

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALEJANDRO CASTILLO,

Defendant-Appellant.

UNPUBLISHED
February 10, 2004

No. 243968
Manistee Circuit Court
LC No. 02-003274-FH

Before: Zahra, P.J., and Cavanagh and Cooper, JJ.

PER CURIAM.

A jury convicted defendant Alejandro Castillo of delivering less than five kilograms of marijuana, MCL 333.7401(2)(d)(iii). The trial court sentenced him to six months in jail and four years' probation. Defendant appeals as of right. We affirm.

On April 13, 2001, detective Timothy Prieze and Phil Memberto, the confidential informant, went to a house in Manistee to purchase marijuana. While inside the home, Detective Prieze claimed that defendant gave him marijuana in exchange for \$300. Defendant denied any involvement with the drug deal and maintained that this was a case of mistaken identity.

I. Excessive Fine

On appeal, defendant argues that the fine imposed by the trial court violates the constitutional prohibitions against excessive fines.¹ In this regard, we note that the Supreme Court recently held that the Due Process Clause of the Fourteenth Amendment "makes the Eighth Amendment's prohibition against excessive fines . . . applicable to the States."² We review questions of constitutional law de novo.³

¹ See US Const, Am VIII; Const 1963, art 1, § 16.

² *Cooper Industries, Inc v Leatherman Tool Group, Inc*, 532 US 424, 433-434; 121 S Ct 1678; 149 L Ed 2d 674 (2001).

³ *People v Garza*, 469 Mich 431, 433; 670 NW2d 662 (2003).

Here, the trial court imposed a \$6,000 fine on defendant for violating MCL 333.7401(2)(d)(iii), which provides for a maximum fine of “not more than \$20,000.00.” Defendant does not challenge the constitutionality of MCL 333.7401(2)(d)(iii) itself, but instead claims that the \$6,000 fine imposed was unconstitutionally disproportionate. According to MCL 769.34(10), however, “[i]f a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence”

In *People v Antolovich*, we articulated the following factors to consider in analyzing whether a fine violates the Michigan Constitution’s prohibition against excessive fines:

”In determining whether a fine authorized by statute is excessive in the constitutional sense, due regard must be had to the object designed to be accomplished, to the importance and magnitude of the public interest sought to be protected, to the circumstances and nature of the act for which it is imposed, to the preventive effect upon the commission of the particular kind of crime, and in some instances to the ability of accused to pay, although the mere fact that in a particular case accused is unable to pay the fine required to be assessed does not render the statute unconstitutional.”^[4]

As noted in *Antolovich*, fines are imposed for trafficking in the illegal drug trade for purposes of punishment and deterrence.⁵ It is believed that the possibility of a \$20,000 maximum fine for the instant crime “attempts to stifle the allure of potentially enormous profits from illegal drug trafficking.”⁶ Furthermore, the public places great importance on curbing the illegal drug trade.⁷

With these principles in mind, we find that the \$6,000 fine imposed upon defendant was proportionate to the seriousness of the offense and the offender and did not violate the Michigan Constitution’s prohibition against excessive fines. While the circumstances surrounding defendant’s offense may not be grave, it is noteworthy that defendant was fined substantially less than the maximum authorized under the statute. To the extent defendant maintains that the fine was excessive given his poor financial situation, he fails to support this claim.

Similarly, we find no merit to defendant’s assertion that the trial court violated the Eighth Amendment’s prohibition against excessive fines. A fine violates the Excessive Fines Clause of the Eighth Amendment when it is grossly disproportional to the gravity of the defendant’s offense.⁸ For the same reasons we articulated in deciding that defendant’s fine complied with the

⁴ *People v Antolovich*, 207 Mich App 714, 717; 525 NW2d 513 (1994), quoting 24 CJS, Criminal Law, § 1604, p 203; see also *People v Miller*, 206 Mich App 638, 640; 522 NW2d 697 (1994).

⁵ *Antolovich*, *supra* at 717-718.

⁶ *Id.* at 718.

⁷ *Id.*

⁸ See *United States v Bajakajian*, 524 US 321, 334, 336; 118 S Ct 2028; 141 L Ed 2d 314 (1998).

Michigan Constitution's prohibition against excessive fines, we conclude that defendant's fine did not violate the excessive fines clause of the Eighth Amendment.

II. Ineffective Assistance of Counsel

Defendant next argues that he was denied a fair trial due to ineffective assistance of counsel. Absent a *Ginther*⁹ hearing, however, our review is limited to plain error on the existing record affecting his substantial rights.¹⁰

Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise.¹¹ To establish ineffective assistance of counsel, defendant must prove: (1) that his counsel's performance was so deficient that he was denied his Sixth Amendment right to counsel; and (2) that this deficient performance prejudiced him to the extent there is a reasonable probability that but for counsel's error, the result of the proceedings would have been different.¹² Defendant must also overcome the strong presumption that his counsel's performance was sound trial strategy.¹³

According to defendant, defense counsel was ineffective for failing to object when the prosecutor elicited the following testimony from Detective Priese:

Q. Sir, why did it take so long to arrest the defendant?

A. Another case developed with the Castillos involving marijuana.

Q. Not involving this defendant?

A. At the beginning of the case it was believed that both the brothers – we determined how they were obtaining marijuana.

Q. But it is fair to say it took several months to locate this defendant, Alejandro Castillo?

A. We held off making arrests on this complaint pending the other complaint that we had going on with them. And then they kind of disappeared for quite a time frame. And we had a hard time locating them in order to arrest them.

⁹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

¹⁰ *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

¹¹ *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

¹² *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

¹³ *Id.* at 600.

Defendant claims that this other bad acts evidence was inadmissible under MRE 404(b)(1) and (2).

Evidence of an individual's other crimes, wrongs, or acts is inadmissible to prove the character of an individual in an attempt to show action in conformity therewith.¹⁴ Even assuming, arguendo, that this testimony amounted to other bad acts evidence, defendant has failed to overcome the presumption that defense counsel's failure to object was sound trial strategy. Defense counsel's decision to downplay a defendant's prior conduct may be considered a matter of trial strategy.¹⁵ Here, any reference to defendant's other bad acts in the above testimony was brief and largely innocuous. This Court will not second-guess counsel regarding matters of trial strategy or assess counsel's competence with the benefit of hindsight.¹⁶

Defendant next contends that defense counsel was ineffective for eliciting the following "other bad acts" testimony from Mr. Memberto:

Q. How did . . . you know Mr. Castillo had marijuana?

A. Actually was a conversation that I heard between him and my son that was sitting next to me and it was very obvious to anybody who frequented that bar that that is what was going on between them. Would have been a better thing just to have a sign on his chest.

This question did not specifically call for other bad acts evidence. And we question whether Memberto's testimony is explicit enough to constitute evidence of other bad acts. In any event, this line of questioning was designed to elicit the details surrounding Mr. Memberto's relationship with defendant. The confidential informant's relationship with defendant was relevant to establish the context of the transaction in this case. Defendant has therefore failed to show how this amounted to ineffective assistance of counsel.

Defendant further claims that defense counsel was ineffective for posing the following question to defendant's sister, Nereida Castillo Resendiz:

Q. Were [Jaime and defendant] arrested down [in Texas]?

A. I don't—I think they got arrested once but, you know. I don't know why they got arrested. But they paid their whatever they had to pay, their bail or whatever, and they let them go.

Reading this question in context, it is clear that defense counsel was not trying to elicit information regarding defendant's previous arrests. Rather, he was attempting to ascertain when and where defendant was arrested *for the charged offense*. The fact defense counsel ignored Ms.

¹⁴ MRE 404(b)(1); *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

¹⁵ *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

¹⁶ *Id.*

Resendiz's unresponsive reply to his question, rather than asking for a curative instruction, was a matter of trial strategy that we will not second-guess on appeal.¹⁷

III. Jury Instructions

Defendant also challenges the trial court's refusal to give CJI2d 5.11 in its charge to the jury. Claims of instructional error are reviewed de novo on appeal.¹⁸ As a general rule, "[w]e review jury instructions in their entirety to determine if error requiring reversal occurred."¹⁹ It is the function of the trial court to clearly present the case to the jury and instruct them on the applicable law.²⁰ Even if somewhat imperfect, reversal is not required where the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights.²¹

CJI2d 5.11 instructs jurors to evaluate the testimony of police officers under the same standards it used to evaluate other witnesses. However, the use note to CJI2d 5.11 specifically provides that the "instruction is discretionary and *may* be given upon request."²² We further note that the Criminal Jury Instructions are not officially sanctioned or required by the Supreme Court.²³ Regardless, a review of the record shows that the trial court provided the jury with the general instructions regarding how to assess a witness' credibility. Accordingly, we find no error in the trial court's refusal to give CJI2d 5.11.

IV. Cumulative Error Doctrine

Defendant ultimately claims that he was denied a fair trial due to the cumulative effect of the improper introduction of other bad acts evidence and the trial court's refusal to give CJI2d 5.11. Because there were no errors of consequence that combined to deprive defendant of a fair trial, the cumulative error doctrine is inapplicable.²⁴

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Jessica R. Cooper

¹⁷ See *id.*

¹⁸ *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

¹⁹ *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

²⁰ *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001).

²¹ *Aldrich*, *supra* at 124.

²² Emphasis added.

²³ *People v Stephan*, 241 Mich App 482, 495-496; 616 NW2d 188 (2000).

²⁴ *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999).