STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 14, 2011
v	No. 298298 Montcalm Circuit Court
ADAM KEITH ANDERSON, Defendant-Appellant.	LC No. 2009-012653-FH

Before: SAAD, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of possession of a firearm by a felon (felon-in-possession), MCL 750.224f, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and possession of marijuana, MCL 333.7403(2)(d). Defendant was sentenced to terms of imprisonment of 3 to 15 years for the felon-in-possession conviction and 62 days for the marijuana conviction, to be served consecutively to a mandatory 2-year term for the felony-firearm conviction. We affirm.

Defendant argues the search warrant at issue in this case was invalid and that the shotgun recovered during the search of his home should have been excluded. We disagree.

"A trial court's ruling on a motion to suppress evidence is reviewed for clear error, but its conclusions of law are reviewed de novo." *People v Unger*, 278 Mich App 210, 243; 749 NW2d 272 (2008). A reviewing court must give great deference to a magistrate's determination of probable cause. *Id*. "Appellate review of a magistrate's determination whether probable cause exists to support a search warrant 'involves neither a de novo review nor application of an abuse of discretion standard. Rather, the preference for warrants . . . requires the reviewing court to ask only whether a reasonably cautious person could have concluded that there was a "substantial basis" for the finding of probable cause.'" *Id.* at 243-244, quoting *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992).

"A search warrant may not be issued unless probable cause exists to justify the search." *People v Waclawski*, 286 Mich App 634, 697; 780 NW2d 321 (2009). Probable cause exists when the facts and circumstances would allow a reasonable person to believe that contraband or evidence of a crime will be found in a particular place. *People v Keller*, 479 Mich 467, 475; 739 NW2d 505 (2007); see also *Unger*, 278 Mich App at 244. "Probable cause must be based on

facts presented to the issuing magistrate by oath or affirmation," such as by means of an affidavit. *Waclawski*, 286 Mich App at 698. An affidavit must be read in a realistic and commonsense manner. *Unger*, 278 Mich App at 244. The standard to be applied by the reviewing court is whether a reasonably cautious person could have concluded there was a substantial basis for the finding of probable cause to issue the warrant. *People v Mullen*, 282 Mich App 14, 21; 762 NW2d 170 (2008).

In the present case, the affidavit listed several facts that would lead a reasonably cautious person to conclude there was a substantial basis for believing that contraband or evidence of a crime would be found at the stated property, namely the house thought to be located at 11612 South Castle Road. The police were investigating the drug-producing activities of certain individuals. An identified witness saw these individuals in possession of drug-making equipment while at the subject property. The witness described the property as a white, two-story house with a nearby barn. The witness's testimony was partially corroborated when a police officer went with the witness to the property and observed a nearby mailbox with the address 11612, as well as a two-story white house with a nearby barn. Taken as a whole, a reasonably cautious person could have believed that equipment used in the production of a controlled substance would be found at the property.

Defendant argues that the witness and the police never specifically observed him engaged in any wrongdoing or suspicious activity. Consequently, defendant asserts that the firearm seized during the execution of the search warrant should have been excluded from evidence. This argument, however, is immaterial. As noted above, the proper standard is whether there is probable cause to believe that contraband or evidence of criminal activity may be found at the described location. *Keller*, 479 Mich at 475.

Defendant also argues that the trial court gave a prejudicial jury instruction and that he is therefore entitled to a new trial. While the jury instruction may appear harsh when read in isolation, we perceive no abuse of discretion when the instruction is viewed in the overall context of this case.

Claims of instructional error are reviewed de novo. *People v McKinney*, 258 Mich App 157, 162; 670 NW2d 254 (2003). The determination whether a jury instruction is applicable to the facts of a case is within the sound discretion of the trial court. *Id*. at 163. "Jury instructions are reviewed in their entirety to determine if error requiring reversal occurred." *Id*. at 162.

A trial court may, in its discretion, "comment on the evidence, the testimony, and the character of the witnesses as the interests of justice require." MCR 2.516(B)(3); see also *People v Anstey*, 476 Mich 436, 451-452; 719 NW2d 579 (2006). "The trial court's authority to comment on the evidence encompasses the power to summarize the evidence relating to the issues, call the jury's attention to particular facts, and point out the important testimony so as to lead the jury to an understanding of its bearings." *Id.* at 453 (internal quotation marks and citations omitted). "The trial court's comments must be fair and impartial, and the court should not make known to the jury its own views regarding disputed factual issues, the credibility of the witnesses, or the ultimate question to be submitted to the jury." *Id.* at 453-454 (internal quotation marks and citations omitted).

Defendant argues that the trial court's instruction regarding the defense witness was not fair and impartial for two reasons. First, defendant argues that the trial court showed its bias by telling the jury that the witness was not timely disclosed to the prosecution. Second, defendant argues that the trial court's instruction discredited the testimony of the witness, who was critical to the defense.

The trial court instructed the jury:

> In this case there was testimony by [a defense witness] who was not disclosed to the People in a timely manner. You should examine this witness's testimony closely and be very careful about accepting it. You should think about whether [the witness's] testimony is supported by other evidence. When you decide whether to believe this witness consider the following: was the witness's testimony falsely slanted in favor of the defendant? Does she have some bias in favor of the defendant? In general, you should consider the testimony of this witness more cautiously than that you would of any other witness. You should be sure that you've examined it closely before you base a decision on it.

Defendant's first point is unsupported. Defendant cites no authority for his proposition that it was improper for the trial court to tell the jury that the witness was not timely disclosed to the prosecution. We cannot conclude that the court abused its discretion by informing the jury of the witness's untimely disclosure.

With respect to defendant's second point, we note that a party must generally disclose the names and addresses of all lay and expert witnesses whom the party intends to call no later than 28 days before trial. MCR 6.201(A)(1). If a party violates this rule, "the court, in its discretion, may . . . prohibit the party from introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances." MCR 6.201(J). The court's decision to exclude evidence or enter any other order under MCR 6.201(J) is reviewable only for an abuse of discretion. *Id*.

Here, defendant did not inform the prosecution of the witness until a few days before trial began. Indeed, as the trial court recognized, defendant's introduction of the witness was "a little bit of a surprise" for the prosecution. It is clear that, because of defendant's late disclosure of the witness, the trial court could have excluded the witness's testimony altogether. *Id*.; see also *People v Elkhoja*, 251 Mich App 417, 439; 651 NW2d 408 (2002), vacated in part on other grounds 467 Mich 916 (2003). But instead of completely excluding the witness's testimony, the trial court fashioned a less severe remedy, instructing the jury merely that the testimony of the late-disclosed witness should be carefully scrutinized and weighed with caution.

We fully acknowledge defendant's argument that the jury instruction in this case constituted a "charge for conviction" in violation of *People v Brown*, 43 Mich App 170; 204 NW2d 72 (1972). In *Brown*, the trial court instructed the jury:

> You will determine the factual situation here because either Emmet Evans is a liar or this defendant, James Edward Brown, is a liar.

> In so doing, you will weigh, analyze the respective theories of each side, and in fact, if you find that the defendant did assault Emmet Evans on this date and this occasion, then you will convict him. Disregarding any sympathy you may have for his cause or for the defendant himself because he does have a physical affliction. Because in a larger sense, this is not the case of the People of the State of Michigan on behalf of Emmett Evans, it is the peace and dignity of the peace of the people of the State of Michigan for whom you represent [sic] that is making the charges here today. For we are in difficult times in this country. We are now in a situation where we are going to have the rule of law or the rule of the mob. Because you have listened to this testimony and if an assault did take place, this man was not assaulted because he was Emmett Evans, he was not assaulted because he was a wrestling instructor at Wayne University. He was assaulted, if one took place, because someone thought he was a pig. The proper vernacular these days for a policeman.
>
> On the other hand, if you find no matter what your personal feelings might be, that in fact no assault and battery took place, then you will acquit the defendant.
>
> But, there are two diametrically opposed positions in this case. I say someone is a liar. You will determine by your verdict who is the liar. [*Id*. at 173-174.]

The *Brown* Court characterized this jury instruction as a "charge for conviction" because the trial court had essentially issued an "exhortation[] to the jurors to convict the defendant." *Id.* at 175. The *Brown* Court concluded that, given the trial court's strong language and one-sided instruction, it was meaningless for the trial court to tell the jurors that they were the sole judges of the facts. *Id.* at 175-176.

Unlike the instruction in *Brown*, the jury instruction given in the present case was not an "exhortation[] . . . to convict the defendant." It is true that the trial court brought to the jury's attention that there had been a late disclosure of the witness. However, the court left open the possibility that the jurors would find the witness credible. Indeed, unlike in *Brown*, the trial court in this case did not instruct the jurors that the witness was likely "a liar" or that the witness's testimony was "diametrically opposed" to the other evidence of the case. In contrast to the instruction in *Brown*, the instruction in the instant case simply did not convey to the jurors that they should convict defendant regardless of the evidence. See *People v Bowen*, 77 Mich App 684, 687-688; 259 NW2d 189 (1977).

Considering the trial court's right to "comment on the evidence, the testimony, and the character of the witnesses," MCR 2.516(B)(3), and to fashion a remedy for the late disclosure of witnesses, MCR 6.201(J), we cannot conclude that the court abused its discretion by giving the challenged instruction in this case. The instruction did not amount to an impermissible "charge for conviction."

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Pat M. Donofrio