STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 18, 2003
v RICHMOND MAURICE MCKENZIE, Defendant-Appellant.	No. 237202 Oakland Circuit Court LC No. 01-176909-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v ALTHEA MICHELLE MCKENZIE, Defendant-Appellant.	No. 237815 Oakland Circuit Court LC No. 01-176908-FH

Before: Wilder, P.J., and Griffin and Gage, JJ.

PER CURIAM.

These consolidated appeals involve what appears to be a fairly large drug operation. In Docket No. 237815, following a jury trial, defendant Althea McKenzie was convicted of possession with intent to deliver between 5 and 45 kilograms of marijuana, MCL 333.7401(2)(d)(ii), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced her as a second felony offender, MCL 769.10, to 13 months' to 10 ½ years' imprisonment for the marijuana conviction and 2 years' imprisonment for the felony-firearm conviction. She now appeals as of right. In Docket No. 237202, following a jury trial, defendant Richmond McKenzie was convicted of intent to deliver between 5 and 45 kilograms of marijuana, MCL 333.7401(2)(d)(ii), felon in possession of a firearm, 750.224f, and two counts of felony-firearm, MCL 750.227b. The trial court sentenced him to 23 months' to 7 years' imprisonment for the marijuana conviction, 1 to 5 years' imprisonment for the felon in possession of a firearm conviction, and 2 years' imprisonment each for the felony-firearm convictions. He now appeals as of right. We affirm in part and reverse in part.

After receiving information that a drug operation was being conducted at defendants' house, officers from the Southern Oakland Narcotics Information Consortium (SONIC), conducted several days of surveillance of the house, and thereafter obtained a search warrant. On January 26, 2001, officers executed the search warrant. Defendant Althea McKenzie was at the house at the time the search was conducted, but defendant Richmond McKenzie was not at the house at that time. He alleges that he was in Arizona. During the search, officers found large amounts of marijuana and money, as well as firearms, throughout the house, including the master bedroom, which contained personal items belonging to defendant Richmond McKenzie.

Docket No. 237815

Defendant Althea McKenzie raises two issues on appeal. She first argues that the trial court erred in failing to suppress evidence obtained under an invalid search warrant. In reviewing a motion to suppress evidence, the trial court's factual findings are reviewed for clear error. *People v McGhee*, 255 Mich App 623, 626; 662 NW2d 777 (2003); *People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1983). We review de novo the trial court's final decision at a motion to suppress hearing. *People v Aldrich*, 246 Mich App 101, 116; 631 NW2d 67 (2001), citing *People v Barrera*, 451 Mich 261, 269; 547 NW2d 280 (1996). However, great deference is given to a magistrate's finding of probable cause. *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992), citing *Illinois v Gates*, 462 US 213; 103 S Ct 2317; 76 L Ed 2d 527 (1983). A magistrate's finding of probable cause will be affirmed if "a reasonably cautious person could have concluded that there was a substantial basis for the finding of probable cause." *Russo*, *supra*.

The basis for a magistrate's determination of probable cause is limited to the facts and circumstances set forth in the affidavit. MCL 780.653; *People v Sundling*, 153 Mich App 277, 312; 395 NW2d 308 (1986). Probable cause sufficient to issue a search warrant exists when the totality of facts and circumstances set forth in the affidavit "would lead a reasonable person to believe that the evidence of a crime or the contraband sought is in the place requested to be searched." *People v Brannon*, 194 Mich App 121, 132; 486 NW2d 83 (1992). The affidavit and search warrant should be reviewed in a common sense and realistic manner. *Russo*, *supra* at 604. To issue a warrant, the magistrate need not find probable cause that a specific person was personally involved in illegal activities, only that evidence sought will be found in the place to be searched. *People v Whitfield*, 461 Mich 441, 445; 607 NW2d 61 (2000).

Here, officers received information that drugs would be found at defendants' house and thereafter conducted surveillance of the home. Defendant contends that the source of information (SOI's) tip may not support probable cause because the affidavit did not affirmatively state that the SOI's information was based on personal knowledge. When relying on an unnamed source for probable cause, an affidavit must affirmatively state that the information is based on personal knowledge and that the information is reliable and credible. MCL 780.653. However, if an independent police investigation confirms the informant's tip, the tip may support probable cause even without an affirmation of the informant's reliability or personal knowledge. *People v Harris*, 191 Mich App 422, 425-426; 479 NW2d 6 (1991). Independent verification can compensate for a failure to set forth a basis for the informant's knowledge. *People v Gentry*, 138 Mich App 225, 228-229; 360 NW2d 863 (1984), quoting *Illinois v Gates*, *supra*.

