

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 9, 2013

v

CHAD MICHAEL MOORE,

Defendant-Appellant.

No. 306039
Midland Circuit Court
LC No. 11-004709-FH

Before: M. J. KELLY, P.J., and CAVANAGH and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right his conviction, following a jury trial, of delivery of a controlled substance (methamphetamine), MCL 333.7401(2)(b)(i). Defendant was sentenced to serve 240 months to 40 years in prison. We affirm defendant's conviction and sentence, but remand for the correction of a clerical error in the judgment of sentence.

Defendant's conviction stems from a January 2011 controlled drug buy supervised by officers assigned to the Bay Area Narcotics Enforcement Team (BAYANET). The buy was made by a confidential informant who had come to law enforcement with information about defendant's involvement in methamphetamine trafficking. At trial, the prosecutor elicited information from the informant about his knowledge of defendant's prior involvement in the production and sale of methamphetamine. Defendant argues on appeal that this testimony was improper, because it involved prior bad acts and he was not given prior notice that the prosecution would be seeking to introduce it.

MRE 404(b)(2) provides as follows:

The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination.

The recognized goals of the notice requirement are:

(1) to force the prosecutor to identify and seek admission only of prior bad acts evidence that passes the relevancy threshold, (2) to ensure that the defendant has an opportunity to object to and defend against this sort of evidence, and (3) to facilitate a thoughtful ruling by the trial court that either admits or excludes this evidence and is grounded in an adequate record. [*People v Hawkins*, 245 Mich App 439, 454-455; 628 NW2d 105 (2001).]

The testimony cited was also elicited at the preliminary examination, nearly four months prior to trial. There is nothing in MRE 404(b)(2) that requires that written notice be provided to a defendant. Rather, the rule speaks in general terms. When the prosecutor elicited this same testimony from the confidential informant at the preliminary examination, defendant was on notice that the prosecutor would seek to do the same at trial.

What was not spelled out at the preliminary examination was the purpose the evidence was being offered at the preliminary examination. However, defense counsel had the opportunity to explore the prosecutor's reasoning, but failed to do so. "[E]rror requiring reversal may only be predicated on the trial court's actions and not upon alleged error to which the aggrieved party contributed by plan or negligence." *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003). Therefore, we reject defendant's argument as to lack of notice.

Defendant also argues that admission of the evidence could not be considered harmless. This assertion is predicated on the assumption that notice was lacking, which we reject, and an unstated presumption that the evidence was not relevant, which we also reject. MRE 404(b)(1) provides as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

MRE 401 defines "relevant evidence" to mean "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

The court instructed the jury that one of the elements it had to find was "that Defendant knew he was delivering methamphetamine." In closing argument, defense counsel stated that defendant was arguing that this element of the crime had not been proven. Evidence of defendant's prior manufacture and delivery of methamphetamine was relevant to this fact of consequence. See MRE 401. Defendant's prior experience with the controlled substance makes it much more probable that he knew that the substance delivered during the controlled buy was methamphetamine.

Next, defendant argues that certain comments in the prosecutor's opening statement and closing argument constituted misconduct. During his opening statement, the prosecutor stated as follows:

Now, I anticipate you'll hear that in January of this year, of 2011, BAYANET was receiving numerous tips and some significant information about methamphetamine being sold here in Midland County.

I expect you'll hear that the BAYANET detectives started to develop that intelligence and that information and that information [sic] and the fingers were pointing to this individual, [defendant], as being involved.

During his closing argument, the prosecutor also stated as follows:

Now, you heard from two detectives, two Bay Area Narcotics Enforcement Team [BAYANET] detectives. They were involved in this case from its inception.

You heard them tell you and testify that they were receiving information about methamphetamine being sold here in Midland County in January of this year.

You heard them both testify that they were developing that information, they received intelligence, and they also received information from a tipster who turned out to be the confidential informant

All of that information, all that intelligence led to and pointed to [defendant].

According to defendant, the prosecutor's comments misstated the evidence because no evidence supported the prosecutor's assertion that law enforcement received information about defendant's involvement in methamphetamine trafficking from more than just the confidential informant.

Although it is not directly stated, the prosecutor's arguments do imply that BAYANET officers received general information about methamphetamine being sold in Midland County and that this information was in addition to the information provided by the informant. The prosecutor stated that the officers were receiving "numerous tips," implying more than one informant. Further, the prosecutor referred to "developing . . . information" and "*also* receiv[ing] information from a tipster who turned out to be the confidential informant." (Emphasis added.) Although the statements from the prosecutor's opening were properly qualified ("anticipate," "expect"), he affirmatively stated in closing that the jurors had heard from the two testifying BAYANET officers that information in addition to the informant's had been received.

However, no such information was brought out in the testimony. Both Bay County Sherriff's Detective Dustin Box and Midland County Sheriff's Detective Shannon Guilbeaux

testified only about their interaction with the confidential informant, and neither testified that any other information had been received from someone other than the informant.

Nevertheless, for at least two reasons the prosecutor's reference to evidence not adduced at trial was harmless. First, defendant was charged with a single count stemming from the January 13, 2011, controlled buy, and the evidence of his guilt (which included eyewitness testimony and chemical analysis) was substantial. Second, the jurors were instructed that it was their duty to decide the facts, that "the lawyers' statements and arguments are not evidence," and that they "should only accept things the lawyers say that are supported by the evidence." "It is well established that jurors are presumed to follow their instructions[.]" *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), and we see nothing in the record before us to presume otherwise.

Defendant has also filed a supplemental Standard 4 brief. Although defendant does not separately specify the issues he is seeking to raise, we reject the arguments made in the brief. Nothing in the record supports the assertion that the prosecutor elicited fraudulent evidence, or that the prosecutor acted with a malicious intent to deny defendant due process of law. Likewise, nothing in the record supports the assertion that the trial court had any bias or prejudice against defendant, or otherwise acted without impartiality. And, defendant's unsubstantiated allegations are not sufficient to warrant a remand for an evidentiary hearing.

Finally, we agree that the judgment of sentence erroneously references MCL 769.12, when defendant was sentenced pursuant to the "double penalty" provision of the repeat controlled substance offender statute, MCL 333.7413(2). We remand for correction of this clerical error. MCR 6.435(A); MCR 7.216(A).

Defendant's conviction and sentence are affirmed, but we remand for correction of the identified clerical error in the judgment of sentence. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Christopher M. Murray