STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ANDERSON,

Defendant-Appellant.

UNPUBLISHED
November 27, 2001

No. 224031
Ingham Circuit Court
LC No. 98-074227-FC

Before: O'Connell, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions, following a jury trial, of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(c) (penetration occurring during the commission of any other felony), one count of first-degree home invasion, MCL 750.110a(2), and nineteen counts of possession of another's financial transaction device with intent to use, MCL 750.157p. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent terms of life imprisonment for the CSC I convictions, thirty to sixty years' imprisonment for the home invasion conviction, and five to fifteen years' imprisonment for each possession conviction. We affirm.

On appeal, defendant first challenges the affidavit underlying the search warrant authorizing a search of his home and vehicle. Defendant also maintains that the police did not have probable cause to search his vehicle and home and that evidence found pursuant to the search should have been excluded at trial.

We review a trial court's factual findings in a suppression hearing for clear error. *People v Custer*, 465 Mich 319, 325-326; 630 NW2d 870 (2001) (opinion of Markman, J.); *People v Brzezinski*, 243 Mich App 431, 433; 622 NW2d 528 (2000). "However, '[a]pplication of constitutional standards by the trial court is not entitled to the same deference as factual findings.' The application of the exclusionary rule to a violation of the Fourth Amendment is a question of law" that this Court reviews de novo. *Custer*, *supra* at 326 (citation omitted). Moreover, in *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001), this Court recently made the following observation with regard to probable cause.

> "Probable cause sufficient to support issuing a search warrant exists when all the facts and circumstances would lead a reasonable person to believe that the evidence of a crime or the contraband sought is in the place requested to be

searched." [*Id.*, quoting *People v Brannon*, 194 Mich App 121, 132; 486 NW2d 83 (1992).]

See also *People v Kazmierczak*, 461 Mich 411, 417-418; 605 NW2d 667 (2000); *Brzezinski, supra* at 433.

Defendant's initial challenge to the affidavit underlying the search warrants is that the affiant, Detective Sergeant John Draganchuk, provided the magistrate with false information and omitted material evidence. However, our review of defendant's motion to suppress and the transcript of the suppression hearing reveals that although defendant argued the police did not have probable cause to search, he did not raise these specific issues in the lower court. Thus, we review for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

When challenging the affidavit underlying a search warrant, a defendant has the burden of showing, by a preponderance of the evidence, "that the affiant knowingly and intentionally, or with a reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to the finding of probable cause." *Ulman, supra* at 510, citing *Franks v Delaware*, 438 US 154, 171-172; 98 S Ct 2674; 57 L Ed 2d 667 (1978). This standard also applies where the defendant alleges that there were material omissions from the affidavits. *Ulman, supra* at 510. If the defendant meets this burden, the invalid portions of an affidavit can be severed, and the validity of the warrant tested by the information remaining in the affidavit. *Id*., citing *People v Melotik*, 221 Mich App 190, 200-201; 561 NW2d 453 (1997).

In the instant case, defendant has failed to show that Draganchuk knowingly and intentionally inserted false material into the affidavit or that he omitted material information. *Ulman, supra* at 510. Contrary to defendant's assertion in his brief on appeal, Draganchuk did not admit during the suppression hearing that he falsified information in the supporting affidavit, and the record does not otherwise substantiate defendant's claim of falsification or intentional material omission. Consequently, defendant has not demonstrated plain error affecting substantial rights. *Carines, supra* at 763.

Defendant also argues that probable cause did not exist to justify the police search of his home and vehicle. Specifically, defendant maintains that the description of his vehicle provided by Dragunchuk in the affidavit did not contain sufficiently differentiating characteristics giving rise to probable cause, and that the elapsed time between the assault and the execution of the search warrants made it improbable that the evidence sought would be retrieved in the places identified in the warrants. We disagree.

After a careful review of the record, we agree with the trial court that the magistrate correctly concluded that probable cause existed to search defendant's home and vehicle. During the suppression hearing, Draganchuk testified that he obtained a description of the victim's assailant after speaking with her on August 25, 1998.[1] Because the victim's head was covered by a towel for part of the assault, she was able to give a limited description of her attacker.

[1] The assault occurred on August 23, 1998.

However, she described her attacker as having a slight build, wispy, curly brown hair, blue eyes, and further recalled that he smelled strongly of cigarette smoke.

As part of his investigation, Draganchuk also obtained films from video surveillance cameras at four different financial institutions where the assailant used the victim's automatic teller machine (ATM) card to withdraw funds in the hours following the assault. After reviewing the films, Dragunchuk was able to discern distinct characteristics of the assailant's vehicle. Draganchuk determined over twenty identifying characteristics of the vehicle,[2] such as pieces of paper on the vehicle's dashboard, and an elliptical shaped item hanging from the rear-view mirror. Dragunchuk subsequently met with a representative from a local Ford dealership who confirmed that the vehicle on the films was a Ford Ranger from the period of the late 1980s to 1992 because it did not have a driver's side airbag. Draganchuk also observed that the assailant was of small stature, and although he wore a face mask, his hair was curly.

