STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 12, 2016
v	No. 324285 Kalamazoo Circuit Court
WILLIAM LOBEZ WADE, Defendant-Appellant.	LC No. 14-000718-FH

Before: BOONSTRA, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

Defendant appeals by right his convictions, following a jury trial, of the manufacture or delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), and possession of marijuana, MCL 333.7403(2)(d). The trial court sentenced defendant as a habitual offender—fourth offense, MCL 769.12, to a prison term of 55 months to 40 years for the cocaine offense, and 6 months for the marijuana offense, with credit for 29 days served. We affirm defendant's convictions and the scoring of offense variables, but remand for further proceedings pursuant to *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015).

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Kristen Coleman reported to Kalamazoo police that suspected drug activity was occurring at the residence of her neighbor, Sheena Schmidt. Officers Andrew Werkema, Charles Treppa, and Kyle Wosburg responded to Schmidt's apartment. They were greeted at the door by Schmidt, who allowed them into her home. Werkema entered the kitchen with Schmidt and saw a white powdery substance on the kitchen table, along with a scale, a cooking pot, and baking soda. Marijuana was also found in the kitchen, as was a BB gun and sandwich baggies, which were collected for evidence. Defendant was in the living room of the apartment; Treppa testified that defendant "was sitting on a piece of furniture . . . [with] a box of sandwich baggies setting directly between his feet. There was a sifter with some white residue on it setting . . . [to] the left of him . . . and he also had white chunky residue that was on his lap."

Wosburg obtained defendant's consent to search his vehicle. Inside the vehicle Wosburg found an electronic taser, a baggie of a leafy substance he believed to be marijuana, and a handgun that was later revealed to be a BB gun. Defendant told Wosburg that he had used crack cocaine up to five times a day for the past five years.

Before trial, defendant objected to the prosecution's attempt to admit evidence related to his prior drug convictions, as well as Coleman's testimony concerning prior alleged drug transactions, pursuant to MRE 404(b). After an offer of proof, the trial court overruled defendant's objection.

Werkema, Treppa, and Wosburg testified to their search of Schmidt's apartment and defendant's vehicle as described above. An expert for the prosecution testified that he had analyzed the substances collected as evidence and determined that they were cocaine and marijuana.

Coleman testified that she was the person who told the police that defendant was involved in alleged drug transactions, although she stated that she did not observe any transactions on the day the police arrived at Schmidt's residence. She testified that she had observed defendant in the past sitting in his truck while various people approached and spoke to defendant, and that on at least one occasion she had seen defendant hand something to a man through the window of the truck, although defendant told her that what he had given the man was bus fare.

Schmidt testified that she leased the apartment in which the drugs were found, and that on the day of the search, she bought cocaine and marijuana and brought them home. She also testified that the defendant was not present when she returned home, but arrived later and was mad at her for buying the drugs. She also testified that all of the drugs in question, as well as the baggies, sifter, and scale, were hers, and that she was responsible for the drug activity at the home.

James Cole, defendant's former parole officer, testified that on a prior occasion defendant had been caught with 92 pieces of crack cocaine in a pill bottle while he was living with a girlfriend. Additionally, Cole testified that, at that time, defendant had admitted that he possessed the drugs with intent to sell them because he was unemployed.

Defendant was convicted as described above. At sentencing, the trial court scored offense variable (OV) 15 (circumstances that indicate drug trafficking) at 5 points, and OV 19 (interference with the administration of justice) at 10 points. This appeal followed.

II. OTHER ACTS EVIDENCE

Defendant argues that the trial court erred in admitting evidence of his prior cocaine conviction and Coleman's testimony regarding her suspicions of defendant's past drug activity. We disagree.

The admissibility of evidence pursuant to MRE 404(b) is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *People v Waclawski*, 286 Mich App 634, 670; 780 NW2d 321 (2009). A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes. *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007). The determination whether the probative value of evidence is substantially outweighed by its prejudicial effect is best left to a contemporaneous assessment of the presentation, credibility and effect of the testimony. *Waclawski*, 286 Mich App at 670. Even if evidence is admitted in error,

reversal is not required unless it affirmatively appears that it is more probable than not that the error was outcome determinative. The defendant bears the burden of establishing that, more probably than not, a miscarriage of justice occurred. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001).

> MRE 404(b) governs admission of evidence of other acts and provides in relevant part:
>
> (1) 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.

Thus, evidence of other acts to show propensity to commit the offense charged is excluded to avoid the danger of conviction based on a defendant's history of misconduct. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998).

MRE 404(b) is a rule of inclusion, not exclusion. *People v Pesquera*, 244 Mich App 305, 317; 625 NW2d 407 (2001) (citation omitted). Thus, "[r]elevant other acts evidence does not violate Rule 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 VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994). Our Supreme Court has articulated the requirements the prosecution must satisfy before evidence may be admitted under MRE 404(b). The evidence (1) must be offered for a proper purpose, (2) must be relevant, and (3) must not have a probative value substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *VanderVliet*, 444 Mich at, 74. Evidence of misconduct similar to that charged is logically relevant to show that the charged act occurred if the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they were manifestations of a common plan, scheme, or system. *People v Dobek*, 274 Mich App 58, 86; 732 NW2d 546 (2007).

With regard to Coleman's testimony, the prosecution offered this evidence for a proper nonpropensity purpose—explaining why the police came to be investigating Schmidt's apartment and defendant on the day in question. See *People v Jackson*, 498 Mich 246, 269-270; *VanderVliet*, 444 Mich at, 74. It was Coleman's prior experience witnessing suspected drug transactions, observing defendant sitting in his truck having multiple people approach and then leave quickly, that made her believe there was drug activity occurring at the home. These observations were the reason a police investigation was initiated and defendant was ultimately convicted. Further, her testimony was relevant to allow the jury to hear the complete story of the circumstances surrounding defendant's arrest, as well as to rebut defendant's theory of the case, i.e., that he essentially found himself in the presence of controlled substances by coincidence.

Further, the probative value of Coleman's testimony was not substantially outweighed by the danger of unfair prejudice. *Knox*, 469 Mich at 509. Unfair prejudice exists when there is a

tendency that the evidence will be given undueor preemptiveweight by the jury, or when it would be inequitableto allow use of the evidence. *Blackston*, 481 Mich at 462. Assessing probative value against prejudicial effect requires a balancing of factors, including the time necessary to present the evidence and the potential for delay, whether the evidence is cumulative, how directly the evidence tends to prove the fact in support of which it is offered, how important the fact sought to be proved is, the potential for confusion, and whether the fact can be proved another way with fewer harmful collateral effects. *Id*.

Here, Coleman's testimony was not unfairly prejudicial. Although she testified that she believed defendant was engaged in drug activity, she admitted on cross-examination that she never actually saw defendant provide anyone with drugs and that defendant had provided an alternate explanation for one occasion where she saw him hand a man something through the window of his truck. Thus, it is unlikely that Coleman's testimony concerning defendant's behavior was given undue or preemptive weight by the jury. *Blackston*, 481 Mich at 462.

Finally, given the substantial evidence against the defendant, such as being found with cocaine and admitting to using it, Coleman's testimony, while helpful in providing context to the jury, was not outcome determinative of his guilt. Thus even if the testimony was admitted in error, the error was harmless. *Knapp*, 244 Mich App at 378.

With regard to Cole's testimony, the prosecution offered evidence of defendant's past drug conviction in part to demonstrate defendant's familiarity with the manufacture and delivery of cocaine, and therefore to rebut the suggestion that defendant was coincidentally at the apartment where drugs were located. It was further offered to show a common scheme, plan or system on the part of defendant to resort to the manufacture or delivery of cocaine when unemployed. The evidence was thus offered for a proper purpose. See *VanderVliet*, 444 Mich at 74; *People v McGhee*, 268 Mich App 600, 609; 709 NW2d 595 (2005).

Further, Cole's testimony was relevant. Cole's testimony tends to show, in direct contrast to the testimony of Schmidt, that defendant was not accidentally or innocently in a place that happened to contain drugs. *McGhee*, 268 Mich App at 611 ("Evidence of intent is relevant because it negates the reasonable assumption that the incident was an accident . . . . The more often a defendant acts in particular manner, the less likely it is that the defendant acted accidentally or innocently.") Because Cole testified to defendant's involvement in a very similar situation (the possession of cocaine for distribution while unemployed and living with a girlfriend), it is relevant to defendant's claim that he did not knowingly possess the cocaine at issue, did not intend to deliver the cocaine, and did not have a plan or scheme for such delivery. *Id*., see also *Crawford*, 458 Mich at 395.

Further, Cole's testimony, while prejudicial, was not unfairly so. MRE 403; *Blackston*, 481 Mich at 462. Cole's testimony was not of the type that would tend to be given undue or preemptive weight by the jury; rather, the evidence was offered in essence to counter the assertion that defendant was merely coincidentally in the presence of controlled substances. Further, the jury was instructed that it was only to consider evidence of other acts as evidence of defendant's motive, intent, knowledge of controlled substances, and identity, and was not to consider the evidence for any other purposes, including propensity or bad character. Juries are

presumed to follow their instructions. See *People v Hana*, 447 Mich 325, 351; 524 NW2d 682 (1994) (quotation marks and citation omitted).

Finally, again, in light of other substantial evidence against defendant, even if Cole's testimony was admitted in error, such error was harmless. *Knapp*, 244 Mich App at 378.

III. SENTENCING

Defendant argues that the trial court erred in scoring OV 15 and 19. We disagree. However, defendant also argues that the trial court's sentence was based on facts not necessarily found by the jury or admitted by defendant. In the circumstances of this case, we conclude, pursuant to *Lockridge*, that remand is required.

"[J]udicial fact-finding remains an important component of Michigan's sentencing scheme post-*Lockridge*." *People v Jackson (On Reconsideration)*, ___ Mich App ___, ___; ___ NW2d ___ (2015) (Docket No. 322350), slip op at 11. A trial court's scoring of OVs must be supported by a preponderance of the evidence; we review the trial court's findings of fact for clear error. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). We review the proper interpretation and application of the sentencing guidelines de novo. *People v Perkins*, 468 Mich 448, 452; 662 NW2d 727 (2003).

OV 15 is scored for aggravated controlled substance offenses. MCL 777.45. Five points are scored where "[t]he offense involved the delivery or possession with intent to deliver marihuana or any other controlled substance . . . or possession of controlled substances . . . having a value or under such circumstances as to indicate trafficking." MCL 777.45(1)(h). "Trafficking" means the sale or delivery of controlled substances on a continuing basis to 1 or more other individuals for further distribution. MCL 777.45(2)(c).

Defendant argues that OV 15 was erroneously scored based on a lack of evidence to indicate trafficking. However, properly parsing OV 15, 5 points may be scored if (1) "the offense involved the delivery or possession with intent to deliver" a controlled substance *or* (2) possession of controlled substances "having a value or under such circumstances as to indicate trafficking." The word "or" is generally a disjunctive term when used in a statute. *People v Gatski*, 260 Mich App 360, 365; 677 NW2d 357 (2004). Thus, the plain language of MCL 777.45(1)(h) indicates that the Legislature intended the word "or" to establish alternative means for scoring 5 points for OV 15. See *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999). Therefore, because defendant's conviction was for possession of cocaine with intent to deliver, MCL 333.7401(2)(a)(iv), OV 15 was properly scored at 5 points regardless of any evidence of "trafficking." Moreover, defendant was found in possession not only of cocaine but of a digital scale, commonly used to weigh quantities of drugs to package for sale, and other drug paraphernalia commonly used in the sale of drugs. Accordingly, the trial court did not abuse its discretion in scoring 5 points for OV 15.

OV 19 concerns interference with the administration of justice. Under MCL 777.49(c), the trial court must score OV 19 at 10 points if "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." OV 19 may be scored for threatening statements made to a witness after the sentencing offense was completed. See *People v Smith*,

488 Mich 193, 202; 793 NW2d 666 (2010). In *Smith*, the defendant told a witness that "she 'shouldn't talk to anybody' because 'there was no proof of anything' and that defendant 'was innocent' as long as she remained quiet. Defendant told [the witness] that if he could not 'take care of the problem,' then he would 'have somebody else do it for' him." *Id*. at 196. As a result of the statements, the witness was initially reluctant to speak to police. *Id*.

Here, Coleman testified that defendant told her that she was mentioned in the police report documenting the investigation that led to his current charges, that she was a "snitch," and that he had "people watching" her. Although Coleman appeared relatively nonplussed by defendant's threatening language, she did testify that part of the reason she did not initially appear in court in response to a subpoena was out of concern raised by defendant's statements, and that she was "irritated" that she had to "worry" about defendant. Thus, the trial court did not err in determining that defendant's statements to Coleman constituted interference or at least attempted interference with the administration of justice. MCL 777.49(c).

The trial court correctly scored defendant's offense variables. However, as OV 19 was based on conduct that occurred after and independent of the sentencing offense, and was necessarily not based on facts found by the jury or admitted by defendant, we conclude that a *Crosby*[1] remand is required by *Lockridge*.[2]

In *Lockridge*, 498 Mich at 391-392; the Supreme Court held that in order to avoid any Sixth Amendment violations, Michigan's sentencing guidelines scheme was to be deemed advisory, instead of being mandatory. The concern is that when a judge makes findings of fact "beyond facts admitted by the defendant or found by the jury" in a sentencing proceeding that increases a defendant's minimum sentence, this runs afoul of a defendant's right to a jury trial. *Id*. at 364. As a result, the guidelines no longer can be considered mandatory, but sentencing judges must consult the guidelines and " 'take them into account when sentencing.' " *Id*. at 391, quoting *United States v Booker*, 543 US 220, 264; 125 S Ct 738; 160 L Ed 2d 621 (2005).

In determining whether there is any plain error under this new scheme, the first inquiry is whether the facts admitted by the defendant and the facts necessarily found by the jury "were sufficient to assess the minimum number of OV points necessary for the defendant's score to fall in the cell of the sentencing grid under which he or she was sentenced." *Id*. at 394. If the answer is "yes," then a defendant cannot establish any plain error. *Id*. at 395. If the answer is "no," then a remand to the trial court is required.

Here, if the 10 points scored for OV 19 were removed from consideration of defendant's guidelines score, defendant's sentence would be outside the guidelines recommendation.

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[1] *United States v Crosby*, 397 F3d 103 (CA 2, 2005).

[2] Because the jury specifically indicated that it found defendant guilty of violating MCL 333.7401(2)(a)(iv) under both a manufacturing theory and a possession with intent to deliver theory, and OV 15 may be scored at 5 points if the offense involved delivery, the scoring of OV 15 was based on facts found by the jury and does not implicate *Lockridge*.

Therefore, defendant's "guidelines minimum sentence range was actually constrained by the violation of the Sixth Amendment" and defendant is entitled to remand procedures as established in *Lockridge*.[3] *Id*. at 396. On remand, the trial court should determine whether, now aware of the advisory nature of the guidelines, the court would have imposed a materially different sentence. *Id*. at 397. If the court determines that it would have imposed a materially different sentence, then it shall order resentencing, subject to the procedures set forth in *Lockridge*. *Id*.

Affirmed with regard to defendant's convictions and the scoring of OVs 15 and 19. Remanded with regard to defendant's sentence. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ David H. Sawyer
/s/ Jane E. Markey

[3] "[O]n a Crosby remand, a trial court should first allow a defendant an opportunity to inform the court that he or she will not seek resentencing. If notification is not received in a timely manner, the court (1) should obtain the views of counsel in some form, (2) may but is not required to hold a hearing on the matter, and (3) need not have the defendant present when it decides whether to resentence the defendant, but (4) must have the defendant present, as required by law, if it decides to resentence the defendant. Further, in determining whether the court would have imposed a materially different sentence but for the unconstitutional constraint, the court should consider only the 'circumstances existing at the time of the original sentence.' " *Lockridge*, 498 Mich App at 398 (footnote and citation omitted).