

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

KAZEEM OMOTOSHO ADISA,

Defendant-Appellant.

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UNPUBLISHED

December 20, 2005

No. 257164

Oakland Circuit Court

LC No. 03-192493-FH

Before: White, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of possession with intent to deliver between 450 and 1,000 grams of heroin, MCL 333.7401(2)(a)(ii). Defendant was sentenced to 6 to 30 years' imprisonment. We affirm.

The material facts are not in dispute. Police officers received a tip from a confidential informant indicating that a female was possibly involved in illegal narcotics trafficking and staying at a local hotel. The police established surveillance outside the hotel, during which police observed a female and two males arrive in a white Mazda. Defendant and the female exited the vehicle and went inside the hotel. A short time later, defendant and the female came out of hotel and after a brief conversation, the female gave defendant a tied black plastic bag, which he placed in the Mazda's trunk. A search of the vehicle revealed, among other things, that the bag contained 103 "pods" of pure heroin. The pods were constructed of tape and packing material and covered in fecal matter. The estimated "street value" of the heroin, properly "cut" was between four million and seven million dollars, the largest seizure in Oakland County history. At trial, defendant denied any knowledge of the contents of the plastic bag and denied smelling any odor of feces inside the Mazda's trunk or emanating from the black bag. Following deliberations, defendant was convicted as charged. This appeal ensued.

Defendant first argues that the trial court erred in admitting the investigating officer's testimony pertaining to drug profile evidence. We disagree. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Washington*, 468 Mich 667, 670; 664 NW2d 203 (2003). An abuse of discretion is found "when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling." *People v Walker*, 265 Mich App 530, 533; 697 NW2d 159, lv gtd 472 Mich 928 (2005).

Drug profile evidence is an “informal compilation of characteristics often displayed by those trafficking in drugs.” *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999), citing *People v Hubbard*, 209 Mich App 234, 239-240; 530 NW2d 130 (1995). The use of drug profile evidence as substantive evidence of guilt is not permitted. *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). Drug profile evidence is inherently prejudicial because it may suggest to the jury that otherwise innocuous behavior indicates criminal activity. *Murray*, *supra* at 53. However, courts are permitted to use expert testimony, even expert police testimony, to explain the significance of items seized and aid the jury’s understanding in controlled substance cases. *Id.* The trial court “must take into consideration the particular circumstances of a case and enable profile testimony that aids the jury in intelligently understanding the evidentiary backdrop of the case, and the modus operandi of drug dealers.” *Id.*

This Court, in *Murray*, set forth certain factors to determine if the drug profile evidence was properly admitted by the trial court. “First, the reason given and accepted for the admission” of the drug profile testimony must only be “to assist the jury as background or modus operandi explanation.” *Murray*, *supra* at 56. Second, the drug profile evidence, standing alone, should not enable a jury to infer guilt. *Id.* at 57. There must be some additional evidence beyond the profile evidence offered by the prosecution to prove a defendant guilty. *Id.* Third, the trial court must give the jury instructions that the profile evidence should only be used for its “appropriate use,” or only as background or as an explanation of the modus operandi of narcotic traffickers. *Id.* Finally, the expert witness should not give his opinion regarding the defendant’s guilt or “expressly compare the defendant’s characteristics to the profile in such a way that guilt is necessarily implied.” *Id.* at 57-58.

The drug profile evidence was properly admitted. The profile evidence was not offered as substantive evidence of defendant’s guilt as the officer did not expressly compare the drug profile evidence to defendant’s characteristics. Instead, the officer explained the origin of heroin, the common modes of importation of heroin into the United States, the way a drug dealer will usually package the heroin and the procedure for “cutting” the drug to increase its street value, that money orders in large denominations were commonly used by drug dealers, that narcotic couriers commonly use packaging materials and tape of the type found in the Mazda, and that, based on the smell emanating from the “pods” of heroin, which were covered in human fecal matter, the heroin was most likely imported by “a body carrier. Contrary to the contention of defendant, this type of evidence assisted the jury in understanding the background and modus operandi of a narcotic trafficker, and was not improper drug profile evidence. Further, while the officer opined that defendant intended to deliver the heroin based on the amount of heroin found and the way the heroin was packaged, this type of evidence regarding defendant’s ultimate intent is proper. See *People v Ray*, 191 Mich App 706, 707; 479 NW2d 1 (1991).

Further, additional evidence beyond the drug profile testimony was introduced to prove defendant’s guilt. *Murray*, *supra* at 56. This included evidence that defendant was in the hotel with the suspected body carrier, that defendant was seen in possession of the heroin, that defendant attempted to hide the plastic bag by placing the plastic bag underneath a piece of cardboard in the trunk of the Mazda, and that despite evidence that it was a warm day, defendant who claimed the bag contained “fruit, nonetheless placed the bag in the trunk underneath several items. Other evidence proving defendant’s guilt included testimony that the smell of human feces emanating from the “pods” of heroin was so overwhelming it could be detected through the

forensic chemist's biohazard mask and from several feet away by the police, contradicting defendant's claim that he could not smell anything, and that defendant knew the driver of the Mazda was unemployed but, nevertheless, received transfers of large amounts of money on a continuing basis.

Nor are we persuaded that reversible error occurred because the trial court did not provide an instruction to the jury limiting the use of the officer's testimony regarding the drug profile evidence to background or modus operandi information. Defendant failed to request or object to the omission of a limiting instruction at trial, and therefore defendant's claim of error is forfeited. *People v Gonzalez*, 468 Mich 636, 643; 664 NW2d 159 (2003). A forfeited nonconstitutional error may not be considered by an appellate court unless the error was plain and it affected defendant's substantial rights. *Id.*

Here, the lack of a limiting instruction to the jury was not plain error. The requirement of a limiting instruction to the jury is but one of the four factors used to determine whether the drug profile evidence is properly admitted. As explained in *Murray, supra*, "[s]ome or all of the . . . [four] factors may be helpful in distinguishing between the appropriate and inappropriate use of drug profile evidence and thus help to determine the admissibility of such evidence." *Murray, supra* at 56. Accordingly, the trial court was not required to give a limiting instruction. See *Id.* at 57. The trial court satisfied the other factors in favor of finding that the officer's testimony was properly admitted. Additionally, based on the trial court's final instructions, the jury was free to accept or reject the drug profile testimony. We therefore conclude that the trial court did not abuse its discretion in allowing the admission of the drug profile testimony for the limited purpose of informing the jury of the background and modus operandi of heroin trafficking.

Defendant next argues that there was insufficient evidence to sustain his conviction of possession with intent to deliver between 450 and 1,000 grams of heroin or that, alternatively, the trial court erred in denying his motion for directed verdict. In reviewing the sufficiency of the evidence, this Court must view the evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). We view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). Similarly, this Court reviews a trial court's decision on a motion for a directed verdict de novo to determine whether the evidence presented by the prosecutor, 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 proved beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

To convict a defendant of possession with intent to distribute 450 and 1,000 grams of heroin, the prosecution must establish: (1) that the defendant knowingly possessed heroin; (2) that the defendant intended to deliver heroin to someone else; (3) that the substance possessed must have actually been heroin and the defendant must have known it was heroin; and (4) that the substance was in a mixture weighing between 450 and 1,000 grams. See *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998).

Defendant only challenges the third element, i.e. that he knowingly possessed the heroin. Defendant wrongly contends that, while circumstantial evidence may be used to establish possession, the prosecution was required to present direct evidence that defendant knew he

possessed heroin. Defendant cites the wrong standard. Instead, to prove knowing possession with intent to deliver, the prosecution must establish two components, (1) possession and (2) intent. *People v Wolfe*, 440 Mich 508, 519; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

“Possession with intent to deliver can be established by circumstantial evidence and reasonable inferences arising from that evidence. . . .” *Id.* at 526. Possession can be either actual or constructive. *Id.* at 520. Evidence that the defendant knew that the narcotics were present and had the right to exercise control over them is enough to establish constructive possession. *Id.* Possession can be shown by circumstantial evidence and any reasonable inferences drawn therefrom. *People v Nunez*, 242 Mich App 610, 615-616; 619 NW2d 550 (2000). Possession may be found even when the defendant is not the owner of the recovered narcotics. *Wolfe, supra* at 520. A defendant in plain view with possession of the narcotics is enough to establish possession. See *People v Head*, 211 Mich App 205, 210; 535 NW2d 563 (1995).

“An actor’s intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor’s state of mind, minimal circumstantial evidence is sufficient.” *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998) (internal citations omitted). Actual delivery of the controlled substance is not required to prove intent to deliver. *Wolfe, supra* at 524. Intent to deliver can be inferred from the quantity of narcotics in a defendant’s possession, from the way in which those narcotics are packaged, and from other circumstances surrounding the arrest. *Id.*

Here, viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence to prove knowing possession with the intent to deliver. Possession was established with evidence that defendant was observed in plain view with dominion and control of the bag containing the heroin. This evidence, taken with the prosecution’s evidence demonstrating defendant’s attempt to hide the bag underneath cardboard and several items in the vehicle’s trunk, was sufficient to establish possession.

The prosecution also established defendant’s intent to deliver. Given the large quantity seized, the monetary value of the heroin, the manner in which the heroin was packaged, the seizure of multiple money orders and currency bands in large denominations, and the absence of any evidence indicative of personal consumption, the jury could reasonably infer defendant knowingly possessed the heroin with intent to deliver.

Because the essential elements of the crime charged were proved beyond a reasonable doubt, the trial court properly denied defendant’s motion for directed verdict. Viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence to sustain defendant’s conviction of possession with intent to deliver 450 to 1,000 grams of heroin.

Affirmed.

/s/ Helene N. White  
/s/ Kathleen Jansen  
/s/ Kurtis T. Wilder