

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDALL KEVIN HENRY,

Defendant-Appellant.

UNPUBLISHED
December 5, 2013

Nos. 306449 and 308963
Ingham Circuit Court
LC Nos. 10-001265-FC;
10-001266-FC

Before: BORRELLO, P.J., and M. J. KELLY and BOONSTRA, JJ.

PER CURIAM.

In these consolidated appeals, in Docket No. 308963, defendant appeals as of right his jury-trial convictions of four counts of armed robbery, MCL 750.529. In Docket No. 306449, defendant appeals as of right his conviction of one count of armed robbery, MCL 750.529. The trial court joined the cases and both were tried before the same jury. The trial court sentenced defendant as a habitual offender, fourth offense, MCL 769.12, to 216 to 420 months' imprisonment for each conviction. For the reasons set forth in this opinion, we remand this case for an evidentiary hearing to develop a factual basis regarding defendant's Fourth Amendment challenge and one of defendant's claims of ineffective assistance of counsel. We hold resolution of the remaining issues presented for review in abeyance pending completion of the evidentiary hearing.

I. FACTS

Defendant's convictions arise out of a series of armed robberies that occurred at the L&L Gas Express in Lansing on November 16, November 17, November 20, and December 2, 2010 and one armed robbery that occurred at a nearby Quality Dairy on December 2, 2010. For purposes of clarity, we will separately discuss the evidence that correlates with each specific instance of armed robbery before discussing other general evidence that was introduced at trial.

NOVEMBER 16, 2010 L&L GAS EXPRESS ROBBERY

On November 16, 2010, Christopher Selover was working as an attendant at the L&L Gas Express in Lansing. At about 4:20 p.m., Selover was alone in the gas station when an African American man arrived and robbed the store. Selover testified that the man stood approximately 5-foot-5-inches to 5-foot-6-inches tall and weighed about 150 to 160 pounds. Selover testified that he recognized the man because he previously entered the gas station on at

least five other occasions and wore a dark colored ice company uniform. During the robbery, the man wore a large “puffy” black coat and a black stocking cap with a little visor. Selover testified that the man approached the front counter and asked for a Black & Mild cigar. Selover turned around to get the cigar, and when he turned back around, the man was holding a gun and demanded money. Specifically, Selover testified that the man pointed a silver semi-automatic handgun at him and stated, “This isn’t a joke. Give me the money. . . .” Selover handed money from the cash register to the man. After the man took the money, as he walked out of the building, he told Selover not to be a “hero,” and not to call the police or “push any buttons.” The man then got on his bicycle and rode north.

David Bismack, the Lansing district manager for the Arctic Glacier Ice Company, testified that defendant previously worked for Arctic Glacier assisting with ice deliveries. Bismack testified that employees such as defendant wear navy blue t-shirts or sweatshirts with the Arctic Glacier name on it during deliveries.

NOVEMBER 17, 2010 L&L GAS EXPRESS ROBBERY

On November 17, 2010, Richard Mellot was working as an attendant at the L&L Gas Express. At about 8:20 p.m. when he was alone in the store an African American man who stood between 5-feet-8-inches and six-feet tall and weighed about 180 pounds entered and robbed the store. Mellot saw the man’s face and he identified defendant as the man who robbed him that night. Mellot testified that defendant wore a dark colored coat with fur trim and a knit hat with a “tiny bill” on it. Mellot testified that defendant approached the front counter and asked for a Black & Mild cigar. Mellot turned to get the cigar, and when he turned back around, defendant was holding a black and silver 9-milimeter handgun and demanded “the money.” Defendant told Mellot that he had “two seconds to open the drawer before I shoot you.” Mellot gave defendant over \$200 and defendant left the gas station and walked toward the Dorchester apartment complex located nearby.

During the investigation, Detective Steven McClean presented Mellot with a photograph array of six individuals including defendant. Mellot refused to identify anyone “100-percent” without observing the suspects in person.

NOVEMBER 20, 2010 L&L GAS EXPRESS ROBBERY

On November 20, 2010, Kelly Buell was working at the L&L Gas Express at 7:20 a.m. when an African American wearing a gray hooded sweatshirt robbed the store. Buell estimated that the man was about six-feet tall and weighed about 180 pounds. Buell identified defendant as the man who robbed her. Buell testified that defendant stated, “you know the deal. Give me the money. Hurry up, you have two seconds.” When defendant demanded money, Buell did not see a weapon. Buell testified that she handed defendant money, and as defendant was walking out of the store, he told her not to “push any buttons.” At that point, Buell saw that defendant was holding scissors in his sleeve.

