STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 20, 2001
v	No. 217595 Wayne Circuit Court
DEREK HUSTON[1], Defendant-Appellant.	LC No. 98-007126

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

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver less than fifty grams of a controlled substance, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and was sentenced to three to twenty years' imprisonment. Defendant now appeals as of right. We reverse.

Undercover officer John Anderson testified that he observed defendant and another individual, Lamont Duncan, standing together near the corner of St. Paul and Canton streets in Detroit. Anderson indicated that he saw two drug transactions occur. With regard to the first transaction, Anderson noted that a pedestrian approached the men and gave money to Duncan and then received a small plastic baggie from Duncan. Anderson stated that defendant was "just standing there" during the transaction; defendant did not participate in it. Anderson explained that in the second transaction, a car stopped on the street near the two men, defendant spoke with the driver, and defendant accepted money from the driver. Anderson indicated that defendant put the money in his pocket and then walked over to Duncan, received a "tiny item" from Duncan, and gave it to the driver.

Anderson testified that both defendant and Duncan were arrested minutes later. Officer Gary Jones testified that forty-seven packets of crack cocaine and $914 were seized from Duncan. Officer Andrew White testified that defendant had $49 in his pocket but was not

[1] Defendant's actual name is Aaron Safford. The case caption reads differently because defendant initially identified himself as Derek Huston when he was arrested. In fact, Derek Huston is defendant's cousin. Mr. Huston is not involved in this case.

carrying any drugs. Although defendant raises several issues on appeal, we will address one dispositive issue.

Defendant contends that the court erred when it admitted impermissible drug profile testimony. We agree.

A police officer may testify as an expert on drug-related law enforcement by virtue of his training and experience. See *People v Williams (After Remand)*, 198 Mich App 537, 542; 499 NW2d 404 (1993). Expert testimony on drug profile evidence is admissible to explain the significance of seized contraband or to help the jury understand information that is not within the knowledge of an ordinary lay person. See *People v Griffin*, 235 Mich App 27, 44-45; 597 NW2d 176 (1999).

However, drug profile evidence is not admissible as substantive evidence of guilt. *People v Hubbard*, 209 Mich App 234, 241; 530 NW2d 130 (1995). Drug profile testimony is admissible to educate a jury about the general characteristics of drug trafficking, but it may not be admitted to "impermissibly link[] an innocuous drug profile characteristic to [the] defendant." *People v Murray*, 234 Mich App 46, 63; 593 NW2d 690 (1999).

In *Murray*, we recognized that many drug profile characteristics "could apply equally to innocent individuals as well as to drug dealers," and therefore, the use of profile evidence must be carefully presented. *Id*. at 53. We identified four factors which courts may use to distinguish between proper and improper drug profile evidence. First, the evidence must be offered for a proper purpose, that is, to provide the jury with helpful background or modus operandi information. Second, "the profile, without more, should not normally enable a jury to infer the defendant's guilt." *Id*. at 57. That is, "the pieces of the drug profile by themselves should not be used to establish the link between innocuous evidence and guilt." *Id*. Third, the court must clarify the proper use of such evidence, typically through a limiting instruction which directs the jury not to use the profile information as substantive evidence of guilt. Fourth, the expert witness should not express an opinion on the defendant's guilt, "nor should he expressly compare the defendant's characteristics to the profile in such a way that guilt is necessarily implied." *Id*.

In this case, three police officers testified as lay witnesses about drug trafficking and their observations related to the instant case. Some of this testimony expressly compared defendant to the drug profile information in such a way that guilt was necessarily implied.

First, all three officers testified that defendant was standing with Duncan at or near the corner of St. Paul and Canton streets, in a known drug trafficking area. While this general testimony may not be impermissible, Officer Jones' testimony went further. He said: "We get ongoing complaints of narcotic *activity on the corner and around that corner*." Over objection, Jones repeated the fact that he had been to the area numerous times and that it was a known drug trafficking area. Jones' testimony identified the very corner of St. Paul and Canton streets, where defendant was arrested, as a known drug trafficking area. This was not simply innocuous drug profile information. As in *Murray*, Jones' testimony directly linked defendant to a specific site where previous drug activity had occurred. *Murray*, *supra* at 63. We have said that it is prejudicial to suggest that a defendant, by virtue of his presence in an area, is guilty of a

controlled substance offense. See *People v Hudgins*, 125 Mich App 140, 146; 336 NW2d 241 (1983).

In addition, the prosecutor also used this information in closing, stating: "*It's hard to describe why these things would happen two times in a row* with that kind of activity, money, small item and in an area where there's nothing but abandoned houses, *and these two people are* just hanging out there *doing things which they know are narcotic flagging*." [Emphasis added.] This argument conveyed the same impermissible message which this Court previously rejected in *Hudgins*.

