

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER LEE RUSSELL,

Defendant-Appellant.

UNPUBLISHED

May 15, 2003

No. 234058

Oakland Circuit Court

LC No. 1999-165683-FH

Before: Markey, P.J., and Cavanagh and Hoekstra, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver less than five kilograms of marijuana, MCL 333.7401(2)(d)(iii), and sentenced to two years' probation, with the first ten months to be served in the county jail on work release. He appeals as of right. We affirm.

On February 4, 1999, the police executed a search warrant for drugs at defendant's residence in Branden Township. Defendant, who lived in the residence with a woman he later married, was the only person in the residence at the time of the search. During the search, the police found drug paraphernalia, packaging materials, and several bags of marijuana, totaling approximately thirteen pounds, in the master bedroom, bathroom closet, and living room, along with "proofs of residency" for defendant and his fiancée. Defendant's fingerprints were found on one bag of marijuana.

Several of defendant's claims on appeal involve the validity of the search warrant that led to recovery of the evidence against defendant. Defendant argues that the trial court erred in failing to suppress the evidence on the basis that the underlying affidavit contained false information and material omissions. The trial court's findings are reviewed for clear error, *People v Reid*, 420 Mich 326, 336; 362 NW2d 655 (1984), but "we review de novo the trial court's ultimate decision regarding a motion to suppress," *People v Echavarria*, 233 Mich App 356, 366; 592 NW2d 737 (1999).

A search warrant may issue only on a showing of "probable cause, supported by oath or affirmation." Const 1963, art 1, § 11. "Probable cause to search exists when facts and circumstances warrant a reasonably prudent person to believe that a crime has been committed and that the evidence sought will be found in a stated place." *People v Brzezinski*, 243 Mich App 431, 433; 622 NW2d 528 (2000); *People v Stumpf*, 196 Mich App 218, 227; 492 NW2d 795

(1992). Probable cause “requires ‘only the probability, and not a prima facie showing, of criminal activity.’” *People v Russo*, 439 Mich 584, 607; 487 NW2d 698 (1992) (citations omitted).

“The defendant has the burden of showing, by a preponderance of the evidence, that the affiant knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to the finding of probable cause.” *People v Ulman*, 244 Mich App 500, 510; 625 NW2d 429 (2001). Material omissions are reviewed under the same standard. *Id.*; *Stumpf, supra* at 224. Reviewing courts must read the warrant “in a common-sense and realistic manner.” *Russo, supra* at 604. “Rather than engage in hypertechical after-the-fact scrutiny of affidavits, we give great deference to the magistrate’s decision because of our preference for the use of search warrants.” *Stumpf, supra* at 227.

Defendant asserted below that, because the affidavit contained a statement that pre-recorded investigative funds could be seized, the magistrate was misled into erroneously believing that controlled buys had been conducted at the stated location. We disagree. The reference to investigative funds was contained in a boilerplate description of items that could be seized in any search. The affiant did not aver that any controlled buys had been conducted and a realistic and common sense reading of the affidavit does not support defendant’s speculative claim that the magistrate was misled. See *Russo, supra*.

Defendant also argued that the affidavit contained a material omission because it alleged that his fiancée was arrested for possession of cocaine, but did not include information that she was not convicted. The statement in the affidavit was not false; however, as defendant asserts, a material omission is reviewed in the same manner as a false statement. See *Ulman, supra*. There is no evidence that the incomplete information was omitted “knowingly and intentionally or with reckless disregard for the truth” and, further, it was not “necessary to a finding of probable cause.” See *id.* The affiant testified that he was not aware that the charge against defendant’s fiancée had been dismissed. Further, the affidavit included “sufficient untainted information to establish probable cause apart from the misinformation” to support the warrant. See *People v Griffin*, 235 Mich App 27, 42; 597 NW2d 176 (1999). Defendant’s fiancée and housemate was the subject of an ongoing narcotics investigation, and there was information that she regularly brought narcotics from Texas to Michigan. Proof that she resided at the residence was recovered during a “trash pull” from the trash in front of the residence, and her car had been parked there. Marijuana residue was also recovered from the trash in front of the residence. “[P]robable cause for issuance of a search warrant may be based on the fruits of a search without a warrant of household garbage set out for curbside collection.” *People v Pinnix*, 174 Mich App 445, 446-449; 436 NW2d 692 (1989). Thus, even when the challenged information is disregarded, the remaining averments provide a sufficient showing of probable cause that drugs would be found at the residence to issue the search warrant. See *Griffin, supra*.

Defendant also argued that the affiant could not rely on a police investigative report which indicated that defendant’s fiancée drove from Texas to Michigan with large amounts of marijuana because the affiant had no corroboration for the information. The trial court implicitly found that the affiant’s reliance on the police report was appropriate, and we agree. A search warrant may be based on hearsay so long as the magistrate has sufficient facts to conclude that the information was based on personal knowledge and that the information was reliable.

Echavarria, supra; *People v Poole*, 218 Mich App 702, 706; 555 NW2d 485 (1996). Where the information is supplied to the affiant by a person who is named, it must contain “affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information.” MCL 780.653(a). Information received from a fellow police officer may be used as a basis for a warrant affidavit, and the magistrate may consider the source to be credible, so long as the affiant informs the magistrate that he received the information from a fellow officer and his reason for finding the information credible. *People v Mackey*, 121 Mich App 748, 753-754; 329 NW2d 476 (1982).

Here, the affiant was the officer-in-charge of an ongoing narcotics investigation that involved other named police officers. The affiant stated that he had reviewed another officer’s investigative report, he named the police detective who prepared the report, and he confirmed information in the report concerning defendant’s fiancée. A “reasonably cautious person could have concluded, under the totality of the circumstances, that there was a substantial basis” for the magistrate’s reliance on the information in the police report in support of a finding of probable cause. See *Echavarria, supra* at 367.

Defendant also argues, for the first time on appeal, that the small amount of marijuana stems found in the garbage were insufficient to establish that there might be marijuana at the residence, and further, that the marijuana stems were not evidence of illegal activity because the “mature stalks of the plant” are specifically excluded from the statutory definition of marijuana. MCL 333.7106(3). Because these arguments were not raised below, our review is limited to plain error affecting defendant’s substantial rights. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). We are not persuaded by defendant’s arguments. The odor of marijuana alone is enough to give rise to probable cause. *People v Kazmierczak*, 461 Mich 411, 424; 605 NW2d 667 (2000). Likewise, the presence of marijuana stems in the trash outside defendant’s residence was sufficient to “warrant a reasonably prudent person” to conclude that marijuana would probably be present inside the residence. See *Russo, supra*; *Brzezinski, supra*. Moreover, the garbage was picked up on the day of a “normal trash pickup,” just two days before the warrant was issued. Although staleness is “an aspect of the Fourth Amendment inquiry,” the two-day delay did not negate a finding of probable cause when considered in light of the “other variables” in the “ongoing narcotics investigation,” such as the information that defendant’s fiancée was making regular trips to Texas for marijuana. *Russo, supra* at 605-606; *Stumpf, supra* at 226.

Defendant also asserts in his statement of questions presented that the trial court should have held an evidentiary hearing on this matter. Defendant has waived this issue, however, by failing to address it in his appellate brief. See *People v Kean*, 204 Mich App 533, 536; 516 NW2d 128 (1994). In any case, defendant had the opportunity at the preliminary examination to cross-examine the affiant about the challenged information. Later, the court gave defendant an opportunity to show why a further evidentiary hearing was necessary, given its determination that the redacted affidavit was sufficient to establish probable cause, and defendant failed to do so. After hearing defendant’s arguments regarding the validity of the affidavit, the trial court asked defense counsel, “What do you need an evidentiary hearing for? What are you thinking it’s – what do you think it’s going to show?” Counsel’s only response was, “We would like to explore – if necessary, to explore these issues, talk about this through --.” Because we agree that the affidavit was sufficient to justify issuance of a search warrant even without the allegedly

false statements or omissions, *Griffin, supra*, defendant has not shown the need for further development of this issue at an evidentiary hearing. We find no error.

Next, defendant argues that the evidence was insufficient to show that he either possessed or intended to deliver the marijuana. Defendant preserved this issue by moving for a directed verdict below. This Court must review the evidence de novo in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979); *People v Oliver*, 242 Mich App 92, 94-95; 617 NW2d 721 (2000). The standard of review is deferential and this Court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Possession of a controlled substance

may be either actual or constructive. Likewise, possession may be found even when the defendant is not the owner of recovered narcotics. Moreover, possession may be joint, with more than one person actually or constructively possessing a controlled substance. [*People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002) (citations omitted).]

