STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

RONALD ALLEN,

Defendant-Appellant.

UNPUBLISHED
December 4, 2001

No. 225334
Jackson Circuit Court
LC No. 99-096442-FH

Before: Fitzgerald, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant was charged and convicted of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v), possession of marijuana, MCL 333.7403(2)(d), and resisting and obstructing a police officer, MCL 750.479.[1] Defendant appeals by right. We affirm.

Defendant first argues that his motion to suppress was improperly denied by the trial court. Specifically, defendant argues that the marijuana and cocaine police found must be suppressed because the police conducted an invalid investigatory stop under *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968). We disagree.

We review a trial court's factual findings, made after a suppression hearing, for clear error. *People v Custer*, 465 Mich 319, 325 (Markman, J.), 345 (Weaver, J.); 630 NW2d 870 (2001).

> 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. Questions of law relevant to the suppression issue are reviewed de novo. [*Id.* at 326 (Markman, J.), 345 (Weaver, J.) (citations omitted).]

"The Fourth Amendment and its Michigan counterpart guarantee the right of people to be secure against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. The Fourth Amendment is not a guarantee against all searches and seizures, only those that are

[1] Defendant was sentenced as a fourth habitual offender, MCL 769.12.

unreasonable." *People v Shields*, 200 Mich App 554, 557; 504 NW2d 711 (1993). The stop and frisk exception to the warrant requirement allows a brief, investigatory stop when there is a reasonable, articulable suspicion that criminal activity is afoot. *Illinois v Wardlow*, 528 US 119, 123; 120 S Ct 673; 145 L Ed 2d 570 (2000). The exception also allows seizure of objects found during a search necessitated by a legitimate concern for personal safety, and the reasonableness of the search depends on a balancing of the need to search against the intrusion the search entails. *Terry*, *supra* at 20-21; *People v Wallin*, 172 Mich App 748, 750; 432 NW2d 427 (1988). "In order for an investigatory stop to be reasonable, the police must have a particularized suspicion, based upon an objective observation, that the person stopped has been, is, or is about to be engaged in criminal wrongdoing. The 'particularized suspicion' must be based upon an assessment of the totality of the circumstances presented to the police officer." *Shields, supra* at 557. "Reasonable suspicion entails something more than an inchoate or unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause." *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996), cert denied 519 US 1081; 117 S Ct 747; 136 L Ed 2d 685 (1997). In addition,

> [a] police officer may perform a limited patdown search for weapons if the officer has a reasonable suspicion that the individual is armed, and thus poses a danger to the officer or to other persons. "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." [*Custer*, *supra* at 328 (citations omitted).]

Here, defendant was observed, by Officer LaPorte, standing on the corner of a street, in a high crime and drug area, with two other individuals at 2:30 a.m. Officer LaPorte knew one of the men and observed him gesturing towards defendant in a manner that the officer believed indicated a drug transaction. As the patrol car approached, one of the men glanced at the patrol car, glanced back at defendant and the other man, and began to walk away. Defendant also began to walk away.

Based on these circumstances, we find that Officer LaPorte had a reasonable, articulable suspicion that justified the investigatory stop. Contrary to defendant's assertions, police can consider defendant's association with another individual suspected of a crime, defendant's presence in a high crime or drug area, and defendant's evasive behavior after observing police in the aggregate to justify an investigatory stop. *Wardlow, supra* at 124; *Custer, supra* at 329 n 3; *Shields, supra* at 557-558. Furthermore, we note that "[i]n analyzing the totality of the circumstances, the law enforcement officers are permitted, if not required, to consider 'the modes or patterns of operation of certain kinds of lawbreakers. From [this] data, a trained officer draws inferences and makes deductions -- inferences and deductions that might well elude an untrained person.'" *People v Nelson*, 443 Mich 626, 636; 505 NW2d 266 (1993), quoting *United States v Cortez*, 449 US 411, 418; 101 S Ct 690; 66 L Ed 2d 621 (1981).

In addition, it does not matter that this conduct could also have been innocent.

> It is always possible . . . to hypothesize innocent explanations for the circumstances preceding a traffic stop. That possibility alone cannot thwart the proper efforts of law enforcement to protect our communities. "*Terry* accepts the

> risk that officers may stop innocent people." [*People v Oliver*, 464 Mich 184, 202; 627 NW2d 297 (2001), cert pending, quoting *Wardlow, supra* at 126.]

Thus, we find that defendant's motion to suppress was properly denied because the investigatory stop of defendant was lawful.

Next, defendant argues that there is insufficient evidence to support his conviction for resisting and obstructing a police officer. We note that defendant's argument centers on his conclusion that the arrest was unlawful.[2] We conclude that Officer LaPorte had probable cause to arrest defendant. Defendant's actions of pushing Officer LaPorte's hand away, twice, constituted an assault on a police officer. Further, defendant's refusal to cooperate with Officer LaPorte's patdown search obstructed Officer LaPorte while he was engaged in the performance of his duty. See MCL 750.479. Therefore, Officer LaPorte's arrest of defendant was justified.

Defendant also argues that the trial court should have instructed the jury on use of marijuana and use of cocaine. We disagree.

We review the trial court's refusal to give an instruction on a lesser-included misdemeanor for an abuse of discretion. *People v Malach*, 202 Mich App 266, 276; 507 NW2d 834 (1993). "Failure to give such an instruction is an abuse of discretion if a reasonable person would find no justification or excuse for the ruling made." *Id.*

> A court must instruct concerning a lesser included misdemeanor where (1) the defendant makes a proper request; (2) there is an "inherent relationship" between the greater and lesser offense; (3) the jury rationally could find the defendant innocent of the greater and guilty of the lesser offense; (4) the defendant has adequate notice; and (5) no undue confusion or other injustice would result. [*People v Rollins*, 207 Mich App 465, 468-469; 525 NW2d 484 (1994).]

Here, we find that defendant did make a proper request for the instructions on use. However, we conclude that defendant cannot satisfy the second requirement because there is no inherent relationship between possession of marijuana or possession of cocaine and use of marijuana or use of cocaine. "Offenses are inherently related if they relate to the protection of the same interests and are related in an evidentiary manner such that, generally, proof of the misdemeanor is necessarily presented in proving the greater offense." *People v Corbiere*, 220 Mich App 260, 263; 559 NW2d 666 (1996). Put another way, "the second condition requires two inquiries: first, whether the offenses relate to the protection of the same interests, and, second, whether, in general, proof of the misdemeanor is necessarily presented as part of the proof of the greater charged offense." *People v Steele*, 429 Mich 13, 23; 412 NW2d 206 (1987).

Admittedly, the Legislature's goal in enacting laws against possessing controlled substances was similar to its goal in enacting laws against use of controlled substances. However, proof of use of a controlled substance is not required to convict an individual of

---

[2] One element of resisting arrest is that the arrest must be lawful. *People v Julkowski*, 124 Mich App 379, 383; 335 NW2d 47 (1983).

possession of a controlled substance. Possession of a controlled substance only requires a person to "knowingly or intentionally possess a controlled substance" MCL 333.7403(1). Therefore, these two crimes are distinct and not inherently related.

Furthermore, even if we were to conclude that defendant could demonstrate an inherent relationship, we cannot conclude that the jury could have found defendant guilty of use of marijuana and cocaine. Sergeant Stadelman did testify that when he observed defendant, his speech was slurred, his eyes were "droopy" and watering, he was incoherent, and that these characteristics could indicate use of controlled substances. However, Sergeant Stadelman did not testify that he thought defendant had been using marijuana or cocaine. Indeed, there was no evidence that defendant had used marijuana or cocaine. Defendant was only observed chewing and swallowing the marijuana and cocaine that he had put in his mouth during the struggle with Officer LaPorte. This is not the method generally used when an individual is using marijuana or cocaine. As the trial court indicated, the evidence suggested that defendant was not using the substances as such, but rather was trying to conceal or destroy them by consumption. Furthermore, defendant himself did not testify that he was using marijuana or cocaine; instead, he testified that he did not know why the police stopped him and that he did not have marijuana or cocaine in his mouth or anywhere else on his person. Thus, denial of these jury instructions was proper.

Finally, defendant argues that the trial judge improperly engaged in ex parte communications with the jury, entitling him to a new trial. We disagree.

"[C]ontact with a deliberating jury must be carefully limited." *People v France*, 436 Mich 138, 149; 461 NW2d 621 (1990). MCR 6.414(A) details the responsibility of the trial court and states:

> The trial court must control the proceedings during trial, limit the evidence and arguments to relevant and proper matters, and take appropriate steps to ensure that the jurors will not be exposed to information or influences that might affect their ability to render an impartial verdict on the evidence presented in court. *The court may not communicate with the jury or any juror pertaining to the case without notifying the parties and permitting them to be present. The court must ensure that all communications pertaining to the case between the court and the jury or any juror are made a part of the record.* [Emphasis added.]

Our Supreme Court in *France*, *supra* at 166, "tempered the long-standing automatic-reversal rule when an ex parte communication takes place in favor of a more realistic evaluation of the defendant's right to a fair trial." *People v Gonzalez*, 197 Mich App 385, 402; 496 NW2d 312 (1992).[3]. Our Supreme Court explained that the procedure for reviewing such cases is as

---

[3] Indeed, there is little doubt that under the pre-*France* standard for reviewing these types of cases, this would be an error requiring reversal. See *People v Heard*, 388 Mich 182, 183-184; 200 NW2d 73 (1972) (automatic reversal required where trial judge brought exhibits to jury); *People v Olson*, 66 Mich App 197, 198-199; 238 NW2d 579 (1975) (automatic reversal required where trial judge entered jury room to talk to jury).

follows:

> Upon appeal, it is incumbent upon a reviewing court to first categorize the communication that is the basis of the appeal. This will necessarily lead to the determination of whether a party had demonstrated that the communication was prejudicial, or that the communication lacked any reasonable prejudicial effect. [*France, supra* at 143.]

In other words, the communication must first be categorized as substantive, administrative, or housekeeping. *Id.* at 142-143.

> Substantive communications are those that include instructions regarding matters of law while the jury is deliberating. There is a presumption of prejudice where this type of communication occurs. Administrative communications encompass instructions regarding evidence and imploring the jury to continue with deliberations. No prejudice is presumed, and the defendant's failure to object constitutes acquiescence in the propriety of the communication. Finally, housekeeping communications include discussions between court officers and jurors regarding matters of concern wholly irrelevant to the case upon which the jurors are deliberating. There is a presumption of no prejudice in relation to these instructions and a failure to object constitutes a waiver of any claim of error associated with the communication. [*Gonzalez, supra* at 402-403 (citations omitted). Accord *France, supra* at 143-144, 163-164.]

Finally, when deciding whether prejudice exists, it is important to note that prejudice is broadly defined as "any reasonable possibility of prejudice." *France, supra* at 142, 162-163.

In this case, the record reflects that the trial judge transported the jury instructions, exhibits, and verdict form to the jurors in the jury room after the trial judge had read the jury instructions to the jury and before the jury had begun deliberations. Defendant argues that this action is properly classified as a substantive communication. We disagree. As previously stated, substantive communications are "those that include instructions regarding matters of law *while the jury is deliberating*." *Gonzalez, supra* at 402 (emphasis added). Accord *France, supra* at 143, 163. The jury, in this case, had not yet begun deliberations. In fact, the trial judge had specifically instructed jurors to return to the jury room and refrain from discussing the case until they were instructed to do so. The record reflects nothing other than the fact that the trial judge delivered the instructions, exhibits, and verdict form to the jury before they began deliberations. Defendant has alleged and demonstrated no other form of communication than the physical delivery of these items. Therefore, there is no basis to conclude that the communication was substantive.

Similarly, the communication cannot be classified as a housekeeping communication. Our Supreme Court provided examples of housekeeping communications stating that they "are those which occur between a jury and a court officer regarding meal orders, rest room facilities, or matters consistent with general 'housekeeping' needs that are unrelated in any way to the case being decided." *France, supra* at 144. The communication at issue was clearly related to the case.

We find that this communication, if communication at all, is properly classified as administrative. *Cf. Meyer v City of Center Line*, 242 Mich App 560, 564-565; 619 NW2d 182 (2000) (the trial judge's instructions to the jury on how to complete the verdict form was an administrative communication). Here, the trial judge simply took these items into the jury room with no allegation of any other form of communication.[4]

Given our conclusion that this communication is properly classified as an administrative communication, there is no presumption of prejudice. *France, supra* at 143, 163. Nonetheless, the prosecution has the burden of demonstrating a lack of prejudicial effect because defendant objected. *Id.* at 143, 163-164. We conclude that the prosecution has successfully demonstrated a lack of prejudice. The jury instructions had already been read to the jury, the jury had not started deliberations, and there was no evidence that anything else transpired besides the physical act of taking these items to the jury in the jury room. Thus, we conclude that defendant is not entitled to relief.

We affirm.

/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra
/s/ Jane E. Markey

[4] However, we strongly urge the trial judge to refrain from this practice in the future. The delivery of any items to the jury should be done by a bailiff or other court officer and not the judge.