STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM EARL MADDOX,

Defendant-Appellant.

UNPUBLISHED
October 3, 1997

No. 187552
Bay Circuit Court
LC No. 95-001106-FH

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

PER CURIAM.

Defendant appeals as of right from his conviction by jury of attempted false pretenses over $100, MCL 750.218; MSA 28.415, and possession of cocaine less than twenty-five grams, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v). Defendant was charged in connection with his involvement in a scheme by which Thad Gatza attempted to get money from his father to pay a drug debt that he and his girl friend, Lisa Gerard, owed to defendant by telling Gatza's father that he was being held hostage in a drug house until a debt to defendant was paid. We affirm.

Defendant first claims that introduction of evidence of his past drug dealing and argument that defendant's past behavior was evidence that Gatza owed defendant a drug debt deprived defendant of a fair trial. We disagree. Where defendant would have had motive to participate in Gatza's scheme if Gatza owed him a drug debt, the trial court was correct to conclude that this evidence was relevant and admissible for the limited purpose of showing motive, where MRE 404(b) specifically provides for this result. Nor was this evidence too prejudicial to come in or needlessly cumulative. Despite evidence of a statement made to the police at the time of his arrest that while defendant had sold drugs elsewhere he had never sold them in Bay City, defendant continued to maintain at trial that he had not sold drugs to Gatza and Gerard and that the residue-containing baggies in defendant's possession had been found in the street and he did not know their contents. This evidence tended to help resolve the credibility contest between defendant and Thad Gatza that otherwise existed. Under those circumstances, any prejudicial effects were outweighed by the probativeness of the evidence. Thus, the trial court's ruling that evidence of defendant's prior drug dealing was admissible was not an abuse of discretion. See *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

Defendant also argues that the prosecutor failed to provide adequate notice of intent to use bad acts evidence as required by MRE 404(b). The Supreme Court has held that pretrial notice of intent to introduce other active evidence at trial is required. *People v VanderVliet*, 444 Mich 52, 89; 508 NW2d 114 (1993) as modified at 445 Mich 1205; 520 NW2d 338 (1994). Here, the trial court noted that defendant received notice that evidence of defendant's drug dealing would be an issue at trial where such evidence had been given during the preliminary examination. Defendant's counsel brought a motion in limine in an attempt to keep out such evidence because of similar testimony presented during the preliminary examination. On that basis the purpose of requiring advance notice, i.e., to prevent unfair surprise and to provide the defense an opportunity to formulate arguments regarding relevancy and unfair prejudice, was met.

Defendant next argues that introduction of a statement Lisa Gerard made to police was an abuse of discretion and deprived defendant of his constitutional right to confront Lisa Gerard. We disagree. Gerard was in custody on an unrelated charge when she volunteered to the police that Thad Gatza was being "held hostage" by defendant until she returned with money to pay their drug debt owed to defendant. An out-of-court statement against the declarant's penal interest can come in where it is shown that the declarant is unavailable and that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. MRE 804(b)(3). Gerard was unavailable to testify at trial because she took the position that she would assert her Fifth Amendment right to not testify. Further, the trustworthiness of her statement was sufficiently demonstrated to overcome a presumption of unreliability such that adversarial testing would have added little to its reliability. *People v Poole*, 444 Mich 151, 163-165; 506 NW2d 505 (1993); *People v Petros*, 198 Mich App 401; 499 NW2d 784 (1993). Gerard's statement was made while in police custody which ordinarily would make the statement highly suspect. *Poole, supra* at 162. However, Gerard was not a codefendant nor was she in custody because of the events surrounding defendant's arrest. The statement was not part of a confession and there is no evidence that it was made as part of a formal interrogation. Gerard had nothing to gain from making the statement except to perhaps help Thad Gatza, whom she apparently believed was still being held hostage at the apartment. Contrary to defendant's argument, the fact that Gatza testified he was not being held hostage does not mean Gerard's statement lacked veracity on its face. There is no requirement that the statements be clearly corroborated. *People v Barrera*, 451 Mich 261, 272; 547 NW2d 280 (1996). Where Gatza concocted the scheme after learning that Gerard had failed to get money and had been arrested, Gatza's assertion that he had been free to go does not necessarily mean that Gerard could not have reasonably believed that her statement was true at the time she made it. *Id*. at 268-269. Finally, the only portion of Gerard's statement that was not against her penal interests was the statement that defendant would pay her bail, and even that was conditioned upon her arranging for money to buy more drugs. Therefore, it was not necessary to strike any portion of Gerard's statement as not being against her penal interests and thus not reliable enough to come in where any such "carry-over" portions were made in the context of Gerard's narrative of events. *People v Richardson,* 204 Mich App 71, 76-77; 514 NW2d 503 (1994). The trial court's ruling that the statement was admissible pursuant to MRE 804(b)(3) was not an abuse of discretion. *Ullah, supra* at 673.

Defendant also argues that the prosecution introduced drug dealer profile evidence as substantive evidence of defendant's guilt, which was error requiring reversal. We disagree. This Court has held that so called "drug profile" evidence is not admissible as substantive evidence of intent to deliver a controlled substance. *People v Hubbard*, 209 Mich App 234, 235; 530 NW2d 130 (1995). However, in light of *People v Peterson*, 450 Mich 349; 537 NW2d 857 (1995), we feel that adherence to the broad holding in *Hubbard* is questionable. See Justice Boyle's dissent in denying leave in *Hubbard*, 450 Mich 965; 548 NW2d 634 (1996). However, we need not address the harmony between *Hubbard* and *Peterson* because we find that any error in the introduction of such evidence in this case was harmless. See *Hubbard*, *supra* at 243.

Defendant also argues that his right to present a defense was violated when the trial court refused to admit the prosecution's March 27, 1995, witness list as evidence that Thad Gatza lied on the stand when Gatza testified that he had not agreed to testify against defendant until approximately one week before the trial. We disagree. The prosecutor was required by law to file the witness list at issue when he filed the March 27, 1995, information. MCL 767.40a(1); MSA 28.980(1)(1). However, while the prosecutor was required to list witnesses it might call when an information is filed, the prosecutor is also permitted to add and remove witnesses from the list. MCL 767.40a(4); MSA 28.980(1)(4); *Gawthrop, supra* at 728. Nothing can be inferred from the fact that plaintiff placed Gatza's name on a witness list that would indicate Gatza lied when giving his testimony. The witness list was not relevant for such purpose. The trial court did not abuse its discretion in so ruling. Further, the record shows that defendant was not denied the right to present a defense where he was permitted to recall Thad Gatza and question him as to his motivation to testify. The jury heard testimony that Gatza's father may have been pressuring him to testify against defendant. The jury also heard testimony regarding Gatza's plea bargain and deferred sentence from which the jury could infer that Gatza may have had a motive to lie and to consider that in assessing his credibility.

Finally, defendant argues that the trial court abused its discretion when it dismissed a juror for cause on the fourth day of the trial. We disagree. "A juror is presumed competent" and the "challenging party must show that the challenged juror 'has preconceived opinions or prejudices, or such other interest or limitations as would impair his capacity to render a fair and impartial verdict.'" *Butler v DAIIE*, 121 Mich App 727, 746; 329 NW2d 781 (1982), quoting *McNabb v Green Real Estate Co*, 62 Mich App 500, 505; 233 NW2d 811, lv den 395 Mich 774 (1975). The record shows that the juror was concerned about the police reaction to the verdict. This statement supports the trial court's conclusion that the juror believed the verdict would be not guilty, thus indicating premature deliberation on the part of the juror. Under the circumstances, we find no abuse of discretion. See MCL 768.10; MSA 28.1033; *People v Harvey*, 167 Mich App 734, 743; 423 NW2d 335 (1988); *People v VanCamp*, 356 Mich 593, 605; 97 NW2d 726 (1959).

Affirmed.

/s/ Richard A. Bandstra
/s/ William B. Murphy
/s/ Robert P. Young, Jr.