STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VINCENT LAMONT HIGHTOWER,

Defendant-Appellant.

UNPUBLISHED
March 19, 1999

No. 207174
Jackson Circuit Court
LC No. 97-080620 FH

Before: Markman, P.J., and Hoekstra and Zahra, JJ.

PER CURIAM.

Defendant appeals by right his conviction and sentence for possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). We affirm.

Following a confidential informant's controlled purchase of crack cocaine, the Jackson City Police Department arrested defendant during a raid of the home at which the transaction occurred. Although defendant was not directly involved with the informant's deal, as officers entered, they observed him throw a bag of crack rocks behind him. On information that he had earlier sold to at least three other individuals, defendant was charged with possession with intent to deliver. Defendant raises three claims of error.

First, defendant alleges error in the trial court's decision to admit his cousin's testimony relating to alleged deals defendant had made earlier in the day of the raid. He claims that the unfair prejudice of this evidence substantially outweighed any probative value, arguing that by allowing testimony concerning his sales of crack cocaine, the jury was improperly led to believe he had a propensity to commit the charged crime. The admissibility of bad acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

The rule of evidence at issue provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however,

> be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case. [MRE 404(b)(1).]

People v VanderVliet, 444 Mich 52; 508 NW2d 114 (1993), details three requirements for the introduction of other acts evidence. To be admissible, the evidence must be proffered for a proper purpose under MRE 404(b); it must be relevant under MRE 402; and it must pass the balancing test of MRE 403. *Id.*, at 74-5. Admission of evidence is prohibited under Rule 404(b) when the sole purpose of the evidence is to show an individual's propensity for a particular action based on a character inferred from the other acts. *Id.*, at 65.

The transaction with the police department's confidential informant involved defendant's cousin, Latisia Davenport, defendant acting only indirectly. However, Davenport testified that earlier in the day she had purchased crack cocaine from defendant. She also testified that defendant sold to two other individuals this same day, from a supply he maintained in a plastic bag that was in his possession throughout the day. When she began to testify to the first of these additional sales, defense counsel objected on the ground that defendant was not charged with delivery. The court permitted the testimony, ruling that because the charge involved the intent to deliver, this evidence was admissible to demonstrate the "disposition or mind of the defendant."

We agree with the trial court that this evidence was properly proffered under Rule 404(b). There is also no question that the other acts evidence was relevant to an issue of fact or consequence. Relevant evidence is defined as:

> [E]vidence 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.]

That defendant sold crack cocaine to at least three individuals on the day in question, all transactions made from the supply he is alleged to have discarded in the presence of police officers, is indisputably relevant to the question whether he possessed that supply with the intent to deliver. Beyond a vague assertion questioning probative value, defendant does not actually contest these first two requirements of *VanderVliet*. Rather, he principally argues that the third requirement was not satisfied.

The third prong of the *VanderVliet* test requires the application of the balancing test of MRE 403:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. [MRE 403.]

Evidence presented by the prosecutor is expected to be "prejudicial" to the interests of a defendant, and MRE 403 prohibits only evidence that is unfairly so. *Crawford, supra,* at 398. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Id.* Defendant essentially argues that similar acts are always unfairly prejudicial, and substantially outweigh the probative value.

In *People v Mouat*, 194 Mich App 482; 487 NW2d 494 (1992), where the defendant admitted possession of cocaine but denied the intent to deliver, this Court found no abuse of discretion in the admission of evidence of prior drug transactions. As in this case, testimony relating prior purchases from the defendant was held to be highly probative of the issue of intent. *Id.,* at 484-85. This Court found that the probative value of this evidence substantially outweighed the danger of unfair prejudice. *Id.* In the instant case, defendant's opening statement demonstrated a trial strategy of admitting to marijuana possession at the scene of the raid while denying any involvement with the cocaine recovered. As in *Mouat*, testimony of prior sales was the critical method of demonstrating defendant's intent to deliver the drugs.

Moreover, as recommended by controlling authority, the court gave an instruction directing the jurors to limit their consideration of the contested evidence. *VanderVliet, supra,* at 75. Conceding that the trial court gave a limiting instruction in this case, defendant argues that such protective measures are generally ineffective, and that the specific prejudice generated by the similarity of these acts was incurable. We disagree. The court gave a clear instruction that evidence of defendant's transactions earlier in the day of the raid was to be used only in consideration of intent to distribute drugs. We conclude that there was no abuse of discretion in the admission of this evidence.

Defendant next asserts that comments constituting "civic-duty" arguments, made by the prosecutor during her opening statement and closing argument, were improper. While prosecutors are generally accorded great latitude regarding their arguments and conduct, they should not resort to civic-duty arguments that appeal to the fears and prejudices of jurors. *People v Bahoda,* 448 Mich 261, 282; 531 NW2d 659 (1995). This Court reviews allegations of prosecutorial misconduct on a case-by-case basis. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). We examine the pertinent portion of the record and evaluate the prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial. *Id.*

Defendant neither raised objection to the prosecutor's statements as they were made, nor objected generally to her opening statement or closing argument. Notwithstanding this failure, defendant contends that prejudice arising from the improper inclusion of "civic-duty" arguments was so great that his due process rights were incurably violated. Because the failure to object deprives the trial court of an opportunity to cure the error, this Court will reverse only if a curative instruction could not have eliminated the prejudicial effect of the remarks or where the result would be a miscarriage of justice. *People v Messenger,* 221 Mich App 171, 179-80; 561 NW2d 463 (1997).

Reviewing the comments in context, we hold that they did not deny defendant a fair and impartial trial. The first two comments, made during the prosecutor's opening, do little more than state a fact that was readily agreed to in defense counsel's opening, where he stated:

> "[W]hat we're going to find out is it's true, the prosecution and the police in this matter did put one--shut down one more drug house as she said and did put one more drug dealer out of business. But that particular drug house belonged to their witness, Latisia. And the particular drug dealer, as you will find out, was not Mr. Hightower but in fact Latisia."

To the extent that any of the prosecutor's comments suggested that defendant was the dealer who "should be put out of business," such inference falls short of an argument appealing to the fears and prejudices of the jurors. *Bahoda, supra,* at 282.

Further, this Court has held that an improper civic-duty argument is cured by a cautionary instruction that arguments of counsel are not evidence. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Here, both before opening statements, and following closing arguments, the court instructed jurors that the statements and arguments of the attorneys were not evidence, and were meant only to assist the understanding of each side's legal theories, and how each side viewed the case. Given these expressions of caution, we find there was no miscarriage of justice. *Messenger, supra* at 179-80.

Defendant additionally asserts that the prosecutor ignored the lower court's ruling regarding reference to Davenport's plea agreement. Satisfied that the agreement did not involve any consideration for testimony in the instant trial, the court granted the prosecutor's motion to restrict defense counsel from inquiring as to the terms of the agreement. However, this ruling, was contingent on the prosecutor not discussing the plea nor questioning Davenport about her conviction. Defendant asserts that a comment made during the prosecutor's closing argument could be "construed no way other than telling the jury the witness was convicted by plea," in violation of the court's ruling.

Defendant fails to provide this Court with any authority relevant to his assertion that the prosecutor's action is so egregious as to merit reversal. Nowhere does he discuss any law concerning a party's alleged disregard of such a court ruling. It must not be left to this Court to search for authority to sustain or reject a party's position. *Carlin, supra,* at 489. Moreover, defendant's claim concerns a remark to which he did not object below. Because this issue is improperly preserved, and in light of the lack of relevant authority, we find that defendant abandoned his final claim.[1]

Affirmed.

/s/ Stephen J. Markman
/s/ Joel P. Hoekstra
/s/ Brian K. Zahra

[1] Notwithstanding this disposition, we note that the remark was really no more than an appropriate review of the evidence on the part of the prosecutor. Davenport earlier testified at great length to her crack sales on the day in question, and to her arrest during the Jackson Police Department's raid. The prosecutor's remark that she had confessed to her illegal activity did not discuss Davenport's conviction; it merely repeated that she had admitted to her transgressions. Placed in this context, the remark did not deny defendant a fair and impartial trial. Moreover, had defendant not failed to object,

the trial court could have been afforded an opportunity to cure any error with an instruction that could have eliminated any prejudicial effect of the remark.