STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT HUGH THOMAS,

Defendant-Appellant.

UNPUBLISHED
February 17, 2004

No. 244071
Kent Circuit Court
LC No. 01-007184-FH

Before: Schuette, P.J., and Meter and Owens, JJ.

MEMORANDUM.

Following a jury trial, defendant was convicted of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), and conspiracy to deliver the same, MCL 750.157a. He was sentenced to lifetime probation and now appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On June 27, 2001, an undercover police officer gave defendant $100 and, thereafter, an unidentified man gave the officer five rocks of crack cocaine at defendant's direction. The police had staged three prior purchases of cocaine at this same location, two of which involved defendant. However, the charges were for the purchase on June 27.

Defendant first argues that the trial court erred in holding that MRE 404(b) did not bar testimony relating to the three prior buys. However, on two of the three prior occasions defendant received the money while someone else delivered the cocaine. Thus, this evidence tended to establish that defendant was conspiring with the unidentified man on June 27 to deliver the cocaine to the undercover officer. Since the evidence was offered for a proper purpose and was relevant, it could be excluded only if its probative value was outweighed by its prejudicial effect. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998). Equating prejudicial with significantly unfair, the trial court concluded that providing the jury with this information would not unfairly prejudice defendant. We find no abuse of discretion with regard to the trial court's decision. *People v Ackerman*, 257 Mich App 434, 441; 669 NW2d 818 (2003). Even assuming that testimony regarding one of the prior incidents was improperly admitted, we cannot conclude that its admission affected the outcome of the case. See *People v. Sykes*, 229 Mich App 254, 273-274; 582 NW2d 197 (1998).

Defendant next argues that the trial court erred in admitting Debra Howard's statements as those of a co-conspirator under MRE 801(d)(2). Defendant maintains that the prosecutor

failed to establish the conspiracy independent of any statements that Howard made. See *People v Vega*, 413 Mich 773, 780; 321 NW2d 675 (1982). However, the prosecutor established that the undercover police officer told Howard that he wanted the cocaine before he gave her the money because he did not want to be ripped off. Howard then went outside and talked to defendant. When she came back inside, the officer gave her $100. She went back outside, and defendant then said, "Go in there and get your s___," pointing to a trailer. It was established that "s___" was a common word for controlled substances. Howard went into the trailer and came out thirty seconds later with a paper towel in her hand. She reentered the house and opened the paper towel. Inside were five rocks of cocaine. This evidence does not involve any statement by Howard and was sufficient to establish a conspiracy between Howard and defendant. Howard's statements were admissible.

Finally, defendant argues that the trial court erred in admitting a photocopy of a $20 bill used in the buy rather than requiring the bill itself under MRE 1002. However, MRE 1004(4) provides that an original writing is not required where it is not closely related to a controlling issue. Because there was testimony that the buy money was given to defendant, we conclude that the bill itself was not closely related to a controlling issue in the case and that the original was not required. The important fact was that money had been given to defendant *at all*, not the precise nature of the bills involved. Defendant contends that the actual bill *was* related to a controlling issue in the case because it might have contained fingerprints valuable in determining the true perpetrator of the charged crimes. However, even assuming that the original bill should have been admitted, we cannot agree, given the testimony presented at trial, that the failure to admit the actual bill affected the outcome of the trial. See, generally, *Sykes, supra* at 273-274.

Affirmed.

/s/ Bill Schuette
/s/ Patrick M. Meter
/s/ Donald S. Owens