STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT TURNER,

Defendant-Appellant.

UNPUBLISHED
November 21, 1997

No. 195928
Oakland Circuit Court
LC No. 95-142745-FH

Before: Jansen, P.J., and Doctoroff and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), carrying a concealed weapon in an automobile, MCL 750.227; MSA 28.424, possession of a firearm in the commission of a felony, MCL 750.227b; MSA 424(2), and driving with expired license plates, MCL 257.255(1); MSA 9.1955(1). Defendant was subsequently convicted of two counts of being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. Defendant was sentenced to two to twenty years' imprisonment on the drug conviction, one to five years' imprisonment on the CCW conviction, two years' imprisonment on the felony-firearm conviction, and ninety days' imprisonment on the expired plates conviction. Defendant's sentences for the drug conviction and the CCW conviction were then vacated and defendant's sentences were enhanced to two to forty years and two to twenty years, respectively, for the two counts of habitual offender. Defendant thereafter pleaded guilty to felon in possession of a firearm, MCL 750.224f; MSA 28.42(6) pursuant to a *Cobbs*[1] plea agreement and was sentenced to one to five years' imprisonment to be served concurrently with the other sentences. Defendant now appeals as of right. We reverse and remand for a new trial.

On appeal, defendant first argues that the district court erred in reopening the proofs at the preliminary examination to permit the prosecution to introduce a supplemental witness after the court had already rendered its decision. Defendant argues that the prosecution was given every opportunity to present its case, and the supplemental witness was merely cumulative evidence that would not establish defendant's intent to distribute cocaine. Moreover, defendant argues, the trial court's decision

was especially improper where the evidence to be admitted was inadmissible drug dealer profile evidence. We disagree.

At the preliminary examination, the prosecution presented testimony from Officers Ortman and Alvis regarding what occurred on the evening defendant was arrested. Thereafter, the prosecution moved to bind defendant over on the charge of possession with intent to deliver less than 50 grams of cocaine. Instead, pursuant to a request by defendant, the court bound the defendant over on the lesser offense of possession of less than 25 grams of cocaine. The prosecutor subsequently moved to reopen the proofs in order to call a narcotics officer to supplement the other evidence. Defense counsel objected to the motion, arguing that the evidence presented spoke for itself, and additional evidence would be cumulative. The court disagreed and granted the motion. The prosecution then offered the testimony of Officer Pascho Ivezaj of the Pontiac Police Department. Based on the supplemental evidence, the court was satisfied that the prosecution established probable cause to bind defendant over on the charge of possession with intent to deliver.

The reopening of proofs in a criminal case for either the prosecution or defendant generally rests within the sound discretion of the court. *People v Collier*, 168 Mich App 687, 694; 425 NW2d 118 (1988). In ruling on a request to reopen the proofs, the court must consider "whether any undue advantage would be taken by the moving party and whether there is any showing of surprise or prejudice to the nonmoving party." *Id.* at 694-695. In this case, although the prosecution could have introduced the testimony of Officer Ivezaj initially, the fact that it did not do so does not preclude it from admitting that evidence where the court finds that it would be helpful and relevant to the bind over determination. The prosecution did not obtain an undue advantage over the defense by introducing the testimony because the evidence was offered to prove precisely the charge brought against defendant, not to enhance the charge or alter the facts. In addition, defendant was given the opportunity to cross-examine the witness and scrutinize his testimony. Furthermore, defendant was aware of the charge brought against him, and should not have been surprised by the prosecution's efforts to introduce testimony on the intent element of the offense. Finally, the prosecution correctly noted that had the court declined to reopen the proofs, it could have made a motion to remand the case for a subsequent preliminary examination based on the additional evidence. See *People v Stafford*, 434 Mich 125, 137; 450 NW2d 559 (1990); *People v Miklovich*, 375 Mich 536, 539; 134 NW2d 720 (1965). The need for efficiency and expediency in the criminal justice system encourages courts to exercise their discretion in situations such as this, rather than requiring the prosecution to pursue the lengthy and costly alternative of motioning the circuit court to remand for re-examination of the evidence. Therefore, we find that the magistrate did not abuse his discretion in reopening the proofs and permitting the prosecution to offer the testimony of an additional witness.

Defendant next argues that the trial court abused its discretion in allowing a prosecution witness to qualify as an expert where he was the officer in charge of the case. Defendant asserts that the officer's intimate involvement in this matter prevented him from being impartial and providing the jury with an unbiased expert opinion. Defendant failed to object to the admission of

the expert's testimony at trial. Therefore, this issue was not preserved for appeal. *People v Stanaway*, 446 Mich 643, 694; 521 NW2d 557 (1994). In the absence of an objection, this Court will only review the issue to avoid manifest injustice. *People v Amos*, 163 Mich App 50, 53; 414 NW2d 147 (1987). Because we conclude that there was no manifest injustice by the admission of the evidence on this basis, we decline to address this issue. In any event, we find that the admission of this evidence was not improper and did not prejudice defendant.

Defendant also contends that the trial court abused its discretion in allowing a police officer, qualified as an expert witness, to testify regarding information that amounted to "drug dealer profile" evidence. We agree. Although defendant did not preserve this issue by objecting to the admission of this evidence below, we will review the issue because we find that a failure to do so would result in manifest injustice. *Amos*, *supra* at 53.

In *People v Hubbard*, 209 Mich App 234, 235; 530 NW2d 130 (1995), this Court held that "drug dealer profile" evidence is inadmissible as substantive evidence of a defendant's guilt. In the instant case, we are persuaded that much of Officer Payne's testimony amounted to "drug dealer profile" evidence, which was irrelevant and inadmissible at trial. After Officer Payne was qualified as an expert witness on drug trafficking and drug activities, the prosecutor asked him several questions pertaining to his experiences in determining whether someone possessed narcotics for personal consumption, or in order to distribute them. The questions Payne was asked specifically focused on the size and amount of narcotics a drug dealer would commonly possess if he intended to distribute them, the approximate value of the cocaine generally sold, and the frequent use of beepers and pagers, as well as firearms, by drug dealers. Officer Payne's responses did not consider the precise facts of the case, but were general references to situations where he had previously observed drug transactions. The conclusions he drew were based on his experiences with drug trafficking and activities over the years. Although they may be useful to assist him in recognizing and apprehending persons he believes to be involved in the unlawful possession and distribution of narcotics, it is unfair to defendant, and others in his position, to allow an officer to take his street experiences, however common they may be, and instantly assume the facts are identical in every drug case he confronts, absent additional evidence to supplement the officer's preconceived determination.[2] Although the officer's intuitions may often prove accurate on the streets, his approach on combating drug-related activities was not relevant to the facts of this case. Therefore, we find that the testimony pertaining to typical drug dealer transactions, was offered as substantive evidence of defendant's guilt, in violation of the principles this Court espoused in *Hubbard*. Furthermore, the admission of this evidence was not harmless error. Because there was little evidence other than Payne's testimony to support an inference that defendant intended to distribute the cocaine, there is a reasonable probability that the error affected the outcome of the trial. *Hubbard*, supra at 243. Accordingly, we hold that the admission of the officer's expert testimony was erroneous and we reverse defendant's convictions and remand for a new trial excluding this evidence.[3]

Finally, defendant argues that his trial counsel's failure to move to quash the information based on the court's decision to reopen the proofs, as well as counsel's failure to object to the admission of the "drug dealer profile" evidence, constituted ineffective assistance of counsel that deprived defendant of a fair trial. Defendant did not file a motion to remand the case to the trial court for an evidentiary hearing pursuant to MCR 7.211(C)(1)(a) and *People v Ginther*, 390 Mich 436, 442; 212 NW2d 922 (1973). Therefore, this Court's review is limited to mistakes apparent from the record. *People v Burton*, 219 Mich App 278, 292; 556 NW2d 201 (1996).

As to defendant's first contention, in light of our previous holding that the trial court did not abuse its discretion in reopening the proofs during the preliminary examination, we find that defense counsel was not deficient by failing to file a motion to quash the information. Counsel is not obligated to pursue a matter, by means of motion or objection, where such efforts would clearly be unsuccessful or where the conduct challenged is permissible. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991); *People v Eagen*, 136 Mich App 524, 528; 357 NW2d 710 (1984). Defendant has failed to show that had a motion to quash been made, it would have been granted, providing defendant with a reasonably likely chance of acquittal. See *People v Cavitt*, 189 Mich App 31, 32; 471 NW2d 630 (1991). Cf. *People v Thomas*, 184 Mich App 480, 482; 459 NW2d 65 (1990).

On the other hand, we agree with defendant's contention that it is apparent from the record that counsel was ineffective by failing to object to the "drug dealer profile" evidence. As discussed above, much of Officer Payne's expert testimony amounted to "drug dealer profile" evidence, which is inadmissible at trial. In light of this conclusion, we hold that defense counsel's failure to object to such evidence was deficient performance which severely prejudiced defendant's case, and ultimately contributed to his conviction. This Court's recent decision in *Hubbard, supra* at 234, placed defense counsel on notice that the proffered testimony by the officer was, at the very least, objectionable. Even had the court decided to admit the evidence over an objection, defense counsel still had an obligation to object to such damaging, and unduly prejudicial testimony, to preserve the record for appeal. Furthermore, we are not persuaded that the failure to object could be attributed to trial strategy because the exclusion of this evidence would have strengthened defendant's case, and made it more difficult for the prosecution to prove the elements of the crime.

Finally, in order to succeed on a claim of ineffective assistance of counsel, defendant is required to show that he was prejudiced by defense counsel's deficiencies. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Prejudice is established by a showing that "there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Stanaway, supra* at 687-688. Defendant was clearly prejudiced as a result of counsel's deficiency because, absent Payne's testimony, there was a lack of evidence regarding defendant's intent to distribute the cocaine. Although the jury might still have concluded that the amount of cocaine and the circumstances of the arrest create an inference that defendant intended to deliver the drugs, we are convinced that defendant's chances of acquittal on that charge were severely diminished by counsel's failure to object to Payne's testimony. There is a strong likelihood that, absent the challenged evidence, defendant would have, instead, been convicted of the lesser offense of possession of less than 25 grams

of cocaine. Therefore, we reverse defendant's convictions and remand for a new trial excluding the officer's testimony pertaining to drug dealer profiles.

Reversed and remanded for a new trial consistent with this opinion.

/s/ Kathleen Jansen
/s/ Martin M. Doctoroff
/s/ Hilda R. Gage

[1] *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

[2] For example, Payne testified that, in his opinion, defendant possessed the drugs with the intent to deliver them. However, this conclusion was based on his own experiences and beliefs that most persons who carry guns, beepers, and have significant amounts of narcotics in their possession, are drug dealers.

[3] Our decision on this issue should not be interpreted as completely banning Officer Payne from testifying as to relevant circumstances of the case that fall within the ambit of his expertise. However, he may not provide the jury with information that is merely speculative and stereotypical, and that does not have any application to the facts of this case.