McClean presented a photograph array of six photographs of individuals, including defendant, on a single page. Buell was unable to identify anyone in that array. However, when

McClellan presented a separate array of six individual photographs on separate pages to Buell, she identified defendant as the perpetrator with 90-percent certainty.

DECEMBER 2, 2010 L&L GAS STATION ROBBERY

On December 2, 2010, Selover was working at the L&L Gas Express and was in the store alone at 6:17 p.m. when a man robbed the store. Selover testified that the robber was “the same man” that previously robbed him on November 16, 2010. Selover testified that, on this occasion, the man wore a camouflaged “puffy” jacket with fur around the top with an orange interior lining. Selover explained that the man walked in and laughingly said, “you know what the f----- deal is.” Selover testified that as he handed money to the man, the man reached into his waistline as if he was going to pull out a gun. The man then left the gas station and walked toward the Dorchester apartment complex located nearby.

DECEMBER 2, 2010 QUALITY DAIRY ROBBERY

On December 2, 2010, Tamara Miller and Taylor Hatz were working the late-night shift at the Quality Dairy store at the corner of Washington and Jolly Road in Lansing, when an African American male about five-feet-eight-inches tall and weighing about 140-150 pounds entered and robbed the store. At trial, both Miller and Hatz testified that defendant was the man who committed the robbery. Hatz testified that he saw defendant’s face and looked him in the eye. Miller testified that defendant was wearing a hooded sweatshirt that was “dark brown, or a dark color like that.” Hatz testified that defendant wore a textured dark hooded sweatshirt. Miller testified that defendant walked behind the front counter and demanded that she open the cash register drawer while holding a long knife. Miller complied, and when she opened the drawer, defendant took cash out of the register and then ran to the door and told Miller not to “touch anything” and that he would be back.

Candace Brickley and Berkley Watson were shopping at the Quality Dairy at the time of the robbery. Brickley did not see the robber. Watson testified and agreed that on the night of the robbery, she informed police that she did not see the robbery or the person who committed the robbery. However, at trial, Watson testified that she saw defendant in the store at about the time of the robbery when he briefly walked by her. Watson testified that defendant wore a tan or “Carhartt” colored long-sleeved shirt or hooded jacket.

POLICE INVESTIGATION AND OTHER EVIDENCE

On December 5, 2010, Sergeant Joe Brown of the Lansing Police Department went to the Dorchester apartment complex located about four blocks away from the L&L Gas Express on an unrelated call. Brown attempted to make contact with the occupants of apartment 104 to no avail. Brown testified that he and other officers entered the apartment after observing pry marks on an unsecured window at the apartment. Specifically, Brown testified as follows:

We were following up on an unrelated call looking for possible accused in another event, and we were concerned that with the pry marks, the open window, that’s indicative of somebody breaking into a residence rather than using the key. We needed to check the welfare to make sure that there were no victims and to see if there were any suspects within the apartment.

Brown testified that when police entered the apartment they found “Randall Henry” and another man lying on a mattress in a bedroom. Brown observed cash currency that appeared to be hidden under the mattress and he recalled seeing a black puffy coat on a couch in the apartment. Police arrested the men and obtained a search warrant for the apartment. During execution of the search warrant, police found a black “puffy” coat with the name “M. Amery” inscribed on it, a camouflaged jacket with an orange interior lining and fur trim around the hood, two pair of scissors, \$30 in cash, a leather cap, and a brown/gray reversible hooded sweatshirt. The brown side of the reversible hooded sweatshirt was a textured pattern and the gray side was a sweatshirt-type weave. The items were admitted into evidence at trial.

Police obtained copies of the surveillance videos of all five robberies. Michigan State Police Detective Sergeant James Young testified as an expert in forensic video analysis. He made still photographs from the surveillance videos then conducted a comparison of the camouflaged coat, the hooded sweatshirt, and the black puffy coat that police seized from the apartment with the coats worn by the perpetrator in the surveillance videos. He was 99-percent sure that the camouflage coat recovered from the apartment was the same one worn in one of the surveillance videos and he pointed out nine matching unique characteristics. He also determined that the brown side of a recovered sweatshirt was probably the same as the brown side of a sweatshirt observed in one of the surveillance videos. However, his analysis was inconclusive with respect to the gray side of the sweatshirt and the black puffy coat.

