

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CEDRICK CARRADINE,

Defendant-Appellant.

UNPUBLISHED

April 23, 2002

No. 228554

Genesee Circuit Court

LC No. 00-005659-FH

Before: Gage, P.J., and Griffin and Buth*, JJ.

PER CURIAM.

Defendant appeals as of right from a jury conviction of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v), for which he was sentenced as an habitual offender, fourth offense, MCL 769.12, to thirty-four months to fifteen years in prison. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first contends that the trial court erred in admitting drug profile evidence. Defendant failed to preserve this issue because the objection raised below is not the same asserted on appeal. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Therefore, review is precluded unless the defendant demonstrates plain error that affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A profile is a list of usually innocuous characteristics that police believe to be typical of a person engaged in a particular illegal activity. *People v Murray*, 234 Mich App 46, 52-53; 593 NW2d 690 (1999); *People v Hubbard*, 209 Mich App 234, 239; 530 NW2d 130 (1995). Drug profile evidence is not admissible as substantive evidence of guilt. *Id.* at 241. An expert witness is not permitted to opine “that, on the basis of the profile, the defendant is guilty,” or to “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, 321; 614 NW2d 647 (2000). Expert testimony is admissible, however, “to aid the jury in understanding evidence in controlled substance cases” and “to explain the significance of items seized and the circumstances obtaining during the investigation of criminal activity.” *Murray, supra* at 53. In other words, the prosecutor is not allowed to use profile evidence to argue that the defendant must be guilty because he fit the profile, but can “rely[] on the facts of the case to prove guilt when understood in the context of the profile” *Id.* at 59.

* Circuit judge, sitting on the Court of Appeals by assignment.

The testimony at issue did not concern innocent behavior that was considered indicative of criminal behavior. Rather, the officer's knowledge of the drug trade was used to help the jury to understand the significance of the size of the rock of crack cocaine and the piece of antenna found in defendant's pocket. Such testimony is not drug profile evidence and is admissible to explain the significance of contraband or other items seized. *Id.* at 62-63; *People v Ray*, 191 Mich App 706, 708; 479 NW2d 1 (1991). Defendant has thus failed to establish plain error in the admission of the evidence.

Defendant next contends that trial counsel was ineffective for failing to move for a mistrial after police witnesses provided unsolicited information in response to questioning. Because defendant failed to raise this claim below in a motion for a new trial or an evidentiary hearing, review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

An unresponsive answer to a proper question is not usually error, *People v Measles*, 59 Mich App 641, 643; 230 NW2d 10 (1975), and does not provide a basis for relief absent some evidence that the prosecutor conspired with or encouraged the witness to give the testimony at issue. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). However, this Court will scrutinize unresponsive remarks made by police officers, who have a special obligation not to venture into forbidden areas. *People v Holly*, 129 Mich App 405, 415-416; 341 NW2d 823 (1983).

In this case, defendant was seen making a "throw-down" motion and a piece of crack cocaine was found in the area where defendant had been standing. Rather than admit that he was speculating that defendant had been holding the cocaine when he made the motion, an officer stated that he "wouldn't have went through the motions with Mr. Carradine that I did if I honestly didn't think that he discarded something from his hand." While the answer was not responsive and the officer's belief was not relevant to any fact in issue, we cannot find that defendant was prejudiced by the response. Given that none of the officers could say they saw defendant in possession of the cocaine, it was clear that the jury was being asked to infer from the relevant facts that defendant had been holding the piece of crack cocaine and threw it away. Indeed, that was the focus of the attorneys' closing arguments. Given that plus the fact that the officer never expressed an opinion regarding defendant's guilt or the ultimate issue of fact regarding possession, defendant has not shown that but for counsel's error, the outcome of the trial probably would have been different. *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001).

Defendant also takes exception to an officer's unsolicited opinion that defendant had attempted to escape on the ground that such evidence was not relevant. Evidence of flight is admissible because it permits an inference of consciousness of guilt, although such evidence alone is insufficient to sustain a conviction. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Flight includes an attempt to escape custody. *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001). The officer's opinion was based on his observations of defendant's behavior and thus was admissible. *People v Hanna*, 223 Mich App 466, 475; 567 NW2d 12 (1997). Any motion for a mistrial based on the admission of the evidence thus would

have been futile and counsel is not ineffective for failing to make a useless motion. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Affirmed.

/s/ Hilda R. Gage
/s/ Richard Allen Griffin
/s/ George S. Buth