

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MUSIKLA BANTY FLENNY,

Defendant-Appellant.

UNPUBLISHED

November 15, 2007

No. 266547

Berrien Circuit Court

LC No. 2005-400462-FH

Before: Sawyer, P.J., and White and Talbot, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of possession with intent to deliver 50 to 449 grams of a controlled substance, MCL 333.7401(2)(a)(iii). He appeals as of right, and we affirm.

Defendant was charged after the vehicle in which he was a passenger was pulled over on Interstate-94 in Berrien County, because the driver, Andre Hogan, defendant's brother, failed to signal two lane changes. In a search of the vehicle, performed pursuant to Hogan's consent, 248 grams of cocaine were found in the rear storage compartment underneath the vehicle's floorboard. At trial, two Berrien County Sheriff's Department detectives were qualified by the trial court as experts in drug trafficking, and testified to the general characteristics of persons trafficking in controlled substances.

Defendant first challenges the sufficiency of the evidence that he possessed the drugs, asserting that every fact relied on by the trial court was subject to an innocent explanation. In determining whether a conviction is supported by sufficient evidence, we review the evidence in the light most favorable to the prosecution to determine whether the trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000), aff'd 466 Mich 39 (2002).

To convict a defendant of possession of a controlled substance with the intent to deliver, the prosecution must prove, among other elements, that the defendant knowingly possessed the substance intending to deliver it. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). Possession may be actual or constructive, *People v Wolfe*, 440 Mich 508, 520; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992), and it may be proved by circumstantial evidence, *People v Nunez*, 242 Mich App 610, 615-616; 619 NW2d 550 (2000).

In a case relying on circumstantial evidence, the prosecution is not required to negate every theory consistent with the defendant's innocence. *People v Hardiman*, 466 Mich 417, 423-424; 646 NW2d 158 (2002). The prosecution is only required to produce evidence sufficient to convince a reasonable trier of fact in the face of the contradictory evidence presented by the defendant. *Id.* at 424. Moreover, it is for the trier of fact to determine what inferences may be drawn from the evidence and the weight accorded those inferences. *Id.* at 428. Here, the trial court noted that although the individual facts might be explained with some exculpatory explanation, when it looked at all the facts together, the facts established beyond a reasonable doubt that defendant possessed the cocaine. Because we must view the evidence in the light most favorable to the prosecution, *Sherman-Huffman*, *supra*, it is for the trier of fact to determine which inferences can be drawn from the evidence, *Hardiman*, *supra*, and the inferences drawn by the court based on the evidence are sufficient to support a finding that defendant knew that the drugs were present in the vehicle, we conclude that defendant's conviction of possession with intent to deliver is supported by sufficient evidence.¹

Defendant next claims that he was denied the effective assistance of counsel by counsel's failure to investigate three potential witnesses: Hogan; Danielle Weatherall, his girlfriend; and Myra Black, Hogan's girlfriend in Detroit. We disagree.

To establish a claim for ineffective assistance of counsel, "a defendant must prove that his counsel's performance was deficient and that, under an objective standard of reasonableness, defendant was denied his Sixth Amendment right to counsel." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). The defendant must overcome a strong presumption that counsel's assistance was sound trial strategy. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). A defendant must also prove that his counsel's deficient performance was prejudicial to the extent that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Id.*

Neither Hogan nor Black testified at either of defendant's evidentiary hearings. Thus, the testimony of Hogan and Black, had counsel investigated them and called them as witnesses, remains unknown. Accordingly, defendant has failed to show that counsel's failure to investigate either Hogan or Black and call either as a witness deprived him of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). In addition, counsel offered reasonable explanations for the failure to call these witnesses. Counsel was informed by Hogan's attorney that he would assert his Fifth Amendment right against self-incrimination if called to testify, and that his truthful testimony would not help defendant. As to Black, counsel determined that her testimony would not be relevant to the question whether defendant knew that the cocaine was in the vehicle. Further, given the nature of the case against

¹ We note that much of the testimony defendant relies upon to establish that there were innocent explanations for each fact relied on by the trial court was not presented at trial, but was presented at the sentencing hearing or at the hearings on defendant's motions for a new trial.

defendant, counsel's reliance on the defense that the prosecutor failed to establish guilt beyond a reasonable doubt was not unreasonable.

Weatherall did testify at the *Ginther* hearing. The trial court determined that there was no reasonable probability that the result of defendant's trial would have been different had she testified at trial. *Carbin*, 463 Mich at 600. Weatherall's explanation of the source of the \$910 differed from defendant's statement to Hopkins. In addition, Weatherall's explanation of why defendant had her cellular telephone did not explain why there were five cellular telephones between defendant and Hogan, nor did it explain why defendant attempted to hide a cellular telephone. Further, Weatherall's testimony that defendant and Hogan shared a close relationship would actually have supported the inference found by the trial court that Hogan would not have failed to tell defendant of the cocaine. Additionally, the trial court found that Weatherall was not a credible witness. Under these circumstances, we must accept the trial court's determination that Weatherall's testimony had no reasonable probability of changing the outcome of defendant's trial. *Id.*

Defendant next asserts that the trial court erred in qualifying the two sheriff's deputies as experts in drug trafficking. We review a trial court's determination to qualify a witness as an expert for an abuse of discretion. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). A trial court abuses its discretion when it fails to select a reasonable and principled outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). To testify as an expert witness, an individual must be qualified by knowledge, skill, experience, training, or education. MRE 702; *People v Haywood*, 209 Mich App 217, 224-225; 530 NW2d 497 (1995).

Deputy John Hopkins testified that he has worked as a road patrol deputy for 18 to 20 years. Of the 100 to 120 traffic stops he initiates each month, 15 to 20 involve drug trafficking. Thus, over the course of his career, Hopkins has been involved in more than 3500 traffic stops involving persons engaged drug trafficking. In addition, Hopkins worked one year as an undercover officer for the narcotics unit. Although this occurred early in his career, Hopkins continues to speak with the officers assigned to the narcotics unit on a daily basis and he attends the unit's meetings. Hopkins has also attended training seminars sponsored by the Michigan State Police and the Drug Enforcement Agency regarding drug trafficking. Based on Hopkins' experience, training, and knowledge, the trial court did not abuse its discretion in qualifying Hopkins as an expert witness in drug trafficking. *Murray, supra.*

Detective James Zehm testified that for the past five years, Zehm worked in the narcotics unit of the Berrien County Sheriff's Department, where he investigates the distribution and sale of controlled substances. He meets regularly with other members of the narcotics unit and interviews confidential informants and persons suspected to be drug traffickers. He attended numerous training sessions, day-long, week-long, and two-week long sessions, regarding drug trafficking. Based on Zehm's experience, training, and knowledge, the trial court did not abuse its discretion in qualifying Zehm as an expert witness in drug trafficking. *Id.*

Defendant additionally argues that the trial court erred in admitting the expert testimony of Hopkins and Zehm because the drug profile evidence was not proven to be reliable or generally accepted, and because it did not give the trial court a better understanding of the evidence, given that the trial judge had presided over the drug docket for many years. We

review a trial court's decision to admit expert testimony for an abuse of discretion. *Murray, supra* at 52.

Because defendant did not object to the admission of Hopkins's and Zehm's expert testimony on the ground that the deputies failed to provide any proof that their testimony regarding the characteristic of persons engaged in drug trafficking was consistent with generally accepted drug profiles, our review of this claim is for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 765; 597 NW2d 130 (1999).

In 2004, MRE 702 was amended to conform to FRE 702 and to incorporate the United States Supreme Court's teachings in *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993). *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779 n 44, 781; 685 NW2d 391 (2004); Staff Comment to 2004 Amendment. In *Daubert, supra* at 589, the Supreme Court stated that FRE 702 imposed a gatekeeping obligation on the trial court to "ensure that any and all scientific testimony . . . admitted was not only relevant, but reliable." The Supreme Court articulated four factors a trial court could use to determine whether scientific testimony was reliable: (1) whether the theory or technique could be tested; (2) whether the theory had been subject to peer review and publication; (3) the known or potential error rate of the theory or technique; and (4) whether the theory or technique had been generally accepted in the scientific community. *Id.* Six years later, in *Kumho Tire Co, Ltd v Carmichael*, 526 US 137, 147; 119 S Ct 1167; 143 L Ed 2d 238 (1999), the Supreme Court stated that a trial court's obligation as a gatekeeper to ensure that expert testimony was relevant and reliable extended to all expert testimony, not just to scientific testimony. Nonetheless, the Court indicated that, in certain cases, whether expert testimony was reliable could depend on the expert's personal knowledge or experience, rather than on scientific foundations. *Id.* at 150. See e.g., *United States v Hankey*, 203 F3d 1160, 1167-1170 (CA 9, 2000), in which the Ninth Circuit, citing *Kumho, supra*, stated that the reliability of expert testimony regarding gang affiliations depended on the knowledge and experience of the expert, rather than on the methodology or theory behind it. We therefore conclude that defendant has failed to meet his burden in establishing plain error. *Carines, supra*. The trial court did not plainly err in finding that the expert testimony of Hopkins and Zehm was reliable.

To be admissible under MRE 702, expert testimony must serve to give the trier of fact a better understanding of the evidence or assist in determining a fact in issue. *People v Williams (After Remand)*, 198 Mich App 537, 541; 499 NW2d 404 (1993). According to defendant, because the trial court oversaw the drug docket, the expert testimony of Hopkins and Zehm did not provide the trial court with a better understanding of the evidence. Defendant's argument is without merit. In *People v Simon*, 189 Mich App 565, 568; 473 NW2d 785 (1991), we stated the following:

It is also well established in Michigan that a judge in a bench trial must arrive at his or her decision based upon the evidence in the case. The judge may not go outside the record in determining guilt. When the factfinder relies on extraneous evidence, the defendant is denied his constitutional right to confront all the witnesses against him and to get all the evidence on the record. [Citations omitted.]

In deciding defendant's guilt, the trial court could not have relied on its own specialized knowledge regarding drug trafficking. *Simon, supra* at 568. Thus, the trial court did not abuse its discretion in determining that the expert testimony of Hopkins and Zehm was admissible under MRE 702.

Finally, defendant asserts that the trial court improperly relied on the drug profile evidence as substantive evidence of defendant's guilt. Drug profile evidence may not be used as substantive evidence of a defendant's guilt. *Murray, supra* at 53. It may, however, be used to explain the background or modus operandi of persons engaged in drug trafficking. *Murray, supra* at 54. Recognizing that there is a very fine line between the use of drug profile evidence as substantive evidence of a defendant's guilt and as background or modus operandi evidence, this Court has set forth the following four factors as helpful in distinguishing between the appropriate and inappropriate use of drug profile evidence: (1) the reason given and accepted for the admission of the drug profile testimony must only be for a proper use -- to assist the trier of fact as background or modus operandi evidence; (2) the evidence, without more, should not enable the trier of fact to infer the defendant's guilt; (3) the trier of fact must be instructed about the limited and proper use of the drug profile evidence; and (4) the expert witness should not express an opinion, based on the profile evidence, that the defendant is guilty. *Id.* at 54, 56-57.

Defendant argues that the second factor, along with the trial court's incorporation of the drug profile evidence into its factual findings, provides ample reason to conclude that the trial court used the drug profile evidence as substantive evidence of his guilt. We disagree. The prosecution presented evidence beyond the drug profile evidence from which the court could infer defendant's guilt. Further, while the court summarized the profile evidence, it explained its finding of guilt by reference to other substantive evidence. Moreover, a trial court is presumed to know and understand the law. *People v Sherman-Huffman*, 466 Mich 39, 43; 642 NW2d 339 (2002); *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992). And, in fact, the trial court stated the proper use of drug profile evidence on the record when it admitted the expert testimony of Hopkins. Thus, we have no reason to conclude that the trial court relied on the drug profile evidence as substantive evidence of defendant's guilt.

Affirmed.

/s/ David H. Sawyer
/s/ Helene N. White
/s/ Michael J. Talbot