

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH LEE THOMAS,

Defendant-Appellant.

UNPUBLISHED

July 7, 2000

No. 211456

Genesee Circuit Court

LC No. 97-001629 FH

Before: McDonald, P.J., and Gage and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to a term of five to twenty-five years' imprisonment. Defendant appeals as of right, and we affirm.

I

Defendant first contends that he was denied his state and federal constitutional rights to confrontation and a fair trial when Flint Police Officer Harlon Green was allowed to testify that a confidential informant told him that defendant was selling cocaine from Flint address 734 East McClellan. Because defendant did not object to this testimony before the trial court, the issue is not preserved for appellate review. To avoid forfeiture of the unpreserved issue, defendant must demonstrate plain error that was outcome determinative, or error that falls under the category of cases where prejudice is presumed or reversal is automatic. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994).

We find that defendant has established plain error arising from Officer Green's testimony concerning information provided by a confidential informant. *People v Wilkins*, 408 Mich 69; 288 NW2d 583 (1980). Even assuming that Officer Green's testimony regarding the content of the confidential informant's tip was not hearsay because it was not offered to prove the truth of the matter asserted (i.e., that defendant was selling cocaine at the residence in question), but only to explain why the police arrived at 734 East McClellan, the testimony was not relevant. As in *Wilkins*, Officer

Green's state of mind was not a "fact . . . of consequence to the determination of the [instant] action." MRE 401; *Wilkins, supra* at 73. Moreover, even if the testimony did have some limited relevancy as background information, the probative value of the evidence was substantially outweighed by the danger of unfair prejudice because the testimony "provided the jury with the content of an unsworn statement of an informant who was not produced at trial" and "pointed to the defendant's guilt of the crime charged." MRE 403; *Wilkins, supra* at 74.

The admission of Officer Green's testimony also violated defendant's constitutional rights of confrontation. US Const, Am VI; Const 1963, art 1, § 20. In *People v Tanner*, 222 Mich App 626; 564 NW2d 197 (1997), this Court held that the defendant's right to confront one of his accusers was violated when the trial court allowed into evidence an affidavit of a police officer containing unsworn statements and information provided by a confidential informant. In this case, Officer Green's testimony about information provided by the confidential informant likewise violated defendant's right of confrontation because the informant was never identified or produced at trial for cross examination. *Id.* at 632.

Notwithstanding that the admission of Officer Green's testimony regarding the information conveyed by the confidential informant constituted plain error, we find that reversal is not required. In a case involving forfeited plain error, whether constitutional or nonconstitutional, a reviewing court should reverse only when "the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of [the] judicial proceedings." *Carines, supra* at 774.

Here, the record does not indicate that defendant is actually innocent of the crime charged. To the contrary, overwhelming evidence established that defendant possessed a pill vial containing twenty-five rocks of cocaine inside his jacket pocket and discarded the jacket while being chased by the police. Furthermore, defendant himself admitted at trial that he previously sold drugs from 734 East McClellan. In light of this evidence, we cannot conclude that the error in question seriously affected the fairness, integrity or public reputation of these judicial proceedings. Thus, reversal is unwarranted. *Carines, supra*.

II

Defendant next argues that his state and federal rights to due process were violated when the prosecutor introduced evidence of his past bad acts. Defendant did not object to the challenged testimony at trial, and therefore failed to preserve this issue for appellate review. Accordingly, we again review the issue for plain error affecting defendant's substantial rights. *Carines, supra* at 763.

We already have discussed Officer Green's testimony regarding the statement of the confidential informant and concluded that any error arising from admission of the informant's statement does not warrant reversal. Furthermore, no plain error occurred when defense counsel elicited, on cross examination of Flint Police Officer William Meyer, that Meyer knew defendant "from a raid." Indeed, defendant himself acknowledged that the police conducted a raid while he lived at 734 East McClellan. Next, irrespective of whether Sergeant McLellan's recounting of defendant's statement that up until two months ago he formerly sold cocaine from 734 East McLellan constitutes proper evidence of prior acts

offered for a noncharacter purpose (i.e., to prove defendant's knowledge or intent), MRE 404(b); *People v Crawford*, 458 Mich 376, 389-397; 582 NW2d 785 (1998), we find no error requiring reversal in light of defendant's own testimony at trial that until approximately two months before his instant arrest he sold cocaine from 734 East McLellan, and the police officers' overwhelming testimony concerning defendant's possession of the vial containing twenty-five crack rocks. *People v Smith*, 456 Mich 543, 554-555; 581 NW2d 654 (1998). Finally, no plain error arose from Sergeant McLellan's reference to "other information" as his basis for believing defendant's admission to previously selling drugs because this statement references no prior bad acts by defendant.

