

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD LEE TENNON, a/k/a RONALD
COLEMAN TENNON,

Defendant-Appellant.

UNPUBLISHED

April 15, 1997

No. 189661

Macomb Circuit Court

LC No. 95-000065-FH

Before: Holbrook, Jr., P.J., and Fitzgerald and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession of less than twenty-five grams of cocaine, MCL 333.7403(1) and (2)(a)(v); MSA 14.15(7403)(1) and (2)(a)(v), and sentenced to thirty-two to forty-eight months' imprisonment. Defendant appeals as of right. We affirm.

Defendant was stopped on an outstanding warrant in Mount Clemens. When the officers frisked defendant, they found a small knife and a rock of crack cocaine. Both items were found in the same pocket of defendant's coat. The officers arrested defendant, and, after transporting him to the police station, searched him again. The second search turned up another rock of crack cocaine. At trial, defendant's girlfriend testified that the drugs belonged to her, and that defendant did not know that they were in his pocket.

Defendant first argues that the trial court abused its discretion by allowing the prosecution to introduce evidence regarding the knife he was carrying. He claims that this evidence was introduced solely to inflame the jury, and was therefore inadmissible pursuant to MRE 404(b). He also claims that the evidence was inadmissible under MRE 403 because its probative value was substantially outweighed by the danger of unfair prejudice. We review a trial court's decisions on evidentiary issues for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

Here, the prosecution offered evidence that a knife belonging to the defendant was found in the same pocket as a rock of crack cocaine. Under these circumstances, evidence regarding the knife was probative on the question of defendant's knowledge of the drugs found in his pocket. We conclude that

this probative value was not substantially outweighed by the danger of unfair prejudice. In addition, any danger of unfair prejudice was cured by the trial court's warning to the jury that the knife was not to be considered as evidence of guilt. Thus, this evidence was properly admissible pursuant to MRE 403 and the trial court did not abuse its discretion by admitting it.

Defendant's argument as to MRE 404(b) also must fail. Under MRE 404(b), evidence of prior bad acts is inadmissible where it is "offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith." *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). However, such evidence is admissible if it is relevant to a material issue other than the defendant's propensity to commit crime and if it can pass the test for admissibility under MRE 403. *Id.* at 74-75. As pointed out above, evidence regarding defendant's possession of a knife passes both of these tests because the evidence was relevant to defendant's knowledge of the cocaine found with the knife and its probative value was not substantially outweighed by the danger of unfair prejudice. Thus, this evidence was properly admissible pursuant to MRE 404(b), and the trial court did not abuse its discretion in admitting it.

Next, defendant argues that the prosecutor's remarks regarding the knife and defendant's use of an alias denied him a fair trial. As a preliminary matter, we note that defendant failed to object to some of these remarks. Therefore, our review of those remarks is precluded unless a curative instruction could not have eliminated the prejudicial effect of the remark or the failure to consider the issue would result in a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). We review prosecutorial misconduct issues case by case to determine whether defendant was denied an fair and impartial trial. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996).

We conclude that the prosecutor's remarks did not amount to misconduct. As noted above, the prosecutor properly introduced evidence regarding defendant's possession of a knife. While the prosecutor did refer to the knife even after the trial court had instructed him not to bring it up again, these remarks were not improper. We believe the trial court's instruction to "forget about the knife" was simply intended to protect defendant from any unnecessary prejudice. Because the prosecutor's only additional references to the knife were necessary in order to explain his theory of the case, they were not unnecessarily prejudicial. In addition, the trial court sustained defendant's only objection on this point. Therefore, defendant has already received his relief. *People v Miller*, 211 Mich App 30, 42-43; 535 NW2d 518 (1995).

Defendant did not object to the prosecutor's remarks regarding his use of an alias. We find that defendant's use of an alias was relevant to show consciousness of guilt. See *United States v Okayfor*, 996 F2d 116, 120 (CA 6, 1993). Thus, the prosecutor's remarks were proper. Moreover, even assuming that the prosecutor's remarks were improper, we conclude that a timely-requested instruction could have cured the error.

Defendant also argues that the cumulative effect of these alleged errors denied him a fair trial. Because we find that the prosecutor's remarks were proper, there can be no cumulative effect of error.

Next, defendant claims that the trial court abused its discretion by denying his request for a mistrial. However, defendant does not cite any authority in support of this argument and has effectively abandoned it. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995). Even had this issue been properly argued, we would hold that the trial court did not abuse its discretion. Defendant's motion was based on the erroneous introduction of videotaped deposition testimony regarding an unrelated assault. We do not believe this evidence prejudiced defendant or impaired his ability to get a fair trial. First, the testimony did not mention defendant by name, and was not linked to him or to the issues at trial in any way. Second, the reference to an assault was very brief, and the deponent denied that there ever was an assault. Finally, neither the prosecution nor the judge made any further mention of this testimony. Under these circumstances, we conclude that defendant was not denied a fair trial, and that the trial court's decision to deny a mistrial was not an abuse of discretion. *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995).

Finally, defendant contends that the testimony of the prosecutor's rebuttal witness was improper impeachment on a collateral matter. This witness testified that defendant's girlfriend told him that she was afraid of defendant and knew he carried a knife. We review the admission of rebuttal evidence for an abuse of discretion. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996).

Extrinsic evidence may not be used to impeach a witness on a collateral matter even if the extrinsic evidence constitutes an otherwise admissible prior inconsistent statement of the witness. *People v Rosen*, 136 Mich App 745, 758; 358 NW2d 584 (1984) (citing *People v Carner*, 117 Mich App 560, 571; 324 NW2d 78 [1982] [Baguley, J.]). The question in this case is whether the prosecutor's impeachment involved collateral matters. We find the following discussion in *Rosen, supra* at 758-759, instructive:

In *People v Guy*, 121 Mich App 592, 604-605, 329 NW2d 435 (1982), lv den 417 Mich 1088 (1983), this Court endorsed the discussion in McCormick, Evidence (2d ed), § 47, pp 98-99, concerning what is not collateral. The *Guy* Court provided this synopsis:

"McCormick indicates there are three kinds of facts that are not considered to be collateral. The first consists of facts directly relevant to the substantive issues in the case. The second consists of facts showing bias, interest, conviction of crime and want of capacity or opportunity for knowledge. The third consists of any part of the witness's account of the background and circumstances of a material transaction which as a matter of human experience he would not have been mistaken about if his story were true."

As to the second category of facts, McCormick states in part:

"The second kind of facts meeting the above mentioned test for facts that are not collateral includes facts which would be independently provable by extrinsic evidence, apart from the contradiction, to impeach or disqualify the witness. Among

these are facts showing bias, interest, conviction of crime, and want of capacity or opportunity for knowledge." (Footnotes omitted.) McCormick, *supra*, p 99.

Here, defendant claims the prosecution improperly impeached a defense witness on her fear of defendant and on her knowledge regarding the knife defendant was carrying. We conclude that neither of these issues was collateral. The witness's fear of defendant was relevant to show bias. Her knowledge regarding the knife defendant was carrying was directly relevant to the prosecution's case. As noted above, the fact that the knife belonged to defendant and was found in the same pocket as the crack cocaine was relevant to show that defendant knew the drugs were in the pocket of the coat. Under these circumstances, these were not collateral issues. Thus, the prosecutor's impeachment was proper, and the trial court did not abuse its discretion in allowing the rebuttal testimony.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ E. Thomas Fitzgerald

/s/ Michael R. Smolenski