STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERWIN C. THOMAS,

Defendant-Appellant.

UNPUBLISHED
September 6, 1996

No. 176026
LC No. 92-114273

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EZELL MOORE, JR.,

Defendant-Appellant.

No. 176944
LC No. 92-114272

Before: Young, P.J., and Corrigan and M.J. Callahan,* JJ.

PER CURIAM.

In this consolidated appeal, defendants appeal by right their convictions after a joint jury trial. Defendant Thomas appeals his conviction of possession with intent to deliver between 50 and 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), and sentence to a ten- to twenty-year term of imprisonment. Defendant Moore appeals his conviction of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7413(2); MSA 14.15(7413)(2), and sentence to a two- to forty-year term of imprisonment. We affirm.

I. STOP AND FRISK

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

First, both defendants argue that the trial court should have suppressed the cocaine and money seized during their encounter with police. We disagree. Defendant Thomas concedes that the initial stop and frisk by the police was proper, but contends that the officers exceeded the scope of a permissible search when they pulled down his pants to reveal a large rock of cocaine because it was not immediately apparent that the hard object was contraband. Defendant Moore argues that even the initial stop and frisk was unlawful because the police had no reason to suspect defendants' involvement in a felony. A trial court's decision to suppress evidence will not be disturbed unless the ruling was clearly erroneous. *People v Chambers*, 195 Mich App 118, 121; 489 NW2d 168 (1992). A decision is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *Id.*

Both the state and federal constitutions guarantee the right to be secure against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. To secure the right, police officers generally must obtain a search warrant, subject to certain exceptions, including so-called investigative stops. When a police officer observes behavior that leads to a particularized suspicion that a person has engaged, or is about to engage, in criminal activity, the officer may stop that individual without a warrant and make reasonable inquiries. *People v Champion*, ___ Mich ___; ___ NW2d ___ (Docket No. 100138, issued 7/2/96).

The particularized suspicion that criminal activity is afoot must derive from the police officer's assessment of the totality of the circumstances. *Id; People v Taylor*, 214 Mich App 167, 169; 542 NW2d 322 (1995). During an investigative stop, a police officer may pat-down for weapons if he has a reasonable suspicion that the stopped individual is armed. *Champion, supra*. The trial court did not clearly err in ruling that the circumstances warranted a reasonably prudent person's belief that criminal activity was afoot and that the officers' safety was endangered. Nor did the frisk of defendants exceed that necessary to discover the existence of a weapon.

Pontiac police received a 911 call regarding shots fired inside a house at 98 Lull Street. As they approached the address in a marked scout car with its headlights off, Officers Orin Gooch and Roland Garcia saw three men, including the two defendants, run from the location, enter a car and speed away. Because defendants were seen running from the scene where shots allegedly had been fired, the officers had a particularized, articulable suspicion that criminal activity was afoot. They were justified in stopping defendants to make reasonable inquiries regarding their suspicion. During the stop, the officers were entitled to pat-down defendants for weapons for their own safety. On the basis of the report of shots fired, and defendants' apparent flight, the officers had reason to believe that defendants might be armed. *Taylor, supra*, at 169. While conducting a pat-down search of Thomas, Officer Roland Garcia felt a hard object in Thomas' groin area that he thought might be a weapon. Thus, Officer Garcia acted reasonably when he searched Thomas' pants to determine whether the hard object was a weapon. Accordingly, the subsequent seizure of the cocaine and money from defendant Thomas was proper.

Thomas argues that Officer Garcia exceeded the scope of a lawful search under the "plain feel" exception because the hard object in his crotch was not immediately apparent as contraband. That

argument is irrelevant. Because Officer Garcia believed that the hard object he felt in Thomas' pants could have been a weapon, Garcia was justified in removing Thomas' pants to expose the object to protect himself and Officer Gooch. *Taylor, supra,* at 169. The trial court did not clearly err in denying defendants' motion to suppress the evidence

II. PROBABLE CAUSE

Defendant Moore argues that Officers Gooch and Garcia lacked probable cause to arrest him. We disagree. This Court reviews for clear error a trial court's finding of probable cause to arrest. *People v Thomas*, 191 Mich App 576, 580; 478 NW2d 712 (1991). The trial court did not clearly err in finding probable cause.

Probable cause to arrest exists if the facts available to the officer at the moment of arrest would justify a person of reasonable caution in believing that the suspect has committed a crime. *Champion, supra; People v Richardson,* 204 Mich App 71, 79; 514 NW2d 503 (1994). A police officer may rely on the representations of fellow officers in assessing probable cause. *People v Himmelein*, 177 Mich App 365, 370; 442 NW2d 667 (1989). We review the probable cause determination in light of the circumstances that existed at the time of arrest. Included among the relevant circumstances are the actions of others who were present. *People v Harper,* 365 Mich 494, 500; 113 NW2d 770 (1962). After Officer Garcia felt the hard object in defendant Thomas' pants, he handcuffed defendant Thomas and instructed Officer Gooch to handcuff defendant Moore. Officer Garcia testified that he wanted all the occupants of the vehicle handcuffed so that when the hard object was removed, only his hands would be free to grab it. Officer Gooch justifiably relied on Officer Garcia's information that a weapon might be present.

The search of defendant Thomas revealed a large rock of crack cocaine, a bag of powder cocaine, a pager, and about $3,000 in cash wrapped in rubber bands. The police also found $1,700 in cash wrapped in a rubber band and a pager on defendant Moore. Because both defendants had large amounts of cash and pagers, and defendant Thomas had a large quantity of cocaine, the facts available at the moment of arrest would justify a fair-minded person of average intelligence in believing that defendant Moore also had committed a felony. Moreover, the knowledge that defendant Moore had a criminal record and recently had dealt drugs added to the quantum of probable cause. The trial court's finding that the police had probable cause to arrest Moore was not clearly erroneous.

III. EXPERT TESTIMONY REGARDING THE DISTRIBUTION OF COCAINE

Next, defendant Thomas argues that the trial court abused its discretion in permitting Officers Garcia and Conway Thompson to testify that the amount of cocaine seized was for distribution rather than personal use. We reject defendant's claim. Because defendant Thomas did not object to Officer Thompson's testimony that he now challenges on appeal, this issue is not preserved. *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995). Thus, we address only whether the trial court abused its discretion in admitting Officer Garcia's testimony. The determination regarding expert qualifications and the admissibility of expert testimony is within the trial court's discretion and will not be

reversed on appeal absent an abuse of that discretion. *People v Ray*, 191 Mich App 706, 707; 479 NW2d 1 (1991).

MRE 702, governing the admissibility of expert testimony, provides:

> If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Therefore, expert testimony is admissible when the witness is an expert, the facts in evidence require or are subject to examination and analysis by a competent expert, and the particular subject area belongs more to an expert than an ordinary person. *Ray*, *supra*, at 707. The critical inquiry is whether such testimony will aid the factfinder in deciding the case. *Id.*

Officer Garcia was not explicitly qualified as an expert but appears to have been considered an expert in narcotics arrests. He testified that the cocaine seized from defendants was for distribution rather than for personal use. He based this opinion on his past experience, the recovery of the large amount of cash and cocaine, and the absence of any narcotic paraphernalia in the car or in defendants' possession. He had been with the Pontiac Police Department for twenty-two years and was specially trained in narcotics enforcement through the Oakland County Narcotics Enforcement Team and the Drug Enforcement Agency. He also had worked in the Pontiac vice unit for six years. About ninety percent of his work involved drug enforcement. He had purchased crack cocaine hundreds of times in an undercover capacity.

Whether the amount of cocaine involved was for personal use or for distribution was a fact in evidence subject to examination and analysis by a competent expert. The knowledge involved belonged more to an expert than an ordinary person. *Ray*, *supra*, at 707. Whether defendants possessed a quantity of cocaine for distribution is not knowledge that laypersons would possess. The officer's testimony would have aided the jury in determining defendants' intent. *Id.* at 707-708. That the testimony embraced the ultimate issue of intent to deliver did not render the evidence inadmissible. *Id.* at 708. The trial court did not abuse its discretion in allowing Officer Garcia's testimony that defendants possessed the cocaine with the intent to distribute it.

IV. PROSECUTORIAL MISCONDUCT

Defendant Thomas also argues that alleged prosecutorial misconduct during the rebuttal closing argument denied him a fair trial. We review a claim of misconduct to determine whether the defendant was denied a fair and impartial trial. *People v Daniel*, 207 Mich App 47, 56; 523 NW2d 830 (1994). We decide misconduct issues case-by-case by examining the pertinent portion of the record and evaluating a prosecutor's remarks in context. *People v Kulick*, 209 Mich App 258, 260; 530 NW2d 163 (1995). A prosecutor may not argue facts not in evidence. The prosecutor, however, may argue

the evidence and all reasonable inferences from the evidence as it relates to the prosecutor's theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

First, the prosecutor argued facts not in evidence when he told the jury that someone had reported a shooting at 98 Lull Street to stop defendants from selling drugs there. Viewed in context, the prosecutor's unsupported comment did not deny defendants a fair trial. The trial court promptly instructed the jury that attorneys' arguments were not evidence and that the jury should decide the case solely on the testimony from the witnesses. Because the court's instruction cured any possible prejudice, the comment did not deny defendant a fair trial. See *Daniel, supra*.

Defendants also complain about the prosecutor's comments regarding flight. The record is unclear whether the prosecutor knew that a flight instruction would not be given. Although the evidence showed that defendants ran from 98 Lull Street, no evidence established that defendants actually fled a crime scene. Thus, the prosecutor's intimation that defendants were fleeing a crime scene was improper. Again, however, defendant Thomas was not denied a fair trial because the trial court gave the jury a curative instruction. Accordingly, the prosecutor's comments did not deny defendant Thomas a fair trial.

Affirmed.

/s/ Robert P. Young, Jr.
/s/ Maura D. Corrigan
/s/ Michael J. Callahan