STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 21, 2001
v	No. 218591 Oakland Circuit Court
JOHN THOMAS GRIES, Defendant-Appellant.	LC No. 98-160355-FH

Before: Murphy, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for unlawful manufacture of a controlled substance, MCL 333.7401(2)(d)(iii) (less than five kilograms or fewer than twenty plants). We affirm.

Defendant first contends that the affidavit in support of the search warrant contained material representations and that – even with the challenged information – the affidavit did not warrant the magistrate's finding of probable cause. We disagree.

A search warrant may not issue unless a magistrate has determined that the information contained in the supporting affidavit establishes probable cause for the warrant's issue. *People v Kaslowski*, 239 Mich App 320, 323; 608 NW2d 539 (2000); Const 1963, art 1, § 11; MCL 780.651(1); MCL 780.653. We review with deference a magistrate's finding of probable cause to determine whether the affidavit presented to the magistrate contained sufficient information to justify a reasonably cautious person's conclusion that evidence of criminal conduct would be found by searching a particular place. *People v Nunez*, 242 Mich App 610, 612-613; 619 NW2d 550 (2000).

Search warrants must describe with particularity the place to be searched. *People v Hampton*, 237 Mich App 143, 150; 603 NW2d 270 (1999); US Const, Am IV; Const 1963, art 1, § 1; MCL 780.654. The particularity requirement is satisfied when a police officer can – with reasonable effort and to the exclusion of all other locations – ascertain and identify the place to be searched from the description given in the search warrant. *Hampton*, *supra* at 150-151.

Defendant presented no evidence showing that the affiant intentionally omitted or misrepresented information regarding the character of the residence as a duplex or the character of the garbage in which marijuana was found as "shared" by the other tenants residing in the

duplex. The record in this case supports the conclusion that it was unlikely that a place other than defendant's residence would have been mistakenly searched.

We also disagree with defendant's contention that the affidavit contained insufficient information – with or without the challenged information – to support a magistrate's finding of probable cause to support the issuance of a search warrant.

A finding of probable cause based on an affidavit's allegations requires that the affidavit contain more than an affiant's conclusions or beliefs – the affidavit must contain facts within the affiant's knowledge. *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001). An affidavit containing information provided by an unnamed informant must also contain information that establishes the informant's credibility or the information's reliability, *and* information from which a magistrate can conclude that the unnamed informant possessed personal knowledge of the facts on which the affiant relied. *People v Stumpf*, 196 Mich App 218, 222-223; 492 NW2d 795 (1992), cert den 510 US 1042; 114 S Ct 686; 126 L Ed 2d 654 (1994). MCL 780.653(b).

Here, much of the information contained in the affidavit was based on evidence gathered from the affiant's investigation into the information. The affiant's investigation confirmed the informant's report of defendant's name and address. A search of garbage placed outside defendant's residence further corroborated the informant's report that defendant was using and selling marijuana from the residence. A LEIN search revealed that defendant had two previous arrests for possession of marijuana and that he was convicted of one of those offenses. We are convinced that a reasonably cautious person could conclude that the marijuana found in defendant's trash established probable cause that marijuana would be found in the residence from which the trash originated. The evidence gathered by the affiant's investigation was sufficient to support the unnamed informant's personal knowledge of defendant, defendant's address, and defendant's possession of contraband. Furthermore, the same evidence supported the reliability of the information provided by the informant.

Defendant next argues that insufficient evidence was presented at trial to support his conviction because the only evidence found in an area over which he exercised exclusive control were items not necessarily indicative of criminal activity.

Whether legally sufficient evidence has been presented to support a conviction requires the prosecution to produce evidence from which a rational trier of fact could reasonably conclude that all the elements of a charge were proved beyond a reasonable doubt. *People v Griffin*, 235 Mich App 27, 31; 597 NW2d 176 (1999). Defendant's conviction for unlawful manufacture of marijuana required proof beyond a reasonable doubt that: (1) defendant manufactured a controlled substance; (2) the manufactured substance was marijuana; and (3) defendant knew that he was manufacturing marijuana. CJI2d 12.1; MCL 333.7401(2)(d)(iii). Circumstantial evidence and reasonable inferences drawn from circumstantial evidence may be sufficient to prove the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

The jury's role of determining the credibility of witnesses and the weight of the evidence is not subject to appellate review. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992). Defendant's knowledge of and participation in the marijuana grow operation was supported with evidence from which the jury could reasonably infer that

defendant knew about the contents of the flat's rear bedroom and intended to "manufacture" a controlled substance from cultivating the marijuana plants. The plants seized from defendant's residence were identified as marijuana plants, information pertaining to indoor marijuana horticulture was found in defendant's bedroom, marijuana remnants were found in garbage containing only correspondence addressed to defendant, marijuana seeds and stems were seized from the flat, and equipment used to facilitate the growth and post-harvest preparation of marijuana was found in defendant's residence.

Defendant next contends that the prosecutor's rebuttal argument exceeded the proper bounds of trial advocacy, included prejudicial remarks not based on evidence presented at trial, and amounted to error requiring reversal. Appellate review of allegedly improper conduct is precluded if the defendant fails to timely and specifically object unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom *People v Caruso*, 513 US 1121; 115 S Ct 923; 130 L Ed 2d 802 (1995); *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998).

We agree that the prosecutor overstepped her bounds on at least two occasions in rebuttal argument[1]. In fact, the prosecutor's brief on appeal agrees that one of these comments was improper. However, in both instances, an objection could have led to a curative instruction which would have overcome any potential prejudice to defendant. In addition, in the absence of an objection by defense counsel, any prejudice that may have been caused by the prosecutor's remarks was eliminated by the court's instruction to the jury that the attorneys' arguments were not evidence. *Schutte, supra* at 721-722.

Finally, defendant claims that he was denied the effective assistance counsel because his trial attorney failed to move for suppression of the evidence seized pursuant to the search warrant, and because defense counsel failed to object to prejudicial remarks made by the prosecutor during rebuttal argument. We disagree.

Defendant has not affirmatively shown that his counsel's performance fell below an objective standard of reasonableness and that actual prejudice resulted from his counsel's ineffectiveness – that is, had his counsel not erred, there existed a reasonable probability that the result of his trial would have been different. *People v Williams*, 240 Mich App 316, 330; 614 NW2d 647 (2000).

Affirmed.

/s/ William B. Murphy
/s/ Janet T. Neff

I concur in result only.

/s/ Joel P. Hoekstra

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[1] The reference to "birds of a feather" was clearly improper, as was the direct references to the jurors.