We find the affidavit was sufficient to support the finding of probable cause. The affidavit was provided by an experienced narcotics officer with the South Oakland Narcotics Information Consortium (SONIC). The affidavit stated that the affiant had received information from an SOI that the residents at 38210 Nine Mile Road were trafficking in narcotics and that "Maurice McKenzie" was involved in the operation. The affiant stated that he believed the SOI's information to be "reliable and credible based upon the information provided by the SOI and affiant's independent investigation." The affidavit also described the independent investigation undertaken to verify the SOI's tip. Two days before the issuance of the warrant, officers removed five bags of garbage that had been abandoned at the curbside of defendants' house and found two large plastic wrappers containing remnants of marijuana. It was averred that the large plastic wrappers are commonly used to package large amounts of marijuana. Officers also found several proofs of residence for Richmond Maurice McKenzie at the address. The affidavit further stated that Richmond McKenzie had been arrested and convicted of distribution of marijuana in 1986. Finally, while conducting surveillance of the home for two days before the warrant request, officers observed numerous vehicles arrive and leave the home within short periods of time, which is indicative of drug activities. The affiant concluded that based on the totality of the facts and relying on the affiant's extensive experience and training in narcotics investigations, the affiant believed narcotics and contraband would be located at the residence.

Viewing all the circumstances set forth in the affidavit, the independent police investigation sufficiently confirmed the SOI's tip to support probable cause. See *People v Hall*, 158 Mich App 194, 198; 404 NW2d 219 (1987). Therefore, a sufficient basis existed for the magistrate to find probable cause and the trial court did not err in failing to suppress the evidence.

Defendant Althea McKenzie next argues that the trial court erred in failing to declare a mistrial. The denial of a motion for mistrial is reviewed for an abuse of discretion. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). A mistrial should only be granted for an irregularity that is prejudicial to the defendant's rights, and impairs his ability to get a fair trial. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). "The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments 'were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial.'" *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988), quoting *People v Rogers*, 60 Mich App 652, 657; 233 NW2d 8 (1975).

At trial, through the testimony of an officer, the prosecutor moved to admit into evidence the actual bags of marijuana that officers confiscated from defendants' house. The prosecutor gave the testifying officer a package containing the bags and asked the officer to open the package and verify that the bags being introduced into evidence actually contained marijuana. During this process, the trial judge stated, "Would you close that stuff up. It's giving me a headache." The comment was then followed by laughter in the courtroom. Based solely on this comment, both defendants moved for mistrial. With regard to defendant Althea McKenzie, a primary factual issue at trial was whether she had knowledge of the marijuana being present in the house. According to the defense, the judge's comments created the inference that, because of

the strong smell, it would be impossible to live in proximity to the marijuana without being aware of its presence.

Defendant relies on *People v Hudgins*, 125 Mich App 140; 336 NW2d 241 (1983), for the principle that reversal is required when a judge makes comments in front of the jury expressing the judge's disapproval of drug use. Defendant, however, misstates the holding in *Hudgins*. In *Hudgins*, this Court specifically held that the judge's statements regarding disapproval of drug use were not improper: "The mere disapproval of the charged illegal act does not deny a defendant a fair trial." *Id*. at 148. This Court did hold, however, that reversal is required when a judge directly connects the conduct to the defendant. *Id*.

Here, the judge merely expressed a desire to be relieved from a distracting and unpleasant odor, rather than any personal approval or disapproval of drug use. The comment, while inappropriate, did not connect the drugs to this defendant, nor did it reflect any opinion regarding defendant Althea McKenzie's knowledge. Because the trial judge "never expressed his own opinion on the merits of the issue, nor did he persist in commenting on the matter," the judge did not breach his duty of impartiality. *People v Missouri*, 100 Mich App 310, 339; 299 NW2d 346 (1980). Furthermore, considering the substantial evidence at trial supporting Althea McKenzie's knowledge of the drug operations, there is no reason to believe that the judge's comment had any influence on the jury. Before the judge's comment, the testifying officer had already testified regarding the characteristic odor of marijuana that emanated from the bags in evidence. He also stated that when conducting the search of defendants' house, he could detect the distinct odor of marijuana when he walked into defendants' basement. After the judge's comment, several other officers who assisted in conducting the search testified that the odor of marijuana was strong in the house. Under the circumstances, the judge's comment did not unduly influence the jury.

Regardless, the trial court instructed the jury that comments made by the court were not evidence and should be disregarded. Jurors are presumed to follow their instructions, and proper instructions are presumed to cure most errors. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Therefore, any alleged error was cured by the trial court's instruction.

