STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARCHIE LEON BANKS,

Defendant-Appellant.

UNPUBLISHED
June 28, 2002

No. 227653
Monroe Circuit Court
LC No. 99-029928-FH

Before: Zahra, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver less than fifty grams of a mixture containing cocaine, MCL 333.7401(2)(a)(iv). He was sentenced as a fourth-offense habitual offender, MCL 769.12, to a prison term of forty-six months to forty years. We affirm.

I

Defendant first argues that the trial court erred in denying his motion to suppress evidence seized pursuant to the search warrant on the basis that the police conduct violated the knock-and-announce statute, MCL 780.656, and constituted an unreasonable search and seizure under the United States and Michigan Constitutions, US Const, Am IV; Const 1963, art 1, § 11. We disagree.

We review a trial court's factual findings regarding a motion to suppress for clear error. *People v Echavarria*, 233 Mich App 356, 366; 592 NW2d 737 (1999). "A decision is clearly erroneous if, although there is evidence to support it, the Court is left with a definite and firm conviction that a mistake has been made." *People v Chambers*, 195 Mich App 118, 121; 489 NW2d 168 (1992). The trial court's ultimate decision regarding a motion to suppress is reviewed de novo. *Echavarria*, *supra*.

MCL 780.656 requires officers to knock, announce their identity, state their purpose, and allow the occupants of a house reasonable time to answer the door from the most remote room of the house before they may forcibly enter in order to execute a search warrant. *People v Tanner*, 222 Mich App 626, 635; 564 NW2d 197 (1997); *People v Humphrey*, 150 Mich App 806, 813-814; 389 NW2d 494 (1986). When a method of entry violates the knock-and-announce statute, the remedy of suppression is appropriate only where the police conduct is so egregious as to be

unreasonable under Fourth Amendment standards. *People v Howard*, 233 Mich App 52, 60-61; 595 NW2d 497 (1998). Noncompliance with the knock-and-announce statute has been excused where police officers heard running or other suspicious noises inside the dwelling, where they had a basis to conclude that evidence would be destroyed or lives endangered by a delay, and where events indicated that compliance with statutory requirements would be futile. See *People v Williams (After Remand)*, 198 Mich App 537, 545; 499 NW2d 404 (1993) (and cases cited therein).

In this case, the testimony at the hearing revealed that four officers, wearing police gear, went to defendant's motel room to execute a search warrant. When the officers approached the door of the small room, one officer knocked on the door, and yelled "state police, search warrant." During a lapse of approximately five seconds following the initial announcement, officers heard movement in the room, which was described as a sliding door. After hearing the noises from inside, officers began to ram the metal door to effectuate an entry. There was testimony that, during the more than one minute that it took to gain entry, an officer continued yelling, "state police, search warrant, open the door." When the officers entered the motel room, no one was in the room and a sliding door leading outside had been left open.

Based on the testimony adduced at the hearing, we find that the trial court did not abuse its discretion in denying defendant's motion to suppress. In reviewing the trial court's findings of fact on this issue, we give regard to its opportunity to gauge the credibility of the witnesses testifying. MCR 2.613(C). We agree with the trial court that, after the officers announced their presence, the noises of movement in the small motel room presented a legitimate concern of the possibility of flight. Moreover, acting on a warrant that specified that drugs and a gun were located in the motel room, the officers had a comprehensible concern that the evidence they sought could be easily destroyed and that their safety may be in jeopardy. These circumstances were sufficient to render noncompliance with the knock-and-announce statute reasonable. See *Williams (After Remand)*, *supra*. Accordingly, we are not "left with a definite and firm conviction that a mistake has been made," and therefore find no error in the trial court's decision to deny defendant's motion to suppress the evidence seized.

With respect to defendant's additional challenges to the warrant, we observe that even without the challenged portion allowing a "rapid entry," the affidavit was sufficient to establish probable cause to search defendant's residence, and that the circumstances at the scene justified the officers' conduct.

II

Defendant also challenges the trial court's alternative finding that the inevitable discovery exception to the exclusionary rule precludes suppression. In light of our determination that defendant's Fourth Amendment rights were not violated, we need not address this argument. We nevertheless note that, contrary to defendant's claim, a violation of the knock-and-announce requirement is subject to the inevitable discovery exception and, under the circumstances of this case, suppression of the seized evidence would not be an available remedy. See *People v Vasquez (After Remand)*, 461 Mich 235, 241-242; 602 NW2d 376 (1999); *People v Stevens*, 460 Mich 626, 645, 647; 597 NW2d 53 (1999).

III

Defendant's final claim is that he was denied a fair and impartial trial because of prosecutorial misconduct. We disagree. Because defendant failed to timely object to the alleged improper remarks below, this Court reviews this claim for plain error affecting defendant's substantial rights, i.e., that affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Viewed as a whole and in context, none of the challenged conduct rises to the level of error requiring reversal. Given the evidence, the remarks do not affect the outcome of the trial. The challenged remarks, which were made during rebuttal argument, were responsive to defense counsel's closing argument and were based on the evidence produced at trial. See *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Kennebrew*, 220 Mich App 601, 607-608; 560 NW2d 354 (1996); *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). Further, a prosecutor may use emotional or "hard language" when it is supported by evidence and is not required to phrase arguments and inferences in the blandest possible terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

We also reject defendant's claim that he is entitled to a new trial because the prosecutor elicited irrelevant and highly prejudicial testimony. Contrary to defendant's claim, the testimony that a witness met defendant "through [the witness] smoking crack cocaine," and that defendant threatened to have witnesses shot if they "snitch[ed]" was relevant to defendant's drug trafficking activities. See MRE 401. Likewise, testimony concerning defendant's alleged possession of a gun inside his motel room was relevant to the circumstances surrounding the police officers' entry into the room and seizure of the drugs. We note that, contrary to defendant's implication, evidence is not inadmissible simply because the very nature of the evidence is prejudicial, and defendant has not demonstrated that he was unfairly prejudiced by the evidence. See MRE 403. Moreover, even if there was merit to defendant's contention, he has failed to demonstrate that the evidence affected the outcome of the proceedings, particularly given the strong evidence against him in this case. See *Carines*, *supra*. In sum, defendant has not established that the prosecutor's conduct warrants reversal.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Helene N. White