STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 19, 2013
v	No. 308765 Oakland Circuit Court
KENNETH RAY WRIGHT, Defendant-Appellant.	LC No. 2011-238177-FC

Before: METER, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of delivery of a controlled substance causing death, MCL 750.317a. We affirm.

Defendant's conviction arises from his delivery of heroin to a third person who then injected heroin into Robert Wilcox and he died.

On appeal, defendant first argues that MCL 750.317a is a strict liability criminal offense in violation of due process because it does not require a showing of mens rea. After de novo review of this constitutional challenge, we disagree. See *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006).

MCL 750.317a provides:

> A person who delivers a schedule 1 or 2 controlled substance . . . to another person in violation of . . . MCL 333.7401 . . . that is consumed by that person or any other person and that causes the death of that person or other person is guilty of a felony punishable by imprisonment for life or any term of years.

In *People v Plunkett*, 485 Mich 50; 780 NW2d 280 (2010), our Supreme Court held that MCL 750.317a, delivery of a controlled substance causing death, is a general intent crime. *Id*. at 60. The *Plunkett* Court explained that the statute "does not require the intent that death occur from the controlled substance first delivered in violation of MCL 333.7401. Rather, the general intent required to violate MCL 750.317a is identical to the general intent required to violate MCL 333.7401(2)(a): the *delivery* of a schedule 1 or 2 controlled substance." *Plunkett*, 485 Mich at 60. Thus, MCL 750.317a does require a culpable state of mind as it relates to the delivery of a controlled substance in violation of MCL 333.7401. See *People v Maleski*, 220 Mich App 518,

521-522; 560 NW2d 71 (1996). And MCL 750.317a "punishes an individual's role in placing the controlled substance in the stream of commerce, even when that individual is not directly linked to the resultant death." *Plunkett*, 485 Mich at 60. "[W]here a statute requires a criminal mind for some but not all of its elements, it is not one of strict liability." *People v Quinn*, 440 Mich 178, 187; 487 NW2d 194 (1992). Therefore, we reject defendant's argument that MCL 750.317a is a strict liability criminal offense in violation of due process; thus, this argument is without merit.

Next, defendant argues that the prosecutor improperly shifted the burden of proof during her rebuttal closing argument by referring to his inconsistent defenses. We disagree.

Defendant failed to preserve this claim by objecting to the prosecutor's statements during her rebuttal closing argument and requesting a curative instruction; thus, our review is for plain error affecting his substantial rights. See *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999); *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

Prosecutorial misconduct issues are decided on a case-by-case basis by examining the record as a whole and evaluating the prosecutor's remarks in context and in light of defense arguments. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010); *Brown*, 279 Mich App at 135. During defense counsel's closing argument he argued that the prosecution failed to establish beyond a reasonable doubt that defendant sold the heroin or, if he did, that the heroin caused Wilcox's death. In her rebuttal argument, the prosecutor commented on the fact that defendant's argument was inconsistent or conflicting. However, contrary to defendant's claim, the prosecutor did not impermissibly imply that defendant had to prove his innocence, i.e., shift the burden of proof. See *People v Fyda*, 288 Mich App 446, 463-464; 793 NW2d 712 (2010). The prosecutor merely commented on the weaknesses of defendant's defense theories and fairly responded to an issue raised by defendant; thus, prosecutorial misconduct was not established. See *Brown*, 279 Mich App at 135; *People v McGhee*, 268 Mich App 600, 634-635; 709 NW2d 595 (2005). Furthermore, the jury was properly instructed both before and after the evidence was presented that the burden of proof rests on the prosecution and jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, defendant has failed to establish plain error warranting appellate relief.

Next, defendant argues that Offense Variable (OV) 6 was improperly scored at 50 points because there was no evidence of his intent to kill Wilcox; thus, he is entitled to resentencing. We disagree.

