STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRIN JACKSON,

Defendant-Appellant.

UNPUBLISHED
February 3, 1998

No. 183954
Oakland Circuit Court
LC No. 94-133592 FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES G. DENT,

Defendant-Appellant.

No. 184461
Oakland Circuit Court
LC No. 94-133597 FH

Before: Griffin, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant Jackson was convicted by a jury of possession with intent to deliver 50 grams or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), and possession of an open liquor container in a vehicle, MCL 257.624a; MSA 9.2324(1). Defendant Jackson was sentenced as a repeat drug offender, MCL 333.7413(2); MSA 14.15(7413)(2), to ten to forty years' imprisonment for the cocaine conviction, plus sixteen days (time served) for the open liquor violation.

Defendant Dent was convicted by the same jury of possession with intent to deliver 50 grams or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii),

possession of a firearm during the commission of a felony, second offense, MCL 750.227b(b); MSA 24.424(2)(b), being a felon in possession of a firearm, MCL 750.224f; MSA 24.424(5), and possession of an open liquor container in a vehicle, MCL 257.624a; MSA 9.2324(1). Defendant Dent was sentenced as a second felony offender, MCL 769.10; MSA 28.1082, to ten to thirty years' imprisonment for the cocaine conviction, five years' consecutive imprisonment for the felony-firearm second conviction, one to seven-and-a-half years' imprisonment for the felon in possession conviction, and sixteen days (time served) for the open liquor violation.

Defendants filed separate appeals as of right which were consolidated for our review. We affirm as to defendant Dent. We reverse and remand for a new trial as to defendant Jackson.

Both defendants argue that the trial court erred in denying their motions to suppress evidence and refusing to direct a verdict of acquittal. We disagree. Having thoroughly reviewed the record, we find that the officers had particularized suspicion to approach defendants. *People v Shabaz*, 424 Mich 42, 54, 57, 59; 378 NW2d 451 (1985) (relying on *Terry v Ohio*, 392 US 1, 21; 88 S Ct 1868; 20 L Ed 2d 889 [1968]). The officers then saw evidence of drinking and drug usage in plain view, justifying defendants' arrests. MCL 764.15(1)(a); MSA 28.874(1)(a) (warrantless misdemeanor arrest). The van was properly searched and inventoried as part of that arrest. *People v Bullock*, 440 Mich 15, 26; 485 NW2d 866 (1992); *People v Toohey*, 438 Mich 265, 278-279, 284; 475 NW2d 16 (1991).

Next, defendants argue that, because their personal property was forfeited in a civil proceeding following their arrest, prosecution was barred by the Double Jeopardy Clause. We disagree. Defendants have failed to show that the forfeiture was so punitive in form or effect as to be equivalent to a criminal prosecution. *People v Acoff*, 220 Mich App 396, 397-399; 559 NW2d 103 (1996) (quoting *United States v Ursery*, 518 US ___; 116 S Ct 2135; 135 L Ed 2d 549, 569 n 3 [1996]); see also *People v Duranseau*, 221 Mich App 204, 205-208; 561 NW2d 111 (1997).

Defendants next argue that the prosecution should not have been allowed to argue that several exhibits contained cocaine where only one exhibit was tested by the state police crime laboratory. We again disagree. The evidence was admissible because, since a field test turned out positive for cocaine, it was helpful in resolving the pending charges. *People v VanderVliet*, 444 Mich 52, 60 n 8, 62 n 10; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205 (1994). This Court may not assess the weight and value of the evidence, but only determine whether the evidence was of a kind properly considered by the jury. *Cole v Eckstein*, 202 Mich App 111, 113-114; 507 NW2d 792 (1993).

Defendant Jackson argues that there was insufficient evidence to support his conviction of possession with intent to deliver cocaine. Although we find the issue to be close, we disagree. Viewing the evidence in the light most favorable to the prosecution, the jury could have reasonably inferred that, given the quantity of cocaine, the apparent drug dealing by codefendant, the presence of cocaine in plain view near the passenger's seat, and Jackson's attempted flight, that defendant Jackson must have had knowledge of and involvement in a scheme to manufacture, package, or sell the cocaine. *People v*

Petrella, 424 Mich 221, 268-270; 380 NW2d 11 (1985); see also *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995).

Next, defendants argue that the trial court should have dismissed the jury venire and granted a mistrial because of certain allegedly prejudicial comments made by a prospective juror. We disagree. Defendants have failed to show that the comments were so prejudicial that they were deprived of a fair trial. *People v Sawyer*, 215 Mich App 183, 186-187; 545 NW2d 6 (1996).

Defendant Jackson further argues that the trial court erred in limiting his examination of the owner of the van and in refusing to grant a continuance when the owner failed to appear for further questioning. Defendant may not argue that the trial court abused its discretion because both attorneys agreed to the court's ruling. Second, any error in the court's refusal to grant a continuance was harmless because the parties had already obtained as much information as the owner of the van was willing to disclose before asserting his right to remain silent. See *People v Charles O Williams*, 386 Mich 565, 574-575; 194 NW2d 337 (1972); *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992).

Finally, both defendants argue that the trial court abused its discretion by admitting "other-acts evidence" allegedly committed by defendant Jackson. We agree. However, as to defendant Dent, we find the error to be harmless. *People v Mateo*, 453 Mich 203; 551 NW2d 891 (1996), and *People v Mosko*, 441 Mich 496, 502-503; 495 NW2d 534 (1992).

In *VanderVliet, supra* at 74-75, our Supreme Court held that evidence of other crimes, wrongs, or acts is admissible under MRE 404(b) if such evidence is (1) offered for a proper purpose rather than to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to prevail under the balancing test of MRE 403. MRE 404(b) is an inclusionary, not exclusionary, theory of admissibility. *VanderVliet, surpa* at 64-65. *People v Hoffman*, 225 Mich App 103; ___ NW2d ___ (1997).

In the present case, both defendants objected to the other-acts evidence regarding defendant Jackson. The disputed evidence was a prior conviction of defendant Jackson for possession with intent to deliver cocaine, and a subsequent arrest of defendant Jackson for possession of cocaine. In admitting this evidence, the trial court failed to specify a limited purpose for its use. Rather, the court indicated that the other-acts evidence was admissible for "the whole litany" of purposes allowable under MRE 404(b):

> I have made a finding that it [prior conviction] is allowable and admissible under 404(b), not to prove the character, as the rule says. We're not attacking the character of Mr. Jackson. I'm allowing it in, for *all other purposes* and find it to be probative under those purposes under the rule. [Emphasis added.]

The trial court subsequently instructed the jury that evidence of defendant Jackson's other bad acts could only be considered to decide whether he "used a plan, a system or a characteristic scheme that he had used before."

On appeal, the prosecution argues that the arrest and conviction *could* have been admitted for the limited purpose of proving defendant Jackson's "knowledge and intent." We find the prosecutor's argument to be without merit. An arrest without a conviction is evidence of nothing other than perhaps a mistake in judgment by the police. However, the danger of unfair prejudice from the evidence of an arrest is significant. Further, absent a proper and limited purpose, prior convictions are not admissible as substantive evidence of guilt and their admission for purposes of impeachment is severely limited. See *People v Allen*, 429 Mich 558; 420 NW2d 499 (1988). The potential danger of unfair prejudice from the use of a defendant's criminal record was well articulated by the Supreme Court in *Allen, supra* at 566-569:

> There can be little doubt that an individual with a substantial criminal history is more likely to have committed a crime than is an individual free of past criminal activity. Nevertheless, in our system of jurisprudence, we try cases, rather than persons, and thus a jury may look only to the evidence of the events in question, not defendant's prior acts in reaching its verdict. See *United States v Mitchell*, 2 US (2Dall) 348, 357; 1 L Ed 410 (1795).
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> A jury should not be allowed to consider the defendant's guilt of the crime before it on the basis of evidence of his propensity for crime. Finding a person guilty of a crime is not a pleasant or easy assignment for a representative group of twelve people. It is much easier to conclude that a person is bad than that he did something bad. Hence the appetite for more knowledge of the defendant's background and the slippery slope toward general "bad man" evidence.
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> This appetite presents three types of impropriety. First, the jurors may determine that although defendant's guilt in the case before them is in doubt, he is a bad man and should therefore be punished. Second, the character evidence may lead the jury to lower the burden of proof against the defendant, since, even if the guilty verdict is incorrect, no "innocent" man will be forced to endure punishment. Third, the jury may determine that on the basis of his prior actions, the defendant has a propensity to commit crimes, and therefore he probably is guilty of the crime with which he is charged. *Beaver v Marques, A proposal to modify the rule on criminal conviction impeachment*, 58 Temple L Q 585, 592-593 (1985). All three of these dimensions suggest a likelihood that innocent persons may be convicted.

> The danger then is that a jury will misuse prior conviction evidence by focusing on the defendant's general bad character, rather than solely on his character for truthtelling.

The prosecutor views *VanderVliet, supra,* as an open door in all cases for the admission into evidence of a defendant's criminal record. The prosecutor has misread *VanderVliet*. Under *VanderVliet*, evidence of other crimes, wrongs, and acts are admissible only if all three *VanderVliet* criterion are satisfied.

Here, the evidence of defendant Jackson's prior conviction and subsequent arrest was not offered or admitted for a specific proper purpose. The prosecution nebulously argued knowledge and intent, the trial court articulated no basis other than the general purposes of the court rule, and the jury was instructed to consider the other-acts evidence only in terms of its bearing on a plan, system, or characteristic scheme. There was no discernible consistency in the reasons given by the prosecution and the court for admitting the evidence. Second, defendant Jackson's prior conviction and subsequent arrest is not relevant to any fact at issue at trial. Defendant's "intent" to commit the charges was not proved by defendant's criminal record. Further, defendant's "knowledge" of cocaine or cocaine trafficking was not at issue. Moreover, the record is dearth of any proofs showing a common scheme, plan, or characteristic way in which the drugs were allegedly dealt, linking the prior conviction to the present case, so as to otherwise justify admitting the other-acts evidence. Finally, for the reasons stated in *Allen, supra,* the danger of unfair prejudice from the admission of defendant Jackson's conviction and arrest substantially outweigh any probative value from the evidence. Accordingly, after applying *VanderVliet*, we hold that the trial court abused its discretion in admitting this evidence.

Next, we must decide whether the error was harmless. As to defendant Dent, we hold that the error was harmless in light of the overwhelming evidence in support of his conviction. *People v Robinson,* 386 Mich 551, 563; 194 NW2d 709 (1972); *People v Ullah,* 216 Mich App 669, 676; 550 NW2d 568 (1996). Specifically, defendant Dent admitted to being in possession and control of the vehicle in which a large package of recently cooked crack cocaine was found in the cabinet above the driver's seat. A smaller quantity of crack cocaine was also discovered in a pouch on the driver's door and a large $100 rock of cocaine in smaller chips and flakes of crack cocaine were found between the front seats. When the police arrived at the scene, defendant Dent was sitting in the driver's seat of the vehicle, apparently conducting a drug transaction out of the driver's side window. Finally, the improperly admitted evidence pertained to defendant Jackson, not defendant Dent. In view of all the evidence and circumstances, we hold that it is not reasonably probable that the error affected the jury's verdict as to defendant Dent. *People v Hubbard,* 209 Mich App 234, 243; 530 NW2d 130 (1995); *People v Hall,* 435 Mich 599, 609, n 8; 460 NW2d 520 (1990); MCL 769.26; MSA 28.1096, and MCR 2.613(A).

However, in regard to defendant Jackson, we hold that the error requires reversal. As to defendant Jackson, the circumstantial evidence was minimal, not overwhelming. There was no direct evidence that defendant Jackson possessed the cocaine found primarily on the driver's side of the vehicle. There were no identifiable fingerprints linking defendant Jackson to the van or the cocaine. The

officers testified that they neither observed Jackson with cocaine nor did they attempt to make a controlled buy from him. He was not in possession of marked money or other paraphernalia that would suggest cocaine possession. Defendant Jackson had no keys to the van or van compartments. Further, because defendant Jackson did not own or control the vehicle and had only recently been given a ride, the evidence of constructive possession was weak. The alleged drug dealing that the police observed occurred from the driver's window, not from the passenger side where defendant Jackson was sitting.

In summary, the question of defendant Jackson's guilt was closely drawn. After thorough review, we conclude that it is "reasonably probable" that improper evidence of defendant Jackson's prior conviction and subsequent arrest affected the jury's verdict. See, generally, *Hubbard, supra* at 243.

Affirmed as to defendant Dent. Reversed and remanded for a new trial as to defendant Jackson.

/s/ Richard Allen Griffin
/s/ David H. Sawyer