

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DON JEFFERSON, JR.,

Defendant-Appellant.

UNPUBLISHED

December 18, 1998

No. 199960

Recorder's Court

LC No. 96-000773

Before: Saad, P.J., and Kelly and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for possession with intent to deliver between 225 and 650 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii). We affirm.

I

Defendant argues that the evidence presented at trial was insufficient to support his conviction. We disagree. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could reasonably conclude that all of the elements of the offense were proven beyond a reasonable doubt. *People v Sean Jones (On Reh)*, 201 Mich App 449, 451; 506 NW2d 542 (1993). A police officer observed defendant engaging in suspected drug transactions at 19413 Dean in Detroit. Upon executing a search warrant at the premises, the police found 282.89 grams of cocaine in the basement bedroom, along with a handgun, numerous ziplocks, a digital scale containing cocaine residue, and several pieces of registration indicating that defendant lived at that location. Defendant later admitted to the police that he was the only person who slept in the bedroom where the drugs were found and that he was involved in selling cocaine. A rational trier of fact could infer from this evidence that defendant possessed the cocaine with the intent to deliver it. Defendant was not merely present at the location where the drugs were found. Rather, the evidence established a sufficient link between defendant and the drugs to establish possession. *People v Fetterley*, 229 Mich App 511, 515; 589 NW2d 199 (1998). See also *People v Head*, 211 Mich App 205, 210; 535 NW2d 563 (1995).

Defendant further contends that the verdict is against the great weight of the evidence because three defense witnesses testified that defendant no longer lived at the house where the cocaine was found. The testimony of the defense witnesses was contradicted by defendant's confession, the pieces of registration found in the basement bedroom, and the testimony that defendant was seen engaging in suspected drug transactions from the house in question. The verdict therefore is not manifestly against the clear weight of the evidence. *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993).

II

Defendant claims that the trial court erred in denying his motion to suppress evidence obtained pursuant to the search warrant. We disagree. Reviewing the affidavit underlying the search warrant, we find that there was a substantial basis for the magistrate's finding of probable cause. *People v Darwich*, 226 Mich App 635, 636-637; 575 NW2d 44 (1997). The affiant averred that he had had previous successful dealings with the unnamed informant, which established the informant's credibility. MCL 780.653; MSA 28.1259(3); *People v Humphrey*, 150 Mich App 806, 812; 389 NW2d 494 (1986). Also, the facts set forth in the affidavit established that the informant had personal knowledge of the information supplied. MCL 780.653; MSA 28.1259(3). The affiant-police officer observed the informant enter defendant's house without cocaine and with a sum of cash, and then return with cocaine, which he said he had purchased from defendant's house, in accordance with a "controlled buy" arranged by the affiant. Accordingly, there was a substantial basis for the magistrate's finding of probable cause. See *Head, supra*, 211 Mich App 208-209; *People v Larson*, 128 Mich App 552, 555-556; 340 NW2d 324 (1983). Our de novo review therefore establishes that the trial court properly denied defendants' motion to suppress. *Darwich, supra*, 226 Mich App 636-637. Moreover, defendant's conclusory assertion that the information contained in the affidavit was the result of either a deliberate falsehood or a reckless disregard for the truth is without merit because defendant has failed to provide an offer of proof and has neither offered supporting affidavits nor explained their absence as required by *People v Turner*, 155 Mich App 222, 226-227; 399 NW2d 477 (1986).

III

Defendant also argues that the trial court erred by refusing to suppress defendant's statement to the police as involuntary. We disagree. The voluntariness of a statement is determined using a totality-of-the-circumstances analysis. *People v Sexton*, 458 Mich 43, 67-68; 680 NW2d 2404 (1998). While the voluntariness of a confession is a question for the trial court, an appellate court must examine the entire record and make an independent determination of voluntariness. *Id.*, 68. The trial court's decision will be disturbed only if it is clearly erroneous. *Id.*

People v Haywood, 209 Mich App 217, 226; 530 NW2d 497 (1995), set forth several factors for determining whether a confession was voluntary. The only factor defendant raises here was that he had been physically abused before he gave the statement.¹ He claims that he was sprayed with mace and hit and kicked before giving the statement. Defendant and his father both gave testimony in support of this contention. However, Officer Karen Williams, who took defendant's statement, testified that defendant gave the statement approximately one hour after being sprayed with mace (by a different police department), and after he was given water to rinse off the mace. She also testified that the effects

of mace last only twenty to forty minutes, and that defendant responded that he was fine when asked about his condition before he gave the statement. The trial court clearly found Williams' testimony to be the most credible. Williams' testimony established that defendant was not maced in order to extract a confession, and that he had recovered from the incident before he gave his statement. Reviewing the totality of the circumstances surrounding defendant's statement, we determine that it was freely and voluntarily made. *Id.*, 226. The trial court thus did not err in denying defendant's motion to suppress.

