

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONNA RHEA BROWN,

Defendant-Appellant.

UNPUBLISHED

October 18, 2012

No. 306228

Cheboygan Circuit Court

LC No. 11-004334-FC

Before: FITZGERALD, P.J., and METER and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right from her conviction by a jury of delivery of a controlled substance causing death, MCL 750.317a. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to 12½ to 40 years in prison. We affirm.

The decedent, Heather Wright, was pronounced dead at Cheboygan Hospital sometime shortly after 5:40 a.m. on January 29, 2011, after using heroin with her fiancé Dale Moody, defendant, and defendant’s boyfriend, William “BJ” O’Connor. According to the trial court, defendant’s blood was drawn, pursuant to a search warrant, at 2:00 p.m. on January 31, 2011, approximately 57 hours after Wright’s death. The blood test showed the presence of morphine, which was described to the jury as a metabolite of heroin. Defense counsel objected to the admission of the blood-test result, arguing that it was prior bad-acts evidence that was not relevant and would serve only to prejudice the jury against defendant. The trial court responded that the evidence was not relevant for purposes of showing that defendant used heroin at the same time as did Wright, in light of testimony from an expert toxicologist that 30 hours following heroin use was nearly the maximum time he would expect to see traces of morphine in a person’s blood. However, the court held that the evidence was admissible under *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), as circumstantial evidence of the source of the heroin that Wright used, agreeing with the prosecution’s argument that evidence supporting its position that defendant used heroin shortly after Wright’s death was relevant to show that defendant had access to heroin. The court noted that the evidence was not admissible “just to show that . . . once you’re a drug user, you’re always a drug user.”

Defendant argues on appeal that the trial court erred in admitting the evidence that she tested positive for morphine. We review the admission of evidence for an abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001).

A court, in evaluating the admissibility of other-acts evidence under MRE 404(b), must determine whether the evidence is offered for a proper purpose, is relevant to a material fact in the case, and is not unfairly prejudicial under MRE 403. *VanderVliet*, 444 Mich at 74-75. The *VanderVliet* Court held that “[i]f the proponent’s only theory of relevance is that the other act shows defendant’s inclination to wrongdoing in general to prove that the defendant committed the conduct in question, the evidence is not admissible.” *Id.* at 63. The Michigan Supreme Court has further stated that “[r]elevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence.” *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998); see also MRE 401.

Under *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003), an abuse of discretion occurs when the trial court chooses an outcome falling outside the “principled range of outcomes.” The trial court’s decision in the present case was carefully considered and was based on its determination that the fact that both defendant and O’Connor tested positive for morphine, especially in light of the drug paraphernalia found at their residence, was circumstantial evidence that could assist the jury in ascertaining the source of the heroin. It was not unreasonable for the court to agree with the prosecutor that defendant’s access to heroin after Wright’s injection, as indicated by her positive test for morphine, was circumstantial evidence that she was the source of the heroin that she and Wright used together. Moreover, as the court noted, this evidence was not particularly prejudicial to defendant, because the jury heard other testimony that defendant was a drug user and that she was present on the night in question and assisted the decedent in using drugs. In addition, the trial court provided a cautionary instruction to the jury, advising them about the proper use of the other-acts evidence. See *VanderVliet*, 444 Mich at 75. Therefore, we cannot conclude that the court abused its discretion in finding defendant’s blood-test result admissible.¹

Next, defendant argues that the trial court committed instructional error in failing to give the jury a specific unanimity instruction and an accomplice instruction. We disagree. Because defendant did not object to the jury instructions, we review this issue for plain error affecting substantial rights. *People v Pipes*, 475 Mich 267, 278-279; 715 NW2d 290 (2006).

Defendant argues that the Michigan Supreme Court’s holding in *People v Cooks*, 446 Mich 503; 521 NW2d 275 (1994), entitled her to a specific unanimity instruction because there were separate and distinct factual bases presented at trial upon which one or more jurors could have split their votes to convict. According to defendant, some jurors might have voted to convict her because they believed she assisted O’Connor in delivering the heroin to Moody, who

¹ Even if the evidence had been erroneously admitted, the error would have been harmless in light of defendant’s admission that she used heroin.

delivered it to Wright, while others might have found her guilty based on the evidence that she prepared the heroin that Wright injected. Defendant argues that these are separate, distinct acts, requiring a specific unanimity instruction.

In *Cooks*, 446 Mich at 505, the complainant testified regarding three instances of sexual penetration, although the defendant was only charged with one count of criminal sexual conduct (CSC). This Court had vacated the defendant's conviction of second-degree CSC because the trial court had refused to instruct the jury that "unanimous agreement about a specific act of penetration is required for conviction." *Id.* at 505-506. The Supreme Court reversed, holding that "[b]ecause materially identical evidence was offered with respect to each of the alleged acts of penetration and there is no reason to believe the jury was confused or disagreed about the basis of defendant's guilt," the trial court did not err in refusing to instruct the jury on specific unanimity. *Id.* at 506.

The *Cooks* Court was asked to "determine whether a general unanimity instruction to the jury was adequate in light of the *pattern of conduct* offered as evidence of a *single charged offense*." *Cooks*, 446 Mich at 511 (emphasis added). In the instant case, defendant does not argue that a pattern of conduct was offered to the jury as a single charged offense. Rather, defendant claims that the jury might have chosen to convict based on an aiding-and-abetting theory or based on defendant's admission that she prepared heroin for Wright to use.

In *People v Smielewski*, 235 Mich App 196, 209; 596 NW2d 636 (1999), this Court held that a specific unanimity instruction is not required in aiding-and-abetting cases, stating:

We conclude, therefore, that merely because the jury could find from the evidence that defendant committed the charged offense of armed robbery as a principal or an aider and abettor, a unanimity instruction was not required. If the opposite were true, a defendant could escape conviction even if he openly acknowledged that he participated in the crime—as either a principal or an aider and abettor—but the jury could not agree on which of the two roles the defendant played in the commission of the crime. Such a result defies common sense. In our opinion, if each juror found that defendant committed the crime by either of such means, each juror found that the defendant committed the crime, . . . and the jury verdict is unanimous. Accordingly, we hold that under the facts of this case, where both theories presented by the prosecution were supported by the evidence and encompassed the commission of a single offense, the trial court's instruction to the jury was an adequate statement of the law, and defendant was not deprived of his right to a unanimous verdict.

Thus, by adhering to the trial court's general unanimity instruction, the jurors in the present case were free to convict defendant either for aiding and abetting O'Connor (or Moody) in his delivery of heroin to Wright or for delivering it herself. No specific unanimity instruction was required and no plain error is apparent.

Similarly, defendant has not demonstrated plain error in the failure of the court to provide any additional accomplice instructions based on Moody's testimony. The court instructed the jury that they should evaluate Moody's testimony with extra caution.² In light of Moody's admission at trial that he was originally charged with "delivery causing death" but later pleaded guilty to lesser charges of "manslaughter, possession of Fentanyl, and maintaining a drug house" in exchange for testifying truthfully, the court's jury instructions regarding Moody's testimony were sufficient. Moody specifically noted during his testimony that, under his plea agreement, he was being exposed to lesser punishment than he would have been under the original charge, and the trial court instructed the jury to evaluate his testimony carefully. No plain error requiring reversal is apparent.³

² The court's jury instructions regarding Moody included the following:

You have heard the testimony of Dale Moody. The evidence shows that he is addicted to drugs. You should examine the testimony of an addict closely and be very careful about accepting it. You should think about whether the testimony is supported by other evidence, because then it may be more reliable.

* * *

When you decide whether to believe Dale Moody, consider the following:

Did the fact that this witness is addicted to drugs effect [sic] his memory of events or ability to testify accurately?

Does the witness's addiction give him some special reason to testify falsely?

Does the witness expect a reward or some special treatment, or has he been offered a reward or been promised anything that might lead him to give false testimony?

Has the witness been promised that he will not be prosecuted for any charge or promised a lighter sentence or allowed to plead guilty to a less serious charge? If so, could this have influenced his testimony?

Was the witness's testimony falsely slanted to make the defendant seem guilty because of the witness's own interests, or to remove suspicious [sic] from others or because he feared retaliation from others in drug trafficking?

Was the witness affected by the fear of being jailed and denied access to drugs? [Emphasis added.]

³ We note that defendant argues, in part, that the prosecution's case depended on Moody's testimony that defendant helped prepare the heroin for Wright on the night that Wright

Finally, defendant claims that her trial counsel was ineffective for failing to request specific unanimity and accomplice instructions. For the reasons discussed above, a specific unanimity instruction was not appropriate. Therefore, defense counsel was not ineffective for failing to request it. See *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). With regard to the accomplice instruction, given the trial court's instructions as given, defendant cannot establish prejudice resulting from the failure to request any additional instructions concerning Moody's testimony. Accordingly, defendant has not established ineffective assistance of counsel in connection with this issue. *Id.*

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Patrick M. Meter

/s/ Mark T. Boonstra

overdosed. However, in her interview with police, which was played for the jury, defendant *admitted* that she cooked the heroin that Wright used.