

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JAMES HAROLD HEARD,

Defendant-Appellee.

UNPUBLISHED

April 10, 2001

No. 219682

Oakland Circuit Court

LC No. 98-161305-FH

Before: Doctoroff, P.J., and Holbrook, Jr., and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction 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). He was sentenced as an habitual offender, third offense, MCL 769.11; MSA 28.1083, to a term of eight to forty years' imprisonment. We affirm.

Defendant argues that the prosecutor's use of drug profile evidence denied him a fair trial. However, defendant did not preserve this issue with an appropriate objection to the challenged testimony at trial. *People v Furman*, 158 Mich App 302, 329-330; 404 NW2d 246 (1987). Accordingly, we review the alleged error under the plain error rule. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain . . . , 3) and the plain error affected substantial rights. . . . The third requirement generally requires a showing of prejudice" *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Further, if the three elements of the plain error rule are established, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" independent of the defendant's innocence.'" *Id.* at 763-764, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quoting *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 555 [1936]).

This Court has stated that drug profile evidence is inherently prejudicial because of the potential for the prosecution to convict an innocent defendant through the substantive use of otherwise "innocuous characteristics." *People v Hubbard*, 209 Mich App 240; 530 NW2d 130 (1995); *People v Murray*, 234 Mich App 46; 593 NW2d 690 (1999). Such evidence should be used cautiously because a jury is likely to give it greater weight due to its "aura of special reliability and trustworthiness." *Hubbard*, *supra* at 241 (citations omitted). However, profile

evidence may be used for proper purposes, such as to aid the jury in understanding the evidence in drug cases or to show that a defendant's activities are in accordance with the usual criminal modus operandi. *Murray, supra* at 53-54.

In *Murray*, this Court stated:

Clearly, there is often a very fine line between the probative use of profile evidence as background or modus operandi evidence and its prejudicial use as substantive evidence; the admissibility of profile evidence must effectively be determined case by case. In particular, a difficulty arises in cases in which profiles are admitted because the evidence of a drug profile must resemble, to some degree, the defendant's own circumstances and characteristics in order to be relevant, MRE 401, but when the profile begins to resemble the defendant's circumstances and characteristics too closely, the profile can appear increasingly as substantive evidence of guilt. In other words, once the profile is found to be relevant to the case, the court will often be faced with a gray area in which it may be obvious that the criminal profile circumstances and characteristics closely resemble those of the defendant, yet also in which the use of the profile may be the only way to explain to the jury the circumstantial evidence in the case.[*Id.* at 55-56]

As a means of guidance, the *Murray* Court identified four factors to be considered in evaluating whether drug profile evidence may be admitted. First, the drug-profile evidence must be offered as background or modus operandi evidence, not as substantive evidence of guilt, and the distinction must be carefully maintained by the attorneys and the court. Second, something more than drug profile evidence must be admitted to prove a defendant's guilt; multiple pieces of profile do not add up to guilt without something more. Third, the trial should make clear to the jury what is and is not an appropriate use of drug-profile evidence by, for example, instructing the jury that drug-profile evidence is properly used only as background or modus operandi evidence and should not be used as substantive evidence of guilt. Fourth, an expert witness should not be permitted to express an opinion that, on the basis of the profile, the defendant is guilty, and should not expressly compare the defendant's characteristics to the profile in a way that implies that the defendant is guilty. *Id.* at 56-57.

In this case, we are not convinced that the drug profile challenged by defendant rose to the level of plain error requiring reversal under the plain error rule. While some of the challenged testimony could be characterized as improper profile evidence, a timely objection could have eliminated any prejudice by limiting the evidence to its proper purpose and use. Accordingly, reversal is not warranted on the basis of this unpreserved issue.

Furthermore, contrary to what defendant argues, the evidence, apart from the drug profile evidence, was not insufficient to support his conviction. The evidence indicated that defendant ran from the police as the police approached him, that an officer observed defendant throw his arm down towards the ground while running, and that the police subsequently found a baggie containing fourteen rocks of cocaine, worth approximately \$500, in the vicinity where defendant was observed throwing something to the ground. This evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant was guilty of possession of

less than fifty grams of cocaine, which he intended to sell. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Wolfe*, 440 Mich 508, 517, 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); see also *People v Ray*, 191 Mich App 706, 708; 479 NW2d (1992); *People v Catania (On Remand)*, 159 Mich App 57, 61; 406 NW2d 473 (1987).

Defendant also argues that the trial court erred in allowing a police officer to testify regarding the substance of a radio dispatch. Because the testimony was not offered to prove the truth of the matter asserted, but only to explain why the officer proceeded as he did, the testimony was not hearsay. *City of Westland v Okopski*, 208 Mich App 66, 77; 527 NW2d 780 (1995); *People v Jackson* 113 Mich App 620, 624; 318 NW2d 495 (1982). Defendant further argues, however, that, even if the testimony was admissible for a proper purpose, he was deprived of a fair trial because the prosecutor subsequently used that evidence improperly. However, because defendant did not object to the prosecutor's conduct, and because a timely objection could have eliminated any prejudice stemming from any alleged improper use of that evidence, we conclude that defendant has not established plain error affecting his substantial rights in this regard. *Carines, supra*; see also *Stanaway, supra*, *People v Duncan*, 402 Mich 1, 15-16; 260 NW2d 58 (1977), *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998); and *People v Turner*, 213 Mich App 558, 575; 540 NW2d 728 (1995).

Finally, we are satisfied that defendant was not deprived of his right to a fair trial because of the cumulative effect of a number of errors. *People v Cooper*, 236 Mich App 643, 660; 601 NW2d 409 (1999).

Affirmed.

/s/ Martin M. Doctoroff
/s/ Donald E. Holbrook, Jr.
/s/ Joel P. Hoekstra