

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CRAIG GORDON BROWN,

Defendant-Appellant.

UNPUBLISHED

April 7, 2005

No. 254476

Lapeer Circuit Court

LC No. 03-007878-FH

Before: Whitbeck, C.J., and Zahra and Owens, JJ.

PER CURIAM.

Defendant Craig Brown appeals as of right from his jury trial conviction of willful neglect of duty.¹ He was sentenced to 180 days in jail. We affirm.

I. Basic Facts And Procedural History

Brown was an officer with both the Almont Police Department and the Brown City Police Department. While employed by Brown City, Brown became acquainted with Brown City Police Officer Albert Geoit. In late February 2003, the St. Clair County Sheriff's Department searched Geoit's home and two vials of testosterone enanthate were seized in addition to four tablets of methandrosternalone, both of which are anabolic steroids. Upon questioning, Geoit stated that he purchased the steroids from Brown.

Pursuant to a search warrant, a parcel addressed to Brown at his post office box was searched and was found to contain Fina-Flex 8, an anabolic steroid intended for use in cattle. A search of Brown's residence revealed syringes, medical packaging, glass vials with anabolic steroid residue, and the materials necessary for converting veterinary steroids into a substance for human use. A search of a computer Brown was known to use revealed that Brown had been ordering anabolic steroids over the Internet.

After a trial, the jury acquitted defendant of three counts of delivery of a controlled substance,² but convicted him of willful neglect of duty.

¹ MCL 750.478.

² MCL 333.7401(2)(b).

II. Brown's Motion To Suppress

A. Standard Of Review

On appeal from a trial court's ruling on a motion to suppress seized evidence, we review the trial court's findings of fact for clear error while reviewing de novo its ultimate decision.³ However, appellate scrutiny of a magistrate's decision on the sufficiency of an affidavit underlying a search warrant "requires the reviewing court to ask only whether a reasonably cautious person could have concluded that there was a 'substantial basis' for the finding of probable cause."⁴ Probable cause to issue a search warrant exists when the facts and circumstances would allow a reasonably cautious person to believe that evidence of a crime is in the stated place.⁵

B. Sufficiency Of The Affidavits

Brown challenges the sufficiency of the four affidavits supporting the searches of the parcel addressed to him at his post office box, his residence, and a subsequent search of the corporate records of two firms with which Brown was known to conduct business.

Brown first alleges that the affidavit supporting the search of the parcel addressed to him at his post office box failed to show probable cause that evidence of a crime would be found in the parcel because the affidavit did not state that the steroids received or delivered by Brown were illegal to possess. This argument lacks merit. The affidavit plainly stated that the St. Clair County Drug Task Force advised the affiant that Brown was redistributing steroids ordered through the United States (U.S.) mail. This clearly violates federal law, which classifies even those anabolic steroids intended for administration through implantation to cattle as Schedule III controlled substances if they are distributed for human consumption.⁶

The omission from the affidavit of the information that it is not necessarily a crime to obtain this type of veterinary steroid through the U.S. mail was not a material omission for the same reason. The affidavit stated that the St. Clair County Drug Task Force advised the affiant that Brown was redistributing steroids ordered through the U.S. mail. The fact that Brown's receipt of the steroids might have been legal if he was not redistributing the steroids is irrelevant. Therefore, Brown has failed to show that the affiant knowingly or intelligently or with reckless disregard for the truth omitted material information from the affidavit.⁷ Further, we question whether failing to recite a point of law in this context could ever be considered a material omission, given that an affidavit in support of a search warrant must provide factual information, while it is the magistrate's responsibility to apply the law to those facts.

³ *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002).

⁴ *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992).

⁵ *People v Kamierczak*, 461 Mich 411, 418; 605 NW2d 667 (2000).

⁶ 21 USC 802(41)(B)(ii).

⁷ *People v Ulman*, 244 Mich App 500, 510; 625 NW2d 429 (2001).

