STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 7, 2013
v	No. 313878 Antrim Circuit Court
JOHN OREN WATERS, Defendant-Appellant.	LC No. 12-004512-FH

Before: MURRAY, P.J., and DONOFRIO and BOONSTRA, JJ.

PER CURIAM.

Defendant was convicted by a jury of conspiracy to deliver a Schedule III controlled substance, MCL 7401(2)(b)(ii) and 750.157a(a), and delivery of a Schedule III controlled substance, MCL 333.7401(2)(b)(ii). He was sentenced to fourteen months' to seven years' imprisonment. He appeals as of right. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

On May 19, 2011, Jenny Ketz was arrested on drug charges arising out of Antrim County and taken to the Kent County Jail. Xavier Libbett testified that he hired defendant, an attorney, to represent Jenny and to take heroin to her to prevent sickness from withdrawal. Libbett testified that he paid defendant in cocaine and small amounts of cash. Jenny testified that defendant delivered heroin to her on two occasions while she was in the Kent County Jail. She testified that the first time he handed the heroin to her with his business card, and the second time he handed it to her while he was showing her some papers. Jail officials testified that they were only permitted to perform cursory searches of attorneys' papers when they came into the jail to meet with their clients.

On May 23, 2011, Jenny was transported to Antrim County Jail. She was arraigned the next day. Ashley Ketz, Jenny's sister, testified that she met with defendant outside the courthouse. Ashley testified that defendant told her that Jenny was sick from heroin withdrawal and that she wanted heroin. Ashley testified that she gave defendant Suboxone, a Schedule III controlled substance which alleviates heroin withdrawal. Jenny testified that defendant later visited her in the jail and gave her the Suboxone, which again was clipped to papers that he showed her.

Defendant was charged for the delivery of Suboxone. At trial, the prosecution sought to introduce evidence of the uncharged deliveries of heroin, as well as evidence that Libbett paid defendant in cocaine. The trial court admitted the evidence over defendant's objection and instructed the jury that it could only consider it to determine whether defendant used a scheme, plan, or system.

At sentencing, the trial court departed upward from defendant's sentencing range, finding that defendant abused his position as an attorney to smuggle contraband into jail. The trial court stated:

> . . . We have here in addition, the violation of trust. Because he used his role as—as an attorney to be escorted into the jail to meet with his client.
>
> Obviously we need to have that happen, because clients and people who are incarcerated who are—have matters pending, need to be able to talk to their attorneys in order to protect their rights and make sure their cases are handled fairly. And so, now we got somebody that actually took advantage of that. And it's a huge violation of trust.
>
> So, in my view, this does warrant a departure. The violation of trust of an attorney using his role to smuggle contraband into a jail is not considered in the guidelines, I don't think—well, I'm not sure it's considered at all. Certainly isn't considered adequately.
>
> And I believe that to be a substantial and compiling [sic] reason to depart. The guidelines call for, what, 0 to 17, I think. Yeah. So I'm going to sentence the Defendant to the Department of Corrections for no less than 14 months, no more than 7 years. The 7 years is the statutory maximum set by law. I don't have any discretion on that. But 14 months. I'll set it at 14 months.

Defendant argues that the trial court erred in admitted evidence of the heroin deliveries and the payment of cocaine, and in departing from the sentencing guidelines. We find that neither argument has merit.

II. UNCHARGED ACTS EVIDENCE

Defendant first argues that the trial court erred in admitting evidence of the uncharged acts under MRE 404(b) and MRE 403.

We review a trial court's admission of evidence of a defendant's other acts under MRE 404(b) for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). "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) (citing *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003)). Determinations of whether evidence should be excluded under MRE 403 "are best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony . . . ." *People v VanderVliet*, 444 Mich 52, 81; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

We review de novo preliminary questions of law. *People v Mardlin*, 487 Mich 609, 634; 790 NW2d 607, 622 (2010).

