

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK I. RICHARDSON,

Defendant-Appellant.

UNPUBLISHED

February 9, 2001

No. 214180

Oakland Circuit Court

LC No. 94-135060-FH

Before: Cavanagh, P.J., and Saad and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his convictions by a jury of conspiracy to deliver more than 225 but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii), possession with intent to deliver more than 225 but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii), possession of an altered driver's license, MCL 257.324; MSA 9.2024, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He also appeals by right from his conviction following a bench trial of possession of a firearm by a convicted felon, MCL 750.224f; MSA 28.421(6). The trial court sentenced him to consecutive terms of twenty to sixty years' imprisonment for the conspiracy conviction, twenty to sixty years' imprisonment for the cocaine possession conviction, and two years' imprisonment for the felony-firearm conviction. These consecutive sentences are to be served concurrently with ninety days' imprisonment for the possession of an altered driver's license conviction and three to ten years' imprisonment for the felon-in-possession-of-a-firearm conviction. We affirm.

Defendant argues that the trial court's denial of defense counsel's motions¹ to withdraw deprived him of a fair trial. We review a trial court's decision regarding a motion to withdraw for an abuse of discretion. See *People v Echavarria*, 233 Mich App 356, 369; 592 NW2d 737 (1999). An abuse of discretion exists when an unbiased person, considering the facts on which the trial court relied, would conclude that there was no justification for the ruling made. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997).

¹ Defense counsel made two motions to withdraw, one on the first day of trial and one on the second day of trial.

When reviewing a trial court's denial of a defense attorney's motion to withdraw, this Court considers the following factors: (1) whether the defendant was asserting a constitutional right, (2) whether the defendant had a legitimate reason for asserting the right, (3) whether the defendant was negligent in asserting his right, (4) whether the defendant was merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision. *Echavarria, supra* at 369.

With respect to factor 1, defendant argues that the trial court's denial of counsel's motions to withdraw deprived him of his Sixth Amendment right to counsel because defendant and his codefendant, Granville Massey, were represented by attorneys associated in the practice of law. Accordingly, defendant asserted a constitutional right. With respect to factor 2, defendant arguably had a legitimate reason for asserting the right. The remaining three factors, however, weigh against defendant.

With respect to factors 3 and 4, defense counsel waited until after jury selection to move to withdraw as defendant's attorney. The trial court could reasonably have concluded that at that late stage in defendant's trial, the motions were merely a delay tactic. See *id.* at 369-370. With respect to factor 5, defendant has not demonstrated prejudice resulting from the trial court's decision. Massey testified that (1) he was not aware that the glove compartment of the vehicle in question contained cocaine, and (2) he did not aid defendant in attempting to deliver the cocaine to Katrice Garland, the confidential informant. This testimony *aided* defendant in the defense of the conspiracy charge. Massey and his attorney also stated, however, that the cocaine in the glove compartment belonged to defendant and that Massey purchased approximately one ounce of crack cocaine from defendant before getting into the vehicle. At first blush, these statements seem antagonistic to defendant's defense. We note, however, that defendant's attorney did not even argue that the cocaine in the glove compartment did not belong to defendant. Given that the jury heard audio tapes of defendant and Garland arranging the drug transaction, counsel could not have made an earnest argument that the drugs in the vehicle did not belong to defendant. Accordingly, counsel focused on defending the conspiracy charge. Massey's testimony aided defendant in this effort by rebutting the notion that Massey conspired with defendant to deliver the cocaine. Under these circumstances, defendant has not demonstrated prejudice. See *id.* at 369.

Our analysis of the factors from *Echavarria* leads us to conclude that the trial court did not abuse its discretion by denying defense counsel's motions to withdraw. Indeed, we cannot say that there was no justification for the trial court's decision. See *Orzame, supra* at 557. As emphasized in *People v Lafay*, 182 Mich App 528, 530; 452 NW2d 852 (1990), and *People v Kirk*, 119 Mich App 599, 603; 326 NW2d 145 (1982), reversal for failure to allow counsel to withdraw is not required absent a showing of an actual conflict of interest that affected the adequacy of the representation. We find no actual conflict of interest in this particular case that affected the adequacy of the representation. We note, however, that courts should proceed with caution when considering whether codefendants may be represented by a single law firm.

Defendant also contends that the trial court failed to follow the procedure outlined in MCR 6.005(F). MCR 6.005(F) requires a trial court to inquire into a potential conflict of interest whenever two or more defendants who have been jointly charged are represented by retained

attorneys associated in the practice of law. Although the trial court did not follow this procedure, the failure to adhere to MCR 6.005(F), in and of itself, does not constitute reversible error. *Lafay, supra* at 531. Given that no actual conflict of interest existed which affected the adequacy of the representation, the trial court's failure to follow MCR 6.005(F) did not constitute reversible error. *Id.* at 530-531; *Kirk, supra* at 603.

Next, defendant argues that the trial court's denial of his motion for a separate trial deprived him of a fair trial. We review a trial court's decision regarding a motion for severance for an abuse of discretion. *People v Etheridge*, 196 Mich App 43, 53; 492 NW2d 490 (1992). An abuse of discretion exists when an unbiased person, considering the facts upon which the trial court relied, would conclude that there was no justification or excuse for the decision. *Orzame, supra* at 557.

Defendants do not have an absolute right to separate trials, and there is a strong policy favoring joint trials in the interests of justice, judicial economy, and administration. *People v Harris*, 201 Mich App 147, 152; 505 NW2d 889 (1993); *Etheridge, supra* at 52. When defenses are antagonistic, however, severance should be granted. *Harris, supra* at 152. Defenses are antagonistic if it appears that a codefendant may testify to exculpate himself and to incriminate the defendant. *Id.* at 153. In such cases, the defendant must make an affirmative showing that a substantial right will be prejudiced in a joint trial. *Id.*; *Etheridge, supra* at 53. Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer or proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is necessary to rectify the potential prejudice. *People v Cadle (On Remand)*, 209 Mich App 467, 469; 531 NW2d 761 (1995). Furthermore, to warrant severance, the defenses must be mutually exclusive or irreconcilable and not merely inconsistent. *Id.*

Severance was not mandated under MCR 6.121(C) because defendant failed to submit an affidavit or make an offer of proof demonstrating that his substantial rights would be prejudiced and that severance was necessary to rectify the potential prejudice. *People v Perez-DeLeon*, 224 Mich App 43, 59; 568 NW2d 324 (1997); *Cadle, supra* at 469. Furthermore, given our previous finding that defendant's and Massey's defenses were not mutually exclusive, the trial court did not abuse its discretion by denying defendant's motion for a separate trial. Indeed, we cannot say that there was no justification for the trial court's decision. See *Orzame, supra* at 557.

Defendant next argues that his conspiracy conviction was against the great weight of the evidence. Defendant preserved this issue for appeal by moving for a new trial in the lower court. *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997). We review a trial court's grant or denial of a motion for a new trial for an abuse of discretion. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). An abuse of discretion exists when the trial court's denial of the motion was manifestly against the clear weight of the evidence. *Id.*

A verdict is against the great weight of the evidence only if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow it to stand. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998); *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). Furthermore, a verdict may be vacated only if it is not reasonably supported by the evidence and is more likely attributable to causes outside the record, such as

passion, prejudice, sympathy, or some extraneous influence. *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993).

The evidence presented at trial did not clearly weigh in defendant's favor. The evidence showed that defendant negotiated to deliver, and intended to deliver, nine ounces of crack cocaine to Garland in exchange for \$6,000. When it was agreed that the sale would occur at Garland's residence, defendant stated, "We'll be there." His response indicated that he intended to bring another person with him to complete the transaction. Massey accompanied defendant and admitted that he knew that the package involved contained crack cocaine. While at defendant's house and en route to Garland's residence, defendant spoke with Garland on his cellular telephone in Massey's presence. Defendant's vehicle was stopped after it had turned onto Garland's street. Approximately eight ounces of crack cocaine were recovered from defendant's glove compartment and approximately one ounce of crack cocaine was recovered from Massey's shirt pocket. These amounts, added together, equaled the approximate amount of the intended sale, and the crack cocaine in both locations was the same color, texture, size, and warmth. A small scale and \$1,800 were also confiscated from Massey. Additionally, a gun was recovered from the glove compartment, along with the eight ounces of crack cocaine, and both defendant and Massey had access to the glove compartment. Therefore, reasonable jurors could have inferred from the circumstances, acts, and conduct of both defendant and Massey that they conspired to deliver the cocaine to Garland. See *People v Justice (After Remand)*, 454 Mich 334, 347; 562 NW2d 652 (1997). The evidence does not preponderate so heavily against the verdict such that it would be a miscarriage of justice to allow it to stand, and the trial court therefore did not abuse its discretion by denying defendant's motion for a new trial. *Lemmon, supra* at 642; *Gadomski, supra* at 28.