At sentencing, the prosecutor objected to the sentencing guidelines score of zero for OV 6 and argued that it should be scored at 50 points because "the killing was committed while committing a major controlled substance offense." Defense counsel argued that the basic charge was a controlled substance charge and the fact that a homicide occurred "does not put it in that category." Referring to MCL 777.1(c), which provides the definition of "homicide" as "any crime in which the death of a human being is an element of that crime," the trial court agreed with the prosecutor and scored OV 6 at 50 points.

The interpretation and application of the statutory sentencing guidelines are legal questions subject to de novo review. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011). In determining legislative intent, we first turn to the specific language of the statute. *People v Lively*, 470 Mich 248, 253; 680 NW2d 878 (2004) (citation omitted). If the plain and ordinary meaning of the language is clear, judicial construction is normally neither necessary nor permitted. *People v Breidenbach*, 489 Mich 1, 8; 798 NW2d 738 (2011) (citation omitted).

The statutory provision for OV 6 is MCL 777.36, which provides that 50 points should be scored if:

> (a) The offender had a premeditated intent to kill or the killing was committed while committing or attempting to commit arson, criminal sexual conduct in the first or third degree, child abuse in the first degree, a major controlled substance offense, robbery, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion, or kidnapping or the killing was the murder of a peace officer or a corrections officer[.] [MCL 777.36(1)(a).]

MCL 761.2(a) defines a "major controlled substance offense" as including: "A violation of section 7401(2)(a) of the public health code . . . being section 333.7401 of the Michigan Compiled Laws." MCL 333.7401(2)(a) prohibits the delivery of controlled substances, including those classified as schedule 1 controlled substances. Heroin is a schedule 1 controlled substance. MCL 333.7212(1)(b). Here, defendant delivered the heroin that killed Wilcox. Thus, according to the plain language of MCL 777.36(1)(a), OV 6 was properly scored 50 points. See *Breidenbach*, 489 Mich at 8. Accordingly, defendant is not entitled to resentencing and this issue is without merit.

Next, defendant argues that he is entitled to resentencing because the trial court based its departure sentence on a factor already considered in the scoring of the sentencing guidelines. We disagree.

A trial court's determination regarding the existence of a factor to depart from the recommended minimum sentence range is reviewed for clear error. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). We review de novo whether the factor is objective and verifiable. *Id*. But we review for an abuse of discretion whether the factor constitutes a substantial and compelling reason to depart from the guidelines range. *Id*. at 264-265.

When imposing a sentence, the court must use the applicable guidelines. MCR 6.425(D). The sentencing court may depart from the recommended sentencing guidelines range if it has a substantial and compelling reason to do so, and it states on the record the reasons for departure. *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007), quoting MCL 769.34(3). A departure sentence may not be based 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 a characteristic or factor was given inadequate or disproportionate weight. *People v Harper*, 479 Mich 599, 616-617; 739 NW2d 523 (2007), quoting MCL 769.34(3)(b); *People v Castillo*, 230 Mich App 442, 448; 584 NW2d 606 (1998). Factors meriting departure

must justify the particular departure made, must be objective and verifiable, must keenly attract the court's attention, and must be of considerable worth. *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008).

According to the evidence admitted at trial, while defendant was on bond for this charged offense, he was arrested for selling heroin to a confidential informant (one-half gram for $50) and an undercover officer (28.9 grams for $3,920) over the course of two days. In rendering its sentence, the trial court noted: "[w]hile on bond for this case he committed the same offense in the sense of delivering heroin and has pled guilty to that, so there's no question with regard to that." The trial court then held that an upward departure was justified in this case "based on the fact that his subsequent criminal behavior for nearly an identical crime is objective, verifiable, keenly and irresistibly grabs this Court's attention and is . . . self-evidently of considerable worth in sentencing the defendant." The trial court then noted that the minimum sentence, according to the sentencing guidelines, was 171 to 356 and that the next ranges on the grid were from 225 to 468 and 427 to 570; thus, the trial court concluded that a sentence of 39 to 99 years was a proportional sentence under the circumstances.

According to the PSIR, Prior Record Variable (PRV) 7 was scored at ten points. MCL 777.57 provides for the scoring of PRV 7 at ten points when the offender has one subsequent felony conviction that occurred after the sentencing offense was committed. MCL 777.57(1)(b) and (2)(a). However, it is clear from the record that the trial court concluded that inadequate weight was accorded to that factor because defendant knew that his sale of heroin resulted in someone's death, he was facing a felony criminal charge in that regard and, while he was out on bond, defendant continued to deliver heroin. The trial court did not clearly err when it determined that this factor existed. The factor is objective and verifiable. And the trial court did not abuse its discretion when it concluded that it constituted a substantial and compelling reason to depart from the sentencing guidelines recommended range. See *Babcock*, 469 Mich at 264-265. Accordingly, defendant's departure sentence is affirmed.

In his Standard 4 brief, defendant next argues that he was denied a fair trial because the trial court improperly denied his request to instruct the jury on CJI2d 16.15. We disagree.

A claim of instructional error involving a question of law is reviewed de novo, but the trial court's determination whether a jury instruction was applicable to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006) (citations omitted). Jury instructions are considered as a whole and, even if somewhat imperfect, instructions do not create error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Kowalski*, 489 Mich 488, 501-502; 803 NW2d 200 (2011); *People v Eisen*, 296 Mich App 326, 330; 820 NW2d 229 (2012). The jury instructions must include all of the elements of the crime charged and any material issues, defenses, and theories for which there is evidence in support. *McGhee*, 268 Mich App at 606.

At trial, defense counsel requested CJI2d 16.15, which provides:

> [There may be more than one cause of death.] It is not enough that the defendant's act made it possible for the death to occur. In order to find that the death of [name deceased] was caused by the defendant, you must find beyond a

> reasonable doubt that the death was the natural or necessary result of the defendant's act.

The use notes for this instruction explain that it applies "where there is an issue as to whether an act of the defendant caused death, or whether death was caused by some intervening cause." The prosecutor objected to the instruction and, relying on *People v Bailey*, 451 Mich 657; 549 NW2d 325 (1996), argued that the heroin did not have to be the sole cause of the death; it only had to be a contributory cause of the death. *Id*. at 676. The prosecutor proposed the following jury instruction instead, which was ultimately given by the trial court:

> The defendant is charged with the crime of illegally delivering a controlled substance that caused a death of another. To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt; First, that the defendant delivered a controlled substance to a person. Deliver means the defendant transferred or attempted to transfer the substance to another person knowing that it was a controlled substance. The person to whom the defendant gave the controlled substances does not have to be the decedent.
>
> Second, that the substance was consumed by a person.
>
> Third, that consuming the controlled substance caused the death of Robert Wilcox.
>
> There may be more than one cause of death. The controlled substance delivered by the defendant does not need to be the sole cause of Robert Wilcox's death. The controlled substance only needs to be a contributing cause that was a substantial factor in the death of Robert Wilcox. It does not matter if there was another contributing cause to the death.

It appears that defendant is arguing on appeal that his requested jury instruction would have permitted the jury to consider whether the injection of the heroin into Wilcox by another person, as well as Wilcox's underlying medical conditions, proximately caused Wilcox's death and constituted intervening causes that superseded defendant's delivery of the heroin as a cause of Wilcox's death. However, first, MCL 750.317a only requires that the heroin delivered by the defendant be consumed by, and cause the death of, a person. The deputy medical examiner testified that the cause of Wilcox's death was drug abuse. The deputy medical examiner, as well as a forensic toxicologist, testified that the level of morphine found in Wilcox's blood, which is a component of heroin, was sufficient to cause Wilcox's death. Second, our Supreme Court in *Bailey*, 451 Mich at 676, held: "In assessing criminal liability for some harm, it is not necessary that the party convicted of a crime be a sole cause of that harm, only that he be a contributory cause that was a substantial factor in producing the harm. The criminal law does not require that there be but one proximate cause of harm found." Further, the *Bailey* Court held: "Where an independent act of a third party intervenes between the act of a criminal defendant and the harm to a victim, that act may only serve to cut off the defendant's criminal liability where the intervening act is the sole cause of harm." *Id*. at 677. Therefore, the jury instruction provided by the trial court accurately set forth the law regarding causation, fairly presented the issues to be tried, and sufficiently protected defendant's rights. See *Kowalski*, 489 Mich at 501-502; *Eisen*,

