

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS EDWIN CARTER,

Defendant-Appellant.

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UNPUBLISHED  
September 6, 1996

No. 174225  
LC No. 93-7959

Before: White, P.J., and Sawyer, and R.M. Pajtas,\* JJ.

PER CURIAM.

Defendant appeals his conviction by jury of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). After the jury rendered its verdict, defendant pled guilty to being an habitual offender, pursuant to MCL 769.10; MSA 28.1082. He was sentenced to five to thirty years. We affirm.

I

On August 4, 1993, William Thompson, a confidential police informant for the Cassopolis Police Department, was instructed to solicit narcotics from street-level drug dealers as part of a program known as "Operation Safe Streets." At approximately 7:00 p.m., Thompson met with Officer David Toxopeus from the Cassopolis Police Department, had both his person and his vehicle thoroughly searched for drugs, contraband and/or money, had a small microphone affixed and concealed under his shirt, and was then instructed to proceed to 417-1/2 Southeast Street.

Thompson proceeded to the address and parked in the driveway. He approached the rented home of Donita White. Thompson knocked on the door and was allowed to enter. Once inside, Thompson spotted defendant, also known as "Tom Tom." Thompson then asked if he could buy a "rock," and defendant answered "yeah," while pulling a clear plastic baggy containing several rocks

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

from his pants pocket. Thompson then tendered \$20 in exchange for a single rock of cocaine and immediately returned to his car.

Once in his car, Thompson called for "Tom Tom" (defendant), who was at that time standing in the front entrance of the home. After defendant approached Thompson's vehicle, Thompson asked defendant how many rocks he could get for \$100 and defendant answered, "six." Thompson then told defendant that he would be back if and when he got more money.

Thompson returned to Officer Toxopeus at the initial meeting place and turned over the rock of cocaine. Thompson, along with his vehicle, was again searched by Toxopeus. On August 31, 1993, defendant was arrested and charged with delivery of less than fifty grams of cocaine.

On January 10, 1994, the court entertained defendant's motion in limine requesting the court to restrict the testimony of Thompson and Officers Bill Riley, Gary Losey, and Toxopeus, forbidding any mention during the proofs of the first case of a second drug deal that allegedly took place between Thompson and defendant. The prosecution agreed, and the court issued an order, stating in pertinent part:

NOW, THEREFORE, IT IS HEREBY ORDERED that Gary Losey, Bill Riley, Keith Thompson and Dave Toxopeus shall not testify in one trial regarding the transaction charged in the other file.

On February 9, 1994, after the jury was selected and excused from the courtroom, and before testimony began, the court heard argument concerning the admissibility of "other bad acts" evidence expected to be testified to by prosecution witness Donita White. Noting that White's testimony was anticipated to include that she sold cocaine for defendant during July and August, and that it was not unusual for defendant to sell cocaine from her home at 417-1/2 Southeast Street, the prosecutor argued that the testimony was admissible as evidence of a plan, scheme, or pattern of behavior pursuant to MRE 404(b). Defense counsel objected and the court decided to reserve the issue until White actually took the stand and an offer of proof was made. Trial then began.

After admitting that he had previously been convicted of several felony charges, that he had gone to prison and was on parole at the time of trial, that he had used and was addicted to drugs in the past, and that he had been caught shoplifting and had two dirty urine screens (one while he was working for Operation Safe Streets), Thompson testified to facts surrounding the August 4, 1993 narcotics buy between himself and defendant as described above. Thompson stated that he began working in tandem with the Cassopolis police in July 1993 after his own son, and many other children, were receiving drugs from the streets. Thompson indicated that he was promised no favorable treatment and that he only received approximately \$100 over a two-month period for gas and food expenses.

On cross-examination, Thompson admitted that he could not remember every detail and acknowledged some inconsistencies between his current testimony and his testimony at the preliminary

examination. Thompson stated he was certain that it was defendant who sold the rock of cocaine to him on August 4, and that he had not sought out defendant to seek revenge on him for supposedly telling Thompson's girlfriend (defendant's cousin) that Thompson was cheating on her.

On redirect examination, Thompson testified that he had known defendant for a couple of years and explained that his preliminary examination testimony may be somewhat conflicting because he had testified in several different cases that same day and may have easily confused the facts between them.

Deputy William Riley, a detective from the Cass County Sheriff's Department, testified that he was the unit commander of Operation Safe Streets and that he and Officer Gary Losey from the Dowagiac Police Department picked up surveillance on Thompson on August 4 and monitored the narcotics buy between Thompson and defendant. Riley stated that he and Losey followed Thompson to 417-1/2 Southeast Street and parked their surveillance van on the street approximately one hundred to 150 yards away. From the front window, Riley observed Thompson leave his car and enter the house. Riley stated that, although he could not actually see what happened while Thompson was in the house, he was able to hear the drug deal take place over the microphone transmitter located in the rear of the surveillance van.

Riley testified that he then witnessed Thompson exit the house approximately a minute later and get in his car. Thereafter, Riley heard Thompson yell for "Tom Tom" and then observed defendant approach the car and lean over Thompson's car window to talk to Thompson about the "six rocks for \$100" deal.

Riley testified that he knew defendant, that he had gotten a good bok at him that day in the driveway, and from what he physically observed, he was certain that it was defendant's voice that he heard over the transmitter. By coordinating what he heard over the transmitter with what he observed from the window of the van, Riley confirmed Thompson's account of the events as they took place on August 4. Riley also testified that Thompson was involved in seventeen different drug transactions through Operation Safe Streets, that he was given approximately \$120 for expenses, that he was not paid on a per buy basis, nor given a bounty for any particular individual.

Officer Losey testified that he was in charge of the receiving unit for Thompson's body mike and because he was sitting on the floor of the van, he was not able to physically observe either defendant or Thompson. Losey was, however, able to identify Thompson's voice over the transmitter and stated that he recorded the transmissions he heard over the speaker. The taped recording was played to the jury following Deputy Riley's direct testimony.

Donita White testified that she was living at 417-1/2 Southeast Street on August 4, 1993 when the transaction allegedly took place. The jury was then excused and the prosecutor presented an offer of proof concerning the admissibility of White's testimony under MRE 404(b) (prior bad acts). White was initially uncooperative and stated that she had previously lied to the prosecutor when she originally agreed to testify pursuant to a plea agreement. The prosecutor then reminded White a drug charge had

been dropped in exchange for her truthful testimony and that if she violated that agreement she would be recharged. It was then that White testified that she had known defendant most of her life, that on one occasion during the summer of 1993 she sold cocaine for defendant out of her home, and that she had once arranged for a cocaine deal with Thompson by calling defendant and requesting that he supply the cocaine via a man nicknamed "Smooth."

After hearing the attorneys' arguments, the court ruled the testimony admissible, concluding that the prior acts were indicative of a "scheme or plan," that they had probative value, and that they tended to defeat defendant's alibi defense.

In the presence of the jury, White then testified that she was to give truthful testimony in accordance with a plea agreement she made with the prosecutor's office and repeated the testimony she had given during the offer of proof. Elaborating on that testimony, White stated that Thompson had also come to her home on July 28, 1993 to buy cocaine, and it was at that time that she called defendant to supply the drugs. White also confirmed that defendant was at her home throughout the late afternoon on August 4 and that he had spent the night.

On cross-examination, White also confirmed that Thompson, too, came to her home on August 4, but indicated that she could not remember whether defendant was present at that time. White stated that she saw no drug deal take place between defendant and Thompson.

At the start of the second day of trial, the court further articulated its reasons for allowing the admission of White's testimony, stating that the evidence of the prior bad acts was more probative than prejudicial because it tended to show that the August 4 transaction was not an isolated incident as typically raised in entrapment cases and because the evidence was relevant to the weight defendant's alibi would carry with the jury.

Defendant testified that he lived in Chicago, but would often return to the Cassopolis area to visit family and friends, including White, his brother Keith Carter, and his one-year-old daughter. Defendant confirmed that he often answered to "Tom Tom" and that he was indeed at White's home at 417-1/2 Southeast Street on August 4 and 5, 1993. Defendant testified that he arrived at White's home early in the day on August 4, that he left the house sometime after 12:30 p.m., that he visited with Para Drayton for a couple hours, that he then went to see his daughter at Dorothy Curtis' home for approximately three hours, and finally returned on foot to White's home sometime after dark.

Defendant stated that he visited the area often and specifically remembered what he did on August 4 because his mother's birthday was on the previous day. Defendant admitted that he knew Thompson, but maintained that he did not have contact with him on August 4, 1993, nor did he ever sell drugs to him. Defendant suggested that Thompson was only testifying for the prosecution because Thompson had previously threatened to "kick defendant's butt" after defendant told Thompson's girlfriend that he saw Thompson with another woman. Defendant also stated that when he was arrested

on August 31, 1993, he was asked by Riley to be a confidential police informant in exchange for his charges being dropped.

Defendant then gave several inconsistent statements, changed his answers from one question to another during cross-examination, and conceded that he never really thought about the details of what happened on August 4 until about three months after he was arrested and started coming to court. Defendant denied having ever sold cocaine, and denied having ever supplied cocaine to White.

The prosecution called several rebuttal witnesses who refuted specific details of defendant's testimony. Deputy Riley denied having ever asked defendant to be an informant, explaining that defendant would not be a wise pick for a CPI because defendant had been arrested along with several others who would obviously be aware of the fact that defendant had been arrested on drug cases. In addition, Riley stated that he would not have asked defendant without first obtaining permission from the prosecutor's office.

Defendant immediately objected and moved for a mistrial asserting that Riley violated the pretrial order limiting his testimony when he mentioned that defendant had been arrested on "drug cases" and that his testimony was prejudicial to defendant. The motion was denied and the trial resumed.

## II

Defendant first argues that the trial court abused its discretion in concluding that the probative value of White's testimony outweighed the danger of any unfair prejudice where the similar bad acts evidence worked only to portray defendant as a drug dealer and thus directly attacked his character, the evidence was not probative of defendant's habitual presence at White's residence, and did not establish a "plan" to use White's home to sell drugs.

While we do not share the trial court's view regarding the relevance and admissibility of the evidence, we conclude that its admission was harmless in light of White's admissible testimony that defendant was at her house August 4, and Thompson's testimony, corroborated by Riley's eyewitness testimony and the taped recordings of the events as they occurred. The evidence against defendant was overwhelming without the challenged testimony.

## III

Defendant next asserts that the prosecutor denied him due process when he vouched for White's credibility and truthfulness by stating that she received leniency in exchange for her truthful testimony.

Defendant specifically objects to the following testimony elicited by the prosecutor:

Q: Did you enter into a plea agreement with the prosecutor's office?

A: Yes.

Q: Were you allowed to plead to one charge of delivery of cocaine in return for your truthful testimony and a dismissal of the aiding and abetting--

A: Yes.

Q: -- delivery of cocaine?

A: Yes.

Because defendant failed to object to this testimony at trial, this Court's review is for a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant is correct in arguing that a prosecutor may not vouch for the credibility of a witness, nor suggest that the government has some special knowledge that the witness is testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). However, "[b]y calling a witness who testifies pursuant to an agreement requiring him to testify truthfully, the Government does not insinuate possession of information not heard by the jury and the prosecutor cannot be taken as having expressed his personal opinion on a witness' veracity." *Id.* quoting *United States v Creamer*, 555 F2d 612, 617-618 (CA7, 1977).

In the present case, no objection was made to the prosecutor's questions, the prosecutor made no reference to any personal knowledge of the witness' veracity, and the court instructed the jurors that they could consider White's past criminal history when deciding whether to believe her testimony. We conclude defendant has shown neither impermissible vouching nor manifest injustice.

#### IV

Lastly, defendant argues that the trial court improperly denied his motion for mistrial after Deputy Riley violated a pre-trial order by disclosing that defendant had other pending drug charges. We disagree.

A denial of a motion for mistrial rests within the sound discretion of the trial court, and absent an affirmative showing of prejudice to the defendant's rights, such an exercise of discretion will not be reversed on appeal. *People v Holly*, 129 Mich App 405, 415; 31 NW2d 823 (1983).

Following defendant's contention that he, too, was asked be a confidential informant in exchange for the police dropping the charge against him, the prosecution recalled Deputy Riley who testified:

Q: Detective, do you remember August 31 of 1993?

A: Yes, sir, I do.

Q: Did you speak with Tom Tom Carter on that day?

A: He would have been one of the several subjects I spoke to, yes.

Q: Did you ask him to be a CPI?

A: Absolutely not.

Q: Why?

A: Due to the fact that we were doing a round up that was well publicized all the raid we were pulling in Cassopolis and Dowagiac. It [sic] he was arrested along with numerous other subjects it would not have been beneficial to try to recruit him as a CPI. Everybody would know he was arrested on drug cases. And we wouldn't have done it at that stage anyhow without getting prior permission from the prosecutor's office.

Generally, a volunteered and unresponsive answer to a proper question is not cause for granting a motion for mistrial. *Holly, supra* at 415. "However, when an unresponsive remark is made by a police officer, this Court will scrutinize that statement to make sure the officer has not ventured into forbidden areas which may prejudice the defense." *Id.*

The court did not abuse its discretion in denying defendant's motion for mistrial. Detective Riley's answer was given in response to a proper question. There is no reason to believe that his reference to "drug cases" rather than "a drug case" was anything but inadvertent. Further, because of White's testimony, the jury received an instruction regarding the use of bad acts evidence. Additionally, in the context of the question and answer, Riley's reference to "drug cases" could be seen as a collective reference to all the drug cases police were pursuing as part of the roundup, and not as an assertion that defendant himself had been charged in other cases..

We conclude that Riley's isolated comment did not deny defendant a fair trial.

Affirmed.

/s/ Helene N. White  
/s/ David H. Sawyer  
/s/ Richard M. Pajtas