

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAVAR BRAD LASENBY,

Defendant-Appellant.

UNPUBLISHED

October 30, 2007

No. 273753

Monroe Circuit Court

LC No. 06-034998-FH

Before: Zahra, P.J., and White and O’Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver 450 or more grams but less than 1000 grams of cocaine, MCL 333.7401(2)(a)(ii), and was sentenced as an habitual offender, second offense, MCL 769.10, to 180 to 540 months in prison. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Sheriff’s deputy Willingham stopped the vehicle in which defendant was riding after observing it tailgating another vehicle. Tremain Lasenby was driving, Delvin Lasenby was seated in the passenger side of the front seat, and defendant was seated in the rear seat behind the driver. Defendant initially provided a false name to the police. He said he had left Lima, Ohio, traveled to Detroit to visit some family members, and was returning to Lima. Based on Deputy Willingham’s training and experience, he was suspicious of drug trafficking because of the air fresheners hanging from the rearview mirror, defendant’s use of a false name, the fact that the group was traveling round trip from Lima to Detroit, and that the information provided by the other occupants about the purpose and how long they had been in Detroit “had not exactly corresponded.” The vehicle was not registered to any of the occupants. The driver declined to consent to a search of the vehicle. Willingham requested a canine unit. With the assistance of the canine unit, Deputy Blair discovered two paper lunch bags underneath the driver’s seat, tucked in from behind. They were “at the toes” of where defendant had been sitting. The bags contained five golf-ball size pieces of cocaine weighing 563.7 grams. Defendant had \$972 folded up in his pocket, and the other men had no significant amount of cash.

The defense presented evidence that the mother of some of defendant’s children gave defendant \$600 to go shopping to get some clothes for them and the children for the Independence Day holiday. Delvin and defendant testified that, while in Detroit, Delvin visited his parents, while defendant stayed in the car, and that they went to a flea market. Defendant’s

shopping efforts at the flea market were unsuccessful. He claimed that he initially provided a false name because he was concerned about some arrest warrants for child support.

Defendant argues that the prosecutor committed misconduct by deliberately and repeatedly eliciting inadmissible and prejudicial testimony that defendant was traveling from a “source city” for drugs on a route frequented by drug traffickers. According to defendant, the evidence was profile evidence that is admissible only where four criteria set forth in *People v Murray*, 234 Mich App 46, 52, 56-58; 593 NW2d 690 (1999), are satisfied. Defendant did not object to the admission of the evidence and the prosecution’s references to it during opening statement and closing argument. Because the alleged error is unpreserved, this Court reviews for plain error that affected substantial rights in accordance with *People v Carines*, 460 Mich 750, 764-767; 597 NW2d 130 (1999).

Drug profile evidence is “an informal compilation of characteristics often displayed by those trafficking in drugs.” *Murray, supra* at 52 (citation omitted). It may be admissible to assist the jury as background or modus operandi explanation, but should not be admitted as substantive evidence of a defendant’s guilt. *Id.* at 56-57.

Drug profile evidence is essentially a compilation of otherwise innocuous characteristics that many drug dealers exhibit, such as the use of pagers, the carrying of large amounts of cash, and the possession of razor blades and lighters in order to package crack cocaine for sale. Such evidence is inherently prejudicial to the defendant because the profile may suggest that innocuous events indicate criminal activity. In other words, these characteristics may not necessarily be connected to or inherently part of the drug trade, so that these characteristics could apply equally to innocent individuals as well as to drug dealers. It is for this reason that the majority of courts have held that drug profile evidence is inadmissible as substantive evidence of guilt, because “proof” of crime based wholly or mainly on these innocuous characteristics could potentially convict innocent people. [*Id.* at 52-53 (citations and internal quotation marks omitted).]

In *Murray, supra* at 56-58, the Court set forth four factors “that may be helpful in distinguishing between the appropriate and inappropriate use of drug profile evidence.”

First, the reason given and accepted for the admission of the profile testimony must only be for a proper use--to assist the jury as background or modus operandi explanation. . . . Second, the profile, without more, should not normally enable a jury to infer the defendant's guilt. The prosecutor must introduce and argue some additional evidence from the case that the jury can use to draw an inference of criminality; multiple pieces of a profile do not add up to guilt without something more. In other words, the pieces of the drug profile by themselves should not be used to establish the link between innocuous evidence and guilt. Third, because the focus is primarily on the jury's use of the profile, courts must make clear what is and what is not an appropriate use of the profile evidence. Thus, it is usually necessary for the court to instruct the jury with regard to the proper and limited use of profile testimony. Fourth, the expert witness should not express his opinion, based on a profile, that the defendant is guilty, nor should he expressly

compare the defendant's characteristics to the profile in such a way that guilt is necessarily implied. [Citations omitted.]

The use of drug profile evidence as substantive evidence of guilt is subject to a harmless error analysis. *Id.* at 64.

In opening statement, the prosecution referred to the anticipated testimony of Deputy Willingham:

He'll tell you about this route, about what source cities are, like Detroit, and—and the situation that he's experienced with a lot of vehicle taking drugs to Lima, which is where the Defendant indicated he was from.

Willingham testified about the reasons for his suspicions after he pulled the vehicle over and noted, “The fact that they were running from Lima to Detroit and back in one day. Detroit is known as a source city. Lima— There— We've come across several vehicles in the past that there's some connection with drug running back and forth.” He also testified that I-75 “is a major thoroughfare for drug trafficking.”

In the prosecutor's closing argument, he stated:

They're coming from a – what's known as a source city; that is a high area that's known, at least to law enforcement circles, as a place where it's a source for cocaine. They're on a route that, unfortunately, has been utilized by a lot of couriers for – for moving narcotics from one location to another. That's I-75. They're on their way to Lima, Ohio, which is an area, as Deputy Willingham told you, where he—they've been getting a lot of vehicles that have been going from Detroit to Lima, Ohio. A lot of cases involving narcotics going in that particular direction.

Although we agree with defendant that his travel from Lima, Ohio, to the “source city” of Detroit along I-75 was not admissible as substantive evidence of defendant's guilt, we are not persuaded that the argument and evidence amounted to plain error that affected defendant's substantial rights. The evidence was admissible to provide background for the deputy's suspicions. The prosecution's case was not solely based on profile evidence; the large quantity of cocaine at defendant's feet in the vehicle was “additional evidence from the case that the jury can use to draw an inference of criminality.” *Murray, supra* at 57. Although the trial court did not instruct the jury concerning the appropriate use of the evidence, defense counsel elicited testimony from Willingham that the majority of people driving from Lima through the area are not dealing in drugs. Defense counsel aptly argued in his closing argument that I-75 is a “huge national thoroughfare,” and “All kinds of people travel on that road everyday for very innocent purposes . . .” Willingham did not express his opinion that based on a drug profile, defendant was guilty, nor did he imply defendant's guilt by comparing defendant's characteristics to a profile. To the extent that the prosecution's argument improperly indicated that the route was substantive evidence of defendant's guilt, the argument was improper, but the error was not “plain” and did not affect the outcome of the proceedings. *Carines, supra* at 763.

Defendant argues that trial counsel was ineffective for failing to object to the introduction of the evidence. However, just as we concluded that the alleged error did not affect the outcome of the proceedings, we similarly conclude that there is no reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different. Therefore, defendant's ineffective assistance of counsel claim fails. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Finally, defendant contends that the evidence was insufficient to establish that he possessed the cocaine. When reviewing the sufficiency of the evidence in a criminal case, this Court views the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999).

"A person need not have actual physical possession of a controlled substance to be guilty of possessing it. Possession may be either actual or constructive. Likewise, possession may be found even when the defendant is not the owner of recovered narcotics. Moreover, possession may be joint, with more than one person actually or constructively possessing a controlled substance.

"The courts have frequently addressed the concept of constructive possession and the link between a defendant and narcotics that must be shown to establish constructive possession. It is well established that a person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession. Instead, some additional connection between the defendant and the contraband must be shown." [*People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002), quoting *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748, amended 441 Mich 1201 (1992) (citations omitted).]

Constructive possession exists where the defendant has the right to exercise control over the narcotics and has knowledge of their presence. *Hardiman*, *supra* at 421 n 4. Circumstantial evidence and reasonable inferences that arise from such evidence may constitute satisfactory proof of possession. *People v McGhee*, 268 Mich App 600, 623; 709 NW2d 595 (2005).

Defense counsel implied that the cocaine might have been left in the vehicle by its owner; however, a trier of fact could reasonably infer that the presence of over 500 grams of cocaine, which could be sold for \$100 a gram, was not inadvertent. And, although it is possible that one or both of the other men in the car may have been aware of the cocaine, and defendant may have been ignorant of the substance at his feet, a rational trier of fact could conclude from the location of the drugs, defendant's conduct, and the large quantity of cash in his possession, that defendant had purchased the cocaine, that he was aware of its presence in the vehicle, and that he had dominion and control over it.

Affirmed.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Peter D. O'Connell