

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILIP ANTHONY ANDERSON,

Defendant-Appellant.

UNPUBLISHED

April 30, 2009

No. 282019

Oakland Circuit Court

LC No. 2007-215936-FH

Before: Murray, P.J., and Gleicher and M. J. Kelly, JJ.

GLEICHER, J. (*concurring*).

I concur with the majority's decision to affirm defendant's convictions, but write separately to express deep concerns regarding the admission of the drug profile evidence and the assistance rendered by defendant's counsel.

I. Drug Profile Evidence

In *People v Murray*, 234 Mich App 46; 593 NW2d 690 (1999), this Court carefully explained the rules governing the admission of drug profile evidence. Those rules embody the following important concepts: (1) a drug profile expert may not "opine that the defendant is guilty merely because he fits the drug profile," *id.* at 54; (2) the expert should not "expressly compare the defendant's characteristics to the profile in such a way that guilt is necessarily implied," *id.* at 57; and (3) "[a]ttorneys and courts must clearly maintain the distinction between the profile and the substantive evidence," including by utilizing an instruction cautioning the jury with respect to its limited permissible use of an expert's drug profile testimony. *Id.* The instant record demonstrates that the prosecutor and the trial court utterly disregarded these concepts, and that defense counsel took no apparent notice of the serious evidentiary violations unfolding around him.

During direct examination conducted by the prosecutor, Sergeant Bart Wilson repeatedly combined without demarcation his factual testimony and expert drug profile opinions. For example, in Wilson's role as an expert witness "in the field of narcotics trafficking," he described that narcotics dealers "take a large amount of substance" and break it down into "street size quantities, for users to buy." Wilson seamlessly segued into a description of defendant's narcotic enterprise: "In this case, what they do is they break it down into bindle form." During an uninterrupted narrative immediately following Wilson's reference to "this case," he explained

that dealers use folded lottery tickets to package the drugs for sale and scales to weigh the product, concluding, “So we look for measurements like that, scales, packaging, anything to break larger amounts down. We also look for proofs.” Wilson’s direct examination then proceeded as follows:

Q. Let’s talk about proofs. Did you find any indications of delivery or items that be [sic] could used in delivery in the upstairs area[?]

A. Yes.

* * *

Q. Starting with the top form, which I believe is People’s Proposed Exhibit 3. Do you recognize what I’ve handed you?

A. Yes, I do.

Q. What is it?

A. Exhibit 3 is bag of sandwich Baggies. You also have a small quantity of—they’re like little Baggies, but they’re no bigger than my fingernail and you also have numerous—these are a sample of the numerous lottery tickets that were also taken out of there.

Q. When you say sample, were those all of the lottery tickets taken out of there?

A. No. There were hundreds through and throughout both rooms, the sitting room and the bedroom. [J]ust tons of them.

Q. And where did you find the Baggie or sandwich Baggie?

A. This would be in the sitting room. Most packaging was in the sitting room. However, the lottery tickets were found in the bedroom.

After setting the stage to portray those who possess digital scales, lottery tickets and baggies as narcotics dealers, Wilson assigned defendant the role of leading drug dealer, precisely the testimonial structure that this Court condemned in *Murray*:

[D]ifficult as it may sometimes be, courts 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, but stop short of enabling profile testimony that purports to comment directly or substantively on a defendant’s guilt. [*Murray, supra* at 56.]

The prosecutor also made no effort to delimit Wilson’s expert testimony concerning a connection between narcotic sales and weapons possession. Because the police found only one “bundle” containing narcotics in defendant’s bedroom area, the prosecutor sought to link

defendant with the 25 bindles of heroin found in the hollow trunk of a backyard tree. The guns found in defendant's bedroom and living areas supplied the linchpin for this connection. In a manner echoing his method of questioning regarding narcotics packaging, the prosecutor first elicited Wilson's expert explanation for narcotic dealers' possession of weapons, and immediately asked that Wilson directly apply the prototype weapons scenario to the facts of defendant's case:

Q. Now if someone wanted to protect an area where drugs were, like in the backyard, what would be a better tool to show someone that you have to be able to protect yourself? What would be something you could threaten someone at that distance?

A. Obviously a long gun, being rifle and a scope and everybody knows what a scope is. Everybody knows what a long rifle is. They're accurate. A scope basically is a binocular for the gun. You can close right in on a target. A .22 is a great weapon. There's no kick, no nothing. It's just like shooting a BB gun. You just boom, boom, boom.

