

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROY ALLEN STARRS,

Defendant-Appellant.

UNPUBLISHED

March 25, 1997

No. 187447

Kent Circuit Court

LC No. 94-001259-FH

Before: Hoekstra, P.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(1) and (2)(a)(iv); MSA 14.15(7401)(1) and (2)(a)(iv), maintaining a drug house, MCL 333.7405(d); MSA 14.15(7405)(d), two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and possession of marijuana, MCL 333.7403(1) and (2)(d); MSA 14.15(7403)(1) and (2)(d). Defendant was sentenced to concurrent terms of three months in jail for the marijuana conviction and two years' imprisonment for each of the felony-firearm convictions, a consecutive term of sixteen to twenty-four months' imprisonment for the drug house conviction, and a consecutive term of two to twenty years' imprisonment for the cocaine conviction. Defendant appeals as of right. We affirm.

I

Defendant first argues that he was denied a fair trial because of the admission at trial of prejudicial drug profile testimony. We disagree.

Because defendant failed to object below, this Court will review this issue only if there has been a plain error that could have been decisive of the outcome. *People v Grant*, 445 Mich 535, 554; 520 NW2d 123 (1994). This Court first addressed the issue of the admissibility of drug profile evidence in Michigan in *People v Hubbard*, 209 Mich App 234; 530 NW2d 130 (1995), and held that such evidence is inadmissible as substantive evidence of a defendant's guilt. *Id.* at 241-242; see also *People v Humphreys*, ___ Mich App ___, ___ NW2d ___ (Docket No. 184583, issued 2/11/97), slip op p

2. Therefore, the central issue in this case is whether drug profile testimony was admitted as substantive evidence of defendant's guilt. We conclude that it was not.

The expert witness, a police officer, testified to the significance of certain items taken from defendant's apartment such as two pagers, a scanner, a small scale, and a revolver. The witness stated that although each of these things may be innocently owned, they became significant to the investigation when considered together with the amounts of money and drugs found in defendant's possession. Although the outcome in *Hubbard, supra*, was decided based on the rule of inadmissibility of drug profile evidence, this Court noted that "courts generally have allowed expert testimony explaining the significance of seized contraband or other items of personal property." *Id.* at 239, citing, among other cases, *People v Ray*, 191 Mich App 706; 479 NW2d 1 (1991). Accordingly, we conclude that the admission of the expert testimony to explain the significance of the items taken into evidence did not result in plain error that affected the outcome of defendant's case.

II

Defendant argues that he was denied the effective assistance of counsel because his trial counsel failed to object when the prosecution (1) erroneously elicited inadmissible hearsay evidence; (2) erroneously vouched for an informant's credibility; (3) impermissibly shifted the burden of proof to defendant in closing argument, and; (4) erroneously introduced inadmissible drug profile testimony. Again, we disagree.

In order to prevail on a claim of ineffective assistance of counsel, defendant must show that his trial counsel's performance was deficient as measured against prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Specifically, defendant first claims that counsel erred in failing to object to a police officer's testimony concerning an informant's out-of-court statements regarding the informant's presence at defendant's residence within 36 hours of the search of the premises, his observation of drugs and guns in defendant's home, and observation of defendant selling cocaine. This Court's review of this issue is limited to the facts contained on the record. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). In this case, even assuming error in counsel's failure to object to the admission of the alleged hearsay testimony, we cannot say that there is a reasonable probability that, but for the error, the result of the proceeding would have been different where the challenged hearsay evidence was essentially cumulative of other evidence admitted into the case.

Next, defendant argues that counsel was ineffective for failing to object to the prosecutor's argument that vouched for the credibility of the informant. We disagree. The prosecutor's argument was properly based upon evidence admitted without objection at trial concerning an issue raised by defense counsel, i.e., the credibility of the informant. Because the prosecutor's argument was proper, defense counsel did not err in failing to object to the argument.

Next, defendant argues that counsel was ineffective for failing to object to the prosecutor's statements in closing argument that defendant failed to produce corroborating witnesses. However, this Court has held that where a defendant takes the stand and testifies in his own behalf, the prosecutor may comment on the defendant's failure to produce corroborating witnesses. *People v Jones*, 134 Mich App 371, 373; 350 NW2d 885 (1984). Because defendant testified that some of the cocaine found in his possession belonged to someone else, it was not error for the prosecutor to comment in closing on defendant's failure to produce corroborating witnesses. Therefore, defense counsel's failure to object to proper inquiries by the prosecutor cannot be said to constitute deficient trial strategy, and defendant was not denied effective assistance of counsel on that basis.

Finally, concerning defendant's argument regarding drug profile testimony, we concluded in Issue I, *supra*, that the challenged testimony was admissible for the purpose of explaining the significance of items seized as evidence. Therefore, it cannot be said that defense counsel's failure to object to properly admissible evidence constituted deficient trial strategy.

Affirmed.

/s/ Joel P. Hoekstra

/s/ William B. Murphy

/s/ Michael R. Smolenski