# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO MENDOZA,

Defendant-Appellant.

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UNPUBLISHED
November 12, 1996

No. 180386
LC No. 93-128948

Before: Doctoroff, C.J., and Wahls and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver over 650 grams of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i), two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), possession with intent to deliver marijuana, MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c), felon in possession of a firearm, MCL 750.224f; MSA 28.421(6), and as a second habitual offender, MCL 769.10; MSA 28.1082. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred when it admitted evidence of his prior conviction for possession with intent to deliver less than fifty grams of cocaine. We disagree. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). An abuse of discretion will be found only where an unbiased person, after having considered the facts on which the trial court relied, would say that there was no justification for the trial court's ruling. *Id*.

Defendant argued in a motion in limine that the substance and nature of his prior conviction should not be admitted into evidence. The prosecutor asked the trial court to admit the prior conviction because it was admissible to prove knowledge and intent under MRE 404(b). The court delayed ruling on the matter, but cautioned the prosecutor not to mention the prior conviction during the prosecution's opening statement.

During defendant's opening statement, his counsel stated:

> Now the evidence is going to reveal that [defendant] had worked at General Motors, that he had retired, that he owned rental properties in the City of Pontiac, none of which reveals that he got it from ill-gotten gain, nothing.

Following defendant's opening statement, the prosecutor argued that defense counsel had misrepresented the facts surrounding defendant's reason for no longer working at GM. The prosecutor argued that it was necessary to bring in evidence of defendant's prior arrest and conviction because defendant had been fired from GM after being arrested on GM property. The trial court ruled that the prior conviction would be admitted in order to clear up the misrepresentation of defense counsel. At trial, over defendant's objection, the trial court admitted testimony from the police officer who arrested defendant for that prior offense and a certified copy of the conviction and sentence imposed.

To be admissible for other reasons, evidence of other crimes, wrongs or bad acts must (1) be relevant to an issue other than propensity, (2) be relevant to an issue or fact of consequence at trial, and (3) not present a danger of undue prejudice which substantially outweighs the probative value of the evidence in view of the availability of other appropriate facts. *People v McMillan*, 213 Mich App 134, 137-138; 539 NW2d 553 (1995). Relevant other acts evidence does not violate MRE 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith. *People v Gimotty*, 216 Mich App 254, 259; 549 NW2d 39 (1996). Here, defense counsel's opening statement opened the door to evidence of the circumstances surrounding defendant's departure from GM and to whether his gains were "ill-gotten." Accordingly, reversal is not required. *People v Marrow*, 210 Mich App 455, 465-466; 534 NW2d 153 (1995); *People v Verburg*, 170 Mich App 490, 498-499; 430 NW2d 775 (1988).

Defendant next asserts that the trial court abused its discretion when it allowed the prosecutor to admit documents that were purportedly drug ledgers. Defendant contends that they were hearsay, and if not, the probative value of those ledgers was substantially outweighed by the danger of unfair prejudice. We disagree. The failure to object to the admission of evidence waives appellate review in the absence of manifest injustice. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). In any case, an admission by a party-opponent is not hearsay. MRE 801(d)(2). The identity of the author or the addressee of a letter may be established by circumstantial evidence. *People v Melvin*, 70 Mich App 138, 145; 245 NW2d 178 (1976). In addition, if defendant did indeed author these ledgers, then they were highly probative of his intent. Accordingly, the ledgers were admissible.

Defendant argues that the prosecutor elicited inadmissible opinion testimony regarding his guilt from two police officers and made improper remarks based on defendant's prior convictions and the purported drug ledgers. Since defendant failed to object to any of these instances of alleged misconduct, our review of these alleged errors is precluded unless an objection could not have cured the errors or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

A witness is prohibited from expressing his or her opinion on the defendant's guilt or innocence of the charged offense. *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985).

However, a person qualified as an expert may give his opinion even though it embraces an ultimate issue in a case, provided that the evidence is from a recognized discipline and it will aid the factfinder in reaching the final decision in the case. *People v Ray*, 191 Mich App 706, 707-708; 479 NW2d 1 (1991). The two police officers in this case testified that the quantity of controlled substances found, the presence of several scales and a food additive used to increase the weight of cocaine indicated that the controlled substances were not held for personal use. Rather, they opined, the particular findings indicated that defendant possessed the controlled substances with the intent to deliver them. Because that information was not within the common knowledge of lay witnesses and it aided the jury in determining defendant's intent, the officers' opinion testimony was proper. *Id.*, pp 707-708.

Additionally, the closing arguments made by the prosecutor based on defendant's prior conviction were proper. The prosecution is free to comment with respect to the evidence and all reasonable inferences that may be drawn from the evidence as it relates to its theory of the case. *People v McElhaney*, 215 Mich App 269, 284; 545 NW2d 18 (1996). We reach the same conclusion with regard to the prosecutor's unobjected-to arguments based on the purported drug ledgers.

Defendant next contends that he was denied the effective assistance of counsel because of counsel's failure to object to the opinion testimony of the two police officers and the admission of the purported drug ledgers. We disagree. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Stanaway*, *supra*, p 687. A defendant must prove that counsel's performance was below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id*. A defendant can only overcome the presumption of effective assistance of counsel by showing that counsel's performance was deficient and that he was prejudiced as a result of the deficiency. *People v LaVearn,* 448 Mich 207, 217; 528 NW2d 721 (1995). Because we find no error resulting from the admission of the opinion evidence and drug ledgers, defendant has failed to demonstrate that his counsel's performance was deficient. *People v Briseno*, 211 Mich App 11, 17; 535 NW2d 559 (1995).

Finally, we disagree that defendant was denied his right to a public trial by the alleged exclusion of his children from the courtroom. *People v Martin*, 210 Mich 139, 140; 177 NW 193 (1920).

Affirmed.

/s/ Martin M. Doctoroff
/s/ Myron H. Wahls
/s/ Michael R. Smolenski