STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STERLING DESHONE BARNES,

Defendant-Appellant.

UNPUBLISHED
December 20, 1996

No. 175116
LC No. 93-007748-FH

Before: Corrigan, P.J., and Taylor and D.A. Johnston,* JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction of unlawful possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). The court sentenced defendant to a term of imprisonment of five to twenty years, to be served consecutively to his current prison term. We affirm.

Defendant first argues that the circuit court denied him due process when it denied his motion for a directed verdict of acquittal. Defendant maintains that the prosecution failed to prove the requisite elements of possession with the intent to deliver. In reviewing a decision on a motion for directed verdict, this Court views the evidence presented through the time the motion was made in the light most favorable to the prosecution to determine whether a rational factfinder could find the essential elements of the crime proven beyond a reasonable doubt. *People v Peebles*, 216 Mich App 661, 664; 550 NW2d 589 (1996). For defendant to be convicted, the prosecution must show that: (1) the recovered substance was cocaine, (2) the cocaine was in a mixture weighing less than fifty grams, (3) the accused was not authorized to possess the cocaine, and (4) the accused knowingly possessed the cocaine with the intent to deliver it. *People v Catanzarite*, 211 Mich App 573, 577; 536 NW2d 570 (1995). An expert witness testified that the recovered substance was cocaine, and that the mixture weighed less than fifty grams. Defendant presented no evidence that he was authorized to possess the cocaine. Evidence thus established the first three elements.

* Circuit judge, sitting on the Court of Appeals by assignment.

Regarding the remaining factor, the prosecutor presented evidence that defendant spoke with individuals in the front yard, defendant then entered the side or back yard, and defendant returned to the front yard to speak with the individuals again. Further, a substantial amount of traffic stopped in front of defendant's house. A detective on surveillance testified that during three separate one-hour periods of surveillance, approximately twelve cars would drive up and the described interactions would occur. During a subsequent search warrant execution, the police found 23 rocks of cocaine in a bottle hidden in an exhaust pipe in the side or back yard. When police arrested defendant, he was carrying a pager and $172 in cash. This evidence was sufficient to establish that defendant constructively possessed the cocaine. *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). Constructive possession exists where the defendant had the right to exercise control over the cocaine and knew that it was present. *Catanzarite*, *supra* at 577. A reasonable inference could be drawn that defendant retrieved the cocaine at the behest of the numerous individuals who comprised the traffic in front of his home. See *People v Sammons*, 191 Mich App 351, 371; 478 NW2d 901 (1991). Moreover, the sheer quantity of crack cocaine, 23 rocks, in defendant's possession was sufficient to establish his intent to deliver. *People v Ray*, 191 Mich App 706, 708; 479 NW2d 1 (1991). Because a rational trier of fact could find that defendant possessed the cocaine with the intent to deliver it, the circuit court did not err in denying his motion for a directed verdict of acquittal.

We next address whether the circuit court properly admitted a police officer's expert opinion regarding defendant's involvement with drugs. Because defendant did not object to the testimony, our review is limited to plain error affecting a substantial right. MRE 103; *People v Grant*, 445 Mich 535, 547-552; 520 NW2d 123 (1994). Defendant has not established plain error. Defendant argues that the evidence was "drug profile" evidence. Drug profile evidence involves common characteristics of drug dealers, or "a listing of characteristics that in the opinion of law enforcement officers are typical of a person engaged in a specific illegal activity." *People v Hubbard*, 209 Mich App 234, 237-239; 530 NW2d 130 (1995) (citation omitted). Drug profile evidence is not admissible to prove substantive guilt. *Id*. at 241.

In *Hubbard*, police officers stopped the defendant, the driver of a maroon Chevrolet, because an informant told them that several African-American males appeared to be dealing drugs from a maroon Chevrolet. At trial, the prosecutor asked a police officer if he was aware of "characteristics or indicators of people who are involved in the drug trade which are fairly consistent across the board." The prosecutor later used that profile evidence of substantive proof of the defendant's guilt. *Id*. at 235-238.

Unlike *Hubbard*, where the police never observed the defendant's behavior for evidence of drug dealing, the police in this case kept defendant under surveillance at various times for a week before his arrest. The evidence adduced at trial, along with its reasonable inferences, demonstrated that defendant possessed cocaine and distributed it to the individuals who stopped in front of his house. While the prosecutor in this case subsequently argued in closing that the opinion testimony supported the inference that defendant was a crack cocaine dealer, he never argued that defendant fit the profile of a drug dealer.

The opinion evidence in the case at bar did not amount to drug profile evidence. Rather, the prosecutor merely elicited an expert opinion from a police officer based on a hypothetical, a permissible trial tactic under *Ray, supra*. This Court stated in *Ray*:

> [The expert witness] testified that the quantity of crack cocaine found in defendant's possession, the fact that the rocks of crack cocaine were evenly cut, and the selling price of crack cocaine on the street clearly indicated that defendant intended to sell the drugs and not simply use the crack cocaine for personal consumption. Such information was not within the knowledge of a layman, and [the expert witness'] testimony would have aided the jury in determining defendant's intent and, thus, his guilt of the charged offense. The fact that the testimony did embrace the ultimate issue of intent to deliver did not render the evidence inadmissible. [*Ray, supra* at 708.]

