

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES WALTER WHITE,

Defendant-Appellant.

UNPUBLISHED

July 15, 2008

No. 276707

Kalamazoo Circuit Court

LC No. 06-001590-FH

Before: Murphy, P.J., and Bandstra and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction for possessing chemicals knowing, or having reason to know, that they are intended to be used for manufacturing methamphetamine, MCL 333.7401c(1)(b). Defendant was sentenced, as an habitual offender, fourth offense, MCL 769.12, to 6 to 20 years' imprisonment. We affirm.

Defendant first argues that his due process rights were violated when the prosecutor questioned him extensively about his drug history, particularly about whether he had ever used methamphetamine. He also argues several evidentiary errors with respect to the evidence. Defendant first placed the matter of his drug use into issue; therefore, he effectively waived review of the arguments presented. *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000); *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). On direct-examination, defense counsel asked defendant whether he used methamphetamine from May 2004 to May 2006; defendant answered, "No." Defendant "opened the door" to questions about his drug use on cross-examination. See *People v Federico*, 146 Mich App 776, 791; 381 NW2d 819 (1985) (the prosecutor may question witnesses on those matters raised on direct examination). The prosecutor, thereafter, properly inquired about whether defendant had ever used methamphetamine, and when he used the drug, because defendant had introduced the matter on direct examination.

Moreover, even if the issue was not deemed waived, there was no error in admitting the evidence. On cross-examination, defendant indicated that he had used methamphetamine in July and August 2006; the charged crime occurred on May 31, 2006. Contrary to the arguments posed by defendant, and regardless of the timeframe during which the methamphetamine use

occurred, we conclude that the evidence was admissible under MRE 608(b)(inquiry regarding specific instances of conduct is proper if probative of the witness' character for truthfulness),¹ under MRE 404(b)(1)(evidence of other crimes or acts is admissible to show intent, knowledge, and motive),² under MRE 403 (relevant evidence is admissible if probative value not substantially outweighed by the danger of unfair prejudice), and under MRE 611(b).³

Defendant also challenges the admission of the police officers' testimony that his behavior was consistent with individuals buying methamphetamine ingredients. Defendant did not object to the challenged testimony; therefore, this issue is unpreserved for appeal. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). Because the evidentiary issue is unpreserved, defendant must demonstrate plain error affecting a substantial right, and reversal is warranted only if the error resulted in the conviction of an innocent defendant or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Taylor*, 252 Mich App 519, 523; 652 NW2d 526 (2002).

This Court has described drug profile evidence as an “informal compilation of characteristics often displayed by those trafficking drugs.” *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999) (citation omitted). The challenged evidence was drug profile evidence. In *People v Williams*, 240 Mich App 316, 320- 321; 614 NW2d 647 (2000), this Court set forth the following factors to apply when considering the admissibility of drug profile evidence:

First, the drug profile evidence must be offered as background or modus operandi evidence, and not as substantive evidence of guilt, and the distinction

¹ To the extent that *People v Westbrook*, 175 Mich App 435, 437; 438 NW2d 300 (1989), does not permit evidence of an arrest under MRE 608(b), the introduction of evidence regarding defendant's arrest for possession of methamphetamine was harmless error, MCL 769.26, given that defendant had already properly testified in general that he used the drug in July and August 2006. Moreover, we would note that *Westbrook* relied on *People v Falkner*, 389 Mich 682; 209 NW2d 193 (1973), which is also cited by defendant here, but in *People v Layher*, 464 Mich 756, 757-758; 631 NW2d 281 (2001), our Supreme Court, addressing witness bias, stated that *Falkner* “is inconsistent with precedent and with the approach to the admission of evidence that we have followed since the adoption [in 1978] of the Michigan Rules of Evidence.”

² The prosecutor was required to establish that defendant knew or had reason to know that the chemicals were going to be used for manufacturing methamphetamine, and any evidence showing defendant's familiarity with or use of the drug would be relevant, MRE 401, to proving knowledge and intent. Given defendant's actions in possessing the chemicals at issue in the spring of 2006, a reasonable inference can be reached that if defendant used methamphetamine in the summer of 2006 as acknowledged, he had some prior exposure to or knowledge of the drug in the spring of 2006. The challenged evidence also lent credence to police testimony regarding inculpatory statements made by defendant. Additionally, under the circumstances any notice failure relative to MRE 404(b)(2) does not warrant reversal. See *People v Dobek*, 274 Mich App 58, 87-88; 732 NW2d 546 (2007).

³ MRE 611(b) provides that “[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility.”

must be carefully maintained by the attorneys and the court. Second, something more than drug profile evidence must be admitted to prove a defendant's guilt; multiple pieces of profile do not add up to guilt without something more. Third, the trial court must make clear to the jury what is and is not an appropriate use of the drug profile evidence by, e.g., instructing the jury that drug profile evidence is properly used only as background or modus operandi evidence and should not be used as substantive evidence of guilt. Fourth, the expert witness should not be permitted to express an opinion that, on the basis of the profile, defendant is guilty, and should not expressly compare the defendant's characteristics to the profile in a way that implies that the defendant is guilty. [Citation omitted.]

In this case, the drug profile evidence was properly admitted. The police officers testified that defendant's actions, specifically milling about the pharmacy and going to more than one store, were consistent with someone gathering methamphetamine components. This testimony was offered as background evidence to explain the method people use to gather methamphetamine ingredients, which are legally obtainable, but closely monitored and regulated by state law. It also explained the officers' behavior in following defendant. It was not presented as substantive evidence of defendant's guilt. The prosecutor admitted other evidence of defendant's guilt, specifically including defendant's confession that he bought the pseudoephedrine and camp fuel for a methamphetamine cook. Moreover, it can be presumed that the judge, sitting as the trier of fact, did not use the profile evidence improperly, and none of the police officers opined or implied that defendant was guilty based on the profile. See *People v Bailey*, 175 Mich App 743, 746; 438 NW2d 344 (1989) ("it is unlikely that the [judge, as the] trier of fact considered the evidence for anything other than the purpose for which it was offered"). Defendant has failed to show that plain error occurred; therefore, reversal is not warranted.⁴

Affirmed.

/s/ William B. Murphy
/s/ Richard A. Bandstra
/s/ Jane M. Beckering

⁴ Defendant briefly mentions that the officers were never qualified as experts; however, this is not the theme or the basis of the issue presented, nor is any argument on the matter sufficiently developed to demand our attention.