STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ODELL RUBEN BROWN,

Defendant-Appellant.

UNPUBLISHED
October 23, 1998

No. 203128
Muskegon Circuit
LC No. 95-138785 FH

Before: Fitzgerald, P.J., and Holbrook, Jr., and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and conspiracy to deliver more than fifty but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). Defendant was sentenced to serve consecutive prison terms of one to ten years for the possession with intent to deliver conviction, and ten to twenty years for the conspiracy conviction. We affirm.

On November 16, 1995, law enforcement officers assigned to the West Michigan Enforcement Team ("WEMET") conducted an unspecified number of controlled drug buys[1] at a residence located in Muskegon, Michigan. Based on the results, the officers applied for and were issued a search warrant for the identified residence and two of its occupants. At approximately 3:30 p.m. that afternoon, WEMET officers converged on the residence in order to execute the search warrant. Several officers wearing either blue or black jackets emblazoned with the word "police" and the acronym "WEMET" in bold white letters, approached the front door of the residence. The officers then knocked on the door, and announced their presence and that they had a search warrant. Shortly thereafter, the officers gained entry into the residence by breaking down the front door with a battering ram. Defendant was apprehended as he attempted to flee out the kitchen door. Several minutes after defendant had been seized, one of the officers asked defendant if the officer could search his person. Defendant responded, "Yeah, go ahead." The subsequent search uncovered a plastic bag containing crack cocaine in defendant's left front pants pocket.

I. MOTION TO SUPRESS

Defendant first raises a three pronged attack to the trial court's denial of his motion to suppress the crack cocaine taken from his person. An appellate court "will not disturb a trial court's ruling at a suppression hearing unless that ruling is found to be clearly erroneous" *People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1983). Accord *People v Massey*, 215 Mich App 639, 641; 546 NW2d 711, remanded on other grounds 453 Mich 873; 554 NW2d 6 (1996). "'Clear error exists when the reviewing court is left with the definite and firm convictions that a mistake has been made.'" *Massey, supra* at 641, quoting *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). "The trial judge's resolution of a factual issue is entitled to deference[,] . . . particularly . . . where a factual issue involves the credibility of witnesses whose testimony is in conflict." *Burrell, supra* at 448.

Defendant asserts that the search warrant was defective on its face because it did not describe him with sufficient particularity. We disagree. In addition to authorizing the search of the residence, the search warrant authorized the search of two African-American males located at the residence. One of the males was described as being "approximately 5'9" weighing approximately 250 pounds wearing blue jeans and a white sweatshirt and dark blue stocking cap." According to both the search warrant and the underlying affidavit, the above described male was observed by an informant "selling cocaine inside [the residence] . . . within the past 48 hours."

The problem defendant raises with respect to the description given is that there were actually two African-American males at the residence on November 16, 1995 who were approximately five feet nine inches in height and weighed approximately 250 pounds. While this is true, it is also true that defendant was the only one of the two men who was wearing a white sweatshirt and blue jeans. In other words, with respect to the description at issue, defendant was the only person of that gender, that ethnicity, that size, wearing that clothing, located at that address on November 16, 1995. Therefore, we conclude that because the search warrant described defendant with sufficient particularity, the search of defendant pursuant to that warrant was valid.[2] See LaFave & Israel, Criminal Procedure (2nd ed), § 3.4(e), p 160 (observing that in "the infrequent cases in which a warrant is obtained to *search* a person, the individual must be described with such particularity that he may be identified with reasonable certainty").

Defendant also asserts that the search was invalid because defendant's consent to the search was obtained only through duress and coercion. Given our conclusion that the search warrant described defendant with sufficient particularity to justify the search, we need not address defendant's consent argument.

Defendant also argues that the cocaine should have been suppressed because the officers conducting the raid violated MCL 750.656; MSA 28.1259(6), Michigan's "knock-and-announce" statute. Again, we disagree. The "knock-and-announce" statute provides:

> The officer to whom a warrant is directed, or any person assisting him, may break any outer or inner door or window of a house or building, or anything therein, in order to execute the warrant, if, after notice of his authority and purpose, he is refused

admittance, or when necessary to liberate himself or any other person assisting him in execution of the warrant. [MCL 780.656; MSA 28.1259(6).]

In *People v Ortiz (After Second Remand)*, 224 Mich App 468, 479; 569 NW2d 653 (1997), rev'd on other grounds 456 Mich 941 (1998), we observed "that the 'knock-and-announce' statute requires a person attempting to execute a search warrant to proclaim his presence and purpose in a manner reasonably calculated to provide notice under the circumstances." We conclude that the officers satisfied this test in the case at bar. In *Ortiz (After Second Remand)*, this Court noted that factors to be considered when examining whether the "knock-and-announce" statute was complied with "include whether the announcement was made with sufficient volume for an average person inside to hear and the time between the announcement and a subsequent forcible entry." *Id*. at 479.

The officers who testified at the motion to suppress hearing indicated that the officer who announced their presence and purpose had firmly and loudly knocked on the front door while yelling several times, "Police, search warrant." Indeed, one officer who had been stationed at the rear of the house indicated that he had heard the announcements. There was also general agreement among the testifying officers that they had waited five to ten seconds after the final announcement before using the battering ram.

As this Court observed in *People v Polidori*, 190 Mich App 673, 677; 476 NW2d 482 (1991): "Because there is no formula for reasonableness, each case must be decided on its own facts." In the case at hand, there is no indication that there was noise coming from the residence that would make it hard for those inside to hear the announcement. The announcement was made at approximately 3:30 p.m., a time of day when it reasonable to assume that some of the residents of the house would be up and about. Furthermore, because the house was relatively small, it would not take much time for a person to respond to the announcement. It was reasonable for the officers to conclude that the lack of response to the announcement constituted a refusal of admittance. LaFave, *supra* at § 3.4(h). p 163 (observing that refusal of admittance may be implied by the "failure to respond to the announcement").[3] Although we acknowledge that the question of whether five to ten seconds is reasonable is a close one, we are not left with a "definite and firm conviction" that the trial court erred when ruling that the officers complied with the "knock-and-announce" statute.

II. MOTION TO DISQUALIFY TRIAL JUDGE

Defendant next claims that the trial judge committed error in denying defendant's motion to disqualify after the trial judge had admitted to having read the search warrant which theretofore had not been admitted into evidence. However, we note that this issue is not properly before us because defendant failed to refer this issue to the chief judge following the trial court's denial of the motion. See *Welch v District Court*, 215 Mich App 253, 258; 545 NW2d 15 (1996). In any event, because defendant has failed to show that the trial judge was actually biased against defendant, *Wayne Co Jail Inmates v Wayne Co Chief Executive Officer*, 178 Mich App 634, 663; 444 NW2d 549 (1989), or that the trial judge had any improper prior participation in the case, *People v Coones*, 216 Mich App 721, 726; 550 NW2d 600 (1996), his argument is without merit.

III. JURY INSTRUCTIONS ON FLIGHT

Defendant finally claims that the trial court committed error in instructing the jury on flight. We disagree. "We review de novo a claim of instructional error." *People v Hubbard*, 217 Mich App 459, 487; 552 NW2d 493 (1996). "We read jury instructions in their entirety to determine if error occurred requiring reversal. Instructions which are somewhat imperfect are acceptable, so long as they fairly present to the jury the issues to be tried and sufficiently protect the rights of the defendant." *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994). Accord *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992).

In instructing the jury on flight, the trial court stated the following:

> There has been some evidence that the defendant tried to run after the alleged crime or he was accused - or at the time of the raid. This evidence does not prove guilt. A person may run or hide for innocent reasons such as panic, mistake or fear. However, a person may also run or hide because of a consciousness of guilt. You must decide whether the evidence is true, and if true, whether it shows hat [sic] defendant had a guilty state of mind.[4]

We believe that the jury instruction adequately conveyed to the jury that defendant's attempt to flee out the kitchen door could have stemmed from innocent reasons. Thus, the jury could have determined that the flight was attributable to defendant's alleged mistaken identification of the raiding police officers as masked gunmen, attempting to rob the residence and its occupants. As a result, the jury instruction fairly represented the issues to be tried and sufficiently protected defendant's rights. *Gaydosh, supra* at 237. Therefore, we hold the trial court did not err in giving the instruction.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh

[1] One of the officers involved testified that during a controlled drug buy, a reliable confidential informant is sent by officers to buy narcotics at a specified location, using money supplied by the officers.

[2] It is unclear from defendant's brief on appeal whether he is asserting that the search warrant was unsupported by probable cause. In any event, we conclude that there was a substantial basis for finding probable cause to search defendant. *People v Poole*, 218 Mich App 702, 705; 555 NW2d 485 (1996).

[3] The fact that the inhabitants of the residence testified they did not hear the announcement is not dispositive. As the Court noted in *Ortiz (After Second Remand)*, "it is not necessary that the inhabitants of a dwelling actually hear the person's announcement, as long as the announcement was reasonably calculated to provide notice under the circumstances." *Ortiz, supra* at 479.

[4] This instruction is based on CJI2d 4.4.