296 Mich App at 330. Further, the trial court did not abuse its discretion in determining that CJI 16.15 was inapplicable under the circumstances of this case.

In his Standard 4 brief, defendant also argues that his right to a unanimous verdict was violated because the trial court instructed the jury that it could find defendant guilty if defendant was either the principal or an aider and abettor of the offense. We disagree.

A criminal defendant is guaranteed the right to an unanimous verdict under the Michigan Constitution. Const 1963, art 1, § 14; *People v Gadomski*, 232 Mich App 24, 30; 592 NW2d 75 (1998). Accordingly, the trial court must instruct the jury regarding the unanimity requirement. *People v Smielewski*, 235 Mich App 196, 201; 596 NW2d 636 (1999). In this case, the trial court did instruct the jury that its verdict must be unanimous. However, defendant contends, because the jury was instructed that it could find defendant guilty if it concluded that he was either the principal or an aider and abettor in the offense "it is impossible to discern upon which theory of guilt the jury unanimously agreed." Thus, the jury instruction could have resulted in a compromise verdict. And, defendant argues, the aiding and abetting instruction was not supported by the evidence.

In this case, the prosecutor presented sufficient evidence of defendant's guilt as a principal or as an aider and abettor to justify both jury instructions. Again, MCL 750.317a provides:

> A person who delivers a schedule 1 or 2 controlled substance . . . to another person in violation of . . . MCL 333.7401 . . . that is consumed by that person or any other person and that causes the death of that person or other person is guilty of a felony punishable by imprisonment for life or any term of years.

The evidence at trial included that defendant delivered heroin to a third-party in violation of MCL 333.7401. The delivered heroin was consumed by Wilcox and it caused his death. Thus, the jury could have concluded that defendant was the principal in the offense. See *Plunkett*, 485 Mich at 60. Further, an aiding and abetting instruction is warranted if there is evidence that (1) the defendant or some other person committed the crime charged, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission when he gave aid or encouragement. *Carines*, 460 Mich at 757-758 (citation omitted). An aider and abettor's state of mind may be inferred from the facts and circumstances. *Id*. at 758. Here, the evidence included that defendant delivered a large quantity of heroin to a third-party, the third-party then delivered some of the heroin to Wilcox, Wilcox consumed that heroin, and it killed him. See *Plunkett*, 485 Mich at 62. Accordingly, the trial court properly provided jury instructions regarding both theories to the jury. Further, because there was sufficient evidence of defendant's guilt under either theory, defendant's right to an unanimous verdict was not violated by submission of the alternative theories to the jury. See *Smielewski*, 235 Mich App at 201-202.

Defendant next argues in his Standard 4 brief that the trial court abused its discretion when it admitted evidence, under MRE 404(b), of a drug offense he committed while this charge was pending. We disagree.

