

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILLIP COOK,

Defendant-Appellant.

UNPUBLISHED

March 25, 2004

No. 242698

Wayne Circuit Court

LC No. 98-010211-01

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

PER CURIAM.

Defendant was convicted, following a jury trial, of possession with intent to deliver more than 225, but less than 650 grams of heroin, MCL 333.7401(2)(a)(ii),¹ and possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v). He was sentenced to twenty to thirty years' imprisonment for the possession with intent to deliver conviction, and one to four years' imprisonment for the possession of cocaine conviction. Defendant appeals as of right, and we affirm.

In September 1997, police received a tip that narcotics transactions were occurring from a home located at 8878 Stoepel in the City of Detroit. With the reliability of the tip in question and with ample raids to perform, the police raid crew did not pursue the lead. Approximately three months later, the issue of drug distribution from 8878 Stoepel was brought to police attention a second time. Based on the tip, surveillance of the location was established by a police officer. On three occasions, pedestrian traffic to the home was reported. On the fourth occasion, a drug transaction was observed. Specifically, a police officer reported observing defendant exchange foil packages, commonly used to sell heroin, with an unidentified male. The unidentified male proceeded to a nearby store where he allegedly engaged in other drug sales. Based on this information, a search warrant was prepared and executed the next day.

During the raid entry, defendant was observed on a couch in the home. A shotgun was within arm's reach. Heroin and heroin foil packages were located on the table in front of

¹ Although the criminal trial involved the recovery of bulk *heroin*, the judgment of sentence incorrectly provides that defendant was convicted of possession with intent to deliver more than 225, but less than 650 grams of *cocaine*.

defendant. A substantial amount of currency, firearms, and narcotic paraphernalia was also recovered. Bills addressed to defendant's alias at the Stoepel address were found in a bedroom with men's clothing. A canine unit also recovered heroin from the attic. Defendant was arrested and removed from the home.

After the search warrant was executed, the original copy of the search warrant could not be located. Additionally, the return or tabulation documented the recovery of guns, but did not document the recovery of the narcotics, suspected heroin, and cocaine. Consequently, defendant alleged that police were merely "hitting homes" and manufactured the search warrant after the fact. However, other documentary evidence substantiated the acquisition of the search warrant and recovery of narcotics. For example, the prosecutor had a logged entry of approval of the search warrant. Additionally, a police document called the "24 hour" report delineated the recovery of narcotics. When police learned of the omission of listed narcotics in the original return, an amended return was filed. The trial court held extensive hearings to address a motion to quash and suppress evidence based on technical deficiencies in the procedural handling and filing of the search warrant. The trial court denied the motions. Nonetheless, the trial court allowed the procedural deficiencies to be admitted before the jury to allow them to address the credibility of the testimony of police officers. Defendant did not appear for the last day of trial, and the jury convicted him as charged. Approximately two years later, defendant was apprehended and sentenced. Defense counsel asked for a downward departure from the twenty-year minimum sentence for the possession with intent to deliver conviction, citing defendant's age, 55, as a basis. However, the trial court concluded that the three prior felony convictions and flight did not warrant a sentencing departure. Defendant now appeals as of right.

Defendant first alleges that he was denied due process of law based on prosecutorial misconduct. We disagree. A claim of prosecutorial misconduct is reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). 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). This Court decides issues of prosecutorial misconduct on a case by case basis, reviewing the pertinent portion of the record and examining the prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). While the prosecutor may not make a statement of fact unsupported by the evidence, the prosecutor may argue the evidence and all reasonable inferences arising from the evidence as related to the theory of the case. *People v Schultz*, 246 Mich App 695, 710; 635 NW2d 491 (2001). Unpreserved claims of prosecutorial misconduct are reviewed for plain error. *Watson*, *supra*. To avoid forfeiture of an unpreserved claim, the defendant must demonstrate plain error that was outcome determinative. *Id.* Error requiring reversal will not be found where the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *Id.*

Following review of the record, defendant's claim of error is without merit. Defense counsel did not object to the prosecutor's "red herring" comment, and defense counsel also alleged that the prosecution raised "red herrings." There is no indication that the prosecutor argued facts not in evidence or shifted the burden of proof. There was no evidence that the prosecutor withheld current police policies and procedures. Lastly, there was no indication that the prosecutor employed inherently inconsistent theories.

