STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROGER LEE OZIER,

Defendant-Appellant.

UNPUBLISHED
September 18, 1998

No. 201263
Kent Circuit Court
LC No. 95-003090 FC

Before: Smolenski, P.J., and McDonald and Saad, JJ.

PER CURIAM.

Defendant was convicted by a jury of receiving and concealing stolen goods over $100, MCL 750.535(1); MSA 28.803(1). Defendant, a fourth-offense habitual offender, MCL 769.12; MSA 28.1084, was sentenced to a term of fifteen to twenty-five years' imprisonment. Defendant appeals as of right. We affirm.

At approximately 10:00 a.m., September, 12, 1995, a Grand Rapids area Michigan National Bank was robbed by a man wearing a mask and a sweatshirt. At approximately 3:00 a.m., September, 13, 1995, the Grand Rapids police made a traffic stop of a vehicle after observing the vehicle's occupants engage in a suspected drug transaction. Defendant was sitting in the back seat of this vehicle while defendant's two female companions were sitting in the vehicle's front seat. Defendant appeared to be holding crack cocaine. Defendant was arrested at that time on a drug charge and the vehicle was searched. A bag containing a red dye pack and shredded money was discovered on the floor of the back seat where defendant had been sitting. The suspected cocaine subsequently tested negative and the drug case against defendant was dropped by the police.

A search warrant was executed for the residence where defendant was staying. Seized from this residence were, among other items, a mask, a $20 bill, a t-shirt, a sweatshirt, and a pair of pants. Seized from an area store was a $50 bill linked to defendant. The bills, t-shirt, sweatshirt and pants were all stained with red dye from the bank. Defendant was charged with bank robbery but convicted of receiving and concealing stolen goods over $100.

Defendant first argues that there was insufficient evidence to establish the element that the value of the property was over $100. See *People v Gow*, 203 Mich App 94, 96; 512 NW2d 34 (1993). We disagree. In reviewing the sufficiency of the evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Medlyn*, 215 Mich App 338, 340; 544 NW2d 759 (1996). Circumstantial evidence and the reasonable inferences arising therefrom may be sufficient to prove the elements of a crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). The value of stolen goods is their market value at the time of the receiving or possession by the defendant. *People v Toodle*, 155 Mich App 539, 553; 400 NW2d 670 (1986).

In this case, approximately $1700 was stolen from a bank. The evidence strongly implicated defendant in the bank robbery. We thus conclude that a rational trier of fact could have found that at the time defendant received or possessed the stolen money it had a value of over $100. *Id.*

Next, defendant raises two grounds for his argument that he was denied his right to the effective assistance of counsel. As explained in *People v Stewart* (*On Remand*), 219 Mich App 38, 41; 555 NW2d 715 (1996):

> A defendant that claims that he has been denied the effective assistance of counsel must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceeding would have been different. . . . A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy, and he must show that, but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different. [(citation omitted).]

In addition, counsel is not required to argue a frivolous or meritless motion. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Specifically, defendant first contends that the affidavit in support of the search warrant falsely stated that a slip of paper with the word "Michigan" was attached to the dye pack found in the bag containing the shredded money. Defendant also contends that "the clothing description which was given on the search warrant" was inaccurate. Defendant contends that counsel therefore should have moved for a hearing to determine the falsity of these statements. See *People v Melotik*, 221 Mich App 190, 200; 561 NW2d 453 (1997).

In reviewing the record of this case, *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995), we note that the defense moved to suppress the search warrant in this case both before and after trial. However, the only ground asserted in support of the motion to suppress was that the warrant was not supported by probable cause. Thus, we can only conclude that defense counsel's failure to raise the additional "false affidavit" theory in support of the motion to suppress was a trial strategy. *Stewart, supra*. Alternatively, even assuming that the statements were false, defendant has

failed to allege that the affiant made the statements knowingly and intentionally, or with reckless disregard for the truth. See *Melotik, supra*. Moreover, defendant has failed to convince us that the purported false statements were necessary to a finding of probable cause to search. See *id*. Thus, where it has not been shown that defendant would have prevailed at a "false affidavit" hearing, we cannot conclude that defense counsel erred in failing to move for such a hearing. Accordingly, we conclude that defendant has failed to establish that he was denied the effective assistance of counsel on this ground. *Id*.

Defendant also argues that defense counsel erred in requesting that the jury be instructed with the lesser offense of receiving and concealing stolen property over $100 because the evidence was insufficient to establish that value of the property was over $100. However, we have already held in this opinion that sufficient evidence was presented from which a rational jury could have found beyond a reasonable doubt that the value of the property was over $100. Accordingly, defendant has failed to establish that he was denied the effective assistance of counsel on this ground. *Id*.

Next, defendant raises several evidentiary questions. Specifically, defendant first takes issue with the testimony of his two female companions and a police officer concerning his use and ostensible purchase of cocaine during the night and early morning, respectively, of September 12 and 13, 1995. Defendant contends that the admission of this testimony violated either MRE 403 or MRE 404(b). We disagree. The trial court did not admit this testimony for the improper purpose of showing defendant's bad character. See MRE 404(b). Rather, pursuant to the prosecutor's motion, the trial court allowed this testimony to be admitted into evidence for the proper purpose of conveying the "complete story" to the jury. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). The trial court also gave the jury a limiting instruction that it could not use the evidence of defendant's use or possession of cocaine as evidence that defendant committed the crime of bank robbery. Accordingly, we likewise find no violation of MRE 403. See *People v Crawford*, 458 Mich 376, 385; ___ NW2d ___ (1998). Thus, we conclude that the trial court did not abuse its discretion in admitting the evidence of defendant's use and ostensible purchase of cocaine. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998).

Defendant also takes issue with the testimony of a police evidence technician that drug paraphernalia was recovered during the search of defendant's residence. Arguably this testimony, which arose as an unresponsive answer on cross-examination and was then further explored by the prosecutor on redirect examination, was not covered by the trial court's previously discussed evidentiary ruling. However, even assuming error, we fail to find that defendant was prejudiced by the error. *Crawford, supra*; *Smith, supra* at 555. The technician's testimony was cumulative of the properly admitted testimony concerning defendant's use and ostensible purchase of cocaine and the jury was given a limiting instruction on the use of this evidence. Moreover, the evidence was overwhelming that defendant received and concealed stolen property over $100. Accordingly, we conclude that any error was harmless. *Crawford, supra*; *Smith, supra*.

Defendant also claims that the trial court erroneously admitted photographs of the bag containing the shredded money and dye pack. We note that such photographs were admitted because the bag was destroyed by the police As explained in *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992):

> Absent the intentional suppression of evidence or a showing of bad faith, a loss of evidence that occurs before a defense request for its production does not require reversal. . . . Defendant bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith.

In this case, defendant does not attempt to argue that the bag and its contents were exculpatory. Rather, defendant implies that the police acted in bad faith in failing to preserve this evidence. However, the police explained at trial that the bag was originally tagged under the number assigned to defendant's drug arrest. The bag should have subsequently been reassigned the number given the bank robbery case. However, the police inadvertently did not do so. When the purported cocaine seized from defendant tested negative, there was no drug case against defendant and the evidence logged under that number, including the bag, was disposed of by the police. We conclude that defendant has failed to establish that the police acted in bad faith. Accordingly, we conclude that the trial court did not abuse its discretion in admitting into evidence the photographs of the bag containing the dye pack and shredded money. *Smith*, *supra* at 550.

Finally, defendant argues that his fifteen-year minimum sentence is disproportionate. We disagree. The trial court explicitly stated that it was not considering defendant guilty of bank robbery. In *People v Hansford*, 454 Mich 320, 322; 562 NW2d 460 (1997), the defendant, a fourth-offense habitual offender, was convicted of breaking and entering an occupied dwelling without the owner's permission and receiving and concealing stolen property over $100. The defendant was sentenced to forty to sixty years' imprisonment. *Id*. In finding this sentence proportional, our Supreme Court stated:

> We believe that a trial court does not abuse its discretion in giving a sentence within the statutory limits established by the Legislature when an habitual offender's underlying felony, in the context of his previous felonies, evidences that the defendant has an inability to conform his conduct to the laws of society. The sentence in this particular case was within the limits authorized by the Legislature for an habitual offender, fourth offense, under MCL 769.12(1)(a); MSA 28.1084(1)(a). The serious nature of this crime, defendant's extensive criminal history, and his clear inability to reform, convince us that the trial court did not abuse its discretion in imposing defendant's sentence. [*Id*. at 326.]

So to in this case, the serious nature of defendant's crime, defendant's extensive criminal history, and defendant's clear inability to reform convince this Court that the trial court did not abuse its sentencing discretion.

Affirmed.

/s/ Michael R. Smolenski
/s/ Gary R. McDonald
/s/ Henry William Saad