The second problematic testimony arose when Officer White not only described the types of drug packaging commonly used by drug dealers, but also stated that the drugs found on Duncan were packaged in the same manner used by other drug dealers *in that area*, that is, around St. Paul and Canton streets. This testimony directly linked innocuous profile information to Duncan, and by implication, to defendant because he was charged with possessing the drugs found on Duncan. It heavily implied to the jury that Duncan was a drug dealer and that defendant was culpable because he was with a drug dealer, in a known drug trafficking area. These implications are improper. *Murray*, *supra* at 57, 63.

The third improper use of drug profile testimony related to Officer Anderson's description of "flagging." Anderson did not simply explain that flagging is conduct used by dealers to signal the availability of drugs. He further stated: "Well, he's letting them know he has narcotics if they need it." Not only did the jury learn that drug dealers use flagging to solicit customers, but they also heard Anderson's conclusion that defendant was letting customers know that he had drugs for sale. This conclusive testimony was improper for two reasons. First, lay testimony must be helpful and is limited to rationally based opinions and perceptions; bare conclusions are not proper. See MRE 701; *Woods v Lecureux*, 110 F3d 1215 (CA 6, 1997). Second, the testimony violated the rule of *Murray*. It did not merely educate the jury about drug trafficking but it also offered a positive conclusion that defendant engaged in flagging in order to sell drugs.

Furthermore, Anderson's conclusion is not supported by his other testimony. Even when asked, Anderson could not, and did not, testify that *either* of the drug transactions, which are the subject of this case, arose from such flagging conduct. Despite this lack of evidence, the prosecutor highlighted Anderson's conclusion in the closing argument:

> [Defendant] definitely did one step [to aid and abet Duncan]. He did a whole transaction. He did the whole thing. Other than actually having the bag on his person, *he stopped the person with the flagging*. He went up to the person, took the money. He went over, got the drugs from his partner. Went back over there and delivered the drugs.
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> The fact that *they are flagging down cars*, that is showing intent to deliver. The fact that *they are in a known narcotic area doing this*, that's also intent to deliver these drugs. [Emphasis added.]

Anderson's conclusive testimony about defendant's conduct and the prosecutor's closing argument are incongruous with the evidence.

There is a fine line between proper and improper drug profile evidence. Evidence which purports to comment directly or substantively on a defendant's guilt is impermissible. We conclude that the testimony in these three instances did not simply educate the jury, so that the jury could better assess the significance of various facts. Rather, the testimony invaded the province of the jury and urged the jury to use the drug profile characteristics as substantive evidence of defendant's guilt, contrary to the dictates of *Hubbard* and *Murray*. Further prejudice arose because the court gave no limiting instruction to the jury. As we noted in *Murray*, "failure to instruct the jury to consider the profile testimony only as background information supports the conclusion that it was admitted as substantive evidence of guilt." *Murray*, *supra* at 57. The drug profile information heavily implied, if not concluded, for the jury that defendant was guilty, contrary to *Murray*, *supra* at 57. This testimony was impermissible.

We further conclude that this error was not harmless. The evidence in this case was marginal. Defendant was not found in possession of any drugs or a substantial amount of money. To show constructive possession, the evidence had to support an inference that defendant had "dominion and control" over the drugs in Duncan's possession. *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). Defendant's mere presence during the alleged drug transaction is not criminal nor does it support a theory of guilt under either constructive possession or aiding and abetting. *People v Wolfe*, 440 Mich 508, 520; 489 NW2d 748, amended 441 Mich 1201 (1992).

In this case, the prosecution argued the theory of aiding and abetting to establish the fiction of constructive possession, in order to convict defendant of possession with intent to deliver less than fifty grams of cocaine. The evidence showed that defendant aided and abetted Duncan by carrying one package of drugs from Duncan to the driver. However, the combination of these legal theories, in the face of evidence tending to refute conclusions of possession, along with improper drug profile testimony admitted without a limiting instruction, is a sufficiently unreliable foundation upon which to base a conviction. We, therefore, cannot conclude that no juror used the impermissible drug profile testimony as substantive evidence of guilt. The error was not harmless.

We also note, because the issues may arise again, that the jury instructions on possession and reasonable doubt were proper. In addition, we conclude that the evidence that defendant gave an alias when he was arrested is admissible. The arresting officer knew defendant by that alias and he was entitled to clarify for the jury that the man he arrested was, in fact, defendant. *People v Griffis*, 218 Mich App 95, 98-99; 553 NW2d 642 (1996). Should defendant testify again, his credibility will be relevant, and the prosecution will be entitled to attempt to impeach that credibility, including with evidence that defendant used an alias. *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997).

We reverse and remand for a new trial. We do not retain jurisdiction.

/s/ Martin M. Doctoroff
/s/ Mark J. Cavanagh