STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 12, 2002
v	No. 226760 Saginaw Circuit Court
ANDRE LAMON HENRY, Defendant-Appellant.	LC No. 98-016286-FH

Before: Fitzgerald, P.J., and Hood and Sawyer, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felon in possession of a firearm, MCL 750.224f, and was sentenced as an habitual offender, fourth offense, MCL 769.12, to five to ten years' imprisonment. He appeals as of right. We affirm.

At trial, the prosecution presented law enforcement officers who testified that the Saginaw County Metro Narcotics Unit (SCMNU), a team consisting of police officers and deputy sheriffs, and the Emergency Services Team (EST), a unit that specialized in assisting in the execution of search warrants at locations where weapons were likely to be present, executed a search warrant at a residence at which defendant was present. The search revealed a handgun under the mattress in the bedroom occupied by defendant, and ammunition fitting the handgun in defendant's gym bag. The gym bag was found near the mattress. The officers testified that defendant said that the handgun belonged to his mother, and that he placed it under the mattress for protection. A probation and parole officer testified that defendant had prior convictions for felonious assault, MCL 750.82, and possession of less than twenty-five grams of a controlled substance, MCL 333.7403(2)(a)(v).

Defendant testified and denied stating that the gun belonged to his mother or that he put the gun under the mattress. He maintained that he told the police that he did not know how the gun came to be under the mattress. Defendant denied knowing that the ammunition was in his gym bag, but surmised that his girlfriend, who lived at the residence, must have placed it there.

Initially, defendant argues that the trial court erred by denying his motion to suppress the gun and ammunition seized during the search because the affidavit did not establish probable cause to justify the search and erroneously described the residence. We disagree.

A search warrant may not issue unless probable cause exists to justify the search. US Const, Am V; Const 1963, art 1, § 11. Probable cause exists when the facts and circumstances would allow a reasonably prudent person to believe that the evidence of a crime or contraband is in the stated place. *People v Kazmierczak*, 461 Mich 411, 418; 605 NW2d 667 (2000). When probable cause is presented in the form of an affidavit, that affidavit must contain facts within the knowledge of the affiant, rather than mere conclusions or beliefs. *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001). A magistrate's finding of probable cause is based on all the facts in the affidavit. *People v White*, 167 Mich App 461, 463; 423 NW2d 225 (1988). An affidavit should not be read in a hyper technical way, but rather, should be interpreted with common sense and in a realistic fashion. *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992). We review a trial court's findings of fact on a motion to suppress for clear error, and review the ultimate decision de novo. *People v Sobczak-Obetts*, 463 Mich 687, 694; 625 NW2d 764 (2001).

Here, the affidavit stated that it was likely that narcotics and weapons would be found at the target residence. The affidavit detailed the procedure the police and the confidential informant (CI) used to make a controlled purchase of crack cocaine at the residence. Defendant's assertion that the affidavit did not contain a sufficient level of factual detail regarding the search and surveillance of the CI is hyper technical and without merit. *Russo, supra*. Moreover, the affiant's statement that, based on his training and experience, he knew that persons involved in narcotics trafficking often kept weapons for protection was relevant to the establishment of probable cause. *People v Darwich*, 226 Mich App 635, 639; 575 NW2d 44 (1997). A general description such as "weapons" is a sufficient description of items to be seized if probable cause exists to allow such breadth. *People v Zuccarini*, 172 Mich App 11, 16; 431 NW2d 446 (1988). Furthermore, ammunition, such as that found in defendant's gym bag, is directly related to a weapon. The affidavit was sufficiently specific to support the seizure of the ammunition. *People v Fetterley*, 229 Mich App 511, 543; 583 NW2d 199 (1998). Finally, defendant's argument that the affidavit was fatally defective because it erroneously described the residence to be searched as a two-story structure is without merit. The place to be searched must be described sufficiently to enable the executing officers to locate and identify the premises with reasonable effort while eliminating any reasonable probability that another premises might be mistakenly searched. *People v Hampton*, 237 Mich App 143, 151; 603 NW2d 270 (1999). The description of the residence, taken together with the other information in the affidavit, was sufficient. *People v Westra*, 445 Mich 284, 285-286; 517 NW2d 734 (1994).

Defendant next argues that the trial court abused its discretion by refusing to consider and accept his offer to stipulate that he had prior felony convictions in return for an order prohibiting the prosecution from revealing the specific nature of those convictions. The trial court declined to consider defendant's motion in limine on the ground that the motion was untimely.

In a trial in which the defendant is charged with felon in possession of a firearm, the trial court is precluded from admitting evidence of the specific name and nature of the prior conviction or convictions if the defendant stipulates that he has been convicted of a prior felony. The probative value of such evidence is outweighed by the risk of unfair prejudice. The admission of such evidence is subject to a harmless error analysis. *Old Chief v United States*, 519 US 172; 117 S Ct 644; 136 L Ed 2d 574, 590-591 (1997); *People v Swint*, 225 Mich App 353, 377-380; 572 NW2d 666 (1997).

Defendant's violation of a discovery order requiring the filing of motions within a certain period notwithstanding, the trial court's refusal to accept the proffered stipulation constituted an abuse of discretion. *Id*. However, the error was harmless in light of the substantial evidence of defendant's guilt. A firearm was found under the mattress on which defendant slept. Ammunition fitting the firearm was found in defendant's gym bag. Witnesses testified that defendant admitted that he placed the gun under the mattress. This evidence, which the jury was entitled to accept, *People v Marji*, 180 Mich App 525, 542, 477 NW2d 835 (1989), supported defendant's conviction. Defendant has not established that it is more probable than not that the trial court's error affected the outcome of the case. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Defendant next argues that the trial court abused its discretion by precluding him from calling his mother and his girlfriend as witnesses because his witness list was not filed in a timely manner. In the alternative, he contends that trial counsel rendered ineffective assistance by failing to file the witness list in a timely manner. We disagree with both arguments. Defendant failed to produce the names of all witnesses he intended to call within eleven days of the prosecutor's request, as required by MCR 6.201(F). The trial court had the discretion to fashion a remedy for defendant's failure, including prohibiting the presentation of testimony. MCR 6.201(J); see also *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). Defendant acknowledges that he is not certain as to what the potential witnesses would have said had they testified. He has not established that the trial court's decision to preclude the testimony constituted an abuse of discretion. *Id*. Furthermore, defendant has not shown that, had counsel submitted the witness list in a timely manner and had the witnesses testified, it is reasonably probable that the outcome of the proceedings would have been different. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). He has not overcome the presumption that counsel rendered effective assistance. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant also argues that the prosecutor engaged in various acts of misconduct, and that the cumulative effect of the prosecutor's actions was to deny him a fair trial and due process. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). A claim of prosecutorial misconduct is reviewed de novo; however, a trial court's findings of fact are reviewed for clear error. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

Defendant did not object to the prosecutor's allegedly improper comments. Absent an objection, appellate review is precluded unless an objection would not have cured the error, or unless a failure to review the issue would result in a miscarriage of justice. *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998). The prosecutor did not argue that defendant's socioeconomic status rendered him unworthy of belief. Rather, the prosecutor's reference to defendant's work history was in response to defendant's own suggestion on direct examination that the police officers lied regarding the statements he made to them. A prosecutor is entitled to argue from the evidence that defendant or another witness is not worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). The prosecutor's presentation of

evidence regarding the functioning of the SCMNU and the EST properly placed the actions of the officers in context for the jury, *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996), and did not constitute the improper introduction of bad acts evidence. MRE 404(b). The prosecutor's statement of the law of reasonable doubt was not precise; however, the court correctly instructed the jury on that issue. A jury is presumed to have followed the instructions given to it. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). The prosecutor's statement that defendant had no explanation for the placement of the gun or the ammunition was a proper response to defendant's own testimony. *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999). The cumulative effect of the prosecutor's comments did not deny defendant a fair trial. No miscarriage of justice occurred. *Kelly*, *supra*; see also *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996).

Lastly, defendant argues that he is entitled to resentencing because his minimum prison term of five years is disproportionate to the circumstances of the offense and offender and is so disparate that it constitutes cruel or unusual punishment. We disagree. The legislative sentencing guidelines are inapplicable in this case. MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 253-254; 611 NW2d 316 (2000). The judicial sentencing guidelines do not apply to habitual offender sentences, and are not to be considered when fashioning a sentence for an habitual offender. *People v Williams*, 223 Mich App 409, 412-413; 566 NW2d 649 (1997). Defendant has demonstrated that he cannot conform his conduct to the requirements of the law. His sentence is within the statutory limits, MCL 769.12(1)(a), and does not constitute an abuse of discretion. In addition, the sentence does not constitute cruel or unusual punishment. *Poole*, *supra*.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Harold Hood
/s/ David H. Sawyer