

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ASMIR MILJKOVIC,

Defendant-Appellant.

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UNPUBLISHED

January 26, 2010

No. 285102

St. Clair Circuit Court

LC No. 07-001697-FH

Before: Sawyer, P.J., and Cavanagh and Hoekstra, JJ.

PER CURIAM.

Defendant appeals by right his jury convictions of possession with intent to deliver cocaine, MCL 333.7401(2)(a)(iii), possession with intent to deliver psilocin (mushrooms), MCL 333.7401(2)(b)(ii), and possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii). We affirm.

Defendant's convictions arise from the discovery of a large quantity of drugs and other drug-related items in a safe located in the basement of the home of defendant's friend in June of 2007. The business records of a moving company showed that defendant paid to have a safe matching the description of the safe in Baker's basement moved to Baker's house. Baker also testified that the safe in her basement belonged to defendant and that defendant regularly came to her home to access the safe.

On appeal, defendant first argues that he was denied a fair trial as a consequence of the trial court's improper admission of evidence, particularly MRE 404(b) evidence, which was also admitted without the required pretrial notice and without being subjected to the required limiting instruction, CJI2d 4.11. We disagree.

A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A preliminary question of law regarding the admissibility of evidence is reviewed de novo. *Id.*

MRE 404(b)(1) sets forth the standards for the admission of other acts evidence. It provides as follows:

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.

For evidence to be admissible under MRE 404(b), it must be offered for a proper purpose, it must be relevant, and the probative value must not be substantially outweighed by the potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Evidence is considered unfairly prejudicial if admitting it would create a danger that marginally probative evidence would be given undue weight by the jury. *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001). Other acts evidence is only admissible to prove an issue which is actually in dispute. *People v Brown*, 137 Mich App 396, 404; 358 NW2d 592 (1984). A defendant's denial of culpability places all the elements of a crime in issue. *People v Starr*, 457 Mich 490, 501; 577 NW2d 673 (1998). In this case, because defendant denied any wrongdoing, all the elements of the crimes here were at issue.

It appears that defendant is claiming that the following evidence should not have been admitted: (1) a glove that had been pulled from defendant's trash in March of 2007 and field-tested positive for cocaine, (2) photographs depicting defendant's "lavish lifestyle," including his various possessions which tended to belie the modest income he reported on his income taxes, (3) photographs which showed defendant with "known convicted narcotics dealers in our county," (4) letters from two of those same persons which in part discuss drug transactions, (5) receipts for money orders sent to those same persons, (6) weapons and ammunition that had been found in defendant's home, and (7) several drug ledgers. We consider each claimed error in turn.

During the course of the trial, in response to defendant's objection to the admission of the glove as "bad acts" evidence, the prosecution argued that the evidence was not "bad acts" evidence, rather it was "intrinsic evidence," apparently meaning that the evidence was blended or connected to the crime charged. It was being offered to prove defendant's constructive possession of the drugs in the safe, including the cocaine, because the glove was the same type, color, and texture as the gloves found inside the safe. The trial court agreed with the prosecution and overruled the objection. The trial court did not abuse its discretion when this evidence was admitted.

To secure a conviction on the charges, the prosecution had to prove that defendant knowingly possessed the controlled substances with the intent to deliver. *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748, amended 441 Mich 1201 (1992). Possession can be either actual or constructive. Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between defendant and the contraband. *Id.* at 521. Thus, direct or circumstantial evidence showing that defendant had dominion and control over the controlled substances is sufficient. *Id.* Intent to deliver may be inferred from the amount of controlled substance possessed, from the packaging material, and other circumstances indicating an intent to sell. *Wolfe, supra* at 523-525; *People v Ray*, 191 Mich App 706, 708; 479 NW2d 1 (1991).

Here, although defendant stipulated that the person who possessed the controlled substances in the safe did so with the intent to sell them, the prosecutor was required to prove

every element of the crimes charged. *People v Mills*, 450 Mich 61, 69-70; 537 NW2d 909, modified on other grounds 450 Mich 1212 (1995). And defendant denied that he possessed the controlled substances. The glove that field-tested positive for cocaine was recovered from a trash pull that occurred at defendant's residence. Evidence revealed that the safe in Baker's basement, that contained the controlled substances, including cocaine, was defendant's safe. The gloves found in the safe were like the glove found in defendant's trash. Given this evidence, there was a sufficient connection between the glove and the drugs to warrant a finding that they were connected to the crimes charged and not subject to MRE 404(b). The glove was probative of defendant's possession of the controlled substances and other items located in the safe. Thus, this claim is without merit.

Next, defendant challenges the admission of a group of photographs that were taken in the course of the search of his residence which purportedly depicted a lavish lifestyle compared to his reported income. At trial, defendant objected to the admission of these photographs on the grounds that (1) they were not relevant, (2) they tended to give rise to an inference that defendant was violating the tax laws thereby implicating him in an uncharged offense, and (3) were unnecessary because, by way of defendant's stipulation, intent to deliver was not genuinely in issue. The prosecution argued the evidence was admissible because it tended to show that defendant's lifestyle did not square with his reported income which gave rise to an inference that defendant was in the business of illegally selling controlled substances on a continuing basis, as his primary occupation. Accordingly, defendant intended to sell the controlled substances that were in the safe. The trial court agreed with the prosecution and admitted the evidence. The trial court abused its discretion.

Again, regardless of defendant's stipulation that the person who possessed the controlled substances in the safe did so with the intent to sell them, the prosecutor was required to prove every element of the crimes charged. See *Mills, supra*. We also reject defendant's claim that MRE 404(b) was violated by the admission of the photographs because the argument that the photographs tended to implicate him in a tax crime is too speculative. But we conclude that the evidence was not relevant to the issue whether defendant possessed the controlled substances at issue here with the intent to deliver them.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Evidence is "logically relevant" so long as the evidence affects "the balance of probabilities" in some way relating to a material fact in dispute. *People v VanderVliet*, 444 Mich 52, 60-61; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205 (1994). That defendant maintained an opulent lifestyle beyond his means does not have a tendency to make it more probable than not that he possessed the controlled substances at issue here with the intent to sell them. Further, its probative value is substantially outweighed by its potential for unfair prejudice. See MRE 403. Thus, the decision to admit this evidence constituted an abuse of discretion.

Next, defendant challenges the admission of a group of photographs that showed him with "known convicted narcotics dealers in our county," letters to defendant from two of those same persons which in part discuss drug transactions, and receipts for money orders sent to those same persons. Defendant argued in the trial court that the evidence which merely established his association with convicted drug dealers was irrelevant to the issues in this case. And, further,

defendant argued, to the extent that one of the letters suggested drug activity, which was not charged, it was excludable under MRE 404(b). In response, the prosecution argued that the evidence was relevant in that it tended to establish that defendant was in the business of selling controlled substances, that he was in this business with other people who had already been convicted of being narcotics dealers, and that he possessed these controlled substances at issue with the intent to deliver them. The trial court agreed with the prosecution, but we do not.

That defendant maintained relationships with people convicted of dealing drugs does not have a tendency to make it more probable than not that he possessed the controlled substances at issue here with the intent to sell them. The evidence appears to have been offered to show defendant's criminal propensity and to imply his guilt by association, which is clearly impermissible. See *People v Sobczak*, 344 Mich 465, 470; 73 NW2d 921 (1955). Further, the probative value of the evidence was substantially outweighed by its potential for unfair prejudice. See MRE 403. Thus, the admission of this evidence constituted an abuse of discretion.