III

Defendant also claims that his state and federal rights to due process were violated when the prosecutor introduced Sergeant McLellan's expert opinion that defendant intended to deliver the drugs in his possession. According to defendant, Sergeant McLellan's opinion testimony represented impermissible drug profile evidence. Because defendant also failed to object to this opinion testimony at trial, and thus failed to preserve this issue for appellate review, we again review for outcome determinative plain error. *Carines*, *supra* at 774.

In *People v Murray*, 234 Mich App 46, 56; 593 NW2d 690 (1999), this Court clarified that while drug profile evidence is not admissible as substantive evidence of a defendant's guilt, it may be admissible when offered to assist "the jury in intelligently understanding the evidentiary backdrop of the case, and the modus operandi of drug dealers." In *Murray*, this Court set forth a variety of factors to consider "in distinguishing between the appropriate and inappropriate use of drug profile evidence." *Id.* at 56-58. In this case, while the trial court did not abuse its discretion in allowing Sergeant McLellan to testify as an expert in the sale and distribution of cocaine in the Flint area, Sergeant McLellan offered testimony beyond simple background or modus operandi evidence. Sergeant McLellan did not "stop short of [provid]ing profile testimony that purports to comment directly or substantively on a defendant's guilt," *id.* at 56, but specifically opined that defendant had the intent to deliver the drugs because he satisfied certain characteristics of a drug dealer. This testimony "embraced the ultimate issue of defendant's guilt and thus was inadmissible." *Id.* at 59.

Nonetheless, reversal is not required on the basis of this unpreserved issue because, as previously discussed, no indication exists in the record that defendant is actually innocent of the charged crime. Moreover, in light of the properly admitted evidence of defendant's guilt, the error in question did not seriously affect the fairness, integrity, or public reputation of judicial proceedings.¹ *Carines*, *supra*.

IV

¹ We note that at trial defendant did not challenge the intent element of the instant charge, but instead completely denied possessing the crack. Even though Sergeant McLellan's testimony constituted improper drug profile evidence, defendant's intent to deliver reasonably can be inferred from the quantity of crack rocks in his possession.

Defendant additionally contends that he was denied his right to a fair trial on the basis of prosecutorial misconduct. Defendant failed to preserve this issue for appellate review by objecting at trial to the alleged instances of misconduct. Because defendant has not (1) demonstrated that the alleged instances of misconduct were improper, *People v Schutte*, ___ Mich App ___; ___ NW2d ___ (2000), slip op at 4; *People v Kennebrew*, 220 Mich App 601, 607-608; 560 NW2d 354 (1996), let alone that they constituted plain error, *Carines, supra*, or (2) shown that the prejudicial effect of any allegedly improper comments could not have been cured by a timely instruction, appellate relief on the basis of this issue is foreclosed. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

V

Lastly, we reject defendant's claim that he was denied the effective assistance of counsel. Although we agree that trial counsel's performance fell below an objective standard of reasonableness under prevailing professional norms given counsel's failure to object to Officer Green's hearsay testimony regarding the confidential informant's tip and the inadmissible drug profile testimony of Sergeant McLellan, no reasonable probability exists that, but for counsel's errors, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996); *People v Poole*, 218 Mich App 702, 717-718; 555 NW2d 485 (1996).

We reiterate that despite the errors that occurred during defendant's trial, we cannot conclude in light of the properly admitted evidence that defendant is actually innocent, or that the errors "seriously affected the fairness, integrity, or public reputation of [the] judicial proceedings." *Carines, supra*.

Affirmed.

/s/ Gary R. McDonald
/s/ Hilda R. Gage
/s/ Michael J. Talbot