STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 19, 2004
v	No. 243083 Oakland Circuit Court
CESAR AUJUSTO VALASQUEZ, Defendant-Appellant.	LC No. 2001-176445-FC

Before: Neff, P.J. and Wilder and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver 650 or more grams of cocaine, MCL 333.7401(2)(a)(iv). He was sentenced as an habitual offender, MCL 769.10, to thirty to sixty years' imprisonment. He appeals as of right. We affirm.

I. Pertinent Facts

The police stopped defendant's car for a traffic offense after receiving information from a confidential informant that defendant may have been involved in transporting narcotics from Florida to Michigan. Defendant had been driving in an erratic manner, leading the police to believe he was trying to evade cars that might be following him. The car defendant was driving was registered to another person. After defendant was stopped, he consented to a search of the vehicle. The police found approximately forty-six kilograms of cocaine in a hidden storage compartment in the rear of the car. Pagers, cellular telephones, and cash were also confiscated. Defendant gave a statement to the police denying knowledge of the cocaine.

The search and arrest took place in January 2001. The police had previously followed defendant in October and December 2000, suspecting him of being involved in narcotics trafficking. Each time, defendant was driving a Volvo automobile registered to another person, and drove in an erratic manner that led the police to believe he was trying to evade cars that might be following him.

Further investigation revealed that defendant had previously been stopped for speeding in Georgia, and the police there determined that defendant drove a van registered to another person. On that occasion, defendant consented to a search of the vehicle and the police discovered a hidden compartment in the rear of the van that contained trace amounts of cocaine. A videotape

of the Georgia search was played for the jury in this case. A cellular telephone, pager, and cash were also confiscated.

II. Sufficiency of the Evidence

Defendant first argues that there was insufficient evidence to support his conviction. Defendant specifically argues that the evidence failed to show that he had knowledge of the cocaine, because he gave a statement denying knowledge of the cocaine, the cocaine was found in a secret compartment not readily observable, and the compartment was accessible only by using tools to remove carpeting and interior parts of the car.

In considering this question, we must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to support a conviction. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); see also *People v Hardiman*, 466 Mich 417; 646 NW2d 158 (2002) (discussing inferences).

Although defendant denied knowing that cocaine was hidden in the car, there was evidence that he was previously stopped driving a different vehicle that also had a hidden compartment containing cocaine residue. Further, although the compartment here was accessible with tools, a set of tools suitable for this purpose was found in the back seat of the car. A diagram showing the location of the compartment was also recovered from the car. Defendant had driven the car from Florida to Michigan, and had spent at least a few days driving around the Detroit area. Viewed in a light most favorable to the prosecution, this evidence was sufficient to support defendant's conviction.

III. Evidentiary Rulings

Defendant next argues that several of the trial court's evidentiary rulings denied him a fair trial. The decision whether to admit or exclude evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Watkins*, 176 Mich App 428, 430; 440 NW2d 36 (1989). We find no abuse of discretion here.

A. Georgia Search

The trial court ruled pretrial that the evidence of the Georgia search was inadmissible under MRE 404(b), because it was not probative of defendant's knowledge of the contents of the hidden compartment and, therefore, would likely be introduced solely to show defendant's propensity to commit the offense. After this Court denied plaintiff's application for leave to appeal and on remand from our Supreme Court, the trial court admitted the evidence, finding that the Georgia matter did not involve a conviction and, therefore, would not be unduly prejudicial.[1]

[1] Our Supreme Court ruled that the evidence was offered for a proper purpose, but remanded the (continued…)

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. It 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.

Under MRE 404(b), other acts evidence must be offered for a proper purpose, it must be relevant, its probative value must not be substantially outweighed by its potential for unfair prejudice, and a cautionary instruction must be given if requested. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993).