The affidavit contained information that Brown was ordering anabolic steroids through the mail, which he then redistributed in violation of federal law. The affidavit further contained information suggesting that there was probable cause to believe that this parcel in particular likely contained contraband and other evidence relating to distribution or possession of controlled substances because it was a priority mail parcel and because the return address was for a corporation known to redistribute anabolic steroids from a source in Mexico, a country to which Brown had sent several postal money orders. Read in a common sense and realistic manner, a reasonably cautious person could have concluded from this information that there was a substantial basis for the finding of probable cause.⁸

C. Probable Cause For Search Of Residence

Brown next contends that the affidavit supporting the search of his residence lacked probable cause because it lacked an allegation that Brown possessed or sold steroids at his home. However, a magistrate is free to make the logical inference that evidence of drug activity is often found in a drug trafficker's home.⁹ Here, the evidence that Brown received a substantial amount of steroids in the mail provided a substantial basis for the finding of probable cause to search his home.

D. Search Of The Corporate Records

Brown also challenges the search of the corporate records, arguing that the affidavits supporting the search were tainted by the allegedly improper searches of the parcel and Brown's residence. The trial court found that Brown lacked standing to challenge the search of the corporate records because he had no privacy interest therein.¹⁰ On appeal, Brown has failed to cite any authority suggesting that the trial court's decision was incorrect. An appellant may not simply announce his position and leave it this Court to discover and rationalize the basis for his claims.¹¹ Therefore, Brown has abandoned this issue on appeal.¹² We note, however, that we would reject Brown's argument regarding the searches of the corporate records in any event because the prior searches were proper.

III. Admission Of E-mails

Brown next asserts that the trial court erred in admitting evidence of e-mails, in which Brown placed orders for the purchase of anabolic steroids, without first analyzing the e-mails under the rubric of MRE 404. Although Brown objected to the admission of several specific e-mails in which he placed orders for the purchase of anabolic steroids, Brown later waived objection to the admission of the computer records in their entirety. Thus, we conclude that

⁸ *Russo, supra* at 603-604.

⁹ *People v Nunez*, 242 Mich App 610, 614-615; 619 NW2d 550 (2000).

¹⁰ *People v Perlos*, 436 Mich 305, 317; 462 NW2d 310 (1990).

¹¹ *People v Hermiz*, 235 Mich App 248, 258; 597 NW2d 218 (1999); *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998).

¹² *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

Brown has waived this error on appeal.¹³ Again, we note that if we were to reach this issue, we would disagree with Brown's position, because the e-mail messages were relevant and admissible to show Brown's preparation for the delivery of steroids to Geoit and to rebut the defense theory of fabrication, which are permissible purposes that do not relate to the issue of Brown's character.¹⁴

IV. Inconsistency Of The Jury's Verdicts

A. Standard Of Review

We will only reverse a jury's inconsistent verdict if there is evidence that the inconsistency resulted from confusion or compromise rather than leniency.¹⁵

B. Willful Neglect Of Duty Conviction

Brown next alleges that there was insufficient evidence of his guilt for a rational trier of fact to conclude beyond a reasonable doubt that he was guilty of willfully neglecting a duty. However, despite framing this as a sufficiency of the evidence claim, what Brown actually argues is that it was inconsistent for the jury to convict him of willful neglect of duty while acquitting him of three counts of delivery of a controlled substance.

The Michigan Supreme Court has held that a jury may return inconsistent verdicts.¹⁶ The Court reasoned that when a jury chooses not to convict because it has chosen to be lenient, the defendant "has no cause for complaint."¹⁷ On the other hand, if jury confusion or compromise results in an inconsistent verdict, reversal may be appropriate.¹⁸ To establish jury confusion or compromise, the defendant must put forth evidence beyond the verdict itself.¹⁹ Here Brown offered no evidence that the jury's verdict was the result of confusion or compromise rather than leniency; therefore, the alleged inconsistency does not merit reversal.²⁰

¹³ *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001) ("A defendant may not waive objection to an issue before the trial court and then raise the issue as an error on appeal"); *Troy v McMaster*, 154 Mich App 564, 570-571; 398 NW2d 469 (1986).

¹⁴ See *People v VanderVliet*, 444 Mich 52, 64; 508 NW2d 114 (1993); *People v Houston*, 261 Mich App 463, 468; 683 NW2d 192 (2004).

¹⁵ See *People v Lewis*, 415 Mich 443, 450 n 9, 453; 330 NW2d 16 (1982); *People v McKinley*, 168 Mich App 496, 510; 425 NW2d 460 (1988).