Defendant next alleges that he was denied the right to a properly instructed jury and due process of law when the trial court failed to provide an adverse inference instruction regarding

the violation of MCL 780.655(5). We disagree. Jury instructions are reviewed in their entirety to determine if error requiring reversal occurred. *People v Brown*, 239 Mich App 735, 746; 610 NW2d 234 (2000). Instructions must not be extracted piecemeal to establish error. *Id.* Somewhat imperfect instructions do not necessitate a reversal provided that the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.*

At the time of trial, MCL 780.655 provided:

When an officer in the execution of a search warrant finds any property or seizes any of the other things for which a search warrant is allowed by this act, the officer, in the presence of the person from whose possession or premises the property or thing was taken, if present, or in the presence of at least 1 other person, shall make a complete and accurate tabulation of the property and things so seized. The officer taking property or other things under the warrant shall forthwith give to the person from whom or from whose premises the property was taken a copy of the warrant and shall give to the person a copy of the tabulation upon completion, or shall leave a copy of the warrant and tabulation at the place from which the property or thing was taken.²

The plain language of the statute does not provide a remedy for a violation. *People v Sobczak-Obetts*, 463 Mich 687, 709-710; 625 NW2d 764 (2001). Additionally, suppression of evidence is not an appropriate remedy where police officers act pursuant to a valid search warrant and their conduct is within the scope of the warrant. *Id.* at 712. Where there has been no police misconduct, the deterrent purposes of exclusion are not served based on technical violations of MCL 780.655. *Id.*

In the present case, defendant does not seek suppression, but rather, contends that an adverse inference instruction was appropriate. We disagree. As previously stated by the Supreme Court, MCL 780.655 does not provide a remedy for a violation. *Obetts, supra*. Moreover, an adverse inference instruction would have caused juror confusion. The trial court ruled that the search warrant was valid. Additionally, the trial court ruled that procedural violations that were admitted through police testimony were only used to assess credibility. Furthermore, corroborative evidence of the valid search warrant was admitted through the testimony of police witnesses and police documentation. The prosecutor's log and 24 hour report corroborated the fact that the search warrant was obtained on the date requested and contradicted the defense claim of after the fact manufacture. Thus, an adverse inference instruction would have contradicted the corroborative evidence in the case and led to jury confusion. Consequently, we cannot conclude that the trial court's refusal to instruct was erroneous.³ *Brown, supra*.

² MCL 780.655 was amended on April 1, 2002, by 112 PA 2002 to provide that the affidavit in support of the search warrant, which may contain the name of an informant, need not be left at the premises.

³ We also note that the statutes addressing search warrants do not provide a remedy to the defendant, but does provide a *penalty* against a person who exceeds their authority or exercises
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Furthermore, when a violation of procedural due process is alleged, the procedural protections are examined for fundamental fairness. *Thomas v Deputy Warden*, 249 Mich App 718, 724; 644 NW2d 59 (2002). Fundamental fairness involves consideration of the interest at stake, the risk of an erroneous deprivation based on the procedures used, the value of additional procedures, and the government interest, including the fiscal or administrative burdens imposed by substitute procedures. *Id.* Fundamental fairness in this case does not support the reading of an adverse inference instruction. The trial court held extensive evidentiary hearings to address the circumstances surrounding the approval of the search warrant, the validity of the allegations contained within the search warrant, the allegations of police misconduct regarding the procedural statutory requirements, the log of the search warrants at the district court level, and the procedural handling of the search warrant by the district court and prosecutor's office. Following these extensive hearing, the trial court concluded that falsehoods were not contained within the search warrant, the testimony of the affiant of the search warrant was credible, and the procedures followed by the district court and prosecutor's office were lax. Nonetheless, the trial court did not hold the police accountable for the deficiencies of others and did not find police misconduct. Therefore, fundamental fairness was provided to defendant after allegations of violations of procedural due process arose.

Defendant next alleges that there was insufficient to support the conviction of possession with intent to deliver more than 225, but less than, 650 grams of heroin because there was no evidence that defendant possessed the drugs found in the attic. We disagree. When reviewing a challenge to the sufficiency of the evidence, the appellate court views the evidence in the light most favorable to the prosecution to determine whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

A person need not have actual possession of a controlled substance to be convicted of a possession charge. *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748, modified 41 Mich 1201 (1992). Possession may be actual or constructive, and constructive possession exists when the totality of the circumstances presents a sufficient nexus between a defendant and the contraband. *Id.* at 520-521. Constructive possession may be proven by circumstantial evidence and reasonable inferences drawn from the evidence. *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000). Mere proximity to drugs is insufficient to support a finding of possession. *People v Griffin*, 235 Mich App 27, 35; 597 NW2d 176 (1999).

In the present case, viewing the evidence in the light most favorable to the prosecution, there was sufficient circumstantial evidence and reasonable inferences from which the jury could conclude that defendant possessed the heroin found in the attic. *Johnson, supra*. Police received a tip regarding drug sales out of the home at 8878 Stoepel. The day before the execution of the search warrant, defendant was observed exchanging foil packets with another individual. That individual proceeded to a store front where he appeared to engage in drug transactions with other individuals. When police entered the home, they found defendant on the couch with a shotgun

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the authority with unnecessary severity. A person who, in executing a search warrant, willfully exceeds his authority or exercises it with unnecessary severity is subject to a fine up to \$1,000 or imprisonment for not more than one year. MCL 780.657.

nearby. On the table in front of defendant, 909 foil packets of heroin were found with scales, the cutting agent lactose, a coffee grinder, and a sifter. Those items, while common items found in a kitchen, indicated that defendant engaged in drug sales, not individual use. Additionally, defendant was found with a substantial amount of cash, (in excess of \$3,500), and bills addressed to an alias used by defendant were found in the southwest bedroom with men's clothing, size medium to large. Additional guns and drugs, cocaine and heroin, were found in the southwest bedroom. These facts indicated that defendant exercised dominion and control over the home. An officer testified that defendant stated that he lived in the home. There was no evidence that any other person occupied the home. While defense evidence presented during evidentiary hearings indicated that defendant had previously lived at the home and was visiting on this occasion, this evidence was not presented to the jury, but was a position taken during the hearings to challenge the search warrant. It was reasonable for the jury to infer, based on these facts and circumstances, that defendant was in possession and control of the heroin found in the attic. *Nunez, supra*.

