STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 26, 2009
v	No. 281604 Oakland Circuit Court
STEVEN ANDRE HALL, Defendant-Appellant.	LC No. 2007-214930-FH

Before: Cavanagh, P.J., and Fort Hood and Davis, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(iv), possession of less than 25 grams of methadone, MCL 333.7403(2)(a)(v), and possession of Darvocet, MCL 333.7403(2)(b)(ii). The trial court sentenced defendant as a fourth felony offender, MCL 769.12, to 18 months to 20 years' imprisonment for possession with intent to deliver heroin and two terms of 18 months to 15 years' imprisonment for possession of methadone and Darvocet. Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On May 18, 2007, Officer Todd Raskin investigated a possible stolen cell phone purported to be on a person named Steven who was working at a McDonald's restaurant in Auburn Hills. Officer Raskin encountered defendant, who identified himself as Steve, sweeping the parking lot of the restaurant. Officer Raskin asked defendant if he had any cell phones on him and defendant handed Officer Raskin two cell phones, neither of which matched the missing phone's description.

Upon patting down defendant to determine if he had additional cell phones, Officer Raskin found a pill bottle in his back pant pocket that contained 14 individual packets of heroin, packaged in corner ties and weighing a total of 1.5 grams. In addition, Officer Raskin found four white pills of methadone, one pill of Darvocet, and $180. Officer Raskin did not find any drug use paraphernalia on defendant's person.

I. EXPERT WITNESS TESTIMONY

Defendant first argues on appeal that the trial court erroneously admitted expert witness testimony by Officer Raskin and Detective Bauman as well as erroneously allowed these two officers to testify about drug profile evidence as substantive evidence of defendant's guilt.

The decision to admit or deny expert testimony falls within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion. *People v Wilson*, 194 Mich App 599, 602; 487 NW2d 822 (1992). An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

A. Testimony by Officer Raskin

Defendant contends the trial court erroneously determined that Officer Raskin did not have to be qualified as an expert witness before giving opinion testimony about drug dealers and drug users that, according to defendant, required specialized knowledge. Defendant specifically objected to Officer Raskin's testimony regarding what "use paraphernalia" consists of for a heroin user as well as his testimony that drug dealers often have several phones.

Pursuant to MRE 701, if the witness is not testifying as an expert, the witness' testimony "in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."

Police officers may properly testify regarding their opinions on topics with which they have personal knowledge of or experience. *People v Oliver*, 170 Mich App 38, 50; 427 NW2d 898 (1988). In *Oliver*, this Court held that a police officer may provide lay opinion testimony regarding topics within his or her personal knowledge as long as it is not overly scientific or technical. *Id*. The *Oliver* Court continued this Court's liberal application of MRE 701 "in order to help develop a clearer understanding of facts for the trier of facts." *Id.*

Officer Raskin was a 13-year veteran police officer and had identified, field tested, and arrested persons for heroin previously. In addition, Officer Raskin had made arrests on persons for possessing use paraphernalia, and therefore, had personal knowledge of the different types of paraphernalia people use for different types of drugs, including heroin.

Officer Raskin's testimony regarding use paraphernalia was properly admitted under this Court's liberal application of MRE 701. See *Oliver, supra*. Officer Raskin's testimony that defendant did not have use paraphernalia on his person and that dealers have multiple phones was rationally based on his perceptions as a police officer who had experience in narcotics trafficking. Nothing about Officer Raskin's testimony was overly scientific or technical and his testimony allowed the jury to have a clearer understanding of whether defendant had the intent to deliver heroin. The trial court did not abuse its discretion in allowing Officer Raskin's lay opinion testimony.

B. Testimony by Detective Bauman

Defendant additionally submits that the trial court erroneously qualified Detective Bauman as an expert witness in narcotics trafficking without the prosecution first establishing a sufficient foundation for the sources of Detective Bauman's conclusions.

MRE 702, which governs the admissibility of expert testimony, provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The critical inquiry in determining whether to admit expert testimony is whether the testimony will aid the factfinder in making the ultimate decision in the case. *People v Ray*, 191 Mich App 706, 707; 479 NW2d 1 (1991).

Drug-related law enforcement is a recognized area of expertise. *People v Williams (After Remand)*, 198 Mich App 537, 542; 499 NW2d 404 (1993). A police officer may be qualified by his training and expertise to testify on how quantities, packaging, and related items establish a defendant's intent at the time he possessed the drugs. *Id*.

The prosecution introduced evidence that at the time of trial, Detective Bauman had been a police officer for 12 years and was a member of the Narcotics Enforcement Team (NET) for three-and-a-half years. As a member of the NET, Detective Bauman worked undercover with duties to investigate and infiltrate the criminal organizations that surround the illegal drug trade. Detective Bauman had received training in street level narcotics trafficking, including the police academy, training as a road officer, specialized and advanced narcotics training (including heroin), training with the prosecutor's office, IRS, DEA, and FBI, and most importantly training by virtue of his caseload.

The prosecution was clearly able to demonstrate that Detective Bauman was qualified to testify as an expert witness by virtue of his knowledge, skill, training, and experience. Detective Bauman opined at trial that the way in which the drugs were packaged, the lack of drug paraphernalia, the presence of two cell phones, and the large amount of cash found on defendant indicated that the drugs found in his possession were meant for distribution rather than personal use. This type of expert testimony aided the trier of fact in determining whether the facts of the case supported a finding that defendant had the intent to deliver the drugs found in his possession. The trial court did not abuse its discretion in allowing Detective Bauman's expert testimony.

C. Drug Profile Testimony

Defendant next claims that the trial court erroneously allowed Officer Raskin and Detective Bauman to testify about drug profile evidence as substantive evidence of guilt.

Defendant objected at trial to the qualifications of police officers to testify as expert witnesses. But he did not object to the use of drug profiling evidence as substantive evidence of defendant's guilt. Therefore, he failed to preserve this argument on appeal. See MRE 103(a); *People v Grant*, 445 Mich 535, 545; 520 NW2d 123 (1994). The issue is reviewed for plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is warranted only when the plain, forfeited error resulted in the

conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Carines, supra.*

Detective Bauman's testimony cannot reasonably be characterized as profile evidence. *People v Murray*, 234 Mich App 46; 593 NW2d 690 (1999); *People v Hubbard*, 209 Mich App 234; 530 NW2d 130 (1995). He did not testify about defendant's characteristics as a drug trafficker. Rather, Detective Bauman's focus was the relationship between the circumstances in which the heroin was found and the purpose of the heroin, opining that it was intended to be sold and not consumed for personal use because of several factors: the amount of heroin, when considered with the way in which it was packaged in corner ties, multiple cell phones and $180 in cash on defendant's person, and defendant's lack of use paraphernalia. Detective Bauman's testimony was no more than expert testimony on the significance of seized contraband, which gave the trier of fact a better understanding of the evidence and assisted in determining a fact in issue. *Murray, supra* at 53. As such, the testimony was properly admitted. See *Hubbard, supra* at 239-240. In light of this properly admitted evidence, we cannot conclude that defendant actually was innocent of the drug charges, or that Detective Bauman's challenged testimony "seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Carines, supra.*

II. JURY INSTRUCTIONS

Defendant next argues that the trial court erred in failing to give a cautionary jury instruction regarding Officer Raskin's dual role as a fact witness and as an expert witness when there was no clear demarcation between the fact and expert testimony.

Defendant did not request a cautionary jury instruction in regards to an expert witness' dual role as fact and expert witness at trial. Nor did he object to the instructions as given. A forfeited, nonconstitutional error may not be considered on appeal unless the error was plain and affected the defendant's substantial rights. *People v Gonzalez*, 468 Mich 636, 643; 664 NW2d 159 (2003).

Officer Raskin did not testify as an expert witness, therefore, defendant's argument that a cautionary jury instruction was necessary in order for the jury to properly weigh Officer Raskin's fact and expert testimony is without merit. The trial court did not err in failing to give such a cautionary instruction.

III. PLEA NEGOTIATION QUESTIONING

Defendant's final argument on appeal is that the trial court abused its discretion when it allowed Detective Bauman to testify about defendant's offer to become a confidential informant, which purportedly was a statement made by defendant in the course of a plea negotiation in violation of MRE 410.

A trial court's determination of an evidentiary issue is reviewed for an abuse of discretion. *People v Farquharson*, 274 Mich App 268, 271; 731 NW2d 797 (2007). An abuse of discretion standard acknowledges that there are circumstances in which there can more than one reasonable and principled outcome, and when the trial court selects a principled outcome, it has not abused its discretion. *Babcock, supra*. A decision regarding the admission of evidence

involving a preliminary question of law, such as whether a rule of evidence or statute precludes admissibility of the evidence, is subject to de novo review. *Farquharson, supra.* Under de novo review, a court gives no deference to the trial court. *People v Howard*, 233 Mich App 52, 54; 595 NW2d 497 (1998).

The record does not sufficiently support defendant's claim that the statement was made during plea discussions. Nothing in the record establishes whether formal plea negotiations had begun. During his testimony, Detective Bauman indicated that he engaged in conversation with defendant as, *he believed*, after a proffer agreement. However, neither the prosecutor nor the defense attorney ever indicated that plea discussions occurred. In addition, the trial court never made a finding whether the parties had engaged in plea discussions. Finally, other than Detective Bauman's testimony, the lower court record is devoid of any mention of plea discussions.

This Court's review is generally limited to the record of the trial court and it will generally not allow an enlargement of the record on appeal. See MCR 7.210(A)(1); *People v Shively*, 230 Mich App 626, 628 n 1; 584 NW2d 740 (1998). The lower court record does not substantiate defendant's allegation that Detective Bauman's testimony revealed statements made during a plea negotiation.

Affirmed.

/s/ Michael J. Cavanagh
/s/ Karen M. Fort Hood
/s/ Alton T. Davis