STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 26, 2000
v	No. 216494 Oakland Circuit Court
JEFFREY BERNARD ALLISON, Defendant-Appellant.	LC No. 99-159853-FH

Before: McDonald, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted 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), and was sentenced as an habitual offender, third offense, MCL 769.11; MSA 28.1083, to a prison term of two to forty years. Defendant appeals as of right. We affirm.

Defendant first contends that the trial court erred by admitting the testimony of two police officers. Defendant failed to object to the testimony of either officer and, therefore, this issue is unpreserved for appeal, *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994), and we review only for plain error. *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130, (1999). Three requirements must be met to withstand forfeiture under the plain error rule: (1) error must have occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights. *Id.* at 763. A reversal is required only if plain error resulted in the conviction of an actually innocent defendant, or where the error seriously affected the fairness, integrity, or reputation of judicial proceedings. *Id.*

One officer testified as an expert in narcotics law enforcement and the defense stipulated to his expert qualifications. On appeal, defendant contends that the facts of the case did not warrant an expert's opinion and that the officer gave improper profiling testimony. We disagree. Expert testimony is generally allowed to explain the significance of items seized during a criminal investigation. *People v Murray*, 234 Mich App 46, 54; 593 NW2d 690 (1999); *People v Hubbard*, 209 Mich App 234, 239; 530 NW2d 130 (1995); MRE 702, and the use of expert testimony from police officers is permissible to help the jury understand evidence in a controlled substance case. *People v Ray*, 191 Mich App 706, 707; 479 NW2d 1 (1991). We find no plain error in the use of the police officer's expert testimony because he provided helpful information relating to the trafficking of crack cocaine that was not within the knowledge of the average

person. *Id.* at 708. The fact that the testimony embraced the ultimate issue of intent to deliver did not render the evidence inadmissible. *Id.*; see also *People v Griffin*, 235 Mich App 27, 44-45; 597 NW2d 176 (1999).

Further, although the police officer's testimony that drug dealers usually carry cocaine in a readily accessible spot so that they can discard it without being too noticeable and that they usually carry the drugs in the waistband of their shorts may have been improper "profile evidence" to establish that defendant intended to deliver the cocaine, *Murray, supra*, we find that reversal is not required because the officer also testified that one of the rocks of crack cocaine found by defendant's foot exceeded a personal use amount. Hence, any error did not result in the conviction of an actually innocent person, nor did the error seriously affected the fairness, integrity, or reputation of judicial proceedings. *Grant, supra* at 550-551.

Defendant next contends that a second police officer gave improper opinion testimony that the manner in which the cocaine was packaged indicated that defendant was a drug dealer. The rule governing the admission of lay opinion provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. [MRE 701.]

This Court has found no abuse of discretion in allowing a police officer to offer lay opinion that a defendant was selling crack cocaine based on the officer's observations that he saw the defendant run to different vehicles and lean inside the window for ten to fifteen seconds. *People v Daniel*, 207 Mich App 47, 57; 523 NW2d 830 (1994). The *Daniel* Court held that the officer was not qualified to give an expert opinion, but that the requirements of MRE 701 were met because the testimony was based on the officer's perceptions and assisted the jurors in determining whether the defendant was trafficking narcotics. *Id.* See also *People v Oliver*, 170 Mich App 38, 49; 427 NW2d 898 (1988), modified 433 Mich 862 (1989). *Oliver* noted "[r]ecent panels have liberally applied MRE 701 in order to help develop a clearer understanding of facts for the trier of facts." *Id.* at 50; see also *Heyler v Dixon*, 160 Mich App 130, 148-149; 408 NW2d 121 (1987); *Mitchell v Steward Oldford & Sons, Inc*, 163 Mich App 622, 629-630; 415 NW2d 224 (1987). In light of *Daniel* and *Oliver*, we find no error in the admission of the testimony.

Before trial, defendant moved to exclude evidence that a gun was seized from a codefendant. Defendant argued that evidence of the firearm was irrelevant and unfairly prejudicial because he was not charged with possession of the gun. The prosecution argued that possession of a firearm indicated an intent to deliver illegal drugs. The trial court admitted the gun and gave the jury a cautionary instruction that defendant was not charged with possession of a gun.

This issue is preserved for appeal, *Grant, supra* at 546, and is reviewed for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). An abuse of discretion exists only when an unprejudiced person, considering the facts on which the trial court acted,

would say that there was no justification or excuse for the ruling made. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

Evidence that is not relevant is inadmissible. MRE 402. 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. Relevant evidence, then, has two components, materiality and probative value. *People v Sabin (After Remand)*, 463 Mich 43, 56-57; 614 NW2d 888 (2000); *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). "Materiality" means that the evidence relates to a fact of consequence to the action. *Id*. Defendant's intent was in issue because the prosecution was required to prove that defendant possessed the cocaine with the specific intent to distribute it. *Crawford*, *supra* at 389; see also CJI2d 12.3. *Id.* Thus, we conclude that the requirement of materiality is met here. *Id.*

The second requirement to a finding of relevance, probative value, means the evidence tends to make the existence of the legally consequential fact more probable or less probable than it would be without the evidence. *Crawford*, *supra* at 390. Unlike this Court's previous holding in *People v McCline*, 197 Mich App 711, 717; 496 NW2d 296, vacated on other gds and remanded, 442 Mich 127; 499 NW2d 341 (1993), the gun involved in the instant case was not found locked away in defendant's trunk. Instead, it was situated on the driver's side floorboard of defendant's car, ready to fire. Evidence that a gun was found in defendant's car tends to show that defendant may have been involved in the distribution of narcotics. Hence, the evidence was highly probative and no unfair prejudice resulted from its admission.

Finally, defendant argues that prosecutorial misconduct occurred when the prosecutor made the following remark in the closing argument:

> And we presented Officer Martinez up here because he works in drugs. That's what he does. He does search warrants. He does undercover operations. He buys. He sells. He works in drugs.

A prosecutor may not vouch for the credibility of a witness to the effect that he has some special knowledge that the witness is testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, but he is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *Id.* at 282. Defendant contends that the above comment is similar to those held to be improper in *People v Smith*, 158 Mich App 220, 231-232; 405 NW2d 156 (1987). We disagree. The prosecutor here merely emphasized that the expert on drug trafficking believed that the quantity of drugs found showed an intent to distribute. The prosecution did not vouch for the credibility of the police officer's testimony. Accordingly, reversal on this basis is not required.

Affirmed.

/s/ Gary R. McDonald
/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald