STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 9, 1999
v	No. 208360 Oakland Circuit Court
JAMES E. WHITTAKER, Defendant-Appellant.	LC No. 97-150209 FH

Before: Collins, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of possession with intent to deliver fifty grams or more, but less than 225 grams, of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.14(7401)(a)(iii). The trial court sentenced defendant to ten to forty years' imprisonment. We reverse and remand for a new trial and for additional proceedings consistent with this opinion.

I

We first address defendant's claim that he was denied a fair trial as a result of the trial court's decision to allow the prosecution to present "other acts" evidence. The decision whether to admit or exclude evidence is within the trial court's discretion. This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there is no justification or excuse for the ruling made. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

The trial court permitted the prosecution to present evidence of the circumstances surrounding defendant's 1992 conviction of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). We conclude that the trial court abused its discretion in admitting this evidence.

The Supreme Court recently decided a case with similar facts. In *People v Crawford*, 458 Mich 376; 582 NW2d 785 (1998), the defendant was arrested after a 1992 traffic stop resulted in the discovery of cocaine hidden in the dashboard of his car. The prosecutor was allowed to present

detailed testimony describing the circumstances of a 1988 incident where the defendant participated in the delivery of cocaine to an undercover police officer. See *id*. at 380-382. The Court held that the admission of this evidence constituted error requiring reversal. The Court explained, "To the extent that the 1988 conviction is logically relevant to show that the defendant was also a drug dealer in 1992, we believe it does so solely by way of the forbidden intermediate inference of bad character that is specifically prohibited by MRE 404(b)." *Crawford*, *supra* at 397. Even if the evidence of the defendant's prior conviction had some logical relevance other than character inference, it nonetheless should have been excluded under MRE 403 "because the danger of unfair prejudice substantially outweighed whatever marginal probative value it might have had." *Crawford*, *supra* at 397-398.

As in *Crawford*, the evidence regarding defendant's 1992 conviction was not probative of anything other than defendant's propensity to commit the crime. Moreover, whatever limited probative value could be attributed to the evidence was substantially outweighed by the danger of unfair prejudice. Accordingly, the evidence should have been excluded.

The prosecutor concedes that, in light of *Crawford*, the trial court abused its discretion in allowing the evidence. However, the prosecutor contends that the error was not prejudicial, and defendant's conviction therefore should be affirmed.

A preserved, nonconstitutional error is not a ground for reversal unless, after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999). After reviewing the record, we conclude that it was more probable than not that the error was outcome determinative. There was no direct evidence linking defendant to the cocaine, which was found underneath the vinyl siding at the back of defendant's house. Defendant testified that the cocaine was not his, and he only went into his backyard to mow the lawn or take out the garbage. Although defendant confessed, he presented evidence that he did so because the police threatened to arrest his fiancee. Thus, defendant's credibility was at issue, and the jury's assessment of his testimony was more probably than not influenced by the evidence of his prior conviction. As the *Crawford* Court stated:

> When a juror learns that a defendant has previously committed the same crime as that for which he is on trial, the risk is severe that the juror will use the evidence precisely for the same purpose that it may not be considered, that is, as suggesting that the defendant is a bad person, a convicted criminal, and that if he "did it before he probably did it again." [*Crawford*, *supra* at 398, quoting *People v Johnson*, 27 F3d 1186, 1193 (CA 6, 1994).]

Accordingly, we reverse defendant's conviction and remand for a new trial.

II

Defendant also argues that the trial court erred in refusing to conduct an in camera review of a police informant. We review the trial court's decision regarding whether a confidential informant should

be produced to determine if it is clearly erroneous. *People v Acosta*, 153 Mich App 504, 509; 396 NW2d 463 (1986).

The search of defendant's home was conducted pursuant to a search warrant that was issued on the basis of statements made by a confidential police informant. The informant identified Mack Whittaker as the individual who sold him drugs in font of defendant's house. Mack Whittaker is defendant's cousin, a frequent visitor in his home, and a known drug dealer. Defendant sought production of the informant, arguing that testimony that the informant purchased drugs from Mack Whittaker, and that the latter went behind defendant's house to retrieve the drugs, would raise a reasonable doubt as to defendant's guilt.

Whether the identity of a confidential informant should have been disclosed must be decided on a case-by-case basis. *Roviaro v United States*, 353 US 53, 62; 77 S Ct 623; 1 L Ed 2d 639 (1957); *People v Underwood*, 447 Mich 695, 704; 526 NW2d 903 (1994). No fixed rule with respect to disclosure is justifiable. The trial court must balance the public interest in protecting the flow of information against the individual's right to prepare his defense. *Roviaro, supra* at 62. Where the government opposes a defense request for disclosure of the identity of an informant, and where the accused is able to demonstrate a possible need for the informant's testimony, the trial judge should require production of the informant and conduct an in camera hearing to determine whether he could offer any testimony helpful to the defense. *Underwood, supra* at 706, citing *People v Stander*, 73 Mich App 617, 622-623; 251 NW2d 258 (1977).

In the present case, the trial court denied defendant's request for production of the informant because it found that he did not demonstrate a need for the informant's testimony. However, defendant was not required to demonstrate an *actual* need for the informant's testimony; rather, defendant only had to establish a *possible* need for the testimony. *Id*. at 707; *People v Wyngaard*, 226 Mich App 681, 684; 575 NW2d 48 (1997), lv gtd 460 Mich 856; 598 NW2d 338 (1999). Here, defendant claimed that the informant's testimony could corroborate the defense theory that the cocaine found under the siding of defendant's house belonged to someone other than defendant, namely, Mack Whittaker. The informant's testimony that Mack Whittaker sold him drugs retrieved from behind defendant's house would render the defense theory more probable than it would be without the testimony. See MRE 401. Accordingly, defendant demonstrated, at the least, a possible need for the informant's testimony, and the trial court clearly erred in denying defendant's request for production of the informant. See *Acosta, supra*. The court should have conducted an in camera hearing to determine whether the informant in fact could have provided testimony that was either relevant and helpful to defendant's defense or essential to a fair determination of defendant's guilt. See *Underwood, supra*; *Wyngaard, supra*. Because we have already found that defendant is entitled to a new trial, we direct the court to conduct such a hearing on remand.

III

Finally, defendant maintains that he was denied the effective assistance of counsel at trial. However, in light of our resolution of the previous issues, we need not address this claim.

Reversed and remanded for a new trial and for additional proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jeffrey G. Collins
/s/ David H. Sawyer
/s/ Mark J. Cavanagh