

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

XAVIER LAMONTE LIBBETT,

Defendant-Appellant.

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UNPUBLISHED

February 4, 2000

No. 216096

Kent Circuit Court

LC No. 97011565 FH

Before: Zahra, P.J., and Kelly and McDonald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v), the lesser included offense of the charged crime, possession with intent to deliver less than 50 grams cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). He was sentenced as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to 2 to 15 years' imprisonment, to be served consecutively with the sentence that defendant was serving at the time and for which he was on parole, and to pay \$60 to the Crime Victim's Rights Fund. Defendant appeals as of right. We affirm.

This case arose out of a traffic stop which occurred in Grand Rapids during which an officer found crack cocaine under the driver's seat of the borrowed car driven by defendant. At trial, defendant's theory was that the cocaine was not his and he knew nothing about it.

Defendant contends that because there was nothing to connect defendant to the cocaine, the prosecution failed to present evidence sufficient to prove beyond a reasonable doubt that defendant possessed it. When reviewing the sufficiency of the evidence, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found evidence sufficient to prove the essential elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992).

To be found guilty of possession of cocaine, the accused must knowingly and intentionally possess such. MCL 333.7403(1); MSA 14.15(7403)(1). In *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998), we explained:

A person need not have physical possession of a controlled substance to be found guilty of possessing it. Possession may be either actual or constructive, and may be joint as well as exclusive. The essential question is whether the defendant had dominion or control over the controlled substance. A person's presence at the place where the drugs are found is not sufficient, by itself, to prove constructive possession; some additional link between the defendant and the contraband must be shown. However, circumstantial evidence and reasonable inferences arising from the evidence are sufficient to establish possession. [Citations omitted.]

The prosecution presented evidence that defendant, the sole occupant of the car, was seen after midnight driving from an area near a party store parking lot well known for street level drug transactions. A police officer observed defendant speeding and, after the car pulled to the side of the road without being signaled by the officer to do so, the officer witnessed defendant leaning toward the floor with his left side. While searching the car, another officer found suspected cocaine in a baggie in the folds of a plastic bag under the driver's seat and a razor blade in the pocket of a shirt on the driver's seat of the car. A field test of the suspected cocaine showed positive and a crime scene technician confirmed that the substance was cocaine weighing 1.49 grams. Viewing this evidence in a light most favorable to plaintiff, we find the evidence sufficient to support a finding beyond a reasonable doubt that defendant knowingly or intentionally possessed the cocaine found in the borrowed car.

Defendant next argues that he was denied a fair trial because, over his objection, the trial court permitted Officer Dirk VanDoorne to testify as an expert on the use and sale of cocaine. Specifically, defendant argues that the trial court erred when it allowed VanDoorne's testimony about the characteristics of drug traffickers to be used as substantive proof of defendant's guilt and that such an inference -- that defendant was a drug dealer because he fit the drug dealer profile -- is impermissible. "[T]he determination regarding the qualification of an expert and the admissibility of expert testimony is within the trial court's discretion. An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification for the ruling made." *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999), citing *People v Beckley*, 434 Mich 691, 711, 456 NW2d 391 (1990).

The *Murray* Court explained that "there is often a very fine line between the probative use of [drug] profile evidence as background or modus operandi evidence and its prejudicial use as substantive evidence," and that the admissibility such evidence must be determined on a case by case basis. *Id.*, 54-55. The *Murray* Court noted the prejudicial nature of drug profile evidence containing otherwise innocuous characteristics, such as use of pagers or possession of razor blades. The profile may suggest that innocuous events indicate criminal activity. *Id.*, 52-53.

The *Murray* Court identified factors which may be considered when determining admissibility of drug profile evidence. The reason for the admission of the profile testimony must be for a proper purpose. The profile, without more, should not normally allow the jury to infer the defendant's guilt. Because the focus is on the jury's use of the profile evidence, the court must generally instruct the jury on the proper and limited use of the testimony. Finally, the expert should not express an opinion

whether the defendant is guilty or imply guilt through comparison of the defendant's characteristics to the profile. *Id.*, 56-57.

In controlled substance cases, a prosecutor may use expert testimony from police officers to aid the jury in understanding evidence. *People v Ray*, 191 Mich App 706, 707; 479 NW2d 1 (1991). VanDoorne was called to give drug profile testimony, and to assist the jury in understanding the significance of the physical evidence. Applying the factors enumerated by the *Murray* Court, this evidence was admissible to aid the jury in understanding drug trafficking and the significance of the form and size of the cocaine chunks.

VanDoorne testified regarding defendant's lack of money on his person and stated that the money could have been spent on this particular purchase. He also stated that it is not wise to keep one's money and drugs together because of the possibility of being "ripped off" or the police confiscating both the money and drugs. These statement linked the innocuous characteristic of not carrying cash to defendant's being a drug user or dealer. Even if some of VanDoorne's testimony was improper, the error was harmless. The Michigan Supreme Court recently explained that, when reviewing preserved, nonconstitutional error, there is a presumption that such is harmless, "which presumption may be rebutted by a showing that the error resulted in a miscarriage of justice." *People v Lukity*, 460 Mich 484, 493; 596 NW2d 607 (1999). "A preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *Id.*, 495-496. Because VanDoorne's testimony was presented to aid the jury with regard to drug trafficking and the jury did not convict defendant of that offense, such testimony was not prejudicial and outcome determinative. Moreover, the evidence of defendant's leaning forward to place something under the seat, the finding of cocaine there, and the razor blade in defendant's shirt pocket all pointed to defendant's guilt with regard to possession alone. Thus, any error was harmless.

Finally, defendant argues that prosecutorial misconduct deprived him of a fair and impartial trial where, during rebuttal argument, the prosecution told the jurors, among other things, that the defense was trying to "trick" them. Because defendant failed to object at trial to any of the alleged misconduct, our review is precluded unless a curative instruction could not have eliminated the prejudicial effect of the prosecutor's remarks, or a miscarriage of justice would result from the failure to review the issue. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Messenger*, 221 Mich App 171, 179; 561 NW2d 463 (1997). Upon review of defendant's allegations of prosecutorial misconduct and the prosecutor's actual comments read in context, we conclude that any misconduct that may have occurred was not so extreme that an instruction could not have cured any resultant prejudicial effect. See *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996). Therefore, we find no miscarriage of justice.

Affirmed.

/s/ Brian K. Zahra  
/s/ Michael J. Kelly  
/s/ Gary R. McDonald