Docket No. 237202

Defendant Richmond McKenzie raises three issues on appeal. He first argues that the trial court erred in denying his motion for directed verdict of acquittal. "When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime were proved beyond a reasonable doubt." *Aldrich*, *supra* at 123. "Circumstantial evidence and the reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

Defendant primarily argues that because he was in Arizona on the day the information charges, a rational trier of fact could not find he was in possession of the drugs or firearms on that date. Possession of drugs can be actual or constructive. *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992). Constructive possession over drugs occurs when the defendant has the power to exercise dominion and control "either directly or through another person." *People v Burgenmeyer*, 461 Mich 431, 439; 606 NW2d 645 (2000).

"The ultimate question is whether, viewing the evidence in a light most favorable to the government, the evidence establishes a sufficient connection between the defendant and the contraband to support the inference that the defendant exercised dominion and control over the substance." *Wolfe*, *supra* at 521, quoting *United States v Disla*, 805 F2d 1340, 1350 (CA 9, 1986). Intent to deliver can be inferred from the facts and circumstances, including the quantity and packaging, *Wolfe, supra*, and because of the difficulty in proving intent, minimal circumstantial evidence is required, *People v Fetterley*, 229 Mich App 511, 518; 583 NW2d 199 (1998).

In this case, the evidence was sufficient to allow the jury to infer that defendant exercised dominion and control over the drugs and intended to sell them. Over twenty pounds of marijuana was found in visible locations throughout defendant's home. Defendant's clothing and personal belongings were found in the master bedroom along with marijuana and firearms. Receipts for men's clothing, dated January 9 and bearing defendant's name, as well as other documents bearing defendant's name, were found in the master bedroom. Marijuana was found in a vehicle insured by defendant. Further, scales used for weighing, a tally sheet, and packaging material consistent with a drug trafficking operation, were found in the home. The basement of the house, which contained an office area where defendant kept his business documents, smelled strongly of unburned marijuana and contained nearly fifteen pounds of marijuana. This evidence, viewed as a whole, is sufficient to permit the inference that defendant continued to reside at the house and was involved in a complex marijuana delivery operation.

Even though defendant alleges he was in Arizona on the date charged in the information, the jury could still reasonably infer that defendant continued to exercise control over the narcotics during his absence. Defendant need not physically possess the drugs to be convicted of possession. *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). The fact that the drugs were pervasive throughout defendant's home along with his personal possessions suggests that defendant maintained control over the drugs. *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). As Judge Posner stated, "[i]t would be odd if a dealer could not be guilty of possession, merely because he had the resources to hire a flunky to have custody of the drugs." *United States v Manzella*, 791 F2d 1263, 1266 (CA 7, 1986). Similarly, it would be odd if a dealer could avoid conviction merely because he had the resources to take a vacation. Therefore, the trial court properly denied defendant's motion for directed verdict with regard to the possession of marijuana with intent to deliver charge.

The above analysis also applies to defendant's felon in possession charge. Possession of a firearm can be actual or constructive and can be proved by circumstantial evidence. See *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989) (discussing constructive possession of a short-barreled shotgun).

The fact that the firearms were discovered in visible locations throughout the house co-owned by defendant provided sufficient evidence to allow the inference that defendant constructively possessed the firearms. Two firearms were found under the bed in the master bedroom of the home. Defendant's personal belongings, including clothing, personal identifications, and business documents, were found in the master bedroom and throughout the remainder of the house. Therefore, the trial court properly denied directed verdict with regard to the felon in possession of a firearm charge.

With regard to the felony-firearm charges, we find it necessary to initially note that defendant did not specifically list the felony-firearm charges in his statement of the question presented. However, he did assert that the trial court erred in failing to direct verdict in his favor, and he referred to the felony-firearm charges in the analysis of his brief. Therefore, we conclude that while inarticulately stated, defendant has sufficiently raised this issue with regard to the felony-firearm charges. Moreover, with regard to these charges, we conclude that the trial court erred in failing to grant a directed verdict in defendant Richmond McKenzie's favor.

A review of the relevant law persuades us that the possession element of felony-firearm is defined more narrowly that the possession element for the purpose of drug possession or felon in possession, and therefore merits separate treatment. See *People v Elowe*, 85 Mich App 744, 748; 272 NW2d 596 (1978)(discussing the statutory meaning of possession for the purposes of felony-firearm).

The crimes of felon in possession and felony-firearm have two different aims. Felon in possession is an ongoing status crime, which is intended to protect the public from having guns at the disposal of persons convicted of felonies. *People v Swint*, 225 Mich App 353, 374; 572 NW2d 666 (1997). Because the Legislature has determined that convicted felons are dangerous, mere dominion and control over a firearm by a convicted felon constitutes a danger to society. See MCL 750.224f. Defendant's conviction in this case of felon in possession, therefore, accords with the purpose of the felon in possession statute when, as here, the firearm was temporarily inaccessible to defendant on the date charged, even though it could be found that it was still under his dominion and control.

