STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 24, 2005
v	No. 253766 Wayne Circuit Court
DANIEL NEWBY, Defendant-Appellant.	LC No. 02-003910

Before: Neff, P.J., and Owens and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), possession of marijuana, MCL 333.7403(2)(d), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to a prison term of seventeen months to twenty years for the possession with intent to deliver cocaine conviction, time served for the possession of marijuana conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals by delayed leave granted. We affirm.

I. Underlying Facts

Defendant's convictions arise from allegations that, on February 21, 2002, he was operating a drug house at 20481 Hawthorne Street in Detroit. The house was a white frame house with one address and one mailbox. The house appeared as a single-family residence from the outside, but was actually a duplex, and defendant resided in the upstairs flat. On February 21, 2002, at 6:45 p.m., the police executed a search warrant for the house. After the police knocked and announced their presence, an officer removed the security grate door, and another officer rammed the front door in order to gain entry. When the police entered the house, they heard noises and running upstairs. Officers ran up the stairs, which were by the front door.

Once upstairs, Officer Juan Davis observed defendant and codefendant Winsean Armstrong running from the living room toward the kitchen, which was located at the rear of the house. Defendant was in front of codefendant Armstrong, and neither defendant heeded the officer's orders to stop. As codefendant Armstrong ran, he tossed a loaded automatic firearm through a doorway into a bedroom. He continued in the kitchen and laid down on the floor. Two other individuals, Felicia Smith and Gregory Nettles, were in the kitchen leaning against the sink.

As codefendant Armstrong surrendered, defendant continued running through the kitchen, opened the back door, and went onto an outside balcony. Moments later, defendant returned to the kitchen and laid down on the floor. An officer, who was positioned in the backyard as rear security, observed an individual wearing a hooded sweatshirt quickly toss an object off the balcony, and go back into the house. The object was a fully loaded, .357 Colt blue steel revolver. Police witnesses identified defendant as the only person in the house wearing a hooded sweatshirt.

Upon searching defendant, the police found a gun holster situated on his right side, and $101. A search of codefendant Armstrong revealed a plastic baggie containing nine individual packets of marijuana, totaling 20.18 grams, $1,680, and a gun holster. Neither Smith nor Nettles had any drugs, but Nettles had a ceramic pipe used for smoking crack cocaine in his pocket.

In plain view, on the dining room table, officers observed loose marijuana in a baggie, several empty ziplock bags, and an Ajax canister. An officer unscrewed the Ajax canister and found fourteen individual packets of cocaine and loose chunks of cocaine, totaling 5.37 grams. In the flat, the police found a utility bill addressed to defendant on a bookshelf, defendant's keys to the house in a bedroom, and defendant's Michigan identification card showing the Hawthorne address. The evidence established that neither codefendant Armstrong, Nettles, nor Smith lived in the house.

In a statement made to the police, defendant stated that he had resided at the Hawthorne residence for six months. He admitted ownership of the marijuana and that he knew "of the cocaine being here," but denied being in possession of the cocaine or selling drugs. He refused to answer questions about "any gun."

II. Motion to Suppress

Defendant first argues that the trial court erred by denying his motion to suppress evidence seized during the search because the search warrant was invalid. Defendant contends that the affidavit did not provide sufficient facts to find that the information supplied was based on personal knowledge or was reliable, and that the warrant incorrectly described the place to be searched as a "single family" home.

The trial court concluded that the police had probable cause to search the residence. Relying on *Maryland v Garrison*, 480 US 79, 87; 107 S Ct 1013; 94 L Ed 2d 72 (1987), the trial court also found that the discrepancy regarding the character of the dwelling in the search warrant amounted to a "reasonable mistake."[1] The court noted that, once the officers entered the house and heard a commotion upstairs, they had to secure the premises because of personal and public safety concerns.

[1] In *Garrison*, the Supreme Court reversed a lower court's ruling that invalidated a search warrant issued to search the apartment on the third floor of a building because the third floor was actually divided into two apartments. The Court concluded that, under the circumstances, the warrant was nonetheless valid because the police did not know, nor should they have known, that there were multiple dwelling units on the third floor. *Id*. at 79-80, 85.

This Court reviews a trial court's factual findings on a motion to suppress for clear error, but the court's ultimate decision is reviewed de novo. *People v Echavarria*, 233 Mich App 356, 366; 592 NW2d 737 (1999). Clear error exists where this Court is left with the definite and firm conviction that a mistake has been made. *People v Parker*, 230 Mich App 337, 339; 584 NW2d 336 (1998).

A search warrant may not issue unless probable cause exists to justify the search. US Const, Amend IV; Const 1963, art 1, § 11; MCL 780.651. "Probable cause to issue a search warrant exists where there is a 'substantial basis' for inferring a 'fair probability' that contraband or evidence of a crime will be found in a particular place." *People v Kazmierczak*, 461 Mich 411, 417-418; 605 NW2d 667 (2000). The magistrate's findings of probable cause must be based on the facts related within the affidavit. MCL 780.653; *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001). In assessing a magistrate's decision with regard to probable cause, a reviewing court must evaluate the search warrant and underlying affidavit in a commonsense and realistic manner, giving deference to the conclusion that probable cause existed, and determine whether a reasonably cautious person could have concluded, under the totality of the circumstances, that there was a substantial basis for a finding of probable cause. *People v Russo*, 439 Mich 584, 603-605; 487 NW2d 698 (1992); *People v Poole*, 218 Mich App 702, 705; 555 NW2d 485 (1996).

In this case, an unnamed informant provided information regarding suspected drug trafficking in the residence. A search warrant affidavit may be based on information supplied by a unnamed informant if the affidavit contains "affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable." MCL 780.653; *Poole*, *supra* at 706. A finding of personal knowledge should be derived from the information provided and not merely from a recitation that the informant had personal knowledge. *People v Stumpf*, 196 Mich App 218, 223; 492 NW2d 795 (1992). Further, "[i]f personal knowledge can be inferred from the stated facts, that is sufficient to find that the informant spoke with personal knowledge." *Id*.

Here, the search warrant affidavit provided sufficient facts from which a magistrate could find that the information supplied by the unnamed informant was based on personal knowledge and was reliable. The affiant, Officer Davis, stated that, on February 19, 2002, the police received an anonymous phone call, and the unnamed informant stated that the seller, described as a black male, age 30 to 35, six-feet tall, 180 lbs., with a medium complexion and a medium build, lived at the specified address, which was a two-story "single family white wood dwelling located on the West side of the street, between 8 mile and Winchester . . . ." The unnamed informant indicated that the seller "will only sell to people that the seller knows."

Although the affiant's lack of any prior dealings with the informant may raise a question regarding the informant's credibility, there were sufficient facts to establish that the information provided by the informant was reliable. The affiant, who is a member of the Narcotics Bureau, had received specialized training in "narcotic trafficking [i]nvestigations," and had been involved in numerous drug-related investigations. The affiant stated that he set up a "fixed surveillance" for thirty minutes at the address provided by the unnamed informant. The affiant observed six individuals, each arriving separately, enter the house, and leave within a short time. On two separate occasions, the affiant talked to two white males after they came out of the house. He

asked both "if they were up?" Both individuals said yes, and showed the affiant "one ziplock each of suspected crack cocaine."

The affiant's independent surveillance of the address provided by the unnamed informant verified the informant's statement that narcotics were being sold at the location. Further, the affiant had participated in "multiple narcotic raids" and, based on his experience and surveillance of the residence, he believed that illegal drug trafficking was being conducted at the address. An independent police investigation that verifies information provided by an informant can support issuance of a search warrant. *Stumpf*, *supra* at 223; *People v Harris*, 191 Mich App 422, 425-426; 479 NW2d 6 (1991). Further, an affiant's experience is relevant to the establishment of probable cause. *People v Darwich*, 226 Mich App 635, 639; 575 NW2d 44 (1997). In sum, viewing the search warrant and affidavit in a commonsense and realistic manner, and giving deference to the magistrate's conclusion, there was a substantial basis for the magistrate to determine that there was probable cause to believe that controlled substances would be found at the location.