Q. Could that cause damage?

A. It can kill you. It's a bad round. The way it was explained to me, is once it enters your body, the bad thing about a .22 round, it bounces all over. So it rips out all the sort of weapons—I mean, all sort of vital organs. It doesn't just go straight through, like a high powered rifle. A .22 is a bad firearm.

Q. Would a .22 with a scope be able to cover the area around where the drugs were held?

A. Most certainly.

Q. Better or worse than a handgun?

A. Better.

Q. Now, let's talk about the tree itself. In addition to the dealers being afraid of being robbed, what else is he afraid of or having happen?

A. Of getting arrested by the police.

Q. And what methods do they have that you have encountered, at least, to protect themselves when they're dealing from getting caught?

A. Hiding drugs, deceiving people, deceiving the police.

Q. What effect would putting drugs in a tree have in a dealer's mind in protecting themselves from being caught?

A. Well, he put it in a tree to basically put it away from his bedroom. But yet it's protected within the curtilage, within the area of his control. And if he

were to lose it, he's not out that much, but he's out. I mean, that's his business. But the mind set there is away from me, you don't have me. However, it's a sloppy case. There's everything else that was found.

Wilson additionally opined that it would be "pretty brazen" for a neighbor or passerby to walk into someone's backyard and look inside the tree trunk. The prosecutor again requested that Wilson affix his profile opinions to defendant, and Wilson obliged:

Q. . . . What have you found that tells you that even those [sic] were in a tree the defendant he is connected to those items?

A. Well, you have the packaging, which is distribution. You not only have the lottery tickets. I call them cracks. You've got numerous of those. You have numerous plastic Baggies in a bedroom. There's no sandwich stuff, there's no peanut butter or jelly. Along with the other stuff, you have scales. You have weapons. The distribution center is his house.

There's a reason for that. You take a large quantity. You break it up in your house. There's no wind, A; you're not going to do this stuff outside. There are no witnesses. You're going to do it in a concealed area. The police aren't there, and then he just stashes it outside.

Q. How does the fact that there's an identical bindle in the dresser from the 25 on the site, how does that help you?

A. You found Heroin inside the house, you found Heroin outside. I mean, you've got a pretty good case.

Q. What would your opinion be regarding the ownership of the items in the tree or possession?

A. Hands down Mr. Anderson.

Q. What about possession with intent to deliver the controlled substances found, do you believe that is possession with the intent to deliver or possess for personal use?

A. Certainly it's with intent to deliver.

Q. And what are some of your basic reasons? I know we talked about some.

A. The scale, the packaging, the quantity and it's basically in more than one spot. All those put together and the weapons, all those put together are pretty classic as far as distribution.

Q. And regarding the rifles that were found, were those reasonably accessible to the area where you found upstairs the packaging, the scale, Baggies, and such?

A. The one was right next to the bed loaded and the other one in the crawl space, my deputy had no problem getting to that either. It was right there and then the swords, of course, were right there.

By structuring the direct examination to combine Wilson’s factual discoveries during the raid with Wilson’s expert opinions, the prosecutor effectively blurred any potential distinction between Wilson’s detective persona and his expert witness role.¹ Wilson’s direct examination testimony, as orchestrated by the prosecutor, flagrantly disregarded this Court’s admonition in *Murray* that

when the testimony at issue is a drug profile, the expert may not move beyond an explanation of the typical characteristics of drug dealing—in an effort to provide context for the jury in assessing an alleged episode of drug dealing—and opine that the defendant is guilty merely because he fits the drug profile. Such testimony is inherently prejudicial and constitutes an inappropriate use of the profile as substantive evidence of guilt. [*Id.* at 54 (footnote omitted).]

Rather than “stop[ping] short of enabling profile testimony that purports to comment directly or substantively on a defendant’s guilt,” *id.* at 56, the prosecutor, defense counsel and the trial court allowed Wilson unfettered license to repeatedly opine that defendant had committed the charged offenses.

II. Cautionary Instruction

The majority correctly observes that the trial court read the jury a cautionary instruction concerning Wilson’s expert testimony. The instruction substantially conformed to CJI2d 5.10, titled “Expert Witness.” The trial court provided this instruction as a part of the multiple jury instruction package delivered at the conclusion of the trial. However, the trial court neglected to read CJI2d 4.17, titled “Drug Profile Evidence,” which cautions as follows:

You have heard testimony from [*name witness(es)*] about [*his/her/their*] training or experience concerning other drug cases. *This testimony is not to be used to determine whether the defendant committed the crime charged in this case.* [Emphasis supplied]. This testimony may be considered by you only for the purpose of [*state purpose for which evidence was offered and admitted*].

In my view, the trial court failed to fulfill its obligation to “make clear what is and what is not an appropriate use of the profile evidence” when it gave only the expert witness jury instruction. *Id.* at 57. The instruction given advised the jurors that they “[did] not have to believe an expert’s opinion,” but did not inform them that they should not consider Wilson’s

¹ See *United States v Quigley*, 890 F2d 1019, 1023-1024 (CA 8, 1989): “This point by point examination of profile characteristics with specific reference to Quigley constitutes use of the profile not as background to explain or justify an investigative stop, but as substantive evidence that Quigley fits the profile and, therefore, must have intended to distribute the cocaine in his possession.” This Court cited *Quigley* with approval in *Murray*, *supra* at 55.

drug dealer profile testimony “as substantive evidence of defendant’s guilt.” *Id.* at 61. In *United States v Lopez-Medina*, 461 F3d 724, 744 (CA 6, 2006), the Sixth Circuit clearly distinguished between a general instruction addressing expert testimony and a specific admonishment regarding the proper use of a police officer’s opinion:

A general instruction on weighing officer testimony does not guard against a jury mistakenly weighing opinion testimony as if the opinion were fact, nor does it instruct the jury that they are free to reject the opinions given. Nor does such a general instruction regarding possible law enforcement bias address the additional risk of bias in forming expert conclusions regarding one’s own investigation.

In my estimation, the trial court bore an obligation to properly instruct the jury with respect to its limited permissible use of Wilson’s profile testimony, despite defense counsel’s complete silence throughout Wilson’s direct examination. Our Supreme Court has repeatedly emphasized that trial courts must serve as the “gatekeepers” of expert testimony. In *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 782; 685 NW2d 391 (2004), the Supreme Court explained that “[t]his gatekeeper role applies to *all stages* of expert analysis. MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data.” (Emphasis in original). Had the trial court conducted the assessment described in *Gilbert*, it might have recognized and curtailed the prosecutor’s improper use of Wilson’s testimony as substantive evidence, instructed the prosecutor to observe a demarcation between Wilson’s roles as an expert and as an investigator, and supplied a jury instruction sufficient “to guard against the risk of confusion inherent when a law enforcement agent testifies as both a fact witness and as an expert witness.” *Lopez-Medina*, *supra* at 744.

III. Ineffective Assistance of Counsel

Because defendant’s appellate counsel did not properly preserve this issue by moving for a new trial or a *Ginther*² hearing, this Court limits its review only to any plain error evident on the existing record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). To demonstrate ineffectiveness of counsel, a defendant must satisfy the two-part test described by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The first part of that test mandates a showing that counsel “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland*, *supra* at 687. The effective assistance of counsel is presumed, and the defendant must overcome a heavy burden to demonstrate otherwise. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). The second part of the *Strickland* test requires a showing that counsel’s deficient performance prejudiced the defense. “To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different.” *Carbin*, *supra* at 600.

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

I cannot conceive of any strategic explanation for defense counsel's complete failure to object to Wilson's expressions of opinion regarding defendant's guilt, or counsel's failure to timely request an instruction specifically addressing the probative limits of Wilson's expert drug profile opinions. I cannot characterize trial counsel's silence throughout Wilson's direct examination as a reasonable exercise of professional judgment, because no possible harm would have resulted to defendant's case had his counsel simply voiced an objection premised on the principles described in *Murray*. This Court issued its comprehensive, detailed opinion in *Murray* a decade ago. A minimally competent attorney should have been aware that drug profile testimony "is inherently prejudicial to the defendant because the profile may suggest that innocuous events indicate criminal activity." *Murray, supra* at 53, quoting *United States v Lim*, 984 F2d 331, 334-335 (CA 9, 1993). An attorney functioning as the counsel required by the Sixth Amendment would have objected to Wilson's blatantly improper hearsay statements and highly prejudicial expert conclusions that defendant was guilty. But, as discussed briefly below, counsel's errors did not alter the outcome of defendant's trial.

IV. Prejudice

This Court recognized in *Murray* that the testimony of a law enforcement witness offering both expert opinions and recitations of fact qualifies as potentially uniquely prejudicial. But despite the plain errors committed here, I agree with the majority that after examining the record in its entirety, the errors did not alter the outcome of defendant's trial. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The evidence indisputably revealed that defendant resided in the upstairs living area of the home, where the police found guns, narcotics, and narcotic packaging materials. Because the search warrant's execution yielded direct evidence that would certainly have resulted in defendant's conviction, even without supplementation by Wilson's improper opinions, I concur in the affirmance of defendant's convictions.

/s/ Elizabeth L. Gleicher