The trial court did not abuse its discretion in concluding that the probative value of the evidence was not substantially outweighed by the potential for unfair prejudice. The evidence was probative of a principal issue in this case (i.e., defendant's knowledge of the hidden compartment containing cocaine), and the fact that the Georgia matter did not involve a conviction minimized the potential for unfair prejudice. Also, as required by *VanderVliet*, the trial court instructed the jury that the evidence could only be used for limited purposes:

> You have heard evidence that the defendant committed improper acts for which he is not on trial. If you believe this evidence, you must be careful only to consider it for certain purposes. You may only think about whether this evidence tends to show that the defendant knowingly possessed the cocaine. That the defendant knew what the things found in his possession were. That the defendant acted purposefully, that is not by accident of mistake or because he misjudged the situation. That the defendant used a plan, scheme of characteristic scheme [*sic*] that he has used before or since. You must not consider this evidence for any other purpose.
>
> For example, you must not decide that it shows the defendant is a bad person or that he is likely to commit crimes. You must not convict the defendant here because you think he is guilty of other bad conduct.
>
> All the evidence must convince you beyond a reasonable doubt that the defendant committed the alleged crime or you must find him not guilty.

The danger that a properly instructed jury would use the evidence to find that defendant had a propensity to commit crimes did not substantially outweigh the probative value of the evidence.

(…continued)

case instructing the trial court to consider whether the danger of undue prejudice substantially outweighed its probative value. Under the law of the case doctrine, our Supreme Court's determination that the evidence was offered for a proper purpose is binding on this Court. See *People v Kozyra*, 219 Mich App 422, 433; 556 NW2d 512 (1996).

People v Crawford, 458 Mich 376, 384; 582 NW2d 785 (1998); *People v Martzke*, 251 Mich App 282, 294-295; 651 NW2d 490 (2002). The trial court did not abuse its discretion in allowing the evidence.

B. Videotaped Statement

The prosecutor proffered a portion of defendant's custodial statement in which defendant indicated that he was expecting a telephone call from his associates in a week. Defendant objected to its admission, but argued that, if it was allowed, the entire videotaped interview should be admitted to "show the context the statement is made in." See MRE 106. In particular, defendant wanted to show that the police were pressuring him to reveal the identity of the owners of the cocaine, knowing it did not belong to him. The trial court ruled that certain statements could be introduced through testimony, but the entire recorded interview, approximately 2-1/2 hours long, would not be admitted because it involved extraneous matters, such as the punishment defendant might face.

Defendant argues that the admitted statement was misleading and taken out of context. Defendant has not shown that he was prejudiced by the evidence. Defendant has not demonstrated that the use of the portion of the videotaped statement was either misleading or calculated to cause confusion. Further, considering the length of the interview and the presence of extraneous and inadmissible matters, admission of the entire interview would have caused a waste of time and created a danger of confusing the jury about inappropriate matters. MRE 403. Defendant has not shown that fairness required that the entire interview be considered by the jury. MRE 106.

C. Michigan Surveillance

Defendant argues that the trial court erroneously allowed evidence that he was under police surveillance twice in the months leading up to this arrest. The trial court denied defendant's motion in limine to exclude this evidence, finding that the circumstances leading to defendant's arrest were relevant and more probative than prejudicial because of the need to give the jury a full presentation of the circumstances surrounding defendant's arrest. But the trial court included this matter in its cautionary instruction regarding the limited use of other acts evidence.

We find no abuse of discretion. Evidence that defendant drove in an erratic manner indicative of flight or evasion during the earlier periods of police surveillance was relevant to explain his similar driving on the day of his arrest, which in turn was probative of defendant's consciousness of guilt, i.e., knowledge that his vehicle contained illegal drugs. Thus, the evidence was relevant and admissible for a proper, noncharacter purpose under MRE 404(b). *VanderVliet*, *supra*. Further, because defendant was not arrested earlier, and the officers testified that they did not stop defendant or witness any drug activity at those times, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. The trial court did not abuse its discretion.

D. Note to Wife

Defendant argues that the trial court erred by admitting into evidence a note he wrote after his arrest, which he intended for his wife. The note[2] was first disclosed outside the jury's presence when read into the record by the prosecutor:

> Doctor Nunez Monharozon, if I can get in touch with you telephone fax, question does your cell phone receive collect calls. News Channel 4 Oakland County, I would like to come along with Doctor Nunez to see what we can do.
>
> However, however if, if not it's not, it doesn't matter then that changes everything all is dead. No money for Doctor Nunez like the other time proceeding until I get out sell your car.

The prosecutor continued with a list of phrases that were also contained in the note: "Econolodge[3] IRS, Mexican lottery, social security card, Columbian accounts, Republic Bank." *Id.* Over defendant's objection, the prosecutor offered the note to show that defendant was attempting to contact an attorney (according to counsel, "doctor" means "attorney" in Spanish), and that defendant was instructing his wife to sell her car "like last time."

Defendant argues that the notes involved extraneous matters that had nothing to do with the issues at trial. We agree with the trial court that the question whether inculpatory inferences could be drawn from the cryptic contents of the note was for the jury to decide. Defendant's objections primarily concerned the weight of the evidence, not admissibility. The court did not abuse its discretion in allowing this evidence. MRE 403; *Watkins*, *supra*.

IV. "Drug Profile" Evidence

Defendant argues that the trial court erred by allowing police officers to testify that certain characteristics involved in this case (e.g., his consent to search the vehicle, the use of a car registered to another, evasive driving, and use of cellular telephones and pagers) were consistent with how drug traffickers act. Because defendant failed to object to the challenged testimony at trial, this issue is not preserved. Accordingly, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Because profile evidence can be admissible under certain circumstances, although not as substantive evidence of guilt, we find no plain error. *People v Williams*, 240 Mich App 316, 320-321; 614 NW2d 647 (2000); *People v Murray*, 234 Mich App 46, 56-57; 593 NW2d 690 (1999).

Defendant also argues that his attorney's failure to object to this evidence deprived him of the effective assistance of counsel. Although defendant moved for a new trial below, he did

[2] The note was written in Spanish but translated into English for purposes of trial.

[3] Defendant had been staying at an Econolodge motel when arrested for this offence.

not raise this ineffective assistance of counsel issue or request a *Ginther*[4] hearing. Therefore, our review of this issue is limited to mistakes apparent on the record. *People v Juarez*, 158 Mich App 66, 73; 404 NW2d 222 (1987).

To establish ineffective assistance of counsel, defendant must show that trial counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced him as to deprive him of a fair trial. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). In so doing, defendant must overcome the strong presumption that counsel engaged in sound trial strategy. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). In this case, we cannot conclude from the silent record that counsel's failure to object was objectively unreasonable, or whether his failure to object might have been part of a valid trial strategy. Furthermore, because defendant has not demonstrated that the challenged testimony was plainly inadmissible, he has not shown that he was prejudiced by counsel's failure to object.

V. Aiding and Abetting Instruction

Defendant argues that the trial court erred by failing to instruct the jury on a theory of aiding and abetting. Defendant was not charged as an aider or abettor, and neither party requested a jury instruction under that theory. Thus, we review this unpreserved instructional issue for plain error affecting defendant's substantial rights. *Carines*, *supra*.

A person who aids or abets an offense is treated the same as a principal. MCL 767.39.[5] Defendant has failed to show how he was prejudiced by the trial court's failure to instruct on this *additional* theory of guilt. We similarly find no merit to defendant's argument that defense counsel was ineffective for failing to request an instruction on aiding and abetting. Although defendant argues that the evidence minimized his involvement in any offense, an instruction on aiding and abetting would have provided the jury with an *additional* theory of guilt. Defense counsel was not ineffective for failing to request such an instruction.

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[4] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

[5] MCL 767.39 abolished the distinction between a principal and a person who aids or abets an offense. The statute provides:

> Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

VI. Cumulative Effect of Errors

Finally, defendant argues that the cumulative effect of multiple errors deprived him of a fair trial. See *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001). Because there are no individual errors, there is no cumulative effect. *People v Sawyer*, 215 Mich App 183, 197; 545 NW2d 6 (1996).

Affirmed.

/s/ Janet T. Neff
/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly