STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 8, 2011
v	No. 294898 Roscommon Circuit Court
DONALD RAY SWANIGAN, Defendant-Appellant.	LC No. 08-005759-FH

Before: MURPHY, C.J., and MURRAY and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for possession of a controlled substance less than 25 grams, MCL 333.7403(2)(a)(*v*). Defendant was sentenced to 24 to 180 months' imprisonment. We affirm.

The impetus for this case comes from the search of a vehicle in which defendant was a back seat passenger. Specifically, the vehicle was pulled over by Roscommon police for a lane violation and loud exhaust. Once pulled over, the 14-year old-driver had no driver's license, so all occupants were asked to exit the vehicle. A search of the vehicle's interior was then conducted, whereupon the police located an unmarked bottle of Vicodin in the back pocket of the passenger seat. The prosecution's case was that the pills belonged to defendant, a point with which the jury apparently agreed.

Defendant raises several challenges to his conviction. First, defendant argues his Fourth Amendment rights were violated when the police searched the car in which he was a passenger and found Vicodin. However, a criminal defendant must have standing to assert his Fourth Amendment claim, *People v Powell*, 235 Mich App 557, 561; 599 NW2d 499 (1999), citing *People v Duvall*, 170 Mich App 701, 705; 428 NW2d 746 (1988), in turn citing *United States v Salvucci*, 448 US 83; 100 S Ct 2547; 65 L Ed 2d 619 (1980), as standing to challenge a search or seizure is not automatic. *People v Smith*, 420 Mich 1, 20; 360 NW2d 841 (1984); *People v Jordan*, 187 Mich App 582, 589; 468 NW2d 294 (1991). The defendant bears the burden of establishing standing. *People v Brown*, 279 Mich App 116, 130; 755 NW2d 664 (2008). In order to do so, "a defendant must demonstrate that, under the totality of the circumstances, there existed a legitimate personal expectation of privacy in the area or object searched. Second, the individual's expectation must be one that society accepts as reasonable." *People v Lombardo*, 216 Mich App 500, 504-505; 549 NW2d 596 (1996), citing in part *California v Greenwood*, 486

US 35, 39; 108 S Ct 1625; 100 L Ed2d 30 (1988). An expectation of privacy is legitimate if the person had an actual, subjective expectation of privacy and that actual expectation is one that society recognizes as reasonable. *Bond v United States*, 529 US 334, 338; 120 S Ct 1462; 146 L Ed 2d 365 (2000); *People v Perlos*, 436 Mich 305, 317; 462 NW2d 310 (1990); *Smith*, 420 Mich at 27. Whether the expectation exists, both subjectively and objectively, depends on all the circumstances surrounding the intrusion. *Id.* at 27-28.

Our precedent squarely holds that defendant had no standing to challenge the validity of the vehicle search. In *People v Smith*, 106 Mich App 203, 208; 307 NW2d 441 (1981), the defendant argued the trial court erred by not suppressing evidence of a .22-caliber revolver found in a car in which the defendant had been a passenger. After noting that the defendant had neither property nor possessory interest in the car or in the gun seized, *id*. at 208-209, this Court held "[t]he mere fact that defendant was in a car with the owner's permission immediately prior to the search did not endow him with a reasonable expectation of privacy in the area searched. Defendant, thus, lacks standing to attack the search and seizure." *Id*. at 209. See also *People v Carey*, 110 Mich App 187, 193-194; 312 NW2d 205 (1981) (holding, "[d]efendant, however, does not have standing to challenge the constitutionality of the search and seizure because he does not assert either a property or a possessory interest in the automobile or in the gun seized.").

Here, defendant has failed to assert a property or possessory interest in the car that was searched or in the Vicodin found in the car. *Smith*, 106 Mich App at 209; *Carey*, 110 Mich App at 193-194. The fact that defendant was lawfully in the car does "not endow him with a reasonable expectation of privacy in the area searched. Defendant, thus, lacks standing to attack the search and seizure." *Smith*, 106 Mich App at 209. Defendant has not carried his burden of establishing standing by demonstrating a reasonable expectation of privacy. *Brown*, 279 Mich App at 130; *Smith*, 420 Mich at 21.[1]

Defendant's second argument is that evidence of the first controlled buy that occurred on October 22, 2008, was admitted in violation of MRE 404(b). For two reasons we disagree.[2] First, defense counsel opened the door to the relevancy of evidence regarding defendant's actions earlier that day, as defendant raised his actions and knowledge of what was occurring earlier that day with the occupants of the vehicle. See *People v Allen*, 201 Mich App 98, 103; 505 NW2d 869 (1993). The prosecution was allowed to rebut defendant's version with facts of her own.

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[1] There is no doubt that the vehicle was properly pulled over for violation of a traffic offense. See MCL 257.683(2); MCL 257.707(1).

[2] This issue is not properly preserved as defendant objected to this evidence on a ground (relevancy) different than that raised on appeal (MRE 404b). *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Thus, we review this issue for plain error. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Second, this evidence was otherwise properly presented to provide the jury with the full context of defendant's actions on October 22, 2008. In *People v Delgado*, 404 Mich 76, 80; 273 NW2d 395 (1978), our Supreme Court stated:

> It is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some antecedent event from which the fact or event in question follows as an effect from a cause. When such is the case and the antecedent event incidentally involves the commission of another crime, the principle that the jury is entitled to hear the "complete story" ordinarily supports the admission of such evidence. [*Id*. at 83.]

Based on this principle, the Court in *Delgado* found a prior heroin purchase was so related to the subsequent purchase that "[e]vidence of other criminal acts [was] admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime." *Id*., citing *State v Villavicencio*, 95 Ariz 199; 388 P2d 245 (1964). The evidence was admissible without regard to MRE 404(b); it was irrelevant whether the evidence was admissible under a "similar acts" analysis. *Id*. at 84.

Specifically, plaintiff offered evidence of the first controlled buy to illustrate defendant's activity and effort to assist the confidential informant in obtaining narcotics. The confidential informant told the police that he called defendant early on October 22, 2008, (the same day the car was pulled over) to purchase marijuana. Although no narcotics were produced from this first attempted buy, it was "so blended" and connected to the acts comprising the charged crime that proof of one involved or explained the circumstances of the crime. *Id.* The evidence linked defendant to the Vicodin found in the car that was searched based on all of defendant's conduct on October 22, 2008. The evidence was not offered to prove defendant's bad character in violation of MRE 404(b). It was offered to provide the jury with the context of the charge against defendant. No error occurred in the admission of the evidence.

Defendant also argues that the trial court violated MRE 404(b) by admitting evidence of defendant's prescription history of Vicodin. On the day of his arrest, defendant told the police that he did not know the Vicodin pills were in the car, and that he had a valid prescription for Vicodin (a fact later confirmed by the police). Defendant testified that he takes Vicodin on an "as needed" basis for his injured finger, but that he did not possess the pills found in the car. On cross-examination, the prosecution questioned defendant about his Vicodin prescription history, revealing that between June 2008 and September 2008, defendant received about ten prescriptions amounting to almost 200 pills of Vicodin. During closing argument, the prosecution argued that defendant had a "serious Vicodin problem."

People v Figgures, 451 Mich 390; 547 NW2d 673 (1996), forecloses defendant's argument. In that case, the defendant and his wife were divorced. One evening, the defendant came over to his ex-wife's house and a fight broke out between them. *Id.* at 393-394. Defendant was convicted of breaking and entering an occupied dwelling with intent to commit felonious assault. *Id*. at 394. On appeal, the defendant argued that he did not intend to commit a felonious assault because he and his ex-wife were on good terms. *Id*. at 395. On cross-examination, the

prosecutor impeached the defendant with a police report indicating the defendant and his ex-wife were not on good terms. *Id*. at 397. On appeal, we held the prosecution's evidence was proper rebuttal evidence, as "[r]ebuttal evidence is admissible to 'contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same.'" *Id*. at 399, quoting *People v De Lano*, 318 Mich 557, 570; 28 NW2d 909 (1947).

> Once defendant testified on direct examination that he and the complainant were "reconciling," in an attempt to create the impression with the jury that he would not have assaulted the complainant because the two had been living together and getting along well in the months before the illegal entry, he opened the door to the presentation of further evidence bearing on the actual state of their relationship . . . . [*Figgures*, 451 Mich at 399-400 (quotation marks and citation omitted).]

The evidence of defendant's prescription history was used by the prosecution to rebut defendant's statement that he only used his lawful Vicodin prescription on an "as needed" basis. It "contradict[ed], repel[ed], explain[ed] or disprove[d]" the inference that defendant did not know the Vicodin pills were in the car and that he did not possess the pills. Defendant "opened the door to the presentation of further evidence" by testifying he has Vicodin for his injured finger and only uses it on a limited basis. *Allen*, 210 Mich App at 103. Consequently, the evidence of defendant's prescription history was properly admitted at trial regardless of MRE 404(b).

Defendant also argues that the trial court's curative instruction, following a police officer's nonresponsive testimony that defendant was on parole at the time of his arrest, was insufficient to cure the prejudicial impact of the statement. After the improper reference, the trial court immediately intervened and excused the jury from the courtroom. The trial court cautioned the police officer, and the parties then agreed that the trial court should give a curative instruction to the jury. The trial court instructed the jury that they could not consider the police officer's improper statements related to defendant's parole. Because defense counsel agreed to the curative instruction and failed to object to the substance of that instruction, defendant waived his argument that the instruction was insufficient to cure any error resulting from the police officer's testimony. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Therefore, there is no error to review. *Id.* at 219.

Affirmed.

/s/ William B. Murphy
/s/ Christopher M. Murray
/s/ Douglas B. Shapiro