Similarly, the officer here relied on the existing evidence, not profile characteristics, to opine that defendant dealt drugs. The officer testified that the frequent traffic at defendant's house, the large amount of cocaine found in defendant's possession, the plentiful cash found on defendant's person and defendant's use of a pager, taken together, established that defendant was a crack cocaine dealer. In his testimony, the officer explained the significance of the seized contraband, which *Hubbard, supra* at 239, allows. The expert's testimony was related to the direct evidence in the case. Defendant has not established plain error.

Defendant also argues that prosecutorial misconduct denied him a fair trial or, in the alternative, that defense counsel's failure to object to the prosecutor's actions constituted ineffective assistance of counsel. Defense counsel did not object to the prosecutor's alleged improper remarks. Therefore, appellate review of the prosecutor's remarks is precluded unless the prejudicial effect could not have been cured by a cautionary instruction or failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Whitfield*, 214 Mich App 348, 352; 543 NW2d 347 (1995).

Defendant argues that the prosecutor impermissibly asked him in cross-examination whether he knew the value of a rock of crack cocaine. A defendant can prevail on a claim of prosecutorial misconduct only if the allegedly improper question denied him a fair trial. See *People v Yarger*, 193 Mich App 532, 540; 485 NW2d 119 (1992). Because defendant had admitted on direct examination that he attended drug counseling, the prejudicial effect of the prosecutor's question was minimal and could have been cured by a cautionary instruction. This case is distinguishable from *People v McKinney*, 410 Mich 413, 420-421; 301 NW2d 824 (1981), which defendant cites for support, because the prosecutor's five questions in this case did not equate to the numerous questions put by the *McKinney* prosecutor that established the defendant's familiarity with heroin. Nor did the prosecutor here require defendant to perform a pantomime to demonstrate how drugs are ingested, as occurred in *McKinney*.

Defendant also relies on *People v Quinn*, 194 Mich App 250; 486 NW2d 139 (1992); it likewise is not analogous to this case. The prosecutor in *Quinn* asked the defendant, who was charged

with felonious assault, several questions about his previous use of cocaine and marijuana. In this case, where defendant was charged with possession with the intent to deliver cocaine, the prosecutor asked questions related to the charge – questions about the value of crack cocaine and defendant's prior use of the drug. Moreover, the prosecutor in *Quinn* injected the defendant's character into closing argument, which did not occur here.

Defendant next complains that the prosecutor should not have referred to defendant's admission that he was unfaithful to his girlfriend. The prosecutor merely commented on the explanation that defendant had provided for carrying a pager, a device that defendant himself admitted might lead people to believe he was using to deal drugs. Defendant opened the door to the prosecutor's comments, *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995), and a prosecutor may comment upon the evidence, *People v Ricky Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993). Defendant also asserts that the prosecutor improperly referred to his unemployed status. While a defendant's employment status is not admissible to imply guilt, *People v Elwood Johnson*, 393 Mich 488, 496-497; 227 NW2d 523 (1975), a cautionary instruction could have cured any resulting prejudice. Also, the prosecutor did not use defendant's lack of employment to prove defendant's guilt, but to show that defendant did not have a legitimate reason for carrying that amount of cash.

Finally, defendant claims that he was denied effective assistance of counsel because his counsel failed to object to the prosecutor's comments. To establish ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance was deficient and that the deficiency prejudiced him. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Further, the defendant must overcome the presumption that the challenged action is sound trial strategy. *Id.* A defendant must also show a reasonable probability that, but for counsel's deficient performance, the result would have been different and that the result of the proceeding was fundamentally unfair or unreliable. *People v Poole*, 218 Mich App ___; ___ NW2d ___ (Docket Nos. 169867, 169987, issued September 17, 1996). In the absence of a separate evidentiary record, our review is limited to the record furnished on appeal. *People v Moseler*, 202 Mich App 296, 299; 508 NW2d 192 (1993).

Defendant has not established that the outcome of the trial would have been different absent these alleged errors, *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995). Defendant has not demonstrated that the result of the proceeding was fundamentally unfair. On direct examination, defendant himself introduced his prior drug use, admitted that he carried a pager and explained that he carried the pager to prevent his girlfriend from discovering his other attachments. Defendant may not be heard to complain on appeal about an error that he caused or an error to which he acquiesced. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995).

Defendant also argues that counsel was deficient in failing to object to the "profile evidence." Because the circuit court properly admitted this evidence, counsel had no basis to lodge an objection. Counsel is not deficient for failing to assert meritless arguments. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Moreover, counsel's failure to object to the drug profile evidence was understandable because the trial occurred the year before *Hubbard, supra*, was decided.

Affirmed.

/s/ Maura D. Corrigan
/s/ Clifford W. Taylor
/s/ Donald A. Johnston