STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 7, 2004
v	No. 247650 Oakland Circuit Court
JEFFERSON WILLIAMS FEW, JR., Defendant-Appellant.	LC No. 2002-185413-FC

Before: Neff, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of manufacturing or possessing with intent to deliver 650 or more grams of cocaine, MCL 333.7401(2)(a)(i), conspiracy to manufacture or possess with intent to deliver 650 or more grams of cocaine, MCL 750.157a and MCL 333.7401(2)(a)(i), and possession with intent to deliver 50 or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii). He was sentenced to prison terms of twenty to forty years each for the manufacturing or possessing with intent to deliver 650 or more grams of cocaine and conspiracy convictions, and ten to twenty years' imprisonment for the possession with intent to deliver 50 or more but less than 225 grams of cocaine conviction, all sentences to be served consecutively. He appeals as of right. We affirm.

I

Defendant's convictions stem from an undercover operation in which the police arranged a controlled buy of cocaine by an informant from codefendant Ronald Graves, Jr. Graves agreed to sell the informant an eighth of a kilogram of cocaine, which Graves said would be delivered by defendant to the informant in the parking lot of Charlies' Roost, a bar in Pontiac. When defendant arrived with the eighth kilogram of cocaine (125 grams), formed in a compressed ball known as a "big eight," police arrested him. Defendant later led police to a house at 514 Highland Street, owned by his aunt, that was used for a cocaine operation. Police found another sixteen "big eight" balls of cocaine in the house, as well as packaging materials, a scale, and other items associated with preparing cocaine for distribution.

Defendant was charged with possession with intent to deliver the cocaine seized from him in the bar parking lot under subsection (2)(a)(iii) (50 or more but less than 225 grams of cocaine). He was charged with manufacturing or possessing with intent to deliver the cocaine seized from the house under subsection (2)(a)(i) (650 or more grams).

II

Defendant first argues that the district court erred in binding him over on counts 1 (manufacturing or possessing with intent to deliver 650 or more grams of cocaine) and 2 (conspiracy to manufacture or possess with intent to deliver 650 or more grams of cocaine). Defendant maintains that the prosecutor presented insufficient evidence at the preliminary examination to connect him to the drug operation at 514 Highland. But because we conclude that none of defendant's issues successfully challenge the fairness or reliability of the lower court proceedings, any evidentiary deficiency at the preliminary examination is not a ground for vacating or reversing defendant's conviction. *People v Yost*, 468 Mich 122, 124 n 2; 659 NW2d 604 (2003); *People v Hall*, 435 Mich 599, 601-603; 460 NW2d 520 (1990). Therefore, we need not review this issue.

III

Defendant challenges the trial court's denial of his motion to suppress the search warrant and the evidence seized pursuant to the search warrant. The trial court denied the motion on the ground that defendant lacked standing, but further stated that the affidavit was sufficient to support probable cause for issuing the search warrant. (Appendix C, pp 4-6.)

"The Fourth Amendment guarantees the right of persons to be secure against unreasonable searches and seizures." *People v Lombardo*, 216 Mich App 500, 504; 549 NW2d 596 (1996), citing US Const, Am IV; Const 1963, art 1, § 11. In reviewing a claim of a Fourth Amendment violation, the court must first ascertain whether the defendant has standing to challenge the search. *People v Powell*, 235 Mich App 557, 561; 599 NW2d 499 (1999); *People v Duvall*, 170 Mich App 701, 705; 428 NW2d 746 (1988). The test to determine whether a person has a constitutionally protected privacy interest so as to confer standing is whether he had an expectation of privacy in the object of the search and seizure and whether the expectation is one that society recognizes as reasonable. *Powell*, *supra* at 560; *Lombardo supra* at 504. The defendant has the burden of establishing standing. *Id.* at 505; *Powell*, *supra* at 561. The court deciding the issue should consider the totality of the circumstances. *Id.*

Here, the trial court did not err in finding that defendant lacked standing to challenge the search warrant. The court concluded that defendant did not have a reasonable expectation of privacy in the house because he was not living at the house; there was no evidence that he had exclusive control over the premises; he failed to corroborate his claim that he was paying rent; and he took no steps to prevent Graves from entering the house without a key. These findings are supported by the record. Furthermore, evidence established that the house was in an uninhabitable condition because there was no running water and no proper source of electricity, and defendant merely claimed that he was repairing the house.

In any event, the trial court correctly determined that the affidavit was sufficient to establish probable cause. A search warrant may be issued only on a showing of probable cause that is supported by oath or affirmation. Const 1963, art 1, § 11; *People v Nunez*, 242 Mich App 610, 612; 619 NW2d 550 (2000). Probable cause exists when a reasonably cautious person would be justified in concluding that evidence of criminal activity could be found in a stated place to be searched. *Id.* In reviewing the magistrate's determination regarding probable cause, the search warrant and underlying affidavit must be read in a common-sense and realistic

manner, and the reviewing court must give deference to the magistrate's conclusion that probable cause existed. *Id.* at 612-613.

Detective Niedjelski swore in the affidavit that there was probable cause to find Graves and evidence of drug trafficking based on defendant's statement that Graves gave him drugs from the house on Highland. Although the affidavit does not indicate that defendant gave any information that additional drugs could be found at the Highland house, Niedjelski stated that, based on his experience in drug investigations, drug traffickers store drugs, drug-related equipment, and other evidence of drug transactions at "easily accessible locations" to facilitate drug transactions. Niedjelski's experience is relevant to the existence of probable cause. *People v Darwich*, 226 Mich App 635, 639; 575 NW2d 44 (1997). A reasonably cautious person could infer that defendant's and Niedjelski's combined statements provided probable cause to believe that evidence of criminal activity could be found in the Highland house. *Nunez, supra* at 612.

Defendant contends that the affidavit did not set forth sufficient information from which the magistrate could conclude that his statement to the police was sufficiently reliable. Probable cause may be founded on hearsay. *People v Harris*, 191 Mich App 422, 425; 479 NW2d 6 (1991). Contrary to defendant's argument, a magistrate's reliance on hearsay is not subject to rigid requirements. Instead, when probable cause is predicated on hearsay information, the magistrate must "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *People v Hawkins*, 468 Mich 488, 502 n 11; 668 NW2d 602 (2003), quoting *Illinois v Gates*, 462 US 213, 238; 103 S Ct 2317; 76 L Ed 2d 527 (1983). Furthermore, MCL 780.653 provides that a magistrate may base a finding of probable cause on information supplied to the affiant by a named person if the affidavit contains "affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information." MCL 780.653(a). These requirements are satisfied here. The magistrate could conclude that defendant's knowledge was based on his own observations and experiences with the Highland house, and he was able to describe the house.

IV

Defendant next contends that the trial court erred in denying his motion to suppress the statements he made to the police. In the first statement, given shortly after his arrest on June 6, 2002, defendant stated that he had been delivering the one-eighth kilogram of cocaine to the informant pursuant to Graves' instructions, and that he had obtained the cocaine from the house on Highland Street in Pontiac. In the second statement, defendant gave more information regarding the drug operation on Highland, and he admitted that an eighth-kilogram of cocaine found in a kitchen vent belonged to him.

In reviewing a trial court's denial of a motion to suppress an incriminating statement, we review the record de novo, but we review the trial court's underlying findings of fact for clear error. *People v Adams*, 245 Mich App 226, 230; 627 NW2d 623 (2001). We will affirm the trial court's decision unless we are left with a definite and firm conviction that the trial court erred. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). If the question of voluntariness turns on the credibility of witnesses, this Court will defer to the trial court. *Id.*

Defendant contends that his statement was involuntary because the police failed to advise him of his *Miranda*[1] rights before the first interview, and the police failed to ask him if he needed food, rest, or medical attention before the second interview. Although the police failed to have defendant sign a written waiver of rights before the first interview, Officer Cronin testified that defendant was orally advised of his rights, and voluntarily agreed to waive them. Cronin also testified that defendant did not appear to be under the influence of drugs during the interview, and he did not request an end to the interview, or complain of sleep deprivation. Cronin and Detective Jennings testified that Cronin read defendant his *Miranda* rights before the second interview, and that defendant indicated that he understood the rights, but would waive them. He did not request an attorney, request an end to the interview, or complain of sleep deprivation.

Defendant testified that the officers did not advise him of his *Miranda* rights before the first interview, and that they instructed him to sign the form before the second interview, without explaining his rights or verifying that he understood them. He also testified that the officers ignored his request for an attorney and denied him access to a phone. The question of voluntariness thus turned on the credibility of the witnesses. The trial court found that the officers were credible, and that defendant was not. Because we defer to the trial court's evaluation of witness credibility, we find no error in the trial court's decision to deny the motion to suppress. *Sexton, supra* at 752.

V

Defendant challenges the trial court's denial of his motion to suppress evidence seized during a patdown search. He argues that the patdown search was an unjustified intrusion on his Fourth Amendment rights.

Police officers may make a valid investigatory stop if they possess "reasonable suspicion" that criminal activity is occurring. *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968); *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996). The detaining officer must have had a "particularized and objective basis for the suspicion of criminal activity." *Id.* at 98-99. "An officer who makes a valid investigatory stop may perform a limited patdown search for weapons if the officer has reasonable suspicion that the individual stopped for questioning is armed and thus poses a danger to the officer." *Id.* at 99.

These requirements were satisfied when the officers ordered defendant to the ground and Pawlowski conducted the patdown search after defendant rode his motorcycle into the Charlies' Roost parking lot. The officers had reasonable suspicion that defendant was delivering an eighth-kilogram of cocaine, based on the informant's arrangements with Graves. The officers also had reasonable suspicion that defendant was armed and thus posed a danger to the officers. Pawlowski testified that their informant described defendant as violent and short-tempered, and that he knew from experience that narcotics traffickers often carry guns. Defendant was wearing

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

a loose-fitting sweatshirt, so the officers could not rule out the possibility that he was armed without conducting the search.

If an officer conducting a patdown search feels something that, under the totality of the circumstances, has an immediately-apparent incriminating character, and the officer has probable cause to believe that the object is contraband, the "plain feel" exception to the search warrant requirement authorizes the officer to remove the object for further examination. *Champion*, *supra* at 110-114, 118. These requirements were satisfied. While conducting the lawful patdown search of defendant, Pawlowski felt a round bulge. Pawlowski, an experienced narcotics investigator, surmised from the object's shape, size, and hardness, that it was the eighth-kilogram of cocaine the informant was expecting. The plain feel exception thus justified further search of the item. Accordingly, the trial court properly denied the suppression motion.

VI

Defendant claims that the trial court erred in denying his motion for a directed verdict on the counts of conspiracy and manufacturing or possessing with intent to deliver 650 or more grams of cocaine. He contends that the only evidence linking him to the larger quantity of cocaine at the Highland house was Graves' inadmissible hearsay. "When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

MCL 750.157a provides, in pertinent part:

> Any person who conspires together with 1 or more persons to commit an offense prohibited by law, or to commit a legal act in an illegal manner is guilty of the crime of conspiracy . . . .

Establishing a conspiracy requires evidence of specific intent to combine with others to accomplish an illegal operation. *People v Blume*, 443 Mich 476, 481; 505 NW2d 843 (1993). Each conspirator is deemed criminally responsible for the acts of his coconspirators committed in furtherance of the conspiracy's goal. *People v Houseman*, 128 Mich App 17, 24; 339 NW2d 666 (1983). It is not necessary to show that each conspirator knew the full extent of the conspiratorial enterprise. *People v Meredith (On Remand)*, 209 Mich App 403, 412; 531 NW2d 749 (1995).

