STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 22, 2011
v	No. 296461 Wayne Circuit Court
CHARLES MOORE, Defendant-Appellant.	LC No. 09-023345-FH

Before: MURPHY, C.J., and BECKERING and RONAYNE KRAUSE, JJ.

PER CURIAM.

Following his bench trial, defendant was convicted of possession with intent to deliver less than five kilograms of marijuana, MCL 333.7401(2)(d)(*iii*). He was sentenced to six months to four years' imprisonment on the drug conviction. Defendant appeals as of right. We affirm.

During preraid surveillance, police saw defendant conduct a transaction in front of a home in Detroit that appeared to be a drug sale. A search warrant was executed and defendant was found holding 30 small Ziploc baggies containing marijuana inside a larger Ziploc bag.

On appeal, defendant claims that his conviction was against the great weight of the evidence. Specifically, he argues that the evidence preponderated heavily against the verdict with respect to the issue of possession. We disagree.

A new trial may be granted to a defendant when the verdict is "against the great weight of the evidence or contrary to law." MCR 2.611(A)(1)(e); MCR 6.431(B) ("On the defendant's motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice"). With respect to the great weight of the evidence standard, a new trial is warranted "only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). However, conflicts in the testimony and questions of witness credibility are insufficient grounds for granting a new trial. *Id.* at 643. Under narrowly carved out exceptions to the rule that courts may not circumvent a trier of fact's role in assessing testimony, a motion for new trial is properly granted where the testimony supporting the verdict contradicts indisputable physical facts or law, the testimony is patently incredible or defies physical realities, the testimony is inherently implausible such that it could not be believed by a reasonable juror, or where the testimony

supporting the verdict was seriously impeached and the case was marked by uncertainties and discrepancies. *Id.* at 643-644.

The elements of possession with intent to deliver less than five kilograms of marijuana are: (1) knowing possession of the controlled substance by the defendant, (2) intent to deliver the controlled substance to another person, (3) the substance was marijuana and the defendant knew that it was marijuana, and (4) the weight of the marijuana was less than five kilograms. See *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998).

It is undisputed here that the bag of marijuana was found at the scene, that it was tested and confirmed as marijuana, and that it weighed less than five kilograms. Defendant is not arguing that he did not know the substance in the bag was marijuana, nor is he challenging the quantity of marijuana found by police or the conclusion that the manner of packaging indicated an intent to sell. Rather, defendant is challenging the possession element of the crime and claiming that the marijuana found during the execution of the search warrant did not belong to him and was not on his person.

The evidence showed that defendant was at Mario Burrell's home on July 7, 2009. Sergeant Willie Smith was conducting preraid surveillance on the home and saw Adrian Evans come from the back of the house to meet a woman on the sidewalk. He took money from the woman and handed her a small item from his front right pocket. About five minutes later Smith saw defendant come out to meet a man on the sidewalk. The man gave defendant money and defendant walked back to the garage for a moment before returning with a small item, which he handed to the man. Smith believed these transactions to be drug sales and he called in the search warrant execution team, giving them descriptions of both Evans and defendant.

The warrant team, including Officers Lamar Penn, Jade Tanguay, James Kisselburg, and Magdalena McKinney, ran onto the property a minute or two after Smith made the call. There were three men standing in the yard: Burrell, defendant, and Douglas Davis. Evans came running out of the house as the officers arrived, reached into the waistband of his pants, pulled out a gun, and threw it on the ground. Penn and Tanguay followed him, and Evans jumped over a back fence before Tanguay caught up and arrested him. Evans had ten Ziploc bags of marijuana in his front right pocket and $844.

As Kisselburg ran onto the property, he saw defendant holding a gallon-sized bag of marijuana. Kisselburg headed toward defendant, who began running around the side of the garage and fell as he turned the corner. Kisselburg took the bag containing the drugs out of defendant's hands. No money was found on defendant.

McKinney detained Davis, took $205 from him, and wrote him a ticket for entering without permission. She then went inside the home and removed a check card, a Michigan identification card belonging to Evans, and a photograph of Evans that she found near an AWS digital scale on a table in the back bedroom.

Evans and defendant were tried together. Testimony from the officers was presented and it was stipulated that the gun found in the yard was a .380 caliber semi-automatic pistol with four rounds in it, but no latent fingerprints were recovered from the gun, that the ten Ziploc bags

found on Evans contained 18.47 grams of marijuana, and that the thirty Ziploc bags found on defendant contained 52.35 grams of marijuana.

Evans testified in his defense that he was walking out of the house and talking on his cell phone when the police arrived. He said he ran because he was scared, given that he had some marijuana on him. He testified that the item he dropped on the ground was his cell phone and that he never had a gun. Evans also testified that the only person with whom he smoked marijuana that day was Burrell. He was not sure if anyone else present at the house had marijuana on them.

