STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CALVIN HOWARD,

Defendant-Appellant.

UNPUBLISHED
May 3, 2002

No. 229138
Oakland Circuit Court
LC No. 99-168634-FH

Before: Zahra, P.J., and Neff and Saad, JJ.

PER CURIAM.

Defendant was convicted of possession with intent to deliver less than fifty grams of heroin, MCL 333.7401(2)(a)(iv), resisting or obstructing a police officer, MCL 750.479, and possession of marijuana, MCL 333.7403(2)(d). He was sentenced as a fourth habitual offender, MCL 769.12, to 1-1/2 to 15 years' imprisonment for the resisting or obstructing conviction, and one year for the possession of marijuana conviction, and a consecutive term of two to ten years' imprisonment for possession with intent to deliver heroin conviction. He appeals as of right. We affirm.

Defendant first argues that the prosecutor improperly vouched for the credibility of her police expert. This issue is not preserved for appeal because defendant did not object to the challenged conduct at trial. *People v Avant,* 235 Mich App 499, 512; 597 NW2d 864 (1999). Accordingly, we review this issue for plain error affecting defendant's substantial rights, i.e., error that was outcome determinative. *People v Carines,* 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Watson,* 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant complains that during voir dire, the prosecutor committed misconduct when she queried jurors concerning their personal knowledge of street drug sales, asking the jurors if they would all agree with her that "police officers, who dedicate part of their career, a good part of it, into knowing … the value of narcotics, how they're packaged, and how they're distributed … might have a little better knowledge of the system" than the jurors or the prosecutor. Then, in closing argument, after reviewing her police expert's extensive experience in street drug sales, the prosecutor stated, "He knows, in the City of Pontiac, what is and is not use and what is and is not intent to deliver." Defendant contends that these comments constitute improper vouching.

The purpose of voir dire is to "afford counsel an opportunity to develop a rational basis for excluding jurors." *People v Pawelczak,* 125 Mich App 231, 243; 336 NW2d 453 (1983).

The prosecutor's voir dire questions, considered alone, were permissible because they were arguably designed to test the potential jurors' receptiveness and attitude toward anticipated expert police testimony. However, the prosecutor's comments during closing argument, coupled with her voir dire questioning, border on impermissible bolstering of a witness' credibility, by suggesting that the expert police witness' testimony was entitled to special weight.

A prosecutor may "argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief." *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997) (citation omitted). However, a prosecutor may not attest to or vouch for the credibility of witnesses, the determination of which is the exclusive province of the jury. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995); *People v Erb*, 48 Mich App 622, 632-633; 211 NW2d 51 (1973). Viewed as a whole, the prosecutor's remarks come dangerously close to exceeding the bounds of permissible argument. Nonetheless, we find no error requiring reversal. In view of the overwhelming evidence against defendant, we conclude that any error was not outcome determinative and did not seriously affect the fairness, integrity or public reputation of the judicial proceedings. *Carines, supra*.

Defendant next complains that he was prejudiced because irrelevant and prejudicial evidence was admitted at trial, specifically, that he was in an area known for criminal activity at the time the police arrested him. Again, defendant did not preserve this issue for appeal with an appropriate objection at trial. *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). We review this issue for plain error. *Carines, supra* at 763. Both of the police officers who testified for the prosecution testified that they patrolled 40 Mechanic Street on the date in question because it was a complaint area or "special check" area because of complaints of narcotics trafficking and criminal activity that originated from there. Defendant argues that the evidence was irrelevant and, even if relevant, was unduly prejudicial and requires reversal. We disagree.

Even if the testimony is objectionable on the basis that it was irrelevant or unduly prejudicial, reversal is not warranted. Defendant cannot demonstrate that the testimony affected his substantial rights. *Id.* at 763. The evidence against defendant was overwhelming. He was observed by police officers who, on routine patrol, observed him with marijuana in plain sight. Expert testimony supported that the heroin, which was subsequently recovered, was for resale. The fact that defendant was in a crime target area at the time he was caught was not argued by the prosecutor and cannot be said to have affected the outcome of the trial.

Defendant next argues that his stop and subsequent search were impermissible and therefore, the drug charges should have been dismissed. We disagree. At the outset, we note that the suppression of evidence, not dismissal of the charge, is the proper remedy for an illegal search and seizure. *People v Chambers*, 195 Mich App 118, 120; 489 NW2d 168 (1992). Defendant moved for dismissal, not suppression. In this case, however, the drug charges could not survive without the evidence of the drugs. Thus, dismissal of those charges would have been inevitable if the drug evidence was suppressed. *Id.* at 120-121. "A trial court's decision to suppress evidence will not be disturbed unless the ruling was clearly erroneous. A decision is clearly erroneous if, although there is evidence to support it, the Court is left with a definite and firm conviction that a mistake has been made." *Id.* at 121 (citation omitted).

In this case, the initial, investigatory detention of defendant was valid.

> "[A] police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." A brief, on-the-scene detention of an individual is not a violation of the Fourth Amendment as long as the officer can articulate a reasonable suspicion for the detention. "Police officers may make a valid investigatory stop if they possess 'reasonable suspicion' that crime is afoot." [*People v Custer*, 465 Mich 319, 326-327; 630 NW2d 870 (2001) (citations omitted).]

"There is no bright line rule to test whether the suspicion giving rise to an investigatory stop was reasonable, articulable, and particular." *People v Nelson*, 443 Mich 626, 635; 505 NW2d 266 (1993). The totality of the circumstances should be considered. *Id.* at 636-637. Presence in a high crime area along with evasive behavior are both factors that could lead to a finding that the stop was reasonable. *Id*.

The officers here validly approached defendant for purposes of investigating possible criminal behavior. Defendant was in an area known for narcotics trafficking. It appeared to the police that something was possibly being exchanged between defendant and two women, as is typical in a street drug sale. When defendant noticed the officers in fully marked police cars, he made an unusual movement, to his right side, then back again. The police saw at defendant's right side, in plain view, a pipe with suspected marijuana sticking out of it. These facts, known to the officers when they approached defendant, support a reasonable suspicion that criminal activity was afoot.

In addition, the search that led to the finding of heroin was proper because it was a valid search incident to arrest.

> A search of a person incident to an arrest requires no additional justification. The permissible scope of a search incident to arrest extends to the opening of containers found within the control area of the arrestee.
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> *A search conducted immediately before an arrest may be justified as incident to arrest if the police have probable cause to arrest the suspect before conducting the search.*
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> In a unanimous opinion authored by Justice Levin, this Court held that a search without a warrant of persons whom the police had probable cause to arrest was proper, even though the persons searched had not been formally arrested. *People v Arterberry*, 431 Mich 381; 429 NW2d 574 (1988). Justice Levin reasoned:
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> "Since the officers had probable cause to arrest Arterberry and the other occupants, the search was proper: had the occupants been arrested, they could have been searched incident to the arrest. The validity of the search is not negated by the failure of the officers to arrest the occupants." *Id.* at 384.

> The search of a container preceding a formal arrest can qualify as a search incident to arrest if probable cause for the arrest existed before the container was searched. However, a search of a container cannot be justified as being incident to an arrest if probable cause for the contemporaneous arrest was provided by the fruits of that search. [*People v Champion*, 452 Mich 92, 115-117; 549 NW2d 849 (1996) (citations omitted) (emphasis added).]

The police had probable cause to arrest defendant before they searched the container, which contained heroin. After they properly approached defendant to speak with him, they saw, in plain view, that defendant had a baggie of suspected marijuana under his leg. They previously saw a pipe containing suspected marijuana. The items, found in plain view by an experienced narcotics officer, provided probable cause to seize the marijuana and supported a lawful arrest for possession. In *People v Alfafara*, 140 Mich App 551, 556-559; 364 NW2d 743 (1985), this Court found that a partially burned cigarette in a roach clip, which was observed in plain view by police officers, provided probable cause to seize the item and supported a lawful arrest for possession. See *People v Martinez*, 192 Mich App 57, 63; 480 NW2d 302 (1991). Thus, at the time defendant's brown pouch was searched, there was already probable cause for defendant's arrest. The search was therefore proper as incident to arrest.

Finally, defendant argues that the prosecution improperly relied on expert police testimony. While defendant objected to the expert's qualifications at trial, he did not object to the use of expert testimony to explain the significance of the seized evidence in the case. Thus, the issue is not preserved and we review it only for plain error.[1] *Carines, supra* at 763.

"Drug profile evidence has been described as an 'informal compilation of characteristics often displayed by those trafficking in drugs." *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999) (citation omitted). "'It is nothing more than a listing of characteristics that in the opinion of law enforcement officers are typical of a person engaged in drug activity.'" *Id.* Such evidence is inherently prejudicial. *Id.* at 53. While profile evidence is generally condemned as substantive evidence of guilt, "a prosecutor may use expert testimony from police officers to aid the jury in understanding evidence in controlled substance cases." *Id.*

> 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." For example, in [*People v*] *Ray*, [191 Mich App 706; 479 NW2d 1 (1991),] *supra* at 708, this Court determined that a police officer properly offered expert testimony that the quantity of crack cocaine, and the way the rocks of crack cocaine were evenly cut, clearly indicated that the defendant intended to sell the drugs. Even where a police officer expert witness' testimony is "founded solely on observations of innocent conduct," courts have upheld admission of the expert's opinion that the "defendant's activities indicated

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[1] In his brief on appeal, defendant sets forth the standard for reviewing an expert's qualifications, but does not argue that the expert at issue was not qualified. Thus, this issue is abandoned. *People v Kent*, 194 Mich App 206, 209-210; 486 NW2d 110 (1992).

> that he acted in accordance with usual criminal modus operandi." "For that very reason, the expert testimony may be valuable to the jury." However, when the testimony at issue is a drug profile, the expert may not move beyond an explanation of the typical characteristics of drug dealing—in an effort to provide context for the jury in assessing an alleged episode of drug dealing—and opine that the defendant is guilty merely because he fits the drug profile. Such testimony is inherently prejudicial and constitutes an inappropriate use of the profile as substantive evidence of guilt. [*Id.* at 53-54 (citations omitted).]

The prosecutor did not have her expert testify to a list of characteristics common to drug dealers, nor did she elicit from the expert an opinion that defendant must be guilty because he fit within the drug profile. Rather, the prosecutor elicited evidence that the expert was familiar with the street value of drugs and was familiar with how they are sold. She then elicited his opinion that, under the circumstances, defendant's activities were commensurate with an intent to distribute, i.e., the quantity of heroin recovered and the manner in which it was packaged indicated such intent. This was proper expert testimony. *Ray*, *supra* at 708. The expert was qualified and his testimony assisted the jury. There was no plain error requiring reversal.

Affirmed.

/s/ Janet T. Neff

I concur in result only.

/s/ Brian K. Zahra