In this case, drug paraphernalia, packaging materials and several bags of marijuana, totaling approximately thirteen pounds, were found inside the small mobile home where defendant and his fiancée lived and defendant's fingerprints were found on one of the bags. The evidence of a large amount of marijuana in the home supported a "reasonable inference that defendant possessed—even if jointly—the drugs." See *id.* at 423. In addition, there was testimony that marijuana has a limited shelf life and that the amount of marijuana found was consistent with an intent to deliver. A reasonable jury could have found that the essential elements of the crime were proven beyond a reasonable doubt. See *Hampton, supra*. Although defendant suggests a number of ways that the evidence could support an exculpatory theory, "the prosecutor need not negate every reasonable theory consistent with innocence." See *Nowack, supra*.

Defendant also suggests that the trial court erred by failing to sua sponte instruct the jury in accordance with CJI2d 4.15 (fingerprint evidence). The use note for that instruction, however, states that it is to be given "only where the sole evidence of identity comes from fingerprints." Contrary to defendant's claim, this case was not decided "on fingerprint evidence alone." Here, where the marijuana was found in defendant's residence, the trial court's failure to sua sponte give CJI2d 4.15 was not plain error. Therefore, this unpreserved issue does not warrant appellate relief. See *Carines, supra*.

Next, defendant contends that reversal is required because a police officer testified on cross-examination that defendant "chose not to talk" to the officer. Because defendant did not

object to the officer's testimony below, we review this issue for plain error affecting defendant's substantial rights. See *Carines, supra*. A defendant's postarrest, post-*Miranda*¹ silence may not be used to impeach a defendant's exculpatory testimony at trial. *People v Vanover*, 200 Mich App 498, 500; 505 NW2d 21 (1993). Here, the police officer's comment was made in response to a defense question regarding "how cooperative" defendant was at the time of his arrest. Counsel followed up by eliciting information that defendant was advised of his right to remain silent and that his decision not to talk was "still cooperative."

This issue does not warrant reversal for several reasons. First, because defense counsel elicited the testimony, "by plan or negligence," the issue is waived, thus extinguishing any error. See *People v Riley*, 465 Mich 442, 448-449; 636 NW2d 514 (2001); *Griffin, supra* at 46. Moreover, even if not treated as waived, counsel's question about the extent of defendant's cooperation opened the door to admission of the evidence that defendant did not make a statement. See *Vanover, supra* at 501-502. The prohibition against evidence of a defendant's silence is "not so that the defendant may freely and falsely create the impression that he has cooperated with the police when in fact he has not." *Id.* at 503. In this case, counsel's questions about the extent of defendant's cooperation created "a fair implication" that defendant "had cooperated in all ways with the investigation in this case," when, in fact, he had not done so. See *id.* at 502. Moreover, the prosecutor did not use the officer's comment about defendant's silence "as direct evidence of defendant's guilt," and this case was not a credibility contest between defendant's and the officer's versions of events. See *id.* at 503-504. Considered in this context, we find no plain error affecting defendant's substantial rights.

Defendant also argues that the trial court erred in excluding the search warrant affidavit as evidence. The affidavit did not mention defendant's name and defendant wanted to admit it to prove that he was not the focus of the police investigation. Questions regarding the admission of evidence are reviewed for an abuse of discretion. *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000).

The affidavit, which contained out of court statements by the affiant and others, was hearsay. See MRE 801. "Hearsay is inadmissible as substantive evidence at trial, except as provided for in the Rules of Evidence." *People v Tanner*, 222 Mich App 626, 629; 564 NW2d 197 (1997). Defendant offered no hearsay exception under which the affidavit could be admitted, arguing only that it was relevant to his theory of the case that the marijuana and gun were not his. Even relevant hearsay cannot be admitted unless there is an exception in the rules of evidence. See MRE 802. Defendant argues that the trial court's exclusion of the affidavit prevented the jury from hearing his position in this case. We disagree. Defendant elicited testimony that the police had never "encountered" defendant and had never purchased marijuana from him, and defendant's fiancée testified that she was the person who drove to Texas and brought marijuana into the house, which she shared with defendant. The court did not abuse its discretion in excluding the affidavit. See *id.*

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Finally, defendant argues that reversal is required because of the cumulative effect of the combined errors. Because we have rejected defendant's claims of error, reversal under this theory is also unwarranted. See *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra