

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERANGELUS RENDEZ JAMES,

Defendant-Appellant.

UNPUBLISHED

June 27, 2006

No. 261723

Wayne Circuit Court

LC No. 04-008809-02

Before: Cooper, P.J., and Neff and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for possession of 50 or more but less than 450 grams of cocaine, MCL 333.7403(2)(a)(iii), possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v), and possession of marijuana, MCL 333.7403(2)(d). The trial court sentenced defendant, as a third habitual offender, MCL 769.11, to 12 to 40 years in prison for the possession of cocaine conviction, two to eight years in prison for the possession of heroin conviction, and one year in prison for the possession of marijuana conviction. For the reasons set forth in this opinion we affirm the convictions and sentences of defendant.

This case arose from an undercover surveillance of an apartment complex in Belleville, Michigan. The target of the investigation was Karen Simmons. While observing Simmons, an undercover detective witnessed defendant and Simmons leave the apartment and get into a vehicle registered to defendant at the Belleville apartment. The two drove to a nearby house where Simmons sold two rocks of crack cocaine. Following this drug purchase, the officer prepared an affidavit and search warrant for the apartment. Defendant and Simmons returned to the apartment. Sometime later, Simmons agreed to purchase approximately \$4,000 worth of marijuana from an undercover detective. Simmons stated that she would have to go to the bank to get the money but would meet up with the undercover officer at a local McDonald's. Police then observed defendant and Simmons return to the apartment. Later, defendant drove Simmons to the agreed meeting place, where defendant waited in his car. As soon as the purchase was completed, police arrested Simmons and defendant.

The police then executed a search warrant on the apartment and found drawers filled with men's clothing and child support notices mailed to the address in the name of defendant. They also found cocaine, marijuana, heroin and a piece of cardboard with numbers written in columns, later identified as a ledger for drug transactions.

Defendant moved to quash the warrant and suppress the evidence on the grounds that there was no reasonable suspicion to arrest him and therefore the search of his home was invalid. He also claimed that the allegations in the affidavit were insufficient to establish probable cause to issue the search warrant because there were no links between the alleged illegal activity and defendant or his residence. The trial court denied the motion holding that the affidavit was not defective because it stated that the informant had been used in the past and that the officers observed Simmons and defendant leave the apartment after the informant called Simmons and arranged a meeting to purchase crack cocaine. Simmons pled guilty to several charges and claimed that defendant did not reside in the apartment, and that all of the drugs, drug paraphernalia and cash seized at the apartment, were hers.

Defendant argues that he was denied the right of confrontation because he was unable to cross-examine the confidential informant who contacted the police. Because defendant admittedly failed to raise this issue before the trial court, it has not been properly preserved for appellate review. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). We therefore review this issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, defendant must establish that: (1) an error occurred; (2) the error was plain; and (3) the plain error affected defendant's substantial rights, i.e., it affected the outcome of the lower court proceedings. *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003), citing *Carines*, *supra* at 763.

The Confrontation Clauses of the United States and Michigan Constitutions guarantee a criminal defendant the right "to be confronted with the witnesses against him[.]" US Const, Am VI; Const 1963, art 1, § 20. The Confrontation Clause requires the unavailability of a witness and a prior opportunity for cross-examination before admitting testimonial evidence against a defendant. *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v McPherson*, 263 Mich App 124, 132; 687 NW2d 370 (2004). Defendant relies on *United States v Cromer*, 389 F3d 662, 666-668 (CA 6, 2004), in which the court concluded that a police officer's testimony about statements made to the officer by a confidential informant violated the Confrontation Clause and required reversal of the defendant's convictions. However, defendant has not identified or provided transcript references to any testimony about the confidential informant.

Due to the fact that none of the trial witnesses testified about the informant's statements to the police, defendant's reliance on *Cromer*, *supra*, is misplaced. The undercover officer testified that he was conducting surveillance at an apartment complex in Belleville and that Karen Simmons, defendant's girlfriend, was the subject of the surveillance. Further, the informant never identified or implicated defendant in any criminal activities; the informant only referenced Simmons and the Belleville apartment. Therefore, the Confrontation Clause was not implicated during defendant's trial.

Defendant contends that the police did not have probable cause to search the apartment and that the affidavit was based on unreliable, inadequate, or erroneous information. Findings of fact regarding a motion to suppress evidence are reviewed for clear error, and the trial court's ultimate decision on a motion to suppress is reviewed de novo. *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001); *People v Wilkens*, 267 Mich App 728, 732; 705 NW2d 728 (2005). Clear error occurs when this Court is left with a definite and firm conviction that a mistake was made. *Id.* at 732.

At the outset, we address the prosecutor's argument that defendant lacks standing to challenge the search warrant. Because this issue is unpreserved, this Court reviews it for plain error affecting substantial rights. *Carines, supra* at 762-763. In deciding whether a violation of the Fourth Amendment has occurred, we must first determine whether the defendant has standing to challenge the search, which involves evaluating whether the defendant had a reasonable expectation of privacy in the location that was searched based on the totality of the circumstances. *People v Powell*, 235 Mich App 557, 561; 599 NW2d 499 (1999). The defendant bears the burden of establishing standing. *Id.* An expectation of privacy is legitimate only if the individual exhibited an actual, subjective expectation of privacy and that actual expectation is one that society recognizes as reasonable. *People v Taylor*, 253 Mich App 399, 404; 655 NW2d 291 (2002). Because defendant asserted in his motion to quash a supporting brief that the Belleville apartment was his home and the police obtained other evidence indicating that it was defendant's home, he had an actual, subjective expectation of privacy that society recognizes as reasonable. *Id.* Accordingly, the trial court did not commit plain error in failing to conclude otherwise.

"The Fourth Amendment of the United States Constitution and its counterpart in the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures." US Const, Am IV; Const 1963, art 1, § 11; *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). A search warrant requires probable cause to justify the search. MCL 780.651; *Id.* at 417. Probable cause exists when the facts and circumstances would lead a person of reasonable caution to believe that "there is a 'substantial basis' for inferring a 'fair probability' that contraband or evidence of a crime will be found in a particular place." *Id.* at 417-418, quoting *People v Russo*, 439 Mich 584, 604; 487 NW2d 698 (1992); *People v Nunez*, 242 Mich App 610, 612; 619 NW2d 550 (2000). This Court must evaluate the affidavit and search warrant in a commonsense and realistic manner, granting deference to the magistrate's conclusion that probable cause existed because of the preference for the use of search warrants. *Nunez, supra* at 612-613; *People v Stumpf*, 196 Mich App 218, 227; 492 NW2d 795 (1992).

"The magistrate's findings of reasonable or probable cause shall be based on all the facts related within the affidavit made before him or her." MCL 780.653; MSA 28.1259(3). When probable cause is averred in an affidavit, the affidavit must contain facts within the knowledge of the affiant rather than mere conclusions or beliefs. However, the affiant's experience is relevant to the establishment of probable cause. Police officers are presumptively reliable; in addition, self-authenticating details establish reliability. An independent police investigation that verifies information provided by an informant can also support issuance of a search warrant. [*People v Ulman*, 244 Mich App 500, 509-510; 625 NW2d 429 (2001) (citations omitted).]

"A search warrant may be issued on the basis of an affidavit that contains hearsay." *People v Harris*, 191 Mich App 422, 425; 479 NW2d 6 (1991). Pursuant to MCL 780.653(b), the affidavit may be based upon information supplied by an unnamed person 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."

The affidavit stated that the informant could purchase cocaine from Simmons, who lived at the address of the Belleville apartment. Czernik, the undercover officer involved in the transactions, averred that the informant called Simmons and requested a meeting where he could purchase cocaine. Czernik asserted that the police observed Simmons and a black male exit the apartment, get into a tan Ford, and drive to the prearranged location. After the meeting, the informant produced cocaine that he had purchased from Simmons. The affidavit also stated that the informant had been used in the past where narcotics had been purchased and that the vehicle was registered to the address of the Belleville apartment, as provided by the informant.

