

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEPHEN MOODY,

Defendant-Appellant.

UNPUBLISHED

March 15, 2002

No. 226957

Berrien Circuit Court

LC No. 1999-404856-FH

Before: Meter, P.J., and Markey and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of conspiracy to possess with intent to deliver 225 grams or more but less than 650 grams of a mixture containing cocaine, MCL 333.7401(1)(ii) and MCL 750.157a.¹ Defendant was sentenced as a second habitual offender, MCL 769.10, to twenty to forty-five years' imprisonment. Defendant appeals as of right. We affirm.

Defendant's first contention on appeal is that the trial court abused its discretion in denying his motions to sever because his defense was inconsistent with and antagonistic to that of his co-defendants. This Court reviews a denial of a motion to sever for an abuse of discretion. MCL 768.5; *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994). An abuse of discretion will be found only where "an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made." *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000).

MCR 6.121(C) states:

On a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant.

In *Hana, supra*, 346-347, our Supreme Court explained:

¹ Defendant was found not guilty of possession with intent to deliver 225 grams or more but less than 650 grams of a mixture containing cocaine, MCL 333.7401(1)(ii).

Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision.

Here, defendant did not come forward with an affidavit or make an offer of proof at either the pretrial motion or a renewed motion at the beginning of the trial. Instead, defendant sought to rely on an affidavit submitted by a co-defendant, which suggested that defendant possessed duct tape that was ultimately used to wrap the package containing the cocaine. However, as noted by the trial court, the admission of the affidavit was a contingent occurrence. In fact, a mistrial was granted for the co-defendant before the affidavit was introduced into evidence.

Moreover, the *Hana* Court opined that “[i]nconsistency of defenses is not enough to mandate severance; rather, the defenses must be ‘mutually exclusive’ or ‘irreconcilable.’” *Hana, supra* at 349. Similarly, we distinguished the concepts of “mutually exclusive” and “irreconcilable” from the “incidental spillover prejudice” that is “almost inevitable in a multi-defendant trial.” *Id.*, quoting *United States v Yefsky*, 994 F2d 885, 896 (CA 1, 1993). The *Hana* Court also cited the following explanation:

[W]e hold that a defendant seeking severance based on antagonistic defenses must demonstrate that his or her defense is so antagonistic to the co-defendants that the defenses are mutually exclusive. Moreover, defenses are mutually exclusive within the meaning of this rule if the jury, in order to believe the core of the evidence offered on behalf of one defendant, must disbelieve the core of the evidence offered on behalf of the co-defendant. [*Hana, supra* at 350, quoting *State v Kinkade*, 680 P2d 801, 803 (Ariz 1984).]

In the instant matter, it was possible that defendant did possess the duct tape, but that he was not responsible for the duct tape being used to wrap the cocaine. Indeed, the co-defendant’s affidavit did not indicate that defendant was observed wrapping the cocaine. Thus, defense counsel could have argued that the assertion in the co-defendant’s affidavit fell well short of establishing defendant’s actual or constructive possession of the cocaine. This argument would not have asked the jury to disbelieve the “core of the evidence” offered by either co-defendant. Accordingly, we do not believe that the trial court abused its discretion by concluding that the defenses were not mutually exclusive based on the affidavit.

Defendant also challenges the admission of expert testimony regarding the use of caravans in drug trafficking. Defendant contends that the testimony was impermissible “drug profile evidence” because “nothing was presented to prove the acceptability or reliability of drug profiles and the probative value of such evidence was outweighed by its unfair prejudice.” According to the record presented on appeal, defendant’s objection below was to the expert qualifications of the police officer offering the testimony, not to the testimony itself. As such, defendant fails to assert the same ground on appeal as he did in the trial court, and the issue is forfeited. *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71. In order to avoid forfeiture under the plain error rule, three requirements must be met: (1) error must have occurred, (2) the

error was plain, i.e. clear or obvious, and (3) the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), reh den 461 Mich 1205 (1999). Generally, the third requirement requires a showing of prejudice—that the error affected the outcome of the lower court proceedings. *Id.*

In *People v Hubbard*, 209 Mich App 234, 241; 530 NW2d 130 (1995), we held “that drug profile evidence is not admissible as substantive evidence of guilt” because “the probative value of such evidence is outweighed substantially by the danger of unfair prejudice.” In *People v Murray*, 234 Mich App 46, 53; 593 NW2d 690 (1999), we recognized, however, that “courts generally have allowed expert testimony to explain the significance of items seized and the circumstances obtaining during the investigation of criminal activity.” “Even more specifically, this Court has held that a prosecutor may use expert testimony from police officers to aid the jury in understanding evidence in controlled substance cases.” *Id.*

Relying on the *Murray* decision, we recently summarized the four factors that are applied to determine whether drug profile evidence should be admitted:

First, the drug-profile evidence must be offered as background or modus operandi evidence, and 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 court must make clear to the jury what is and is not an appropriate use of the drug-profile evidence by, e.g., 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, the expert witness should not be permitted to express an opinion that, on the basis of the profile, 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. [*People v Williams*, 240 Mich App 316, 320-321; 614 NW2d 647 (2000).]

We are mindful that there is “a very fine line between the probative use of profile evidence as background or modus operandi evidence and its prejudicial use as substantive evidence.” *Murray, supra* at 54.

Here, after reviewing the record we do not believe that the drug profile evidence was used by the prosecutor as substantive evidence of defendant’s guilt; instead, it was used to present a context or background for the facts surrounding defendant’s arrest. Indeed, the prosecutor even advised the jury that the drug profile evidence was not substantive evidence of defendant’s guilt. Moreover, the trial court properly instructed the jury that the drug profile evidence was for background purposes only, and “should not be used to infer the defendant’s guilt in this case.” In fact, the trial court gave its limiting instruction twice—before the testimony was introduced and then, again, prior to the jury’s deliberation. Further, the expert witness did not express an opinion, or even imply, that defendant was guilty based on the drug profile evidence. Rather, the prosecutor was required to supplement the drug profile evidence with the facts of the instant matter. Indeed, the drug profile evidence was insufficient to alone enable the jury to infer defendant’s guilt. Accordingly, our application of each of the four

Murray factors supports the admission of the evidence. Therefore, the admission of the drug profile evidence was not plainly erroneous, and defendant may not avoid forfeiture of this issue.

Next, defendant contends that he was deprived of his constitutional right to effective assistance of counsel because his attorney failed to introduce into evidence the fact that the cell phone found in one of the cars was registered to Anderson. Because defendant did not request a new trial or an evidentiary hearing on this issue, our review is limited to the facts on the record. *Snider, supra* at 423. Generally, a successful claim of ineffective assistance of counsel requires a defendant to show that his or her attorney's representation deviated from an objective standard of reasonableness, resulting in the denial of a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). There is a strong presumption that counsel's actions constituted sound trial strategy under the circumstances. *Id.* at 302. A defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 302-303, quoting *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997).

This Court has repeatedly held that decisions regarding what evidence to present are presumed to be matters of trial strategy. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). However, even if defendant was successful in rebutting the presumption that the evidence was not admitted for trial strategy purposes, we are not persuaded that, but for the failure to have this evidence admitted, the outcome of the proceedings would have been different. Evidence indicating that the cell phone was registered to Anderson would not have been sufficient to distance defendant from the other car. Moreover, establishing ownership of a cell phone is not sufficient to prove or disprove an individual's use of the cell phone. Simply put, we do not believe that this one fact, standing alone, would have changed the outcome of the case. *Toma, supra* at 302-303. Consequently, we reject defendant's contention that he was deprived of his constitutional right to effective assistance of counsel.

Next, defendant contends that the verdict was against the great weight of the evidence. Where, as here, a defendant fails to raise the issue by an appropriate motion below, appellate review of the issue is forfeited. *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997). However, the issue may still be considered if failure to do so would result in a miscarriage of justice. *People v Noble*, 238 Mich App 647, 658; 608 NW2d 123 (1999).

As noted above, defendant was convicted of conspiracy to possess with intent to deliver 225 grams or more but less than 650 grams of a mixture containing cocaine, MCL 333.7401(1)(ii) and MCL 750.157a. Conspiracy is a partnership in criminal purposes. *People v Justice (After Remand)*, 454 Mich 334, 345; 562 NW2d 652 (1997), quoting *People v Atley*, 392 Mich 298, 310; 220 NW2d 465 (1974). The gist of a conspiracy is an unlawful agreement, although the conspiracy's purpose need not be accomplished. *People v Mass*, 464 Mich 615, 632; 628 NW2d 540 (2001). "Identifying the objectives and even the participants of an unlawful agreement is often difficult because of the clandestine nature of criminal conspiracies. Thus, direct proof of the conspiracy is not essential; instead, proof may be derived from the circumstances, acts, and conduct of the parties." *Justice, supra* at 347. Reasonable inferences "may be made because such evidence sheds light on the coconspirators' intentions." *Id.* at 347-348.

First, the evidence at trial showed that the two cars, a Cadillac and an Oldsmobile, were changing lanes as if they were traveling together, and when the officer passed one car it slowed down significantly, and eventually exited the freeway. Second, the evidence at trial also showed that the Cadillac was not registered to Anderson, Harvey, or defendant. Third, the evidence at trial revealed that Anderson and defendant appeared nervous and gave false names. Fourth, Anderson and Harvey denied traveling together, but the evidence revealed that the parties communicated via cell phones and pagers. Fifth, the evidence revealed that the duct tape used to package the cocaine in the Cadillac was once part of the roll of duct tape found in the Oldsmobile and the co-defendant's fingerprints were found on the duct tape wrapped around the cocaine. Finally, an expert in the sales and distribution of cocaine gave background evidence on caravans. From the circumstances, acts, and conduct of the parties there was sufficient circumstantial evidence to permit the jury to infer a conspiracy. Because the evidence reasonably supports the verdict, failure to review the issue would not result in a miscarriage of justice. *Noble, supra* at 658.

Defendant's final contention on appeal is that the trial court committed error mandating reversal by failing to grant defendant's motion to quash the bindover. "A circuit court's decision to grant or deny a motion to quash charges is reviewed de novo to determine if the district court abused its discretion in binding over a defendant for trial." *People v Jenkins*, 244 Mich App 1, 14; 624 NW2d 457 (2000); see also *Snider, supra* at 419. A magistrate's erroneous conclusion that sufficient evidence was presented at the preliminary examination is rendered harmless by the presentation at trial of sufficient evidence to convict. *People v Moorner*, 246 Mich App 680, 682-683; 635 NW2d 47 (2001); *People v Meadows*, 175 Mich App 355, 359; 437 NW2d 405 (1989). For the same reasons that we reject defendant's contention that his verdict was against the great weight of the evidence, we believe that there was sufficient evidence presented to support his conviction. Accordingly, any error by the magistrate in the instant matter was rendered harmless by defendant's conviction. Consequently, defendant's final contention of error is also without merit.

Affirmed.

/s/ Patrick M. Meter
/s/ Jane E. Markey
/s/ Donald S. Owens