Next, defendant argues that the admission of improper drug profile evidence deprived him of a fair trial. We review a trial court's evidentiary decisions for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion exists when an unbiased person, considering the facts upon which the trial court relied, would conclude that there was no justification for the decision. *People v Williams*, 240 Mich App 316, 320; 614 NW2d 647 (2000).

Drug profile evidence is essentially a compilation of otherwise innocuous characteristics exhibited by many drug dealers. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). These characteristics may not necessarily be connected to or inherently part of the drug trade and may apply equally to innocent individuals as well as to drug traffickers. *Id.* at 53. Such evidence is problematic and is inherently prejudicial to a defendant because it may suggest that innocuous characteristics are indicative of criminal activity. *Id.* For this reason, drug profile evidence is not admissible as substantive evidence of guilt. *Id.*; *People v Hubbard*, 209 Mich App 234, 241; 530 NW2d 130 (1995). When expert testimony regarding drug trafficking is admitted, the expert may not move beyond an explanation of the typical characteristics of drug dealing and testify that the defendant is guilty merely because he fits a drug profile. *Murray, supra* at 54. For drug profile evidence to be admissible: (1) it must be offered as background or modus operandi evidence and not as substantive evidence of the defendant's guilt, (2) something more than drug profile evidence must be admitted to prove a defendant's guilt, (3) the trial court must clarify for

the jury the appropriate and inappropriate uses of the drug profile evidence, and (4) the expert should not express an opinion, based on a profile, that a particular defendant is guilty, nor should he compare the defendant's characteristics to the profile in such a way that guilt is necessarily implied. *Williams, supra* at 320-321; *Murray, supra* at 56-57.

The record shows that the drug profile evidence was admitted as substantive evidence of defendant's guilt on the conspiracy charge. As in *Hubbard, supra* at 242, the prosecutor sought to admit the evidence to explain the particular behavior of defendant and Massey. Expert witness Michael Brown of the Drug Enforcement Administration did not testify in general terms; instead, he compared the circumstances of the case to a specific drug profile. Brown testified that in his experience, if two people are involved in delivering drugs, each person has a separate role, and further testified that this is what he found in this case. While Brown did not directly testify that defendant was guilty of conspiracy, he compared the circumstances of this case to the drug profile in such a way that guilt was necessarily implied. See *Williams, supra* at 321, and *Murray, supra* at 57. The prosecutor argued the profile evidence as evidence of defendant's guilt in her closing argument when she referred to defendant's and Massey's roles in the attempted sale. See *Hubbard, supra* at 242-243. Brown's testimony did not constitute background or modus operandi evidence, since the prosecutor asked Brown specifically about the circumstances of this case and how those circumstances compared to a particular drug profile. Furthermore, the trial court failed to give a cautionary instruction about the proper uses of the drug profile evidence. See *Williams, supra* at 320-321, *Murray, supra* at 57, and *Hubbard, supra* at 243. Consequently, the trial court erred by allowing the drug profile evidence at trial.

Although the trial court improperly admitted the drug profile evidence, reversal is unwarranted. Defense counsel did not object to the introduction of the drug profile evidence at trial.² Unpreserved claims of error are reviewed under the "plain error rule." *People v Carines*, 460 Mich 750, 763-767, 774; 597 NW2d 130 (1999). In order to avoid forfeiture under the plain error rule, a defendant must show that: (1) an error occurred; (2) the error was plain, i.e., clear or obvious; and (3) the plain error affected substantial rights. *Id.* at 763. Establishing that the plain error affected substantial rights requires a showing of prejudice such that the error affected the outcome of the lower court proceedings. *Id.* Reversal is warranted only when the plain, forfeited error results in the conviction of an actually innocent defendant or when the error seriously affects the fairness, integrity, or public reputation of judicial proceedings irrespective of the defendant's guilt or innocence. *Id.* at 763-764.

Even conceding that the admission of the drug profile evidence constituted plain error, defendant cannot establish that he was prejudiced to the extent that the error affected the outcome of the proceeding. *Id.* at 763-767, 774. For the reasons previously expressed in this opinion, there existed overwhelming evidence that defendant and Massey conspired to deliver cocaine notwithstanding the improper drug profile evidence. Accordingly, defendant has not proven that the error affected the outcome of the proceedings, and reversal is not required. *Id.* at 763-764.

² While codefendant's counsel objected to the admission of the testimony, neither defendant nor his counsel objected.

Even assuming, arguendo, that defendant had preserved this argument for appeal, we would nonetheless find no basis for reversal. As stated in *Murray, supra* at 64, the proper standard for assessing the impact of improperly-admitted testimony is whether it is “highly probable” that the testimony did not affect the jury’s verdict. In light of the properly-admitted evidence supporting defendant’s convictions, we indeed find it “highly probable” that the drug profile testimony did not affect the jury’s verdict.

Next, defendant argues that the trial court improperly re-instructed the jury on the intent element required for conspiracy. Specifically, defendant contends that the trial court should have instructed the jury that both defendants had to have knowledge of the amount of cocaine to be delivered in order to be convicted of conspiracy. Jury instructions are to be read as a whole rather than extracted piecemeal to establish error, and even if the instructions are somewhat imperfect, no error exists as long as the instructions fairly presented the issues to be tried and sufficiently protected the defendant’s rights. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995); *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994).

This issue was recently decided in *People v Mass*, 238 Mich App 333; 605 NW2d 322 (1999), lv gtd 462 Mich 877; 613 NW2d 722 (2000).³ In *Mass, supra* at 337, this Court held that while proof of the specific intent to deliver a controlled substance is required in order to establish a conspiracy, the specific intent requirement does not apply to the quantity of the substance. Therefore, because proof of the specific intent to deliver a certain amount of a controlled substance is not required to establish a conspiracy, the trial court did not err in its re-instruction to the jury. *Id.* at 337, 339.

Next, defendant argues that Drug Enforcement Administration Special Agents Brown and Steven Mitchell committed perjury at trial. The elements of perjury are: (1) the administration to the witness of an oath authorized by law, by competent authority; (2) an issue or cause to which the facts sworn are material; and (3) willful false testimony regarding those facts. *People v Kozyra*, 219 Mich App 422, 428-429; 556 NW2d 512 (1996); *People v Honeyman*, 215 Mich App 687, 691; 546 NW2d 719 (1996). A materially false statement is one that could have affected the course or outcome of the proceeding. *Kozyra, supra* at 432; *Honeyman, supra* at 692. Furthermore, wilful false testimony cannot be proven merely by contradicting the witness’ sworn statement; instead, evidence of circumstances strongly corroborating the contradiction must be presented. *Kozyra, supra* at 429; *Honeyman, supra* at 692.

Defendant contends that Brown and Mitchell perjured themselves by testifying that Garland lived on Willowick Street. In support of his argument, defendant references a petition and order for probation department investigations, in which Garland’s address is noted as 29375 Sharon Lane. We note, however, that Garland’s residential address was not a material issue that would have affected the outcome of the proceedings. See *Kozyra, supra* at 432, and *Honeyman, supra* at 692. Furthermore, perjury requires the submission of evidence that strongly corroborates the falsity of a witness’ sworn statement. *Kozyra, supra* at 429; *Honeyman, supra*

³ The fact that the Supreme Court has granted leave in *Mass* does not diminish its precedential value. See MCR 7.215(C)(2).

at 692. The petition and order for probation department investigations does not, by itself, strongly corroborate that Brown and Mitchell presented perjured testimony. Moreover, there is no evidence that Garland was not actually living at the Willowick residence on the date that the transaction was to occur. Consequently, there is no evidence suggesting that Brown or Mitchell committed perjury at defendant's trial.

Defendant's final issue on appeal is that the prosecutor committed misconduct by allowing perjured testimony and false evidence to be presented at trial. We review claims of prosecutorial misconduct to determine whether a defendant was denied a fair and impartial trial. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

Defendant contends that the prosecutor committed misconduct by allowing Brown and Mitchell to falsely testify that Garland lived on Willowick Street. Given our previous holding, this contention is meritless. Defendant also contends that the prosecutor committed misconduct by submitting forensic chemist Roger Fuelster's allegedly false laboratory analysis report as evidence and by allowing him to testify falsely at trial. Fuelster testified that he examined the mixture seized by the police from the vehicle in question and found it to be a mixture containing cocaine and weighing over 225 grams. Fuelster's laboratory report corroborated this testimony. Neither the record nor defendant's argument on appeal supports a finding that this pivotal information was false. Accordingly, defendant cannot show that he was deprived of a fair trial by the introduction of Fuelster's testimony and report. See *Avant*, *supra* at 508.

Affirmed.

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