

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM NORMAN HICKS,

Defendant-Appellant.

UNPUBLISHED

September 16, 2010

No. 292314

Wayne Circuit Court

LC No. 09-002578-01-FH

Before: Talbot P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Because the trial court did not err in failing to suppress evidence seized during the execution of a search warrant, there was no prosecutorial misconduct, defendant was not prejudiced by any errors in the jury instructions, and defendant was not denied the effective assistance of counsel for counsel's failure to object to the instructions, we affirm.

On October 7, 2008, police seized a rifle from 8118 American Street. Although defendant moved to suppress evidence seized, arguing that the affidavit in support of the search warrant was deficient, the parties stipulated to the validity of the search at trial in order to avoid reference to the fact that the police obtained the search warrant in order to search for a murder weapon. No party referenced a murder during the trial. The parties stipulated that defendant was a convicted felon who did not have a right to possess a firearm.

Defendant first argues that the affidavit for the search warrant lacked probable cause because there was no evidence that defendant was connected to a murder outside of a Coney Island two months before issuance of the search warrant. In an appeal from a trial court's ruling denying defendant's motion to suppress evidence, we review the trial court's findings for clear error; however, we review questions of law, as well as the trial court's ultimate finding, de novo. *People v Hawkins*, 468 Mich 488, 496; 668 NW2d 602 (2003); *People v Mullen*, 282 Mich App 14, 21; 762 NW2d 170 (2008). A finding is clearly erroneous if it leaves this court with a definite and firm conviction that a mistake was made. *People v Malone*, ___ Mich App ___, ___ NW2d ___ (Docket No. 286958, issued March 30, 2010), slip op p 8. In a pretrial hearing, Detroit Police Officer Moises Jimenez testified that he was the affiant on a request to search 8118 American Street. Jimenez prepared a written affidavit and also appeared before the magistrate. Although page two of the three-page affidavit was missing, Jimenez had an

independent recollection regarding the probable cause alleged in the affidavit. There had been a homicide at a Coney Island parking lot in September 2008, just a couple of blocks from 8118 American Street. Jimenez was assisting the investigator assigned to the homicide case. During the course of the homicide investigation, Jimenez had an opportunity to interview several witnesses. It appeared that the victims in the homicide were killed because of mistaken identity—they owned the same vehicle as the individual who may have actually been targeted for the shooting.

One witness was aware of the mistaken identity theory of the shooting and suggested that the officers would find the murder weapon at 8118 American Street. The witness was a female who wanted her identity protected. Jimenez requested the warrant to search 8118 American Street for a firearm that was used in the murder. The witness's exact identification was left out of the affidavit. The witness did not expressly provide the address, but told officers the location of the home. Police also left the exact terminology she used to identify the house out of the affidavit for fear defendant would be able to identify the witness based on that terminology. The witness did not provide the officers with real names. She used only nicknames. The witness did not actually observe the shooting. Jimenez did not want to explain how the witness knew what she knew because "there's some things that if I say it, he's going to know exactly who told us this. I mean, I don't have a problem if I could approach or have counsel tell you what I have to say." Jimenez did not believe that the witness had ever provided police with information before this incident. There was no reason for Jimenez to doubt the witness's veracity, and the information she provided was independently corroborated.

After reviewing the record, we conclude that based on Jimenez's testimony at the pre-trial motion, there was sufficient probable cause to support issuance of the search warrant, meaning the facts and circumstances would have allowed a reasonable person to believe that the evidence of a crime or contraband sought was in the stated place. *People v Kazmierczak*, 461 Mich 411, 417-418; 605 NW2d 667 (2000); *People v Wacławski*, 286 Mich App 634, 698; 780 NW2d 321 (2009). Jimenez was not relying on his personal inferences or beliefs; rather, his investigation revealed that there was probable cause to believe that the firearm would be found at 8118 American Street. *People v Martin*, 271 Mich App 280, 298; 721 NW2d 815 (2006). The unnamed informant provided Jimenez with particularized information. MCL 780.653(b). Although Jimenez did not want to reveal the particular information because he wanted to protect the informant's identity, Jimenez did testify that the information was independently corroborated. An independent police investigation that verifies information provided by an informant can support issuance of a search warrant. *Wacławski*, 286 Mich App at 699. For these reasons, the affidavit provided a sufficient basis for the magistrate to issue a search warrant.

Defendant next argues that he was denied a fair trial when, during closing argument, the prosecutor vouched for the credibility of the prosecution's witnesses and stated his personal belief that defendant was lying. Defendant did not preserve the issue for appeal because he failed to object to the arguments or request a curative instruction. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Our review is, therefore, limited to ascertaining whether there was plain error that affected substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

It is clear from the parties' closing arguments that the case hinged on witness credibility. Contrary to defendant's assertions, the prosecutor did nothing to insinuate that he had personal

knowledge that prosecution witnesses were testifying truthfully; rather, the prosecutor simply argued that the prosecution witnesses were credible based on the facts already in evidence. Similarly, the prosecutor attacked defendant's credibility based on the disparity between defendant's post-arrest statement and his testimony at trial. It could not be said that the prosecutor acted improperly in simply arguing that prosecution witnesses were worthy of belief while defendant was not. A prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to the prosecution's theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). As long as the prosecutor does not insinuate that he has some special knowledge that a witness is testifying truthfully, he may argue from the facts that a witness is credible. *Bahoda*, 448 Mich at 276; *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009); *People v Dobek*, 274 Mich App 58, 63-64; 732 NW2d 546 (2007).

Finally, defendant argues that he was denied a fair trial when the trial court erred twice in instructing the jury. Defendant further claims that he was denied the effective assistance of counsel at trial based on counsel's failure to object to the errors. Defense counsel expressed satisfaction with the instructions, thereby waiving the issue for appellate review. *People v Hall (On Remand)*, 256 Mich App 674, 679; 671 NW2d 545 (2003). Defendant's claim that counsel was ineffective is likewise unpreserved where he failed to file a motion for a new trial or request a hearing in the trial court.¹

We agree that the trial court erred in giving the "evidence of flight" instruction where there was never any indication that defendant attempted to flee. However, the minor error in instructing the jury was cured because the trial court instructed the jury that the court's comments, rulings, and instructions were not evidence and should not be considered by the jury. The jury was presumed to have followed the court's instructions. *Unger*, 278 Mich App at 237.

Defendant also takes issue with the trial court's instruction on the elements of the charged crimes. The instructions must include all of the elements of a crime and any material issues, defenses, and theories for which there is evidence in support. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). Our review of the record reveals that there may have been an error in transcription. The transcript is not fluid. However, it appears that the trial court incorrectly referred to the charge as carrying a concealed handgun when the charge was, in fact, felon in possession of a firearm. Still, the trial court properly laid out the elements of felon in possession in its subsequent instructions. The judge also explained the jury form to the jury, which included the two charges and possible results. Count One was "Not Guilty of Weapons Firearms -- Possession by a Felon" or "Guilty of Weapons Firearms -- Possession by a Felon." After deciding Count One, the jury was to then move on to Count Two, with the options of "Not Guilty of Weapons -- Felony Firearm" or "Guilty of Weapons -- Felony Firearm." Additionally, the trial court provided the jury instructions to the jury in written form, including CJI2d 11.34 and 11.38, which were the proper instructions for felony-firearm and felon in possession. Therefore, it appears that the instructions, as a whole, adequately apprised the jury of the crimes charged and the elements needed to prove the crimes. Jury instructions must be evaluated as a

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

whole and, even if somewhat imperfect, instructions will not be grounds for reversal as long as they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994).

Even if there was error in the instructions, it could not be said that counsel's failure to object fell below an objective standard of reasonableness or that the result of trial would have been different. Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) that the resultant proceedings were fundamentally unfair or unreliable. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Odom*, 276 Mich App 407, 417; 740 NW2d 557 (2007); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). The trial court's erroneous instructions were minor and were cured by other instructions. Defense counsel was not required to raise a claim that would have been pointless. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998) (counsel is not required to raise a meritless objection).

Affirmed.

/s/ Michael J. Talbot
/s/ Patrick M. Meter
/s/ Pat M. Donofrio