STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 22, 2002
v	No. 225660 Oakland Circuit Court
KEVIN DONNELL HOWARD, Defendant-Appellant.	LC No. 99-166990-FH

Before: K.F. Kelly, P.J., and Hood and Doctoroff, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver cocaine less than fifty grams, MCL 333.7401(2)(a)(iv), and possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to consecutive terms of 1½ to 20 years' imprisonment for possession with intent to deliver cocaine, and 1½ to 15 years' imprisonment for possession with intent to deliver marijuana. Defendant appeals as of right. We affirm.

I. Basic Facts and Procedural History

While on patrol, police officers attempted to speak to defendant who was sitting on the porch of an abandoned house with a known prostitute. Instead of responding to the officers' request, defendant fled. The officers pursued defendant and eventually apprehended him. During the chase, defendant reached into his jacket and made a throwing motion. During a subsequent search of the area, the officers found a plastic bag containing crack cocaine. Following defendant's arrest, authorities retrieved several packets of marijuana from his pocket.

During voir dire and following preliminary questioning, defense counsel stipulated to the for cause dismissal of two venire persons. The court then seated two additional jurors and the questioning resumed. Neither the prosecutor nor defense counsel objected to this procedure. During the trial, the prosecutor called Officer MacQuarrie, an eighteen-month veteran of the Pontiac Police Department Narcotics Enforcement Section, to testify as an expert in the area of narcotics trafficking and enforcement. Defense counsel objected arguing that the trial court should only qualify MacQuarrie on matters pertaining to law enforcement relative to narcotics in particular. When the prosecution maintained that it sought to qualify him on this basis, defense counsel withdrew the objection. Defendant was convicted and now appeals.

II. Jury Selection

First, defendant argues that the trial court's failure to follow established procedures for seating jurors deprived him of his constitutional rights and so corrupted the factfinding function of the jury as to deprive him of due process. We disagree.

As an initial matter, we note that defendant failed to object to the challenged jury selection below thus failing to properly preserve the issue for appellate review[1]. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). This Court reviews unpreserved claims of constitutional error for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764-766; 597 NW2d 130 (1999); *People v Taylor*, 245 Mich App 293, 304; 628 NW2d 55 (2001). To avoid forfeiture under the plain error rule, defendant must establish that: (1) the error occurred, (2) the error was clear and obvious, and (3) the plain error affected substantial rights, in that the error affected the outcome of the lower court proceedings. *Carines*, *supra* at 763. "Reversal 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*.

In the case at bar, we find the jury selection procedure employed by the trial court not only complied with the express conditions set forth in MCR 2.511(F), but also satisfied the requirement for fairness and impartiality contained in MCR 2.511(A)(4). Defendant was allowed to examine the newly seated jurors before further challenges were allowed. Defendant did not exercise any peremptory challenges and expressed satisfaction with the jury ultimately seated.

Moreover, defendant and the prosecutor stipulated to dismiss two potential jurors for cause who were subsequently excused, thus precipitating the inadvertent seating of two additional jurors. Error warranting reversal must be that of the trial court and not error to which the aggrieved party contributed by plan or negligence. See *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999). Defendant should not be allowed to request a certain action of the trial court by stipulating to the dismissal of the jurors for cause, then argue on appeal that the resultant action was error. See *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001) (stating, "[a] defendant may not waive objection to an issue before the trial court and then raise the issue as an error on appeal."). Accordingly, we find no error requiring reversal in this regard.

III. Admissibility of Defendant's Flight from Police

Next, defendant contends that the trial court erred in allowing evidence of defendant's flight because the prejudicial effect of this evidence substantially outweighed its probative value. MRE 403. We do not agree.

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[1] Generally, it is necessary for defendant to exhaust his peremptory challenges to preserve an objection to the jury selection process. *People v Taylor*, 203 195 Mich App 57, 59-60; 489 NW2d 99 (1992).

To preserve an evidentiary issue for appellate review, "a party must object timely at trial and specify the same ground for objection as is asserted on appeal." *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992). Here, defendant failed to object to either officer's testimony concerning his flight. Consequently, the issue is not properly preserved for our review. Notwithstanding, this Court reviews unpreserved claims of nonconstitutional error for plain error affecting substantial rights. *Carines, supra* at 763-764.

Although Michigan appreciates the inherent equivocal nature of evidence regarding a defendant's flight, Michigan jurisprudence nevertheless allows its admission to show consciousness of guilt. *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001); see also *People v Cammarata*, 257 Mich 60, 66; 240 NW 14 (1932); *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995); *People v Cutchall*, 200 Mich App 396, 398-401; 504 NW2d 666 (1993), overruled on other grounds by *People v Edgett*, 220 Mich App 686; 560 NW2d 360 (1996); *People v Clark*, 124 Mich App 410, 413; 335 NW2d 53 (1983). "The term 'flight' has been applied to such actions as fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody." *Coleman, supra* at 4. This Court in *Cutchall, supra*, adopted the holding of *Clark, supra*, and found that evidence of flight could be substantive evidence of purpose, intent, or knowledge and is admissible where relevant and material but should be admitted with caution where the probative value is slight in light of the other evidence presented in the case. *Cutchall, supra* at 399.

Upon review of the record, we find that evidence of defendant's flight is relevant, material and admissible because it could give rise to an inference of guilt. *People v Kyles*, 40 Mich App 357, 360; 198 NW2d 732 (1972); *Cammarata, supra* at 66. Additionally, evidence of flight was also admissible because it was probative of defendant's consciousness of guilt. *Compeau, supra* at 598; see also *Cutchall, supra* at 399-401. Accordingly, the trial court correctly found that evidence of defendant's flight was relevant, not unduly prejudicial, and thus admissible.

Furthermore, we find the trial court appropriately exercised its discretion in instructing the jury on this issue. In closing arguments, both the prosecutor and defense counsel referred to defendant's flight and proffered alternate theories. While the prosecutor characterized defendant's flight as consciousness of guilt, defendant maintained that his flight indicated nothing more than his fear of the police. Because of these competing theories, the trial court issued a cautionary instruction regarding evidence of flight indicating that the evidence was inherently ambiguous and susceptible to different interpretations. The court instructed the jury to first determine whether the evidence of flight was true, and if true, to determine defendant's reasons for flight. As a general rule, juries are presumed to follow instructions. *People v Mette*, 243 Mich App 318, 330-331; 612 NW2d 713 (2000).

IV. Search and Seizure

Next, defendant challenges the trial court's decision to admit drug evidence arguing that it should be suppressed because it flowed from an unconstitutional "seizure" as the police had no reasonable and articulable facts that, taken together with rational inferences, would reasonably warrant the stop. We disagree.

A trial court's factual findings regarding suppression of evidence will not be reversed unless they are clearly erroneous. *People v Oliver*, 464 Mich 184, 191; 627 NW2d 297 (2001). The ultimate decision regarding a motion to suppress is reviewed de novo. *People v Williams*, 240 Mich App 316, 319; 614 NW2d 647 (2000).

In the case at bar, the trial court found that defendant abandoned the crack cocaine during his flight from police thus relinquishing any reasonable expectation of privacy therein. Indeed, the case law in Michigan is abundantly clear that a defendant who discards property during a chase has abandoned that property. This negates any reasonable expectation of privacy and further justifies a warrantless search and seizure. *People v Mamon*, 435 Mich 1, 4, 6-7; 457 NW2d 623 (1990). Furthermore, once police officers found the crack cocaine and arrested defendant, the marijuana was discovered pursuant to a lawful search incident to defendant's arrest. See *People v Eaton*, 241 Mich App 459, 461-463; 617 NW2d 363 (2000) (finding that once the police make a lawful arrest, the police do not need additional probable cause to justify a search incident to that arrest.) Here, where defendant abandoned crack cocaine during flight from the police thereby giving rise to defendant's lawful arrest, the marijuana subsequently discovered on his person during a search incident to his arrest was properly admitted. *Mamon, supra* at 4. Accordingly, we decline to discern error requiring reversal in this regard.

V. Expert Witness

Finally, defendant argues that notwithstanding Officer MacQuarrie's certification as an expert in narcotics trafficking enforcement, he was impermissibly allowed to present testimony outside the scope of his qualifications and give an ultimate opinion concerning the particulars of drug trafficking and drugs retained for personal consumption.

Because defendant failed to object to the challenged testimony at trial, the issue is not properly preserved for appellate review. *Carines, supra* at 763-764. However, this Court reviews unpreserved claims of nonconstitutional error for plain error affecting substantial rights. *Id.*

Generally, a police officer may be qualified as an expert witness regarding the significance of a particular quantity of drugs discovered in a defendant's possession where the testimony assists the factfinder in its determination concerning the defendant's intent and guilt relative to the crime charged. *People v Stimage*, 202 Mich App 28, 29-30; 507 NW2d 778 (1993); *People v Williams (After Remand)*, 198 Mich App 537, 542; 499 NW2d 404 (1993). Indeed, such evidence is not rendered inadmissible merely because the officer's testimony "embraced the ultimate issue of intent to deliver." *Stimage, supra* at 30.

Additionally, the factual scenario presented in *People v Ray*, 191 Mich App 706, 707-708, 479 NW2d 1 (1991), is sufficiently similar to the situation presented in the case at bar to dispose of defendant's challenge. In *Ray*, as here, the defendant challenged the trial court's qualification of a police officer as an expert witness wherein the court permitted the officer to testify on the significance of the quantity and division of the drugs allegedly found on the defendant relative to the defendant's intent to deliver. *Id*. at 707. On appeal, this Court found that the trial court properly qualified the police officer as an expert witness based on his training and experience in observing drug use and drug trafficking. *Id*. 707-708. This Court further concluded that the officer's testimony regarding the quantity and characteristics of the drugs found in the defendant's possession along with the officer's opinion that it indicated that the

drugs were for distribution and not personal use was admissible. *Id*. 708. This Court reasoned that the information contained in the officer's testimony was beyond the knowledge of a layperson and would have aided the jury in discerning the defendant's intent. Consequently, the evidence was not rendered inadmissible merely because the testimony embraced the ultimate issue concerning defendant's intent to deliver. *Id*.

In the case at bar, MacQuarrie opined that the crack cocaine and marijuana seized were for distribution because of the area in which they were seized, the number of "rocks" found, the manner of packaging, and the fact that defendant had no user paraphernalia – such as a crack pipe or rolling papers – but rather, only had a pager at the time of his arrest. MacQuarrie did not offer his opinion on defendant's ultimate guilt or innocence. On the contrary, MacQuarrie only testified as to defendant's intent if indeed the factfinder found that defendant possessed the drugs. Because such information is not within a layperson's knowledge, MacQuarrie's testimony would therefore aid the jury "in determining defendant's intent and, thus, his guilt of the charged offense." *Id*. We find no error.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Harold Hood
/s/ Martin M Doctoroff