

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 25, 2012

v

DEANDRE RON-RICO HAWKINS,

Defendant-Appellant.

No. 305965
Saginaw Circuit Court
LC No. 09-033606-FH-3

Before: SHAPIRO, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions for possession with intent to deliver a controlled substance less than 5 kilograms (marijuana), MCL 333.7401(2)(d)(iii); felon in possession of a firearm, MCL 750.224f; maintaining a drug house, MCL 333.7405(1)(d); possession of a controlled substance less than 25 grams (cocaine), MCL 333.7403(2)(a)(v); and three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm. The trial court was within its discretion when it refused to give any weight to evidence of polygraph examinations taken by defendant and another witness as part of defendant’s motion to suppress evidence found in his house. We agree that the trial court erred in refusing to qualify the polygraph operators as experts, but this error was harmless. Defendant’s other arguments are without merit.

I. FACTS

Saginaw Police Officer Robert Adams responded to a burglar alarm report at 814 Maple on October 29, 2009. He found no evidence of forced entry, but when defendant and his friend Natasha Redeemer arrived Adams told defendant that he wanted to sweep the house for defendant’s safety. While conducting what he termed a “basic” search to ensure that nobody was hiding inside, Adams noticed what appeared to be marijuana in a bedroom and, according to Adams, defendant admitted the marijuana was his. A full search pursuant to a search warrant revealed cocaine in a waterless fish tank, a digital scale, two other scales, and Ziploc baggies. Officers also found more marijuana, two bullet-resistant vests, an assault rifle, and two pistols.

Saginaw Police Detective Rick Lutz testified as an expert in the field of “manufacture, packaging and distribution of controlled substances.” He asserted that the Ziploc baggies found in the house were consistent with other cases involving packaging and distribution of controlled substances. Further, Lutz testified that defendant “told me that all the dope was his, and that he

wasn't going to involve anyone else." Based on the alleged marijuana, the packaging materials, the scales, the firearms, the large quantity of money, and the bulletproof vests, Lutz opined that the alleged marijuana "was more for distribution than use," and that the house was a "drug house." Detective John Butcher of the Saginaw County Sheriff's Department also testified as an expert in the field of "manufacturing, packaging, or distribution of controlled substances" and said that search results mirroring those in this case would indicate that the marijuana found would be for "distributional use" and that the house would be a drug house.

At trial, defendant testified that he did not reside at 814 Maple in October 2009, having moved out about one month before the incident in question. Defendant testified that the marijuana, cocaine, and firearms found in the house were not his and he denied telling Adams that the drugs were his. Defendant testified that he did not have knowledge of the bulletproof vests, and that he had one electronic scale in the house for his dog.

II. MOTION TO SUPPRESS EVIDENCE

Before trial, defendant moved to suppress the evidence discovered by the officers, arguing that he did not consent to the initial search of his house and that Adams entered the house without his consent. "We review for an abuse of discretion the trial court's consideration of polygraph-examination results in weighing a defendant's credibility." *People v Roberts*, 292 Mich App 492, 503; 808 NW2d 290 (2011).

At the suppression hearing, Officer Adams asserted that defendant unlocked the door for him and allowed him to enter. By contrast, defendant testified that he told Adams he did not have permission to enter. Defendant moved to qualify two licensed polygraph examiners, Christopher Lanfear and Howard Swabash as experts. Lanfear had examined defendant and Swabash had examined Redeemer. The trial court refused to qualify them as experts but allowed them to testify. Lanfear testified that during a polygraph examination defendant stated he did not consent to Adams's search of his house. Lanfear found defendant to be truthful. Similarly, Swabash testified that during a polygraph examination Redeemer, who was present when Adams entered 814 Maple, stated defendant did not consent to the search. Swabash further testified that he found Redeemer to be truthful.

When defendant moved to qualify Swabash as an expert in the field of polygraph examinations, the following colloquy occurred:

The Court: All right. For the same reasons I'm not going to qualify him as an expert, I don't think he met the standard for expertise as to polygraphs. But I will allow his testimony and recognize that he is a – qualified as a polygraph examiner, for whatever that's worth.

Mr. Maddaloni: Well, if I may inquire of the Court, what standard – is there a specific standard that I have failed to – to follow?

The Court: Yeah, I don't – I don't think that polygraph examinations are recognized as – that they necessarily meet all the qualifications, as they're not recognized as valid scientific instruments and qualified for testimony.

Mr. Maddaloni: So if I'm just clear, the Court is denying my request to have him qualified as expert because the Court does not believe that it's scientifically valid?

The Court: The polygraph examinations have not been recognized by the scientific community as valid.