The crime of felony-firearm, on the other hand, is not intended to punish the mere ownership of a firearm by a person who commits a felony. *Burgenmeyer*, *supra* at 436. Instead, because access to a firearm during the commission of a crime increases the risk to bystanders and victims, felony-firearm is intended only to punish a person who carries or possesses a firearm during the commission of a felony. MCL 750.227b; *People v Terry*, 124 Mich App 656, 660; 335 NW2d 116 (1983). "[A] person 'carries or has in his possession' a firearm during a felony when the person has physical possession of the weapon or when the weapon is available and accessible to the person during the felony." *Terry*, *supra* at 656.

Our Supreme Court most recently discussed the element of possession as it relates to felony-firearm in *Burgenmeyer*, *supra*. There, undercover officers bought cocaine from the defendant's roommate on August 7, 1990. *Id*. at 433. Later that day, officers arrested both the defendant and his roommate after the two left their house together. At the time he was arrested, the defendant was in possession of $700 in marked bills from the controlled cocaine buy, but was not carrying drugs or firearms. *Id*. Police obtained a warrant and searched the defendant's house just after midnight on August 8, 1990, and found cocaine and firearms in close proximity to each other. *Id*. at 422. The Court affirmed the defendant's convictions of possession of cocaine and felony-firearm, noting that at the time the defendant possessed the cocaine in his house, thereby committing the drug felony, the firearm was nearby and accessible. *Id* at 440. "The drugs and the weapons were close enough that a jury reasonably could conclude that the defendant possessed both at the same time, as the prosecutor charged." *Id*.

In this case, as in *Burgenmeyer*, officers found drugs in close proximity to the firearms. However, this case is distinguishable from *Burgenmeyer*. Here, evidence at trial suggested that

defendant was in Arizona between January 19 and January 30.[1] The information charged that defendant committed the crimes on January 26, yet the prosecution presented no evidence that defendant had reasonable access to a firearm on or near that date.

"A drug-possession offense can take place over an extended period, during which an offender is variously in proximity to the firearm and at a distance from it. In a case of that sort, *the focus would be on the offense dates specified in the information*." *Burgenmeyer, supra* at 439 (emphasis added). In *Burgenmeyer*, the Court determined that defendant physically possessed cocaine while a firearm was accessible, thereby committing felony-firearm on August 7, 1990, even though the information charged that the crime was committed on August 8, 1990. The Court found that this time difference was close enough to affirm the conviction. *Id*. at 440.

Here, however, the information charged that defendant committed the crimes on January 26, when defendant was alleged to have been in Arizona. The prosecution failed to produce any evidence that defendant had reasonable access to the firearms on the date charged in the information. Therefore, under the circumstances, we find the trial court erred in failing to direct verdict in defendant Richmond McKenzie's favor on the felony-firearm charges.

Defendant also argues that his conviction of felony-firearm predicated on the felon in possession of a firearm charge violates his double jeopardy protections. Although we have found that the trial court erred in failing to direct verdict on the felony-firearm charges, which renders this issue moot, we will briefly address the issue. "A double jeopardy challenge involved a question of law that this Court reviews de novo." *People v Dillard*, 246 Mich App 163, 165; 631 NW2d 755 (2001). "Where multiple punishment is involved, the Double Jeopardy Clause acts as a restraint on the prosecutor and the courts, not the Legislature." *People v Robideau*, 419 Mich 458, 469; 355 NW2d 592 (1984), citing *Brown v Ohio*, 432 US 161; 97 S Ct 2221; 53 L Ed 2d 187 (1977). "The Legislature's intent constitutes the determining factor under both the federal and the Michigan Double Jeopardy Clauses." *Dillard, supra* at 165.

In *Dillard, supra*, this Court specifically held that double jeopardy protections do not preclude the conviction of felony-firearm predicated on felon in possession. *Dillard, supra*. This Court is bound by the holding in *Dillard*.

Finally, defendant argues that he was denied a fair trial because of the cumulative effect of the errors occurring at trial. A claim for reversal based on several alleged errors at trial is reviewed to determine if the cumulative effect of the errors denied defendant a fair trial. *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001). Although the effect of one error might not provide a basis for reversal, the cumulative effect of a number of minor errors may add up to error requiring reversal. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). "[T]he effect of the errors must have been seriously prejudicial in order to warrant a finding that defendant was denied a fair trial." *Id*. at 388.

[1] This evidence was not entirely uncontested.

Before trial, in an effort to avoid the prejudice of the jury's learning of defendant's prior felony, the parties stipulated that the felon in possession charge would be referred to as "ineligible person in possession." During closing arguments, the prosecutor improperly referred to defendant's felony-firearm charge as felon in possession of a firearm. During jury instructions, the court misstated and referred to defendant's felon in possession of a firearm as just that, instead of as "ineligible person in possession of a firearm." Defendant now claims error requiring reversal based on the prosecutor's and the trial court's misstatements.

With regard to the prosecutor's misstatement, defense counsel made no objection at trial and requested no special instruction. Because defendant failed to object to the statement, the issue is not preserved for review. *People v Dowdy*, 211 Mich App 562, 570; 536 NW2d 794 (1995). Regardless, the written jury instructions, which corrected the misstatement, cured any prejudice resulting from the inadvertent lapse. See *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

With regard to the trial court's misstatement, defense counsel objected to the misstatement at trial, but then waived his objection when the court provided a written jury instruction correcting the error. "A defendant may not waive objection to an issue before the trial court and then raise the issue as an error on appeal." *Aldrich*, *supra* at 111.

Defendant also claims that the trial judge prejudiced the defense when, during an officer's testimony, he asked the officer to close up the bags of marijuana, stating: "Would you close that stuff up. It's giving me a headache." This claim of error was addressed *supra* as it related to defendant Althea McKenzie, and has already been determined to be without merit.

Defendant also claims that the trial court abused its discretion by refusing to allow defendant to elicit testimony that defendant voluntarily surrendered to police. Defendant contends that voluntary surrender is probative evidence of an innocent conscience, as much as flight can be evidence of a guilty conscience. However, defendant failed to provide any authority to support the position that evidence of voluntary surrender is admissible to prove innocence.

A trial court's decision regarding the admissibility of evidence is reviewed for an abuse of discretion. *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 526 (2002). In general, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402. "Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence." *Taylor*, *supra*; MRE 401.

Although evidence of flight may be admissible to show a defendant's guilty conscience, the converse is not necessarily true. Without supporting authority provided by defendant, we find the trial court did not abuse its discretion in refusing to admit the evidence. Regardless, the jury ultimately learned of defendant's voluntary surrender. Therefore, any possible error in the trial court's decision was harmless.

Defendant finally claims that the prosecutor improperly attempted to shift the burden of proof at trial to defendant. At trial, in an effort to refute the theory that defendants were running a profitable drug operation, defendant explicitly advanced an alternate theory to explain his large home and significant amounts of cash. In opening statements, defense counsel stated that

defendant's legitimate business operations explained the family's wealth. In closing arguments, defense counsel stated that cash found in the master bedroom was procured through a home refinancing and winnings from casino gambling, not drug activities.

Defendant's assertion that the prosecutor attempted to shift the burden all relate to the prosecutor's comments on inferences created by the defense theory. "[W]here a defendant testifies at trial or advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant." *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). When the defense relies on a particular theory, the prosecutor is not prohibited from commenting on the improbability of the theory or evidence. *People v Jones*, 468 Mich 345; 662 NW2d 376 (2003). All of the complained-of comments by the prosecutor were made in response to or in reference of defendant's theory of the case. "Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof." *Fields*, *supra* at 94. Under the circumstances, the prosecutor's comments do not constitute error requiring reversal.

Because we find no individual errors that require reversal, defendant's argument that the cumulative effect of the alleged errors requires reversal is without merit.

In sum, with regard to Docket No. 237815, we find that the trial court did not err in failing to suppress the evidence obtained pursuant to the valid search warrant. We further find that the trial court did not err in failing to declare a mistrial based on the trial judge's comment regarding the smell of the marijuana at trial. Therefore, we affirm defendant Althea McKenzie's convictions and sentences. With regard to Docket No. 237202, we find the trial court did not err in failing to direct verdict in favor of defendant Richmond Maurice McKenzie regarding the possession with intent to deliver marijuana and felon in possession charges. Further, we find no error requiring reversal of those convictions. Thus, we affirm defendant Richmond Maurice McKenzie's convictions and sentences on those charges. However, we find the trial court did err in failing to direct verdict in favor of defendant Richmond Maurice McKenzie with regard to the two felony-firearm charges. Therefore, we reverse the trial court's decision in that regard and remand to the trial court for vacation of defendant Richmond Maurice McKenzie's felony-firearm convictions and entry of an order directing verdict in his favor on those charges.

Affirmed in part, reversed in part, and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin
/s/ Hilda R. Gage