

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ORLANDO BAKER,

Defendant-Appellant.

UNPUBLISHED

December 21, 2006

No. 264832

Monroe Circuit Court

LC No. 05-034264-FH

Before: Zahra, P.J., and Cavanagh and Schuette, 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). Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 2 to 25 years' imprisonment. Defendant appeals as of right. We affirm.

I. Basic Facts and Procedure

In August, 2004, a state parole agent and a Monroe Police Department officer went to an apartment complex at 2840 Monroe St., Monroe, to apprehend a fugitive, Mario McIntosh. Parole agent Rankin and Officer McCormick proceeded to unit 329 and knocked. Marshall Kyles came to the door but did not open it. Rankin spoke through the door and stated that he was looking for McIntosh. Kyles responded that McIntosh was not there. Kyles agreed to let Rankin and McCormick enter the apartment to search for McIntosh. Rankin testified that he heard sounds of people moving about and talking in hushed tones for approximately two to three minutes before Kyles opened the door. Once inside, the officers observed four men in the living room area, who were later identified as Marshall Kyles, Aaron Sewell, Anthony McIntosh, and Ronell Smith. At the end of the hallway, Rankin saw a bathroom with its door open and observed defendant inside. Rankin recognized defendant, knew that there was a warrant for his arrest and arrested him. A search of defendant's pockets revealed a key to the apartment and \$881 in cash.

Shortly after Rankin and McCormick entered the apartment, other officers arrived. One of the officers, Officer Schiappacasse, entered one of the bedrooms to ascertain whether Mario McIntosh was there. Schiappacasse found \$638 in cash stuffed into a shoe, which he turned over to McCormick. Sewell eventually claimed ownership of the money. While in the apartment, McCormick also noticed a knotted baggie containing an off-white, chunky substance sitting atop

the disposal drain in the kitchen sink. Subsequent tests revealed the substance was cocaine. McCormick also recovered from the kitchen counter a scale and three razor blades. A marijuana cigarette was found in the living room. Kyles, the owner of the apartment, testified that the drugs found in the kitchen were his. Kyles indicated that defendant did not know that there were drugs in the apartment. Kyles was charged with possession of cocaine and marijuana and pleaded guilty.

Kyles testified that defendant visited Kyles's apartment two to three times per week to date Kyles's sister and said she would occasionally drop defendant at Kyles's apartment before going to work and give him her key to let himself in.

In June, 2005, a jury convicted defendant of possession with intent to deliver less than 50 grams of cocaine. In February, 2006, defendant filed a motion for a new trial or for a *Ginther*¹ hearing. Defendant argued that the prosecutor engaged in misconduct which deprived him of his right to a fair trial. Specifically, defendant alleged that the prosecutor wrongly: (1) elicited testimony and remarked in his closing argument that defendant had an alias; (2) elicited testimony from officers and remarked in his closing argument that the officers believed defendant was a fugitive; (3) elicited testimony from officers and remarked in his opening statement that the officers had prior contact with defendant; (4) elicited testimony and remarked in closing argument that defendant was from Detroit, a "source city" for drugs. Defendant also argued that his counsel was ineffective for failing to object to the prosecutorial misconduct. In its response, the prosecution disputed the contention that any of the alleged wrongdoing deprived defendant of the right to a fair trial. In April, the trial court held a hearing on defendant's motion, denied it and entered an order the same day. The trial judge concluded:

[T]he evidence was fairly – was more sufficient to convict Mr. Baker, regardless of these other alleged errors, which I don't find them to be. So far all those reasons, I – I don't find that there was any unfair prejudice here, and I think the testimony was admissible, although I agree that it was getting close to the line. But I nevertheless think that it did not cross that line, and so the motions are denied.

II. Analysis

Defendant raises two issues on appeal. First, defendant contends that the prosecutor engaged in misconduct and deprived defendant of his right to a fair trial. Second, defendant argues that his trial counsel was ineffective for failing to object to the prosecutorial misconduct. We disagree with both assertions.

1. Alleged Prosecutorial Misconduct

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial, i.e., whether prejudice resulted. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). This Court reviews a defendant's unpreserved claim of prosecutorial

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

misconduct for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, defendant must establish that: (1) an error occurred; (2) the error was plain; (3) and the plain error affected defendant's substantial rights, i.e., it affected the outcome of the lower court proceedings. *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003), citing *Carines*, *supra* at 763.

Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005); *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled in part on other grds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Defendant raises on appeal the same claims of prosecutorial misconduct asserted in the motion for new trial argued before the trial court. However, only one of these alleged errors is preserved by objection. Specifically, defense counsel only objected to the closing argument when the prosecutor stated that Detroit is a source city for drugs.

