

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRY LEE MUSIC,

Defendant-Appellant.

UNPUBLISHED

May 17, 2002

No. 230087

Branch Circuit Court

LC No. 98-066623-FH

Before: Wilder, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of possession with intent to deliver a controlled substance (marijuana), MCL 333.7401(2)(d)(iii), domestic violence, MCL 750.81(2), and possession of a controlled substance (methamphetamine), MCL 333.7403(2)(b). The trial court sentenced him to 28 to 180 months' imprisonment on the marijuana conviction, 20 to 180 months' imprisonment on the methamphetamine conviction, and 90 days' imprisonment on the domestic violence conviction, all to be served concurrently. We affirm.

The charges against defendant arose from a complaint by two tenants in defendant's house, a woman and her minor son. Both tenants reported to police that defendant assaulted them while in the house and that defendant had been drinking. The minor indicated that defendant had taken pills. Police and emergency medical personnel responded to the residence. At first they pounded on the front and back doors, but they received no response. They then attempted to pry open the front door so they could check on defendant, but defendant pushed it back closed, told them to go away, and forbid them from entering the house. At this time, defendant gave mixed responses to the police's questions, had indicated that he had been drinking, then denied drinking, and indicated that he took ten pills. Meanwhile, another officer gained entry through the back door, handcuffed defendant, and put him in a chair where medical personnel could evaluate him.

Thereafter, emergency personnel examined defendant to determine whether he was in need of immediate medical attention. Defendant gave inconsistent responses to inquiries about his condition and was uncooperative.¹ In order to help evaluate defendant's condition, police

¹ A police officer testified that it was fairly obvious that defendant had consumed alcohol on the basis of his physical actions, his speech, his belligerent nature, and the confused and conflicting
(continued...)

and emergency personnel looked for pills and alcohol. This pursuit included the opening of a duffel bag that the minor child stated was a place where defendant normally kept his medications. The duffel bag contained a large quantity of marijuana. Ultimately, the emergency personnel determined that defendant required no further medical treatment, and the police transported him to jail on charges of domestic violence. Later, police obtained a search warrant based in part on the marijuana that was observed in the duffel bag. In the ensuing search, police seized a number of things from the residence, including marijuana and methamphetamine. Defendant now appeals his convictions arising from the charges filed with respect to the alleged domestic violence incident and with respect to the drugs found in his house.

Defendant first argues that the trial court erred in denying his motion for a mistrial. Specifically, defendant argues that a mistrial was warranted because the prosecution intentionally elicited evidence that a Michigan Department of Corrections inmate identification card issued to defendant was found in his house, and thus it could be inferred that defendant has a prior criminal record. We review the trial court's denial of a motion for mistrial for an abuse of discretion. *People v Ortiz-Kehoe*, 237 Mich App 508, 513; 603 NW2d 802 (1999). In this context, an abuse of discretion will be found only where the denial of a mistrial has deprived the defendant of a fair and impartial trial. *People v Manning*, 434 Mich 1, 7; 450 NW2d 534 (1990).

During the examination of a police witness, the prosecution introduced evidence discovered during the search of a bedroom in defendant's house that tended to establish that defendant was the occupant of that bedroom. Because the marijuana and methamphetamine were located in that same bedroom, the prosecution was attempting to prove that defendant possessed the contraband because that was his bedroom. Among the items found in this bedroom that tended to show that it belonged to defendant was defendant's Michigan Department of Corrections prisoner identification card. After the card was marked, the following exchange occurred:

Q. [Prosecutor] I'll show you People's Proposed Exhibit Number 8 for identification. Could you identify that?

A. [Police Witness] Yes, sir. This is an identification card issued by the Michigan Department of Corrections to one prisoner by the name of Terry Music, with an expiration date of 7-12 of 1994.

Q. And where was that seized from?

A. Officer Scheid found this particular ID in a box under a bed in [defendant]'s bedroom, the same bed he found the marijuana on.

Subsequently, the witness, when identifying other exhibits found in the same box as the prisoner identification card, referred to those exhibits as being located in the same box in defendant's bedroom along with defendant's prisoner identification. After the third reference to defendant's prisoner identification card, defendant objected and moved for a mistrial or, in the alternative,

(...continued)

statements that he made.

“that the card not be accepted as an exhibit or that it not be referred to again, and some kind of instruction given to the jury as to – that this is not something that they can consider.” The trial court denied the motion for mistrial, but ordered that no further reference be made to the nature of the card. Further, the trial court gave the jury a cautionary instruction at that time and in its final instructions to the jury.

Defendant now argues that because the prisoner identification evidence was erroneously admitted and its admission by the prosecutor constituted misconduct, the trial court abused its discretion in denying his motion for mistrial. We disagree. At trial, the presence of methamphetamine and marijuana in defendant’s home was not contested. Rather, who owned or possessed the drugs was the disputed issue. Evidence regarding who occupied the room where the drugs were found was relevant to this issue, and items such as the prisoner identification card tended to establish who controlled that room in the house. Thus, the prisoner identification card had significant probative value and its admission was not erroneous as defendant claims.² *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001); MRE 401; MRE 402; MRE 403.

Defendant objected only after the police witness continued to make reference to the card while identifying other items that the police seized from the bedroom where the drugs were located. It was the witness’ emphasis on defendant’s status as a former prisoner that defendant found objectionable. Contrary to defendant’s claim, in this context, we find no misconduct by the prosecutor.³ The police witness’ subsequent reference to the exhibit as a “prisoner” card or photo were unsolicited and constituted no evidence of misconduct by the prosecutor. Further, we are persuaded that the trial court’s handling of defendant’s objection adequately addressed the situation. *People v Lugo*, 214 Mich App 699, 705; 542 NW2d 921 (1995). We find no abuse of discretion in the trial court’s denial of a mistrial.

Next, defendant challenges the police and emergency personnel’s entry into defendant’s bedroom. Because defendant failed to raise this claim in the trial court, it is not preserved. *People v Stacy*, 193 Mich App 19, 28; 484 NW2d 675 (1992). Thus, to avoid forfeiture, defendant must show outcome determinative plain error. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

In his appellate brief, defendant concedes that the initial warrantless entry into his home could be justified under the exigent circumstances exception to the Fourth Amendment’s warrant requirement, *Mincey v Arizona*, 437 US 385, 392-393; 98 S Ct 2408; 57 L Ed 2d 290 (1978); *City of Troy v Ohlinger*, 438 Mich 477, 483-484; 475 NW2d 54 (1991), in this case on the basis of emergency medical care. Defendant also acknowledges that it is proper to seize evidence of criminal conduct that is observed while rendering medical treatment. *Id.*; see also *People v*

² Whether defense counsel could have or should have requested a limiting instruction before the exhibit was presented to the witness is not an issue before us. However, we reject the suggestion in defendant’s brief that the prosecutor, rather than defendant’s counsel, should have anticipated the potential prejudicial nature of the exhibit.

³ The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

Brzezinski, 243 Mich App 431, 434; 622 NW2d 528 (2000) (“The ‘emergency aid’ exception allows police officers to make an entry or search without a warrant where they reasonably believe it is necessary to assist a person who may be in serious need of medical aid.”). Defendant, however, maintains that before the search for pills and alcohol commenced, the evidence established that emergency personnel had determined that defendant did not require further medical treatment and, therefore, the discovery of the marijuana in the duffel bag was the result of an illegal search. A review of the record demonstrates that defendant’s claim is unsupported. The arresting officer testified that the medical personnel continued to evaluate defendant after the marijuana was found. One of the medical personnel at the scene testified that after finding the marijuana, but not prescription medications, he consulted with his partner about defendant’s condition before clearing the scene. The evidence shows that the discovery of the marijuana occurred well within the timeframe that defendant was being examined and before a final decision on the need for further medical treatment of defendant had been made. Because the factual predicate for defendant’s claim is without merit, defendant cannot show the existence of plain error.⁴

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra

⁴ To the extent that defendant argues that defense counsel’s failure to seek suppression of the evidence denied defendant effective assistance of counsel, we find his claim without merit. Counsel is not required to make futile motions. *People v Sabin (On Second Remand)*, 242 Mich App 656, 660; 620 NW2d 19 (2000). Defendant has failed to show a reasonable probability that the outcome of the trial could have been different had counsel moved for suppression of the drugs on the basis argued on appeal. *Id.*