

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HOLLY ANN GEIGER,

Defendant-Appellant.

UNPUBLISHED

November 14, 2000

No. 212334

Monroe Circuit Court

LC No. 97-028640-FH

Before: Hoekstra, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(v). She was sentenced as a second controlled substance offender, MCL 333.7413(2); MSA 14.15(7413)(2), to a term of two to eight years' imprisonment. She appeals as of right. We affirm.

Defendant argues that the trial court abused its discretion in allowing evidence of a prior similar act pursuant to MRE 404(b). We conclude, however, that any error in the admission of the similar acts testimony was harmless under *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

In the instant case, Officer Foley testified that as defendant walked to a white vehicle after speaking with Officer Foley, she slipped her left hand into her left front pocket. Defendant opened the car door with her right hand and kept her left hand in her pocket as she entered the vehicle. Foley observed the seat when defendant opened the door and saw nothing in the seat when defendant entered the vehicle. Foley then began talking with the driver, Blake Morrow, and saw defendant ease her hand out of her pocket and slip it down towards her leg and under her left thigh. As this occurred, Morrow reached to the rear of the car with his right hand and retrieved a black and red vest out of the back seat, which he placed over defendant's left hand and leg. After searching defendant and Morrow and finding nothing, Foley checked the vehicle. In the front right passenger seat, underneath the vest, on top of the seat where defendant's hand had been, Foley found a crack pipe. Foley further testified that when he found the pipe he asked defendant whose pipe it was, and she first stated that she did not know because a lot of people had been in and out of the vehicle. Defendant said she needed to talk to Foley immediately, apparently regarding James Baker, another man at the scene who defendant said had threatened

her. Foley told her it was not an appropriate time and informed her of his observations made with respect to the pipe. Foley remarked to defendant that the pipe was more than likely hers, and defendant said “yeah it’s probably mine, but I still need to talk to you right away.” The pipe was not dusted for fingerprints. Over defendant’s objection, the prosecutor was permitted to introduce the testimony of Jennifer Bartley, a former police officer, that two years earlier she had transported defendant in the back of her car to be “lodged” on a complaint, and that when she checked the back of her car after removing defendant, she found a crack pipe. It was stipulated that defendant pled guilty to possession of cocaine as a result.

Defendant denied putting her hand in her pocket or under her thigh, as described by Foley, and testified that it was too dark out for Foley to have seen what he said he observed. She denied admitting that the pipe was hers. She testified that she had known Morrow for a few years and that he used cocaine and had used a crack pipe that night. She testified that the vest belonged to Morrow, and that she did not have a crack pipe on her when she entered the vehicle. She stated that she “had a chance to throw one out if I had one way before I came upon Officer Foley.” The owner of the car testified in defendant’s behalf that on a different occasion, shortly after the incident in question, he picked Morrow up with defendant and Morrow got out after a few blocks. The owner was pulled over by police a few blocks down the road, and police found a crack pipe in the back seat where Morrow had been sitting.

With or without the prior acts testimony, the evidence depicted a situation where the pipe might have belonged to either defendant, Morrow, or some other previous occupant of the vehicle, and the question who actually possessed it depended on the credibility of Foley’s testimony regarding his observations. If the jury believed that the seat was empty before defendant entered the vehicle, and that Foley observed the movements he testified he saw, then the evidence strongly supported defendant’s guilt. Morrow’s hand was never observed under the vest. Defense counsel argued that it was likely that the pipe fell out of the vest. However, it is highly unlikely that Morrow would have retrieved a vest containing a pipe from the back seat only to place it even closer to him in the front seat. The circumstances are far more consistent with the view that Morrow had observed, and was assisting, defendant’s efforts to conceal the pipe. Further, defense counsel made a strong argument to the jury focusing the jury’s attention on the point that regardless of defendant’s background, the only question for the jury was whether the pipe found in the car that night was hers. Under the circumstances presented here, where there was testimony that defendant and the vehicle were involved with drug dealers and users, and where apart from the physical circumstances testified to by Foley, the pipe could just as likely have belonged to Morrow, we conclude that testimony that defendant had possessed a different crack pipe two years before added little to the case and most likely was not outcome determinative. *Lukity, supra* at 495-496.

Next, defendant contends that the trial court plainly erred in using an improper sentencing guidelines grid for possession of over twenty-five grams of a controlled substance, rather than possession of less than twenty-five grams. This issue is without merit. The judicial sentencing guidelines do not apply to defendants whose sentences are enhanced under the subsequent offender provisions of the controlled substances act. *People v Edgett*, 220 Mich App 686, 691, 694; 560 NW2d 360 (1996). Defendant’s sentence is within the statutory maximum for a second

possession offense and does not represent an abuse of the sentencing court's discretion. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997).

Affirmed.

/s/ Mark J. Cavanagh

/s/ Helene N. White

I concur in the result only.

/s/ Joel P. Hoekstra