STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN MOSLEY,

Defendant-Appellant.

UNPUBLISHED
December 4, 1998

No. 201043
Recorder's Court
LC No. 95-009584

Before: Markey, P.J., and Sawyer and Whitbeck, JJ.

PER CURIAM.

Defendant was charged with possession of 650 or more grams of cocaine with intent to deliver. The jury convicted defendant of the lesser included offense of possession of 650 or more grams of cocaine, MCL 333.7403(2)(a)(i); MSA 14.15(7403)(2)(a)(i). The trial court sentenced defendant to life imprisonment. He appeals as of right. We affirm.

I. Basic Facts and Procedural History

On the evening of July 25, 1995, one Antoine Davis bought suspected cocaine at a house located at 15875 Plainview in Detroit (the "Plainview House"). The police obtained a search warrant for the Plainview House, that they executed just after midnight on July 26, 1995. Defendant had been seen at the house early in the evening of July 25 when Davis was there, but was not present when the warrant was executed, although four or five other people were there. In the south rear upstairs back bedroom, the police found a locked trunk next to the bed. Inside the trunk were seven bags containing white powder, later shown to be 825.01 grams of cocaine. The trunk also contained papers with defendant's name and the Plainview address, an electronic scale commonly used for weighing narcotics, and about $15,000 in cash. The papers in the trunk did not contain anyone else's name. On a dresser was a photo ID card with defendant's picture and Davis' name. A loaded AK-47 assault rifle was under the bed.

The search warrant for the Plainview House was based upon an affidavit from Detroit police officer James Watt. Watt stated in the affidavit that on July 25, 1995, he made arrangements over the phone to buy cocaine from Antoine Davis. Watt stated that Davis said he would pick up the cocaine and meet Watt at a prearranged delivery site in fifteen minutes. Watt stated that other officers who had Davis under surveillance followed him to the Plainview House.

Watt stated that Davis was admitted to the house by defendant, left a few minutes later and drove directly to the meeting place where he sold cocaine to Watt.

At an evidentiary hearing on defendant's motion to suppress, James Raby, another Detroit police officer, testified that he was conducting surveillance of Davis' home at 9191 Grandmont in Detroit (the "Grandmont House"). Raby testified that he saw Davis' car, a green Chevrolet, in front of the Grandmont House. Raby testified that Watt notified him that "the deal was set up, and that Antoine Davis was going to pick up the dope and would meet him at the restaurant within 15, 20 minutes." Raby testified that other officers, who had the house in sight, notified him that Davis' car was leaving the Grandmont address. Raby testified that he and other officers took turns following the car, one turning off as another assumed position, and then picking up again a few blocks later. Raby testified that the car stopped at the Plainview House. Raby testified that he saw a white Bronco or Explorer parked outside the Plainview House. Raby testified that he ran the plate and that it came back registered to defendant.

Raby further testified that at approximately 7:30 p.m. on July 25, he saw Davis exit his car, go up on the porch and knock on the front door of the Plainview House. Raby testified that a man, whom he later identified as defendant, came out on the porch and that the man and Davis then entered the Plainview House. Raby testified that, after four or five minutes, Davis left the Plainview House, returned to his car and drove directly to a restaurant where he met Watt and "made the deal." Raby testified that Davis was arrested and taken to the police station, where he gave a statement to Raby. According to Raby, Davis said he had not brought the cocaine from the Grandmont House. Raby testified that he did not ask Davis where he got the cocaine from or about the events at the Plainview House so Davis could not tip anyone off about a possible raid. Raby testified that he drove by the Plainview House to confirm the address an hour and a half to two hours after Davis' arrest and that the Bronco was still parked outside.

Raby also testified that he assisted Watt in preparing the affidavit for the search warrant for the Plainview House. Raby testified that he described the man who met Davis on the porch of the Plainview House, that he based the description on his own observation and that Watt included that information in the warrant. Raby testified that later that evening, the police conducted additional surveillance of the Grandmont House and observed foot traffic "consistent with a crack house." According to Raby, using that information, the police obtained a warrant to search the Grandmont House.

Carl Clarke, a Detroit police officer, prepared the affidavit for the search warrant for the Grandmont House. The affidavit indicated that Davis left the Grandmont House and went to meet Watt, to whom he sold two ounces of cocaine. It also indicated that, after his arrest, Davis admitted that he lived at the Grandmont House. The affidavit did not mention Davis' stop at the Plainview House. At the evidentiary hearing, Clarke testified that the affidavit contained additional information pertinent to the Grandmont House, that being that surveillance after Davis' arrest revealed activity consistent with narcotics trafficking.

After being bound over for trial, defendant filed a motion to quash the information, asserting that the evidence did not establish that he had possession of or control over the cocaine or even knew it was there. In addition, he argued that the felony-firearm charge was improper pursuant to the recent ruling in *People v Williams*, 212 Mich App 607, 609; 538 NW2d 89

(1995), which held that "a person away from home cannot be deemed in possession of a firearm found in his house." The trial court ruled that the magistrate properly bound defendant over on the controlled substance charge but not on the felony-firearm charge, which it dismissed.

After defendant filed his motion to quash but before it was heard, defendant filed a motion to suppress pursuant to *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978), asserting that the affidavit in support of the search warrant for the Plainview House contained false statements. At the evidentiary hearing on this motion, defendant argued that the police did not observe Davis meet him at the Plainview House but got information about him from Davis and made up the meeting to obtain the search warrant. The court rejected that argument as speculative at best. The trial court agreed that the officers' testimony was inconsistent on some points, but not to the extent that it would have to conclude that Davis was not followed to the Plainview House. The trial court also found that the differences in the affidavits for the search warrants for the Plainview and Grandmont Houses did not prove that the contents of the affidavit for the Plainview House search warrant were fabricated. The trial court concluded that the testimony did not establish that the contents of the affidavit were false and that the affidavit did provide probable cause for issuance of the search warrant. The trial court therefore denied the motion to suppress.

During the course of the evidentiary hearing, the prosecutor filed a motion in limine seeking to introduce evidence of the circumstances leading up to Davis' arrest to prove that defendant possessed the cocaine found in the trunk and intended to deliver it and to explain why the police targeted the Plainview House. The trial court granted the motion, stating that it would put its reasons on the record at a later date, but it never did and no order was ever entered.

After extensive trial testimony, the jury found defendant guilty of the lesser included offense of simple possession. The trial court sentenced defendant to life imprisonment. The trial court denied defendant's postjudgment motion for a directed verdict or a new trial, but defendant has not appealed that ruling.

II. Standard of Review

A. The Motion to Suppress

We review a trial court's factual findings made following a suppression hearing for clear error. A factual finding is clearly erroneous if, after review of the record, this Court is left with a definite and firm conviction that a mistake has been made. *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997). However, to the extent that resolution of disputed factual questions turns on the credibility of witnesses or the weight of the evidence, this Court will generally defer to the trial court. *People v Young*, 212 Mich App 630, 634; 538 NW2d 456 (1995), remanded 453 Mich 976 (1996), on remand 222 Mich App 498; 565 NW2d 5 (1997), rev'd *sub nom. People v Sexton*, 458 Mich 43; 580 NW2d 404 (1998).

B. Admission of Evidence

The decision to admit or exclude evidence is within the sole discretion of the trial court, and we review this decision for an abuse of discretion. *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997); *People v Price*, 214 Mich App 538, 546; 543 NW2d 49 (1995). "There is an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling." *Sawyer, supra*.

C. Police Witness Testimony

Because the issue was not addressed by the trial court, this Court reviews the issue de novo. *People v Catey*, 135 Mich App 714, 722; 356 NW2d 241 (1984).

D. Prosecutorial Misconduct

In reviewing claims of prosecutorial misconduct, we examine the challenged conduct in context to decide whether it denied defendant a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). However, with regard to defendant's unpreserved claim of prosecutorial misconduct during closing argument, review is precluded unless a curative instruction could not have removed the prejudicial effect or failure to consider the issue would result in a miscarriage of justice. See, e.g., *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

E. The Motion to Quash

We review the trial court's analysis of a bindover process de novo. This Court must redetermine if the magistrate committed an abuse of discretion in finding probable cause to believe that the defendant committed the offense charged. This Court decides whether the evidence presented to the magistrate was sufficient to establish, as a matter of law, that the offenses charged had probably been committed by the defendant. There must be evidence of each element of the crime charged or evidence from which the elements can be inferred, although the magistrate need not find guilt established beyond a reasonable doubt. *People v McBride*, 204 Mich App 678, 681; 516 NW2d 148 (1994).

III. The Motion to Suppress

Defendant contends that the trial court erred in denying his motion to suppress the evidence on the ground that the allegations in the search warrant affidavit for the Plainview House were fabricated. *Franks, supra*. We disagree.