The informant provided Simmons' name and address and demonstrated that he could contact Simmons over the telephone. This shows that the informant had personal knowledge of Simmons and her whereabouts. The informant participated in a "controlled buy" of cocaine from Simmons, who was seen leaving the apartment where the informant said Simmons lived. A controlled buy demonstrates reliability and is sufficient to establish probable cause for a search warrant. *People v Head*, 211 Mich App 205, 209; 535 NW2d 563 (1995). Czernik also averred that he had used this informant in the past where narcotics had been purchased. Further, a magistrate is free to make the logical inference that evidence of drug activity is often found in a drug trafficker's home. *Nunez, supra* at 614-615. Defendant was seen leaving the apartment in his vehicle, which was registered to the address provided by the informant. Defendant accompanied Simmons to a controlled buy and returned to the apartment. We therefore conclude that the affidavit satisfied the personal knowledge and reliability requirements of MCL 780.653(b). After considering the affidavit and search warrant in a commonsense and realistic manner, we further conclude that a person of reasonable caution would believe that there was a substantial basis for inferring a fair probability that contraband or evidence of drug trafficking would be found in the Belleville apartment.

Defendant next argues that there was insufficient evidence to sustain his convictions. Challenges to the sufficiency of the evidence in criminal trials are reviewed de novo to determine whether, viewing the evidence in a light most favorable to the prosecutor, any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Randolph*, 466 Mich 532, 572; 648 NW2d 164 (2002).

The elements of possession of 50-450 grams of cocaine are (1) that the recovered substance is cocaine, (2) that the cocaine is in a mixture weighing more than 50 grams and less than 450 grams, (3) that defendant was not authorized to possess the substance, and (4) that defendant knowingly possessed the cocaine. MCL 333.7403(2)(a)(iii); see also *People v Gonzalez*, 256 Mich App 212, 225-226; 663 NW2d 499 (2003) (discussing the elements of possession of less than 50 grams of cocaine with intent to deliver).

The police found a bag containing 90.19 grams of cocaine in the closet and a rock of crack cocaine weighing 35.92 grams on the headboard. There is no dispute that defendant was not authorized to possess cocaine.

The offense of possession of a controlled substance requires a showing of dominion or control over the controlled substance with knowledge of its presence and character. *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003). Possession may be either actual or constructive and may be joint or exclusive. *Id.* at 166. The defendant's mere presence where the controlled substance was found is not sufficient to establish possession; rather, an additional

connection or nexus between the defendant and the controlled substance must be established for constructive possession. *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002); *People v Wolfe*, 440 Mich 508, 520; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992). Possession may be proven by reasonable inferences drawn from circumstantial evidence. *Nunez, supra* at 615. The jury, not the appellate court, determines what inferences may be fairly drawn from the evidence. *Hardiman, supra* at 428.

The closet contained exclusively men's clothing. Defendant's vehicle was registered to the address of the apartment, and he was seen leaving the apartment in this vehicle. The police found opened mail from the Secretary of State, an insurance company, and the Wayne County Friend of the Court, addressed to defendant at the address of the apartment. Socks that appeared to be men's socks were found in the drawer of one of the hutches. Simmons lived in the apartment and admitted that she stored drugs in the apartment. Defendant's 18-year-old son was in the apartment without defendant when the police executed the search warrant. This evidence suggested that defendant resided in the apartment, sharing the bedroom with Simmons, and thus had constructive possession of the cocaine. See *Hardiman, supra* at 422-423 (finding possession where defendant received mail at the apartment, her car was found in the parking lot, and the drugs were found in female clothing in the closet). Viewing the evidence in the light most favorable to the prosecutor, a rational trier of fact could have found, beyond a reasonable doubt, that 1) the substance recovered was cocaine, 2) the cocaine was in a mixture weighing between 50 and 450 grams, 3) defendant was not authorized to possess the cocaine, and 4) defendant knowingly possessed the cocaine. Thus, there was sufficient evidence to support defendant's conviction for possession of 50 or more but less than 450 grams of cocaine.

