

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MAURICE WHITE,

Defendant-Appellant.

UNPUBLISHED

May 13, 2003

No. 234063

Cass Circuit Court

LC No. 00-010467-FH

Before: Saad, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant appeals by right from his conviction by a jury of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv). The trial court sentenced him as a third-offense habitual offender, MCL 769.11, to thirty-four months to thirty years' imprisonment. We reverse and remand for a new trial.

The trial occurred on March 13 and 14, 2001. Joe Richey, who described himself as a "recovering addict," testified as follows: He had been charged with various criminal offenses and entered into an agreement with the prosecutor whereby he would be released on bond in exchange for participating in undercover drug buys. On the evening of August 9, 2000, he participated in an undercover buy on Cherry Street in Dowagiac. After the police gave him twenty dollars, he drove to Cherry Street, walked down the street, and encountered a man named Franklin Fowlkes, whom he knew from prior drug transactions. He told Fowlkes that he "was looking," at which point Fowlkes took the twenty dollars from him and gave it to defendant, who was seated in a nearby black vehicle. Richey observed defendant "pull out a bag of rocks, and take the money from [Fowlkes], and give [Fowlkes] a rock." Fowlkes then dropped the "rock" into Richey's vehicle, and Richey departed to meet with the police.

Dewey Murdick, the chief analyst of the Berrien County Forensic Laboratory, testified that he confirmed as cocaine a substance given to him on October 20, 2000, by Officer Dave Toxopeus of the Dowagiac Police Department. He testified that the cocaine weighed 0.108 grams.

David Toxopeus testified that after receiving from Richey the "rock" that Richey bought, he tested it in his office and determined that it was cocaine. He testified that he later turned the substance over to Murdick for further analysis. Toxopeus did not actually witness the drug sale.

Steve Keene of the Cass County Sheriff's Department testified that he participated in the undercover buy by searching Richey's vehicle before and after the buy.

Defendant testified that he came to Cherry Street in Dowagiac on August 9, 2000, to pick up a friend for a basketball tournament. He testified that while his vehicle was parked in a driveway and he was standing with a group of people, Fowlkes approached the group.¹ He denied taking money from Fowlkes or selling any drugs to Fowlkes. He further testified that "[r]ight around" August 9, 2000, he was working at a place called Tafcor in Berrien Springs. On cross-examination, the prosecutor attempted to elicit that many of the individuals standing with defendant on the day in question had been prosecuted for drug crimes.

In rebuttal, Officer Toxopeus testified that some of the individuals defendant stated he had been standing with on the day in question had indeed been prosecuted for drug offenses, and Susan Rondeau testified that defendant started employment with Tafcor on August 21, 2000.

On appeal, defendant first argues that the prosecutor presented insufficient evidence to support the conviction. In reviewing the sufficiency of the evidence, this Court "must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997); see also *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). All conflicts with regard to the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Further, this Court should not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *Id.*; *Wolfe, supra* at 514-515.

The evidence presented, viewed in the light most favorable to the prosecution (and disregarding the improperly-admitted evidence discussed below), was sufficient to establish beyond a reasonable doubt that defendant delivered less than fifty grams of cocaine. Indeed, Richey clearly testified that he saw defendant deliver a "rock" to Fowlkes, and this "rock" was later determined to be cocaine. While Richey was a recovering drug addict and had become a police informant in exchange for his release on bond, it was the role of the jury to determine credibility. *Wolfe, supra* at 514-515; *Terry, supra* at 452. We will not interfere with the jury's role in that regard. Moreover, even though another person was in the vehicle with defendant at the time of the drug transaction,² Richey clearly testified that he saw *defendant* deliver the cocaine to Fowlkes. Accordingly, the evidence sufficiently supported defendant's conviction.

Next, defendant argues that the prosecutor committed misconduct requiring reversal during his cross-examination of defendant and during closing arguments by emphasizing that defendant had been standing with convicts – specifically, drug dealers – on the day in question. We agree.

¹ Defendant did not indicate why Fowlkes approached the group that day.

² Defendant suggests on appeal that this second person was the true drug possessor and that defendant was merely an innocent "bystander."

We review claims of prosecutorial misconduct on a case-by-case basis. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). We examine the prosecutor's actions in context to decide if they deprived the defendant of a fair and impartial trial. See *id.* Otherwise improper remarks may not require reversal if the remarks were made in response to defense counsel's arguments. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

Here, while cross-examining defendant, the prosecutor asked whether defendant knew that several individuals with whom he had been standing on the day in question had been convicted of drug offenses in the past. For example, the following colloquy occurred at one point during the cross-examination:

Q. Okay. Now, I take it it would be your testimony that it was just a coincidence, then, that you were in this front yard with four other people who had been convicted of drug offenses?

A. Yes, sir.

Q. But weren't [sic] engaged in any drug activity, right?

A. No, sir.

Q. Okay. Because Mr. Bacon has also been prosecuted for drug dealing, did you know that?

The prosecutor then tried to elicit that the individuals in question did not have jobs and therefore had a motive to be drug dealers:

Q. During this time did Katarri Edwards have a job?

A. I'm not for sure, sir.

* * *

Q. Okay. Did you know whether or not any of those individuals have supplemented their income by dealing cocaine in our county?

A. No, sir.

Q. Okay. Would you agree with me that twenty dollars for two minutes would be a good supplement to an income?

A. Yes, sir.

Then, apparently not satisfied by defendant's answers during cross-examination that he was not aware of his acquaintances having been convicted of drug offenses in the past, the prosecutor called Officer Toxopeus as a rebuttal witness and elicited that the individuals had indeed been involved with drugs:

Q. Detective Toxopeus, do you know LaMoan Moore?

A. I know the name, it doesn't, I can't think of him right now.

Q. Katarri Edwards?

A. Yes.

Q. Jack Blackamore?

A. Yes.

Q. Robert Bacon?

A. Yes.

Q. Those last four names that I read, have you prosecuted or assisted in the prosecution of each one of those for cocaine?

A. Yes.

Finally, the prosecutor then stated the following during closing arguments:

. . . I brought up the list of other people who were in, according to the defendant's testimony, who were standing right with him for two reasons. One is because it's just, perhaps it's just a coincidence that he was standing there with four other people who were drug dealers. Standing there doing what? He never did say that, but I'm sure it wasn't dealing drugs, because that would look bad in front of you, wouldn't it? But he never did give you an explanation, because according to his testimony he only knew one person originally, the first testimony, "I only knew one person on that street, and that was Leetarrus Edwards," and then when I cross-examined him, "Oh, wait, I know Leetarrus, I know Katarri, both of which are drug dealers, I know Jack Blackamore, that's right, he's a drug dealer, too, and Robert Bacon, and not only do I know them all, we were all standing there in the front yard," it just kept developing as we talked, but that's a long ways from, "I just stopped by to pick up Leetarrus to go to a basketball tournament."

We conclude that the prosecutor's continual reference to defendant's association with drug dealers (and the trial court's allowance of the prosecutor's questions and comments in this regard) denied defendant a fair trial and requires reversal. As noted in *People v Hudgins*, 125 Mich App 140, 146; 336 NW2d 241 (1983), a prosecutor may not appeal to the prejudices of the jury by emphasizing that a defendant on trial for a drug offense was in a drug trafficking area. Yet the prosecutor did exactly this. Moreover, the evidence elicited by the prosecutor was akin to drug profile evidence, which this Court has deemed inadmissible as substantive evidence of guilt. *People v Hubbard*, 209 Mich App 234, 241; 530 NW2d 130 (1995).

The prosecutor contends on appeal that the challenged evidence and comments were simply a proper response to defense counsel's arguments and were not used substantively to show defendant's guilt. The prosecutor states that the evidence and comments merely tended to

disprove defendant's contention that he came to Cherry Street on the day in question to pick up one friend for a basketball tournament. We cannot agree with this rationale. Indeed, while the prosecutor was entitled to rebut defendant's motives for being on Cherry Street, he could not do so by making a repeated and strong "guilt by association" argument. *Hudgins, supra* at 146. Moreover, it is simply disingenuous to argue that the prosecutor was not using the challenged evidence as substantive evidence of guilt. Clearly, the prosecutor used the evidence to prove that defendant came to Cherry Street that day in order to sell drugs – the very activity for which defendant was convicted.

We conclude that the improper evidence and arguments in this case denied defendant a fair trial.³ Given the repeated nature of the errors and the fact that only one eyewitness supported defendant's conviction, we cannot conclude that the errors were harmless under the harmless-error standard from *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Patrick M. Meter

/s/ Donald S. Owens

³ We acknowledge that at one point in the trial, the trial court overruled defense counsel's objection to the evidence at issue and allowed the prosecutor to continue his questioning. Therefore, it could be argued that this issue involves not prosecutorial misconduct but rather the improper admission of evidence by the trial court. However, even if we were to analyze this issue under the standard of review for the admission of evidence by the trial court, we would nonetheless find error requiring reversal.