We first note that, "A magistrate can consider only the information in the affidavit made before him in determining whether or not probable cause exists to issue a search warrant." *People v Sundling*, 153 Mich App 277, 285-286; 395 NW2d 308 (1986). Probable cause to search must exist at the time a search warrant is issued. *People v Russo*, 439 Mich 584, 606; 487 NW2d 698 (1992). Probable cause sufficient to support the issuance of a search warrant exists when all the facts and circumstances would lead a reasonable person to believe that evidence of a crime or the contraband sought is in the place to be searched. *People v Lucas*, 188 Mich App

554, 567; 470 NW2d 460 (1991). '"Search warrants and the underlying affidavits are to be read in a common-sense and realistic manner.'" *Russo, supra* at 603 (citation omitted). "Affording deference to the magistrate's decision. . . requires that reviewing courts ensure that there is a substantial basis for the magistrate's conclusion that there is a 'fair probability that contraband or evidence of a crime will be found in a particular place.'" *Russo, supra* at 604, quoting *Illinois v Gates*, 462 US 213, 238; 103 S Ct 2317; 76 L Ed 2d 527 (1983).

To prevail on a motion to suppress evidence pursuant to *Franks, supra*, the defendant must show by a preponderance of the evidence that the affiant knowingly and intentionally or with reckless disregard for the truth inserted false material into the affidavit or made a material omission and that the false material or the material omission was decisive to a finding of probable cause. *People v Chandler*, 211 Mich App 604, 612-613; 536 NW2d 799 (1995); *People v Kort*, 162 Mich App 680, 686; 413 NW2d 83 (1987).

Here, the defendant contended that the police fabricated the allegation that Davis had met defendant at the Plainview House en route to the meeting with the officer. There was no evidence to support defendant's contention that Davis disclosed defendant's name or description to the police after his arrest. The differences between the contents of the search warrant for the Plainview House and the search warrant for Grandmont House did not establish that the meeting did not occur. While defense witnesses testified that neither defendant nor Davis were at the Plainview House at the time the meeting took place, the trial court found that such testimony was incredible, and we will defer to that finding. Having reviewed the testimony at the evidentiary hearing, we cannot say that the trial court's finding that such a meeting took place was clearly erroneous. Therefore, the trial court properly denied the motion to suppress.

IV. Admission of Evidence

Defendant contends that the trial court erred in admitting evidence regarding the facts and circumstances that led the police to obtain the warrant to search the Plainview House. Defendant contends that such evidence, which indicated that defendant delivered cocaine to Davis, was inadmissible under MRE 404(b)(1). We find no abuse of discretion, *Sawyer, supra*, in the trial court's decision to admit the evidence. The evidence was admissible for a proper purpose under MRE 404(b)(1), that being to prove that defendant intended to deliver the cocaine in his possession. The probative value of such evidence was not substantially outweighed by the danger of unfair prejudice. *People v Mouat*, 194 Mich App 482, 485; 487 NW2d 494 (1992). The evidence was also admissible to give the jurors the "complete story" surrounding the discovery of the cocaine. *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978).

V. Police Witness Testimony

Defendant contends that he was denied a fair trial when police officers were allowed to testify as to the street value of the cocaine and the significance of certain paraphernalia found within the vicinity of the cocaine. Defendant failed to preserve this issue by raising a proper objection at trial. *People v Dunham*, 220 Mich App 268, 273; 559 NW2d 360 (1996). Even if the issue had been preserved, it is without merit because the evidence was admissible. *People v Williams (After Remand)*, 198 Mich App 537, 542; 499 NW2d 404 (1993); *People v Ray*, 191 Mich App 706, 707-708; 479 NW2d 1 (1991).

VI. Prosecutorial Misconduct

Defendant next argues that the prosecutor improperly shifted the burden of proof by questioning a witness about his failure to produce evidence that would corroborate his testimony and citing that lack of evidence in his closing argument. We find nothing improper in the prosecutor's cross-examination or argument. *People v Fields*, 450 Mich 94, 115 & n 24; 538 NW2d 356 (1995). We also reject defendant's claim that the prosecutor improperly argued that there was no evidence to support defendant's theory of the case. *People v Burd*, 39 Mich App 22, 26; 197 NW2d 76 (1972).

VII. The Motion to Quash

Defendant contends that the trial court erred in denying his motion to quash. We disagree. The presence of defendant's personal papers in the trunk where the cocaine was found was sufficient to show constructive possession, *People v Richardson*, 139 Mich App 622, 625-626; 362 NW2d 853 (1984), and the quantity of cocaine and the paraphernalia found with it were sufficient to show intent to deliver. *Wayne Co Prosecutor v Recorder's Court Judge*, 119 Mich App 159, 162; 326 NW2d 825 (1982).

Affirmed.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ William C. Whitbeck