made a good faith effort to bring the criminal charge to trial within the 180-day period. MCR 6.004(D)(1); *People v Norman Crawford*, 232 Mich App 608, 612; 591 NW2d 669 (1998). The 180-day period begins when either:

> (a) . . . the prosecutor knows that the person charged with the offense is incarcerated in a state prison or is detained in a local facility awaiting incarceration in a state prison, or
>
> (b) . . . the Department of Corrections knows or has reason to know that a criminal charge is pending against a defendant incarcerated in a state prison or detained in a local facility awaiting incarceration in a state prison. [MCR 6.004(D)(1)(a), (b).]

The purpose of the 180-day rule is to dispose of untried cases against prison inmates so that their sentences may run concurrently. *People v Chavies*, 234 Mich App 274, 280; 593 NW2d 655 (1999). Given its purpose, the rule does not apply where the defendant is subject to mandatory consecutive sentencing upon conviction. *Id*.

Defendant was convicted of possession with the intent to deliver less than fifty grams of cocaine. MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). MCL 333.7401(3); MSA 14.15(7401)(3) provides:

> A term of imprisonment imposed pursuant to subsection (2)(a) or section 7403(2)(a)(i), (ii), (iii), or (iv) shall be imposed to run consecutively with any term of imprisonment imposed for the commission of another felony.

Defendant's previous conviction under MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii) is a felony. Accordingly, we hold that because defendant was subject to mandatory consecutive sentencing, her 180-day claim is without merit. *Chavies, supra* at 280.[1]

Defendant next contends that the prosecution's questions to prospective jurors constituted misconduct warranting a new trial. "Issues of prosecutorial misconduct are decided case by case, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor's remarks in context." *People v Noble,* 238 Mich App 647, 660; 608 NW2d 123 (1999). Specifically, defendant contends that a series of illustrations during jury voir dire only served to confuse and mislead the prospective jurors. Defendant did not properly preserve the issue for appeal with a timely objection. Accordingly, this Court will only review if the prejudicial effect of the remarks could not have been cured by an appropriate instruction or if failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Because a timely objection could have led to a curative instruction, we find the issue to be waived. Further, we are satisfied that the voir dire questions had no effect on the fairness, integrity or public reputation of the proceedings. *People v Carines,* 460 Mich 750, 774; 597 NW2d 130 (1999).

Defendant next contends that there was insufficient evidence to support her conviction. When reviewing a sufficiency claim, this Court must view the evidence in the light most favorable to the prosecution and determine if a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson,* 460 Mich 720, 722-723; 597 NW2d 73 (1999). However, this Court must not interfere with the jury's role of judging the facts and determining the weight and credibility of witnesses' testimony. *People v Wolfe,* 440 Mich 508, 514-515; 489 NW2d 478 (1992). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *Carines, supra* at 757.

In order to support a conviction for possession with intent to deliver less than fifty grams of cocaine, the prosecutor must prove four elements: (1) that the recovered substance is cocaine, (2) that the cocaine is in a mixture weighing less than fifty grams, (3) that the defendant was not authorized to possess the substance, and (4) that the defendant knowingly possessed the cocaine with the intent to deliver. *Wolfe, supra* at 508. Here, defendant claims that the prosecution failed to prove each and every element of the offense.

Addressing the first, second and third elements, Dennis Lippert, a civilian chemist for the Michigan State Police Department, testified that he examined the substance seized pursuant to the search warrant and found that the substance contained cocaine and weighed 6.63 grams. Cocaine is a controlled substance. Defendant was not authorized to possess or deliver a

[1] We further conclude that the record shows that the prosecution made a good-faith effort to bring the case to trial within 180 days. The initial adjournment was by consent. Later, when it appeared that the judge before whom the case was to be tried within the 180 days would not be present for the trial, the prosecutor tried to locate a substitute judge. No judge was available, but the case was tried within a short time thereafter. This constitutes a good-faith effort to bring the case to trial within 180 days.

controlled substance. MCL 333.7401(1); MSA 14.15(7401)(1). Accordingly, there was sufficient evidence submitted by the prosecutor to establish the first three elements of the offense beyond a reasonable doubt.

Addressing the fourth element, the only element really in question, defendant argues that there was no evidence that defendant either actually or constructively possessed the cocaine or that she intended to deliver the cocaine. A person need not have physical possession of a controlled substance to be found guilty of possessing it. *People v Fetterley,* 229 Mich App 511, 515; 583 NW2d 199 (1998). As noted in *Fetterley*:

> Possession may be either actual or constructive, and may be joint as well as exclusive. The essential question is whether the defendant had dominion or control over the controlled substance. A person's presence at the place where the drugs are found is not sufficient, by itself, to prove constructive possession; some additional link between the defendant and the contraband must be shown. However, circumstantial evidence and reasonable inferences arising from the evidence are sufficient to establish possession. [*Fetterley, supra* at 515.]

With respect to the intent to deliver aspect of the fourth element, the *Fetterley* Court stated:

> Actual delivery is not required to prove intent to deliver. An actor's intent may be inferred from all of the facts and circumstances and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. Intent to deliver can be inferred from the quantity of the controlled substance in the defendant's possession and from the way in which the controlled substance is packaged. [*Fetterley, supra* at 517-518.]

In the instant case, defendant was not present when the search warrant was executed. However, Officer Doug Strablow testified that he discovered several items in the apartment which he characterized as personal correspondence belonging to defendant. The items included: a Michigan Identification card; a Social Security card; a food stamps card; a prescription; a court document; a State Farm Insurance document; and a vehicle registration. These documents were found in the same box as the bottle of inositol, which is a common cutting agent used to increase the salable amount of cocaine. A ledger was also found in the apartment which had defendant's and her boy-friend's names on it, and which police witnesses opined was used to document drug transactions. Further, the cocaine was found in a closet that also contained articles of women's clothing that were consistent with defendant's size and stature. In addition, upon her arrest, defendant wanted her mother to come to the apartment to pick up the rest of defendant's belongings. Defendant also told Keelty that the red Mustang in which a digital scale was found was her car.

There was testimony that the cocaine recovered in the search was packaged in "corner ties" (wherein the cocaine is placed in a plastic baggy and then one of the corners is torn or cut from the rest of the bag), and that this is a commonly used means of packaging cocaine for distribution. The quantity of cocaine found was more than a normal user would have on hand. There was a cutting agent present, and testimony that users of cocaine do not cut their own drugs

as this merely dilutes the cocaine. In addition, a user would not normally have a digital scale to weigh her cocaine. Rafael Finley, defendant's boyfriend, had $580 and two pagers in his pocket when he was arrested. One of the pagers belonged to defendant. Pagers are commonly used to contact drug dealers. Viewing this evidence in the light most favorable to the prosecution, the evidence was sufficient to support a finding beyond a reasonable doubt that defendant constructively possessed the drugs found in her closet and that she intended to deliver them to others.

Defendant next contends that the trial court erred in admitting evidence of defendant's other crimes, wrongs or acts. We review the trial court's evidentiary decisions for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v Warren*, 228 Mich App 336, 341; 578 NW2d 692 (1998), rev'd in part on other grounds 462 Mich 415; 615 NW2d 691 (2000).

Prior to trial, the prosecution moved to admit evidence of defendant's prior drug dealings. The trial judge held the motion in abeyance until the prosecutor demonstrated that the evidence was necessary to prove defendant's intent and identity. During the trial, the prosecutor renewed the motion. The prosecutor argued that because the defense was that defendant was not the possessor of the narcotics, the similar acts evidence would demonstrate defendant's identity as a possessor of the narcotics. Further, the prosecutor argued that the evidence was probative of defendant's intent to distribute the cocaine, which would also tend to demonstrate lack of mistake. Defendant argued that under MRE 403, the evidence sought to be introduced by the prosecution was significantly more prejudicial than probative.

The trial court held that any prejudice to defendant did not overcome the prosecution's right to refute the defense theory that defendant was merely in the wrong place with the wrong person. The trial court stated that it would give a limiting instruction explaining that the jury could only consider the evidence for a proper purpose and not with regard to defendant's guilt or innocence in the instant case. In addition, the trial court ruled that the amount of the cocaine involved in defendant's prior conviction was not to be addressed by either party. Following the court's ruling, David Wiengand, a trooper with the Michigan State Police, testified to four close-in-time drug transactions involving defendant, her boyfriend, and Trooper Wiengand. During these transactions, defendant was present, communicated with Trooper Wiengand, and verbally set the price of the cocaine to be sold.

Defendant argues that the evidence concerning her prior drug related activity was inadmissible pursuant to MRE 404(b), which provides:

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other

crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Evidence of other acts may be admitted if (1) it is offered for a proper purpose; (2) it is relevant to an issue or fact of consequence at trial; and (3) its probative value is not substantially outweighed by its potential for unfair prejudice. *People v Douglas Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998); *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205 (1994). A proper purpose is one other than establishing the defendant's character or to show his propensity to commit the offense. *Crawford, supra*, at 390. The proffered evidence truly must be probative of something other than the defendant's propensity to commit the crime, and if the prosecutor fails to weave a logical thread linking the prior act to the ultimate inference, the evidence must be excluded, notwithstanding its logical relevance to character. *Id.*

Here, the evidence of defendant's activity was properly admitted. The evidence was not admitted for the improper purpose of showing defendant's character and her propensity to act in conformity therewith. Rather, the prosecutor articulated proper non-character purposes for the admission of the evidence: to demonstrate defendant's knowledge of her boyfriend's drug activity, her intent to participate in that activity, and that the presence of the cocaine was not merely a mistake. Second, the evidence was relevant; it had a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; see also *Crawford, supra,* at 388-390. Defendant's participation in drug transactions was clearly relevant with respect to her knowledge of cocaine sales and her intent. Finally, the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice to defendant. In light of the trial court's instructions to the jury that it was not to consider the evidence of defendant's prior drug dealings for any other purpose than defendant's knowledge and intent and lack of mistake, and in light of the significant probative value of the evidence, the danger of unfair prejudice to defendant did not substantially outweigh the probative value of the evidence. *Crawford, supra* at 385; *VanderVliet, supra* at 74-75.

Finally, defendant contends that the trial court erred by failing to give an instruction to the jury on the destruction of evidence.[2] Defendant did not request the instruction at trial or object to the trial court's failure to give the unrequested instruction. The failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused. MCL 768.29; MSA 28.1052. Absent an objection at trial, our review of jury instructions is waived unless relief is necessary to avoid manifest injustice. *People v Henry*, 239 Mich App 140, 151; 607 NW2d 767 (1999). We find no manifest injustice, and we are satisfied that the failure to give this instruction had no substantial effect on the fairness, integrity or public reputation of the proceedings. *Carines, supra* at 774.

[2] The police destroyed the evidence after the trial of a codefendant.

Affirmed.[3]

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Helene N. White

[3] Defendant's supplemental brief in pro per raised two issues already raised by counsel. We do not separately address the supplemental brief because the claims of error are discussed and rejected above.