STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 29, 2004
v	No. 248099 Wayne Circuit Court
HARRIETT SPENCER, Defendant-Appellant.	LC No. 98-011075-01

Before: Jansen, P.J., and Meter and Cooper, JJ.

PER CURIAM.

Defendant Harriett Spencer appeals as of right her jury trial convictions of possession with intent to deliver less than fifty grams of cocaine,[1] possession with intent to deliver less than fifty grams of heroin,[2] and possession of a firearm during the commission of a felony.[3] Defendant was sentenced to two years' imprisonment for her felony-firearm conviction, and three months to twenty years' imprisonment for each narcotics conviction. We affirm.

I. Facts

On the afternoon of September 9, 1998, Detroit police officers executed a search warrant at 4417 Grandy. Defendant was the only person inside the home at the time of the search. At the time of her arrest, defendant told police officers that she lived in the home and sold $200 of cocaine that day. Defendant also admitted to the presence of a handgun and narcotics on a dresser near the front door.

Defendant failed to appear in court on December 4, 1998, for a hearing related to this case. A capias was issued. Defendant was arrested on a different matter nearly five years later, and taken into custody. Her trial began on March 11, 2003. At trial, defendant recanted her earlier statement to the police. Defendant testified that she did not live at 4417 Grandy and was

[1] MCL 333.7401(2)(a)(iv).

[2] MCL 333.7401(2)(a)(iv).

[3] MCL 750.227b.

homeless in 1998. Defendant testified that she used, but did not sell, drugs and that the police were framing her.

II. Jury Instructions

Defendant argues that the trial court invaded the province of the jury to determine the validity of the search warrant and disparaged defense counsel by instructing the jury at the conclusion of opening statements regarding the court's pretrial determination that the search warrant was valid. Generally, "[w]e review jury instructions in their entirety to determine if error requiring reversal occurred."[4] As defendant failed to object to the trial court's instruction, our review is limited to plain error affecting defendant's substantial rights.[5]

Defendant moved for the suppression of the narcotics and the handgun in a pretrial hearing. Defendant contended that the search warrant was invalid, because it was dated September 10, 1998, the day after the actual raid. The trial court denied defendant's motion, concluding that the discrepancy in dates was an "innocent mistake."[6] However, defense counsel implied in opening statement that the date discrepancy was not merely a typographical error. The court allowed the comment, over the prosecutor's objection, but informed defense counsel that the jury would be instructed regarding its pretrial determination. Defense counsel failed to use the opportunity to amend his opening statement accordingly. The trial court instructed the jury at the conclusion of opening statements of the court's pretrial determination that the search warrant was valid. The trial court explained that the issue of validity was, therefore, not before the jury.[7]

---

[4] *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

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

[6] See *People v Westra*, 445 Mich 284, 285-286; 517 NW2d 734 (1994) (a technical defect on the face of the search warrant does not invalidate the warrant).

[7] Specifically, the trial court instructed the jury:

> Members of the jury, during the opening statement of Mr. Rutledge he mentioned something about a search warrant. A search warrant was executed in this case; that is, the police took a document, took it the prosecutor's office and then took it to a judge to get permission to search the premises, and on that search warrant there was a discrepancy as to the date, and Mr. Rutledge claimed the date made the search warrant invalid.
>
> A hearing was conducted and the Court decided that the discrepancy in the date was a typographical error, an honest error made by the police and that the search warrant was in fact, in fact, a valid search warrant. It was a good search warrant.
>
> So the issue of whether or not the search warrant was good or not good is not an issue that you should consider. The Court has already decided that this

(continued…)

The trial judge must instruct the jury on the applicable law and fairly present the case to the jury in a comprehensive and understandable manner.[8] The trial court is permitted to comment in its discretion on the testimony, evidence, and character of witnesses within the interests of justice.[9] We will not reverse where the jury instructions "fairly presented the issues to be tried and sufficiently protected the defendant's rights."[10]

As defense counsel was warned at the time of the prosecutor's objection that the trial court intended to instruct the jury regarding the validity of the warrant, defendant was not denied the opportunity to address the issue in opening statement. Furthermore, the trial court properly removed the issue from the jury's review. The trial court properly instructed the jury that the date discrepancy on the search warrant amounted to an honest mistake. The statement was short and did not expound upon the court's reasons for making this finding. The trial court did not imply that defense counsel was trying to misrepresent the facts or deceive the jury, nor did the trial court vouch for the credibility of police witnesses. Accordingly, the trial court properly and fairly instructed the jury regarding the search warrant.