Following defendant’s arrest at the Dorchester apartment, police interrogated defendant. A video recording of the interrogation was admitted into evidence at trial. During the interview, defendant admitted committing robberies at the L&L, but he did not specifically state that he was involved in the November 17, 2010 robbery and he did not provide any details about his possible involvement. Defendant stated that he committed the robberies because he needed money to support his drug addiction. Defendant admitted using a BB gun during the November 16, 2010, L&L robbery. Defendant thought he used scissors at the Quality Dairy robbery, not at the L&L robbery on November 20, 2010. However, defendant admitted to robbing the L&L while dressed in a gray hooded sweatshirt and Buell testified that defendant, with scissors in hand, was wearing a gray hooded sweatshirt when he robbed the L&L on November 20, 2010.

Defendant also admitted to the robbery at the Quality Dairy. Defendant agreed that the robbery in the camouflage coat was “the last one.” He said he did not use a weapon at that robbery. Defendant was convicted and sentenced as set forth above. This appeal ensued.

II. ANALYSIS

A. WARRANTLESS ENTRY

In a Standard 4 brief, defendant contends that police violated his Fourth Amendment rights by entering Dorchester apartment 104 without a warrant.

“It is a ‘basic principle of Fourth Amendment law’ that searches and seizures inside a home without a warrant are presumptively unreasonable.” *Payton v New York*, 445 US 573, 586; 100 S Ct 1371; 63 L Ed 2d 639 (1980) (quotation and citation omitted). The prosecution contends that defendant does not have standing to challenge the search. A defendant has

standing to challenge a search if he had “a reasonable expectation of privacy in the place that was searched.” *People v Powell*, 235 Mich App 557, 561; 599 NW2d 499 (1999). Whether a person has a reasonable expectation of privacy in a particular area “should be decided after considering the totality of the circumstances.” *People v Perlos*, 436 Mich 305, 317-318; 462 NW2d 310 (1990). The defendant has the burden to establish standing. *Powell*, 235 Mich App at 561. In the event that a defendant has standing to challenge a search, “[g]enerally, a search conducted without a warrant is unreasonable unless there exist[s] both probable cause and a circumstance establishing an exception to the warrant requirement.” *People v Snider*, 239 Mich App 393, 407; 608 NW2d 502 (2000) (internal quotation marks and citation omitted).

In this case, the record shows that defendant had standing to challenge the warrantless search and seizure. At the time of entry, defendant and a man were at the apartment lying on a bed. During the police interrogation, defendant indicated that he did not rent the apartment. Instead, defendant stated that a man named “Levell” leased the apartment. Defendant told police that Levell allowed him to stay in the apartment for a few days. In addition, evidence shows that police found several articles of clothing in the apartment that were linked to defendant. This evidence indicates that defendant was an overnight guest at the apartment. He was sleeping at the apartment, he had personal belongings there, and he informed police that the owner of the apartment allowed him to stay there for several days. As such, defendant has standing to challenge the warrantless entry. See *Minnesota v Olson*, 495 US 91; 110 S Ct 1684; 109 L Ed 2d 85 (1990); *Minnesota v Carter*, 525 US 83, 89-90; 119 S Ct 469; 142 L Ed 2d 373 (1998); *People v Parker*, 230 Mich App 337, 340-341; 584 NW2d 336 (1998) (although a mere visitor does not have a reasonable expectation of privacy in his guest’s home, an overnight guest may have a legitimate expectation of privacy in the premises).

Although the record allows us to determine that defendant has standing to challenge the warrantless entry, the record does not contain sufficient facts to allow us to determine whether the entry violated the Fourth Amendment. Because defendant presents a plausible argument that his Fourth Amendment rights were violated, and because resolution of this issue requires development of a factual record, we find it necessary to remand this case for an evidentiary hearing.¹

¹ MCR 7.211(C)(1)(a)(ii) provides that a defendant seeking a remand for “development of a factual record . . . required for appellate consideration” of an issue sought to be reviewed on appeal should file a motion for remand “[w]ithin the time provided for filing the appellant’s brief.” Defendant did not move for a remand in this Court and he did not include any request for a remand in the statement of his issues present. However, at one point in his Standard 4 brief, defendant requests that this Court grant him an “evidentiary hearing for purposes of the anonymous man.” It appears that defendant contends that police entered apartment 104 based on information from an anonymous tip. There is nothing in the court rules to suggest that defendant may not request a remand in an appellate brief under MCR 7.212(C)(8). Moreover, irrespective of whether defendant requested a remand, MCR 7.216(A)(5) and (7) provides this Court with the authority to remand for an evidentiary hearing without a motion from defendant.