To support a possession of marijuana conviction, there must be evidence that defendant knowingly possessed marijuana. MCL 333.7403(2)(d). The police found unspecified amounts of marijuana in the closet with men's clothing and 41.75 grams of marijuana in or on one of the hutches. Because the evidence suggested that defendant resided at the apartment and shared a bedroom with Simmons, he had constructive possession of the marijuana. See *Hardiman, supra* at 422-423. Viewing the evidence in the light most favorable to the prosecutor, a rational trier of fact could have found, beyond a reasonable doubt, that defendant knowingly possessed the marijuana. Thus, there was sufficient evidence to support defendant's conviction for possession of marijuana.

To support a possession of less than 25 grams of heroin conviction, there must be some evidence that defendant knowingly possessed less than 25 grams of heroin. MCL 7403(2)(a)(v). Czernik testified that, in one of the hutch drawers with defendant's mail and men's socks, the police found 2.069 grams of heroin divided into five paper packets constructed from lottery tickets. Further, the evidence suggested that defendant resided at the apartment and shared a bedroom with Simmons, leading to a conclusion that he had constructive possession of the heroin. See *Hardiman, supra* at 422-423. Viewing the evidence in the light most favorable to the prosecutor, a rational trier of fact could have found, beyond a reasonable doubt, that defendant knowingly possessed the heroin. Thus, there was sufficient evidence to support defendant's conviction for possession of less than 25 grams of heroin.

Defendant maintains that Simmons' testimony demonstrated that he did not live in the apartment and only stayed there occasionally. Simmons provided ample testimony that defendant did not live in the apartment, was not involved in drug trafficking, and was not aware

that drugs were in the apartment. However, absent exceptional circumstances, issues of witness credibility are for the jury. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). This Court will not interfere with the role of the trier of fact of determining the weight of the evidence or witness credibility. *People v Hill*, 257 Mich App 126, 141; 667 NW2d 78 (2003).

Defendant argues that the prosecutor committed misconduct during Simmons' cross-examination. Because defendant failed to object at trial, this claim is not preserved for appellate review. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003); *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). This Court reviews defendant's unpreserved claim for plain error affecting his substantial rights. *Carines, supra* at 763; *Ackerman, supra* at 448.

The test of prosecutorial misconduct is whether defendant was denied a fair and impartial trial, i.e., whether prejudice resulted. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). This Court reviews claims of prosecutorial misconduct case by case, examining the remarks or conduct 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); *Abraham, supra* at 272-273. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled on other grounds *Crawford v Washington*, 541 US 36. No error requiring reversal will be found if the prejudicial effect of the prosecutor's improper conduct could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

During Simmons' cross-examination, the prosecutor questioned her as follows:

Q. What time of day did you cook the crack or what became that crack?

A. I cooked it late at night while my children were sleep [sic].

Q. Now, when you're cooking it, you do it on the stove in a pan, fair enough?

A. Yes.

Q. You used some baking soda with it?

A. Yes.

Q. You're saying that there's no smell coming from cooking crack cocaine in your kitchen?

A. No.

Q. And it's never affected your child with asthma?

A. No, it hasn't.

Q. But this is a deliberate choice you've made to do this in the house even though your child has this illness, is that right?

A. Yes.

Simmons, the only defense witness, testified extensively that defendant did not live in the apartment, did not have a key to the apartment, did not possess or control any of the drugs, and did not know about the drugs. Therefore, it was not error for the prosecutor to challenge her credibility. The court instructed the jury that the lawyers' statements and arguments are not evidence. Jurors are presumed to follow the trial court's instructions. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Therefore, the prejudicial effect, if any, would have been cured by the jury instructions. Absent an objection, the "judge's instruction that arguments of attorneys are not evidence dispelled any prejudice[.]" and the jury is presumed to follow the court's instructions. *Bahoda, supra* at 281; *People v Lueth*, 253 Mich App 670, 687; 660 NW2d 322 (2002).

Affirmed.

/s/ Jessica R. Cooper

/s/ Janet T. Neff

/s/ Stephen L. Borrello