STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 29, 2002
v	No. 226730 Oakland Circuit Court
JOHNNIE CALEB, JR., Defendant-Appellant.	LC No. 99-169338-FH

Before: White, P.J., Whitbeck, C.J., and Holbrook, Jr., J.

PER CURIAM.

A jury convicted defendant Johnnie Caleb, Jr., of possession with intent to deliver less than fifty grams of heroin.[1] The trial court sentenced him as a fourth habitual offender[2] to a prison sentence of two to twenty years. Caleb appeals of right and we affirm.

I. Basic Facts

The prosecutor's chief witness in this case was City of Southfield police officer Mark Zacks, whom the trial court recognized as an expert in drug law enforcement. Officer Zacks testified that in November 1999, acting as a patrol officer, he went to a medical clinic to investigate an alleged domestic assault. While checking Caleb's driver's license status, he discovered that Caleb was wanted on outstanding arrest warrants. Officer Zacks arrested and searched Caleb. As a result of the search, Officer Zacks found a "doper-folded" packet containing white powder in a coin pocket; a "doper-fold" is apparently a method of wrapping drugs in paper. Inside Caleb's pants pocket, Officer Zacks found a plastic bag that contained 18 "doper-folded" paper packets sealed with tape and stamped with the numerals 24-7, which he said acted as the narcotics dealer's brand. After his arrest, during the booking process, Caleb stated to Officer Zacks that he was unemployed.

According to Officers Zacks, a single paper packet containing drugs was known as a "bindle." A "bundle" consisted of 10 "bindles" packaged together. Officer Zacks acknowledged that heroin would cost slightly less in Detroit than in Southfield. In his opinion, each of the bindles Caleb possessed would be worth $20 and that the bindles Caleb possessed were

[1] MCL 333.7401(2)(a)(iv).

[2] MCL 769.12.

consistent with the amount a "street level narcotics dealer" would have, not personal use. He reached this conclusion because the bindles were separated, taped shut to prevent "product" loss and to permit concealment, stamped with a brand identification number, and because of the number of bindles. Officer Zacks also believed that the individual bindle in Caleb's coin pocket, which was not taped shut, was likely for personal use. Officer Zacks said that he had learned from his experience as an officer that it was very common for drug sellers to be drug users. A heavy heroin user could use five bindles of heroin a day. A "chronic" user could spend $150 a day on the habit, which would buy seven or eight bindles, but would usually buy heroin in larger packets.

When Caleb testified on his own behalf, he admitted that he possessed the packets of heroin that Officer Zacks found in his pockets. However, pointing out that he was a recovering drug addict, he said that at the time of his arrest he was "strung out on heroin." He had been using between eight and ten packets of heroin per day, but increased that amount to twelve packets of heroin a day. He referred to the drugs as "nickel packs" costing $5 each and said that the larger packet of heroin was a free bonus he received after buying more than twenty packets of heroin. Caleb did not know who "2-4-7" was, but identified his drug source as "[a] dude named J. J." Caleb said he had "never sold dope before in [his] life," but acknowledged being previously convicted of second-degree home invasion. Caleb added that he had retired from General Dynamics after twenty years and received a retirement check of $1,800 to $2,300 twice each month, and did not sell drugs to support his drug habit. This was contrary to the prosecutor's theory that Caleb sold drugs to earn money to pay for his drug habit.

II. Expert Opinion

A. Standard Of Review

Caleb first argues that the trial court erred in allowing Officer Zacks to render an opinion as an expert on drug law enforcement concerning the packaging and quantity of heroin. He contends that an ordinary juror would have this knowledge and that the testimony, which embraced the ultimate issue whether Caleb possessed the heroin for personal use or for delivery, was more prejudicial than probative. Additionally, he asserts that the testimony was inadmissible drug courier or drug dealer profile evidence. Although Caleb objected to Officer Zacks' qualifications as an expert, he did not object to his testimony on the grounds he now asserts merit reversal. Thus, because he failed to preserve this issue for appeal,[3] we must determine whether allowing Officer Zacks to testify as an expert was plain error affecting Caleb's substantial rights[4] for the reasons he now states.

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[3] See MRE 103(a)(1); *People v Kilbourn*, 454 Mich 677, 684-685; 563 NW2d 669 (1997).

[4] See *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999).

B. Scope Of Testimony

According to MRE 702:

> If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

As we explained in *People v Murray*:[5]

> [T]his Court has held that a prosecutor may use expert testimony from police officers to aid the jury in understanding evidence in controlled substance cases. *People v Ray*, 191 Mich App 706, 707; 479 NW2d 1 (1991). For such expert testimony to be admissible, "(1) the expert must be qualified; (2) the evidence must serve to give the trier of fact a better understanding of the evidence or assist in determining a fact in issue; and (3) the evidence must be from a recognized discipline." *People v Williams (After Remand)*, 198 Mich App 537, 541, 499 NW2d 404 (1993).

Because Caleb admitted that he possessed the heroin found on his person, the critical challenge the prosecutor faced at trial was explaining to the jury why the amount of drugs and the way they were packaged meant that Caleb possessed them with the intent to deliver rather than to use the drugs himself. Caleb concedes in his appeal that the case law contradicts his argument that allowing this testimony was error, but claims that cases like *Williams* and *Ray* were wrongly decided. However, he has not persuaded us to join his point of view. We disagree that an ordinary juror, even when presented with "relevant background information," could draw appropriate inferences concerning possession with the intent to deliver as opposed to the simple intent to possess. While drugs are referenced frequently in the news and entertainment media, there is little question that an ordinary juror will not know enough about the drug trade to understand the different factors that point to an intent to possess for personal use and for delivery.[6] Packaging and drug terminology as specific as "bindle," "bundle," and "nickel bag," as well as concepts like product branding and doper-folds, and street pricing are not widely known among those who do not use or sell drugs or those who do not work in a field that comes in contact with drug users and sellers. Thus, as a drug law enforcement agent with significant training and experience in the field, Office Zacks was properly asked to identify the factors in this case that suggested Caleb possessed the heroin with the intent to deliver it because his

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[5] *People v Murray*, 234 Mich App 46, 53; 593 NW2d 690 (1999).

[6] See *Williams*, *supra* at 542.

testimony helped the jury understand this technical evidence.[7] That this testimony embraced the ultimate issue of intent does not constitute error.[8]

Caleb also argues that this evidence was improper drug profile evidence.

> Drug profile evidence has been described as an "informal compilation of characteristics often displayed by those trafficking in drugs." *People v Hubbard*, 209 Mich App 234, 239; 530 NW2d 130 (1995), quoting *United States v McDonald*, 933 F2d 1519, 1521 (CA 10, 1991), and *United States v Campbell*, 843 F2d 1089, 1091, n 3 (CA 8, 1988). . . . Drug profile evidence is essentially a compilation of otherwise innocuous characteristics that many drug dealers exhibit, such as the use of pagers, the carrying of large amounts of cash, and the possession of razor blades and lighters in order to package crack cocaine for sale. [*Hubbard*, *supra* at] 238; *United States v Lui*, 941 F2d 844, 848 (CA 9, 1991). Such evidence "is inherently prejudicial to the defendant because the profile may suggest that innocuous events indicate criminal activity." *United States v Lim*, 984 F2d 331, 334-335 (CA 9, 1993). In other words, these characteristics may not necessarily be connected to or inherently part of the drug trade, so that these characteristics could apply equally to innocent individuals as well as to drug dealers. It is for this reason that the majority of courts have held that drug profile evidence is inadmissible as substantive evidence of guilt, because "proof" of crime based wholly or mainly on these innocuous characteristics could potentially convict innocent people. *Hubbard*, *supra* at 239-240.[9]

However, the present case did not involve drug profile testimony concerning innocent behavior; rather, this case involved expert testimony about the meaning of the quantity and packaging of the illegal heroin found on Caleb. This Court has distinguished such testimony from drug profile testimony, finding it is proper to present expert testimony "explaining the significance of seized contraband or other items of personal property."[10]

Though Caleb further contends that this evidence should have been excluded because it was more prejudicial than probative, we disagree. The significance of the drugs found on Caleb went to the heart of the prosecutor's burden of proof. Any evidence against a party has some potential for prejudice, but this evidence was not substantially more prejudicial than probative.[11]

Caleb has failed to prove that, for any of the reasons he names, admitting this evidence was plain error. Thus, he is not entitled to reversal on this basis.

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[7] See *Murray*, *supra*.

[8] See MRE 704.

[9] *Murray*, *supra* at 52-53.

[10] *Hubbard*, *supra* at 239; see also *Murray*, *supra* at 63.

[11] MRE 403.

III. Impeachment

A. Standard Of Review

Caleb argues that the trial court erred in allowing the prosecutor to impeach him with evidence of his previous conviction of second-degree home invasion because this evidence was more prejudicial than probative of his credibility as a witness. We review preserved evidentiary errors to determine whether the trial court abused its discretion in admitting the evidence.[12]

B. MRE 609

At trial, the prosecutor, over defense objection, sought to introduce evidence that Caleb had been convicted of both unarmed robbery and second-degree home invasion. The trial court considered the requirements of MRE 609, which provides:

> (a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross examination, and
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> (1) the crime contained an element of dishonesty or false statement, or
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> (2) the crime contained an element of theft, and
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> (A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and
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> (B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.
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> (b) Determining Probative Value and Prejudicial Effect. For purposes of the probative value determination required by subrule (a)(2)(B), the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. The court must articulate, on the record, the analysis of each factor.

The trial court found both convictions were dissimilar to the charged offense and both involved theft and dishonesty, but that the unarmed robbery conviction was more prejudicial than probative because of its assaultive nature. However, the trial court found that the home invasion

[12] See *People v McRunels*, 237 Mich App 168, 183; 603 NW2d 95 (1999).

conviction, which involved stealth and theft and was fairly recent, was more probative of credibility than it was prejudicial. Thus, though excluding evidence of the unarmed robbery conviction, the trial court permitted the prosecutor to impeach Caleb with his home invasion conviction as part of the prosecution theory that Caleb committed crimes to support his drug habit and was, in fact, intending to sell, i.e., deliver, the drugs found in his possession.

Caleb claims that the trial court erred in inferring that home invasion involved an element of stealth, and that stealth would satisfy the prerequisite for admissibility under MCR 609(a)(1) or (2). Though he fails to provide any authority in support of this argument, we are aware that in *People v Parcha*,[13] this Court intimated that stealth, alone, is insufficient to indicate that a crime involves a form of dishonesty. Nevertheless, Caleb concedes that home invasion is a theft offense that "reflects on credibility as any other theft offense does."[14] Thus, even if the trial court considered whether home invasion involved stealth, the consideration was harmless because the trial court properly found that home invasion involved dishonesty.

Caleb also contends that the trial court's error was in its failure to consider that he could not present his defense – that he intended to use the drugs found in his possession, not that he intended to deliver them – without testifying. His argument calls into question the trial court's analysis under MRE 609(b). However, the danger MRE 609(b) addresses is the possibility that impeachment evidence might affect "the decisional process if admitting the evidence causes the defendant to elect not to testify." In this case, despite the impeachment evidence, Caleb chose to testify.

More importantly, because the home invasion was dissimilar to the charged narcotics offense, there was a lower possibility of prejudice outweighing the probative value of this evidence.[15] In other words, contrary to Caleb's argument, the jury was unlikely to convict him solely because they believed him to be a "bad" person. There is no objective basis to conclude that possible prejudice arising from this factor outweighed the probative value of using the dissimilar home invasion conviction for impeachment purposes. Under these circumstances, the trial court did not abuse its discretion in admitting the impeachment evidence.

IV. Unemployment

A. Standard Of Review

Caleb asserts that the trial court erred when, over defense objection, it permitted the prosecutor to elicit testimony from him that he was unemployed at the time of the offense. We

[13] *People v Parcha*, 227 Mich App 236, 246; 575 NW2d 316 (1997), quoting 28 Federal Practice & Procedure, § 6514, p 74, n 47.

[14] The Michigan Supreme Court and this Court have also concluded that a conviction of breaking and entering, the predecessor crime to home invasion, can be used to impeach. See *People v Allen*, 429 Mich 558, 610-611; 420 NW2d 499 (1998); *People v Bartlett*, 197 Mich App 15, 19; 494 NW2d 776 (1992).

[15] See *Allen, supra* at 606; *Bartlett, supra* at 20.

review preserved evidentiary errors to determine whether the trial court abused its discretion in admitting the evidence.[16]

B. Relevance

Caleb argues that his employment status is irrelevant to his motive for committing the crime, and cites *People v Henderson*[17] in support of this proposition. In *Henderson*, the Michigan Supreme Court noted:

> Evidence of poverty, dependence on public welfare, unemployment, underemployment, low paying or marginal employment, is not *ordinarily* admissible to show motive. The probative value of such evidence is diminished because it applies to too large a segment of the total population. Its prejudicial impact, though, is high. There is a risk that it will cause jurors to view a defendant as a "bad man" – a poor provider, a worthless individual.
>
> Other evidence of financial condition may, however, be admissible in the circumstance of a particular case.[18]

Unfortunately, and perhaps inadvertently, Caleb omits the word "ordinarily" from his quotation of this passage. Rather than acknowledging that *Henderson* establishes a rule of admissibility dependent on relevance to the particular circumstance of a case, Caleb suggests that *Henderson* provides a flat prohibition against using unemployment as evidence of motive. Clearly, this is not evident in the text itself.

Generally, all relevant evidence is admissible, and irrelevant evidence is not.[19] To be relevant, evidence must "have any tendency to make the existence of any fact that is of consequence . . . more or less probable."[20] If believed, the prosecutor's theory that Caleb's need for money to support his own drug habit was his motive for selling drugs would have made it more probable that he possessed the heroin found on his person with the intent to deliver it.[21] This evidence, therefore, did not rely on generalized stereotypes about people who are unemployed that provided the basis for the criticism in *Henderson*.

Even if the trial court erred in admitting this evidence, Caleb introduced evidence that he had an adequate income. This countered the prosecutor's motive theory. Consequently, any

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[16] See *McRunels*, *supra*.

[17] *People v Henderson*, 408 Mich 56; 289 NW2d 376 (1980).

[18] *Id*. at 66 (emphasis added and footnotes omitted).

[19] MRE 402.

[20] MRE 401.

[21] See, generally, *People v Rice (On Remand)*, 235 Mich App 429, 440-441; 597 NW2d 843 (1999).

error in admitting the evidence does not warrant reversal because it is not more probable than not that such error was outcome determinative.[22]

V. Prosecutorial Misconduct

A. Standard Of Review

Caleb maintains that the prosecutor committed misconduct during closing argument by denigrating defense counsel during closing arguments.[23] We review de novo claims that a prosecutor engaged in misconduct.[24]

B. Fair Trial

When analyzing a prosecutorial misconduct claim, this Court "evaluates the challenged conduct in context to determine if the defendant was denied a fair and impartial trial."[25] A prosecutor may not personally attack defense counsel's credibility,[26] nor "suggest that defense counsel is intentionally attempting to mislead the jury."[27] However, an otherwise improper comment will not warrant reversal when made in response to the defense's arguments.[28]

In the case at bar, in his opening statement, defense counsel asked the rhetorical question "why am I wasting your time," when Caleb had been caught possessing heroin. Defense counsel answered his own question by arguing that Caleb was a drug addict, but that there was no "indicia of trafficking." In closing argument, defense counsel continued his trial strategy, referring to Caleb as a "sick and suffering drug addict" who bought heroin as if filling a prescription for his illness, and that as a drug user who possessed an illegal drug, defendant should only be convicted of simple possession of heroin.

In rebuttal, the prosecutor referred to defense counsel's rhetorical question during opening statement, supplying her own answer that defense counsel was present because it was his job, for which he was being paid. The prosecutor followed her comment, however, with the observation that "every [d]efendant has the right to a trial and he's exercised that right." The

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[22] *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

[23] Caleb also asserts that the prosecutor committed misconduct by presenting Officer Zacks as an expert and using the impeachment and motive evidence. However, having found no substantive legal error in having Officer Zacks testify as an expert or in the trial court's decision to admit this evidence, the prosecutor did not commit misconduct in these respects. See *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999) (introducing evidence in good faith belief that it is admissible is not misconduct).

[24] See *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

[25] *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

[26] See *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996).

[27] *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001).

[28] See *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

prosecutor's comments did not attack defense counsel's credibility or imply that he was attempting to mislead the jury. Thus, viewed in context and in light of defense arguments, the prosecutor's comments properly responded to defense arguments and sought to dispel any inference, either favorable or unfavorable, from the fact that the case was tried. Moreover, the trial court, by instructing the jury that it must ground its decision in the evidence, which did not include the attorneys' comments, dispelled any possible prejudice resulting from the prosecutor's comments.[29] We have found no evidence that the prosecutor denied Caleb a fair and impartial trial.

VI. Ineffective Assistance

A. Standard Of Review

Caleb argues that he was denied effective assistance of counsel because his trial attorney did not adequately prepare for trial, failed to present any real defense, did not present any character witnesses on his behalf, and did not obtain an expert witness to counter Officer Zacks' testimony. We review constitutional questions de novo,[30] a standard that is particularly relevant in this case because the legal test we apply to ineffective assistance of counsel issues does not require us to defer to the trial court to any extent. However, because Caleb did not move for a new trial or an evidentiary hearing on this issue,[31] our review is limited to errors plainly apparent from the record.[32]

B. Legal Standards

As this Court explained in *People v Knapp*,[33]

> To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). The defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991),

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[29] See *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995).

[30] See *People v Conat*, 238 Mich App 134, 144; 605 NW2d 49 (1999).

[31] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

[32] See *People v Lee*, 243 Mich App 163, 183; 622 NW2d 71 (2000).

[33] *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001).

citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

C. Defense Counsel's Performance

Case law settles that failing to present witnesses[34] or prepare adequately[35] for trial can constitute ineffective assistance of counsel if the failure to do so deprives the defendant of a "substantial defense."[36] "A substantial defense is one that might have made a difference in the outcome of the trial."[37] However, decisions concerning which witnesses to call and what evidence to present are often considered part of trial strategy.[38]

In this case, though Caleb claims that his trial attorney should have called a number of different witnesses at trial, he fails to provide any description of the testimony they would have offered. Without this piece of information, it is impossible for us to determine whether their testimony would have given Caleb a "substantial defense," making defense counsel's failure deficient. Without knowing what these witnesses would have said if called to the stand, it is also impossible to determine how defense counsel's failure to call them to testify prejudiced Caleb.

The same reasoning holds true for his claim that his attorney failed to present a defense. He has failed to identify what that defense might have been and how it was "substantial." As a result, we cannot determine whether his attorney was deficient in failing to present another defense, or if this failure was prejudicial to Caleb. In contrast, we think it was logical for his trial attorney to attempt to persuade the jury that he was guilty only of simple possession rather than possession with intent to deliver because Officer Zacks found Caleb with the drugs.

> It is well established that arguing that defendant is guilty of an offense is not necessarily ineffective assistance of counsel. . . . Where the evidence obviously points to defendant's guilt, it can be better tactically to admit to the guilt and assert a defense or admit to guilt on some charges but maintain innocence on others. Such a trial tactic may actually improve defendant's credibility and will not be second-guessed.[39]

That the strategy was unsuccessful does not mean his attorney was ineffective.[40]

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[34] *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990).

[35] See *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990).

[36] See *People v Julian*, 171 Mich App 153, 158-159; 429 NW2d 615 (1988).

[37] *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

[38] *People v Julian*, 171 Mich App 153, 158-159; 429 NW2d 615 (1988).

[39] *People v Walker*, 167 Mich App 377, 382; 422 NW2d 8 (1988).

[40] See *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999).

In sum, Caleb has failed to meet his heavy burden of overcoming the presumption that his trial counsel provided effective assistance.[41]

Affirmed.

/s/ Helene N. White
/s/ William C. Whitbeck
/s/ Donald E. Holbrook, Jr.

[41] See *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001).