Our Supreme Court has stated:

> In *VanderVliet*, we adopted the approach to other acts evidence enunciated by the United States Supreme Court in *Huddleston v. United States*, 485 U.S. 681, 691–692, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988). That approach employs the evidentiary safeguards already present in the rules of evidence. First, the prosecutor must offer the other acts evidence under something other than a character to conduct or propensity theory. MRE 404(b). Second, the evidence must be relevant under MRE 402, as enforced through MRE 104(b), to an issue of fact of consequence at trial. Third, under MRE 403, a determination must be made whether the danger of undue prejudice [substantially] outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under Rule 403. Finally, the trial court, upon request, may provide a limiting instruction under MRE 105. [*People v Sabin(On Remand)*, 463 Mich 43, 55-56; 614 NW2d 888, 895-96 (2000) (citations and quotation marks omitted).]

"Under *VanderVliet*, the trial court's initial determination in deciding whether to omit other acts evidence is one of relevance." *Id*. at 56. The trial court must determine whether the evidence is "admissible under a permissible theory of logical relevance." *Id*. at 57. Here, the trial court admitted evidence of defendant's prior heroin deliveries as evidence of the existence of a common scheme or plan, i.e., delivering drugs to clients in jail. The trial court admitted evidence that defendant was paid by Libbett in cocaine as evidence of motive.

We agree with the trial court that evidence of the prior heroin deliveries was admissible under a logical theory of relevance. Defendant argues that the trial court erred because the evidence only showed a series of similar acts, not a plan. We disagree. In *Sabin*, our Supreme Court held that when evidence is admitted to show a common plan or scheme, the charged and uncharged acts need not be part of one overarching plan or scheme. *Sabin*, 463 Mich at 67-68. Rather, it is permissible to introduce uncharged acts to show that the defendant developed a system that he used in multiple instances to commit distinct yet similar acts. *Id*. In this case, the charged act (of delivering Suboxone) and uncharged acts (of delivering heroin) were sufficiently similar to support an inference that they were manifestations of a system. In both cases, defendant used relaxed prison searches of attorneys' papers to smuggle contraband to Jenny. Defendant then handed Jenny the substances by concealing it with paper and business cards. The only significant differences between the charged and uncharged acts were the location, the substances, and the sources of the substances. Thus, the trial court did not abuse its discretion in finding that the evidence of defendant's heroin deliveries were admissible as proof of a scheme, plan, or system.

We also agree with the trial court that evidence that defendant was paid in cocaine for his services was relevant, although not for the reason stated by the trial court. The trial court found this evidence to be relevant to defendant's motive in delivering the Suboxone. "'A motive is the inducement for doing some act; it gives birth to a purpose.'" *Sabin*, 463 Mich at 68 (quoting

People v Kuhn, 232 Mich 310, 312; 205 NW 188 (1925). No evidence was presented indicating that defendant received payment in cocaine for delivering the Suboxone to Jenny; indeed Libbett did not provide defendant with the Suboxone—Ashley did. Although evidence that defendant received payment in cocaine was relevant to defendant's motive in delivering the heroin, *Sabin*, 463 Mich at 68, it was less clearly relevant to defendant's motive in delivering the Suboxone.

However, the prosecution argues that the heroin deliveries and defendant's acceptance of cocaine as payment was part of the res gestae of the charged act. We agree. In *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996), quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978) (quotation marks and citations omitted), 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.

Stated differently:

> Evidence of other criminal acts is 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.

Here, Libbett testified that he hired defendant to represent Jenny and to take heroin to her to prevent sickness from withdrawal in jail. Although Libbett testified that he had contemplated that defendant would deliver heroin to Jenny, rather than Suboxone, the fact remains that defendant's services were engaged to keep Jenny from suffering withdrawal in jail. In fact, Ashley testified that defendant informed her that Jenny was "dope sick" and that Jenny wanted him to bring her something, at which point Ashley gave defendant the strip of Suboxone.

