

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY A. POWELL,

Defendant-Appellant.

UNPUBLISHED

April 28, 2000

No. 209533

Recorder's Court

LC No. 95-007297

Before: Wilder, P.J., and Bandstra and Cavanagh, JJ.

PER CURIAM.

Defendant was charged with possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Following a jury trial, defendant was convicted of possession of twenty-five grams or more, but less than fifty grams, of cocaine, MCL 333.7403(2)(a)(iv); MSA 14.15(7403)(2)(a)(iv). The trial court initially sentenced defendant to two years' probation; however, because this sentence was invalid under the mandatory sentencing provision of MCL 333.7403(2)(a)(iv); MSA 14.15(7403)(2)(a)(iv),¹ defendant was resentenced to eighteen months to four years in prison. Defendant now appeals as of right. We reverse and remand for a new trial.

Defendant argues that the trial court erred in granting the prosecution's motion in limine preventing the defense from introducing any evidence that Officer Christopher Hatcher, along with several other police officers from the Detroit Police Department's Sixth Precinct, had recently been indicted by a federal grand jury for allegedly performing corrupt acts while on duty.² Defendant contends that this evidence was admissible under MRE 404(b)(1) as proof that he was a victim of Hatcher's scheme, plan, or system in planting evidence and falsely accusing him of committing a crime. We agree.

Initially, we note that at trial defendant argued that the evidence of Hatcher's corrupt acts should be admitted for the specific purpose of showing his "*propensity* to plant evidence on defendants, to rob dope houses and to conduct himself at all times as an outlaw." On appeal, defendant asserts that the evidence was admissible for the proper purpose of showing Hatcher's "scheme, plan, or system." An issue based on one ground is not preserved by an objection at trial based on another ground. *People v*

Lino (After Remand), 213 Mich App 89, 93-94; 539 NW2d 545 (1995), overruled on other grounds *People v Carson*, 220 Mich App 662; 560 NW2d 657 (1996). However, although this issue was not technically preserved for appellate review, this Court may nonetheless review an unpreserved evidentiary issue where failure to do so will result in manifest injustice. *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). Because we find that defendant suffered manifest injustice by the omission of the challenged evidence, we will review the merits of defendant's claim.

This Court reviews the trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Howard*, 226 Mich App 528, 551; 575 NW2d 16 (1997). An abuse of discretion will be found only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v Nelson*, 234 Mich App 454, 460; 594 NW2d 114 (1999).

MRE 404(b)(1) 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.

Evidence of other acts may be admitted if (1) it is offered for a proper purpose; (2) it is relevant to an issue or fact of consequence at trial; and (3) its probative value is not substantially outweighed by its potential for unfair prejudice. *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998); *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205 (1994). A proper purpose is one other than establishing the person's character to show his propensity to commit an act. *Crawford*, *supra* at 390.³

A criminal defendant has a federal and state constitutional right to present a defense. US Const, Ams VI, XIV; Const 1963, art 1, § 13; *People v McIntire*, 232 Mich App 71, 102; 591 NW2d 231 (1998). In the instant case, defendant's sole defense was that Hatcher planted the cocaine and illegally arrested him. The prosecutor argued during rebuttal that defendant's contention that the officers planted the cocaine and falsely accused defendant of possessing it was "ludicrous." Defendant's inability to present evidence that Hatcher was under federal indictment for an alleged scheme plan or system to plant evidence for use against persons he wished to arrest, deprived the defendant of the opportunity to add credibility to his theory that the same occurred in the instant case. Thus, while the proffered evidence was clearly inadmissible for the purpose of showing Hatcher's propensity to plant evidence and commit other corrupt acts in the performance of his police duties, it was admissible under MRE 404(b)(1) and highly probative of defendant's theory of the case. Under these circumstances, we believe that the trial court's ruling deprived defendant of his constitutional right to present a defense, and that he is therefore entitled to a new trial.

In light of our disposition of this issue, we need not consider the additional issues raised by defendant.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Kurtis T. Wilder

/s/ Richard A. Bandstra

/s/ Mark J. Cavanagh

¹ MCL 333.7403(2)(a)(iv); MSA 14.15(7403)(2)(a)(iv) provides that a person who violates this section “shall be imprisoned for not less than 1 year and not more than 4 years, and may be fined not more than \$25,000.00 or placed on probation for life.”

² The indictment alleged that, on several occasions beginning on October 19, 1995, Hatcher performed illegal searches and seizures; kept property discovered during these searches for his own use; planted evidence to use against persons he wished to arrest; and falsified police reports.

³ We note that although MRE 404(b) is typically applied to other acts of a criminal defendant, it includes the acts of any person. See *People v Rockwell*, 188 Mich App 405, 409-410; 470 NW2d 673 (1991).