Defendant next alleges that the trial court erred in concluding that defendant lacked standing to challenge the search. Defendant further alleges that the prosecutor was barred from challenging standing because it was alleged at trial that defendant owned the home. Neither allegation provides defendant with any form of relief. Irrespective of the trial court's conclusion regarding standing,⁴ the trial court nonetheless upheld the validity of the search warrant. Thus, the trial court reached the issue in the alternative, and if the trial court had ruled that defendant had standing, the upholding of the validity of the search warrant does not provide him any form of relief. The prosecutor's position regarding standing also has no bearing on the conviction. At the request of the trial court, the prosecutor briefed the issue of standing. However, at trial, evidence regarding the legal owner of the home was not introduced. Rather, the prosecutor's theory of the case was that defendant was in constructive possession of the illegal items based on the evidence. The evidentiary hearings had no bearing on the trial, and the evidence produced at the evidentiary hearings regarding defendant's prior occupancy was not introduced at trial. This claimed error is simply without merit.

Defendant next alleges that the trial court abused its discretion by improperly admitting MRE 404(b) or other acts evidence. We disagree. The trial court's decision to admit this evidence was not an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). The evidence was not offered as a prior bad act, but was offered to explain the circumstances of the charged crimes and to explain the police officers' activity. *People v Scholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996).

Defendant next alleges that the trial court's decision to refuse to suppress the evidence was clearly erroneous because the information in the warrant was insufficient, conclusive, stale, false, or made with reckless disregard for the truth. We disagree. When reviewing a magistrate's decision to issue a search warrant, this Court must examine the search warrant and underlying affidavit in a common-sense and realistic manner. *People v Darwich*, 226 Mich App

⁴ The trial court's conclusion regarding standing was proper. See *People v Armendarez*, 188 Mich App 61, 71; 468 NW2d 893 (1991).

635, 636-637; 575 NW2d 44 (1997). Under the totality of the circumstances, this Court must then determine whether a reasonably cautious person could have concluded that there was a substantial basis for the magistrate's finding of probable cause. *Id.* at 637. When a person of reasonable caution would conclude that contraband or evidence of criminal conduct will be found in the place to be searched, probable cause for a search exists. *Id.* We review a lower court's findings of fact in deciding a motion to suppress evidence for clear error. *People v Head*, 211 Mich App 205, 209; 535 NW2d 563 (1995). However, we review de novo a lower court's ultimate decision regarding a motion to suppress. *People v Goforth*, 222 Mich App 306, 310 n 4; 564 NW2d 526 (1997).

The trial court, after conducting extensive evidentiary hearings regarding the search warrant, rejected the claims raised by defense counsel. On this record, we cannot conclude that the trial court's factual findings were clearly erroneous. *Head, supra*.

Lastly, defendant alleges that the statutory scheme found in MCL 333.7401 and MCL 333.7403 violates the principle of proportionality and violates the ban against cruel and unusual punishment. We disagree. It is presumed that a statutory minimum is the appropriate sentence, and a legislatively mandated sentence is presumed to be proportionate. *People v Poppa*, 193 Mich App 184, 187-188; 483 NW2d 667 (1992). Despite statutory minimums, a sentencing court has discretion to depart if substantial and compelling reasons to do so are present. *Id.* at 188. In *Poppa*, this Court noted the goals of sentencing and how a sentence may be individualized by application of the principle of proportionality:

A trial court enjoys broad discretion in imposing sentence so that it can tailor each sentence to the circumstances of the case, the particular characteristics of the defendant, and the interests of society in rehabilitating the defendant and deterring others from committing similar offenses. However, this exercise of discretion is not unfettered. A sentence must "be proportionate to the seriousness of the circumstances surrounding the offense and the offender." Where the sentence is not proportionate; the sentencing court has abused its discretion; appellate review of sentencing decisions is limited to determining whether an abuse of discretion has occurred. [Citations omitted.]

The contention raised by defendant is without merit. The potential to lower a minimum sentence based on individualized circumstances does not constitute cruel and unusual punishment, but represents discretionary action. Indeed, in this case, defendant asked the trial court to exercise its discretion and find substantial and compelling reasons to deviate from the twenty-year minimum. The trial court could not find substantial and compelling reasons to depart where defendant had three prior felony convictions, absconded during trial, and was not located for nearly two years. Thus, the objection to discretionary, not mandatory action is without merit.

Affirmed.

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