

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

TIMOTHY DWAYNE JOHNSON,

Defendant-Appellant.

UNPUBLISHED

January 17, 2003

No. 234088

Muskegon Circuit Court

LC No. 93-035436-FC

Before: Sawyer, P.J., and Gage and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of conspiracy to deliver over 650 grams of cocaine, MCL 750.157a; MCL 333.7401(2)(a)(i), and three counts of delivering less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv). The trial court sentenced defendant to consecutive prison terms of life for the conspiracy conviction and 5 to 20 years for each delivery conviction. Defendant's original claim of appeal filed with this Court was dismissed as untimely. *People v Johnson*, unpublished order of the Court of Appeals entered January 27, 1999 (Docket No. 214501). Defendant subsequently filed a motion for relief from judgment in the trial court, raising the same issues as in the instant appeal. The trial court found that defendant had established "good cause" based on appellate counsel's failings, but denied relief because defendant had not established "actual prejudice" necessary for entitlement to relief. This Court denied defendant's delayed application for leave to appeal, *People v Johnson*, unpublished order of the Court of Appeals entered June 14, 2000 (Docket No. 224973); however, our Supreme Court has remanded to this Court as on leave granted, *People v Johnson*, 463 Mich 1016; 627 NW2d 597 (2001). We affirm.

Subchapter 6.500 of the Michigan Court Rules governs motions for relief from judgment, *People v Jackson*, 465 Mich 390, 395-397; 633 NW2d 825 (2001). The defendant bears the burden of establishing entitlement to relief under MCR 6.508(D); *People v Reed*, 198 Mich App 639, 645; 499 NW2d 441 (1993). A trial court may not grant relief if: (1) direct appeal is available; (2) the motion raises grounds already decided adversely to the defendant, unless the defendant establishes that a retroactive change in the law has undermined the prior decision; or (3) "alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal" or in a prior motion unless the defendant demonstrates (a) good cause for failure to previously raise such grounds, and (b) actual prejudice from the alleged irregularities that support

the claim for relief. MCR 6.508(D); *Jackson, supra* at 397. If either “good cause” or “actual prejudice” is lacking, the trial court need not address the other prong before denying the motion. *Jackson, supra* at 405-406.

Where a defendant has been convicted after trial, as in the case at bar, “actual prejudice” is established if defendant demonstrates that but for the alleged error, he would have had a reasonably likely chance of acquittal. MCR 6.508(D)(3)(b)(i). Alternatively, defendant may demonstrate “actual prejudice” by showing that an irregularity was so offensive to the maintenance of a sound judicial process that his conviction should not be allowed to stand, regardless of the effect of the irregularity on the outcome of the case. MCR 6.508(D)(3)(b)(iii); *People v Moldowan*, 466 Mich 862; 643 NW2d 570 (2002).

In general, the trial court's decision to grant or deny a motion for relief from judgment is reviewed for an abuse of discretion. *People v Ulman*, 244 Mich App 500, 508; 625 NW2d 429 (2001); *Reed, supra* at 645. Any factual findings necessary to the trial court’s decision are reviewed for clear error. MCR 2.613(C); *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000).

I

Defendant first claims that he was denied a fair trial when two police officers were permitted to testify as expert witnesses concerning crack cocaine distribution because the testimony constituted inadmissible “profile” evidence that the prosecutor improperly used as substantive evidence of guilt. We note initially that defendant did not object to this evidence below on the same ground as now raised on appeal, and therefore, did not properly preserve this argument. MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

In *People v Hubbard*, 209 Mich App 234; 530 NW2d 130 (1995), this Court held the admission of drug profile evidence constituted error warranting reversal where (1) the evidence was used as substantive evidence to show “a consistent pattern of behavior,” (2) the prosecutor argued the profile evidence in closing, and (3) the trial court did not give a limiting instruction. *Id.* at 242-243. This Court further found that the preserved error was not harmless because there was no direct evidence of the defendant’s guilt and the circumstantial evidence was not overwhelming, and therefore, the issue of the defendant’s guilt was “closely drawn.” *Id.* at 243.

In *People v Murray*, 234 Mich App 46, 51-62; 593 NW2d 690 (1999), this Court distinguished the holding in *Hubbard*, finding that the trial court did not abuse its discretion in admitting expert testimony about drug trafficking where (1) the officer’s testimony did not constitute an opinion about whether the defendant was a drug trafficker, but was testimony given to educate the jury about drug transactions; (2) the prosecution did not rely on the expert testimony in closing arguments; and (3) the jury received a limiting instruction on the expert testimony. See also *People v Griffin*, 235 Mich App 27, 44-45; 597 NW2d 176 (1999) (holding that expert testimony concerning indicia of drug trafficking was not improper drug profile evidence but constituted proper expert testimony concerning material issues); *People v Williams*, 240 Mich App 316, 320-321; 614 NW2d 647 (2000) (profile evidence may be admitted where there is other evidence to establish the defendant’s guilt).

A review of the testimony of the officers in this case reveals that they did not specifically opine that defendant was a drug dealer because he exhibited the pertinent characteristics. In fact, during cross-examination, one officer denied any personal knowledge regarding whether defendant carried either a pager or cellular phone. Moreover, during cross-examination, defense counsel expressly and frequently relied on the officer's status as an expert to elicit answers about indicia of drug trafficking. Defendant may not assign error on appeal to something that his own counsel deemed proper at trial. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995); *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). Further, in closing arguments, the prosecution did not use the experts' descriptions of the drug dealer profile for substantive evidence of defendant's guilt. Finally, the court gave the jury a limiting instruction, instructing that the jury did not have to believe the expert's opinion and that the fact that the witness was a police officer did not make the testimony any more or less believable.

In this case, as opposed to *Hubbard*, there was substantial evidence of defendant's guilt. The prosecutor presented direct testimony by two alleged accomplices that defendant was the leader of a conspiracy to distribute substantial quantities of cocaine over a four-year period (500 grams on average per week). The prosecutor also presented direct testimony that defendant delivered cocaine to a police officer on three separate occasions, which defendant admitted in his trial testimony. Further, the prosecutor presented circumstantial evidence corroborating the testimony of the alleged coconspirators, including "controlled buys" of cocaine when defendant was present, testimony of police officers placing defendant at locations alleged to have been used in the conspiracy, as well as associating with alleged members of the conspiracy, and testimony that the police made a substantial purchase of cocaine from defendant's alleged "source" in Detroit.

This evidence, if believed, overwhelmingly proved defendant's guilt beyond a reasonable doubt. Although the accomplices' testimony was subject to attack, the trial court instructed the jury that such testimony should be carefully scrutinized. This Court should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Hardiman*, 466 Mich 417, 431; 646 NW2d 158 (2002); *People v Elkhoja*, 251 Mich App 417, 442; 651 NW2d 408 (2002).

Because the expert testimony at issue was properly admitted or, or at the very least, was not outcome determinative even if admitted in error, defendant has failed to establish "actual prejudice," necessary for relief from judgment, MCR 6.508(D)(3)(b)(i). Therefore, the trial court did not abuse its discretion by denying defendant's motion for relief from judgment. *Ulman*, *supra* at 508.

II

Next, defendant argues that admission of bad acts evidence contrary to MRE 404 denied him a fair trial. Again, we note that defendant preserved an objection to testimony that he used a gun to question persons about missing money on the basis of relevancy, unfair prejudice, and lack of personal knowledge; however, defendant did not properly preserve an objection under MRE 404. Defendant did however properly preserve this issue with respect to evidence that he failed to file Michigan income tax returns by objecting on relevancy, unfair prejudice and MRE 404 grounds.

All logically relevant evidence is admissible. MRE 401; MRE 402. To be relevant, the evidence must be material or probative of a fact of consequence to the action. To be material, the fact must be one “in issue” or within the “range of litigated matters in controversy.” *People v Sabin (After Remand)*, 463 Mich 43, 57; 614 NW2d 888 (2000). However, it is settled that evidence of other crimes, wrongs, or acts may not be used to prove a person’s character to show that the person acted in conformity and therefore is guilty. MRE 404(b); *Sabin (After Remand)*, *supra* at 56.¹

Assuming, arguendo, that the evidence should be analyzed under MRE 404(b), defendant’s argument that the evidence admitted was improper character evidence used in violation of MRE 404(b)(1) fails. Here, the prosecutor alleged, and presented evidence to support, that defendant was the leader of a conspiracy to import and distribute thousands of dollars worth of cocaine, and that defendant controlled both the distribution of the cocaine and the revenue it generated. Thus, evidence that defendant used force to assert his dominion and control over missing alleged drug profits (\$6,000) was directly relevant and material to defendant’s membership and position in the alleged conspiracy, as well as to the scope of the conspiracy. Moreover, because the evidence was highly probative and the charged offense was dissimilar to assault, its probative value was not exceeded by the danger of unfair prejudice. MRE 403; *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001); *People v Rice (On Remand)*, 235 Mich App 429, 441; 597 NW2d 843 (1999).²

A similar analysis applies to evidence that defendant did not file Michigan income tax returns. The evidence was arguably relevant, as the trial court concluded, to show that the cash, which other witnesses testified defendant possessed, had been obtained illegally. Further, although the probative value of the evidence was not great, the dissimilarity between drug trafficking and income tax evasion lessened its potential for unfair prejudice. Moreover, defendant testified that his source of income during the period of the alleged conspiracy was in fact from illegal sources, including gambling and marijuana sales; this testimony diminished any prejudicial effect of the evidence.

Even assuming, arguendo, that the evidence of defendant’s use of the gun and failure to file income tax returns were improperly admitted, the other evidence of defendant’s guilt was overwhelming. Thus, defendant cannot demonstrate that error warranting reversal occurred because it does not affirmatively appear that it is more probable than not that the errors were outcome determinative, *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999), nor is defendant entitled to relief from judgment because he has not shown that, but for the alleged errors, it is reasonably likely he would have been acquitted, MCR 6.508(D)(3)(b)(i).

III

¹ To be admissible under MRE 404(b), the trial court must determine: (1) that the evidence is offered for a proper purpose; (2) that the evidence is relevant; (3) that the probative value is not substantially outweighed by unfair prejudice; and (4) the trial court may, upon request, provide a limiting instruction to the jury. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998).

² There is no indication in the record that defendant requested a limiting instruction.

Defendant next contends that the prosecutor denied him a fair trial when, before the defense attacked their credibility, he stressed that the alleged accomplices had agreed to testify truthfully as part of their plea bargains, thus implying special knowledge and improperly vouching for their credibility. Defendant did not preserve his claim of prosecutorial misconduct by specific objection and request for a curative instruction. *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998). Claims of prosecutorial misconduct are reviewed de novo, but unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting the defendant's substantial rights. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

The mere disclosure of a plea agreement with a prosecution witness, which includes a provision for truthful testimony and sanctions for untruthful testimony, does not constitute improper vouching or bolstering by the prosecutor, provided the prosecutor does not suggest special knowledge of truthfulness not available to the jury. *People v Bahoda*, 448 Mich 261, 276-277; 531 NW2d 659 (1995); *People v Enos*, 168 Mich App 490, 492; 425 NW2d 104 (1988). Moreover, prosecutors are accorded great latitude in their arguments and conduct and may argue credibility based on facts in evidence or reasonable inferences drawn from the evidence. *Bahoda*, *supra* at 282.

A review of the testimony shows that during direct examination, the prosecution merely recounted the details of the witnesses' plea bargains. Defendant's argument that error occurred because the prosecutor elicited the details of the plea agreements on direct examination, rather than on redirect examination after the witness' credibility is attacked on cross-examination, is without merit. In opening statement before the presentation of any proofs by the prosecutor, defense counsel referred to the accomplices as two "parrots," who were only testifying to escape a life prison sentence, and continued a vigorous attack on their credibility during cross-examination and closing argument. A prosecutor's conduct that might otherwise be improper is not improper where it is in response to a defense attack. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

To the extent defendant relies on the prosecution's rebuttal argument to establish prosecutorial misconduct, the reliance is misplaced. The prosecution referred to the terms of the plea bargains in its rebuttal argument only after defense counsel argued during closing that the witnesses were not worthy of belief because they were testifying against defendant to lessen their own sentences. Moreover, by instructing the jury that attorney comments are not evidence and that it was the jury's duty to determine credibility, the trial court cured any possible prejudice. *Bahoda*, *supra* at 281. It follows that the trial court correctly concluded that defendant failed to establish "actual prejudice" required by MCR 6.508(D)(3)(b)(i) or (iii), and did not abuse its discretion by denying relief from judgment, *Ulman*, *supra* at 508; *Reed*, *supra* at 645.

IV

Defendant next contends that his Sixth Amendment right to confront witnesses was violated when the trial court permitted the prosecution to admit the preliminary examination testimony of a missing witness.³

Out-of-court statements offered for their truth are usually inadmissible hearsay. See MRE 801(c); MRE 802. However, hearsay testimony may be admitted when the declarant is unavailable. “Unavailability” as a witness includes the situation where the declarant “is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance.” MRE 804(a)(5). If the declarant is unavailable as a witness, “[t]estimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination” is not excluded by the hearsay rule. MRE 804(b)(1). MRE 804(b)(1) on its face requires no more than that the defendant has the “opportunity” and “similar motive” to cross-examine the witness. In a case where evidence falls within a firmly rooted hearsay exception such as MRE 804(b)(1), reliability can be inferred without more. See *People v Meredith*, 459 Mich 62, 70-71; 586 NW2d 538 (1998).

Defendant had the opportunity to cross-examine Thompson at the preliminary examination. Whether defendant possessed certain police reports or not, he had a similar motive to cross-examine Thompson – to damage Thompson’s credibility. The trial court did not abuse its discretion in permitting the prosecution to admit Thompson’s preliminary examination testimony. Thus, the trial court correctly concluded that defendant had failed to establish “actual prejudice” required by MCR 6.508(D)(3)(b)(i) or (iii), and no abuse occurred in denying defendant’s motion for relief from judgment. *Ulman, supra* at 508.

V

Finally, defendant argues that the trial court erred by instructing the jury that the “evidence clearly shows that [the accomplice witnesses] are guilty of the same crime that the Defendant is charged with.” Defendant contends this instruction impermissibly undermined the

³ The witness, Kevin Thompson, had originally testified against defendant on a charge of conspiring to deliver a lesser amount of cocaine that ultimately was dismissed in circuit court. At the preliminary examination on the instant case, the magistrate received the transcript of the prior examination and the prosecutor produced Thompson for additional cross-examination. Defense counsel noted, and the prosecutor agreed, that he had received a “big packet of documents” the day before the exam (when defense counsel had indicated that Thompson would need to be produced). By the start of the trial, however, Thompson could not be found and defense counsel stipulated that the prosecutor and police had used due diligence in attempting to produce him. However, counsel objected to reading Thompson’s testimony from both preliminary examinations because Thompson was an informant, the jury would not be able to judge his demeanor and thereby assess his credibility, and discovery had not been completed at the time of the preliminary examination. The trial court ruled that the transcripts of Thompson’s prior testimony could be admitted under MRE 804(b)(1), also rejecting defendant’s argument on this issue at the hearing on his motion for relief from judgment, finding that defendant had “failed to demonstrate how further discovery would have altered the cross examination in any manner.”

fact-finding function of the jury and freed the prosecution from its duty to prove all elements of the offense beyond a reasonable doubt that a conspiracy existed.

Defendant not only failed to preserve the alleged error by not specifically objecting, *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000), but waived alleged error by affirmatively using the witnesses' admitted guilt on a life offense, and the accomplice witness cautionary instruction, to attack the accomplices' credibility, *id.* at 215, 218-219; *People v Sutton (After Remand)*, 436 Mich 575, 596; 464 NW2d 276 (1990); *Griffin, supra* at 46.

The defense theory of the present case was that although defendant delivered less than 50 grams of cocaine on three separate occasions, he was not guilty of conspiracy to deliver 650 or more grams of cocaine because the two main accomplice witnesses, Ladon Weaver and Rozell Matthews, were lying to save themselves from a life prison sentence. Specifically, defense counsel argued that Weaver and Matthews were "parrots" who echoed what the prosecutor wanted them to say to escape from a mandatory life sentence for conspiracy to deliver 650 grams of cocaine. Defense counsel did not contest that there was a conspiracy to deliver 650 grams of cocaine; just that defendant was not guilty of being a part of it.⁴ Instructions are proper if they are consistent with the evidence and with the defendant's theory of the case. *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002).

In pertinent part, before instructing the jury on how to assess accomplice testimony, the court stated:

Kevin Thompson, Ladon Weaver and Rozell Matthews say that they took part in the crime and that the defendant is charged with committing. The evidence clearly shows that all three of those witnesses are guilty of the same crime the defendant is charged with.

Kevin Thompson, Ladon Weaver and Rozell Matthews have all been promised that they will be allowed to plead to lesser charges than the crime the defendant is charged with committing. Such a witness is called an accomplice.

You should examine an accomplice's testimony closely and be very careful about accepting it.

The given instruction is from CJI2d 5.4 regarding "undisputed accomplices." This instruction should be given when the witness has admitted his guilt or has been convicted of the crime, or where the evidence clearly indicates his complicity. See *People v Jensen*, 162 Mich App 171, 187-190; 412 NW2d 681 (1987). The instruction did not infer defendant was part of the conspiracy. Based on defendant's theory of the case as well as the evidence presented, the court did not err in its instruction to the jury.

⁴ Defense counsel even went so far as to argue that the testimony indicated Matthews and Weaver were involved in a conspiracy themselves.

Again, however, even assuming the trial court erroneously gave the instruction, defendant has not shown that but for the instruction, he would have had a reasonably likely chance of acquittal, or that the giving of the instruction constitutes an irregularity so offensive to the maintenance of sound judicial process that his conviction should not be allowed to stand, regardless of the effect of the irregularity on the outcome of the case. See MCR 6.508(D)(3)(B)(i) and (iii).

Affirmed.

/s/ David H. Sawyer

/s/ Hilda R. Gage

/s/ Michael J. Talbot