# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KIRT ALLEN MARVEL,

Defendant-Appellant.

UNPUBLISHED
February 21, 1997

No. 190381
Osceola Circuit Court
LC No. 95-002214-FH

Before: MacKenzie, P.J., and Holbrook, Jr., and T.P. Pickard,* JJ.

PER CURIAM.

Defendant was convicted by a jury of delivering less than fifty grams of a mixture containing cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and subsequently pleaded guilty of being an habitual offender, second offense, MCL 769.10; MSA 28.1082. He was sentenced to serve six to thirty years in prison and ordered to pay $250 in restitution to the Central Michigan Enforcement Team (CMET). He appeals as of right and we affirm defendant's convictions but vacate the order of restitution and remand for consideration of defendant's challenge to the accuracy of certain presentencing information.

Defendant first argues that the trial court improperly admitted testimony from a sheriff's deputy that defendant acknowledged having sold cocaine and/or marijuana over a nine year period that concluded prior to the time of the charged incident. The trial court, referring to MRE 402, 403 and 404(b), concluded that the testimony was relevant to the "knowledge and intent elements" of the charged offense, apparently to defendant's knowledge that the substance given to the informant was cocaine. Rule 404(b) precludes the admission of evidence where its relevancy depends on (1) an inference of the defendant's character from his prior misdeeds; and (2) using this inference as proof of the defendant's conduct on a particular occasion. *People v VanderVliet*, 444 Mich 52, 63-64; 508 NW2d 114 (1993). However, even if other acts evidence is permissible under MRE 404(b), it is subject to exclusion under MRE 403 if its probative value is substantially outweighed by the danger of unfair prejudice and/or other factors. *Id.* at 74-75. Other acts evidence that is relevant only to matters not actually disputed at trial may have marginal probative value and technical relevance in comparison to

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

its potential for prejudice. "The prosecutor should not be allowed to introduce other acts evidence only because it is technically relevant." *Id*. at 90-91. We agree with defendant that the testimony in question should have been excluded because there was no disputed issue at trial regarding whether defendant knew that the instant cocaine was actually cocaine. The defense did not suggest that defendant transferred the instant cocaine to the informant without knowing that it was cocaine, but simply disputed defendant's involvement in the transaction with the informant. Accordingly, defendant's statement about having sold drugs in the past could have been significantly relevant only to show that he would act in conformity, a purpose forbidden by MRE 404(b). Thus, we conclude that the trial court abused its discretion, *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995), by admitting this evidence, which had no significant probative value and held the potential for being improperly used by the jury to show defendant had a propensity to commit the crime.

However, the erroneous admission of the other acts evidence was harmless because it did not prejudice defendant in light of the strong evidence of his guilt. *People v Rodriquez*, 216 Mich App 329, 332; 549 NW2d 359 (1996). Our inquiry into prejudicial error "focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence." *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996). Here, the police officer observing the scene of the drug purchase saw that the suspect car was a "grayish" Chevrolet Cavalier with the license plate "EEV620." After defendant's initial meeting with the informant, another police officer, who had known defendant for several years, saw defendant driving a car with the license plate "EEV620" and believed that the car was a Cavalier. One defense witness testified that defendant drove a little gray car, while another defense witness testified that defendant owned a silver Cavalier. Accordingly, it is clear that defendant drove the car to the final meeting with the informant. He thereby played an active role in delivering the cocaine; there is no reasonable possibility that he was merely present at the time of the transfer. In view of the informant having been searched by a police officer prior to the exchange, there is no reasonable possibility that the informant had cocaine on his person prior to the encounter with defendant. Accordingly, in light of the limiting instruction given to the jury regarding the other acts evidence and the other untainted evidence of defendant's guilt, we conclude that prejudicial error did not occur.

Next, defendant argues that the trial court improperly precluded cross-examination of the informant about his financial compensation from CMET. However, the court did not actually preclude the defense from cross-examining the informant about this matter, but merely required defense counsel to connect testimony about compensation paid to the informant for transactions after the incident with the informant's credibility in this case. A defendant does not have an unlimited right to cross-examine on any subject. *People v Hackett*, 421 Mich 338, 347; 365 NW2d 120 (1984). The trial court did not abuse its discretion, *People v Minor*, 213 Mich App 682, 684; 541 NW2d 576 (1996), by requiring defense counsel to relate the proposed cross-examination to the informant's credibility in this case. Regardless, the informant's testimony about the compensation he received for setting up cocaine and marijuana deals was not stricken from the jury's consideration.

We further conclude that the trial court did not abuse its discretion by excluding a police officer's testimony regarding whether drug informants used by the officer generally had been involved in the drug trade. In *People v Hubbard*, 209 Mich App 234, 235, 241; 530 NW2d 130 (1995), this

Court held that expert testimony about profiles of drug dealers should be excluded under MRE 403 as substantive evidence of a defendant's guilt. Such profiles "are inherently prejudicial because of the potential they have for including innocent citizens as profiled drug couriers." *Id.*, quoting with approval *United States v Hernandez-Cuartas*, 717 F2d 552, 555 (CA 11, 1983). We find the rationale of *Hubbard* instructive. Like using profiles of drug dealers against an individual defendant, negative generalizations about police drug informants have the potential of being improperly applied to individual informants.

Next, defendant contends that police officers improperly gave opinions about the informant's credibility. However, because the defense had attacked the informant's credibility during cross-examination, opinion testimony that the informant had a truthful character was admissible under MRE 608(a).

Defendant next argues that it was improper for a police officer to testify that, when he saw defendant after his arrest, the officer perceived defendant as looking like the person he had seen in the suspect vehicle. We find no error. "Identification is not required to be positive, absolute, certain, or wholly unqualified to justify admission; where there is some evidence for that purpose, objections to its sufficiency go to weight rather than admissibility." *People v Camon*,, 110 Mich App 474, 485; 313 NW2d 322 (1981). Accordingly, the witness' less than positive identification did not constitute error requiring reversal.

Defendant next argues that the officer's nonresponsive testimony, that he would have arrested defendant based on what the informant told him, was improper because it placed "the imprimatur of the state" behind defendant's guilt. We find no prejudice to defendant on this basis because this nonresponsive testimony was stricken by the trial court.

Defendant next asserts that the prosecutor's remarks during closing argument regarding the informant's credibility were improper and that the prosecutor, without a good-faith belief that she had the information sought, questioned another witness about the informant's history of taking drug tests in connection with employment. However, these arguments are not properly preserved because they are outside the scope of defendant's statement of this issue which is limited to police opinion testimony. *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990).

Defendant next advances multiple claims of prosecutorial misconduct. Because these claims were not preserved below, review is precluded unless a curative instruction could not have eliminated the prejudicial effect or failure to consider the issue would result in a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996). Defendant asserts that the prosecutor made remarks in closing argument that impermissibly referenced defendant's failure to testify and shifted the burden of proof and that he also made improper remarks at various points during the trial that disparaged defense counsel. We decline to review any of these remarks because they did not prejudice defendant and, thus, did not constitute manifest injustice in light of the strong evidence of defendant's guilt. Likewise, trial counsel's failure to object to the prosecutor's remarks, which arguably referenced defendant's failure to testify, did not constitute ineffective assistance of counsel because there is no

reasonable probability that those remarks impacted the outcome of the trial. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). We find no misconduct by the prosecutor in asking a defense witness if he had been in fights with defendant in light of the prosecutor's explanation that he was seeking to elicit information about the degree of friendship between the witness and defendant. The bias or interest of a witness is always a relevant subject of inquiry on cross-examination. *People v Morton*, 213 Mich App 331, 334; 539 NW2d 771 (1995). Contrary to defendant's argument that the prosecutor improperly appealed to the jury's civic duty by eliciting testimony from the informant that he wanted to work for CMET because he had two children and did not "want to see them growing up doing that stuff and ending up in jail," this testimony was relevant because one could reasonably determine that an informant motivated by this concern would be less likely to implicate a suspect falsely. Accordingly, this was not an improper civic duty argument that injected inappropriate issues broader than defendant's guilt or innocence. See *People v Potra*, 191 Mich App 503, 512; 479 NW2d 707 (1991).

Defendant next argues that trial counsel provided ineffective assistance by failing to impeach or cross-examine a police officer based on portions of the tape recording of the incident in which the officer may have referred to the suspect vehicle as "blue" rather than gray or silver. We note that defendant has failed to provide a transcript of the tape recording, but assume for purposes of this appeal that the pertinent statements set forth in defendant's brief on appeal are accurate. The officer apparently made this reference when the suspect car was first seen returning to the area where its occupants previously contacted the informant. It is reasonable that a gray or silver car might be initially misperceived as blue. More importantly, the car and defendant as its driver were identified with reference to the license plate on the car irrespective of the car's color. We conclude that trial counsel's failure to address this matter did not constitute ineffective assistance because there is no reasonable probability that this would have impacted the jury's verdict. *Johnson, supra*, 451 Mich 124. While defendant claims that portions of the tape recording played to the jury also contained inadmissible hearsay, he has abandoned this argument by failing to argue its merits because he has not identified those portions or asserted with specificity why they were supposedly inadmissible. *People v Jones*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). Likewise, defendant has failed to develop his conclusory claim that, to the extent any issues raised in his brief went without objection from trial counsel below, this fell below an objective standard of reasonableness. In sum, defendant has not established that his conviction should be reversed based on ineffective assistance of counsel.

Defendant raises multiple issues related to his sentence. Defendant is not entitled to resentencing based on the prosecutor making allegations at sentencing that were unsupported by record evidence because the trial court expressed that it disregarded those remarks. *Cf. People v Brown*, 186 Mich App 350, 359; 463 NW2d 491 (1990). The prosecutor's remarks maintaining that the type of sentence imposed would send a message to the community and that a substantial penalty was necessary to deter similarly situated individuals was permissible argument inasmuch as deterrence is one of the goals in sentencing a drug offender. *People v Antolovich*, 207 Mich App 714, 717-718; 525 NW2d 513 (1994). Contrary to defendant's argument, there is no indication from the trial court's comments that it failed to recognize its discretion to impose a lesser maximum sentence than the highest possible maximum sentence due to the habitual offender plea. See *People v Beneson*, 192 Mich App

469, 471; 481 NW2d 799 (1992). However, the trial court was without authority to require defendant to pay $250 in restitution to CMET. *People v Chupp*, 200 Mich App 45, 45; 503 NW2d 698 (1993). Thus, we vacate the award of restitution. *Id.*

Finally, defendant argues that trial counsel provided him ineffective assistance by failing to challenge the accuracy of information in the presentence report that defendant had pleaded guilty to a probation violation charge involving malicious property damage. At sentencing, the court expressly referred to defendant's alleged probation violation in imposing sentence. On appeal, defendant moved for remand to conduct an evidentiary hearing, supporting his claim with an affidavit in which he averred that he never pleaded guilty to this charge and, in essence, that his trial counsel never went over the presentencing information report with him. See MCR 7.211(C)(1)(a). In lieu of remanding this matter for a hearing regarding defendant's claim that he received ineffective assistance of counsel, we remand this matter to the trial court and direct it to consider, in accordance with MCR 6.425(D)(3), defendant's challenge to the information in the presentence report regarding probation violation. In the event that the court finds the information to be inaccurate, the court must strike it from the report and resentence defendant.

We affirm defendant's convictions, but vacate that portion of his sentence requiring him to pay $250 in restitution. We remand to the trial court for consideration of defendant's challenge to the accuracy of certain information in the presentence report. We do not retain jurisdiction.

/s/ Barbara B. MacKenzie
/s/ Donald E. Holbrook, Jr.
/s/ Timothy P. Pickard