STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 13, 2007
v	No. 271410 Saginaw Circuit Court
CHRISTIAN ELLIS JOHNSON, Defendant-Appellant.	LC No. 05-026914-FH

Before: Talbot, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

A jury convicted defendant of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), maintaining a drug house, MCL 333.7405(1)(d), and resisting or obstructing a police officer, MCL 750.81d(1). The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11, to concurrent prison terms of 85 months to 40 years for the possession with intent to deliver cocaine conviction and 32 to 48 months for the maintaining a drug house and resisting or obstructing convictions. Defendant appeals as of right. We affirm.

I

On November 22, 2005, Saginaw police officers conducted a surveillance investigation after receiving complaints that drugs were being sold out of an apartment. A vehicle occupied by two individuals stopped outside the apartment. One occupant entered the apartment, returned to the vehicle, and drove off. Police officers found a crack cocaine rock in the vehicle after stopping it for traffic violations. Saginaw Police Sergeant Kevin Revard used information provided by the occupants of the vehicle to obtain a search warrant for the apartment. The police executed the warrant during the early morning hours of November 23, 2005. Defendant was in a common area of the building when the police announced the warrant. He was shot with a Taser gun after stepping back and turning toward the apartment, but managed to run to the apartment before he fell down. The police found another individual, Estelita Pham, in the southwest bedroom of the apartment.

The police seized crack cocaine from defendant's shirt pocket. Defendant also possessed a key that fit a lock on a toolbox that contained various amounts of crack cocaine packaged in paper. The toolbox was located near a scale in the southwest bedroom. Mail addressed to defendant was found in the apartment.

II

Defendant first argues that the evidence was insufficient to support his conviction for resisting or obstructing a police officer. We disagree. "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508; 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). MCL 750.81d(1) provides that "an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties is guilty of a felony." See also *People v Ventura*, 262 Mich App 370, 374-376; 686 NW2d 748 (2004). The word "obstruct" includes "the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command." MCL 750.81d(7)(a).

The testimony at trial indicated that the police officers who had the initial contact with defendant wore black shirts and baseball hats with the word "police" written in large white letters on the shirts and hats. Officer Ryan Oberle yelled "stop, police, search warrant." Rather than stop, defendant turned in the direction of the apartment. According to Sergeant Revard, defendant "backed up quickly a couple of steps and then started to turn away." Both police officers indicated that, even after being shot with the Taser gun, defendant continued toward the apartment. He subsequently fell down and was taken into custody.

Viewed in a light most favorable to the prosecution, the evidence was sufficient for the jury to conclude beyond a reasonable doubt that defendant failed to comply with Officer Oberle's lawful command. The evidence was therefore sufficient to support defendant's conviction of the charged offense. Because the resisting or obstructing conviction was supported by sufficient evidence, we reject defendant's request for resentencing predicated on the use of the conviction to score prior record variable 7, MCL 777.57, of the sentencing guidelines for the possession with intent to deliver cocaine conviction.

III

Defendant argues that the prosecutor engaged in misconduct by interjecting the issue of race during his direct examination of Detective Mark Walker. Because defendant did not object to the prosecutor's questioning of Detective Walker, we consider defendant's claim under the plain error doctrine in *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant has not established a plain error. The test of prosecutorial misconduct is whether a defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). The right to a fair trial can be jeopardized if a prosecutor interjects issues broader than the defendant's guilt or innocence. *Id.* at 63-64. The injection of racial remarks is improper because it may arouse the jurors' prejudice against a defendant and, thus, lead to a decision based on prejudice rather than guilt or innocence. *People v Bahoda*, 448 Mich 261, 266; 531 NW2d 659 (1995); see also *People v Cooper*, 236 Mich App 643, 651; 601 NW2d 409 (1999). But "[i]ssues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context." *Dobek, supra* at 64. Further, "[a] prosecutor's good-faith effort to admit evidence does not constitute

misconduct." *Id.* at 70. A prosecutor is entitled to attempt to introduce evidence that he or she legitimately believes will be accepted by the court so long as the attempt does not prejudice the defendant. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999).

