STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ANTHONY MULARZ,

Defendant-Appellant.

UNPUBLISHED
November 28, 2006

No. 263629
Midland Circuit Court
LC No. 03-001697-FH

Before: Fort Hood, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of delivery/manufacture of five kilograms or more but less than 45 kilograms of marijuana, MCL 333.7401(2)(d)(ii); felon in possession of a firearm, MCL 750.224f; and habitual offender, third offense, MCL 769.11. We affirm.

Defendant challenges the admission of evidence that was obtained following a warrantless entry into the house. The trial court admitted the evidence because police validly entered the house based on exigent circumstances and subsequent consent. The federal and state constitutions protect against an unreasonable search and seizure, and a search without a warrant is generally considered unreasonable. US Const, Am IV; Const 1963, art 1, § 11; *People v Brzezinski*, 243 Mich App 431, 433; 622 NW2d 528 (2000). However, the police need not obtain a warrant when there are exigent circumstances, specifically when: (1) there is probable cause to believe a crime was recently committed on the premises and evidence or suspects are present, and (2) specific, objective facts indicated immediate action was required to prevent destruction of evidence, protect the police or others, or prevent escape. *In re Forfeiture of $176,598*, 443 Mich 261, 271; 505 NW2d 201 (1993).

Evidence that the officers smelled marijuana when standing outside the home, and that at least one officer saw marijuana plants through the window, constituted sufficient probable cause. Although, as defendant contends, the officers and persons inside the home offered conflicting testimony on many issues, we defer to the trial court's determination regarding the credibility of conflicting testimony. *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997). The officers' observations - which the trial court accepted - could be used to determine probable cause if they were rightfully in the position where the marijuana was in plain view and their initial intrusion was justified. *People v $207.41 US Currency*, 148 Mich App 326, 329; 383 NW2d 633 (1986). The "knock and talk" procedure is subject to general constitutional requirements. *People v Frohriep*, 247 Mich App 692, 697-699; 637 NW2d 562 (2001). The

officers could make observations as they approached the main door in an area the public was expected to travel. *People v Galloway*, 259 Mich App 634, 641 n 2; 675 NW2d 883 (2003). It was in this area that the officers both smelled marijuana and viewed it through the window.

The next issue is whether the police were required to wait for a warrant after they obtained probable cause. For a warrantless entry to be valid, there must be more than a general fear that evidence might be destroyed. *People v Blasius*, 435 Mich 573, 594; 459 NW2d 906 (1990). Further, defendant was permitted to avoid a "knock and talk" encounter by shutting the door. See *Frohriep*, *supra* at 698-699. Here, however, the facts reveal more than a general fear. An officer testified that he was told someone was going to remove the evidence, and the officers testified that they saw someone run to shut the curtains after someone shut the door. Additionally, at least one officer testified that suspects usually try to destroy marijuana when they know a raid is imminent. These were specific, objective facts supporting the officers' belief that, if they retreated, the evidence would disappear before they obtained a warrant. There were sufficient exigent circumstances justifying the warrantless entry to secure the premises. See *In re Forfeiture of $176,598*, *supra* at 271.

Defendant also challenges the subsequent consent on two grounds. Defendant did not preserve the issue whether the female homeowner could grant consent after defendant shut the door; therefore, review is for plain error. See *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). A third party with equal right of possession or control over the premises can grant consent, *People v Grady*, 193 Mich App 721, 724; 484 NW2d 417 (1992), and co-tenants assume the risk that someone they live with may grant consent. *People v Goforth*, 222 Mich App 306, 311-312; 564 NW2d 526 (1997). In this case, the female owner granted written consent to search the house.[1]

However, defendant also argues that the female homeowner did not give consent willingly. Consent must be given unequivocally, specifically, freely, and intelligently, and its validity depends on the totality of the circumstances. *Galloway*, *supra* at 648. Defendant claims that consent cannot be valid after a protective sweep. However, in *People v Shaw*, 188 Mich App 520, 522-525; 470 NW2d 90 (1991), consent was voluntary when the police conducted a protective sweep, put away their guns, and advised the woman that she did not have to consent but they were going to obtain a search warrant. Here, there was ample evidence supporting the trial court's conclusion that consent was freely given. Based on the officers' description of events, the woman was nervous but not hysterical. The officer who gained consent claimed he informed her of her rights and did not threaten her or promise her anything. Her consent was not

[1] In a supplemental authority, defendant cites *Georgia v Randolph*, ___ US ___; 126 S Ct 1515; 164 L Ed 2d 208 (2006), for the proposition that the female homeowner could not consent to the search when defendant had already refused consent. However, in that case, the co-tenant expressly stated his refusal to consent to a search of the house. *Id.* at 1519. Here, the police never asked defendant for his consent, and he never expressly stated a refusal. Instead, he merely closed the front door as the plainclothes officers approached the house. In any event, even if there was error, in light of the valid warrantless entry into the home and the overwhelming evidence of defendant's guilt, the error did not affect defendant's substantial rights. *Carines*, *supra*.

given unwillingly merely because she hoped it would make her look better or she forgot to add her middle initial. There is nothing in the record to show that she was forced to sign the form.

The trial court did not err when it found that consent was given unequivocally, specifically, freely, and intelligently. Consent was valid, and the trial court did not err by admitting the resulting evidence. *Galloway*, *supra* at 648.

Given our resolution of defendant's challenge, we need not address plaintiff's argument that evidence would have inevitably been discovered.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Christopher M. Murray
/s/ Pat M. Donofrio