

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
March 27, 2012

v

SARAH JO HETTINGER,
Defendant-Appellant.

No. 297237
Jackson Circuit Court
LC No. 09-005898-FH

Before: SHAPIRO, P.J., and WILDER and MURRAY, JJ.

SHAPIRO, P.J. (*dissenting*).

I respectfully dissent. Multiple prejudicial errors in this case require reversal, namely: erroneous admission of prior police investigations concerning the defendant; sua sponte questioning of a detective by the trial court about a magistrate’s finding of probable cause to search defendant’s home; admission of irrelevant and prejudicial testimony concerning crack cocaine; and ineffective assistance of counsel. Given the cumulative nature of the errors,¹ the lack of *any* evidence that defendant ever personally possessed the cocaine and the lack of any direct evidence that defendant was aware the cocaine was in her home, I conclude that the errors undermined the reliability of the verdict and defendant’s conviction should be reversed. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010).²

I. BACKGROUND

On July 29, 2009, police officers in Jackson conducted a controlled purchase of powder cocaine from Patrick Giddis. Giddis is the father of defendant’s two children. After the purchase, the officers saw Giddis enter a house at 305 Homecrest Road. Officers subsequently

¹ The cumulative effect of individually harmless errors can warrant reversal if the cumulative effect was seriously prejudicial so as to merit a finding that the defendant was denied a fair trial. *People v Unger*, 278 Mich App 210, 261; 749 NW2d 272, lv den 482 Mich 1027 (2008).

² “In making this determination, this Court should “focus on the nature of the error in light of the weight and strength of the untainted evidence.” *Feezel*, 486 Mich at 192.

obtained a search warrant for the upstairs apartment at that address. Defendant was the lessee of the apartment and resided there.

On July 30, 2009, approximately ten officers executed the search warrant at 305 Homecrest Road. When the officers knocked on the door and verbally identified themselves, no one responded, so they rammed open the front door. Inside the apartment, the officers discovered defendant's fifteen-year-old brother and defendant's two children, ages five and one, for whom he was babysitting.

During the search, the officers discovered that there were zippers on the undersides of the dining table chairs. They opened the zippers and inside one of the chairs found plastic baggies of cocaine and in another, \$3,850 in cash, including the marked money from the controlled purchase of cocaine. The total amount of cocaine the officers recovered was 114.6 grams.

The prosecution asserted that Giddis was permanently residing at the defendant's apartment and that she was either directly involved with Giddis' cocaine-dealing activities or that she had actual knowledge that Giddis kept cocaine in the house and aided and abetted Giddis' by allowing him to stay at her home despite this knowledge. However, no direct evidence was either admitted or proffered that defendant, as opposed to Giddis, had ever personally possessed the cocaine. Nor was any evidence admitted or proffered that defendant had been advised by Giddis or anyone else of the presence of the cocaine in her home or that she was seen in the presence of the cocaine when it was not hidden.

Defendant testified and called several witness in her defense. She testified that she and Giddis had been involved romantically for several years and had shared a residence for several years, but that in 2008 she, along with the two young children she and Giddis had together, moved out of that residence because she could no longer tolerate his drug activities. Defendant asserted that in July, 2009, just a week or so before the arrest, Giddis told her that his new girlfriend (with whom he had recently had a child) had thrown him out of her home and he asked defendant if he could stay for a few days at her apartment until he found another place.³ She testified that she agreed to his request because he was the father of her children and that he had promised not to bring any drugs into the apartment. According to defendant, Giddis only planned to stay temporarily until he was able to set up other living arrangements. She testified that although she was aware that Giddis had sold drugs in the past, she did not believe he was selling drugs at that point in time because he had no money while, in the past when he was dealing drugs, he had money.

No witness testified that Giddis had been staying at defendant's home for any time beyond the few days described by defendant. Giddis did not testify. Defendant's landlord supported defendant's version of events in that he testified that although defendant had been renting from him for several months, he was not familiar with Giddis.

³ The record is unclear but it appears that on at least one of the nights that Giddis stayed at her home, Charles Schmucker, a friend of Giddis' stayed there as well.

The prosecution introduced evidence that the police found some of Giddis' possessions in defendant's home. During their search, the police found three prescription bottles dated July 22, 2009, belonging to Giddis. The bottles were found on top of the microwave oven in the kitchen. Each listed Giddis' address as Kathy Circle which was his grandmother's address⁴ and listed on his license as his address. The police also found a bicycle receipt made out to Giddis dated July 24, 2009.⁵ It also listed Giddis' address at Kathy Circle.

In a drawer in defendant's bedroom, officers found a variety of other paperwork belonging to Giddis, including court documents from a prior case, a receipt for payment of a plane ticket, as well as his social security card, birth certificate and passport, issued June 29, 2009. In a kitchen drawer, the officers found a letter dated April 29, 2009 to Giddis from his bank, addressed to him at the Kathy Circle address. In the same kitchen drawer they also found Giddis' then-current driver's license and his expired driver's license. In the living room, the officers found a single plastic storage bin containing several articles of men's clothing, men's shoes, a toothbrush in a toothbrush case and a pair of sunglasses.

One of the officers testified that in a dresser in the bedroom they found women's clothing and "men's pants and t-shirts, or a larger size, I assume would be a men's t-shirt." The jury was shown a photo of the contents of that drawer. Contradicting this description of the drawer's contents, defendant testified that all of the clothes in the bedroom belonged to her. At oral argument on appeal, the prosecution conceded that none of the photographs depicted men's clothing in the drawer or elsewhere in defendant's bedroom.

The prosecution also sought to link defendant to the drugs by asserting that defendant had unexplained income. Defendant claimed that she struggled financially and it was uncontested that she worked six days per week at a nursing home as an aide. The prosecution introduced evidence of expenses that it asserted could not have been paid on defendant's hourly wage at the nursing home. First, evidence was admitted that earlier that month,⁶ defendant had gone on a vacation in Cancun, Mexico with her stepfather, her sister and Giddis.⁷ Defendant testified that the trip was a belated high school graduation present from her stepfather as she had been unable to take the trip upon graduation because she was pregnant at that time. Defendant's step-father supported this defense, testifying that he had paid for the entire trip for both defendant and her sister along with Giddis, and that it had been a belated graduation present.

⁴ Two police officers testified that using multiple addresses was consistent with the methodology of drug dealers. Based on their experience and training, they testified that cocaine dealers, in an attempt to mislead the police, often keep their cocaine at a location different from their residence of record.

⁵ These dates fall within the few days that defendant testified Giddis was staying with her.

⁶ A photo taken during the trip was dated July 17, 2009.

⁷ Defendant explained that Giddis' passport, social security card, and birth certificate were at her apartment because she had helped him obtain his passport for this trip.

Second, the prosecution introduced a photo taken during the Cancun trip in which defendant was wearing an expensive pair of Versace-brand sunglasses. Defendant testified that the sunglasses belonged to Giddis and that she had borrowed them the day the photo had been taken.

Third, the prosecution introduced evidence that defendant's apartment contained recently purchased new furniture, including a dining room table, dining room chairs, a king bed, a twin bed, a crib and a dresser the cost of which totaled approximately \$5,500. Defendant testified that she had purchased the furniture with income tax return money that she received in February—\$6,000 from her federal income tax and \$1,000 from her state income tax return. She testified that she and her children had been living in the apartment for several months without any furniture and that she used the tax refunds to finally purchase these items.

Finally, the prosecution admitted evidence that defendant drove a 2006 Pontiac registered in the name of Giddis' uncle. The prosecution argued that this arrangement was consistent with the practice of drug dealers to register their vehicle in someone else's name in order to avoid vehicle forfeiture. Defendant's uncle testified that he registered the vehicle in his name as a favor to defendant because she had bad credit and could not obtain a loan, but that defendant made the payments.⁸

After a three-day jury trial, defendant was convicted of possessing 50 grams or more but less than 450 grams of a controlled substance (narcotic or cocaine), MCL 333.7403(2)(a)(iii). On March 18, 2010, she was sentenced to 5 to 20 years' imprisonment. On April 8, 2010, defense counsel moved for a new trial on behalf of defendant, arguing that the trial court made erroneous rulings, that the verdict was against the great weight of the evidence, and that irregularity of the proceedings denied defendant a fair trial. Defendant then obtained new counsel, who, on August 16, 2010, moved for a new trial on additional grounds. The trial court denied the motion for new trial and defendant now appeals.

II. ANALYSIS

Defendant argues that several of the trial court's evidentiary rulings were in error and that individually or cumulatively, these errors were not harmless.

A. EVIDENCE OF PRIOR INVESTIGATIONS

Over defendant's objection, the trial court admitted extensive testimony, and argument based thereon, that described two prior investigations in which drugs had been found in homes

⁸ The uncle further testified that he agreed to register the vehicle in his name on the condition that no one other than defendant drive the vehicle. However, a few days before the warrant was executed, one of the officers saw Giddis driving the vehicle, and defendant admitted that she had allowed Giddis to drive it on several occasions.

shared by defendant and Giddis during the time defendant admitted they had lived together. The trial court admitted the evidence based on its conclusion that defense counsel had “swung the door wide open” during cross-examination of an investigating detective. I conclude that the trial court erred in admitting the evidence of the prior investigations.

On direct examination of the detective, the prosecution asked, “And are you familiar with both [defendant and Giddis]?” to which the detective replied, “Uh, yes, I have dealt with both in the past.” The detective also indicated that he had previously seen defendant’s vehicle “on several occasions” related to other prior investigations.

In response, during cross-examination of the detective, defense counsel questioned the detective as follows:

Q. Now you testified about having prior investigations. Isn’t it true that your prior investigations involved Patrick Giddis?

A. Yes.

Q. These prior investigations didn’t involve [defendant] did they?

A. She was residing with him when one of the investigations was conducted.

Q. She wasn’t the focus of the investigation, correct?

A. I would say they were both focused [sic] because I did not know exactly who was selling or who was holding narcotics.

The prosecution then notified the trial court that, although it had not planned on admitting evidence of the previous 2005 and 2008 drug investigations involving the execution of warrants for narcotics in homes shared by defendant and Giddis, and had not filed a notice under MRE 404(b)(2), it now wished to introduce such evidence without notice because defense counsel had “opened the door” by asking these three questions. The trial court then allowed detailed and extensive questioning of both the detective and the defendant concerning these prior events.

“Opening the door” is the common name for the rule of curative admissibility. *United States v Whitworth*, 856 F2d 1268, 1285 (CA 9, 1988). Under this rule,

the introduction of inadmissible evidence by one party allowed an opponent, in the court’s discretion, to introduce evidence on the same issue to rebut any false impression that might have resulted from the earlier admission.” See *United States v. Segall*, 833 F2d 144, 148 (9th Cir. 1987); *United States v. Makhlouta*, 790 F2d 1400, 1402-03 (9th Cir. 1986); I J. Wigmore, Evidence § 15 (Tillers rev. 1983). [*Id.*]

Contrary to the majority’s assertion, the rule in Michigan has always been that the door is only opened if the inadmissible evidence introduced by the first party would otherwise prejudice the second party. *Grist v Upjohn Co*, 16 Mich App 452, 482-483; 168 NW2d 389 (1969). The trial

court may not allow inadmissible evidence “merely because the adverse party has brought out some evidence on the same subject, where the circumstances are such that no prejudice can result from a refusal to go into the matter further.” *Id.*

Our Supreme Court confirmed in *People v Yager*, 432 Mich 887; 437 NW2d 255 (1989) that a reference to inadmissible evidence does not “open the door” to introduce extensive evidence on that topic. In *Yager*, the trial court had excluded reference to the defendant’s prior felony convictions in response to a motion in limine filed by the defendant. *People v Yager*, unpublished opinion per curiam of the Court of Appeals, issued January 22, 1988 (Docket No. 88914), slip at 1-2. During trial, the defendant “claimed that a police officer used coercive techniques in interrogating him, including a threat to charge defendant as a habitual offender if he did not confess to a series of breaking and enterings.” *Id.* at 2. The prosecution then questioned the defendant regarding his previous charges. The defendant objected multiple times to the questions, but the trial court allowed them because “the defendant had raised the issue of being threatened by the officer and, therefore the prosecution had a right to explore the nature of the alleged threat on cross-examination.” *Id.* This Court, in a 2-1 decision, concluded that the defendant had “opened the door for the admission of the evidence of his prior convictions” by claiming the officer had threatened him with habitual offender status. *Id.* at 4. On appeal, our Supreme Court reversed the majority and granted the defendant a new trial because “[t]he defendant’s reference to having been threatened with prosecution as a habitual offender did not ‘open the door’ to extensive questioning about the defendant’s prior record.” *People v Yager*, 432 Mich 887; 437 NW2d 255 (1989).⁹

⁹ The majority cites *People v Horn*, 279 Mich App 31; 755 NW2d 212 (2008) to support the proposition that any reference to inadmissible evidence opens the door to a full exploration of the otherwise inadmissible subject. However, in *Horn* the prosecution merely elicited exactly the same information from the victim’s daughter that the defense had already elicited from the victim: both stated that the victim stopped seeing the defendant because he had raped her. The court stated that the evidence introduced by the prosecution was “merely cumulative” of the victim’s testimony. *Id.* at 36.

The majority also misreads *Yager*, suggesting that the evidence that opens the door need merely relate to the evidence sought to be introduced. However, in that case the first evidence was that defendant was threatened with prosecution as a habitual offender, and the “rebuttal” evidence was an exploration of defendant’s prior record, which was clearly related to his status as a habitual offender. Nonetheless, the Supreme Court refused to allow the reference to possible habitual offender status to serve as an excuse to bring defendant’s entire criminal record before the jury. 432 Mich 887.

The facts in the present case are nearly identical. Defense counsel elicited evidence that defendant was the subject of prior investigations. This did not give the prosecution license to explore the details of those investigations, where the original testimony did not create a false impression or otherwise prejudice the prosecution.

In the present case, defense counsel's question whether defendant was the subject of the prior investigations did not open the door to bring in all of the evidence and circumstances surrounding those investigations, particularly given that the detective's answer was that defendant *was* a subject of those investigations. Even accepting the majority's contention that the detective's answer constituted inadmissible testimony, there was no "false impression" or prejudice to the prosecution that resulted from his answer that had to be cured by admission of evidence about those investigations. *Grist*, 16 Mich App at 482-483. That is, the detective testified that both defendant and Giddis *were* the subject of the prior investigations. Had the detective testified that defendant was not the subject of those investigations, the prosecution may have had an argument that the statement was false and, therefore, had opened the door to more detailed information about those investigations to correct the false impression. That did not occur, however. As the record stood, the jury was aware that defendant was, in fact, the subject of those prior investigations, and there was nothing to be "cured" by admitting the evidence regarding the prior investigations. *Id.* Thus, the rule of curative admissibility was inapplicable and the trial court abused its discretion in admitting the evidence of the two prior investigations.

B. QUESTIONING REGARDING PROBABLE CAUSE

I agree with defendant that the trial court plainly erred by questioning a police officer regarding whether a probable cause determination was necessary before a warrant was issued. "A trial court may question a witness in order to clarify testimony or to elicit additional relevant information." *People v Weathersby*, 204 Mich App 98, 109; 514 NW2d 493 (1994); see also MRE 614(b). However, "[a] trial court may not assume the prosecutor's role with advantages unavailable to the prosecution" and should not ask questions that are "intimidating, argumentative, prejudicial, unfair or partial." *Id.*; *People v Sterling*, 154 Mich App 223, 228; 397 NW2d 182 (1986). In determining whether the trial court's questions denied a defendant of the right to due process and a fair trial, "[t]he test is whether the judge's questions and comments *may* have unjustifiably aroused suspicion in the mind of the jury concerning a witness' credibility and whether partiality *quite possibly could* have influenced the jury to the detriment of the defendant's case." *People v Sterling*, 154 Mich App 223, 228; 397 NW2d 182 (1986) (emphasis in original); *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996).

During a deputy's testimony about the search of plaintiff's home, the trial court interrupted and raised the matter of the magistrate's findings of probable cause, inquiring: "Deputy, I just have one question for the jury because they probably don't understand. When an officer or JNET makes a request for a search warrant of a citizen's home, there's normally gotta [sic] be an affidavit of probable cause and the judge as a threshold matter has to be satisfied that there's at least more probable than not that some type of identified controlled substances or something illegal will be present; is that correct? The officer answered, "that is correct."

The trial court erred by inquiring about the probable cause determination for a warrant. Defendant had not challenged the sufficiency of the affidavit at or before trial and the question was not otherwise relevant as whether there was probable cause for the warrant did not make the existence of any fact that was of consequence to the determination of the action more or less probable. MRE 401. Furthermore, a trial court should not inform the jury of earlier rulings in the case that indicate its opinion regarding the merits of the case, and the trial court's question effectively informed the jury of the earlier probable cause determination. See, e.g., *People v*

Corbett, 97 Mich App 438, 443; 296 NW2d 64 (1980). The question also improperly bolstered the witness's credibility and the credibility of the prosecution's case by implying that there had been a determination of probable cause. See also *Sterling*, 154 Mich App at 230 (finding that the questions posed by the trial court to a witness "may well have been interpreted as the court's seal of credibility" on the testimony of the witness).

C. TESTIMONY REGARDING CRACK COCAINE

Defendant also argues that the trial court erred in admitting evidence regarding crack cocaine over repeated objections of counsel. I agree. Defendant was not charged with possession of crack cocaine and there was no evidence that Giddis was selling crack cocaine or that there was any crack cocaine in defendant's home. Nevertheless the court allowed an officer to testify as to the typical quantities and prices of crack cocaine sold. While testimony as to sales of powder cocaine was arguably relevant even though defendant was not charged with sale, such information as to crack cocaine which is sold in different amounts and for different prices than is powder cocaine was not relevant under MRE 401 because it did not make the existence of any fact that was of consequence to the determination of the action more probable or less probable than it would be without the evidence.¹⁰ Thus, the admission of the evidence fell outside the range of reasonable outcomes, rendering it an abuse of discretion. *Babcock*, 469 Mich at 269. Moreover, the evidence was prejudicial as it suggested that the police believed that defendant was involved in crack cocaine, a drug which has a reputation as more dangerous to both individuals and communities than powder cocaine. Although by itself, the admission of this evidence may have been harmless, when considered with the other trial errors it adds to the cumulative error requiring reversal.

D. COUNSEL'S FAILURE TO PROFFER DEFENDANT'S TAX RETURN

I also agree with defendant that trial counsel was ineffective by failing to introduce a copy of defendant's tax return to support her contention that the \$5500 spent on furniture came from her tax refunds to rebut the inference that the furniture was purchased from drug proceeds.¹¹ To establish a claim of ineffective assistance of counsel, the defendant must prove that the counsel's representation fell below an objective standard of reasonableness and the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). The defendant demonstrates prejudice by showing the "existence of a reasonable probability that, but for

¹⁰ The majority notes that the officer was asked about the cost of powder cocaine and that he responded by comparing the cost of crack and powder cocaine. The majority characterizes this as an indirect way of answering the prosecution's question. I agree, but would add that the information about crack cocaine was "indirect" to the point of irrelevance.

¹¹ The prosecution suggests that the tax return is suspect, based on a 2009 date on the document. However, this goes to the weight, not the admissibility of the return, particularly in light of the affidavit asserting that the 2009 date is a result of the word processing program that automatically alters the date whenever a copy is printed.

counsel's error, the result of the proceeding would have been different." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).¹²

This question must be considered in the context of the proofs in the case which were overwhelming, if not exclusively, inferential. The prosecution did not offer any direct evidence that defendant ever personally possessed the drugs nor that she was aware of their presence in her home. Moreover, the assertion that defendant and Giddis had never stopped living together as a couple was undercut by the fact that Giddis had only a few clothes at the apartment all of which, along with his toothbrush, were found in a plastic tub in the living room. Given the lack of direct proofs, the claim that defendant was living beyond her means was central to the prosecution's case and admission of the tax return would have substantially undermined that claim. It also would have bolstered defendant's credibility as the prosecution asserted that her testimony about the tax refund was fabricated. Given that the case against defendant rested on inferences derived from contested circumstantial evidence, counsel's error did result in a reasonable probability of a different outcome.

III. HARMLESS ERROR

The doctrine of harmless error directs that even where this Court finds error, we should not reverse a conviction unless we conclude that the "errors . . . have deprived a litigant a fair trial or have otherwise interfered significantly with the trial's search for truth." *People v Mosko*, 441 Mich 496, 503; 495 NW2d 534 (1992). The number of errors in this case and the absence of direct evidence of defendant's participation in, or knowledge of, the hiding of cocaine in her home lead me to conclude that these errors did deprive defendant of a fair trial and interfered significantly with the trial's search for truth.

This was not a case in which a defendant asserts that we should automatically reverse a verdict based on a single error despite substantial evidence of guilt. The trial court erroneously concluded that the defendant had opened the door to admission of extensive evidence regarding prior bad acts and propensity evidence, improperly questioned a witness as to the magistrate's finding of probable cause to search defendant's home, permitted testimony from police officers regarding *sales of crack* cocaine where defendant was charged only with ordinary possession of powder cocaine. These errors occurred in a case where there was no testimony that defendant had ever been seen with or spoken of the cocaine found hidden in her home and the prosecution's evidence that Giddis had been staying for more than a few days with defendant was modest at best. Moreover, as the prosecution's case rested largely on the assertion that defendant was living beyond her means based upon the purchase of new furniture, her attorney's

¹² I am also concerned by the statement of defense counsel on the first morning of trial that she was unaware that a primary charge also allows for conviction on an aiding and abetting theory where there is more than one actor. See, e.g. *People v Head*, 211 Mich App 205, 21; 535 NW2d 563 (1995). Defense counsel revealed her ignorance of this well-settled rule when she complained to the court that "[i]n the prosecutor's voir dire she began discussing aiding and abetting theories and aiding and abetting instructions. This is the first time I've heard of aiding and abetting [in this case]."

failure to seek admission of the tax return showing the refund was a serious error. In this unique context, I cannot conclude that the errors were harmless.

IV. OTHER ISSUES RAISED BY DEFENDANT

I agree with the majority that there was probable cause for the warrant to search defendant's home. I also agree that prior record variable (PRV) 5 was properly scored.

V. CONCLUSION

Given the multiple errors described above, I would reverse defendant's conviction and remand to the trial court for a new trial.

/s/ Douglas B. Shapiro