After hearing testimony, the trial court denied defendant's motion to suppress the evidence found in his house. It stated its opinion on the record:

The Court: All right. The defendant has cited McKinney [*People v McKinney*, 137 Mich App 110, 115-116; 357 NW2d 825 (1984),] and Barbara [*People v Barbara*, 400 Mich 352, 364; 255 NW2d 171 (1977)] And the results, according to McKinney, of a polygraph examination are admissible in the discretion of the Court in a hearing on a pretrial motion to suppress evidence where the results of the tests are offered on behalf of the defendant; the test was taken voluntarily; the professional qualifications of the polygraph examiner, the quality of the equipment and the procedures employed are approved.

I believe that the defendant has met the first two aspects. As to this third aspect, certainly the professional qualifications of the polygraph examiner have been established, the quality of the equipment has been described; the procedures employed, whether they're approved or not – I guess they're approved in terms of polygraph examiners generally, but whether they're approved by the courts overall as a method of determining credibility is questionable, at least at this point in time.

And then the additional requirements under McKinney are, four, either that the prosecutor or the Court may obtain an independent examination of the subject or of the test results. Again, that hasn't been established, at least as to whether these two witnesses or the defendant and the witness would take an independent exam.

Mr. Maddaloni: They would, but no one asked.

The Court: The results are, fifth, only to be considered with regard to the general credibility of the subject, and then we need to keep them as a separate record.

Here my concern, in this case, is that I don't believe that polygraph examinations have been accepted as valid, generally, by the courts. It concerns me in part because you're relying on a 1977 case and a 1984 case, where there's been extensive research and discussion, in federal cases, particularly, but even in some – in some state cases, about – and questioning, about the validity of polygraph exams and whether they're generally accepted in the scientific community.

Mr. Maddaloni: Ma'am?

The Court: Even in – let me finish – even in Jones, where – which the Court cited, there was some discretion, discussion about the validity of polygraphs and their use. But I know there is much more extensive discussion and a great deal of concern about the use of them in a number of federal cases. And even under McKinney and Barbara, it’s up to my discretion whether to accept them and to use them or allow them in relation to deciding a motion to suppress. And I – I’m not going to accept them as necessarily valid. I’m not going to make a decision on credibility based on the polygraph testimony and evidence that’s been offered here, and I’m simply going to deny the motion. I –

* * *

The Court: Well . . . for the reasons that the Court has indicated, and I believe that polygraph exams or polygraphs in general have not been well accepted in the courts. And I know there’s extensive discussion in the federal courts as to polygraph exams and their validity. That is the basis for my not accepting that. And I will stand by that decision, and I’ll ask the prosecutor to prepare an order.

The results of a polygraph examination are generally inadmissible at trial. *People v Barbara*, 400 Mich at 364. “The basic rationale for the *Barbara* Court’s conclusion was that the polygraph technique had not yet received the degree of acceptance or standardization among scientists which would allow admissibility.” *People v Ray*, 431 Mich 260, 265; 430 NW2d 626 (1988). “[E]xclusion at trial of polygraph results rests upon the judicial estimate that the trier of fact will give disproportionate weight to the results and consider the evidence as conclusive proof of guilt or innocence.” *Id.*

However, polygraph results are admissible under certain circumstances in pre- and post-trial motions, including a motion to suppress evidence. *McKinney*, 137 Mich App at 115-116; *Barbara*, 400 Mich at 412.

A motion to suppress evidence is often a matter preliminary to trial. The question presented is not the ultimate one of defendant’s guilt or innocence. Rather, the question is a legal one to be decided by the trial court. In many cases, as in this, the trial court’s decision rests upon a credibility determination. While a polygraph examination result ought not be determinative, it might be useful to assist the court in determining credibility or veracity. If so, a trial court should have the discretion to consider polygraph examination results in making that determination. [*McKinney*, 137 Mich App at 115-116.]

The trial court may only consider the polygraph-examination results with respect to the examinee’s credibility, not the ultimate truth of any particular statement. *Id.* at 117.

Even when evidence of polygraph examinations is admissible, the trial court has a great deal of latitude in determining what weight to give the evidence. “In our opinion the judge in a post-conviction hearing on a motion for new trial based on newly found evidence may in his or her discretion consider the results of a polygraph examination. If the judge chooses to consider

such results it must be under certain hereinafter enumerated conditions.” *Barbara*, 400 Mich at 412. The *McKinney* court similarly stated that the trial court “should have the discretion to consider” such evidence. *McKinney*, 137 Mich App at 11. These cases do not require the trial court to consider or give any particular weight to evidence of polygraph examinations.

In *Roberts*, the trial court accorded “little weight” to polygraph results proffered by the defendant, and “ultimately concluded that the officers’ version of the events was closer to the truth.” 292 Mich App at 506. This Court rejected the defendant’s argument that the trial court had abused its discretion in giving polygraph evidence “little weight.” *Id.* at 505-506. This Court held that the trial court was “entitled to use its discretion in considering how much weight to give the polygraph examinations” and that the decision to give it “little weight” “was not outside the range of reasonable and principled outcomes.” *Id.*

In this case, the trial court admitted the evidence of polygraph examinations but gave it no weight at all. Under the caselaw described above, this decision was not outside the range of reasonable and principled outcomes.

II. QUALIFICATION OF EXPERT WITNESSES

Defendant argues that, although the trial court allowed Swabash and Lanfear to testify, it erred by refusing to qualify them as expert witnesses. We agree, but find this error to be harmless.

On one hand, Michigan courts have held that the polygraph examination has not been accepted by the scientific community to the extent required for admission of expert testimony. *Ray*, 431 Mich at 265. However, our Supreme Court in *Barbara*, while establishing the bright-line rule that the results of polygraph examinations are inadmissible at trial, also referred to polygraph operators as “experts.” E.g., *Barbara*, 400 Mich at 366, 416. This Court also referred to a polygraph operator as an “expert” while in the same sentence recognizing that polygraph-examination results are inadmissible at trial. *People v Dobek*, 274 Mich App 58, 97; 732 NW2d 546 (2007). Thus, a polygraph operator may simultaneously qualify as an expert in a pretrial hearing while the polygraph operator’s testimony would be excluded as unreliable at trial.¹

The trial court abused its discretion by declining to qualify Lanfear and Swabash as experts. Both men have decades of experience with the Michigan State Police, have conducted thousands of polygraph examinations, and are properly licensed under Michigan law. Indeed, a review of the suppression hearing transcript suggests that the prosecutor did not dispute that Lanfear and Swabash were highly trained and experienced in polygraph examinations, and the

¹ The purpose of a polygraph examination is to have the operator offer an opinion regarding whether the examinee is truthful. Clearly, the operator’s opinion is based on specialized knowledge not within the knowledge of a layperson. Thus, it would appear that a polygraph operator must be qualified as an expert before testifying in any legal proceeding. See *Franzel v Kerr Mfg Co*, 234 Mich App 600, 621; 600 NW2d 66 (1999) (expert testimony requires specialized knowledge).

trial court only refused to qualify them as experts because of its view of polygraph examinations in general. Because it is possible to have experts in polygraph examinations for the purposes of a suppression hearing, the trial court erred by refusing to accept Lanfear and Swabash as experts when they were otherwise highly qualified.

However, as discussed above, the trial court was still free to heed or ignore the polygraph evidence at its discretion. We cannot see that it would have made a difference for the trial court to properly label Lanfear and Swabash as experts, particularly since the trial court stated that it recognized that they were qualified polygraph examiners, “for whatever that’s worth.” “A preserved, nonconstitutional error is not a ground for reversal, unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative.” *People v Cornell*, 466 Mich 335, 363-364; 646 NW2d 127 (2002). Though the trial court should have qualified Lanfear and Swabash as experts, this error was not outcome determinative.

Next, defendant argues that Butcher and Lutz should not have been qualified in the field of manufacturing, packaging, and distribution of controlled substances. In *People v Murray*, 234 Mich App 46; 593 NW2d 690 (1999), this Court approved the use of so-called “drug profile evidence.” *Id.* at 52. “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” *Id.* at 52-53. Trial courts may allow expert testimony on drug-profile evidence to the extent that the testimony “aids the jury in intelligently understanding the evidentiary backdrop of the case[] and the modus operandi of drug dealers[.]” *Id.* at 56. However, such expert testimony cannot “comment directly or substantively on a defendant’s guilt.” *Id.* Drug-profile evidence may only be introduced through the testimony of a qualified expert witness. *Id.* at 53-54.

In *Murray*, this Court provided a three-element test to determine whether expert testimony on drug-profile evidence is admissible at trial:

- (1) the expert must be qualified;
- (2) the evidence must serve to give the trier of fact a better understanding of the evidence or assist in determining a fact in issue;
- and (3) the evidence must be from a recognized discipline. [*Id.* at 53 (citation and quotation marks omitted).]

To meet the first element, the testifying witness must be qualified as an expert as provided by MRE 702. See *id.* To meet the second element, the proffered drug-profile evidence must be limited in scope to “provid[ing] the jury with a better understanding of the evidence,” not as “substantive evidence” of guilt. *Id.* at 58-59. To meet the third element, the proffered drug-profile evidence must relate to “a recognized area of expertise” such as “narcotics-related law enforcement.” See *id.* at 58.

In this case, defendant argues that there was no showing that Butcher’s and Lutz’s training and experience related to the proffered field (“manufacturing, packaging, and distribution of controlled substances”). Further, defendant argues that there was no showing that their testimony was derived from a sound foundation.

“[N]arcotics-related law enforcement is a recognized area of expertise.” *Murray*, 234 Mich App at 58. The proffered field in this case (“manufacturing, packaging, or distribution of controlled substances”) is substantively identical to the “narcotics-related law enforcement” field approved in *Murray*. Thus, the third element of the *Murray* test is met.

Defendant argues that there was no showing that Butcher’s and Lutz’s training and experience related to the proffered field. We disagree because both men testified that they had previously investigated many narcotics cases—Lutz over 100 and Butcher over 1,000. Further, Butcher testified that he has completed “[s]everal schools” in the proffered field taught by the Michigan State Police and Lutz testified that he has completed “[m]any trainings” in the proffered field taught by various federal agencies. This testimony established both “training” and “experience” in “narcotics-related law enforcement.” Thus, the trial court did not abuse its discretion in deciding that Lutz and Butcher had adequate training and experience to be qualified as experts.

Defendant argues that the prosecutor failed to establish a foundation for Lutz’s and Butcher’s expert testimony. To establish a foundation for expert testimony, a party must show “(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.” MRE 702. With respect to the first element of MRE 702, Lutz’s and Butcher’s drug-profile testimony was based on several items found in defendant’s house, including pounds of marijuana, firearms, and bulletproof vests. On the basis of these items, Lutz and Butcher had a sufficient factual basis from which they could opine that defendant’s house was consistent with the profile of a house used for narcotics distribution. With respect to the second element of MRE 702, this Court has explicitly approved drug-profile evidence as a reliable expert field under MRE 702. *Murray*, 234 Mich App at 53. With respect to the third element of MRE 702, the record shows that Lutz and Butcher applied the drug-profile field “reliably to the facts of the case.” In light of the illegal narcotics, multiple firearms and bulletproof vests, numerous plastic baggies containing small amounts of marijuana, and the small electronic scales found in defendant’s house, it was wholly reasonable for Lutz and Butcher to testify that the presence of these items was consistent with narcotics distribution. Accordingly, the trial court did not abuse its discretion in qualifying Lutz and Butcher as experts in the proffered field under MRE 702.

III. ADMISSION OF BULLET-RESISTANT VESTS

Defendant next argues that the trial court should not have admitted the bullet-resistant vests into evidence or allowed related testimony. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401; *People v Small*, 467 Mich 259, 264; 650 NW2d 328 (2002).

MCL 333.7405(1)(d) provides that a person:

Shall not knowingly keep or maintain a store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place, that is frequented by persons using controlled substances in violation of this article for the purpose of

using controlled substances, or that is used for keeping or selling controlled substances in violation of this article.

This statute prohibits a person from “knowingly keeping or maintaining a drug house[.]” *People v Bartlett*, 231 Mich App 139, 141; 585 NW2d 341 (1998).

In this case, the bulletproof vests were relevant to show that defendant’s house was consistent with houses used for distribution of controlled substances, not merely the possession or use of controlled substances. The presence of the bulletproof vests in the house, in addition to the firearms, suggested that defendant identified a need for personal protection. Expert testimony established that such a need for personal protection was consistent with drug houses in general, which tend to attract dangerous criminals. While personal protection itself is innocuous, when considered in the context of the other evidence found in the house, the items used for personal protection here were relevant to the drug-house charge. By analogy, small plastic sandwich bags are innocent, harmless, and do not suggest criminal activity. However, when the sandwich bags are present in the immediate vicinity of marijuana, the sandwich bags then become relevant to show possible distribution of the marijuana. The trial court did not abuse its discretion by concluding that the bulletproof vests were relevant.

Defendant argues that testimony regarding the bulletproof vests should have been excluded because there was no evidence that defendant ever possessed or used the bulletproof vests in furtherance of the crime of maintaining a drug house. However, the bulletproof vests were not admitted as instrumentalities of a crime. Further, testimony established that the bulletproof vests were found in the house in the same location as the controlled substances and firearms. In particular, the bulletproof vests, the two firearms, and several containers of narcotics were all found in the first-floor bedroom.