¹⁶ *Lewis*, *supra* at 448.

¹⁷ *Id.* at 453.

¹⁸ *Id.* at 450 n 9, 451-452; *McKinley*, *supra* at 510.

¹⁹ *McKinley*, *supra* at 510-511.

²⁰ *Id.* at 510-511.

V. Prosecutorial Misconduct

A. Standard Of Review

Brown next contends that he was denied a fair and impartial trial because of prosecutorial misconduct. We review de novo allegations of prosecutorial misconduct while reviewing the trial court's factual findings for clear error.²¹ Because no objection was made to the challenged remarks, we will reverse only for plain error, placing the burden on the defendant to show that error occurred, that the error was clear or obvious, and that the plain error affected his substantial rights.²² Moreover, if a curative instruction could have alleviated the prejudicial effect of the challenged remarks, error requiring reversal did not occur.²³

B. The Challenged Remarks

In her rebuttal argument, the prosecutor suggested that defense counsel's closing argument "was a lot of manipulation of words." She went on to say:

I will tell you about a red herring. When a school of fish is going by, there's a red herring. That's what you're going to see. That's what he's doing here. He's thrown a whole load of red herrings right in your lap hoping that you'll forget about his client."

The prosecutor's comments in this case were strikingly similar to those at issue in *People v Watson*.²⁴ In *Watson*, the prosecutor had argued:

the defense in this case is to distract you, make you look over here, and don't pay any attention to the truth.

You've heard the term "red herrings in the school of blue fish." When the school of blue fish is going beside you, you're going to be attracted to the red herring. You just had the whole boatload of red herrings thrown at you, and it didn't change the truth. Create an issue by asking the question, I believe this is the defense.^[25]

The *Watson* Court held that this comment was not improper because it was made in response to the defense counsel's suggestion that the prosecutor was not concerned about the truth, but only wanted a conviction because of the terrible nature of the crimes.²⁶

²¹ *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

²² *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001), citing *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999).

²³ *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003).

²⁴ *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

²⁵ *Id.* at 592.

²⁶ *Id.* at 593.

Similarly, defense counsel here also suggested that the prosecution was arbitrarily distorting the truth by choosing to believe Geoit and by rewarding him by not pursuing additional charges against him in exchange for his testimony against Brown. Therefore, the prosecutor's rebuttal comments in this case were not improper because they responded proportionately to issues raised by defense counsel and a timely objection and cautionary instruction could have cured any error.²⁷

During her closing argument, the prosecutor also referenced the evidence corroborating Geoit's testimony, including the steroids found in the parcel sent to Brown's post office box. The prosecutor noted:

You were told by Dr. Evans this morning what these are, how they're intended to be used in cattle. These are illegal substances to be possessed in this state.

Defense Counsel: I'm going to object. That's a misstatement of law. It depends on what you're going to use it for, Judge.

Prosecutor: I can clarify it your Honor.

Court: Very good. Thank you.

Prosecutor: It's illegal to possess them unless you're going to use them in cows. And, members of the jury, there's been no credible shred of evidence to suggest to you, that this is what he had and he was going to use them in cows. You know that didn't happen and you also know it didn't happen because you saw the conversion kit.

Any prejudice arising from the arguable implication of these remarks that Brown had to produce evidence showing that he possessed the steroids legally was negated by the fact that the prosecutor went on to argue persuasively from evidence introduced at trial that it was not reasonable to believe Brown possessed the steroids for use in cattle. In making this argument, the prosecutor relied on the fact that Brown possessed all the necessary items to convert the steroids for human use and that one of the firms Brown did business with sold conversion kits containing the same items found at Brown's residence. Further, the trial court properly instructed the jury that Brown did not have to produce any evidence and that the burden was on the prosecution to prove Brown's guilt beyond a reasonable doubt. This instruction "dispelled any prejudice arising from the prosecutor's comment."²⁸

²⁷ *Id.* at 586, 593.

²⁸ *Callon, supra* at 330-331.

In sum, the prosecutor's comments did not result in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.²⁹ Therefore, reversal is not warranted.

Affirmed.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Donald S. Owens

²⁹ *Id.* at 331.