On September 23, 1998, Draganchuk observed a vehicle matching the specific description of the one in the films traveling within a mile of the victim's home, and noted that the driver matched the description of the suspect given by the victim. Specifically, the driver had a slight build and curly hair, and the vehicle had papers on the dashboard and an elliptical shaped object hanging from the rearview mirror. After conducting a LIEN check, Dragunchuk further discovered that defendant was the owner of the vehicle, and that defendant had a slight build and blue eyes, as described by the victim. Evaluating the search warrant and affidavit "in a common-sense and realistic manner," *People v Poole*, 218 Mich App 702, 705; 555 NW2d 485 (1996), we are satisfied that a reasonably cautious person could have concluded under the totality of the circumstances that a substantial basis existed for the magistrate's finding of probable cause. *Id*., citing *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992).

We recognize that staleness is a factor to be weighed in determining whether probable cause exists to search. *People v Stumpf*, 196 Mich App 218, 226; 492 NW2d 795 (1992). However, "the age of the information alone is not determinative, but must be evaluated as part of the particular circumstances of the case." *Id*. Moreover, "the measure of a search warrant's staleness rests not on whether there is recent information to confirm that a crime is being committed, *but whether probable cause is sufficiently fresh to presume that the sought items remain on the premises*." *People v Gillam*, 93 Mich App 548, 553; 286 NW2d 890 (1979) (emphasis supplied). In the instant case, Draganchuk indicated that based on his twenty-nine years of experience as a police officer, rapists often keep a momento of a rape. An affiant's experience is relevant to establishing probable cause. *People v Darwich*, 226 Mich App 635, 639; 575 NW2d 44 (1997); *Ulman*, *supra* at 509. Following the rape, the victim's purse, which contained her ATM card as well as various other items, and her underwear that was cut off during the assault were reported missing from her home. Under the circumstances, we are satisfied that the police had probable cause to believe that evidence from the assault would be

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[2] These included that (1) the vehicle was a light-colored or silver pick-up truck, (2) with an oval Ford emblem on the rear tailgate, (3) the steering wheel did not have an airbag, (4) the vehicle had standard automobile size, rather than truck size, side view mirrors, (5) the vehicle had a black bed liner, and (6) a black plastic tool box extending the entire width of the back bed.

found in defendant's home in spite of the elapsed time between the assault and the execution of the search warrants.

In his supplemental brief, defendant also asserts that a dildo seized from his home containing the victim's DNA was outside the scope of the search warrant and therefore obtained in violation of the Fourth Amendment proscription against unreasonable seizures.

At the conclusion of the suppression hearing, the trial court determined that seizure of the item was proper pursuant to the plain view doctrine. "The plain view doctrine allows officers to seize, without a warrant, items in plain view if the officers are lawfully in a position from which they view the item, and if the item's incriminating character is immediately apparent." *People v Champion*, 452 Mich 92, 101; 549 NW2d 849 (1996). In this case, the police were authorized to search for a face mask worn by the assailant when he withdrew money from the victim's bank account through various automatic teller machines. The dildo was found in a drawer next to the mask. "A warrant authorizing the search of a premises authorizes the search of containers within the premises that might contain the items named in the warrant." *People v Daughenbaugh*, 193 Mich App 506, 516; 484 NW2d 690, mod 441 Mich 867 (1992). Consequently, the police were in a lawful position when they viewed the item.

Further, we reject defendant's argument that to have an incriminating character, the possession of the object must be inherently criminal. Indeed, to satisfy the obviously incriminatory element of the plain view doctrine, "the officers need only have probable cause that an object is evidence or an implement of a crime." *People v Blackburne*, 150 Mich App 156, 166; 387 NW2d 850 (1986). In this case, the victim told the police that she was penetrated twice during the assault, once with a soft object and once with what she believed to be her assailant's penis. Because the dildo was found in the same drawer as the mask and fit the description of one or both objects inserted into the victim during the assault, we share the trial court's view that the officers had probable cause to believe that the dildo was evidence of a crime.

Finally, defendant argues that the trial court erred in denying defendant's challenge for cause to a juror. We disagree and find no error warranting reversal.

We review a trial court's ruling with regard to a challenge for cause for an abuse of discretion. *People v Johnson*, 245 Mich App 243, 256 n 5; 631 NW2d 1 (2001). For reversal to be warranted defendant must satisfy the requirements of the following four-part test:

> There must be a clear and independent showing on the record that (1) the court improperly denied a challenge for cause, (2) the aggrieved party exhausted all peremptory challenges, (3) the party demonstrated the desire to excuse another subsequently summoned juror, and (4) the juror whom the party wished to later excuse was objectionable. [*People v Lee*, 212 Mich App 228, 248-249; 537 NW2d 233 (1995), citing *People v Legrone*, 205 Mich App 77, 81; 517 NW2d 270 (1994).]

During voir dire, defendant voiced his concerns regarding one of the potential jurors. Specifically, the proposed juror had expressed reservations regarding whether she could be impartial, and that she may afford the testimony of police officers more weight. However, in

response to questioning, the juror stated that she could listen to the evidence at trial and render an impartial verdict on the evidence. After the trial court denied defendant's challenge for cause, defendant exercised a peremptory challenge, and the juror was not seated. However, even if we were to accept defendant's contention that the trial court abused its discretion, our review of the record does not yield any indication that defendant, after exhausting his peremptory challenges, "demonstrated the desire to excuse another subsequently summoned juror." *Lee, supra* at 248. Consequently, defendant has failed to demonstrate error requiring reversal.

Affirmed.

/s/ Peter D. O'Connell
/s/ David H. Sawyer
/s/ Michael R. Smolenski