IV

Defendant contends that the trial court erroneously excluded evidence at trial regarding the credibility and truthfulness of defendant's confession and regarding whether the confession was actually made. We disagree. Although the trial court decides the issue of voluntariness, *People v Neal*, 182 Mich App 368, 372; 451 NW2d 639 (1990), "other factors relating to the confession, such as credibility, truthfulness and whether the statement had been made at all, remain for the determination of the trier of fact." *People v Spivey*, 109 Mich App 36, 37; 310 NW2d 807 (1981). Here, the trial court did not exclude any evidence relating to the credibility and truthfulness of the statement and whether the statement was made at all. Contrary to defendant's assertions, the trial court did not exclude the testimony of the Warren police officers. Rather, defense counsel chose to excuse those witnesses. Also, the trial court did not, as defendant suggests, that the officers could testify regarding the reason for defendant's arrest, thus discouraging defendant from calling the officers. Rather, the court left that question open depending upon what the officers testified. In any event, the jury was informed of the macing incident when defense counsel cross-examined Williams.

We further note that defendant's argument regarding the production of Officer Unger need not be considered on appeal because defendant has failed to address the basis of the trial court's decision, i.e., that Unger was not listed as a witness. *Joerger v Gordon Food, Inc.*, 224 Mich App 167, 175; 568 NW2d 365 (1997). In any event, it appears that defendant was improperly attempting to use Unger's testimony as extrinsic evidence to impeach Williams on a collateral matter. MRE 608(b); see also, in general, *People v Sutherland*, 149 Mich App 161, 165; 385 NW2d 637 (1985).

V

Defendant also argues that he received ineffective assistance of counsel. We disagree. A defendant claiming ineffective assistance of counsel must establish that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Stewart (On Remand)*, 219 Mich App 38, 41; 555 NW2d 715 (1996). Defendant simply relies upon his trial counsel's conclusory assertions that he was not prepared for trial and that defendant would be prejudiced if the trial were not adjourned. Defendant has identified no particular errors made by counsel and has failed to make a specific showing of prejudice. There is no record evidence that certain photographs which counsel was allegedly unable to obtain from defendant's prior attorney were admissible or favorable to the defense. Defendant's second confession which counsel claimed to have learned of on the first day of trial was not admitted at trial. Defendant's ineffective assistance of counsel claim is without merit.

VI

Defendant claims that the trial court abused its discretion by denying his motion for a new trial or, in the alternative, judgment notwithstanding the verdict. See MCL 770.1; MSA 28.1098; MCR 6.431(B).² We disagree. Defendant's arguments regarding the sufficiency of the evidence and ineffective assistance of counsel, which he claims were part of the basis for his new trial and JNOV motions, have been addressed *supra*. Defendant's claim that he was denied his constitutional rights to confront witnesses and to present evidence in his own behalf is contradicted by the record. Defendant has thus failed to establish that he is entitled to a new trial or to a judgment notwithstanding the verdict.

VII

Defendant's final argument is that the trial court abused its discretion by denying his motion for a continuance. We disagree. Defendant failed to show good cause to warrant a continuance. *People v Sekoian*, 169 Mich App 609, 613-614; 426 NW2d 412 (1988). Defendant was negligent, because neither he nor defense counsel requested a continuance until the date of trial. See *Sekoian*, 614. Although defense counsel claimed that he was unprepared for trial because he was substituted into the case without his consent, the record indicates that defense counsel signed a stipulation agreeing to be substituted into the case nearly three months before the date of trial. Defendant signed a notice acknowledging the date of trial several months before trial. Also, defendant has not shown that he was prejudiced by the trial court's refusal to grant a continuance. *Id.* Defense counsel's conclusory assertions of prejudice below are insufficient to establish prejudice. The trial court did not abuse its discretion in denying defendant's motion for a continuance.

Affirmed.

/s/ Henry William Saad

/s/ Michael J. Kelly

/s/ Richard A. Bandstra

¹ Defendant seems to argue that he did not make the statement, in addition to arguing that the statement was involuntary.

² Although defendant asserted that he was moving in the alternative for a judgment notwithstanding the verdict, it appears that defendant was, in effect, requesting a directed verdict of acquittal. See MCR 6.419(B); MCR 6.431.