We conclude there is no reversible error stemming from the admission of alias testimony. Although such testimony is generally proper only in certain circumstances, such as in false pretenses cases or as necessary to affect credibility under MRE 608 and MRE 609, its admission under other circumstances does not necessarily require reversal. *People v Thompson*, 101 Mich App 609, 614; 300 NW2d 645 (1980). In *Thompson*, this Court held that alias testimony was permissible given that the questions concerning the defendant's use of assumed names were few and not highly inflammatory, and there was otherwise strong evidence that the defendant committed the offense. To the extent that the alias testimony was improperly admitted, the error was harmless. *Thompson*, *supra* at 614. See also, *People v Phillips*, 217 Mich App 489, 497; 552 NW2d 487 (1996). Likewise, in the instant case, the testimony that defendant went by another name was properly admitted. It was not highly inflammatory. As noted by the plaintiff, such testimony was necessary for identification purposes – to demonstrate how the officers recognized defendant.

Furthermore, there was strong evidence that defendant committed the charged offense. Defendant was found in the apartment where drugs and drug paraphernalia were found. The owner of the apartment testified that defendant was at the apartment two to three times per week. There was also a key to the apartment and \$861 found in defendant's pocket. To the extent that it was an error to introduce testimony regarding an alias, this unpreserved error was harmless given the other evidence in the case.

We also conclude there was no error in allowing testimony and prosecutorial comments concerning the officers' belief that there existed a warrant for defendant's arrest. The admission of such statements was proper because it demonstrated how it was that defendant was recognized by the officers and why he was arrested. The prosecutor did not elicit, nor did any officer volunteer, any specifics with regard to the warrant. Similarly, although the prosecutor elicited testimony from the officers that they knew defendant from a time prior to the day in question, the

prosecutor's questioning did not raise an inference of criminal activity sufficient to require a mistrial. *People v Steiner*, 136 Mich App 187, 196-197; 355 NW2d 884 (1984). The general gist of the officers' testimony was that they knew defendant in the past, thus enabling them to recognize him when they saw him in the apartment.

With regard to the testimony and comments concerning Detroit as a source city, it is not admissible as substantive evidence of defendant's guilt; however, evidence of this sort, commonly called drug profile evidence, may be admissible under particular circumstances of a case to assist the jury in understanding the evidentiary backdrop of a case and the modus operandi of drug dealers. *People v Murray*, 234 Mich App 46, 52-53; 593 NW2d 690 (1999). The profile, without more, should not normally enable a jury to infer the defendant's guilt. The prosecutor must introduce and argue some additional evidence from the case that the jury can use to draw an inference of criminality. *Murray, supra* at 57.

Pieces of the drug profile by themselves should not be used to establish the link between innocuous evidence and guilt. *Murray, supra* at 57. In the instant case, the prosecutor did not rely on the profile evidence to establish a link between innocuous evidence and guilt. The evidence tending to show defendant was guilty of possession with intent to deliver cocaine was ample. Defendant was at the apartment, believed by officers to be a "narcotics house," two to three times per week. The apartment contained a large amount of drugs and drug paraphernalia. Defendant was found with a key to the apartment and \$861 in his pocket.

We note that when profile evidence is presented to the jury the trial court should instruct the jury with regard to the proper and limited use of profile testimony. *Murray, supra* at 57. Here, the trial court failed to give a limiting instruction to the jury. Nonetheless, we conclude that, to the extent that a limiting instruction was required, its omission was harmless error. Given the evidence against defendant, it is highly doubtful that the verdict would have been different but for the drug profile evidence. This Court has observed that even when the admission of profile evidence is improper, the error may nonetheless be harmless where, as here, there is significant evidence against the defendant. *Murray, supra* at 64. In the instant case, none of the challenged testimony or prosecutorial remarks, isolated or taken in sum, appears to have been so prejudicial or serious as to affect the outcome of the proceeding. To the extent that their admission was improper, the error was harmless given the evidence against defendant.

2. Effective Assistance of Counsel

Defendant next argues that his trial counsel was ineffective for failing to object to the testimony elicited by the prosecutor and the prosecutor's remarks during his opening statement and closing argument.

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *LeBlanc, supra* at 579. To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the resultant proceedings were

fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc*, *supra* at 578; *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant must also overcome the presumption that counsel's performance constituted sound trial strategy. *Riley*, *supra* at 140. Whether to object to an impropriety is a matter of trial strategy. *People v Matuszak*, 263 Mich App 42, 58-59; 687 NW2d 342 (2004). As discussed above, none of the instances of alleged prosecutorial misconduct in this case has merit. Therefore, counsel was not ineffective for failing to object on those bases. Defense counsel is not required to make futile objections. *People v Wilson*, 252 Mich App 390, 393-394, 397; 652 NW2d 488 (2002). Even assuming defense counsel was deficient in failing to object, it is unlikely that an objection would have resulted in acquittal. First, the challenged testimony and comments were not so egregious or prejudicial as to render the proceedings fundamentally unfair or unreliable. Second, the evidence against defendant was strong. The apartment wherein he was arrested was sparsely furnished and believed by various narcotics officers to be a "narcotics house." In it were found drugs, a scale, razorblades, and a large amount of cash. A substantial amount of cash and a key to the apartment were found in defendant's pocket. Without needing to rely on the challenged remarks, the jury was presented with sufficient evidence to convict defendant.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Bill Schuette