

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARIO PEARSON,

Defendant-Appellant.

UNPUBLISHED

September 25, 2001

No. 221868

Wayne Circuit Court

LC No. 98-009399

Before: K.F. Kelly, P.J., and Hood and Zahra, JJ.

PER CURIAM.

Defendant was convicted of possession with intent to deliver 50 grams or more, but less than 225 grams, of cocaine, MCL 333.7401(2)(a)(iii). He was sentenced to ten to twenty years' imprisonment. Defendant appeals as of right. We affirm.

I

Defendant first challenges the sufficiency of the evidence that defendant constructively possessed with the intent to deliver more than 50 grams of cocaine. When reviewing a challenge to the sufficiency of the evidence we view the evidence in the light most favorable to the prosecution to determine whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

It is well settled that possession may encompass both actual and constructive possession. *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000); *People v Griffin*, 235 Mich App 27, 34; 597 NW2d 176 (1999). The critical question is whether the defendant had dominion and control over the substance. *Id.* A person's mere presence at a location where drugs are found is insufficient to prove constructive possession. *Id.* at 34-35. Rather, constructive possession exists where the totality of the circumstances indicates a sufficient nexus between the defendant and the illicit substance. *Id.* at 35. Furthermore, constructive possession may be proven by circumstantial evidence and reasonable inferences drawn from the evidence. *Nunez, supra* at 615-616.

Sergeant Robert Kozlowski testified that he observed defendant sell crack cocaine to another man on December 28, 1995, and that he attempted to purchase crack cocaine from defendant on the same day while inside the house that police eventually raided. While Kozlowski and the purchaser were standing on the front porch, defendant was the person who answered the door and let them inside the house. Kozlowski also observed defendant sell suspected narcotics to four people on December 31, 1995, while defendant was standing in the doorway of the residence, and he saw eight people approach and enter the house at different times, and leave within two minutes. Kozlowski testified that such activity was consistent with drug trafficking. Furthermore, as Kozlowski was approaching the house to assist in the raid, he saw defendant, who was standing at the side of the house, turn and flee from the area. From the residence, Officer Joseph Tiseo confiscated an identification card showing defendant's picture and a high school attendance report listing defendant's name along with the address of the house that was the subject of the search warrant. The house appeared to be occupied, and items of clothing were found in the downstairs bedroom in which Officer Jamal Good recovered the cocaine.

The above evidence and reasonable inferences drawn from the evidence tended to show that defendant occupied the house and sold drugs from the house. *Nunez, supra* at 615-616. No evidence was presented that someone other than defendant owned or occupied the house, and only defendant was observed exercising control over the house. Under the totality of the circumstances, the prosecutor established a nexus between defendant and the crack cocaine recovered in the residence during the raid. *Griffin, supra* at 35. Accordingly, sufficient evidence was presented to support defendant's conviction. *Johnson, supra*.

II

Defendant next argues that the trial court erred by allowing the prosecutor to introduce evidence that defendant was selling drugs on two separate occasions within four days prior to the raid. We disagree. Although defendant raised this issue in a motion for mistrial following Kozlowski's testimony, he failed to preserve this issue for appeal by timely objecting during Kozlowski's testimony and allowing the trial court the opportunity to determine whether to admit the other acts evidence. We review unpreserved claims of error for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999); *People v Aguwa*, 245 Mich App 1, 6; 626 NW2d 176 (2001).

Evidence of an individual's crimes, wrongs, or bad acts is inadmissible to prove a propensity to commit such acts. MRE 404(b); *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). Other acts evidence may, however, be admissible for other purposes. *People v Starr*, 457 Mich 490, 495-496; 577 NW2d 673 (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.

Other acts evidence is admissible if a four-prong test is satisfied: (1) the evidence must be offered for a proper purpose under MRE 404(b); (2) it must be relevant under MRE 402, as enforced through MRE 104(b); (3) the probative value of the evidence must not be substantially outweighed by unfair prejudice; and (4) the trial court may, upon request, provide a limiting instruction to the jury. *Starr, supra* at 496; *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). The third prong of the test requires nothing more than the balancing process illustrated in MRE 403. *Starr, supra* at 498. Pursuant to MRE 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. *Id.*

Defendant challenges the admission of Kozlowski's testimony on the basis that its probative value was substantially outweighed by unfair prejudice. Kozlowski's testimony regarding defendant's prior drug sales and Kozlowski's own attempted undercover drug purchase from defendant was relevant in that it tended to show the identity of the drug seller and occupant of the house (i.e., that defendant was the person who was selling drugs out of the house). MRE 401; MRE 402. Defendant's theory of the case was that defendant was not the drug seller, and defense counsel argued that the house was abandoned and that defendant's identification card found inside the house had nothing whatsoever to do with the drug activity that occurred at the house. Therefore, the other acts evidence was very probative in corroborating Kozlowski's identification of defendant as the person whom he observed selling drugs out of the house. While MRE 403 provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, it was not intended to prohibit all prejudicial evidence, but only that which is *unfairly* prejudicial. *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001). Because Kozlowski's testimony was very probative and relevant to a key issue in the case (i.e., the identity of the drug seller), its probative value was not substantially outweighed by the danger of unfair prejudice. Furthermore, the trial court instructed the jury, as requested by defense counsel, regarding the proper use of the other acts evidence. Accordingly, there was no plain error affecting defendant's substantial rights. *Carines, supra* at 761-764; *Aguwa, supra* at 8.

