STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRY MICHAEL SKOVERA,

Defendant-Appellant.

UNPUBLISHED
June 28, 1996

No. 174639
LC No. 93-007723

Before: Hood, P.J., Markman and A.T. Davis, Jr.*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of receiving and concealing stolen property in excess of $100, MCL 750.535; MSA 28.1084. On April 6, 1994, he was sentenced to 8 months in jail and 2 years probation. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred in denying his motion to suppress the evidence seized pursuant to a search warrant because the supporting affidavit was invalid. We disagree. In reviewing a magistrate's decision that an affidavit supporting a search warrant established probable cause, this Court "ask[s] only whether a reasonably cautious person could have concluded that there was a 'substantial basis' for the finding of probable cause." *People v Chandler*, 211 Mich App 604, 612; 536 NW2d 799 (1995). Probable cause exists where a person of reasonable caution would conclude that contraband or evidence of criminal conduct will be found in the place to be searched. *Id.* The warrant and the underlying affidavit should be read in a common sense and realistic manner. *People v Head*, 211 Mich App 205, 209; 535 NW2d 563 (1995).

Defendant argues that the facts and circumstances alleged in the affidavit were insufficient to establish probable cause. Specifically, defendant argues that the unnamed informant who supplied the information in the underlying affidavit was not shown to be reliable or trustworthy. An unnamed person may provide affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the person is credible or that the information is reliable. MCL 780.653; MSA 28.1259(3).

In this case, the affidavit stated:

> Suspects identified as Larry and Terry Skovera, on or about 5-20-93, purchased a VideoCipher Decoder and questioned the store owner about its use. A second unit, similar to the one purchased was also shown to the suspects. The suspects questioned the store owner about the use of two decoders with one satellite dish.
>
> The second unit that the suspects looked at but did not purchase was missing from the business on the morning of 5-21-93. The suspects were left unattended for some time at the store, allowing opportunity to take the second unit.
>
> The nature of these devices are that the serial number and a dealer number must be cleared through Satellite Receivers LTD in Green Bay, WI. *The suspects were given the dealer number when they purchased the first unit, and given instructions on how to retrieve the serial number from the unit in service.*
>
> *A unit with the serial number of the stolen unit, and using the dealer's number was activated on the evening of 5-20-93. The caller requesting activation stated his name was Larry Johnson and gave the address PO Box 698, Stambaugh, MI. The Box number was previously listed under Larry Skovera. The name given by the requesting party is fictitious, and the Box number given is currently not in use. The Skoveras recently installed a Satellite dish at that address to be searched.* [Emphasis added.]

Because the magistrate was permitted to conclude *either* that the person was credible or that the information was reliable, a separate or independent finding that the informant was credible was not required. MCL 780.653; MSA 28.1259(3). Accordingly, we find that the detailed information provided was sufficient for the magistrate's conclusion that the informant spoke with personal knowledge.

Defendant also contends that the affidavit failed to describe with particularity the place to be searched. The description referred to a building containing two apartments, but did not state which unit was intended to be searched. Ordinarily, when a multiunit building is involved, a warrant must state which sub-unit is to be searched. *People v Hunt*, 171 Mich App 174, 177-178; 429 NW2d 824 (1988). However, in this case, both units were intended to be, and were in fact, searched. Defendant lived in one unit and his brother, who was also a suspect, lived in the other unit. We therefore conclude that the affidavit sufficiently described the place to be searched.

We also find no merit in defendant's argument that because the warrant only described the decoder, the seizure of the chassis was improper. The warrant must specifically describe the items to be seized. *People v Zuccarini*, 172 Mich App 11, 15; 431 NW2d 446 (1988). The degree of specificity depends on the circumstances and types of items involved. *Id*. In this case, the police recovered a decoder cartridge bearing the serial number on the warrant. The stolen decoder had been

mounted in the purchased chassis. Because the decoder and chassis work only in conjunction, they are essentially one unit. The fact that stolen goods are intermingled or mixed with legitimate goods does not prevent the police from seizing the entire property. *United States v Hillyard*, 677 F2d 1336, 1340 (CA 1982).

Defendant also claims that because a stolen radar detector which was confiscated from a car owned by defendant was not an item listed on the affidavit, it was improperly seized. We disagree. The officer who conducted the search testified that the radar was in plain view and that defendant consented to the search of the automobile. Although defendant denied below that the radar was in plain view and that he consented to the search, he does not appear to dispute either contention on appeal. Further, it does not appear that that the jury convicted defendant on the basis of the radar detector.

Defendant finally argues that the warrant was invalid because the affiant failed to sign it pursuant to MCL 780.651(2)(a); MSA 1259(1)(2)(a). There is no dispute that the affiant did not sign the affidavit. However, if an adequate basis for a search warrant exists, the failure of the affiant to sign the affidavit does not invalidate the warrant. See *People v Mitchell*, 142 Mich App 518; 370 NW2d 392 (1985) [excluding evidence on hypertechnical basis does not serve exclusionary rule's purpose] aff'd 428 Mich 364, 369; 408 NW2d 798 (1987) [allowing the prosecutor to rebut invalidation of unsigned affidavit by showing that affidavit was made under oath before magistrate.] We therefore conclude that because the warrant was valid the trial court did not clearly err in denying defendant's motion to suppress.