Pursuant to MCR 7.216(A)(5) and (7), this Court has authority to remand for an evidentiary hearing “at any time . . . in its discretion, and on the terms it deems just.” Whether to remand a case for an evidentiary hearing is within the discretion of this Court, and in deciding whether to remand a case, we consider whether the moving party has demonstrated that the issue is meritorious. See *People v Hernandez*, 443 Mich 1, 14-15; 503 NW2d 629 (1993). Remand is appropriate if a factual record is required for appellate consideration of the issue. MCR 7.211(C)(1)(a)(ii). The moving party must support a request for a remand with an affidavit or other offer of proof. MCR 7.211(C)(1)(a).

In this case, the record is unclear regarding the facts and circumstances surrounding the warrantless entry. Brown’s limited testimony is the only record evidence concerning the warrantless entry and the testimony in and of itself is insufficient to allow us to determine whether the entry fell within one of the recognized exceptions to the Fourth Amendment’s warrant requirement.² Specifically, Brown testified that he was dispatched to the apartment complex on an “unrelated call looking for possible accused in another event.” Brown explained that he responded directly to Dorchester apartment 104. Brown stated that officers entered the apartment without a warrant after noticing “several marks which appear to be pry marks” in the lower left corner of apartment 104’s window, and he stated that he was concerned that someone forced entry into the apartment. Brown agreed that somebody could have been hurt in the apartment. Brown’s testimony standing alone does not allow us to determine if the warrantless entry fell within an exception to the warrant requirement. Brown did not articulate why police initially zeroed-in on apartment 104 in particular and he did not explain what type of “unrelated call” police were responding to. Brown did not indicate whether the unrelated incident involved an armed suspect who fled into apartment 104, whether the incident involved an individual who was at the apartment complex in general, or whether the incident involved a less-serious offense that did not involve a potentially armed and dangerous individual. Furthermore, defendant attaches police reports to his Standard 4 brief that conflict with Brown’s testimony that police observed pry marks on the window.³ These reports could refute the assertion that police were concerned that someone broke into the apartment or that there were potential victims in the apartment. Given that the reports are not part of the lower court record, it is not appropriate for us to make findings of fact based on these attachments. See *Powell*, 235 Mich App at 561 n 4 (noting that it is improper for a party to expand the record on appeal). Accordingly, remand for an evidentiary hearing is appropriate. On remand the trial court should determine whether the facts establish that at the time police entered the apartment, they had probable cause and

² The prosecution contends that “exigent circumstances” were present in this case that justified police entry into the apartment. However, the prosecution fails to articulate which of the “exigent circumstances” exceptions applied in the instant case.

³ For example, at trial, Brown testified that he observed that the apartment window was damaged when he saw “pry marks” in the lower corner of the window, however, in his incident report, Brown stated: “I was standing to the right (north) of the apartment window, and notice that it was not completely closed[.] I pulled the sliding window open from left to right, and I found that it was unsecured[.] *I could not determine if the window had damage from forced entry*, due to the vertical blinds getting in the way[.]” (Emphasis added).

circumstances existed that established an exception to the warrant requirement. See *Snider*, 239 Mich App at 407; see also *People v Cartwright*, 454 Mich 550, 558; 563 NW2d 208 (1997) (describing exigent circumstances exception).

In addition, in the event that police violated defendant's Fourth Amendment rights by entering the apartment without a warrant, the evidence obtained pursuant to the subsequent search warrant may have been improperly admitted at trial. It is well-established that evidence seized pursuant to a search warrant issued on the basis of evidence illegally obtained is inadmissible under the "fruit of the poisonous tree" doctrine. See *Wong Sun v United States*, 371 US 471, 485-486; 83 S Ct 407; 9 L Ed 2d 441 (1963); *People v Stevens (After Remand)*, 460 Mich 626, 634; 57 NW2d 53 (1999). Here, the affidavit in support of the search warrant was not part of the lower court record.⁴ In the event that the trial court finds the initial entry violated the Fourth Amendment, the trial court should make findings of fact to determine whether police would have sought and obtained the search warrant based on information wholly independent from the information obtained during the illegal entry. See e.g. *Segura v United States*, 468 US 796, 805; 104 S Ct 3380; 82 L Ed 2d 599 (1984) ("It has been well established . . . that evidence is not to be excluded if the connection between the illegal police conduct and the discovery and seizure of the evidence is so attenuated as to dissipate the taint") (quotation and citation omitted); *People v Smith*, 191 Mich App 644, 650; 478 NW2d 741 (1991), citing *Murray v United States*, 487 US 533, 542; 108 S Ct 2529; 101 L Ed 2d 472 (1988) ("[i]f nothing seen by the officers upon their initial [unlawful] entry either prompted the officers to seek a warrant or was presented to the magistrate and affected the decision to issue the warrant, the evidence [seized during the execution of the warrant] need not be suppressed"). Here, if the search warrant was sought and obtained pursuant to an independent source, then evidence seized during execution of the search warrant was properly admitted at trial. *Id.* However, in the event the trial court finds that the search warrant was not based on an independent source, then evidence seized during execution of the warrant was improperly admitted at trial and the court should determine whether admission of the evidence affected defendant's substantial rights.⁵

