

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRY LYNN SMITH,

Defendant-Appellant.

UNPUBLISHED

November 22, 2002

No. 232961

Oakland Circuit Court

LC No. 00-173349-FH

Before: Murray, P.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

Defendant was originally charged with possession of a firearm by a felon, MCL 750.224f, possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), possession of marijuana, MCL 333.7403(2)(d), and driving while license suspended, MCL 257.904(3)(b) (second offense).¹ Following a jury trial, defendant was convicted of possession of less than fifty grams of cocaine, MCL 333.7403(2)(a)(iv), and driving while license suspended. He was sentenced, as a third habitual offender, MCL 769.11, to concurrent terms of two to ten years' imprisonment for the felon in possession of a firearm conviction, 1½ to 8 years' imprisonment for the possession of less than fifty grams of cocaine conviction, and six months in jail for the driving while license suspended conviction. However, the day after sentence was imposed, the trial court recalled defendant's case and amended his Judgment of Sentence to indicate that his sentence for the possession conviction be served consecutive to the sentence imposed for the firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred in denying his motion for directed verdict because the prosecution failed to prove beyond a reasonable doubt that he had possession of cocaine. We disagree. When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented up to the close of the prosecution's case, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

¹ The charges were bifurcated for trial, with the firearm charge to be adjudicated separately from the remaining charges. After trial, defendant pleaded guilty to the firearm charge.

To sustain a conviction for possession with intent to deliver less than fifty grams of cocaine, the prosecution must show (1) that the recovered substance was cocaine, (2) that the cocaine was in a mixture weighing less than fifty grams, (3) that the defendant was not authorized to possess the substance, and (4) that the defendant knowingly possessed the cocaine with the intent to deliver it. *People v Catanzarite*, 211 Mich App 573, 577; 536 NW2d 570 (1995). Possession with intent to deliver can be established through circumstantial evidence and reasonable inferences arising from the evidence. *People v Wolfe*, 440 Mich 508, 526; 489 NW2d 748, amended 441 Mich 1201 (1992). “A person need not have actual physical possession of a controlled substance to be guilty of possessing it.” *Id.* at 519-520. Possession may be actual or constructive, exclusive or joint with more than one person actually or constructively possessing a controlled substance. *Id.* at 520. Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband establishing that the defendant had “the right to exercise control of the cocaine and knew it was present.” *Id.* at 520-521 (citations omitted). However, a person’s presence, by itself, at a location where drugs are found is insufficient to prove constructive possession. *Id.* at 520. Some additional connection between the defendant and the contraband must be shown. *Id.*

Defendant specifically argues that his presence, by itself, is insufficient to prove constructive possession and that other evidence linking defendant to the house does not show defendant had control over the house, only that he was paying bills for that address. In this case, besides defendant’s presence at the home prior to the execution of a search warrant, there were several additional connections to defendant. Police found defendant’s expired State of Michigan identification, Social Security card, correspondence, and three bills from different utility companies all addressed to defendant at the home’s address. Two current utility bills were found in the mailbox, and were addressed to defendant. Correspondence directed toward defendant was found in the same drawer as crack cocaine. Defendant’s Social Security card was found in the same room as the crack cocaine, cocaine, digital scale, razor blades, and marijuana. In a bedroom, police found defendant’s identification and a third utility bill addressed to defendant at the home’s address. At every location where narcotics were discovered in the home, there was a connection to defendant. The presence of correspondence addressed to defendant at the home’s address and pieces of defendant’s identification in direct proximity to drugs supported a reasonable inference that defendant exercised control over the cocaine and knew it was present. See *People v Richardson*, 139 Mich App 622, 625-626; 362 NW2d 853 (1984). Therefore, the trial court properly denied defendant’s motion for directed verdict because a rational trier of fact could conclude beyond a reasonable doubt that defendant constructively possessed the cocaine.

Defendant next argues that the trial court erred in admitting evidence of drug profiling and allowing it to be used as substantive evidence. We disagree. The decision to admit evidence is reviewed for an abuse of discretion. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). Similarly, the admissibility of expert testimony is within the trial court’s discretion. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). “An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made.” *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000).

A police officer may testify as an expert on drug-related law enforcement by virtue of his training and experience. *People v Williams (After Remand)*, 198 Mich App 537, 542; 499 NW2d

404 (1993). In *People v Hubbard*, 209 Mich App 234, 239; 530 NW2d 130 (1995), this Court acknowledged that a police officer may testify as an expert to “profile evidence,” which has been defined as:

[A]n “informal compilation of characteristics often displayed by those trafficking in drugs,” “an ‘abstract of characteristics found to be typical of persons transporting illegal drugs,’” and “the collective or distilled experience of narcotics officers concerning characteristics repeatedly seen in drug smugglers.” A profile is simply an investigative technique. It is nothing more than a listing of characteristics that in the opinion of law enforcement officers are typical of a person engaged in a specific illegal activity. [*Hubbard, supra* (citations omitted).]

Such expert testimony on drug profile evidence is admissible to explain the significance of seized contraband or other items of personal property to help the jury understand information that is not within the knowledge of an ordinary layperson. See *People v Griffin*, 235 Mich App 27, 44-45; 597 NW2d 176 (1999); *Hubbard, supra*. Drug profile evidence is not, however, admissible as substantive evidence of guilt. *Id.* at 241. To that end, it may not be admitted to impermissibly link an innocuous drug profile to characteristics of the defendant. *Murray, supra* at 61-63.

The trial court determined that Sergeant Ford was an expert on narcotics trafficking and found that his testimony would assist the jury in understanding the evidence or determining a fact at issue. The prosecutor asked Ford several questions concerning the contents of the house. First, Ford testified that the amount of cocaine collected from the house was not consistent with personal use, but more likely distribution. Then Ford testified that whenever there is a quantity of cocaine that indicates distribution is occurring, weapons are more likely to be found. Sgt. Ford also testified that large amounts of currency and a digital scale indicate that drug trafficking is occurring. Ford was then asked to assume that if only the cocaine was found in the house, would his opinion have changed as to the occurrence of distribution in the house. Ford answered that his opinion in this case would not change and that the addition of drug trafficking indicia only adds to his opinion that distribution is occurring. Although the trial court told the jury that the expert opinion may assist in understanding the evidence to determine a fact at issue, it did not instruct the jury that profile evidence was not to be used as substantive evidence of defendant’s guilt.

Nevertheless, the expert testimony in this case is not the “profile evidence” condemned for use as substantive evidence of guilt as was the case in *Hubbard*. In *Hubbard*, a police detective testified as an expert witness about “a profile of drug dealers,” including personal characteristics and behaviors such as drug dealers being unlikely to use their own vehicles, usually traveling in groups of two to six people, rarely carrying identification, using “street names,” and usually carrying large amounts of cash. *Hubbard, supra* at 238. The prosecution in *Hubbard* referred to this profile, arguing that the defendant exhibited many of these characteristics. *Id.* This Court, in reversing the defendant’s conviction, disapproved the use of “drug profile evidence” as substantive evidence of guilt, finding the reliability of such evidence to be suspect. *Id.* at 241. Further, the *Hubbard* Court noted that such profile evidence often changes to meet the facts of any given case and that “[t]he broad brush painted by such profiles inevitably will cover many innocent individuals.” *Id.* at 242.

In the instant case, there is no error because the expert testimony did not suggest, nor did the prosecution, that defendant was likely to be a drug dealer based on “drug profile” evidence. The profile evidence was not used as circumstantial evidence of defendant’s guilt. Rather, the testimony focused on the characteristics of personal property found in the house to help the jury understand the implications of the evidence. Such testimony does not raise the dangers associated with “drug profile” testimony because the expert testimony regarding indicia of drug trafficking was not impermissibly linked to defendant’s personal characteristics. The testimony explained how evidence found in the house supported a conclusion that distribution was occurring in the house. Thus, this testimony only permitted the jury to conclude that distribution was occurring at the house, and was not used as evidence of defendant’s guilt. Accordingly, the testimony at issue is unlike the condemned “drug profile” evidence in *Hubbard*, as it merely explained the significance of the seized contraband and other items of personal property found in the house. See *Murray, supra* at 53, 59-60; *Hubbard, supra* at 238. Therefore, the trial court did not abuse its discretion in admitting Ford’s expert testimony on whether there was distribution occurring at the house.

Defendant next argues that evidence of guns found at the house was not relevant, and if it was minimally relevant, it should have been excluded as its unfair prejudice substantially outweighed any probative value. We disagree. Again, this Court reviews a trial court’s evidentiary decision for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

Generally, all relevant evidence is admissible, and irrelevant evidence is not admissible. MRE 402; *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998). Evidence is relevant if it has any “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). “Under this broad definition, evidence is admissible if it is helpful in throwing light on any material point.” *Aldrich, supra* at 114. To be material, evidence need not relate to an element of the charged crime or an applicable defense. The relationship of the elements of the charge, the theories of admissibility, and the defenses asserted govern relevance and materiality. *People v Brooks*, 453 Mich 511, 518; 557 NW2d 106 (1996); *People v Kevorkian*, 248 Mich App 373, 442; 639 NW2d 291 (2001). Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *People v Sabin (After Remand)*, 463 Mich 43, 58; 614 NW2d 888, on second remand 242 Mich App 656; 620 NW2d 19 (2000).

In this case, weapons found at the home were relevant to the prosecution’s attempt to establish defendant’s intent to deliver cocaine. The Supreme Court has cited a similar situation as an example of relevance. The Court concluded that “[t]he weapon offense is logically relevant to prove the mens rea element of the charged crime” because “[p]rofessional drug traffickers often carry weapons to protect their drugs.” *People v Vandervliet*, 444 Mich 52, 82-83 n 41; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Other courts have recognized that “firearms are recognized as tools of the drug trade; thus, courts have sustained the admission of weapons evidence in narcotics cases because the possession of a weapon is often a hallmark of drug trafficking.” *United States v Hubbard*, 61 F3d 1261, 1270 (CA 7, 1995). Thus, the trial

court properly found the evidence of guns relevant to whether defendant possessed the requisite intent to deliver cocaine found at that residence. Any possible unfair prejudice resulting from the admission of the officers' testimony could have been eliminated by proper cross-examination, argument, instructions by the court, and the jury's common sense. *People v Roberson*, 167 Mich App 501, 510; 423 NW2d 245 (1988). Thus, the trial court did not abuse its discretion in admitting evidence of guns found at the house because they were relevant to whether defendant possessed the requisite intent to deliver cocaine found at the residence.

Last, defendant argues that he is entitled to a resentencing because the trial court changed his sentence from concurrent to consecutive without giving defense counsel a meaningful opportunity to be heard, thereby depriving defendant of due process.² We disagree. We hold that defendant was not denied due process because the trial court conducted a satisfactory resentencing hearing to amend defendant's sentence. See *People v Thomas*, 223 Mich App 9, 14-18; 566 NW2d 13 (1997) (due process requires that a resentencing hearing be held when changing concurrent sentences to consecutive ones in order to give the parties an opportunity to address the court and to give the court the opportunity to consider the effect of consecutive sentencing in conjunction with other information and the remarks when fashioning an appropriate sentence).

Defendant only argues that the trial court did not allow defense counsel to argue his position with respect to the change of sentence. However, a review of that proceeding casts doubt on defendant's position. During the hearing, defense counsel made two arguments to the trial court. Defense counsel first argued that there was a mistake in calculation of the sentencing guidelines. The trial court found no error. Then, defense counsel addressed the amendment of the sentence, stating, "we would respectfully request if the court would consider a year in regards to the gun charge, your honor, and a year in regards to the drug charge." The trial court stated that it would consider it, but ultimately rejected defendant's position.

Further, the trial court openly addressed the underlying concerns that necessitated the resentencing. The trial court was aware that consecutive sentencing was required, and considered the effect of consecutive sentencing when fashioning defendant's sentence. Also, defendant had the opportunity to inform the court of its position with respect to defendant's guidelines and the amended sentence. Therefore, defendant is not entitled to another resentencing because the record plainly indicates that the trial court fully addressed defendant's concerns over the imposition of the mandated consecutive sentences.

Affirmed.

/s/ Christopher M. Murray

/s/ Mark J. Cavanagh

/s/ Richard A. Bandstra

² The trial court erroneously imposed concurrent sentences in this case because consecutive sentences were mandated under MCL 333.7401(3).