The evidence in the record regarding defendant's possession of the bag of marijuana does not preponderate heavily against the verdict such that it would be a miscarriage of justice to allow the verdict to stand. Smith testified that he saw defendant make a transaction that, based on Smith's experience as a seasoned police sergeant, he believed to be a sale of drugs. Defendant claims that he could not have been the man Smith observed making this transaction because that man accepted money from the other party and defendant had no money on him when he was arrested. However, Smith's observation of defendant was not continuous between the transaction and the time of arrest.

With respect to the testimony by the search warrant officers, Kisselburg testified that he saw defendant holding the bag of marijuana when Kisselburg came in with the search team. Kisselburg chased defendant and, when he caught him, took the bag right out of defendant's hands. Defendant points out that the three other officers who testified did not see the bag of marijuana in defendant's hands when they arrived at the house. He claims that this fact on the issue of possession preponderates heavily against the verdict. However, the relevant testimony indicates that although the other officers did not specifically see the bag in defendant's hands, their attention was drawn elsewhere in the rush of events. Defendant claims that the failure of these other officers to notice whether defendant was holding anything is in direct contradiction to Kisselburg's testimony that defendant was holding a bag of marijuana. But none of the officers testified that defendant was definitively *not* holding anything; only that they *did not notice* him holding anything. This illusory contradiction does not raise an issue of serious impeachment or inherent implausibility of the type warranting a new trial with respect to Kisselburg's testimony. Additionally, the bag of marijuana was recovered from the scene, corroborating Kisselburg's version of events and weighing heavily in favor of defendant's guilt.

Defendant also claims that the trial court did not find Kisselburg's testimony credible and, because Kisselburg was the only officer testifying to the presence of marijuana in defendant's hands, without this testimony the evidence reflected defendant's innocence. Defendant's appellate brief references and relies on the following passage from the trial court's findings of fact and verdict:

> And [defendant] was detained there with the good [sic] in his hand. I think we talked about things being red handed.
>
> You know, if you could ever get a better case . . . draw up a scenario that you think there would be no question about people being guilty, it would be we found the dope in everybody's hand. They did all of these acts in front of us.

* * *

> [T]hat would be believable if it was the middle of a transaction perhaps. . . .
>
> [W]ith no person out front looking as if they were going to make a sale, [Kisselburg] would have us believe that [defendant] just had it, had the dope in his hand while everybody was pumping iron in the back. My goodness. Couldn't have been better.

Defendant is relying on the trial court's somewhat sarcastic implication that Kisselburg's testimony about defendant holding the bag of marijuana was too good to be true. The court did mention at another point during its ruling that testimony by Officer McKinney somewhat called into question Kisselburg's testimony. However, later statements made by the trial court indicated its recognition that criminals tend not to act sensibly and its general agreement that defendant indeed possessed the marijuana:

> The question becomes, seriously, how crazy are people? Some would think it's crazy to have some Ziplocs in your pants pocket. But we know that, at least from the testimony of everybody, that that's pretty consistent. . . .
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> * * *
>
> There are things that do not make sense that are true. There was an expression once upon a time that the truth is stranger than fiction. You couldn't have thought up something, but it's true. It's like, no. That's just too neat. That's just too tidy. But it's true.
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> * * *
>
> Now, I don't know if the marijuana was by the garage. I don't know if he had it balled up in his fist. I'm not sure if he dropped it, they didn't see it, how that comes down. But I am convinced that the marijuana that they put [i]n that lock seal folder . . ., the thirty bags, . . . were his beyond a reasonable doubt. Without a question.

When viewed in context, the trial court's statements reflect its acceptance that Kisselburg's testimony was sufficiently credible so as to establish some form of possession of the marijuana by defendant. Defendant does not argue that the court's factual findings were inconsistent with its verdict.

Defendant finally claims that Evans's testimony weighed in his favor. Evans testified that the searched home belonged to Burrell and that Burrell was the only person Evans smoked marijuana with that day. Defendant asserts that these facts make it more likely that Burrell possessed the marijuana instead of defendant. However, Evans never testified that he did not see anyone else holding or carrying marijuana that day, only that he never saw anyone besides Burrell smoking it.

The evidence against defendant was substantially stronger in comparison to the evidence relied on by defendant to attack the soundness of the verdict. Smith saw defendant engage in a transaction that had all the markings of a drug sale. Kisselburg saw defendant holding the bag of marijuana and took it from his hands at the time of arrest. The marijuana was tested and found to be genuine. All of the surrounding circumstances indicated that drug trafficking was taking place out of the house. When reviewing the record in its entirety, defendant's conviction was not against the great weight of the evidence. The evidence did not preponderate so heavily against the verdict that allowing defendant's conviction to stand would constitute a miscarriage of justice.

Affirmed.

/s/ William B. Murphy
/s/ Jane M. Beckering
/s/ Amy Ronayne Krause