III. Evidentiary Issues

Generally, a trial court's decision to admit evidence will be reversed only for an abuse of discretion.[11] We review preliminary questions of law de novo.[12]

A. Bad Acts Evidence

Defendant contends that the trial court erroneously admitted evidence that defendant had another drug case pending in order to show absence of mistake or fabrication.

Evidence of other crimes, wrongs, or acts is inadmissible to show a defendant's character or propensity to commit the charged crime.[13] Evidence of other bad acts may be admissible if offered to prove the defendant's "motive, opportunity, intent, preparation, scheme, plan or system in doing an act, knowledge, identity, or absence of mistake or accident where the same is material."[14] The trial court must also determine that the evidence is relevant pursuant to MRE

(…continued)

> search warrant was valid. So you should, when you consider the case, you should consider that the search warrant was a valid search warrant. All right. [Trial Transcript, March 11, 2003, pp 143-144.]

[8] *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991).

[9] MCR 2.516(B)(3).

[10] *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003).

[11] *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

[12] *Id.*

[13] MRE 404 (b)(1).

[14] *Id.*, see also *People v Sabin (After Remand)*, 463 Mich 43, 55; 614 NW2d 888 (2000).

402 to a material fact,[15] and that the evidence is more probative than prejudicial pursuant to MRE 403.[16] The evidence may tend to prove the defendant's propensity to commit the crime, but this may not be the sole purpose for presenting the evidence.[17] However, the prosecution must "provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown" of the intent to use the evidence.[18]

As defendant asserted that she was framed and was innocent, all elements of the crimes charged were at issue.[19] Evidence of the pending charges was relevant to show defendant's intent or motive to sell the drugs and opportunity to possess and sell the drugs in the instant case. It was also relevant to show an absence of mistake regarding defendant's identity as the perpetrator. The trial court allowed the admission of this evidence, however, without notice, even though the prosecutor knew defendant was claiming innocence and was prosecuting the other case as well. On defendant's request, the trial court gave the jury a limiting instruction that the evidence could not be used to infer that defendant was likely to commit the crime.

Although the evidence of defendant's other pending drug case was offered for a proper purpose, the prosecution was aware of defendant's claim of innocence and potential testimony before trial. Accordingly, the prosecution should have provided advance notice of its intent to admit the evidence. As the prosecution failed to provide this notice prior to trial, the trial court should not have admitted the evidence. However, in light of defendant's statement to police that she sold cocaine on the day of her arrest, defendant has failed to establish that the evidence was more prejudicial than probative. Therefore, even if the evidence was improperly admitted, the error did not affect the outcome of defendant's trial.

B. Defendant's Flight

Defendant also asserts that the trial court erroneously admitted evidence that she absconded for five years before trial. We disagree.

Evidence of flight is admissible to show a defendant's consciousness of guilt.[20] Pursuant to CJI2d 4.4, it is a jury's function to determine if the evidence presented indicates a defendant's guilt or if an innocent explanation exists for a defendant's flight. Flight includes fleeing from the

---

[15] *Sabin*, *supra* at 55.

[16] *Id.* at 55-56, quoting *People v VanderVliet*, 444 Mich 52, 75; 508 NW2d 114 (1993).

[17] *People v Martzke*, 251 Mich App 282, 289; 651 NW2d 490 (2002).

[18] MRE 404(b)(2); *VanderVliet*, *supra* at 89.

[19] See *Martzke*, *supra* at 293-294 (finding that the defendant's denial of the alleged offenses may have caused intent and absence of mistake to become material issues of fact in the case).

[20] *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001).

scene of the crime, departing the jurisdiction, running from the police, resisting arrest, and attempting to escape from custody.[21]

As evidence of flight from the jurisdiction is admissible and is probative of defendant's consciousness of guilt, the trial court did not abuse its discretion by permitting the prosecutor to introduce this evidence. Moreover, the trial court properly instructed the jury to determine from the evidence whether valid reasons existed for defendant's flight or whether defendant's actions indicated a guilty mind.

IV. Prosecutorial Misconduct

Defendant further contends that the prosecutor improperly presented evidence that defendant absconded prior to trial and improperly commented on defendant's flight by arguing beyond the scope of defendant's guilt. Prosecutorial misconduct claims are reviewed case by case, examining any remarks in context to determine if the defendant received a fair and impartial trial.[22]

A prosecutor has the duty to provide a defendant with a fair trial.[23] However, a prosecutor is permitted wide latitude in his arguments.[24] A prosecutor may not make an unsupported statement of fact to the jury, but he is free to argue the evidence and any reasonable inferences arising from the evidence.[25] Furthermore, the trial court instructed the jury not to consider the statements or arguments of counsel as evidence. A jury is presumed to follow its instructions.[26]

The prosecutor sought and was granted permission to present evidence of defendant's flight and to request CJI2d 4.4 to demonstrate that defendant's flight was indicative of a guilty mind in a pretrial motion. As noted *supra*, the evidence of defendant's flight was properly admitted, and was, therefore, properly sought.

With regard to defendant's absconding, the prosecutor commented in opening statement that justice had been delayed. This was a proper comment on the evidence in support of the prosecutor's position and was not made in error. As the prosecutor's comments were proper, defendant was not denied a fair and impartial trial.

---

[21] *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995), citing 29 Am Jur 2d, Evidence, § 532.

[22] *Aldrich*, *supra* at 110.

[23] *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

[24] *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995).

[25] *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003).

[26] *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

V. Ineffective Assistance of Counsel

Defendant alleges that defense counsel was ineffective for failing to argue that the search warrant did not identify which unit of a two-unit dwelling was to be searched and for failing to clearly object to the admission of evidence of defendant's flight. Absent a *Ginther*[27] hearing, our review is limited to plain error on the existing record affecting defendant's substantial rights.[28] Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise.[29] To establish ineffective assistance of counsel, defendant must prove that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the proceedings would have resulted differently.[30] Defendant must overcome the strong presumption that counsel's performance was sound trial strategy.[31]

Defense counsel failed to challenge the validity of the search warrant on the ground that it insufficiently described the place to be searched in his motion to suppress the evidence. Defense counsel moved in limine at the hearing to additionally challenge the scope of the search warrant on this ground. The warrant indicated that the home was a two-family residence, but did not specifically list the particular unit to be searched. The trial court denied the motion and declined to consider the issue.

A search warrant must describe the place to be searched with sufficient specificity to allow the executing officer to identify the place with reasonable effort.[32] A warrant must allow the officer to determine which apartment or unit in a multi-unit structure is to be searched.[33] Although defense counsel should have challenged the search warrant on this ground in his motion to suppress, it is unclear from the record that this error was outcome determinative. Although such an error would require reversal under federal law, the Michigan Supreme Court has found automatic suppression unnecessary. Even if the search warrant contains an inaccurate address, suppression is not required where "the warrant otherwise accurately described the place to be searched" and where the police had made "considerable efforts to ascertain the address."[34] The existing record is insufficient to determine if the warrant would be valid regardless of the overbroad description. Even if the warrant would ultimately have been found invalid, the existing record is insufficient to determine if the executing officers seized the evidence in

---

[27] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[28] *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

[29] *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

[30] *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

[31] *Id.* at 600.

[32] *United States v Votteller*, 544 F2d 1355, 1362 (CA 6, 1976), quoting *Steele v United States No. 1*, 267 US 498, 503; 45 S Ct 414; 69 L Ed 757 (1925).

[33] *Id.* at 1363. See also *People v Hunt*, 171 Mich App 174, 181; 429 NW2d 824 (1988); *People v Toodle*, 155 Mich App 539, 545; 400 NW2d 670 (1986).

[34] *Westra*, *supra* at 285.

"reasonable, good-faith reliance" on the warrant.[35] Furthermore, defendant failed to request a *Ginther* hearing so that an adequate record of defense counsel's error could be made. Accordingly, defendant cannot establish that counsel's error was outcome determinative pursuant to the directives of the Michigan Supreme Court.

Defendant also argues that defense counsel failed to clearly object to the introduction of evidence of defendant's flight. However, we have already determined that this evidence was properly admitted. Defense counsel is not required to raise meritless or futile objections.[36] Therefore, defendant has failed to establish that defense counsel was constitutionally ineffective.

Affirmed.

/s/ Kathleen Jansen
/s/ Patrick M. Meter
/s/ Jessica R. Cooper

[35] *People v Goldston*, ___ Mich ___; ___ NW2d ___ (Docket No. 122364, decided July 15, 2004) (adopting a good-faith exception to the exclusionary rule).

[36] *People v Kuplinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).