We also reject defendant's claim that suppression is required because the search warrant incorrectly described the residence as a "single family" dwelling. A search warrant must particularly describe the place to be searched and the persons or things to be seized. US Const, Am IV; Const 1963, art 1, § 11; MCL 780.654(1); *People v Toodle*, 155 Mich App 539, 543; 400 NW2d 670 (1986). A search warrant must allow the police to determine which unit in a multi-unit structure is to be searched, "unless the multi-unit character of the dwelling is not apparent and the police officers did not know and did not have reason to know of its multi-unit character." *Id*. at 545.

The trial court correctly noted that, under certain circumstances, honest mistakes in describing a location to be searched do not invalidate a warrant. *Garrison*, *supra* at 87. But even if a successful claim could be made that the warrant was invalid, the existing record is sufficient to show that the officers seized the evidence in "reasonable, good-faith reliance" on the warrant. In *People v Goldston*, 470 Mich 523, 541; 682 NW2d 479 (2004), our Supreme Court adopted the good-faith exception to the exclusionary rule for officers executing search warrants that are subsequently found to be invalid. The good-faith exception renders evidence seized pursuant to an invalid search warrant admissible as substantive evidence in criminal proceedings when the police acted "in objectively reasonable good faith reliance" on the magistrate's determination that the search warrant was supported by probable cause and was technically sound. *Id*. at 538, 541.

In this case, the officers' reliance on the judicial determination of probable cause and technical sufficiency with regard to the search warrant was objectively reasonable. There was no reason to believe the facts alleged in the affidavit were false or that the magistrate was misled by false information. *Id*. at 542 (citation omitted). The record shows that the house appeared to be a single-family home when viewed from the street. There was only one address, one central front door, and one mailbox. Based on the record, there are no physical characteristics to suggest that the house was anything other than a single-family dwelling. Also, there is no indication that the magistrate "wholly abandon[ed] [his] judicial role," and the supporting affidavit was not "'so lacking in indicia of probable cause'" that the police could not objectively believe that the warrant was supported by probable cause. *Id*. at 542-543 (citation omitted). In addition, suppression of the evidence here "would not further the purpose of the exclusionary rule, i.e., to

deter police misconduct." *Id*. at 543. Consequently, the good-faith exception to the exclusionary rule is applicable and suppression of the evidence on the basis of an allegedly invalid search warrant is not appropriate.

III. Sufficiency of the Evidence

Next, defendant argues that the evidence was insufficient to support his convictions of possession with intent to deliver cocaine and felony-firearm because there was no proof that he possessed the cocaine or the firearm. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514-515. All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry,* 224 Mich App 447, 452; 569 NW2d 641 (1997).

A. Possession with Intent to Deliver Cocaine

To sustain a conviction for possession with intent to deliver less than fifty grams of cocaine, the prosecution is required to show (1) that the recovered substance was cocaine, (2) that the cocaine was in a mixture weighing less than fifty grams, (3) that the defendant was not authorized to possess the cocaine, and (4) that the defendant knowingly possessed the cocaine with the intent to deliver it. *Wolfe, supra* at 516-517. Defendant challenges only the possession element.

Possession of a controlled substance may be either actual or constructive, and may be joint as well as exclusive. *Id.* at 519-520. Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband. *Id.* at 520. A person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession. *Id*. "The essential question is whether the defendant had dominion or control over the controlled substance." *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of possession. *People v Fetterley,* 229 Mich App 511, 515; 583 NW2d 199 (1998).

Viewed in a light most favorable to the prosecution, the evidence was sufficient for a rational trier of fact to conclude beyond a reasonable doubt that defendant had constructive possession of the cocaine. There was undisputed evidence that defendant resided in the upstairs flat of the house, which was where the cocaine was found, and that he was present when the search warrant was executed. Of the four individuals found in the home, defendant was the only person who resided there. The evidence showed that the police found the 5.37 grams of cocaine concealed in an Ajax container sitting on defendant's dining room table. Defendant admitted that he was aware that the cocaine was there. Further, on the same dining room table, the police found a bag of loose marijuana, which defendant admitted belonged to him. There was also

evidence that defendant was wearing a holster while in his own home, and discarded a loaded weapon at the time of the search.

From this evidence, a jury could reasonably infer that defendant had constructive possession of the cocaine. Although the cocaine could have belonged to anyone in the house, possession may be joint. *Wolfe, supra*. Furthermore, even though defendant asserts that the evidence linking him to the cocaine was weak, the jury was entitled to accept or reject any of the evidence presented. See *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). Moreover, a prosecutor need not negate every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). In sum, viewed in a light most favorable to the prosecution, the evidence was sufficient to sustain defendant's conviction of possession with intent to deliver less than fifty grams of cocaine.

B. Felony-firearm

We also reject defendant's claim that there was insufficient evidence that he had possession of a firearm. The elements of felony-firearm are that the defendant possessed a firearm during the commission or attempted commission of any felony other than those four enumerated in the statute. MCL 750.227b(1); *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Possession of a weapon may be actual or constructive and may be proved by circumstantial evidence. *People v Hill*, 433 Mich 464, 469-470; 446 NW2d 140 (1989). "[A] defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant." *Id.* at 470-471.

As previously indicated, as the police were executing the search warrant, an officer positioned at the rear of the house saw an individual wearing a hooded sweatshirt throw an object off the balcony. The object was a loaded .357 Colt blue steel revolver. The evidence established that defendant was the only person in the house wearing a hooded sweatshirt. In addition, upon searching defendant, the police saw that he was wearing an empty gun holster. From this evidence, the jury could reasonably infer that defendant possessed a firearm during the commission of a felony, i.e., possession with intent to deliver cocaine. Consequently, viewed in a light most favorable to the prosecution, the evidence was sufficient to sustain defendant's conviction of felony-firearm.

IV. Prosecutorial Misconduct

We reject defendant's final claim that he is entitled to a new trial because the prosecutor improperly argued facts not in evidence. This Court reviews preserved issues of prosecutorial misconduct case by case, examining the challenged remarks in context to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

Defendant correctly asserts that the prosecutor's statement, that he was shown crack cocaine, was unsupported by the evidence and, thus, was improper. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994) (a prosecutor may not make a statement of fact to the jury that is unsupported by the evidence). Nonetheless, the challenged statement does not warrant reversal. Immediately following the prosecutor's statement, defense counsel objected, stating,

inter alia, that "[the officer] never testified that he saw them to see what he showed them to be crack cocaine . . . He's never said that . . . [the prosecutor is] lying." The trial court sustained the objection, and contemporaneously instructed the jury to "base [their] recollection based upon the testimony that was presented during the trial in [their] collective recollections." Defendant failed to request any further action by the trial court, and the prosecutor did not discuss the matter further. In its final instructions, the court instructed the jury that the lawyers' comments are not evidence, to decide the case based only on the properly admitted evidence, and to follow the court's instructions. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Further, given the police testimony that the cocaine found in the Ajax container was packaged consistent with an intent to deliver, it is unlikely that the prosecutor's improper statement affected a fair determination of the properly admitted evidence. Under these circumstances, defendant has failed to demonstrate that he was denied a fair trial by the prosecutor's statement.

Affirmed.

/s/ Janet T. Neff
/s/ Donald S. Owens
/s/ Karen M. Fort Hood