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant raises several claims of ineffective assistance of counsel in his Standard 4 brief. Whether a defendant was deprived the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review the trial court's factual findings, if any, for clear error, while constitutional determinations are reviewed de novo. *Id.*

In order to demonstrate that he was denied the effective assistance of counsel under either the federal or state constitution, a defendant must first show that trial counsel's performance was

⁴ The prosecution attaches the affidavit to its reply to defendant's Standard 4 brief; however, a party may not expand the record on appeal and we therefore decline to make findings of fact with respect to the affidavit. See *Powell*, 235 Mich App at 561 n 4.

⁵ See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

“deficient,” and second, a defendant must show that the “deficient performance prejudiced the defense.” *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). “To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different.” *Id.* at 600.

Defendant contends that counsel was ineffective for failing to make “mandatory pre-investigations” and by failing to locate and question alibi witnesses. However, defendant fails to articulate, and the record does not reveal, what “pre investigations” counsel should have made or who the alleged alibi witnesses were, what testimony they could have offered, or how their testimonies would have made any impact at trial. Accordingly, defendant has abandoned his argument for review. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) (“An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority”).

Defendant also contends that trial counsel rendered ineffective assistance when he failed to make “appropriate objections.” Defendant does not articulate what objections counsel should have made other than noting that counsel failed to move to suppress evidence obtained as a result of the warrantless entry. As discussed above, resolution of whether the warrantless entry violated the Fourth Amendment requires remand for an evidentiary hearing. Similarly, whether counsel denied defendant effective assistance in failing to raise a Fourth Amendment challenge in the trial court requires a *Ginther*⁶ hearing. Specifically, this issue requires factual inquiry into the reasons why counsel did not challenge the warrantless entry in the trial court, whether the failure to challenge the entry amounted to deficient performance, and if so, whether the deficient performance prejudiced defendant. See *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973); *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *Carbin*, 463 Mich at 599-600.

C. REMAINING ISSUES

Defendant raises several other issues on appeal. Specifically, defendant contends (1) that there was insufficient evidence to support one of his convictions, (2) that police failed to honor his unambiguous assertion of his Fifth Amendment right to silence during the custodial interrogation, (3) that he was deprived of his Sixth Amendment right of confrontation, and (4) that the prosecution’s failure to disclose the identity of the confidential informant amounted to a violation of *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). Given that resolution of the issues on remand may impact the prejudicial effect of any of these alleged errors, we hold resolution of these remaining issues in abeyance pending the outcome of the evidentiary hearing.

In sum, we hold that defendant has standing to raise a Fourth Amendment challenge to the warrantless entry and we remand this case for the trial court to conduct an evidentiary hearing to resolve whether the warrantless entry violated the Fourth Amendment. In addition,

⁶ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

we conclude that defendant has failed to demonstrate ineffective assistance of counsel in regard to all of his claims except the claim that counsel was ineffective for failing to raise a Fourth Amendment challenge in the trial court. Therefore, we remand for a *Ginther* hearing on that claim.

Remanded for further proceedings consistent with this opinion. We retain jurisdiction and hold in abeyance resolution of the additional issues raised in this appeal.

/s/ Stephen L. Borrello
/s/ Michael J. Kelly

Court of Appeals, State of Michigan

ORDER

People of Michigan v Randall Kevin Henry

Docket No. 306449;308963

LC No. 10-001265-FC; 10-001266-FC

Stephen L. Borrello
Presiding Judge

Michael J. Kelly

Mark T. Boonstra
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 28 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded. As stated in the accompanying opinion, this Court holds in abeyance the remaining issues raised in this case. The proceedings on remand are limited to these issues.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

DEC 05 2013

Date


Chief Clerk