STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 28, 2000
v	No. 213213 Monroe Circuit Court
ANDRE BERNARD JOHNSON, Defendant-Appellant.	LC No. 95-026965-FH; 95-026968-FH; 95-026971-FH; 95-026973-FH; 95-026974-FH

Before: White, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

A jury convicted defendant of one count of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v), and four counts of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). The trial court sentenced defendant as a second-habitual offender, MCL 333.7413; MSA 14.15(7413), to four to eight years' imprisonment for the possession conviction and five to forty years' imprisonment for each delivery conviction. The court ordered that defendant serve the sentences consecutively. Defendant appeals as of right. This case arises out of an undercover operation in which a police officer made a series of purchases of crack cocaine from defendant. We affirm.

Defendant first argues that the trial court abused its discretion when it denied his motions for mistrial. We disagree. This Court reviews a trial court's grant or denial of a motion for a mistrial for an abuse of discretion. *People v Wolverton*, 227 Mich App 72, 75; 574 NW2d 703 (1997). An abuse of discretion exists if the trial court's denial of the motion deprives the defendant of a fair and impartial trial. *Id*.

A trial court should grant a motion for mistrial only for an irregularity that is prejudicial to the defendant's rights and impairs his ability to receive a fair trial. *People v Stewart (On Remand)*, 219 Mich App 38, 43; 555 NW2d 715 (1996); *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). Defendant contends that Officer Robert Alderman's testimony regarding two uncharged incidents that occurred in October and December 1994, deprived him of a fair trial.

Evidence of an individual's crimes, wrongs, or bad acts is inadmissible to prove a propensity to commit such acts. MRE 404(b); *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). Other acts evidence may, however, be admissible for other purposes, such as to prove motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, absence of mistake, or accident. MRE 404(b)(1); *People v Starr*, 457 Mich 490, 495-496; 577 NW2d 673 (1998).

Other acts evidence is admissible if: (1) the evidence is offered for a proper purpose under MRE 404(b); (2) it is relevant under MRE 402, as enforced through MRE 104(b); and (3) the probative value of the evidence is not substantially outweighed by unfair prejudice. The trial court may, upon request, provide a limiting instruction to the jury. *Starr*, *supra* at 496; *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). 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 or less probable than it would be without the evidence." MRE 401.

Defendant argues that the testimony concerning the events of December 6, 1994, constituted inadmissible other acts evidence because no charges arose out of the incident. Alderman testified that on December 6, 1994, he went into an inn to purchase drugs from defendant. Defendant stated that he was uncomfortable selling to Alderman and that Alderman had to "go through" a man named Rich Taylor to purchase the drugs. Alderman and defendant negotiated a $100 sale of crack cocaine, and Alderman gave Taylor $100. Defendant gave the cocaine to Taylor, who then gave it to Alderman. This scenario was virtually identical to the charged incident that took place on December 21, 1994, in which defendant stated that he was uncomfortable selling to Alderman and told Alderman that he would have to "go through" somebody else to get the cocaine. On that date, Alderman gave his money directly to defendant, but received crack cocaine and his change from a man named Ron Johnson.

The evidence of the December 6, 1994, drug sale was admissible to prove identification. Proof of identity is a permissible purpose of other acts evidence. MRE 404(b)(1). The circumstances of the December 6, 1994, sale were very similar to those of the December 21, 1994, transaction for which the prosecution charged defendant. In both drug sales, defendant stated that he felt uncomfortable selling to Alderman and forced Alderman to "go through" another individual to obtain the drugs. Also in both sales, Alderman negotiated the price of the drugs with defendant, and defendant handed the cocaine to another person, who in turn gave it to Alderman. The similarity between the two incidents tended to show defendant's identity and showed that Alderman knew with whom he was dealing during the drug transactions.

Because defendant filed a notice of alibi[1] and testified that he was not at the inn on December 21 or December 29, his identity was a relevant issue at trial. Although defendant claimed an alibi as to only one charge, evidence of defendant's identity was relevant to show that Alderman had dealt with the same person during each of the charged incidents. Also, notwithstanding the notice of alibi, defendant denied that he ever sold drugs to Alderman on any occasion. Further, the probative value of the

[1] At the time that the trial court admitted this evidence, the court had not yet ruled that defendant was prohibited from presenting alibi witnesses.

evidence was not substantially outweighed by unfair prejudice. *Starr, supra* at 496; *VanderVliet, supra* at 55. Because defendant placed his identity at issue in the case, the prosecutor was entitled to present evidence showing that defendant was the person with whom Alderman dealt during the drug transactions. The similarity between the December 6, 1994, and the December 21, 1994, incidents was therefore probative because it showed that defendant was the person who was selling drugs to Alderman. Further, considering that the prosecution charged defendant with four counts of cocaine delivery, and introduced evidence regarding each separate incident, it is unlikely that the challenged testimony was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Defendant also argues that evidence of an October 1994 incident was inadmissible. Alderman testified that on one occasion in October 1994, he purchased drugs from a man named Louis Pace, who was one of four men flagging down cars on the street. Shortly thereafter, while at the inn, Alderman observed that Pace and the other three men entered the bar carrying stacks of money. Defendant and the men went into the men's bathroom, and defendant returned carrying a stack of money that was at least three-fourths of an inch thick. Defendant then put the money into the cash register.

This evidence showed defendant's scheme or plan in using the inn as an establishment through which to conduct drug sales. The evidence revealed that defendant put the money into the cash register after Pace and the three others gave it to him. Other evidence at trial established that defendant often put money that Alderman had given him for drugs into the cash register. Therefore, the evidence of the October 1994 incident showed defendant's scheme and plan to conduct a drug trafficking operation at the inn.

Further, this evidence was relevant because it supported Alderman's testimony that defendant often made Alderman "go through" other individuals to obtain drugs, and it supported Alderman's testimony that defendant had access to the cash register and used it in his drug trafficking operation. The evidence was not more prejudicial than probative given that defendant forced Alderman to "go through" other individuals on more than one occasion. Finally, the trial court gave a limiting instruction stating that any bad acts of other individuals could not be attributed to defendant. Therefore, the trial court did not err in admitting the evidence.

Defendant next contends that he did not receive notice that the prosecutor would use other acts evidence at trial. MRE 404(b)(2) requires a prosecutor to give reasonable notice before trial if he intends to introduce other acts evidence at trial. Pursuant to MRE 404(b)(2), the prosecutor filed a motion for admission of other acts evidence on August 23, 1995, and a notice of intent to admit other acts evidence on November 16, 1995. While these documents did not specifically address the December 6, 1994, and October 1994, incidents, they clearly conveyed the prosecutor's intent to introduce all acts of defendant occurring in late 1994 and early 1995 with respect to Alderman's investigation at the inn. See MRE 404(b)(2) (requiring prosecutors to notify criminal defendants of the "general nature" of the evidence). Contrary to defendant's argument, the prosecutor complied with the notice provisions of MRE 404(b).

Defendant next argues that his trial attorney denied him effective assistance of counsel. We disagree. As an initial matter, we note that defendant failed to preserve this issue for appeal because he did not move for an evidentiary hearing in the trial court. Therefore, our review is limited to errors apparent on the record. *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992).

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that because of such representation, he suffered prejudice to the extent that he did not receive a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To demonstrate prejudice, a defendant must show a reasonable probability that, but for trial counsel's errors, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must also overcome the strong presumption that counsel's actions constituted sound trial strategy. *Id*. at 687.

Defendant contends that his trial counsel was ineffective for failing to timely file a notice of alibi. An attorney's failure to timely file a notice of alibi can constitute ineffective assistance of counsel. *Pickens*, *supra* at 327. In *Pickens*, *supra*, our Supreme Court held that the performance of the defendant's attorney fell below the objective standard of reasonableness when she was aware of his potential alibi defense for nearly three months prior to trial, but nevertheless failed to file a timely notice of alibi. *Id*. The Court, however, found that the error did not prejudice defendant because the alibi witness did not testify at the *Ginther*[2] hearing, and so defendant produced no evidence that the witness would have testified favorably at trial. *Id*. In short, the defendant failed to establish that the witness' testimony would have altered the result of the proceeding. *Id*.

Defense counsel in the present case filed a notice of alibi on Monday, June 15, 1998, the first day of trial, and the prosecutor received the notice on the Friday immediately preceding the first day of trial. As a result of the late filing of the notice, the trial court prohibited defendant from producing any alibi witnesses at trial. Defense counsel stated at trial that she wanted to call four alibi witnesses to testify to defendant's lack of presence at the crime scene. However, the court received no evidence that the four witnesses would have testified favorably to defendant. See *Pickens*, *supra* at 327; *People v McMillan*, 213 Mich App 134, 141; 539 NW2d 553 (1995); *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). Further, defendant presented his alibi defense through his own testimony and supporting material, and it is not clear that the witnesses intended to provide evidence regarding defendant's whereabouts during each of the charged incidents. Accordingly, based on the record, defendant has failed to show that he did not receive effective assistance of counsel at trial. *Pickens*, *supra* at 327; *Avant*, *supra* at 508.

Because we find no error in the trial court's denial of defendant's motion for mistrial, and because we conclude that the defendant's trial attorney did not deprive him effective assistance of counsel, we reject defendant's argument that the cumulative effect of the errors denied him a fair trial.

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[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defendant's final issue on appeal is that his sentences were disproportionate. Again, we disagree. Appellate review of sentencing decisions is limited to whether a trial court abused its discretion. *People v Coles*, 417 Mich 523, 550; 339 NW2d 444 (1983), overruled in part on other grounds *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). An abuse of discretion occurs when a sentence violates the principle of proportionality, which requires that a sentence be proportionate to both the seriousness of the offense and the particular offender. *Milbourn, supra* at 635-636.

A sentence that is within the sentencing guidelines range is presumptively proportionate. However, the sentencing guidelines are not applicable to the sentencing of habitual offenders. *People v Alexander*, 234 Mich App 665, 679; 599 NW2d 749 (1999). Rather, this Court must inquire whether the lower court abused its discretion. *Id*. Some of the factors that a trial court should consider when sentencing a defendant are: (1) whether the offense involved mitigating circumstances, (2) whether the defendant had a prior record, (3) the defendant's age, (4) the defendant's work history, and (5) factors that arise after the defendant's arrest such as his cooperation with law enforcement officials. *People v Johnson (On Remand)*, 223 Mich App 170, 173; 566 NW2d 28 (1997).

In sentencing defendant, the trial court considered the seriousness of the offenses along with the fact that defendant had no verifiable work history. These were proper considerations in determining defendant's sentences. *Milbourn, supra* at 635-636; *Johnson, supra* at 173. When considering defendant's lack of a prior work history, the trial court stated that *if* defendant supported his family through drug sales, doing so would be inappropriate. The trial court did not, contrary to defendant's contention, make a finding that defendant had supported his family with drug proceeds. In considering the seriousness of the offenses, the trial court stated on the record that defendant seemed to be a major part of the drug activity occurring at the inn and stated that defendant was "deeply involved" in selling drugs in the area. The record supported the court's findings because the evidence showed that defendant collected money from drug sales and put the money into the cash register and that defendant told Alderman to "just come on in" if Alderman needed any drugs in the future. The trial court, therefore, considered defendant's extensive involvement in drug sales at the inn when assessing the seriousness of the offenses. The court appropriately considered this factor, and the sentences were proportionate to the offenses involved and the offender. *Milbourn, supra* at 635-636.

Defendant also argues that the trial court should have considered the fact that defendant's sentences were consecutive. He contends that if the trial court had considered this fact, it might have imposed lesser minimum sentences. The record of defendant's sentencing hearing, however, shows that the trial court did consider this fact. The court stated several times on the record that defendant was to serve the sentences consecutively.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell