STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 19, 2004
v	No. 244275 Wayne Circuit Court
FERNANDO BURNSIDE, Defendant-Appellant.	LC No. 01-011634

Before: Cooper, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv). The trial court sentenced him to 180 days in jail and lifetime probation. Defendant appeals as of right. This appeal is being decided without oral argument pursuant to MCR 7.214(E). We affirm.

This case arises out of the seizure of 6.19 grams of cocaine from a duplex, located at 339/341 Eason, in Highland Park. On August 14, 2001, defendant was living at 341 Eason, the lower level of the duplex, with his girlfriend. On that day, Police Officer George Brown observed defendant exit the lower flat of the Eason duplex and engage in what he suspected to be drug deals. Officer Brown testified that on two separate occasions he watched individuals park their vehicles down the street, walk up to defendant, and hand defendant money. Each time this occurred, Officer Brown claimed that defendant went inside the Eason duplex and within minutes returned and handed something to these individuals.

Shortly after the second transaction, the police executed a search warrant on 339/341 Eason. Investigator Charles Ball testified that when he entered the duplex he saw defendant run toward the basement. He claimed that he lost sight of defendant for a few seconds but then found him laying on the basement floor. Investigator Dave Rahn, who followed Investigator Ball into the duplex, testified that he heard defendant yell, "I'm here," and then saw defendant laying on the basement floor.

After securing defendant, the police searched the basement. In the room adjacent to defendant, they discovered a knotted plastic bag that contained thirty smaller bags of crack cocaine. Defendant was discovered approximately eight feet away from the cocaine. The portion of the basement where the cocaine was found, however, was designated as part of 339

Eason. There was no lock on the door separating the two parts of the basement. Investigator Rahn testified that the cocaine appeared to be packaged for distribution.

Defendant denied possessing any drugs. Rather, defendant claimed that he was in the process of moving on the day the search warrant was executed. He claimed that the cocaine belonged to the tenants living in the upper level of the duplex. There was evidence presented that the police discovered heroin and marijuana in the upper level of the duplex.

On appeal, defendant claims that his conviction should be reversed because he was denied his constitutional rights to a fair trial and to confront witnesses when the trial court permitted Investigator Charles Ball to provide prejudicial hearsay testimony regarding the contents of a citizen's complaint. A trial court's evidentiary decisions are generally reviewed for an abuse of discretion.[1] Because defendant failed to specifically object on these grounds below, however, our review is limited to plain error affecting his substantial rights.[2] In any event, error requiring reversal may not be based on the improper admission of evidence unless, after examining the entire case, it appears that the error resulted in a miscarriage of justice.[3]

On cross-examination, defense counsel asked Investigator Ball to read the description of the alleged narcotics dealer contained in the search warrant. The trial court overruled the prosecution's hearsay objection because Investigator Ball prepared the search warrant. Investigator Ball testified that the alleged narcotics dealer was described in the search warrant as "John Doe, black male, 20 to 25 years of age, six feet tall, 160 to 170, medium complexion with a mustache and black hair." He claimed that the search warrant was based on all the information that was given to him. According to Investigator Ball, the description provided in the search warrant was specifically provided by a police informant that had purchased drugs from that individual. The parties stipulated that defendant was only 5'6" tall.

On redirect, the prosecution asked Investigator Ball whether he knew the name of the alleged drug dealer despite the fact that he was described in the search warrant as a John Doe. When Investigator Ball answered in the affirmative, the prosecution asked him if the citizen complaint contained an individual's name. Investigator Ball stated that the citizen complaint named defendant as the drug dealer.

Investigator Ball's testimony concerning the contents of the citizen's complaint was clearly inadmissible hearsay.[4] Written assertions, other than those made by the declarant testifying at trial, that are offered to prove the truth of the matter asserted are considered hearsay.[5] After reviewing the record, however, we find that this error was harmless.

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[1] *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

[2] MRE 103(a)(1); *People v Taylor*, 252 Mich App 519, 523; 652 NW2d 526 (2002).

[3] MCL 769.26.

[4] MRE 801; MRE 802.

[5] MRE 801.

Notably, Investigator Ball's testimony regarding the citizen complaint was not the only evidence offered to show that defendant was selling drugs. Indeed, on two separate occasions, Officer Brown personally observed defendant receive cash from individuals, enter the duplex, and then give something to these people. These exchanges only lasted a matter of minutes and Officer Brown testified that this activity was consistent with narcotics transactions. Based on over twenty years of experience in narcotics, Officer Brown believed that this behavior was consistent with narcotic transactions. Further, when the police entered the duplex shortly after the last transaction, they discovered defendant in the basement within eight feet of the cocaine. While the cocaine was located in the portion of the basement belonging to the upper unit of the duplex, there was no lock separating the two halves of the basement. On these facts, we find that defendant has failed to establish that the admission of the testimony in question was outcome determinative.[6]

Defendant next alleges that the trial court improperly refused the jury's request to reread the testimony of a key witness. We disagree. A trial court's decision to re-examine testimony is generally reviewed on appeal for an abuse of discretion.[7] But defendant's failure to object in the trial court limits our review to plain error affecting his substantial rights.[8]

"A defendant does not have a right to have a jury rehear testimony."[9] When addressing a jury's request in this regard, the trial court "must exercise its discretion to assure fairness and to refuse unreasonable requests . . . ."[10] However, a trial court may not refuse a jury's reasonable request to review testimony.[11] While a trial court may order the jury to continue deliberations without the requested review, it may not indicate that the possibility for review in the future is completely foreclosed.[12]

After deliberating for approximately three hours, the jury in this case sent a note requesting that the trial court provide it with Officer Brown's testimony. In response, the trial court stated:

> Well, this is where it gets fun, ladies and gentlemen. Because this is where you have to, the twelve of you rely on your collective memories, okay? I want you to take a time to talk about what you believe Officer Brown testified to. And then, come to some agreement as to what you best think the testimony was, and what, if anything it proves. Okay?

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[6] *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

[7] *People v Davis*, 216 Mich App 47, 56; 549 NW2d 1 (1996).

[8] *Carines*, *supra* at 763-764.

[9] *People v Carter*, 462 Mich 206, 218; 612 NW2d 144 (2000).

[10] *People v Howe*, 392 Mich 670, 676; 221 NW2d 350 (1974); see also MCR 6.414(H).

[11] MCR 6.414(H).

[12] MCR 6.414(H); *People v Smith*, 396 Mich 109, 110-111; 240 NW2d 202 (1976).

> That's the best I can do, *at this time*. There's no written transcript of his testimony. *There is [a] . . . tape of it. But, we don't play those back, unless we absolutely have to*, okay? So, you need to talk about it amongst yourselves, and *try* to reach an agreement as to what you think the testimony was of Officer Brown, okay?[13]

Approximately thirty minutes later the jury returned with a unanimous verdict of guilty.

After reviewing the above instructions, we do not agree with defendant that the trial court's comments were unreasonable or that they completely foreclosed the possibility of future review. The trial court's comments to the jury were reasonable because the transcripts were not yet completed. Further, the trial court indicated to the jury that the testimony could be played back as a last resort if they could not reach an agreement. These instructions met the requirements established in MCR 6.414(H). Accordingly, we find that defendant failed to establish an abuse of the trial court's discretion, much less plain error affecting his substantial rights.

Affirmed.

/s/ Jessica R. Cooper
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood

[13] Emphasis added.