Under *Sholl*, the prosecution was entitled to present evidence of the payment of cocaine. Coupled with evidence of the heroin deliveries themselves, it presented the "complete story" of defendant's illegal smuggling—how defendant came to represent Jenny, how he knew she was suffering from withdrawal, why he delivered heroin to her, why he took Suboxone from Ashley, and how and why he committed the charged act. Without this evidence, the jury would have been left with an incomplete picture. "[I]t is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place." *Sholl*, 453 Mich at 741. Thus, the trial court did not err in admitting this evidence as logically relevant to the charge offense, albeit for the wrong reason. See *People v Ramsdell*, 230 Mich App 386, 406; 585 NW2d 1 (1998), citing *People v Brake*, 208 Mich App 233, 242 n 2; 527 NW2d 56 (1994).

Having determined that the offered evidence was relevant to a permissible purpose under MRE 404(b), the trial court must next determine if, notwithstanding the evidence's relevance, it should nonetheless be excluded under MRE 403 because "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or

by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403; *Sabin*, 463 Mich at 58.

On this point, defendant argues that the evidence of the uncharged acts should have been excluded because it was (1) insubstantial, (2) unreliable, and (3) designed to show the jury that defendant was a bad person. We disagree. The evidence of the earlier deliveries was directly relevant for the proffered purpose of establishing defendant's plan, scheme, or system, while evidence of the payment in cocaine was relevant to giving the jury a complete picture of the case. This evidence, while prejudicial in the nature of all damaging evidence, was not unfairly prejudicial; it did not improperly inject considerations extraneous to the merits of the lawsuit, such as the jury's bias, sympathy, anger, or shock. See *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995). There is no suggestion in the record that the prosecution presented the evidence in order to inject such considerations. Indeed, the prosecution articulated proper purposes for the admission of each piece of evidence at issue. We find no Rule 403 error.

Finally, the trial court gave the jury a limiting instruction on how it could consider the evidence. "Jurors are presumed to follow their instructions . . . ." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

For these reasons, we find no error in the trial court's admission of the uncharged acts evidence in this case.

II. SENTENCE DEPARTURE

Defendant's sentencing guideline range was 0 to 17 months. When a guideline range is less than eighteen months, a sentence including a prison term constitutes a departure from the guidelines. *People v McCuller*, 479 Mich 672, 676 n 1; 739 NW2d 563 (2007); MCL 769.34(4)(a). Defendant argues that the trial court erred in departing from the sentencing guidelines because it shows that the trial court improperly departed due to defendant's occupation as an attorney, as prohibited by MCL 769.34(3)(a), and because defendant's actions were already taken into account by the sentencing guidelines, specifically OV 19 ("threat to the security of a penal institution"). MCL 777.49. We disagree.

A court may depart from the sentencing guidelines range if it has a substantial and compelling reason to do so, and it must state on the record its reasons for departure. MCL 769.34(3); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). A court may not depart from a sentencing guidelines range based on "an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion[,]" MCL 769.34(3)(a), nor may it base a departure on an offense characteristic or offender characteristic already considered in determining the guidelines range unless the court finds, based on facts in the record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b); *People v Harper*, 479 Mich 599, 616-617; 739 NW2d 523 (2007), cert den 552 US 1232 (2008).

We disagree with defendant's argument that the trial court violated MCL 769.34(3)(a) by departing from the guidelines based upon his occupation as an attorney (i.e., his "legal

occupation"). In departing from the guidelines, the trial court did not rely on the mere fact that defendant was an attorney, but rather on defendant's abuse of his position as an attorney. As the trial court stated, defendant took advantage of the trust that jail officials place in attorneys, and misused that trust to smuggle in contraband. This consideration did not violate MCL 769.34(3)(a).

Nor has defendant established that his conduct was already taken into account under OV 19. Defendant was assessed 25 points under this variable, as he had "by his . . . conduct threatened the security of a penal institution or court." MCL 777.49(a). This variable took into account defendant's conduct of smuggling contraband into jail. However, it did not take into account the method he used to accomplish that conduct—hiding it with his papers knowing they would not be discovered by the jail guards due to the relaxed searches of attorneys' papers. This constituted not only a threat to the security of the jail generally, but was an abuse of the public trust of the judicial system and defendant's unique ability to avoid discovery due to his status as defense counsel. Consequently, defendant has not established that the trial court departed due to a consideration already adequately taken into account by the guidelines under MCL 769.34(3)(b).

Affirmed.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Mark T. Boonstra