STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY R. HATHAWAY,

Defendant-Appellant.

UNPUBLISHED
May 29, 1998

No. 198439
Mason Circuit Court
LC No. 95-012280-FH

Before: Hoekstra, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of assault with intent to do bodily harm less than murder, MCL 750.84; MSA 28.279, and conspiracy to commit assault with intent to do bodily harm less than murder, MCL 750.157a; MSA 28.354(1). The trial court sentenced defendant to enhanced terms as a fourth habitual offender of ten to twenty-five years' imprisonment for each conviction, to be served concurrently. We affirm.

Defendant first argues that the trial court abused its discretion by allowing testimony regarding defendant's prior violent acts. Defendant asserts that this evidence should have been excluded as prior bad acts evidence under MRE 404(b) because it was offered to inflame the jury against him. We disagree because the evidence was relevant and properly admitted for other purposes.

MRE 401 defines "relevant evidence" as evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." MRE 402 provides that, generally, all relevant evidence is admissible. It is under these rules that evidence that directly impacts some element or material issue in a case can be admitted. Under MRE 404(b), the admission of evidence of other crimes or bad acts committed by a witness are not admissible to show the witness' character. This evidence may, however, be admitted for other relevant 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." MRE 404(b)(1).

In the present case, the prosecutor stated that the prior violent incidents helped to explain why the coconspirator was afraid of defendant, why she took part in the conspiracy, and why she continued to lie after the assault. We agree. This Court has held that evidence of a defendant's prior bad conduct was relevant to explain a victim's delay in reporting the alleged abuse. *People v Dunham*, 220 Mich App 268, 273; 559 NW2d 360 (1996). In other words, even if certain evidence "did constitute a bad act, the evidence could be admitted if it was probative of an issue raised at trial." *People v Flaherty*, 165 Mich App 113, 120; 418 NW2d 695 (1987). We find that the evidence presented at trial of defendant's prior bad acts was relevant to explain the coconspirator's conduct. Also, the probative value of this evidence was not substantially outweighed by unfair prejudice to defendant. The testimony about the domestic violence against a girlfriend and three alleged assaults on different people was brief and without detail and simply pointed out the coconspirator's knowledge of the violence. Although the evidence was not helpful to defendant, neither was it unfairly prejudicial by turning the focus of the trial away from the instant assault and toward defendant's character. We do not need to analyze admission of this evidence under MRE 404(b) because the admission of this evidence was within the trial court's discretion and it was properly admitted under MRE 401. See *People v Delgado*, 404 Mich 76, 83-84; 273 NW2d 395 (1978).

Defendant also argues that the coconspirator's testimony exceeded the limits placed upon it by the trial court's ruling that "[t]he prison matter is inadmissible" when she mentioned defendant's parole officer and passing notes to defendant under the doors in the county jail. However, the trial court's ruling regarding prior bad acts was based only on defendant's objection to the five prior incidents of violence. Also, evidence of a former conviction as well as time spent in jail for the current crime were properly admitted at trial to show that defendant tried to influence the testimony of the chief witness against him, as this was evidence of his consciousness of guilt. *People v Hooper*, 50 Mich App 186, 199; 212 NW2d 786 (1973). Moreover, at defendant's request, the trial court gave a limiting instruction to the jury regarding the testimony concerning defendant's prison term, telling them to disregard completely any comment about defendant having been in prison.

Defendant next argues that evidence of the coconspirator's conviction for the same charge should not have been admitted at his trial because the offense did not have an element of theft, dishonesty, or false statement and was more prejudicial than probative and thus violated the strictures of MRE 609. However, the prosecutor had a duty to disclose to the jury any consideration or leniency offered to or received by the coconspirator. *People v Atkins*, 397 Mich 163, 173; 243 NW2d 292 (1976). Although the Michigan Supreme Court has held that it is error to question a cofelon about his conviction, *People v Lytal*, 415 Mich 603, 612; 329 NW2d 738 (1982), this holding led to a dilemma when it was the guilty plea conviction itself that was the consideration given for a cofelon's testimony. See *People v Rosengren*, 159 Mich App 492, 502; 407 NW2d 391 (1987). The Michigan Supreme Court addressed this dilemma in *People v Manning*, 434 Mich 1; 450 NW2d 534 (1990). It held that where the defendant makes it clear that he does not intend to waive impeachment of the cofelon with testimony regarding a plea and the trial court gives a cautionary instruction regarding the limited use of the evidence, it is not error for the prosecutor to reveal the cofelon's guilty plea as well as the plea agreement on direct examination. *Id*. at 11, 13 n 9, 20. Because defendant gave no indication that he wanted to forego impeachment of the coconspirator with the plea agreement and the jury was instructed

regarding use of the evidence of her conviction, the trial court properly admitted this evidence and properly allowed the prosecutor to elicit the testimony.

Finally, defendant argues that his sentence should be reversed because the amended notice of intent to seek an enhanced sentence was filed after the twenty-one day statutory limit. We disagree. Habitual offender enhancement is currently determined according to statute. MCL 769.13; MSA 28.1085 was amended in 1994 and provides for enhancement as follows.

> (1) In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under section 10, 11, or 12 of this chapter, by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense.

This statute reflects "a bright-line test for determining whether a prosecutor has filed a supplemental information 'promptly.'" *People v Bollinger*, 224 Mich App 491, 492; 569 NW2d 646 (1997). In addition, this Court has held that a prosecutor can no longer amend an otherwise timely notice to allege additional prior convictions outside the period provided by statute. *People v Ellis*, 224 Mich App 752, 756-757; 569 NW2d 917 (1997).

In the case before us, there is no question that the prosecutor promptly filed the original supplemental information alleging two prior convictions and placing defendant on notice that he faced enhancement for a third prior conviction. An arraignment was scheduled for November 7, 1995, but defendant signed a waiver of arraignment instead and viewed the information on this day. On November 15, 1995, the prosecutor filed the notice of intent to seek an enhanced sentence based on the third offense and the felony information was filed. On December 1, 1995, the amended notice of intent to seek an enhanced sentence based on a fourth offense was filed. Both the original notice and amended notice of intent to seek an enhanced sentence were filed within twenty-one days of the filing of the information, as required by MCL 769.13; MSA 28.1085.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kathleen Jansen
/s/ Hilda R. Gage