A trial court's evidentiary decisions are reviewed for an abuse of discretion. *Unger*, 278 Mich App at 216. An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Id*. at 217. "Evidentiary errors are nonconstitutional." *People v Blackmon*, 280 Mich App 253, 259; 761 NW2d 172 (2008). Thus, even if preserved, an evidentiary error will not result in reversal of a conviction unless it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

MRE 404(b)(1) prohibits evidence of other crimes, wrongs, or acts "to prove the character of a person in order to show action in conformity therewith." The forbidden evidentiary hypotheses are: "a man who commits a crime probably has a defect in character; a man with such a defect of character is more likely . . . to have committed the act in question." *People v VanderVliet*, 444 Mich 52, 63; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), quoting *People v Engelman*, 434 Mich 204, 212-213; 453 NW2d 656 (1990). Thus, if the proponent's sole theory of relevance is to show the defendant's criminal propensity to prove that he committed the charged offenses, the evidence is inadmissible. *VanderVliet*, 444 Mich at 63. But MRE 404(b) is inclusionary rather than exclusionary. *Id*. at 64, quoting *Engelman*, 434 Mich at 213. It "permits the judge to admit other acts evidence *whenever* it is relevant on a noncharacter theory." *Id*. at 65 (emphasis in original). If the other acts evidence is offered for a proper purpose, is relevant, and if the danger of undue prejudice does not substantially outweigh its probative value, the evidence is admissible. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004); *VanderVliet*, 444 Mich at 74-75.

Here, evidence that defendant sold heroin to a confidential informant and an undercover officer a week before the trial in this matter was admitted by the trial court. Defendant argues that this evidence was admitted "only to prove a propensity to commit such crimes" and was unfairly prejudicial because the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. We reject these arguments. First, the evidence was relevant and was introduced for the proper purposes of establishing that defendant acted purposely, using a common plan or system to illegally deliver heroin to Wilcox's friend, and defendant knew that he was delivering heroin to Wilcox's friend on the day Wilcox died. See MRE 401; *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). Second, the evidence was not unfairly prejudicial. That is, the danger of undue prejudice did not substantially outweigh the highly probative value of this evidence considering defendant's defenses, including that he did not sell the heroin that killed Wilcox. See *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001) (citation omitted). Further, cautionary instructions were given to the jury at least three times as to the proper purpose of the challenged evidence, which minimized any prejudice because jurors are presumed to follow their instructions. See *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998); *People v Martzke*, 251 Mich App 282, 295; 651 NW2d 490 (2002). But, even if the admission of the challenged evidence was erroneous, after consideration of the entirety of the evidence, it does not affirmatively appear more probable than not that this evidence was outcome determinative. See *Lukity*, 460 Mich at 495-496. Accordingly, defendant is not entitled to appellate relief.

Next, defendant argues in his Standard 4 brief that the trial court abused its discretion when it denied his motion for a directed verdict because the prosecution failed to establish beyond a reasonable doubt that the heroin Wilcox consumed caused his death. We disagree.

"When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *People v Parker*, 288 Mich App 500, 504; 795 NW2d 596 (2010). "Circumstantial evidence and reasonable inferences that arise from the evidence can constitute sufficient proof of the elements of the crime." *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003).

An essential element of MCL 750.317a is that death is caused by the delivered scheduled 1 or 2 controlled substance consumed. Defendant argues that the prosecution failed to establish beyond a reasonable doubt that Wilcox died from consuming the heroin that he allegedly sold to a third-party. However, the testimony of the eyewitnesses was consistent that, after Wilcox was injected with the heroin purchased from defendant, Wilcox immediately fell to the ground and could not be revived. The deputy medical examiner testified that the cause of Wilcox's death was drug abuse. The deputy medical examiner, as well as a forensic toxicologist, testified that the level of morphine found in Wilcox's blood, which is a component of heroin, was sufficient to cause Wilcox's death. Considering the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude beyond a reasonable doubt that the heroin defendant delivered caused the death of Wilcox. See *Parker*, 288 Mich App at 504. Thus, the trial court properly denied defendant's motion for directed verdict.

Finally, defendant argues in his Standard 4 brief that the cumulative effect of errors deprived him of a fair trial. Because defendant has not established any errors, this argument is without merit. See *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Henry William Saad