

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEPHEN EDWARD CALDWELL,

Defendant-Appellant.

UNPUBLISHED

August 25, 2009

No. 284571

Oakland Circuit Court

LC No. 2003-192929-FH

Before: Cavanagh, P.J., and Markey and Davis, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), and one count of delivery of 50 or more but less than 450 grams of cocaine, MCL 333.7401(2)(a)(iii). He was sentenced as a third-felony habitual offender, MCL 769.12, to concurrent prison terms of 90 to 480 months for each conviction. He appeals as of right. We affirm.

Defendant's convictions arise from his sales of cocaine to an undercover officer. Defendant did not deny participating in the transactions, but claimed that he did so under duress. At trial, the prosecution presented evidence of two other sales of cocaine to the same undercover officer for which defendant was not charged.

I. Other Acts Evidence

Defendant first argues that the trial court erred in allowing the prosecutor to introduce evidence of the two uncharged sales of cocaine as evidence of other bad acts under MRE 404(b)(1). We conclude that any error in admitting this evidence was harmless.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998).

MRE 404(b)(1) provides:

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.

In deciding whether to admit evidence under this rule, a trial court must decide: (1) whether the evidence is being offered for a proper purpose, not to show defendant's propensity to act in conformance with a given character trait; (2) whether the evidence is relevant to an issue of fact of consequence at trial; (3) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice in light of the availability of other means of proof; and (4) whether a cautionary instruction is appropriate. *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000).

"The prosecutor should not be allowed to introduce other acts evidence only because it is technically relevant, nor should the defendant be allowed to interdict proofs that are highly probative of a truly contested issue." *Id.* at 58. "That the prosecution has identified a permissible theory of admissibility and the defendant has entered a general denial, however, does not automatically render other acts evidence relevant in a particular case." *Id.* at 60. Rather, the trial court must still find that the evidence is *material* (related to a fact that is "at issue," "in the sense that it is within the range of litigated matters in controversy"), and that it has *probative* force (i.e., "any tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence"). *Id.* at 56-57, 60.

In this case, the trial court permitted the evidence of two uncharged drug sales to be admitted for the purpose of showing a plan, scheme and system, and to rebut defendant's duress defense if he decided to testify. However, defendant did not deny making the charged deliveries, and his only defense was duress. Thus, the evidence of other uncharged deliveries was not material because defendant's plan, scheme, or system was not related to any fact "at issue" or any matter in controversy. While the evidence may have been technically relevant to rebutting a duress defense, it was admitted before defendant testified and asserted such a defense.

However, any error in admitting the evidence was harmless. An error in the admission of evidence is harmless unless the defendant demonstrates that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 494-495; 596 NW2d 607 (1999). . The effect of the error is to be evaluated in the context of the weight and strength of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error. *Id.* 495, 497. Here, considered in the context of the untainted evidence admitted at trial, particularly defendant's admissions to the charged transactions, it is not more probable than not that a different outcome would have resulted without the evidence of the uncharged acts. Therefore, defendant is not entitled to reversal on this basis.

II. Admissibility of Prior Conviction for Impeachment

Defendant next argues that the trial court erred in allowing the prosecutor to impeach him with a prior conviction for larceny from a building. We disagree.

MRE 609 provides:

(a) For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross-examination, and

(1) the crime contained an element of dishonesty or false statement, or

(2) the crime contained an element of theft, and

(A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and

(B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

(b) For purposes of the probative value determination required by subrule (a)(2)(B), the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. The court must articulate, on the record, the analysis of each factor.

(c) Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.

At trial, defendant claimed that he became very dependent on drugs approximately a year before the charged deliveries. However, the 1998 larceny conviction tends to show that defendant was committing crimes to support his drug habit five years before the events at issue in this case, and defendant so admitted. Therefore, the 1998 conviction was probative of defendant's credibility. Further, the prejudicial effect of the prior conviction was not particularly high because the conviction not similar to the charged offenses, and defendant never represented that he might not testify if the conviction was admitted. Thus, the trial court did not abuse its discretion in allowing the conviction to be used for impeachment.

III. Sentencing

Defendant lastly argues that the trial court erred by refusing to depart below the sentencing guidelines range of 78 to 195 months. Application of the legislative sentencing guidelines is a question of law to be reviewed de novo on appeal. *People v Babcock*, 469 Mich 247, 253; 666 NW2d 231 (2003); *People v Libbett*, 251 Mich App 353, 365; 650 NW2d 407 (2002).

MCL 769.34(3) provides that “[a] court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure.” However, MCL 769.34(10) provides that “[i]f a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence.” In this case, defendant was sentenced within the guidelines range and he does not challenge the scoring of the guidelines or contend that the trial court relied on inaccurate information in determining his sentences. Thus, we must affirm defendant’s sentences.

Even if the trial court’s decision not to depart below the guidelines was reviewable, however, resentencing would not be warranted. Defendant argues that testimony that he committed the offenses while under duress provided a substantial and compelling reason to depart below the guidelines. In reviewing whether there is a substantial and compelling reason to justify a departure from the guidelines, the determination whether a particular factor exists is reviewed for clear error. *Babcock, supra* at 265. Here, the trial court rejected defendant’s claim that duress was a factor in his commission of the offenses, finding that it was incompatible with defendant’s actions and statements. This finding is not clearly erroneous. Thus, the trial court did not err by refusing to depart below the guidelines.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Jane E. Markey

/s/ Alton T. Davis