Here, the evidence established that defendant and Graves combined for the illegal purpose of narcotics trafficking. Defendant admitted that he was delivering cocaine on Graves' instructions, that Graves kept a cocaine press at the Highland house, and that Graves pressed cocaine there. Although defendant tried to suggest that Graves entered the house without defendant's permission, he never contacted the police or took other steps to eject Graves from the house. A trier of fact could infer from these circumstances that defendant willingly agreed to contribute to the conspiracy by lending his aunt's house and making at least one delivery. This evidence supports both defendant's conviction of conspiracy and manufacturing or possessing with intent to deliver 650 or more grams of cocaine. *Blume, supra*; *Houseman, supra*.

The principal crux of defendant's argument is that the prosecution improperly relied on Graves' statements to establish the conspiracy, and that these statements were inadmissible hearsay. This is an evidentiary issue, so we evaluate it as such. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002).

MRE 801(d)(2)(E) provides that statements made by a coconspirator in furtherance of a conspiracy and in the course of the conspiracy, if there is independent proof of a conspiracy, are not hearsay. Defendant contends that the two statements by Graves, which the prosecutor introduced before defendant's jury, do not qualify under this rule.

The first of the two statements was introduced when Cronin was testifying before defendant's jury alone, during redirect examination, following defendant's cross-examination. Cronin testified that he questioned Graves about defendant's involvement in the operation, and that Graves told him that defendant processed cocaine with Graves at the Highland house. A coconspirator's statement to the police following arrest is not made in furtherance of the conspiracy or during the course of the conspiracy, and is therefore not admissible pursuant to MRE 801(d)(2)(E) against another coconspirator. *People v Cadle*, 204 Mich App 646, 653; 516 NW2d 520 (1994), overruled on other grounds *People v Perry*, 460 Mich 55, 64-65; 594 NW2d 477 (1999). Graves made this statement during the police interview, following his arrest, so MRE 801(d)(2)(E) does not apply. But the trial court overruled defendant's objection on the ground that defendant had opened the door by questioning Cronin about Graves' statements during cross-examination. The trial court was referring to defendant's questions to Cronin regarding Graves' statements about Graves' access to the Highland house and Graves' admission that he did not obtain the cocaine press from defendant.

The trial court correctly ruled that defendant had opened the door by questioning Cronin about statements Graves made that tended to minimize defendant's involvement in the conspiracy. See *People v Verburg*, 170 Mich App 490, 498; 430 NW2d 775 (1988). Defendant attempted to use Graves' statements to show that defendant did not grant Graves permission to use the Highland house, and that defendant was not involved in the installation of the cocaine press. Having done so, he opened the door to the statements Graves made during the same interview regarding defendant's involvement in processing cocaine at the house.

The second of Graves' statements was introduced when the prosecutor introduced a taped telephone call in which Graves told the informant that defendant would deliver the cocaine to Charlie's Roost. Defendant contends that this statement was inadmissible because there was no independent evidence of a conspiracy. We disagree. Evidence that defendant permitted Graves to process cocaine in the home (even if that permission was passive rather than active), and his assistance in delivering cocaine, was sufficient to establish the existence of a conspiracy. Graves' statements during the phone call were made in furtherance of the conspiracy's goal of selling cocaine, and before police intervention ended the conspiracy. The requirements of MRE 801(d)(2)(E) were therefore satisfied.

VII

Defendant next raises claims of prosecutorial misconduct. This Court reviews preserved claims of prosecutorial misconduct case by case, examining the remarks in context to determine whether the defendant received a fair and improper trial. *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002). The propriety of a prosecutor's remarks depends on all the facts of the case. *Id.*

A

Defendant claims that the prosecutor unfairly prejudiced him by alluding to John Gotti, the Gambino crime family, and the mafia, and insinuating that defendant and Graves' cocaine operation was tied to a larger and more widespread trafficking scheme. Defendant preserved this claim with a timely objection. *Id.* at 30. Defendant did not object to the prosecutor's earlier statements that, while defendant and Graves' organization involved only four persons,[2] it was "[t]o some degree … much larger than that because cocaine comes from . . . Columbia, Bolivia, South America," "comes into this country through Florida, Louisiana, Texas, New Mexico, Arizona, [and] California," is shipped "up here" into other states, and "to some degree … this entire organization was involved." We review this unpreserved claim for plain error affecting the defendant's substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

The prosecutor's analogy to John Gotti, the Gambino crime organization, the mafia, and organized crime, and his reliance on other large-scale cocaine operations for argument in this case, unnecessarily raise a question of error by focusing attention beyond the immediate and proper considerations before the jury. Even though the prosecutor tempered his arguments by emphasizing that the jury must base its decision on the facts and evidence in this particular case, the references were, at the very least, imprudent. Nonetheless, given the evidence in this case, we conclude that any error does not require reversal. We cannot conclude that defendant was denied a fair and impartial trial, or that any error affected his substantial rights.

B

Defendant further argues that his counsel was ineffective for failing to object to the remarks about international drug trafficking. To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, there is a reasonable probability that a different outcome would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). This Court's review is limited to the facts contained on the record. *Rodriguez*, *supra* at 38. Given our above conclusion that defendant was not unfairly prejudiced by the

[2] The other two coconspirators, Ernesto Gonzalez and Raymond Graves, were not tried with defendant and Ronald Graves.

prosecutor's remarks, defendant's ineffective assistance claim fails. Defendant has failed to show a reasonable probability that the error, if any, was outcome determinative.

Defendant additionally claims that counsel was ineffective for failing to vigorously cross-examine, to investigate, and to object to repeated prosecutorial misconduct. Defendant has failed to properly argue the merits of these claims. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). In any event, defendant's claims fail because no mistake of counsel is apparent on the record. *Rodriguez, supra* at 38.

VIII

Defendant contends that the sentencing court erred in imposing consecutive instead of concurrent sentences. We disagree.

As in effect on June 6, 2002, the date of defendant's offenses, MCL 333.7401(2)(a)(i) prescribed a mandatory minimum sentence of twenty years for manufacturing or possessing with intent to deliver 650 or more grams of cocaine. This version of MCL 333.7401 also provided in subsection (3) that terms of imprisonment imposed pursuant to subsection (2)(a) "shall be imposed to run consecutively with any term of imprisonment imposed for the commission of another felony. . . ."

MCL 333.7401 was subsequently amended by 2002 PA 665, effective March 1, 2003, to eliminate the twenty-year mandatory minimum sentence for offenses involving more than 650 grams of cocaine. Additionally, in subsection (3), the word "may" was substituted for the word "shall," thereby giving a sentencing court discretion whether to impose concurrent or consecutive sentences. Also, MCL 777.13m, as enacted by 2002 PA 666, became effective March 1, 2003, and provided that the legislative sentencing guidelines applied to drug-related offenses, including those defined by MCL 333.7401.

Defendant argues that the sentencing court erred in failing to recognize that it had discretion to impose concurrent and shorter terms of imprisonment under MCL 333.7401, as amended, and MCL 777.13m, which were both in effect on the date of his sentencing, March 18, 2003. In a recent decision, this Court determined that 2002 PA 665 applied prospectively only, and "only to offenses committed on and after the effective date of the legislation, March 1, 2003." *People v Doxey*, ___ Mich ___; ___ NW2d ___ (Docket No. 247767, issued July 20, 2004), slip op pp 4-5. Accordingly, defendant's claim that he was entitled to sentencing under the amended statute fails.

Affirmed.

/s/ Janet T. Neff
/s/ Michael R. Smolenski
/s/ Brian K. Zahra