

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VICTOR EUGENE THOMPSON,

Defendant-Appellant.

UNPUBLISHED

November 22, 1996

No. 182571

LC No. 93-64299-FH

Before: Fitzgerald, P.J. and O'Connell and T.L. Ludington,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted as charged of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Defendant subsequently pleaded guilty of being an habitual offender, third offense, MCL 769.11; MSA 28.1083. He was sentenced to a prison term of ten to forty years. Defendant appeals as of right. We affirm defendant's conviction and sentence and remand for preparation of the voir dire transcript.

I

Defendant first claims that the trial court abused its discretion by refusing to admit into evidence a tape recording of the transaction that resulted in defendant's conviction. The trial court excluded the tape based on the parties' concession that the tape was unintelligible and "primarily under MRE 403, which will lead to the fact that it's going to be confusing, whatever probative value it has, it's going to be confusing and its going to possibly mislead the jury." The trial court ultimately admitted the tape during the course of the jury's deliberation without objection from defense counsel.

Assuming, arguendo, that the trial court abused its discretion in refusing to admit the tape during trial, any error was harmless. MRE 103(a); MCL 769.26; MSA 28.1096. Defendant contends that admission of the tape into evidence would have allowed defense counsel to challenge officers' testimony as to what they overheard on the wire. However, Officer Bykerk positively identified defendant as the person who sold him drugs. Informant Guy Farley testified that he purchased drugs from defendant and

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

set up the drug sale between Bykerk and defendant. The evidence against defendant was so overwhelming that, even if error occurred, any possible error could not have affected the verdict in this case. *People v Price*, 214 Mich App 538, 546; 543 NW2d 49 (1995).

Defendant next maintains that evidence concerning uncharged misconduct was improperly admitted. We disagree.

To be admissible under MRE 404(b), bad acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993). Defendant does not dispute the relevancy of the prior bad acts evidence. Rather, defendant contends that the evidence was not offered for a proper purpose and that the probative value of the evidence was outweighed by its potential for unfair prejudice.

A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *VanderVliet*, *supra* at 74. The evidence to which defendant objects is Bykerk's and Farley's testimony that Farley had purchased drugs from defendant on prior occasions. This type of testimony is necessary in a case such as this where an admitted drug dealer testifies that he contacted another known drug dealer to set up an undercover buy. Without such testimony, the jury would be left without any explanation as to why the informant would contact defendant to set up a drug buy. In addition, the testimony was confined to that which showed the prior relationship between Farley and defendant concerning drug sales, which was relevant to the ultimate issue of delivery of cocaine. The testimony was given for a proper purpose. *People v Engelman*, 434 Mich 204, 212; 453 NW2d 656 (1990).

A review of the record fails to disclose whether the trial court employed the balancing test required under MRE 403. Based on the limited use of the testimony, however, it is apparent that the prejudicial impact of the testimony did not substantially outweigh the probative value of the testimony. Further, the evidence against defendant was overwhelming. Therefore, assuming the trial court erred by failing to conduct the balancing test, any error was harmless. *Price*, *supra* at 546.

Defendant also asserts that the trial court's limiting instruction was defective because it failed to indicate to the jury a proper purpose for which the testimony regarding the prior drug transactions had been offered and failed to limit the jury's consideration of the testimony to that proper purpose. Defendant did not object to the trial court's limiting instruction and has, therefore, waived appellate review of the issue. *People v Adamski*, 198 Mich App 133, 143; 497 NW2d 546 (1993). Nonetheless, a review of the record reveals that the trial court did in fact instruct the jury as to the limited purpose for which the evidence was offered. *People v Heiss*, 30 Mich App 126, 131; 186 NW2d 63 (1971).

III

Defendant next claims that the trial court erred by preventing defense counsel from cross-examining the informant about the price of the marijuana he sold to Bykerk. We disagree. Contrary to

defendant's suggestion, a "climbing the ladder" theory¹ was not pursued by the prosecutor. The analogy was mentioned to explain to the jury the concept of "flipping" and why informants are helpful to the police. Thus, whether defendant was a higher level supplier than Farley was not an issue. Further, the central issue in the case was whether defendant sold cocaine to Bykerk, and not whether Farley sold drugs to Bykerk or the price of those drugs. The price of marijuana does not have any tendency to make the existence of a fact which is of consequence to the action more or less probable than it would be without the evidence. MRE 401. We find no abuse of discretion in the trial court's decision to exclude the evidence. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

IV

Defendant suggests that the trial court erred by overruling defense counsel's objections to voice identification testimony. The record reveals that defendant objected once to the testimony on the ground that the prosecutor must lay a foundation before questioning Officer Rozema regarding what defendant said during the drug transaction. After Rozema testified that he had previously heard defendant's voice, defendant raised no further objections. Consequently, defendant has failed to preserve this issue for appeal. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). Given the overwhelming evidence of guilt, failure to review this issue will not result in manifest injustice.

V

Defendant raises three arguments in support of his request for resentencing. First, defendant maintains that the sentence imposed is disproportionate. This Court's review of an habitual offender sentence is limited to consideration of whether the sentence violates the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), without reference to the guidelines. *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). After a thorough review of the record, we find that defendant's sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender. Defendant sold drugs and a gun to an undercover officer, which shows a willingness to traffic in both cocaine and firearms. In addition, defendant had a prior robbery conviction and twenty-eight major misconducts while in prison, including assault on a prison employee.

Defendant also contends that resentencing is required because the sentencing judge failed to realize that enhancement of the maximum sentence under the habitual offender statute was discretionary. However, the sentencing judge's statements during the supplemental hearing for the habitual offender notice reveal that the judge recognized that enhancement of the maximum sentence was discretionary. The judge specifically stated that defendant's sentence "could be increased up to forty years in prison." Use of the words "could" and "up to" indicate that the trial court had a clear understanding of its discretion in sentencing. *People v Farah*, 214 Mich App 156, 157; 542 NW2d 321 (1995).

Last, defendant asserts that resentencing is required because the trial judge failed to articulate reasons for the sentence imposed. Articulation of reasons for the sentence on the underlying offense satisfies the articulation requirement as to a subsequent sentence as an habitual offender. *People v*

Poole, 186 Mich App 213, 215; 463 NW2d 478 (1990). In sentencing defendant, the trial judge specifically noted that defendant had a criminal record and twenty-eight major misconducts while in prison, including assault. Hence, defendant's argument is without merit.

VI

Last, defendant claims that the trial court violated MCR 6.425 by denying his request for a transcript of the jury voir dire. MCR 6.425(F)(2)(a)(i) provides that the trial court must direct the court reporter to prepare and file, within the time limits specified in MCR 7.210, "the trial or plea proceeding transcript, excluding the transcript of the jury voir dire unless the defendant challenged the jury array, exhausted all peremptory challenges, was sentenced to serve a term of life imprisonment without the possibility of parole, or shows good cause." Defendant contends that, because he challenged the jury array, he is entitled to the transcript of voir dire. However, a challenge to a jury array must be in writing before the jury is sworn. *People v Kelly*, 147 Mich App 806, 814; 384 NW2d 49 (1985), vacated on other grounds 428 Mich 867 (1987). Here, defendant objected on the record to the race array of the jury after the jury had been sworn in.

Nonetheless, upon defense counsel's objection to the array, the trial court addressed the issue and permitted defense counsel to argue his objection. The trial judge then rendered a decision on the challenge and decided that the selection process was fair, and thus denied defendant's objection. After the court rendered its decision, the jurors were again sworn in. Under these circumstances, we find that, although defendant did not challenge the array in writing before the jury was sworn, he has shown good cause to warrant preparation of the transcript of voir dire.

Defendant's conviction is affirmed, and the case is remanded solely for preparation of the transcript of voir dire. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ Thomas L. Ludington

¹ "Climbing the ladder" apparently refers to the practice of using a lower level drug dealer as an informant to catch a higher level dealer.