STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 26, 1999
v	No. 180386 Oakland Circuit Court
ANTONIO MENDOZA, Defendant-Appellant.	LC No. 93-128948 ON REMAND

Before: Doctoroff, P.J., and Smolenski and Gage, JJ.

PER CURIAM.

This case is before us on remand from the Michigan Supreme Court for our reconsideration in light of our Supreme Court's decision in *People v Crawford*, 458 Mich 376; 582 NW2d 785 (1998). In our previous opinion, we held that evidence of defendant's prior conviction for possession with intent to deliver less than fifty grams of cocaine was admissible under MRE 404(b). *People v Mendoza*, unpublished opinion per curiam of the Court of Appeals, issued November 12, 1996 (Docket No. 180386). Accordingly, we affirmed defendant's convictions for 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(c), and for being a second habitual offender, MCL 769.10; MSA 28.1082. After reconsidering the admissibility of defendant's prior conviction in light of *Crawford, supra*, we reaffirm our prior decision and again affirm defendant's convictions.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Lugo,* 214 Mich App 699, 709; 542 NW2d 921 (1995). A trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998); *Crawford, supra* at 439 (Boyle, J, dissenting).

In *Crawford, supra*, the defendant was convicted of possession with intent to deliver 50 to 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). *Crawford, supra* at 378. On appeal, he asserted that the trial court abused its discretion when it admitted evidence of his prior conviction for delivery of 225 to 650 grams and conspiracy to commit the same offense. The defendant

asserted that the prior conviction should have been excluded under MRE 404(b) as improper character or propensity evidence. *Id.* The prosecutor argued that the prior conviction was admissible under MRE 404(b) to show the defendant's knowledge of the presence of the cocaine and his intent to deliver it. *Id.* at 381. The prosecutor's argument was based on the "doctrine of chances," which rests on the premise that "'the more often the defendant commits an actus reus, the less is the likelihood that the defendant acted accidentally or innocently.'" *Crawford, supra* at 393, quoting Imwinkelried, Uncharged Misconduct Evidence, § 3:11, p 45. The "doctrine of chances" does not require an impermissible character inference because it does not ask the trier of fact to infer knowledge and intent from the defendant's character, but, rather, from "an objective likelihood." *Id.* at 393.

The *Crawford* Court concluded that evidence of the defendant's prior conviction was not admissible to prove knowledge and intent under the doctrine of chances because the facts surrounding the defendant's prior conviction were not sufficiently similar to the facts of the crime for which the defendant was then before the court. *Id.* at 395. The Court explained that the prior conviction involved a situation in which the defendant was caught in the act of selling drugs, while the offense for which the defendant was before the court involved a situation in which the defendant was stopped for a routine traffic violation, which led to the discovery of cocaine hidden in the dashboard of a car the defendant had purchased only five to ten days before his arrest. *Id.* at 396. Thus, the factual relationship between the prior crime and the charged offense "was simply too remote for the jury to draw a permissible intermediate inference of the defendant's mens rea in the instant case," and the evidence was not relevant to proving intent or knowledge. *Id.* Finally, the Court noted that even if the evidence was relevant to proving a consequential fact without requiring an impermissible character inference, the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. *Id.* at 397-399.

Crawford did not set forth any new standards regarding the admissibility of evidence under MRE 404(b), but merely re-emphasized the standards set forth in *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993). The *Crawford* Court explained that several requirements must be met before evidence of prior bad acts may be admitted under MRE 404(b). First, the evidence must be offered for a proper, noncharacter purpose. *Id.* at 385. The Court cautioned that "[m]echanical recitation of 'knowledge, intent, absence of mistake, etc.,' without explaining how the evidence relates to the recited purposes, is insufficient to justify admission under MRE 404(b)." *Id.* at 387. Thus, the second requirement is that the evidence must be relevant to proving a fact that is of consequence to the action. *Id.* at 387-389. Third, the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice. MRE 403; *Crawford, supra* at 397-398.

In the instant case, the prosecutor sought to admit the evidence of defendant's prior conviction for the purpose of clearing up defense counsel's misrepresentation regarding the reason that defendant was no longer working at GM, and also for the purpose of proving knowledge, intent, and identity. The trial court ruled that the evidence was admissible for those reasons. The trial court later instructed the jury that it was to consider the evidence of defendant's prior conviction only for the purpose of proving that "defendant specifically intended to deliver the substance, knew what the things found in his possession were and . . . who committed the crime." Despite the fact that the evidence of defendant's

prior conviction may have been admissible to clear up the misrepresentation regarding the termination of defendant's employment, as we held in our prior opinion, because the trial court instructed the jury that it was to consider the evidence for the purpose of proving intent, knowledge, and identity, we now must determine whether the trial court abused its discretion in admitting the evidence for those purposes.

In doing so, we again conclude that the admission of the evidence was proper. First, the evidence of defendant's prior conviction was offered for proper noncharacter purposes. The record indicates that the evidence was offered and admitted for the purpose of proving knowledge, intent, and identity. Second, the evidence was relevant. To be relevant, evidence must be 1) material and 2) probative. *Crawford, supra* at 388. "'Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial.'" *Id.* at 389, quoting 1 McCormick, Evidence (4th ed), § 185, p 773. The evidence of defendant's prior conviction was material because it was offered to prove knowledge and intent, which are elements of the charge of possession with intent to deliver and, thus, are always "in issue." *Id.* at 389. In addition, identity was in issue because the defense theory was that defendant did not live at the Harriet Street address and that the drugs did not belong to him.

Furthermore, the evidence was probative of intent, knowledge, and identity. To have probative value, the proffered evidence must tend "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; *Crawford, supra* at 388-390. As in *Crawford,* the prosecutor in the present case argued that the circumstances of defendant's prior conviction made it more probable that he knew the cocaine and marijuana were at the Harriet Street address, that the cocaine and marijuana belonged to him, and that he had the intent to deliver. The prosecutor did not ask the jury to infer defendant's intent, knowledge, and identity from defendant's character. Rather, the prosecutor was essentially arguing that the inferences could be made on the basis of "an objective likelihood under the doctrine of chances rather than a subjective probability based on the defendant's character." *Crawford, supra* at 393, quoting Imwinkelried, Uncharged Misconduct Evidence, § 5.05, p 12.

Here, unlike *Crawford,* the circumstances surrounding defendant's prior conviction were sufficiently similar to the circumstances of the instant case to be probative of knowledge, intent and identity. With respect to defendant's prior conviction, Officer Wells testified that his search and arrest of defendant in 1990 revealed approximately $300 in cash and two packets of cocaine. Wells' search of defendant's car revealed a bottle and a brown paper bag, each containing nine packets of cocaine, which were packaged in the manner in which cocaine was typically packaged for sale. In the instant case, a search of the Harriet Street address revealed, among other things, $8400 in cash, thirteen plastic bags containing a large amount of cocaine, and approximately one pound of marijuana. The fact that defendant was found with cocaine packaged for sale in 1990 made it objectively more probable that he knew the cocaine and marijuana were at the Harriet Street address in 1993, and that he intended to deliver the cocaine and marijuana, than if he had not been found with packaged cocaine in 1990. As explained in *Crawford*, the relevance of the evidence, does not require an inference from defendant's character, but requests that the trier of fact infer defendant's knowledge, intent, and identity from "'an

objective likelihood under the doctrine of chances rather than a subjective probability based on the defendant's character.'" *Crawford, supra* at 393, quoting Imwinkelried, Uncharged Misconduct Evidence, § 5:05, p 12.

Finally, we must consider whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. MRE 403; *Crawford, supra* at 397-398. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Crawford, supra* at 398. Here, we acknowledge the risk of prejudice that always exists when evidence of similar prior bad acts is admitted into evidence. However, here, the evidence was more than "marginally probative." Furthermore, the risk of prejudice was somewhat lessened here because the court cautioned the jury that it must not consider the evidence as evidence that defendant was a bad person or was likely to commit crimes, and that it must not convict defendant in the instant case on the basis of a belief that he was guilty of other bad conduct. We cannot presume that the jury refused to follow the court's limiting instruction. *People v Bradford*, 69 Mich App 583, 589-590; 245 NW2d 137 (1976). Under these circumstances, we conclude that the probative value of the evidence was not *substantially* outweighed by the danger of unfair prejudice. MRE 403.

Thus, while we view this as a close question, we cannot conclude that the trial court abused its discretion in admitting defendant's prior conviction into evidence. *Smith, supra* at 550. Accordingly, we again affirm defendant's convictions.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Michael R. Smolenski
/s/ Hilda R. Gage