Detective Walker testified as an expert witness in the area of packaging and trafficking of narcotics. Such testimony is permitted in drug cases to aid the jury in understanding the evidence. *People v Murray*, 234 Mich App 46, 53; 593 NW2d 690 (1999). Examined in this context, we find no basis for concluding that the prosecutor made a bad-faith effort to admit evidence by asking Detective Walker to explain the differences between $10 and $20 rocks of crack cocaine. Detective Walker merely responded to the prosecutor's question by testifying that the price can be affected by differences in race between the buyer and seller or the buyer's neighbor. There is no indication that the prosecutor or Detective Walker attempted to appeal to racial sentiments, if any, that jurors might have for the purpose of obtaining a conviction. Defendant has failed to establish a plain error.

Furthermore, the trial court instructed the jury before deliberations that "you must not let sympathy or prejudice influence your decision." Even if there was plain error, the instruction was sufficient to dispel any prejudice. *People v Watson*, 245 Mich App 572, 591-592; 629 NW2d 411 (2001); see also *People v Abrahams*, 256 Mich App 265, 279; 662 NW2d 836 (2003) (jurors are presumed to follow their instructions and instructions presumably cure most errors).

IV

Defendant contends that the trial court erred by denying defendant's motion for a new trial or *Ginther*[1] hearing with respect to his claim of ineffective assistance of counsel. In general, we review a trial court's denial of a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). The trial court may order a new trial on any ground that supports appellate reversal of the conviction, or because it believes that the verdict resulted in a miscarriage of justice. MCR 6.431(B).

A claim of ineffective assistance of counsel presents a mixed question of fact and constitutional law. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). We review the trial court's factual findings for clear error and its constitutional determination de novo. *Id.* "To prove that counsel has been ineffective, defendant must show that his counsel's performance was deficient, and that there is a reasonable probability that but for that deficient performance, the result of the trial would have been different." *Id.* at 57-58. A *Ginther* hearing is appropriate when the defendant's claim of ineffective assistance of counsel depends on facts not of record. *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973). The trial court should take testimony if there is a factual dispute. *Id.* at 442. In general, it is incumbent on a defendant seeking an evidentiary hearing to show where further elicitation of facts would advance his or her position. See *People McMillan*, 213 Mich App 134, 142; 539 NW2d 553 (1995).

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

Here, defendant has not established any error in the trial court's decision to resolve his ineffective assistance of counsel claim without conducting a *Ginther* hearing. The trial court considered the undisputed evidence that the fax transmission date imprinted on the search warrant and supporting affidavit prepared by Sergeant Revard was November 21, 2005. Although defense counsel suggested at the hearing regarding his motion for a new trial that the "relevant person" from the judge's chambers or prosecutor's office could be called as a witness to provide testimony regarding whether the fax machine was working properly, defense counsel neither identified any potential witness who could advance his position, nor established the materiality of the fax transmission date to the validity of the search warrant.

Further, upon de novo review, defendant has not established that he was denied the ineffective assistance of counsel. Because the trial court did not conduct a *Ginther* hearing, review is limited to the facts of record. *People v Wilson,* 242 Mich App 350, 352; 619 NW2d 413 (2000). It is apparent from the record that defendant's proposed use of the imprinted fax transmission date to challenge the probable cause for the search warrant would have been futile.

To pass constitutional muster, there must be a substantial basis for the magistrate's conclusion that a fair probability exists that contraband or evidence will be found in a particular place. *People v Russo,* 439 Mich 584, 604; 487 NW2d 698 (1992); see also *People v Keller,* 479 Mich 467; ___ NW2d ___ (2007), slip op pp 8-9. Pursuant to MCL 780.653(1), a magistrate determines if there is probable cause for a search warrant based on the facts related within the affidavit. MCL 780.653. Evidence of a facsimile transmission becomes relevant when the magistrate issues the search warrant, although "hypertechnical" violations of the statutory procedures do not affect the validity of the warrant. See *People v Barkley*, 225 Mich App 539, 542; 571 NW2d 561 (1997); see also MCL 780.651(3) (upon finding probable cause for the search warrant, a magistrate may issue it by an electronic or electromagnetic means of communication, including a facsimile transmission); MCL 780.651(4) ("peace officer or department receiving an electronically or electromagnetically issued search warrant shall receive proof that the issuing judge or district court magistrate has signed the warrant before the warrant is executed. . . .").

