STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 8, 2001
v	No. 209533 Recorder's Court
GREGORY A. POWELL, Defendant-Appellant.	LC No. 95-007297 ON REMAND

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

PER CURIAM.

This case is before us on remand from the Michigan Supreme Court. In our original opinion, we held that the trial court erred in granting the prosecution's motion in limine to preclude the defense from producing evidence at trial that Officer Christopher Hatcher had recently been indicted by a federal grand jury for allegedly performing corrupt acts while on duty.[1] We reversed defendant's conviction and remanded for a new trial. *People v Powell*, unpublished opinion per curiam of the Court of Appeals, issued April 28, 2000, (Docket No. 209533). In lieu of granting the prosecution's application for leave to appeal, the Supreme Court vacated this Court's opinion and remanded to this Court for reconsideration in light of *People v Carines*, 460 Mich 750; 591 NW2d 26 (1999) and *People v Brownridge*, 459 Mich 456; 591 NW2d 26 (1999). *People v Powell*, ___ Mich ___ (entered September 27, 2000, Docket No. 116921). We again reverse and remand.

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

[1] The indictment alleged in part that, on several occasions beginning in October 19, 1995, Hatcher performed illegal searches and seizures; kept property discovered during these searches for his own use; planted drug evidence to use against persons he wished to arrest; falsely accused individuals of illegal possession of narcotics, and falsified police reports.

mandatory sentencing provision of MCL 333.7403(2)(a)(iv); MSA 14.15(7403)(2)(a)(iv),[2] defendant was resentenced to eighteen months to four years in prison. Defendant appealed as of right and we reversed and remanded for a new trial.

Defendant argued that the trial court erred in refusing to permit the defense to introduce 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. Defendant contended that this evidence was admissible under MRE 404(b)(1)[3] as proof that he was a victim of Officer Hatcher's scheme, plan, or system in planting evidence and falsely accusing him of committing a crime.

Defendant's sole defense at trial was that Officer Hatcher planted the cocaine and illegally arrested him. The prosecutor argued to the jury during rebuttal that defendant's contention that the officers planted the cocaine and falsely accused defendant of possessing it was "ludicrous." In our original opinion, we concluded that defendant's inability to present evidence that Officer 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. We acknowledged that while the proffered evidence was clearly inadmissible for the purpose of showing Officer Hatcher's *propensity* to plant evidence and commit other corrupt acts in the performance of his police duties, the evidence was admissible under MRE 404(b)(1) to show a common scheme, plan or system and was highly probative of defendant's theory of the case. Thus, we concluded that the trial court's ruling excluding the evidence deprived defendant of his federal and state constitutional right to present a defense,[4] and he was therefore entitled to a new trial.

On remand, the Supreme Court has directed us to reconsider our decision "in light of *People v Carines*, 460 Mich 750 (1999)." In *Carines*, *supra* at 763, our Supreme Court explained that reversal is warranted for an unpreserved, nonconstitutional error if three requirements are met: (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the

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[2] 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."

[3] 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. Itn 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.

[4] US Const, Ams VI, XIV; Const 1963, art 1, § 13.

plain error affected substantial rights.[5] "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.* The reviewing court should reverse only where an error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Id.*, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

As noted above, the trial court's ruling excluding evidence of Officer Hatcher's indictment erroneously prevented defendant from introducing compelling evidence under MRE 404(b)(1) in support of his theory of the case. Accordingly, defendant has established error. We also find that the error was plain, i.e., clear or obvious. The trial court ruled that evidence of the federal indictment was inadmissible because the charges against Officer Hatcher were "mere allegations." The law is clear, however, that MRE 404(b)(1) specifically addresses the admissibility of uncharged conduct and permits the admission of evidence of other crimes, wrongs or acts even if the conduct has not resulted in a criminal conviction. *People v Starr*, 457 Mich 490, 499; 577 NW2d 673 (1998). Thus, evidence admitted under MRE 404(b)(1) is not limited to criminal convictions and the trial court's ruling constituted plain error. Lastly, in view of the fact that the other evidence in this case did not overwhelmingly support defendant's conviction, we conclude that had the jury been permitted to consider highly probative evidence that Officer Hatcher had recently been indicted for corrupt police conduct, including planting evidence to use against persons he wished to arrest and falsifying police reports, the jury could realistically have found reasonable doubt as to whether defendant committed the charged offense. Therefore, we conclude that the plain error seriously affected the fairness, integrity and public reputation of the judicial proceedings. *Carines, supra*.

The Supreme Court has also directed us to consider "whether evidence regarding the police officer's actions in other matters was collateral under *People v Brownridge*, 459 Mich 456 (1999), because of a lack of sufficient foundation here." After reviewing *Brownridge*, we do not believe that a different result is warranted because we find the facts and circumstances of that case highly distinguishable from the instant case. In *Brownridge*, *supra* at 461, the Supreme Court upheld the trial court's exclusion of one officer's opinion testimony concerning the officer-in-charge's veracity and reputation for truthfulness under MRE 608(a) because it raised a collateral matter and would have confused the jury. The Court noted that "defense counsel ably used other evidence to impeach" the officer-in-charge. *Id.* at 462. The Court also upheld the trial court's exclusion of testimony regarding an alleged false statement about the movement of a

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[5] We note, as we did in our original opinion, that at trial defendant argued that evidence of Officer Hatcher's corrupt acts should be admitted for the 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 argued that the evidence was admissible for the proper purpose of showing Officer 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, we reviewed this issue because we found that defendant suffered manifest injustice by the omission of the challenged evidence. *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999).

tracking dog the officer-in-charge made in an affidavit in an unrelated case under MRE 608(b). *Id.* at 463. The Court agreed with the trial court that the statements in the affidavit were not probative of the officer-in-charge's veracity because there was really no inconsistency between the affidavit and the testimony and, in any event, the contents of the affidavit in an unrelated case could confuse the jury. *Id.* at 464.

Conversely, in this case, we do not believe that evidence of Officer Hatcher's indictment in federal court on charges of planting drug evidence for use against persons he wished to arrest, as well as other corrupt conduct, was "collateral" or would have "confused the jury." Rather, Defendant did not seek to impeach Officer Hatcher's veracity under MRE 608 because Officer Hatcher had not testified at trial. Instead, defendant sought to introduce testimony from Officer Hatcher himself regarding the federal indictment to show a scheme, plan or system under MRE 404(b)(1).[6] Further, unlike the impeachment testimony in *Brownridge*, which had nothing at all to do with the arson charges against the defendant, the evidence concerning Officer Hatcher's indictment was directly relevant to whether he engaged in the same or similar scheme, plan or system in this case. Defendant contended that he did not commit the offense and was framed by the police, the evidence concerning Officer Hatcher's indictment not only was highly probative evidence which supported defendant's theory of the case, its admission would have allowed defendant to quite effectively refute the prosecution's argument that the defense theory was "ludicrous."

Lastly, we do not find that that there was "a lack of sufficient foundation" to admit evidence regarding Officer Hatcher's indictment as suggested in the Supreme Court's order. It was undisputed at the time of trial that Officer Hatcher and other police officers had been indicted by a federal grand jury for allegedly performing corrupt acts while on duty. Defendant sought to introduce this undisputed evidence and permit the jury to assess the weight of the evidence and draw its own inferences. Thus, we believe a sufficient foundation for the evidence was established.

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

/s/ Kurtis T. Wilder
/s/ Richard A. Bandstra
/s/ Mark J. Cavanagh

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[6] After the prosecution withdrew Officer Hatcher as a witness and the trial court granted the prosecutor's motion in limine excluding any reference to the federal indictment against Officer Hatcher, defendant sought the trial court's assistance in obtaining a subpoena for Officer Hatcher to testify regarding the indictment.