STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 25, 2004
v	No. 247143 Oakland Circuit Court
ARU ONYEANI AGBO, Defendant-Appellant.	LC No. 02-185307-FH

Before: Schuette, P.J., and Bandstra and Cooper, JJ.

PER CURIAM.

Defendant Aru Onyeani Agbo appeals as of right from his jury trial conviction for possession with intent to deliver between 225 and 650 grams of heroin.[1] Defendant was sentenced to twenty to thirty years' imprisonment. We affirm.

I. Facts

On July 9, 2002, the Oakland Macomb Interdiction Team (OMIT), a multijurisdictional FBI drug unit, conducted surveillance at the Southfield Hampton Inn after receiving information that defendant, a guest at the hotel, may be involved in drug trafficking. Sergeant Terrance Mekoski and Detective David McNealy set up surveillance in the hotel lobby, but witnessed no activity with regard to defendant's room. Just after midnight on July 10, 2002, Detective McNealy placed a call to defendant's room requesting that he come to the lobby. Sergeant Mekoski and Detective McNealy approached defendant, identified themselves as police officers, and asked defendant general questions regarding his business in the area.

The officers asked defendant if they could continue their questioning in his hotel room. Defendant agreed, but became nervous and stopped in front of various doors before coming to his room. The officers asked to enter defendant's room and, when asked, informed defendant of his right to refuse. Defendant then allowed the officers to enter. Upon further questioning, the officers found that defendant could not give a clear account of his business in the area. Defendant denied having contraband and granted the officers verbal permission to search his hotel room. Defendant agreed to sign a written consent form after the search. During the search,

[1] MCL 333.7401(2)(a)(ii).

Detective McNealy found twenty-four pods of heroin wrapped in a T-shirt inside defendant's suitcase. Subsequent tests revealed that each pod contained around twelve grams of heroin, with a total weight of around 300 grams, including packaging. The prosecution theorized that defendant ingested the pods in Nigeria to move the heroin through customs undetected. At the end of the search, defendant signed the top of the consent to search form.

II. Motion to Suppress

Defendant contends that the trial court erred in denying his motion to suppress the evidence against him obtained through an invalid search of his hotel room. Specifically, defendant alleges that the officers lacked reasonable suspicion to conduct a "knock and talk" and that his consent to the search was not given freely, if given at all.[2] We disagree. We review a trial court's factual findings regarding a motion to suppress for clear error.[3] "A decision is clearly erroneous if, although there is evidence to support it, the Court is left with a definite and firm conviction that a mistake has been made."[4] The trial court's ultimate decision regarding a motion to suppress is reviewed de novo.[5]

The federal and Michigan Constitutions guarantee the right of persons to be secure against unreasonable searches and seizures.[6] Warrantless searches are unreasonable per se, "unless the police conduct falls under one of several specifically established and well-delineated exceptions."[7] Valid consent is a recognized exception to the search warrant and probable cause requirements, and allows search and seizure when consent is unequivocal, specific, and freely given.[8] Whether consent to search is freely given involves a question of fact based on the totality of the circumstances.[9] The use of coercive tactics or the existence of a coercive atmosphere is relevant to determining if consent was voluntary.[10] In this regard, courts must consider whether police conduct would suggest to a reasonable person that he was free to decline their search request and leave the area.[11]

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[2] After defendant was placed in custody, the officers recorded a reenactment of the search on videotape. The officers did not record the circumstances surrounding defendant's grant of consent.

[3] *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001).

[4] *People v Chambers*, 195 Mich App 118, 121; 489 NW2d 168 (1992).

[5] *People v Frohriep*, 247 Mich App 692, 702; 637 NW2d 562 (2001).

[6] *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000), citing US Const, Am IV; Const 1963, art 1, § 11.

[7] *People v Gonzalez*, 256 Mich App 212, 232; 663 NW2d 499 (2003).

[8] *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999).

[9] *Id.*

[10] *Id.*; *People v Klager*, 107 Mich App 812, 816; 310 NW2d 36 (1981).

[11] See *People v Bloxson*, 205 Mich App 236, 242-243; 517 NW2d 563 (1994).

We find that the trial court's determination that defendant consented to the search was not clearly erroneous. We first note that this Court upheld the use of the knock and talk procedure to secure permission for a search in *People v Frohriep*.[12] Defendant and the officers presented conflicting testimony at the evidentiary hearing regarding the circumstances of the knock and talk and of the search. Defendant testified that he did not freely give his consent to the search of his hotel room. Defendant testified that Sergeant Mekoski drew his gun in the lobby, yelled at defendant, and forced defendant to allow the officers into his room. Defendant denied granting permission to the search, contending that Detective McNealy searched while Sergeant Mekoski stood guard with a gun. Defendant admitted to signing the written consent form at the police station only upon command. Defendant argued that he would not have consented to the search knowing that he possessed heroin in his room.

However, the officers testified that defendant was very cooperative and agreed to being questioned inside his hotel room. During their questioning, defendant indicated that he was fluent in English and had a business degree from a Nigerian university. When asked, the officers informed defendant that he had the right to deny their entrance into his hotel room. Defendant gave verbal permission to the search after reading the written consent form and signed the form upon the completion of the search. The officers also testified that suspects often consent to a search, even while possessing large quantities of controlled substances, because they believe the officers will not actually conduct a search if consent is given.

The trial court noted that defendant was intelligent and educated. However, the trial court concluded that the officers' testimony was more credible. We defer to the trial court's assessment of the credibility of witnesses at a suppression hearing.[13] As such, we find that the trial court properly denied defendant's motion to suppress the evidence against him.

III. Prosecutorial Misconduct

Defendant contends that the prosecution improperly vouched for the credibility of its witnesses, bolstered the validity of its case, denigrated the defense as a whole, made an improper appeal to the jurors' civic duty, and argued facts not in evidence in closing and rebuttal arguments. We disagree. We review prosecutorial misconduct claims on a case by case basis, examining any remarks in context, to determine if the defendant received a fair and impartial trial.[14] Because defendant failed to object to the alleged instances of prosecutorial misconduct, our review is limited to plain error affecting substantial rights.[15] "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction."[16]

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[12] *Frohriep, supra* at 697-701.

[13] *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999).

[14] *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

[15] *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

[16] *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

Defendant contends that the prosecution denigrated the defense by characterizing defendant's defense as an "attempt to lead [the jury] down a rabbit trail,"[17] and by portraying defendant's allegations against the OMIT officer's veracity in a negative light. Although excessive, the prosecutor's remarks did not amount to a personal attack on defense counsel or suggest that defense counsel intentionally attempted to mislead the jury.[18] Rather, the remarks directly responded to the defense arguments that a third party placed the heroin in defendant's hotel room and that the police officers presented false testimony.[19]

Defendant also contends that the prosecutor improperly vouched for the credibility of its witnesses. A prosecutor enjoys wide latitude in fashioning arguments and may argue the evidence and all reasonable inferences arising from it.[20] A prosecutor may not vouch for the credibility of a witness, however, by conveying that she has some special knowledge that the witness is testifying truthfully.[21] The prosecutor's comments were, again, properly responsive to defendant's allegations of improper police conduct.[22]

Defendant claims that the prosecutor improperly bolstered the validity of her case by repeatedly asserting that the judge would only admit evidence that was legally seized. However, these remarks directly responded to the defense argument that the police officers illegally searched defendant's hotel room, despite the fact that the legality of the search had already been determined to the contrary.[23] The prosecution concedes that it improperly bolstered its case by arguing, "And these officers indicated that in 95 percent of their cases, they are, in fact given consent. Officer Sergeant Mekoski indicated that he got consent in a 46 kilo case, a 15 kilo case, and I know those cases and it did happen."[24] However, defendant has failed to establish that the remark affected the outcome of his trial. We further note that absent an objection, the trial court's instruction to the jury that the remarks of counsel are not evidence was sufficient to dispel any prejudice.[25] Jurors are presumed to follow their instructions.[26]

We also find that the prosecutor's remark concerning "truth and justice" was not so overwhelming that it would have caused the jurors to suspend their powers of judgment in favor

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[17] [Trial Transcript December 13, 2002, p 108.]

[18] See *People v Phillips*, 217 Mich App 489, 497-498; 552 NW2d 487 (1996); *People v Dalessandro*, 165 Mich App 569, 579-580; 419 NW2d 609 (1988).

[19] See *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001), citing *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

[20] *Id.* at 721.

[21] *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001).

[22] *Watson*, *supra* at 592-593.

[23] *Id.*

[24] [Trial Transcript December 13, 2002, p 118.]

[25] *Schutte*, *supra* at 721-722.

[26] *People v Graves*, 458 Mich 476, 486-487; 581 NW2d 229 (1998).

of civic duty.[27] Whether defendant's claims of misconduct are examined singularly or cumulatively, we conclude that defendant has failed to show that he was deprived of a fair trial.[28]

Affirmed.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Jessica R. Cooper

[27] *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991).

[28] *People v Rice (On Remand)*, 235 Mich App 429, 434-435; 597 NW2d 843 (1999).