STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 21, 2004
v	No. 250397 Genesee Circuit Court
AARON J. JACKSON, Defendant-Appellant.	LC No. 03-011483-FH

Before: O'Connell, P.J., and Fitzgerald and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from jury trial convictions for possession of cocaine with intent to deliver, MCL 333.7401(2)(a)(ii), possession of a firearm by a felon, MCL 750.224f, possession of a Taser, MCL 750.224a, maintaining a drug house, MCL 333.7405(d), and possession of firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as an habitual offender, second offense, MCL 769.10, to 20 to 45 years in prison for possession with intent to deliver cocaine, 3 to 7 ½ years for possession of a firearm by a felon, 3 to 6 years for possession of a Taser, 1 to 3 years for maintaining a drug house, and 2 years for felony-firearm. Because we do not find any of defendant's arguments persuasive, we affirm.

Defendant was suspected of operating a drug house. The police placed the house under surveillance. As defendant drove away from the house in a black Yukon, a police officer stopped the vehicle for a traffic stop. While performing a consent search of the car, the officer discovered a glass pipe containing what appeared to be marijuana. Meanwhile, defendant's wife, Carmen Jackson, drove up, got out of the car, and sat on the curb. Officers noticed what appeared to be a bag of marijuana next to where Mrs. Jackson was sitting. The officers obtained written consent from Mrs. Jackson to search her home.

Officers brought defendant back to his house, and Mrs. Jackson returned home in her own car. Defendant was not under arrest. Searching the house, officers discovered firearms and a safe. Defendant told police that the safe contained marijuana and a large amount of cash. Defendant admitted he was involved in trafficking in marijuana and, according to police officers, consented to a search of the safe. Officers forced open the safe and discovered 373.8 grams of cocaine and $8,332 in cash.

Defendant first argues that the traffic stop of his Yukon was pretextual. Specifically, defendant argues that rather than stopping defendant for a traffic violation, the police suspected he was involved in drug trafficking. When reviewing a trial court's ruling on a motion to suppress evidence, this Court reviews a trial court's findings of fact for clear error. *People v Bolduc*, 263 Mich App 430, ___; 688 NW2d 316 (2004). "A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *Id.* This Court reviews de novo the trial court's ultimate decision on a motion to suppress. *Id.* Factual determinations at a suppression hearing regarding consent are reviewed for clear error. *People v Farrow*, 461 Mich 202, 208; 600 NW2d 634 (1999). The trial court's "resolution of a factual issue is entitled to deference," particularly "where a factual issue involves the credibility of the witnesses whose testimony is in conflict." *Id.* at 209.

Deputy Light testified that he stopped defendant's Yukon for two separate traffic violations: speeding and having an unilluminated license plate. The record shows that Light was on the lookout for a black Yukon before the stop, and the Yukon he stopped matched the description given to him by the dispatcher. The real question, however, is not whether officers suspected defendant had drugs in his Yukon, but whether the officer had probable cause to stop the vehicle. *People v Davis*, 250 Mich App 357, 363; 649 NW2d 94 (2002) (because officer "had probable cause to believe defendant was in violation of three traffic laws, the stop was permissible" despite defendant's argument that reasons for stop were a pretext), citing *Whren v United States*, 517 US 806, 813; 116 S Ct 1769; 135 L Ed 2d 89 (1996) (a traffic violation arrest is not made invalid by the fact that it was "a mere pretext for a narcotics search," so long as "the circumstances, viewed objectively, justify that action").

From an objective standpoint, the record reveals that defendant was speeding and his license plate light was out. Consequently, police had probable cause to stop defendant's Yukon for both traffic violations, and there is no constitutional violation. Furthermore, defendant consented to the search of his vehicle, a point he did not contest in the trial court and apparently is not contesting on appeal.

Defendant next argues that Carmen Jackson's consent to search her home was invalid. An individual may waive the requirement of a search warrant so long as she gives her consent to search and seizure. *People v Kaigler*, 368 Mich 281, 294; 118 NW2d 406 (1962). But the consent must be "unequivocal and specific, freely and intelligently given." *Id.* The issue before us is whether Mrs. Jackson's consent for the warrantless search of the house was valid. The validity of a consent to search is based on the totality of the circumstances. *People v Galloway*, 259 Mich App 634, 648; 675 NW2d 883 (2004).

A review of the record reveals that Mrs. Jackson gave consent to the search freely and intelligently. Mrs. Jackson drove to the traffic stop of her own volition, prompted by a message from her husband on the answering machine. Police approached Mrs. Jackson and they discussed the marijuana seen near her. She signed a consent form to search her house. Before she signed the form, however, an officer described it to her and told her that she did not have to allow the police to search her home and that she had the right to stop the search at any time. The officer also explained that she was not under arrest, which she acknowledged. She read the consent form out loud before signing it. Officers testified that she was coherent and did not appear to be under the influence of drugs or alcohol at the time she gave consent. When Mrs.

Jackson arrived at the home, she signed a statement that also expressed her consent for officers to search the home. Under this record, we defer to the trial court's evaluation of witness credibility in matters of consent to search. *Farrow, supra* at 209.

Defendant next argues that he was coerced to consent to search the safe because he had been handcuffed while in the police cruiser and faced possible possession of marijuana charges. Detective Shanlian, however, who talked to defendant at his home, said that defendant gave the officers the combination to his safe and helped search for the key. As pointed out by the trial court, when defendant arrived at the home, the cuffs were removed, and he was told he was not under arrest and was free to leave at any time. At home, defendant seemed calm to officers. Furthermore, defendant in fact did leave the home while the officers were opening the safe. Finally, a police officer testified that when defendant could not locate the key to the safe, he told the officer that the officer could break it open. The trial court is entitled to deference in its conclusion that defendant knowingly and voluntarily consented to the search of the safe, and under the totality of the circumstances, we conclude defendant's consent to search the home or the safe was not coerced.

Defendant next argues that the expert testimony from Sergeant Terry Green constitutes inadmissible drug profile evidence offered as substantive evidence of defendant's guilt. However, at trial his main objection was that an officer actually involved in the case was also testifying as an expert. Thus, the issue he now raises on appeal is not the same as the ground for objection at trial. A party opposing the admission of evidence must timely object at trial and specify the same ground for objection which it asserts on appeal. MRE 103(a); *People v Grant*, 445 Mich 535, 545; 520 NW2d 123 (1994). Defendant's claim, therefore, is reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

MRE 702 states: "If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." In accordance with this Rule, Green, who was present during the opening of defendant's safe, was qualified as an expert in drug trafficking.

The focus of Green's testimony was the relationship between the circumstances of the cocaine found in the safe and the purpose of the cocaine. He opined that the cocaine was meant for delivery because of several factors: the amount of cocaine, the packaging materials, the amount of money in the safe, the absence of use paraphernalia, the presence of ingredients necessary for making crack cocaine, and number of firearms found in the home. Defendant's intent with respect to the cocaine is an element of possession with intent to deliver cocaine, and thus it was clearly relevant and probative evidence. In this regard, courts have generally "allowed expert testimony explaining the significance of seized contraband or other items of personal property." *People v Hubbard*, 209 Mich App 234, 239; 530 NW2d 130 (1995). This Court has noted, "expert opinion testimony will not be excluded simply because it embraces an ultimate issue to be decided by the trier of fact." *People v Ray*, 191 Mich App 706, 707; 479 NW2d 1 (1992).

It is true that drug profile evidence is not admissible as substantive evidence of guilt. See, e.g., *Hubbard, supra* at 241. But Green's testimony cannot reasonably be characterized as profile evidence. He did not testify about defendant's characteristics as a drug trafficker.

Rather, Green's focus was on the facts surrounding the cocaine suggesting that it was intended to be sold and not consumed for personal use. Green's testimony was no more than expert testimony on the significance of seized contraband, and was properly admitted.

Defendant next argues that there was insufficient evidence to convict defendant of felony-firearm and of maintaining a drug house. Challenges to the sufficiency of evidence are reviewed on appeal de novo. *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2003), citing *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). When determining whether sufficient evidence was presented at trial to support a conviction, an appellate court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hill*, 257 Mich App 126, 140-141; 667 NW2d 78 (2003), citing *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court "will not interfere with the role of the trier of fact of determining the weight of the evidence or the credibility of witnesses." *Hill, supra* at 141.

To be convicted of felony-firearm, a defendant must carry or possess the firearm when committing or attempting to commit a felony. MCL 750.227b(1); *People v Burgenmeyer,* 461 Mich 431, 438; 606 NW2d 645 (2000). As our Supreme Court put it, "[t]o be guilty of felony-firearm, one must *carry* or *possess* the firearm, and must do so *when* committing or attempting to commit a felony." *Id.* Constructive possession "exists where the defendant has the right to exercise control over the [contraband] and has knowledge of their presence." *People v Hardiman*, 466 Mich 417, 421 n 4; 646 NW2d 158 (2002).

In the present case, the evidence showed that most of the firearms were located in the master bedroom. Another firearm was located in the computer room on the second floor. The cocaine was found in defendant's safe in the basement. Therefore, defendant constructively possessed a firearm while committing the crime of possession of cocaine with intent to deliver.

Under MCL 333.7405, a person maintains a drug house if he "knowingly keep[s] or maintain[s] a . . . dwelling . . . that is used for keeping or selling controlled substances in violation of this article." As this Court has noted, "to 'keep or maintain' a drug house it is not necessary to own or reside at one, but simply to exercise authority or control over the property for purposes of making it available for keeping or selling proscribed drugs, and to do so continuously for an appreciable period." *People v Griffin*, 235 Mich App 27, 32; 597 NW2d 176 (1999).

Defendant's implicit argument is that the house must be used for selling controlled substances to qualify as a drug house. But the statute clearly provides that the mere keeping of controlled substances in a dwelling is forbidden. If defendant exercised authority or control over the home in order to keep controlled substances, and did so continuously for an appreciable period, he is guilty of maintaining a drug house.

The evidence, viewed in a light most favorable to the prosecution, shows that defendant exercised control over the home and used the house to keep cocaine. Defendant claimed not to have an address, but he stored his safe and firearms at the home where his wife lived. When asked, he agreed to go into the house to look for the key that was supposed to open the safe. This was clearly an indication that defendant exercised some authority over the premises. The

location of his firearms in the master bedroom, tucked away in the closet and under the mattress, and the presence of his safe in the basement, containing a large amount of cash and cocaine, creates the inference that, not only did he retain control over the home, but that he did so continuously for an appreciable period. In light of the above, there was sufficient evidence to convict defendant of maintaining a drug house.

Defendant next argues that a portion of the prosecutor's closing argument was unsupported by the evidence and inflammatory. This Court reviews prosecutorial misconduct issues de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). But, because defendant failed to object to the prosecution's closing argument, it is reviewed for plain error. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Defendant also argues that defense counsel's failure to object to portions of the prosecutor's argument constitutes ineffective assistance.

Defendant specifically objects to the use of the phrase "drug depot" to describe the house at issue. Although a prosecutor may not "vouch for credibility of facts and evidence not in the case," *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994), prosecutor's "are accorded great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 431 NW2d 659 (1995). The prosecutor is "'free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case.'" *Id.*, quoting *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989). Prosecutors are not required to articulate their arguments in the blandest possible terms. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001).

The use of the phrase "drug depot" is supported by the facts. A depot is "a place in which supplies are stored for distribution." *Random House Webster's College Dictionary* (1997), p 354. A large amount of cocaine was stored in defendant's house. Moreover, maintaining a drug house merely requires a defendant to "knowingly keep or maintain a . . . dwelling . . . that is used for keeping or selling controlled substances." MCL 333.7405(1)(d). In other words, defendant maintained a depot for drugs. After reviewing the statement, we conclude that the prosecutor was arguing the evidence and did not commit plain error by referencing a drug depot.

Defendant also argues that the prosecution engaged in misconduct by arguing in closing that his officers had no motive to lie, thus, improperly vouching for witnesses. A prosecutor may not vouch for the credibility of a witness "by implying that he has some special knowledge of their truthfulness." *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). But a prosecutor may nevertheless "comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *Id.* at 455. Furthermore, this Court examines issues of prosecutorial misconduct "by examining the record and evaluating the remarks in context, and in light of defendant's arguments." *Id.* at 454.

Our review of the prosecution's comments in context shows that the prosecutor was not claiming to have any special knowledge of the police officers' truthfulness. Instead, the prosecutor's argument was that, objectively speaking, the officers had no motive to fabricate a story to implicate defendant in a crime. Just as important, this portion of the prosecution's argument must be examined in light of defendant's theory of the case. In his opening statement,

defense counsel introduced the chief theory of defense: that "the police officers are not telling you the truth." Once the police set up surveillance of defendant's home, "they had a vested interest in the case to justify their existence so to speak." The prosecution merely responded to that important and critical defense theory. We find no plain error.

Absent plain error manifested in the prosecution's comments, either with respect to the drug depot or the lack of police officers' motive to lie, it would have been futile for defense counsel to object to them. Counsel is not ineffective for failing to raise a futile objection. *Thomas, supra* at 457.

Defendant's next argument concerns defense counsel's statements about the possible motivation of the police. The prosecution objected to these statements essentially on the ground that defense counsel's argument assumed facts not in evidence. The trial court sustained the objection. Defendant argues that defense counsel's failure to object to the prosecutor's argument constitutes plain error and, alternatively, ineffective assistance. Specifically, the prosecution's objection, defendant argues, constitutes improper vouching for the credibility of police witnesses. This argument is baseless because the prosecution was merely making an objection, not vouching for his witnesses. Thus, there was no error, plain or otherwise. And again, it is not ineffective assistance for counsel not to make a futile objection.

Next, defendant seems to argue that the trial court abused its discretion, and apparently engaged in an impropriety, by sustaining the objection, by failing to give a limiting instruction, and by allowing the prosecutor's argument about drug depot. Defendant offers no supporting authority for the implicit argument that the judge engaged in judicial misconduct. "A bald assertion without supporting authority precludes examination of this issue." *Impullitti v Impullitti*, 163 Mich App 507, 509; 415 NW2d 261 (1987).

Defendant next contends that his trial counsel was constitutionally ineffective for failing to seek sentencing pursuant to the amended version of MCL 333.7401. The statute under which defendant was convicted and sentenced was amended by 2002 PA 665, which became effective on March 1, 2003, before defendant was tried, convicted, and sentenced. Under the amended statute, defendant would have no minimum sentence and would have a maximum sentence of twenty years rather than thirty years. In addition, the trial court would have had discretion to make this sentence run consecutive to a sentence under any other felony, rather than be required to do so. See current version of MCL 333.7401(2)(a)(iii) and (3). Defendant contends that these changes applied to his conviction and his trial counsel should have moved the trial court to apply them when determining the sentence relying on *People v Schultz*, 435 Mich 517; 460 NW2d 505 (1990) and *People v Scarborough*, 189 Mich App 341; 471 NW2d 567 (1991).

This Court has addressed this issue in at least two recent decisions, and in both cases, rejected the applicability of *Schultz* and *Scarborough* to the amendments enacted by 2002 PA 665. See *People v Doxey*, 263 Mich App 115, 120; 687 NW2d 360 (2004) and *Thomas, supra*,, 260 Mich App 457. The *Doxey* Court held that 2002 PA 665 applied prospectively, and, therefore could only be applied to "offenses committed on or after the effective date of the legislation, March 1, 2003." *Doxey, supra* at 122. Because the offense for which defendant was convicted occurred before March 1, 2003, he was properly sentenced under the statutory scheme that existed before the amendments of 2002 PA 665. As trial counsel is not required to advocate a meritless position, his defense counsel cannot be faulted for failing to move for sentencing

under the amended statute. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant next argues that the trial court was under the mistaken impression that it lacked the discretion to abstain from applying the habitual offender statute, MCL 769.10, to increase his maximum sentence to one and a half times the maximum for the possession of cocaine within intent to deliver. Defendant failed to preserve this issue for review because he failed to file a motion for relief from judgment under MCR 6.500 as required by MCR 6.429(C) for sentencing issues not involving the accuracy of the presentence report or the scoring of the sentencing guidelines, and because he failed to object at sentencing. *People v Sexton*, 250 Mich App 211, 227; 646 NW2d 875 (2002). In any event, the record indicates the trial court recognized it had discretion.

Defendant argues that the court failed to take into consideration defendant's rehabilitative potential through substance abuse and psychiatric treatment. First, the trial court may rely on the information in the presentence report, which it clearly did in this case as reflected in the court's references to the report at sentencing. *People v Elliott*, 215 Mich App 259, 262-263; 544 NW2d 748 (1996). The presentence report indicates that defendant received a psychiatric evaluation and was found not to suffer mental illness. The report also shows that defendant underwent substance abuse treatment but did not complete the program. Second, defendant does not assert a substance abuse or psychiatric problem in need of rehabilitation. It is difficult to see how the alleged omission, even if true, could constitute plain error affecting defendant's substantial rights.

Finally, defendant argues that minimum and maximum sentences, because they are excessive, violate the constitutional protection against cruel and unusual punishment. This Court has previously rejected constitutional challenges to MCL 333.7401 on the ground that the mandatory sentencing provision constituted cruel and unusual punishment. See *People v Marji*, 180 Mich App 525, 542-543; 446 NW2d 835 (1989). Moreover, the mandatory penalty provisions of MCL 333.7401(2)(a)(ii) have been held not to constitute cruel and unusual punishment. *People v Matthews*, 143 Mich App 45, 63-64; 371 NW2d 887 (1985).

Affirmed.

/s/ Peter D. O'Connell
/s/ E. Thomas Fitzgerald
/s/ Pat M. Donofrio