

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLAXTON JOHNSON, JR.,

Defendant-Appellant.

---

UNPUBLISHED

July 31, 2008

No. 277571

Kalamazoo Circuit Court

LC No. 06-002077-FH

Before: Murphy, P.J., and Bandstra and Beckering, JJ.

PER CURIAM.

Defendant Claxton Johnson, Jr. appeals as of right his jury trial conviction of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv). Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 30 to 360 months' imprisonment. We affirm defendant's conviction and sentence, but remand for the ministerial task of correcting defendant's presentence investigation report (PSIR).

I. Alleged Prosecutorial Misconduct

Defendant argues that he was denied a fair trial because of several instances of prosecutorial misconduct. We review preserved claims of prosecutorial misconduct de novo, on a case-by-case basis, to determine whether defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Even where error is found, reversal is not required unless it is more probable than not that the error was outcome determinative. *People v Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d 584 (1999), citing *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999).

A.

First, defendant argues that the prosecutor committed misconduct by eliciting testimony from Sergeant William Moore that the sergeant knew defendant "from the streets" and that defendant's friends were "drug dealers." Specifically, defendant argues that the testimony constituted inadmissible other-acts evidence under MRE 404(b). We disagree.

On October 7, 2006, Sergeant Moore observed defendant walking with his friends Melvin Coleman and Lamont Yarborough in a parking lot. According to Sergeant Moore, defendant had

an object in his right hand, which he threw onto the ground as the sergeant approached. Investigators subsequently confirmed that the object was a clear plastic bag containing small chunks of crack cocaine, or approximately 20 individual servings of cocaine. The incident was captured on a police cruiser camera and the videotape was admitted into evidence and played for the jury. Several witnesses testified that the amount of cocaine in the bag indicated that it was intended for sale, and not for personal consumption. Defendant initially informed the police that he never held the bag of cocaine and that it did not belong to him. At trial, however, defendant testified that he was holding the bag for Yarborough, he knew the bag contained a controlled substance, although he was unsure of the type, and he threw the bag onto the ground to avoid being caught by the police.

During direct examination, the prosecutor asked Sergeant Moore whether he knew defendant “from the streets,” and the sergeant testified that he did. Defense counsel objected, arguing that the testimony was irrelevant and constituted other-acts evidence for which the prosecutor had not provided sufficient notice under MRE 404(b). The prosecutor contended that the sergeant and defendant’s familiarity with one another was relevant to the issues in the case. The trial court overruled the objection. Later, during cross-examination, defense counsel asked Sergeant Moore who defendant was with at the time of the offense. The sergeant responded that, “[defendant] was with another subject that I’ve dealt with. He’s a drug dealer.” Defense counsel again objected, and the trial court struck the response. Sergeant Moore then testified that the other subject was “[a] guy that I’ve had contact with on numerous occasions: Melvin Coleman.” Defense counsel attempted to pursue, unsuccessfully, whether Sergeant Moore had investigated any warrant information on defendant’s companions the night of the incident. During redirect examination, Sergeant Moore testified that because he personally observed defendant drop the bag of cocaine onto the ground, he did not believe it was necessary to interview Coleman and Yarborough about the incident. The prosecutor then asked if Sergeant Moore believed defendant’s “fellow drug dealers” would have cooperated had they been interviewed. Defense counsel objected on the grounds that it called for speculation, but the trial court overruled the objection, and Sergeant Moore answered “no.” On recross-examination, defense counsel actively pursued the fact that Sergeant Moore believed the other two men were “fellow drug dealers” in calling into question why he did not bother to interview them at the time of the incident. Sergeant Moore responded, “I’ve built cases on . . . Coleman, yes. He’s a drug dealer. . . . I’ve arrested him on numerous times . . . for drugs.”

Defendant asserts that Sergeant Moore’s testimony constituted unfairly prejudicial other-acts evidence. Pursuant to MRE 404(b), evidence of an individual’s crimes, wrongs, or bad acts is inadmissible to show a propensity to commit such acts. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). We cannot, however, identify a crime, wrong, or bad act inherent in the testimony elicited by the prosecutor that would trigger MRE 404(b) analysis.<sup>1</sup> Therefore, the

---

<sup>1</sup> We acknowledge that Sergeant Moore’s testimony that Coleman “is a drug dealer” and that he had “arrested him . . . for drugs” implicated evidence of other “crimes, wrongs, or bad acts” under MRE 404(b). But, the sergeant’s initial reference to Coleman being a drug dealer was stricken from the record. The trial court instructed the jury to disregard the stricken testimony and we must presume that the jury followed the instruction. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Moreover, Sergeant Moore only referred to Coleman’s history  
(continued...)

appropriate analysis is whether the evidence is relevant, and if so, whether its probative value outweighs its potential prejudicial effect. *People v Mills*, 450 Mich 61, 66; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995).

Generally, all relevant evidence is admissible. MRE 402; *Crawford, supra* at 388. To be relevant, evidence must be material to a fact of consequence to the action. *People v Ackerman*, 257 Mich App 434, 439; 669 NW2d 818 (2003). In this case, Sergeant Moore's testimony that he recognized defendant and Coleman from previous interactions and did not find it necessary to interview Coleman or Yarborough was relevant to the sergeant's identification of defendant as the perpetrator. At the time of his arrest, defendant claimed that someone else had dropped the bag of cocaine onto the ground and identity is always an essential element in a criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). Furthermore, even if the prosecutor's reference to defendant's "fellow drug dealers" suggested that defendant and his friends committed other "crimes, wrongs, or bad acts," the prosecutor's question and the sergeant's response pertained to identifying defendant as the perpetrator, and establishing identity is a proper purpose for admitting other-acts evidence. MRE 404(b)(1).

Moreover, we find no merit to the argument that the probative value of Sergeant Moore's testimony was substantially outweighed by the danger of unfair prejudice. See *Mills, supra* at 66; *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001). The sergeant's testimony was highly probative because it was relevant to establishing identity and there is no indication that the jury gave preemptive weight to the evidence. See *Ortiz, supra* at 306. Therefore, because the evidence was proper, defendant cannot establish that the prosecutor committed misconduct in introducing it. Prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence, and prosecutors are entitled to introduce admissible evidence. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999). Further, considering the other evidence of defendant's guilt presented at trial, including the sergeant's description of the instant offense, a videotape capturing the incident, defendant's admission that he dropped the bag of cocaine to avoid being caught by the police, and the amount of cocaine in the bag, we cannot conclude that it is more probable than not that the challenged testimony or the prosecutor's isolated reference to defendant's "fellow drug dealers" affected the outcome of the case. *Brownridge, supra* at 216.

## B.

Next, defendant argues that the prosecutor committed misconduct by eliciting testimony from defendant about his familiarity with controlled substances and the distribution of controlled substances. Again, we disagree.

During cross-examination, the prosecutor asked defendant whether he was "very familiar with drugs," specifically "crack cocaine." Defense counsel objected, but the trial court overruled the objection. Defendant admitted that he was familiar with crack cocaine, and acknowledged

---

(...continued)

with drugs in response to defense counsel's questions, not the prosecutor's. Therefore, defendant cannot establish that the prosecutor committed any misconduct in that regard.

that he had “handled crack cocaine on numerous occasions.” Defendant also admitted that he knew how crack cocaine was sold, and that he had observed the sale of crack cocaine in the past.

Contrary to defendant’s argument on appeal, evidence that he is merely familiar with crack cocaine and its distribution, and that he had observed others sell crack cocaine in the past, does not implicate MRE 404(b). The appropriate analysis, therefore, is whether the evidence is relevant and not overly prejudicial. *Mills, supra* at 66. Here, defendant’s testimony was relevant to establishing the elements of the charged offense. When a defendant pleads not guilty to the charged offense, all elements that comprise the offense are at issue. *People v Martzke*, 251 Mich App 282, 293; 651 NW2d 490 (2002). For defendant to be found guilty of possession with intent to deliver, the prosecutor had to establish beyond a reasonable doubt that defendant knowingly possessed a controlled substance and that he intended to deliver the substance. *People v McGhee*, 268 Mich App 600, 612; 709 NW2d 595 (2005). At trial, defendant testified that he was only holding the bag at Yarborough’s request, he knew the bag contained a controlled substance, although he was unsure of the type, and he did not intend to distribute it. Evidence that defendant was familiar with controlled substances and their distribution, particularly the distribution of crack cocaine, rebutted his claim that he did not know the clear plastic bag contained crack cocaine and that it was not intended for sale. Furthermore, while the challenged evidence was detrimental to defendant’s case, we do not find that the evidence was overly prejudicial. *Mills, supra* at 66; *Ortiz, supra* at 306. Accordingly, the prosecutor did not commit misconduct in admitting the evidence. See *Noble, supra* at 660-661.

### C.

Defendant also challenges the prosecutor’s introduction of evidence that defendant was on parole at the time of the instant offense. While defendant is correct that the opportunity for a fair trial can be jeopardized when the prosecutor injects issues broader than the guilt or innocence of the accused, *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999), “otherwise improper remarks by the prosecutor might not require reversal if they respond to issues raised by the defense,” *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003). At trial, defendant testified that he was holding the bag of cocaine for Yarborough and that he did not tell the police the bag belonged to Yarborough because a warrant had been issued for Yarborough’s arrest, while there was no outstanding warrant for his own arrest and he had no reason to fear the police.<sup>2</sup> Thereafter, the prosecutor moved to admit evidence of defendant’s parole status. Over defense counsel’s objection, the trial court admitted the evidence, finding that it was relevant to determining defendant’s credibility.

We find that the evidence was properly admitted. At trial, defendant essentially claimed that he took the bag of cocaine from Yarborough, and did not tell the police who the bag belonged to, because he faced less severe consequences than Yarborough for possession of a controlled substance. But, considering defendant’s parole status at the time of the offense, it was

---

<sup>2</sup> During his closing argument, defense counsel stated, “[Defendant’s] buddy had something to hide. His buddy’s worried about getting arrested. His buddy gave him [the bag of cocaine]. And he was a friend, he got rid of it.”

proper for the prosecutor to challenge the credibility of the claim. A prosecutor may argue from the facts that the defendant is not worthy of belief. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Moreover, the trial court instructed the jury that it should only use the evidence of defendant's parole status in evaluating his credibility, thereby eliminating any potential for prejudice. See *Ackerman, supra* at 449 (stating that no error requiring reversal will be found where a curative instruction could have prevented any prejudicial effect).

D.

Next, defendant argues that the prosecutor committed misconduct by questioning him about his post-arrest statements to the police. Specifically, defendant argues that the prosecutor introduced improper evidence of his post-arrest "silence." Because defendant failed to object to the prosecutor's alleged misconduct below, we review this issue for plain error affecting his substantial rights. *People v Cox*, 268 Mich App 440, 451; 709 NW2d 152 (2005). Plain error exists if the error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *Ackerman, supra* at 448.

The Fifth Amendment, US Const, Am V, and Const 1963, art 1, § 17, provide that, in a criminal trial, a defendant shall not be compelled to be a witness against his or her own interests. *People v Schollaert*, 194 Mich App 158, 164; 486 NW2d 312 (1992). A prosecutor may not introduce evidence of, or comment on, a defendant's post-arrest silence. *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). But, as our Supreme Court explained in *People v Cetlinski (After Remand)*, 435 Mich 742, 749; 460 NW2d 534 (1990), "when an individual has not opted to remain silent, but has made affirmative responses to questions about the same subject matter testified to at trial, omissions from the statements do not constitute silence." In other words, "[w]here a defendant makes statements to the police after being given *Miranda*<sup>3</sup> warnings, the defendant has not remained silent, and the prosecutor may properly question and comment with regard to the defendant's failure to assert a defense subsequently claimed at trial." *People v Avant*, 235 Mich App 499, 509; 597 NW2d 864 (1999); see also *People v Davis*, 191 Mich App 29, 31-35; 477 NW2d 438 (1991).

In this case, the prosecutor did not elicit testimony about defendant's post-arrest silence. Defendant did not remain silent post-arrest and post-*Miranda*; instead, he repeatedly stated that he "didn't do shit." Therefore, it was proper for the prosecutor to question defendant about his failure to tell the police that he was holding the bag for Yarborough and that he dropped the bag onto the ground to avoid being caught. See *Avant, supra* at 509. Defendant's failure to assert a defense to the police that he later claimed at trial was evidence of fabrication and consciousness of guilt, *People v Unger*, 278 Mich App 210, 225-226; 749 NW2d 272 (2008), and the prosecutor committed no misconduct in introducing the evidence, *Noble, supra* at 660-661.

---

<sup>3</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

E.

Additionally, defendant argues that during his closing argument, the prosecutor made several improper statements about defendant's familiarity with controlled substances, parole status, and post-arrest "silence," impermissibly appealed to the jury's civic duty, and misstated the law. Defendant failed to object to any of the prosecutor's statements below, with the exception of his statements about defendant's post-arrest "silence." As stated *infra*, we review unpreserved claims of prosecutorial misconduct for plain error. *Cox, supra* at 451.

Defendant argues that during his closing argument, the prosecutor improperly referenced evidence of defendant's familiarity with controlled substances, parole status, and post-arrest "silence." We disagree. In general, a prosecutor is granted great latitude in his closing argument. *Bahoda, supra* at 282. He may argue the evidence admitted at trial and all reasonable inferences arising from the evidence as they relate to his theory of the case. *Id.* As explained *infra*, the challenged evidence was properly admitted to establish the elements of the charged offense and to challenge defendant's credibility. During his closing argument, the prosecutor argued that the jury should consider the evidence for the same purposes. Therefore, because the prosecutor's statements were supported by properly admitted evidence and related to his theory of the case, they were not improper. *Id.*

Defendant next argues that the prosecutor made an improper civic duty argument to the jury. A "civic duty" argument urges the jury to convict a defendant for the good of the community, or otherwise appeals to the jurors' fears and prejudices, and thereby injects issues broader than the guilt or innocence of the accused. *Bahoda, supra* at 282-283. Here, the prosecutor stated, "You folks are the conscience of the community," and "[i]t would be a very serious miscarriage of justice for you not to convict him of this crime with this evidence." When viewed in context we find that the prosecutor's comments were not improper. To the extent that the prosecutor's statements could be considered improper, however, any prejudice was cured by the trial court's instructions directing the jury to return a verdict based only on the evidence and to not let sympathy or prejudice influence its decision. *Ackerman, supra* at 449. Defendant cannot establish that, but for the prosecutor's statements, the outcome of the proceedings would have been different. *Carines, supra* at 763.

Further, defendant argues that the prosecutor misstated the law by arguing that defendant "delivered" the cocaine because "[h]e delivered it to the ground." We note, however, that the trial court instructed the jury that it is the court's duty to instruct on the law and that the jury should disregard any contrary statements about the law made by the attorneys. The court further instructed the jury on the elements of the charged offense, stating that defendant must have "intended to deliver [the controlled] substance to someone else." Therefore, while the prosecutor's statement about delivery of a controlled substance had the potential to mislead the jury, the trial court's instructions eliminated any potential for prejudice. *Ackerman, supra* at 449. Again, defendant cannot establish that the prosecutor's isolated statement affected the outcome of the case. *Carines, supra* at 763.

Because the prosecutor's conduct during closing arguments did not amount to error requiring reversal, defendant's corresponding claim of ineffective assistance of counsel fails as well. See *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999) (stating that in order

to establish ineffective assistance of counsel, the defendant must show that, but for defense counsel's error, it is likely that the proceeding's outcome would have been different).

## II. Jury Instruction on Aiding and Abetting

Defendant next argues that the trial court erred in giving the aiding and abetting instruction requested by the prosecution. We disagree.

We review claims of instructional error de novo on appeal. *People v Lowery*, 258 Mich App 167, 173; 673 NW2d 107 (2003). We review a trial court's determination that an instruction is applicable to the facts of a case for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). An abuse of discretion occurs when the outcome chosen by the trial court is not within the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). In reviewing claims of instructional error, we examine the instructions in their entirety, and if the instructions adequately protected the defendant's rights by fairly presenting the issues to the jury, there is no basis for reversal. *People v Martin*, 271 Mich App 280, 337-338; 721 NW2d 815 (2006).

Defendant claims that he was denied the opportunity to present a defense because the trial court permitted the prosecution to add the "charge" of aiding and abetting after the close of proofs and closing arguments. We disagree. A trial court may amend the information at any time during trial to cure any defect, imperfection, or omission in form or substance, including a variance between the information and proofs, so long as the amendment is not unduly prejudicial. MCL 767.76; *People v Goecke*, 457 Mich 442, 459-460; 579 NW2d 868 (1998). That said, aiding and abetting is an alternative theory of liability, not a separate charge. Thus, in this case, the trial court was not required to amend the information for defendant to be convicted under an aiding and abetting theory. It is not necessary for a prosecutor to charge a defendant in any other form than as a principal. *People v Lamson*, 44 Mich App 447, 450; 205 NW2d 189 (1973). A defendant may be charged as a principal and convicted as an aider and abettor. *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995).

Furthermore, we find that the evidence presented at trial supported the aiding and abetting instruction given. In order for a trial court to give a particular jury instruction, it is necessary that there be evidence to support the giving of that instruction. *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988). "Instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000).

A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense. MCL 767.39. To convict a defendant under an aiding and abetting theory, "the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement." *People v Izarraras-Placante*, 246 Mich App 490, 495-496; 633 NW2d 18 (2001). A defendant may be found guilty of aiding and abetting if he assisted in concealing a controlled substance from police, even if the defendant claims that the controlled substance did not belong to him. *People v DeLeon*, 110 Mich App 320, 325-326; 313 NW2d 110 (1981), rev'd

on other grounds 414 Mich 851 (1982). In this case, defendant testified that the bag he was holding did not belong to him and that he was only holding it because Yarborough asked him to. Defendant admitted, however, that he was aware of Coleman and Yarborough's experience with controlled substance distribution and that the bag contained some type of controlled substance. Defendant further admitted that he threw the bag onto the ground to avoid being caught by the police. Therefore, because there was evidence to support the elements of aiding and abetting, the trial court did not abuse its discretion in instructing the jury on that alternative theory of liability. *Canales, supra* at 574.

### III. Drug Profile Evidence

Next, defendant argues that he was denied his due process right to a fair trial by the improper admission of drug profile evidence. Generally, we review the admission of evidence for an abuse of discretion. *Matuszak, supra* at 47. But, because defendant failed to timely and specifically object to the evidence below, we review this issue for plain error affecting his substantial rights. *Carines, supra* at 763.

A "drug profile" has been defined as a list of usually innocuous characteristics that police believe to be typical of a person engaged in controlled substance distribution. *People v Murray*, 234 Mich App 46, 52-53; 593 NW2d 690 (1999). In other words, "[d]rug profile evidence is essentially a compilation of otherwise innocuous characteristics that many drug dealers exhibit, such as the use of pagers, the carrying of large amounts of cash, and the possession of razor blades and lighters in order to package crack cocaine for sale." *Id.* Drug profile evidence is not admissible as substantive evidence of guilt. *People v Hubbard*, 209 Mich App 234, 241; 530 NW2d 130 (1995). Thus, an expert witness is not permitted to testify that, "on the basis of the profile, the defendant is guilty," or to "compare the defendant's characteristics to the profile in a way that implies that the defendant is guilty." *People v Williams*, 240 Mich App 316, 321; 614 NW2d 647 (2000). Expert testimony is admissible, however, to aid the jury in intelligently understanding the evidence in controlled substance cases and "to explain the significance of items seized and the circumstances obtaining [sic] during the investigation of criminal activity." *Murray, supra* at 53. The prosecution may not use drug profile evidence to argue that the defendant must be guilty because he fits the profile, but may "rely on the facts of the case to prove guilt when understood in the context of the profile . . ." *Id.* at 59.

Contrary to defendant's assertions on appeal, the prosecution did not elicit testimony implying that defendant was guilty on the basis of a drug profile, or use drug profile evidence as substantive evidence of defendant's guilt. The police officers who testified explained the significance of the quantity of cocaine found and the manner in which it was packaged. Their testimony was admissible to show that defendant intended to sell the cocaine, rather than use the cocaine for personal consumption. *People v Stimage*, 202 Mich App 28, 29-30; 507 NW2d 778 (1993); *People v Ray*, 191 Mich App 706, 708; 479 NW2d 1 (1991). Additionally, two of the officers testified that drug dealers frequently hold drugs in their hands or discard drugs to avoid being caught by police. While this testimony described otherwise innocuous characteristics of drug dealers, i.e., the holding of items in their hands or the dropping of items onto the ground, and may be considered drug profile evidence, the officers' statements were isolated and did not suggest that defendant was guilty because he fit the profile. Therefore, considering the other evidence presented at trial, defendant cannot establish that the admission of the challenged evidence constituted plain error affecting his substantial rights. *Carines, supra* at 763.

#### IV. PSIR Correction

Finally, defendant requests a remand for correction of his PSIR. On page one of the PSIR, the following sentences appear: “[t]his is the third felony conviction that the Defendant has committed while on parole,” and “[t]his is the third felony conviction the Defendant has received while on parole.” At sentencing, the trial court acknowledged that the instant offense was the first felony offense defendant had committed while on parole, not the third. Therefore, we find, and the prosecution concedes, that a correction of the PSIR was required. See MCR 6.425(E)(2); MCL 771.14(6). We remand for the ministerial task of correcting the error, and forwarding the corrected PSIR to the Department of Corrections.

Affirmed, but remanded for correction of defendant’s PSIR. We do not retain jurisdiction.

/s/ William B. Murphy  
/s/ Richard A. Bandstra  
/s/ Jane M. Beckering