Defendant next argues that he was entitled to a directed verdict because the evidence failed to establish that he knew that the property was stolen. We disagree.

A directed verdict is inappropriate if, considering the evidence in a light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of an offense. *People v Greenwood*, 209 Mich App 470, 472; 531 NW2d 771 (1995). A court must not weigh the evidence or assess the credibility of the witnesses. *People v Mehall*, 213 Mich App 353, 363; 539 NW2d 593 (1995).

The elements of receiving and concealing stolen property over $100 are that: (1) the property was stolen; (2) the property had a fair market value of over $100; (3) the defendant bought, received, possessed or concealed the property with the knowledge that it was stolen; (4) the property was identified as being previously stolen. MCL 750.535; MSA 1084; *People v Gow*, 203 Mich App 94, 95; 512 NW2d 34 (1993). Mere possession of stolen items, without more, is insufficient to justify a finding of knowledge. *People v Wolak*, 110 Mich App 628, 632; 313 NW2d 174 (1981).

We find that the circumstantial evidence and reasonable inferences arising from the evidence constituted satisfactory proof that defendant knew that the items were stolen. Defendant's brother,

Larry Skovera, testified that defendant purchased a decoder board and its chassis. After defendant paid for it, Larry removed a decoder board from the store, and placed it in the car's front storage compartment. Defendant, allegedly unaware that Larry had already retrieved a decoder, took a second decoder, which he held on his lap. Later, defendant told Larry that he thought the purchased decoder was defective and returned it to the store. When defendant returned home, his brother had installed the stolen decoder board into the purchased chassis and the satellite decoder was operating. Defendant was likely using the stolen items since the satellite decoder equipment was connected to his television when the police searched the apartment. Because there was sufficient circumstantial evidence to allow the inference that defendant knew that he was in possession of stolen property, we conclude that he was not entitled to a directed verdict.

Defendant next argues that he is entitled to a new trial because the prosecutor violated a pretrial order which required the prosecution to make a motion, outside the presence of the jury, before admitting evidence of defendant's prior acts. We disagree. The test of prosecutorial misconduct is whether defendant was denied a fair and impartial trial. *People v LeGrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994).

Defendant claims that the prosecutor solicited testimony regarding his prior acts during the direct examination of Ralph Lewis. However, the record illustrates that the prosecutor did not solicit testimony regarding defendant's prior acts. In fact, the prosecutor attempted to direct the witness' testimony to the events of the particular day in question. Moreover, the trial court immediately instructed the jury to disregard the witness' testimony regarding any instances prior to the day in question and cautioned the witness to confine his answers to that particular day. We therefore conclude that defendant was not denied a fair and impartial trial. *People v Hoshowski*, 108 Mich App 321, 324; 310 NW2d 228 (1981).

Defendant raises several claims of ineffective assistance of counsel. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

Defendant first contends that defense counsel violated the minimum standards of professional conduct by refusing to allow him to testify at trial. The decision to call witnesses is a matter of trial strategy. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). This Court will not second-guess defense counsel's trial strategy. *Id.* Moreover, defendant failed to allege or offer any evidence that, but for this counsel's actions, the outcome of his trial would have been different.

Defendant also contends that defense counsel was ineffective because he failed to adequately cross-examine Larry Neargarth and Ralph Lewis. Defense counsel's decision not to ask the witnesses who, other than defendant, had access to the stolen items may have been a matter of trial strategy.

Again, this Court will not second-guess defense counsel's trial strategy. *Id.* Further, defendant failed to allege or offer any evidence that, but for counsel's actions, there was a reasonable probability that the outcome of the trial would have been different.

Defendant finally argues that defense counsel failed to exercise challenges to remove three jurors from the panel. Specifically, defendant contends that Juror Ferguson, his past teacher and principal, should have been removed because defendant spent "more time in the principal's office [than] in the classroom." However, during voir dire, Juror Ferguson stated that he had "no problems" with defendant, and would have no problem presuming defendant to be innocent. Moreover, defendant offered no evidence or explanation to support a finding that, but for counsel's actions, there was a reasonable probability that the outcome of the trial would have been different.

Defendant also contends that Juror Zavada should have been removed because he stated that defendant would be hiding something if he did not testify. However, Zavada assured defense counsel that he would be able to set that belief aside if the court so instructed. He agreed that he would decide the case on the evidence, and find defendant not guilty if reasonable doubt existed. Again, defendant offered no evidence or explanation to support a finding that, but for counsel's actions, there was a reasonable probability that the outcome of the trial would have been different.

Defendant finally argues that Juror Casagranda should have been removed because he stated that defendant must prove his innocence. However, during voir dire, Juror Casagranda admitted that he had a tendency to be more lenient toward people with problems since he had a multitude of them. He stated that defendant was "innocent until proven guilty" and "if the evidence ain't there, that proves him innocent." He also would have "no problem" if defendant did not testify. Further, the prosecutor's challenge for cause was rejected by the trial court. Moreover, defendant failed to allege or offer any evidence that, but for counsel's actions, there was a reasonable probability that the outcome of the trial would have been different. We therefore conclude that defendant has failed to establish that he was denied effective assistance of counsel.

Affirmed.

/s/ Harold Hood
/s/ Stephen J. Markman
/s/ Alton T. Davis, Jr.