III

Defendant also argues that the trial court erred in denying his motion for mistrial. We review a trial court's grant or denial of a motion for mistrial for an abuse of discretion. *People v Wolverton*, 227 Mich App 72, 75; 574 NW2d 703 (1997). An abuse of discretion exists if the trial court's denial of the motion deprives the defendant of a fair and impartial trial. *Id.* A motion for mistrial should be granted only if there is an irregularity that is prejudicial to the defendant's rights and impairs his ability to receive a fair trial. *People v Stewart (On Remand)*, 219 Mich App 38, 43; 555 NW2d 715 (1996); *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

Defendant contends that his late notice of Kozlowski's prior contacts with defendant deprived him of a fair trial because defense counsel was unable to move *in limine* to exclude the other acts evidence. However, the trial court found that, in any event, the evidence was admissible and that it was relevant to the identity of the perpetrator. Therefore, even if defendant

had moved to exclude the evidence, the trial court would not have granted the motion. Defendant also contends that the late notice regarding Kozlowski's prior contacts with defendant deprived defense counsel of the opportunity to properly prepare to confront the testimony. The record reveals, however, that defense counsel at no time requested a continuance in order to prepare to oppose the testimony and that counsel effectively cross-examined Kozlowski regarding his prior contacts with defendant. In any event, defendant fails to specify how his cross-examination of Kozlowski would have been different had he been aware of the prior contacts at an earlier time.

Defendant also maintains that the late notice of Kozlowski's prior contacts with defendant prevented defense counsel from asking prospective jurors during voir dire if they could follow the trial court's limiting instruction, and that, as such, counsel lacked critical information with which to effectively exercise peremptory challenges or challenges for cause. The trial court asked the prospective jurors during voir dire if they would be able to follow the court's jury instructions, and they responded affirmatively. Furthermore, a jury is generally presumed to have followed the trial court's instructions unless the contrary is clearly shown, and there is no indication in the record that the jury failed to follow the trial court's limiting instruction. *Wolverton, supra* at 77. Therefore, defendant failed to show that the delayed notice of Kozlowski's prior contacts with defendant was prejudicial to his rights or impaired his ability to receive a fair trial. *Stewart, supra* at 43; *Haywood, supra* at 228. As such, the trial court did not abuse its discretion by denying defendant's motion for mistrial. *Wolverton, supra* at 75.

IV

Defendant further argues that the trial court violated his right to due process by allowing the amendment of the information. We disagree. Because defendant failed to preserve this issue for appellate review by challenging the amendment of the information in the lower court, we review his claim of error for plain error affecting his substantial rights. *Carines, supra* at 761-762.

Defendant contends that the amendment of the information was improper because no additional evidence was found to support the amendment. However, an information may be amended at any time before, during, or after trial to cure any defect, imperfection, or omission in form or substance, including any variance between the information and the proofs, as long as the amendment would not unfairly surprise or prejudice the defendant. MCL 767.76; MCR 6.112(G); *People v Goecke*, 457 Mich 442, 459-460; 579 NW2d 868 (1998); *Stewart, supra* at 44. Defendant could not have been unfairly surprised or prejudiced at trial by the amendment of the information because his preliminary examination was conducted on the amended charge. *Goecke, supra* at 462. In addition, because he was aware of the higher charge against him at the time of his preliminary examination, he was provided sufficient notice of the allegations against him at trial. *Stewart, supra* at 44. In any event, there is no requirement that additional evidence be uncovered in order to amend an information.

V

Last, defendant argues that his right to due process was violated by an impermissibly suggestive pretrial identification procedure. We again disagree. Contrary to defendant's

argument, no pretrial identification procedure existed in this case. Rather, the identification card recovered at the residence was evidence admitted to connect defendant to the house and to the drug activity which occurred at the house. In addition, to the extent that defendant challenges Kozlowski's in-court identification of him, no error occurred. Where a pretrial identification procedure is tainted by an unduly suggestive or improper procedure, an independent basis must be established in order for a witness' in-court identification of a defendant to be allowed. *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998); *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996). However, where no impropriety occurred regarding the pretrial identification of a defendant, there is no need to establish an independent basis for an identification. *Id.* at 288. Because no pretrial identification procedure existed, there was no need to establish an independent basis for Kozlowski's in-court identification of defendant. *Id.*

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Harold Hood

/s/ Brian K. Zahra