Finally, defendant argues that the trial court abused its discretion when it admitted "tools of the trade" evidence which included evidence related to the seizure of weapons and ammunition from defendant's house, as well as several drug ledgers. At trial, with regard to the weapons, defense counsel argued that "the specter, however, of dangerous weapons raises I think a potential for unfair prejudice that is not in any way counter-balanced by any relevance to the precise charges which are, in fact, before the jurors . . . ." The prosecution countered that "weapons are an integral part of a drug dealers life," and are, in fact, tools of the trade. A police witness also testified that, in his experience, drug dealers commonly used weapons for protection. The trial court ruled that the evidence related to the weapons was admissible. We agree with that decision. Courts have consistently recognized that weapons evidence in narcotics cases is relevant and not unfairly prejudicial because drug traffickers often carry weapons to protect their controlled substances. See *VanderVliet*, *supra* at 82-83 n 41; *People v Roberson*, 167 Mich App 501, 510; 423 NW2d 245 (1988); see, also, *United States v Hubbard*, 61 F3d 1261, 1270 (CA 7, 1995); *United States v Hatfield*, 815 F2d 1068, 1072 (CA 6, 1987).

With regard to the drug ledgers, defense counsel objected at trial on the grounds that they were not admissible under MRE 404(b). The prosecutor responded that it was "intrinsic evidence of the crime," again apparently meaning that the evidence was blended or connected to the crime charged in the sense that defendant was in the business of selling controlled substances and thus possessed the controlled substances at issue with the intent to sell them. The trial court agreed, as do we. The drug ledgers were not admitted to establish defendant's character to show his propensity to commit the charged acts. See MRE 404(b). The drug ledgers were admitted to establish, and were highly probative of, defendant's intent to deliver. One such ledger contained a dated entry in the same month and year of defendant's arrest. They also tended to establish a nexus between defendant and the controlled substances found in the safe. Thus, the trial court did not abuse its discretion in admitting this evidence. And any failure to provide notice of intent to admit the evidence was harmless. See *People v Hawkins*, 245 Mich App 439, 455; 628 NW2d 105 (2001).

In summary, the trial court abused its discretion with regard to the admission of the (1) photographs depicting defendant's "lavish lifestyle," (2) photographs which showed defendant with "known convicted narcotics dealers in our county," (3) letters from two of those same

persons, and (4) receipts for money orders sent to those same persons. However, evidentiary error does not require reversal unless, after an examination of the entire cause, it appears more probable than not that the error affected the outcome of the trial in light of the weight of the properly admitted evidence. MCL 769.26; MCR 2.613(A); *People v Whittaker*, 465 Mich 422, 426-427; 635 NW2d 687 (2001). In this case, we conclude that this threshold for reversal is not met.

Properly admitted evidence included that defendant owned, and frequently accessed, a safe which was located at his friend's house. The safe contained the following evidence: (1) a men's size 11½ K-Swiss shoebox, two digital scales, a large amount of packing material, plastic bags, various multicolored bags, and rubber gloves; (2) 128.7 grams of cocaine in one plastic bag, 129.8 grams of cocaine in a second plastic bag, and 121.8 grams of cocaine in a third plastic bag; (3) marijuana and 32 grams of mushrooms in six plastic bags. The three plastic bags of cocaine were inside paper lunch bags, which were rolled up inside the K-Swiss shoebox. Defendant's fingerprint was found on one of the digital scales located in the safe. Search warrants executed at defendant's home resulted in the following: (1) paper lunch bags, a K-Swiss shoe box, inositol powder, and a dietary supplement commonly used in cutting cocaine were found in a closet in a room on the second floor which contained a card table and a chair; (2) a device that could be used to detect if someone was wearing a hidden microphone or hidden transmitter was found in what appeared to be an office on the first floor; (3) multicolored plastic bags resembling one found in the safe were found in an outbuilding on defendant's property; (4) several men's size 11½ K-Swiss shoeboxes were located, and (5) a stun gun, a baton, a pair of brass knuckles, a butterfly knife, a .22 caliber rifle, a loaded nine millimeter Beretta semiautomatic handgun and magazines for it were collected. Also found were drug ledgers, an electric currency counting machine, a US Balance scale box, several weights used to calibrate digital scales, and a digital scale like the one found in the safe. In light of the weight of this properly admitted evidence, which strongly tends to establish that defendant possessed and intended to deliver the drugs in the safe, the erroneous admission of the contested evidence does not warrant reversal. And for the same reason we reject defendant's claims, to the extent they have any merit, that some evidence was admitted without proper notice and that the trial court erred when it denied his request for a limiting instruction. See *Hawkins, supra* at 455; *People v Bartlett*, 231 Mich App 139, 144; 585 NW2d 341 (1998).

Next, defendant argues that the trial court abused its discretion and violated his constitutional right to present a defense in excluding Benita Murphy as a witness. Defendant attempted to present Murphy as a witness on the third day of a four day trial without having first disclosed her as a witness before trial pursuant to the trial court's discovery order. Defendant did not raise a constitutional objection in the trial court. Since defendant failed to properly preserve the constitutional issue by raising an objection on that ground below, *Knox, supra* at 508, that portion of defendant's challenge to this issue is unpreserved and is reviewed for plain error. See *People v Pipes*, 475 Mich 267, 278; 715 NW2d 290 (2006).

We review a trial court's decision regarding a discovery violation for an abuse of discretion. *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). A trial court abuses its discretion when its decision is outside the principled range of outcomes. *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003). Pursuant to MCR 6.201(A)(1), upon request, a party has an obligation to provide the court and the other party with

the names and addresses of witnesses the party may call. This obligation continues throughout the course of the proceedings and the party must disclose without a request from the opposing party. MCR 6.201(H). If a party fails to comply with a discovery request, the trial court may impose sanctions, which can include preventing the party from introducing the evidence not previously disclosed. MCR 6.201(J). Preclusion of a witness' testimony is an extreme remedy that should only be used in extreme cases. *People v Merritt*, 396 Mich 67, 82; 238 NW2d 31 (1976). Preclusion is proper where the late amendment of a witness was motivated by gamesmanship or, if granted, would prejudice the other party. *People v Yost*, 278 Mich App 341, 381, 383; 749 NW2d 753 (2008). In determining the appropriate remedy, the trial court must balance the interests of the court, parties, and the public, which includes a consideration of the party's reason for the violation. *People v Greenfield (On Reconsideration)*, 271 Mich App 442, 454 n 10; 722 NW2d 254 (2006).

Here, the record clearly reflects that defendant violated a discovery request when he failed to identify Murphy as a potential witness prior to the start of trial. Defendant acknowledged he learned of the potential testimony the day before trial began. Nevertheless, defendant asserts there was no evidence that his failure to disclose was motivated by gamesmanship or that it prejudiced plaintiff. He argues that the trial court therefore should have imposed a less severe sanction. Its failure to do so, defendant argues, constituted an abuse of discretion. We disagree.

At trial, the defense theory was that the drugs found in the safe were not defendant's drugs. In other words, he claimed someone else possessed the drugs. According to defendant, Murphy would have testified that another man, who had daily access to Baker's home, would always leave the home with bags full of stuff, and on one occasion told her that he had drugs in the bags. Given the significance of this testimony to defendant's theory of innocence, defendant presumably knew the day before trial that her testimony was potentially important. For this reason, we hold that it was within the range of principled outcomes to hold that defendant's failure to timely disclose Murphy's proposed testimony was motivated by gamesmanship.

Similarly, we agree with the trial court's analysis on the issue of prejudice. There is no indication in the record that plaintiff knew until defendant's disclosure that Murphy could provide the testimony described. Thus, plaintiff's presentation of its case was based on the evidence and witnesses previously disclosed. Given that this was a four day trial and defendant waited to amend his witness list until the end of the second day, there is no indication that the prosecution would have had sufficient time to interview Murphy and to prepare to rebut her testimony. It appears that allowing defendant to amend his witness list would have prejudiced the prosecution's case. Accordingly, the trial court's decision did not constitute an abuse of discretion. See *Yost*, *supra* at 381.

Affirmed.

/s/ David H. Sawyer  
/s/ Mark J. Cavanagh  
/s/ Joel P. Hoekstra