Defendant also argues that the prosecution did not lay a sufficient foundation for admission of the bulletproof vests. Here, an officer testified that the two bulletproof vests were found in the bedroom closet and placed in a bag labeled with the incident number. Jordan’s testimony was adequate to authenticate the bulletproof vests.

Defendant further argues that the bulletproof vests were unduly prejudicial. The bulletproof vests could have had a prejudicial effect. By its very nature, a bulletproof vest suggests violence. In light of the fact that defendant did not have a valid law-enforcement use for the bulletproof vests, which would have suggested a lawful exposure to violence, one may infer that defendant contemplated some type of illegal violence.

On the other hand, for the reasons outlined above, the bulletproof vests had a significant probative value as well. The bulletproof vests showed that defendant’s house was consistent with drug houses, one of the charged crimes. MRE 403 only requires exclusion of the evidence when its probative value is *substantially* outweighed by its prejudicial effect. Here, the bulletproof vests had significant probative value. The trial court did not abuse its discretion by admitting them.

IV. MOTION FOR MISTRIAL

Defendant lastly argues that the trial court erred in denying his motion for a mistrial after Lutz testified that defendant refused to answer any questions after his arrest. A trial court's decision regarding a motion for a mistrial is reviewed for an abuse of discretion. *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010).

“A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant . . . and impairs his ability to get a fair trial.” *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003), quoting *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) (omission in *Alter*). “A trial court should only grant a mistrial when the prejudicial effect of the error cannot be removed in any other way.” *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008). Jury instructions are presumed to cure most errors. *Id.*

If a person elects to remain silent after receiving the *Miranda* warnings, the prosecution is not permitted to introduce evidence of the person's silence at trial to attack the person's credibility. *People v Dennis*, 464 Mich 567, 573-574; 628 NW2d 502 (2001); see *Doyle v Ohio*, 426 US 610, 619; 96 S Ct 2240; 49 L Ed 2d 91 (1976).² When a prosecutor nevertheless introduces evidence of a defendant's post-*Miranda* silence, a due-process violation under the Fourteenth Amendment to the United States Constitution has occurred. *Dennis*, 464 Mich at 573.

The facts of this case are similar to the facts in *Dennis*. In *Dennis*, the prosecutor asked a single open-ended question, and the detective-witness revealed that the defendant refused to be interviewed without first speaking with an attorney. *Dennis*, 464 Mich at 575.³ The context of the question and answer in *Dennis* did not “reasonably support a conclusion that the prosecutor intended for this question to elicit a reference to the attempted interview.” *Id.* The trial court instructed the jury to disregard the defendant's silence. *Id.* at 578. Moreover, the prosecutor did not make any additional reference to the defendant's silence during the remainder of the trial. *Id.* at 577. The defendant did not testify, so the reference to the defendant's silence was not used for impeachment purposes. *Id.* at 578. Our Supreme Court held that the defendant's due-process rights under *Doyle* were not violated, so the trial court did not abuse its discretion in denying the defendant's motion for a mistrial. *Id.* at 581.

² But a violation of *Doyle* may occur even if the defendant does not testify. *Dennis*, 464 Mich at 578 n 8.

³ *Q:* What type of investigation follow-up did you do with regard to this?

A: I went out and attempted to interview [defendant], and at that time it was refused. He wished to speak to an attorney prior to me asking him any questions. [*Id.* at 570]

The reference to the defendant's request for an attorney did not change our Supreme Court's analysis.

In this case, like the case in *Dennis*, the prosecutor asked a single open-ended question. The following exchange occurred during the prosecutor's examination of Lutz:

Q: Did the defendant make any statement concerning the controlled substances that you found while at the scene?

A: When Mr. Hawkins was brought back into the house he was sat at the table with me. I gave him some Miranda rights. He chose – he understood his Miranda rights, but he chose not to talk to me. But he did – he did make one statement out of his own free will. He said that nobody – well, let me refer exactly what he said.

Q: Please do.

A: He referred – he told me that all the dope was his, and that he wasn't going to involve anyone else [Tr II, 95.]

The context of the questioning does not suggest that the prosecutor intended for Lutz to reference defendant's silence, as the purpose of the question was to elicit the statement that defendant actually made. Further, the trial court immediately gave a curative instruction to the jury, and the prosecutor did not again reference defendant's silence during trial. The trial court's instruction is presumed to cure any error. *Horn*, 279 Mich App at 36. Although defendant testified in this case, the prosecutor did not attempt to impeach his testimony by referencing his silence during police interrogation. The facts of *Dennis* are indistinguishable, and the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Elizabeth L. Gleicher
/s/ Amy Ronayne Krause