

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REGINALD F. DANIELS,

Defendant-Appellant.

UNPUBLISHED

April 21, 2000

No. 209962

Oakland Circuit Court

LC No. 97-155332-FH

Before: Kelly, P.J., and Holbrook, Jr., and Griffin, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). He was sentenced as a third habitual offender, MCL 769.11; MSA 28.1083, to one to forty years' imprisonment. We affirm.

Defendant's conviction arises from his alleged attempt to sell a rock of crack cocaine to an undercover police officer. Defendant was arrested before the transaction was completed. Evidence at trial indicated that the rock of cocaine, which was about the size of a pencil eraser, was found on the sidewalk in the immediate vicinity of where defendant was arrested. The rock was inside a plastic baggie, referred to as a "corner tear," which was not much bigger than the cocaine itself.

On appeal, defendant raises three issues regarding the failure of the police to have the "corner tear" tested for fingerprints and the prosecutor's arguments regarding this subject. Because these issues were not presented to the trial court, defendant must show plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

First, we conclude defendant has failed to show that the prosecutor's rebuttal argument concerning the science of fingerprint identification requires reversal. Here, the failure of police officers to have the "corner tear" tested for fingerprints was raised by defense counsel in both the opening statement and closing argument. Assuming arguendo that the prosecutor exceeded the bounds of proper rebuttal argument by commenting on the science of fingerprint identification, see *People v Ellison*, 133 Mich App 814, 820; 350 NW2d 812 (1984), we are not persuaded defendant's substantial rights were affected. *Carines*, *supra* at 774.

In this case, the trial court's instruction to the jury that the lawyers' statements and arguments are not evidence was sufficient to cure any perceived prejudice caused by the prosecutor's remarks. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998).

Defendant's other two issues also fail to meet the threshold requirements for plain error. *Carines, supra*. The prosecutor's rebuttal remarks about the "corner tear" being too small to fingerprint were not plainly based on the excluded testimony, but rather, were based on Officer Ferguson's permitted lay testimony explaining why he did not request fingerprint testing. Moreover, to the extent there was any confusion over the distinction between the excluded testimony and the permissible lay testimony, a timely objection and request for a curative instruction could have alleviated any prejudice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Next, the undercover police officer did not improperly express a personal opinion as to defendant's guilt or innocence. *People v Moreno*, 112 Mich App 631, 635; 317 NW2d 201 (1981). Rather, the officer responded to a proper question by explaining his reasons for not requesting fingerprint testing, an issue raised in defense counsel's opening statement. Lay testimony in the form of opinions or inferences that are rationally based on the perception of a witness are permitted, even when they embrace an ultimate issue to be decided by the trier of fact. MRE 701 and 704; *People v Daniel*, 207 Mich App 47, 57-58; 523 NW2d 830 (1994); *McCalla v Ellis*, 180 Mich App 372, 384; 446 NW2d 904 (1989).

Finally, we find no merit to defendant's claim that he was denied a fair trial because of the cumulative effect of the alleged errors. *People v Bahoda*, 448 Mich 261, 292-293, n 64; 531 NW2d 659 (1995).

Affirmed.

/s/ Michael J. Kelly
/s/ Donald E. Holbrook, Jr.
/s/ Richard Allen Griffin