STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWANE COLLINS,

Defendant-Appellant.

UNPUBLISHED
May 24, 1996

No. 165301
LC No. 87-007887

Before: Neff, P.J., and Smolenski and D. A. Johnston,* JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of possession with intent to deliver between 225 and 650 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii), and was sentenced to twenty to thirty years' imprisonment. Defendant appeals as of right and we remand for proceedings consistent with this opinion.

I

Defendant first argues that the trial court erred in finding that defendant lacked standing to object to the search warrant issued for the house in which he was arrested. Because we agree, we remand this case for an evidentiary hearing to determine the propriety of the search warrant and whether it was validly executed.

Defendant did not own the house in which he was arrested, but frequently spent the night and kept some clothing there. Based on this evidence, the trial court determined that defendant lacked standing to challenge the validity and execution of the search warrant. In *Minnesota v Olson*, 495 US 91; 110 S Ct 1684; 109 L Ed 2d 85 (1990), the Supreme Court found that an overnight guest had a sufficient expectation of privacy to have standing to challenge a warrant executed at the house in which he was staying

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* Circuit judge, sitting on the Court of Appeals by assignment.

We fail to see a distinction between the facts of this case and the holding in *Olson*. Defendant frequently stayed overnight at the house in question, left clothes at the house, was the only one present, and was in control of allowing people to enter and exit the premises at the time the warrant was executed. We find this evidence sufficient to allow defendant to challenge the validity of the warrant and its execution.

As a result of the trial court's ruling no record regarding the propriety of the warrant or its execution exits. Thus, we remand for an evidentiary hearing for a determination on those issues.

Because defendant's conviction may ultimately be affirmed, we address his remaining appellate issues.

II

We disagree with defendant that he is entitled to an evidentiary hearing regarding discovery of the confidential informant used by the police in this case.

Defendant's allegation of untruthfulness does not relate to the existence or credibility of the informant. See *People v Poindexter*, 90 Mich App 599; 282 NW2d 411 (1979). Rather, defendant argues that the officer's statements were untruthful in that he did not personally receive the information from the informant and did not personally observe the house in question as stated in the affidavit in support of the warrant. Defendant failed to introduce any evidence, as required by *Poindexter, supra*, to call into question the credibility of the informant.

III

Defendant next argues he was denied a fair trial because the trial court would not permit him to introduce evidence of his life-style. We disagree.

Whether to admit or deny evidence is reviewed for an abuse of discretion. See *People v Bahoda*, 448 Mich 261, 289-290; 521 NW2d 659 (1995).

On our review of the record, we cannot conclude that the trial court abused its discretion in refusing to allow this evidence into the record. Evidence of defendant's life-style is, at best, only tangentially relevant to whether defendant possessed the cocaine found in the room in which the police discovered him.

Further, any error on this issue is harmless beyond a reasonable doubt in light of the overwhelming evidence of defendant's guilt. See *People v Travis*, 443 Mich 668, 686; 505 NW2d 563 (1993).

IV

Defendant next argues that the prosecutor engaged in misconduct during its closing argument. We disagree.

Because defendant's counsel failed to object to the alleged improper comments until the end of the prosecutor's argument, thus depriving the trial court of the opportunity to cure any defect by halting further improper remarks, we review this issue for a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994)

Reading the prosecutor's comments as a whole, we cannot agree that defendant was denied a fair trial. See *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). The prosecution is free to argue its theory of the case, and need not state its inferences drawn from the facts adduced at trial in the blandest possible terms. See *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989).

The prosecutor did not state defendant had to prove anything, rather, the prosecutor merely commented on defendant's counsel's failure to prove issues promised during opening argument. Also, the prosecution clearly stated in its closing argument that defendant did not need to prove anything in this case. In any event, any error could have been cured by a timely objection and cautionary instruction.

V

Defendant next alleges that the trial court erred in allowing a chalkboard, not admitted as evidence, containing notations regarding the amount of cocaine and cash found at the house in question to be submitted to the jury. We find any error to be harmless.

Our conclusion on this issue rests on the fact that the chalkboard was present for the jury to see for most of the trial, and that it contained evidence not contradicted by defendant. Accordingly, we cannot conclude that the chalkboard emphasized the prosecutor's case over defendant, and thus find any error in submitting the chalkboard to the jury to be harmless beyond a reasonable doubt. See *People v Williams*, 179 Mich App 15, 22; 445 NW2d 170 (1989), rev'd on other grounds, 434 Mich 894; 453 NW2d 675 (1990).

VI

Next, contrary to defendant's argument, we find no evidence that the trial court's conduct was so improper as to deny defendant a fair, rather than a perfect, trial. Following our careful review of the record, we are not convinced that the complained of comments, even those properly preserved, unduly influenced the jury. See *People v Sharbnow*, 174 Mich App 94, 99; 435 NW2d 772 (1989).

VII

Next, we decline to review defendant's allegations that the prosecutor introduced improper evidence in the form of defendant's flight, and that the trial court erred in failing to give an instruction on flight to the jury because defendant failed to preserve these issues by objecting below. See *People v Grant*, 445 Mich 535, 545-546; 520 NW2d 123 (1994); *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993).

In any event, on our review of the record, we find no manifest injustice from the alleged errors.

VIII

Finally, defendant challenges his sentence. First, we find no error in the trial court's determination to sentence defendant under the PA 1989, No 143, amendments to MCL 333.7401; MSA 14.15(7401). See *People v Scarborough*, 189 Mich App 341, 344; 471 NW2d 567 (1991).

We next consider whether the trial court erred in failing to depart downward from the mandatory minimum sentence of twenty years' imprisonment as permitted by MCL 333.7401(4); MSA 14.15(7401)(4).

Defendant must prove that substantial and compelling reasons exist to warrant the departure, and we review a court's determination for the existence of substantial and compelling reasons for clear error. *People v Fields*, 448 Mich 58, 77; 528 NW2d 176 (1995).

We cannot conclude that the trial court clearly erred in finding no substantial and compelling reason to depart from the mandatory minimum in this case, especially in light of defendant's failure, twice, to appear for appointed court dates. Such postarrest behavior is properly considered by the trial court in making its determination. *Id*.

We find no abuse of discretion in the trial court's determination that no downward departure was called for in this case. *Id*. at 78.

IX

We remand this case for an evidentiary hearing consistent with this opinion. If the search warrant or its execution are found to be lacking, a new trial must follow. If, however, the warrant and its execution are found sufficient, defendant's conviction and sentence are affirmed.

Remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Michael R. Smolenski
/s/ Donald A. Johnston