STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES NORTHERN,

Defendant-Appellant.

UNPUBLISHED
December 18, 1998

No. 195634
Oakland Circuit Court
LC No. 95-140222 FH

Before: Murphy, P.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver a controlled substance, marijuana, MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c). He was sentenced to an enhanced term of three to eight years in prison pursuant to MCL 333.7413(2); MSA 14.15(7413)(2), as this was his second drug offense. Defendant appeals his conviction and sentence as of right. We affirm.

Defendant's conviction arises from a drug raid conducted at his residence on June 1, 1994. He and several others were at the home. Defendant testified at trial that they were smoking marijuana, drinking beer, and watching television. The police officers who executed the search warrant at defendant's home testified that they found him sitting with two other people at a table on which there were two individually-wrapped packets of marijuana totaling about five grams, a pager, two cell phones, and a calculator. Police also found marijuana residue in defendant's microwave and bills from the pager company in defendant's name. Defendant had approximately $600 in cash on his person, which he testified was the rent money that was due that day. The police also discovered additional tinfoil squares in the residence that were similar in size and shape to those that contained the marijuana discovered on the table.

Defendant first argues that the trial court erred when it allowed the prosecution to introduce others acts evidence concerning the circumstances surrounding his prior conviction for possession with intent to deliver marijuana. Defendant was charged with that crime as a consequence of a May 6, 1993, drug raid at a different residence. The decision whether to admit or exclude evidence is within

the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). An abuse of discretion will be found only when an unprejudiced person, considering the facts upon which the trial court made its decision, would find there was no justification or excuse for the ruling. *Id*.

Defendant contends that introduction of the details of the circumstances of his arrest and conviction for the earlier crime was in error because the evidence was not offered for a proper purpose and its prejudicial value substantially outweighed any probative value it may have had. To be admissible under MRE 404(b), other acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose; (2) it must be relevant; and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994). In other words, "[r]elevant other acts evidence does not violate Rule 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith." *Id.* at 65.

We conclude that the trial court did not abuse its discretion in admitting the evidence concerning the events of May 6, 1993. First, the evidence was admitted for a proper purpose. In order to convict a defendant for possession with intent to deliver marijuana, the prosecution must establish (1) that the defendant knowingly possessed the marijuana, (2) that that defendant intended to deliver the marijuana to someone else, and (3) that the substance possessed was marijuana. See CJI2d 12.3. In this case, although defendant did not dispute that he knowingly possessed marijuana or that he knew that the substance was marijuana, he did specifically contest that he had the intent to deliver the marijuana to someone else. Further, the elements of a criminal offense are always material when a defendant enters a plea of not guilty. *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998). Therefore, the prosecution must carry the burden of proving every element of the offense beyond a reasonable doubt, regardless of whether a defendant specifically contests or offers to stipulate to any of the elements at trial. *Id*. Accordingly, because the prosecutor offered the challenged evidence to show that defendant knowingly possessed marijuana with the specific intent to deliver it to someone else, the evidence was offered for a proper purpose as both "knowledge" and "intent" are specifically enumerated as examples of proper purposes in MRE 404(b).

We also conclude that the evidence was relevant to establishing both defendant's intent and knowledge at the time that he committed the instant offense. The threshold for determining whether evidence is relevant is minimal. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Having already determined that defendant's knowledge and intent regarding the discovered marijuana are facts of consequence to the determination of the action, our concern is whether the challenged evidence is probative of these facts. Although the threshold for relevance is minimal, MRE 404(b) requires that the evidence "truly must be probative of something other than the defendant's propensity to commit the crime." *Crawford, supra* at 390. In other words, there must be a logical thread linking the other acts evidence to a permissible inference, which, in this case, is defendant's knowledge and intent, otherwise the evidence must be excluded. *Id*.

We conclude that the factual similarities between the prior offense and the offense in this case serve to provide the probative force for the admissibility of the evidence to show that defendant knowingly possessed marijuana with the specific intent to deliver it. When the police arrested defendant for the commission of the prior offense, defendant admitted that he was selling marijuana, and the police discovered wrapped packages of marijuana in the residence as well as a large sum of cash on defendant's person. The police also discovered a digital scale, additional packaging material, a police scanner, a weapon, and a pager. When the police arrested defendant for committing the offense in this case, they again discovered wrapped packages of marijuana and additional packing material, as well as a large sum of money on defendant's person. They also discovered two cell phones, a pager, and a calculator on the table where the marijuana was discovered. We conclude that the factual relationship between the earlier offense and the charged offense, although not identical, was not too remote to preclude the jury from permissibly inferring defendant's mens rea in the present case. See *Crawford*, *supra* at 396-397 (concluding that the factual relationship between an earlier controlled drug purchase and a subsequent routine traffic stop was too remote for the jury to draw a permissible inference of defendant's mens rea during the traffic stop).

We finally conclude that the probative value of the challenged evidence was not substantially outweighed by any unfair prejudice resulting to defendant. First, given the factual similarities between the prior and the present offenses, we believe that the challenged evidence was highly probative of defendant's mens rea in this case. Next, in weighing the probative value of the evidence against its potential to unfairly prejudice defendant, we note that the concept of unfair prejudice does not mean damaging. *People v Sabin*, 223 Mich App 530, 537; 566 NW2d 677 (1997). All evidence offered by the prosecution in a criminal case is usually damaging to the defendant else it would not be presented. Rather, the notion of unfair prejudice "denotes a situation in which there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Id*. Stated differently, unfair prejudice ensues only where "evidence which is minimally damaging in logic will be weighed by the jurors substantially out of proportion to its logically damaging effect." *Id*. In this case, as we have indicated, the challenged evidence was highly probative of defendant's mens rea at the time of the charged offense. The danger, however, which MRE 404(b) seeks to prevent, is that the jury will consider the evidence for impermissibly inferring criminal propensity rather than for the purposes for which the evidence was properly admitted. To this end, immediately following the admission of the evidence, the trial court instructed the jury that it could only consider the evidence for the purpose of determining whether defendant knew that he was in possession of marijuana and whether he had the specific intent to deliver it to someone else. The trial court also specifically directed the jury not to consider the evidence for any other purpose, namely, that defendant is a bad person who is likely to commit crimes. Because a jury is presumed to follow the instructions of the trial court unless the contrary is clearly shown, *People v Pearson*, 13 Mich App 371, 382; 164 NW2d 568 (1968); *People v Lewis*, 6 Mich App 447, 454, 455; 149 NW2d 457 (1967), and because the challenged evidence in this case was highly probative of defendant's mens rea, we conclude that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Therefore, we conclude that the trial court did not abuse its discretion in admitting the evidence of defendant's prior involvement in a similar offense.

We note that this case does not present facts similar to those in *Crawford*, *supra*, where, as indicated above, our Supreme Court recently determined that the factual relationship between a charged offense and a previous offense was too remote to warrant admitting evidence of the previous offense pursuant to MRE 404(b). In *Crawford*, some four years had passed between the two offenses, *id.* at 396-397, while in this case the time span was significantly shorter. In *Crawford*, the factual circumstances surrounding the two offenses were dissimilar, *id*., while in this case, as we have indicated above, the factual circumstances surrounding the instant offense and the previous offense were similar. Finally, in *Crawford*, our Supreme Court determined that the only inference that the jury was likely to make from the defendant's prior conviction was that the defendant was a bad person, and thus, he must be guilty of the charged offense. *Id*. at 398-399. In this case, however, the factual similarities between the two offenses allowed the jury to permissibly infer defendant's intent and knowledge at the time of the instant offense. Accordingly, because the facts of *Crawford* are distinguishable from this case, any reliance on *Crawford* is misplaced.

Defendant next argues that there was insufficient evidence to convict him of possession with intent to deliver marijuana. When reviewing the sufficiency of the evidence in a criminal case, this Court considers the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe,* 440 Mich 508, 515; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992). As indicated above, the elements of the crime of possession with intent to deliver marijuana are: (1) that defendant knowingly possessed the marijuana; (2) that defendant intended to deliver the marijuana to someone else; and (3) that the substance possessed was marijuana. See CJI2d 12.3.

A person need not have physical possession of a controlled substance to be found guilty of possessing it. *Wolfe, supra* at 519-520. Possession may be actual or constructive. *Id.* at 520. Where there is no direct evidence that a defendant possessed the substance in question, constructive possession may be demonstrated "when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband." *Id.* at 521. One such circumstance that indicates constructive possession is control of the premises where the drugs were found. *Id.* at 522. Also, actual delivery of a controlled substance is not required to prove intent to deliver the substance. *Id.* at 524. Intent can be inferred from other circumstances surrounding the arrest, such as the quantity of the controlled substance in a defendant's possession or from the manner in which the controlled substance is packaged. *Id*.

Viewing the evidence in the light most favorable to the prosecution, we find that it was sufficient to allow a rational trier of fact to conclude that defendant possessed the intent to deliver marijuana. The evidence showed that defendant resided at the premises where the raid occurred, that he was sitting at the table on which the packets of marijuana were found, and that he was aware that marijuana was on the premises. That evidence was sufficient to show constructive possession. Furthermore, a police officer, qualified at trial as an expert in narcotics investigation, testified that the significant amount of cash found on defendant, the evidence of marijuana in the microwave oven, and the presence of additional tinfoil squares similar to those in which the marijuana on the table was packaged all indicated that drug trafficking was occurring at the residence. Given this testimony, and the fact that intent can be inferred

from the circumstances surrounding the arrest, we find the evidence sufficient to support defendant's conviction.

Defendant next argues that the trial court erred in denying his motion for a mistrial on the basis that one of the testifying officers gave an unresponsive answer to a question by defense counsel that indicated that he had participated in a number of raids at defendant's home. This Court reviews the grant or denial of a mistrial for abuse of discretion; further, where error requiring reversal is claimed, there must be a showing of prejudice to the defendant's rights. *People v Gonzales*, 193 Mich App 263, 265; 483 NW2d 458 (1992). A mistrial should be granted only where the error complained of is so egregious that its prejudicial effect cannot be removed in any other way. *Id*. at 266. We conclude that because the trial court presented a curative instruction to the jury concerning the officer's unresponsive testimony, defendant's rights were not prejudiced by those comments. Therefore, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

Finally, defendant contends that he is entitled to be resentenced because his sentence was disproportionate. We review a defendant's challenge to the proportionality of his sentence for whether the sentencing court abused its discretion. *People v Milbourn*, 435 Mich 630, 634-636; 461 NW2d 1 (1990). A sentencing court abuses its discretion when it imposes a sentence that is disproportionate to the seriousness of the crime and the defendant's background. *Id*. Because defendant was convicted for committing a second drug offense, the sentencing guidelines are inapplicable. *People v Williams*, 223 Mich App 409, 412; 566 NW2d 649 (1997).

The trial court sentenced defendant to serve three to eight years' imprisonment. The court based this sentence on defendant's prior record, which included four felonies and seven misdemeanors, as well as defendant's status as a probationer when he committed the instant offense. Considering defendant's criminal history and the circumstances of the instant offense, we conclude that defendant's sentence is proportionate, and thus, the trial court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Hilda R. Gage