Here, the magistrate signed the search warrant and Sergeant Revard's supporting affidavit with a handwritten date of November 22, 2005. The contents of Sergeant Revard's affidavit similarly indicate that it was based on events that occurred on November 22, 2005. Looking to the facts provided to the magistrate within the affidavit, defendant has not presented any basis for contesting the magistrate's finding of probable cause.

We find no merit to defendant's argument that defense counsel should have argued that the magistrate somehow approved the search warrant a full day before the occurrence of the events on which the search warrant was based. Any challenge to the accuracy of the magistrate's handwritten date of approval would have been meaningless unless accompanied by a challenge to the accuracy of the information in the affidavit on which it was based. A defendant claiming that a search warrant was based on false information must show that the affiant knowingly and intentionally, or with reckless disregard for the truth, made a false statement or omission that was necessary to the finding of probable cause. *People v Martin,* 271 Mich App 280, 311; 721 NW2d 815 (2006).

Because defendant offered no evidence that Sergeant Revard's affidavit was based on false information, it would have been futile for defense counsel to challenge the validity of the search warrant. The circumstances of this case indicate nothing more than that the fax machine was misadjusted relative to the date in question. Defense counsel is not required to make a meritless motion. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002). Therefore, defendant's claim of ineffective assistance of counsel on this ground is without merit.

V

Finally, defendant challenges the scoring of three offense variables, OV 14, OV 15, and OV 19, used by the trial court to determine the sentencing guidelines range for the possession with intent to deliver cocaine conviction. Defendant argues that he is entitled to resentencing if any one of challenges succeed because any error will reduce the applicable sentencing guidelines range.

We review de novo issues involving the interpretation of the sentencing guidelines. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). But a trial court has discretion in determining the points to be scored for offense variables. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "Scoring decisions for which there is any evidence in support will be upheld." *Endres, supra* at 417.

MCL 777.44(1)(a) provides that OV 14 is scored at ten points if the "offender was a leader in a multiple offender situation." The entire criminal transaction may be considered in scoring this variable. MCL 777.44(2)(a). The trial court scored ten points for OV 14 based on the prosecutor's assertion that defendant's girlfriend, Pham, was also charged with maintaining the apartment as a drug house. The presentence report indicates that Pham was dating defendant and temporarily living with him at the time the search warrant was executed. Defendant admitted that he was dealing in drugs, and the information in the presentence report regarding the basis for the search warrant indicates that defendant was the individual who sold drugs out of the apartment. The trial testimony indicates that Pham was found in the bedroom where the scale and toolbox containing the cocaine were found. Similar testimony was presented at defendant's preliminary examination, where Pham waived her right to a preliminary examination.

Considering the evidence that illegal drug dealing was being conducted out of the apartment that Pham temporarily shared with defendant, we conclude that there was evidence to support the trial court's determination that this was a multiple offender situation. Because the entire transaction should be considered, it was not necessary that Pham be implicated in possessing the particular cocaine underlying defendant's drug conviction. In the context of a claim that a person was implicated in knowingly maintaining the place to sell the illegal drugs, the focus is on whether there exists some degree of continuity in doing so. See *People v Thompson*, 477 Mich 146; 730 NW2d 708 (2007) (construing the elements of MCL 333.7405(1)(d)). Further, the evidence that defendant dealt directly with purchasers supports the trial court's determination that defendant had a leadership role in the situation. Therefore, we uphold the trial court's score of ten points for OV 14.

Next, with respect to OV 15, MCL 777.45(1)(g) provides for a score of five points where

> [t]he offense involved the delivery or possession with intent to deliver marihuana or any other controlled substance or a counterfeit controlled substance or possession of controlled substances or counterfeit controlled substances having a value or under such circumstances as to indicate trafficking.

"Trafficking" is statutorily defined as "the sale or delivery of controlled substances or counterfeit controlled substances on a continuing basis to 1 or more other individuals for further distribution." MCL 777.45(2)(c). The record does not support defendant's claim on appeal that the trial court misunderstood how to apply this variable. In response to defense counsel's objection at sentencing that there must be evidence of "further distribution" or wholesale activity, the trial court ruled that a score of five points was appropriate because defendant admitted that he was dealing in drugs.

A court's fundamental obligation in construing a statute is to ascertain the legislative intent that may be reasonably inferred from the words expressed in the statute. *Thompson, supra* at 151. A statute is ambiguous if it irreconcilability conflicts with another provision or is equally susceptible to more than a single meaning. *Mayor of Lansing v Pub Service Comm,* 470 Mich 154, 166; 680 NW2d 840 (2004). "If the statute is unambiguous, it must be enforced as written." *Title Office, Inc v Van Buren Co Treasurer,* 469 Mich 516; 676 NW2d 207 (2004). A court must give effect to every word, phrase, and clause in a statute, and avoid an interpretation that renders any part of the statute surplasage or nugatory. *People v Perkins,* 473 Mich 626, 638; 703 NW2d 448 (2005). Both the plain meaning of a critical word and phrase and its placement and purpose in the statutory scheme are considered. *Sun Valley Foods Co v Ward,* 460 Mich 230, 237; 596 NW2d 119 (1999). As a general rule of grammar and statutory construction, "a modifying word or clause is confined solely to the last antecedent, unless a contrary intention appears." *Id.* at 237.

The word "or" is generally a disjunctive term in a statute. *People v Gatski,* 260 Mich App 360, 365; 677 NW2d 357 (2004). The plain language of MCL 777.45(1)(g) reveals that the Legislature intended the word "or" to establish alternative means for scoring five points. The statutory provision applies to three types of offenses, namely, offenses involving delivery, offenses involving possession with intent to deliver, and offenses involving simple possession, as well as three classes of substances, namely, marijuana, controlled substances other than marihuana, and counterfeit controlled substances.

But it does not follow that the phrase "having a value or under such circumstances as to indicate trafficking" applies to each offense. MCL 777.45(1)(g) contains the only aggravating circumstance that specifically uses the word "trafficking" in relation to listed offenses, although it could be inferred from the content of other provisions that they involve some form of trafficking. For instance, ten points is scored under MCL 777.45(1)(e) if the "offense involved the sale, delivery, or possession with intent to sell or deliver 45 kilograms or more of marihuana or 200 or more of marihuana plants." Further, without regard to the amount, MCL 777.45(1)(d) provides for a score of 25 points where the "offense involved the sale or delivery of a controlled substance other than marihuana or a mixture containing a controlled substance other than marihuana by the offender who was 18 years of age or older to a minor who was 3 or more years younger than the offender."

Had the Legislature intended to treat an offense involving simple possession the same as an offense involving delivery or possession with intent to deliver in MCL 777.45(1)(g), there would have been no need to set it apart from those offenses when listing the applicable classes of substances. Further, a "trafficking" instruction for offenses involving delivery or possession with intent to deliver is unnecessary because theses types of offenses, by their nature, already carry an inference that the offender was involved in some form of trafficking.

Examined in the proper context, we conclude that MCL 777.45(1)(g) is not ambiguous. The phrase "having a value or under such circumstances as to indicate trafficking" applies only to an offense involving "possession of controlled substances or counterfeit controlled substances." Because defendant's offense involved possession with intent to deliver cocaine, the trial court did not err in scoring five points for OV 15. The trial court correctly rejected defendant's claim that OV 15 required that he act in a wholesale capacity. Therefore, it is unnecessary to consider the prosecutor's argument that it could be inferred from the trial evidence regarding the amount of drugs and their packaging that defendant made sales for further distribution as well as to users.

Turning to defendant's challenge to the score of ten points for OV 19, MCL 777.49(c) provides that ten points are to be scored if the offender "interfered with or attempted to interfere with the administration of justice." The investigation of a crime is a critical part of the administration of justice. *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004). Therefore, the evidence underlying defendant's conviction for resisting or obstructing a police officer supports the score of ten points.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly