

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREEMAN EDWARD JONES,

Defendant-Appellant.

UNPUBLISHED

January 12, 2010

No. 287183

Oakland Circuit Court

LC No. 2008-219309-FH

Before: Wilder, P.J., and O’Connell and Talbot, JJ.

PER CURIAM.

After a jury trial, defendant Freeman Edward Jones was convicted of one count of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), one count of felon in possession of a firearm, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to concurrent prison terms of two to thirty years each for the possession with intent to deliver cocaine and felon in possession convictions, to be served consecutively to two concurrent two-year terms of imprisonment for the felony-firearm convictions. He appeals as of right. We affirm.

Defendant’s convictions arise from the February 5, 2008, execution of a search warrant at an apartment in Pontiac where defendant lived with his girlfriend, Mary Amerson. The search warrant was issued after Detective Jeff Lewis, an officer with the Oakland County Narcotics Enforcement Team (“NET”), submitted an affidavit recounting an informant’s controlled buy from defendant.¹ In addition to searching the apartment, officers searched a van in which defendant and Amerson arrived while the warrant was being executed.

Officers discovered Amerson’s purse on the floorboard of the van, near the driver’s door. The purse contained a digital scale and packages of crack cocaine wrapped in “corner ties,” i.e., the corners of plastic baggies that had been tied closed. Inside the apartment, officers found a crack pipe, a digital scale, a box of plastic baggies, and a Rally’s bag containing \$1,030 in cash.

¹ Testimony regarding the controlled buy and search warrant affidavit was not presented to the jury.

These items were all found in a dresser drawer in a bedroom. A fully loaded semiautomatic handgun was found in the bottom drawer of the same dresser. The dresser contained men's clothing in defendant's size. A prescription bottle with defendant's name and address was on top of the dresser. The bedroom also contained men's and women's clothing that matched defendant's and Amerson's sizes, and mail addressed to Amerson.

I. Drug Profile Testimony

Defendant first argues that the prosecutor elicited improper drug profile evidence from Detective Lewis, which denied him a fair trial. Because defendant did not object to Detective Lewis's testimony on the ground that it was improper drug profile evidence, this issue is not preserved for appellate review. MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001), lv den 465 Mich 952 (2002). We review unpreserved claims of evidentiary error for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003).

A. Relevant Facts

At trial, Detective Lewis was qualified to testify as an expert on narcotics trafficking. He testified regarding the items found in the dresser and explained how they related to drug dealing. Regarding the Rally's bag containing the money, he stated that drug dealers typically hide money, drugs, and paraphernalia in this fashion. He stated that drug dealers hide money they receive from their buyers because the money might expose their illegal activities if it was deposited into a bank account. Detective Lewis answered affirmatively when the prosecutor asked, "[I]s that something the drug dealers do, is try to hide them in plain sight in—in ways like this?"

Detective Lewis also explained why the box of plastic baggies found in the bedroom was relevant:

- Q. Why would you take baggies? . . . What's different about my baggies at my house and these baggies that would make you, as a narcotics investigator, think that they have an evidentiary value?
- A. Well, it's—it's in their bedroom in a dresser drawer with the—the currency, along with the paraphernalia. And, basically, what they're doing is—it's where they're breaking down the crack. They're breaking it off or, you know, cutting it off the rock—whatever, doing it. And they're tying it off in these bags, as you saw in the other picture, and they're leaving it in there. That's probably where they do the majority of their—their work.

Detective Lewis further explained that the location of the gun in close proximity to the cash and the baggies was significant because drug dealers typically keep a gun close at hand for protection. He stated that drug dealers "are at their most vulnerable part at night when they're sleeping," and explained that a drug dealer would want a gun close at hand during the night to protect himself and his contraband if an addict or other dealer broke in and tried to steal from him. Detective Lewis testified that drug dealers know they are at risk because their customers

know that they have drugs and cash on hand, and because they cannot use the same safeguards, such as insurance, that legal businesses use.

The prosecutor also asked Detective Lewis what items were needed to sell crack cocaine. He stated, “[Y]ou’d first need the controlled substance to sell; you’d need something to package it in; and you would need a type of protection, and—and something to weight it out, so that you’re not gypping your buyer or giving him too much or too little.” Detective Lewis explained that crack dealers typically buy a large, one-ounce rock of cocaine for \$1,200, break it into one-gram quantities, and sell it on the street for \$100 a gram. They package it in preparation for sale by wrapping each individual piece in a “corner tie,” which is the corner of a clear plastic baggie that is torn from the whole bag and tied with a knot. This was consistent with the way that the drugs were found in defendant’s apartment.

Detective Lewis testified that drug users have no reason to subdivide their drugs into smaller amounts. He stated that users typically buy a rock for \$10 to \$40 to use right away, instead of buying large quantities for future use. The presence of 24 grams of cocaine packaged into individual baggies was indicative of possessing the drugs for purposes of delivery. Lewis stated that a drug dealer would typically bring a scale with him when he sold drugs, so that his buyers would be confident that they were not being cheated. Based on the evidence found in the bedroom and in the van, Lewis concluded that defendant and Amerson were packaging crack cocaine in the bedroom and selling it from the bedroom or the van.

B. Applicable Law

Drug profile evidence has been described as “essentially a compilation of otherwise innocuous characteristics that many drug dealers exhibit, such as the use of pagers, the carrying of large amounts of cash, and the possession of razor blades and lighters in order to package crack cocaine for sale.” *People v Murray*, 234 Mich App 46, 52-53; 593 NW2d 690 (1999). Drug profile evidence is not admissible as substantive evidence of guilt. *People v Hubbard*, 209 Mich App 234, 241; 530 NW2d 130 (1995). Thus, an expert witness is not permitted to testify that, “on the basis of the profile, the defendant is guilty,” or to “compare the defendant’s characteristics to the profile in a way that implies that the defendant is guilty.” *People v Williams*, 240 Mich App 316, 321; 614 NW2d 647 (2000). Expert testimony is admissible, however, to aid the jury in intelligently understanding the evidence in controlled substance cases and “to explain the significance of items seized and the circumstances obtaining [sic] during the investigation of criminal activity.” *Murray, supra* at 53. The prosecution may not use drug profile evidence to argue that the defendant must be guilty because he fits the profile, but may “rely[] on the facts of the case to prove guilt when understood in the context of the profile . . .” *Id.* at 59.

In *Murray*, this Court listed four factors to apply when considering whether drug profile evidence should be admitted. First, the attorneys and the trial court must maintain the distinction between permissibly using drug profile evidence as background or modus operandi evidence, and impermissibly using it as substantive evidence of guilt. *Id.* at 56-57. Second, the prosecutor must offer non-profile evidence to prove the defendant’s guilt. *Id.* at 57.

The prosecutor must introduce and argue some additional evidence from the case that the jury can use to draw an inference of criminality; multiple pieces of a

profile do not add up to guilt without something more. In other words, the pieces of the drug profile by themselves should not be used to establish the link between innocuous evidence and guilt. [*Id.* (internal citations omitted).]

Third, the trial court must make clear to the jury what is and is not an appropriate use of the drug profile evidence by, for example, instructing the jury that drug profile evidence is properly used only as background or modus operandi evidence and should not be used as substantive evidence of guilt. *Id.* Fourth, the expert witness should not be permitted to express an opinion that, on the basis of the profile, the defendant is guilty. *Id.*

In *Murray*, this Court explained why it is necessary to employ these safeguards against the improper use of drug profile evidence:

Clearly, there is often a very fine line between the probative use of profile evidence as background or modus operandi evidence and its prejudicial use as substantive evidence; the admissibility of profile evidence must effectively be determined case by case. In particular, a difficulty arises in cases in which profiles are admitted because the evidence of a drug profile must resemble, to some degree, the defendant's own circumstances and characteristics in order to be relevant, but when the profile begins to resemble the defendant's circumstances and characteristics too closely, the profile can appear increasingly as substantive evidence of guilt. In other words, once the profile is found to be relevant to the case, the court will often be faced with a gray area in which it may be obvious that the criminal profile circumstances and characteristics closely resemble those of the defendant, yet also in which the use of the profile may be the only way to explain to the jury the circumstantial evidence in the case. [*Id.* at 54-55 (internal citations omitted).]

C. Application of the Law

This case falls within the gray area described in *Murray*. Detective Lewis's profile testimony focused on the pattern of storing baggies, a scale, a gun, and money concealed in a fast food bag in a bedroom dresser, which were the circumstances pertaining to defendant. Detective Lewis provided his profile testimony in the context of applying that profile to the evidence. He opined that Amerson's purse contained a large quantity of separately packaged drugs for the purpose of sale to multiple customers. He discounted the possibility that these drugs were kept for personal use, commenting that addicts usually do not or cannot buy more than what they intend to consume right away, and that they would have no reason to make individual packages. He opined that defendant was dividing and packaging the drugs in the bedroom, because that was where the scale and baggies were located. He explained that a drug dealer would want a gun to protect himself and his contraband from thieves, because he cannot resort to law enforcement for protection. He also explained the significance of the cash in the Rally's bag by explaining that drug transactions are conducted in cash to avoid detection by financial institutions.

Although the trial court did not strictly adhere to the safeguards prescribed in *Murray*, we conclude that there was no plain error affecting defendant's substantial rights. In some respects, Detective Lewis's testimony regarding the items in the bedroom was so intertwined with his explanation for why those items were indicative of drug dealing that there was no clear

distinction between the permissible and impermissible uses of the evidence. However, the purpose of Detective Lewis's testimony was to connect the collection of supposedly innocuous items—plastic bags, a scale, concealed cash, and a gun—with the cocaine discovered in Amerson's purse. This necessarily entailed an understanding of why the items in the bedroom were relevant to prove a modus operandi of preparing drugs for sale in the bedroom before selling them from the van. Moreover, Detective Lewis's drug profile testimony was not the only evidence associating defendant's possession of drug-related items to the sale of drugs from the van. Defendant and Amerson were riding together in the van, and they shared an apartment. The drug-related items were found in a dresser that contained clothing and items linked to defendant, in a bedroom that the evidence showed he shared with Amerson. The prosecution's case depended in part on Detective Lewis's explanation for how the items in the dresser were associated with the drugs found in Amerson's purse.

Although the trial court did not instruct the jury on the limitations and restricted use of drug profile testimony, the court instructed the jury that it was not obligated to believe an expert's opinion and that it should judge the credibility of police officers' testimony by the same standards used to evaluate the testimony of any other witness. Additionally, during the prosecutor's questioning, Detective Lewis implicitly expressed his opinion that, based on the usual reasons for possessing the combination of items found in the bedroom dresser, the drugs found in Amerson's purse were intended for sale:

Q. Where—where did the drug dealing encompass based on your experience?

A. My experience is they—they purchased a large quantity. They'd come back to the apartment. They would break it up in the bedroom. They would tie it in the bedroom, repackage it in the bedroom and then either sell out of the apartment or sell it from the van.

Q. All right, and the cash—the money that you said were in denominations consistent with dealing, why would that be kept in a bedroom versus on someone's person?

A. . . . [W]hen you're driving around selling it, [customers] know . . . you have money sometimes so they—they get robbed quite often, and they're not going to put it in a bank 'cause it's an illegal business, and they—you know, they—they have no—no job at that point.

Detective Lewis testified that no paycheck stubs or other paperwork suggesting that the cash came from a bank withdrawal or paycheck was found in the apartment. The prosecutor also asked:

Q. What is your opinion regarding the scope of the operation or the area that the drug operation covered [within the residence?]

* * *

A. . . . [T]hey were keeping it upstairs, but they were selling it from—from that residence.

Q. [W]ould it be your opinion the bedroom was or was not involved in this drug operation?

A. The bedroom was involved.

Q. And whose proofs [prints] were on the dresser, around the dresser where the drug money, the baggies and the firearm were found?

A. Mr. Jones, as well as Miss Amerson's.

The prosecutor asserts that Detective Lewis's testimony addressed only hypothetical dealers, but Detective Lewis's statements that "they have no job," and his references to the apartment, bedroom, and van were specific to defendant and Amerson, not hypothetical archetypes. His testimony specifically tied together the dresser and its contents, defendant and Amerson, and their van, based on his expert knowledge of how drug dealing operations are conducted. Essentially, Detective Lewis analyzed the evidence from his perspective as an expert in drug trafficking and reached the conclusion that defendant was a drug dealer. In this respect, his testimony exceeded the permissible boundaries for use of drug profile evidence.

However, we conclude that any error arising from Detective Lewis's testimony did not affect defendant's substantial rights. *Carines, supra* at 763-764. The purpose of drug profile testimony is to explain how otherwise innocuous characteristics are indicative of drug dealing. The danger of the evidence is that such characteristics "may not necessarily be connected to or inherently part of the drug trade, so that these characteristics could apply equally to innocent individuals as well as to drug dealers." *Murray, supra* at 53. Detective Lewis's testimony did not materially encroach on these dangers. We are satisfied that even if Detective Lewis's drug profile testimony had been properly restricted and the trial court had given appropriate cautionary instructions, the evidence would still have firmly established defendant's involvement in drug dealing. The storage of a scale and plastic baggies in a location where there were no other non-drug items present to measure or wrap, the concealment of a large quantity of cash, and a loaded gun all showed defendant's intent and connection to the supply of drugs in Amerson's purse. We are satisfied that Detective Lewis's testimony, to the extent it may have exceeded permissible limitations on drug profile evidence, was not outcome determinative. Thus, defendant has not met his burden of establishing that his substantial rights were affected. Therefore, this unpreserved claim of error does not require reversal of defendant's conviction.

II. Expression of Defendant's Guilt

Defendant next argues that he was denied a fair trial when Detective Lewis was permitted to testify that he saw defendant sell drugs. Defendant argues that the testimony was an improper expression by Detective Lewis of his personal opinion that defendant was guilty, and that the trial court erred in denying both his motion for a mistrial and posttrial motion for a new trial based on this testimony.

We review a trial court's denial of a mistrial for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). "A motion for a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to get a fair trial." *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995). A trial

court's denial of a motion for a new trial is also reviewed for an abuse of discretion. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). "An abuse of discretion occurs only 'when the court chooses an outcome outside the principled range of outcomes.'" *Id.*, quoting *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

During defense counsel's cross-examination of Detective Lewis, counsel asked about the description of the suspect that Detective Lewis gave to the other officers during his pre-raid briefing. He elicited that Detective Lewis was not sure whether he told the other officers that the age of the suspect was approximately 35 years old, as he had mentioned in his search warrant affidavit.² On redirect examination, the prosecutor asked Detective Lewis why he would not have discussed the suspect's approximate age when he briefed the other officers. Detective Lewis replied that he had seen defendant only once before the raid, from a distance. Defense counsel immediately objected and the following exchange occurred:

[*Defense Counsel*]: Excuse me, Judge. Now, see, I'm objecting. Clearly, that's hearsay, Judge. Now, that's a fact that's being offered and it's an out-of-court declaration for the truth of the matter asserted. Now, Judge, the prosecutor and the officer in charge know that that's improper.

[*The Prosecutor*]: Well, Judge, hearsay is an out-of-court statement used to prove the matter asserted. I believe the officer was testifying that he had seen the Defendant on a previous occurrence. I do not know how that falls under the hearsay.

[*Defense Counsel*]: Well, Judge, but hearsay can be said, or it can be acted, or it can be documentation. He had never saw my client do anything.

BY [THE PROSECUTOR] (CONTINUING):

Q: Is that true?

A: That's not true, I saw your client sell drugs.

Q: Well—

[*Defense Counsel*]: Oh, no. See, Judge—now, see, there goes, in the essence, and, of course, I'd like to make a motion at this point.

[*The Prosecutor*]: We can make the motion or I can clarify, whatever. 'Cause I—I think I can clarify that—correct it, 'cause I think it's a mistake rather than—

[*Defense Counsel*]: I'd like to make my motion Judge.

² Defendant was actually 51 years old on the date of the raid.

[*The Prosecutor*]: Which—whatever, Judge.

The Court: Why don't you clarify it.

Upon further questioning by the prosecutor, Detective Lewis stated that he never personally bought drugs from defendant and saw him “just around” as part of the investigation.

After Detective Lewis was excused, defendant moved for a mistrial based on Detective Lewis's testimony that he saw defendant selling drugs. Defendant argued that Detective Lewis's affidavit in support of the search warrant did not mention that Detective Lewis had seen defendant do anything. The prosecutor argued that defense counsel opened the door to the testimony by stating that Detective Lewis never saw defendant sell drugs. The prosecutor also stated, “I clarified it, even though I was somewhat sketchy on it, because he didn't actually buy the drugs. And I tried to give the jury that impression, which I think is, quite frankly, a false impression since he did, in fact, see him buy drugs.” After taking a break to review the videotape of the trial, the trial court denied defendant's motion for a mistrial, explaining:

I've reviewed the video and, although it was not technically a question posed, defense counsel stood up and said to the witness, you didn't see my client do anything. Whereby [the prosecutor] then asked, is that true, of the witness; and the witness made the statement, it's not true, I saw your client selling drugs. So, therefore, I do feel the defense attorney opened the door with his statement that the witness did not see his client do anything. So I'm going to deny the motion for a mistrial.

The trial court also offered to instruct the jury “to disregard that comment by the witness,” but defense counsel declined the instruction.

On appeal, defendant argues that Detective Lewis's testimony that he saw defendant sell drugs deprived him of a fair trial. Defendant characterizes the testimony as impermissible opinion testimony regarding defendant's guilt. As defendant correctly observes, an expert witness providing drug profile evidence is not permitted to express his opinion, based on a profile, that the defendant is guilty. *Murray, supra* at 57. In this case, however, Detective Lewis's testimony that he saw defendant sell drugs was not an opinion, nor was it based on a profile. It was a factual assertion based on Detective Lewis's first-hand observations. Defendant argues that defense counsel did not “open the door” to Detective Lewis's statement because defense counsel's initial statement, “He had never saw my client do anything” was not made in the context of questioning the witness. However, the trial court reviewed the video of the exchange and found that defense counsel directed the statement at the witness. Given this observation, it was reasonable for the court to find that defense counsel had opened the door for the prosecutor to respond by asking, “Is that true?” Furthermore, the prosecutor thereafter clarified Detective Lewis's testimony by eliciting from Detective Lewis that he never actually bought drugs from defendant and only saw him “just around” as part of the investigation. We also observe that during the discussions on defendant's motion for a mistrial, the prosecutor agreed that he would not mention Detective Lewis's comment during closing argument. The

trial court even offered to instruct the jury to disregard the comment, but defendant declined such an instruction.³

Under the circumstances, there were principled reasons for the trial court to deny defendant's motion for a mistrial, and also his later motion for a new trial. Accordingly, the trial court did not abuse its discretion in denying defendant's motions.

III. Effective Assistance of Counsel

Defendant argues that defense counsel was ineffective for failing to object to the drug profile evidence. “To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different.” *People v Scott*, 275 Mich App 521, 526; 739 NW2d 702 (2007), quoting *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

Even if defense counsel was deficient for not objecting to Detective Lewis's testimony on the ground that it exceeded the scope of permissible drug profile testimony, in light of our conclusion that any error was not outcome determinative, defendant cannot establish the requisite prejudice to establish a claim of ineffective assistance of counsel. See *People v Riley (After Remand)*, 468 Mich 135, 142; 659 NW2d 611 (2003) (“Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion.”).

IV. Double Jeopardy

Lastly, defendant argues that his dual convictions of felon in possession of a firearm and felony-firearm violate his constitutional protection against double jeopardy. Among the protections afforded by the Double Jeopardy Clauses of the United States and Michigan Constitutions, US Const, Am V; Const 1963, art 1, § 15, is protection against multiple punishments for the same offense. *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). However, in *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003), our Supreme Court squarely held that the Legislature intended to authorize cumulative punishments for dual convictions of felony-firearm and felon in possession of a firearm. Thus, there is no double jeopardy violation. *Id.*

³ On appeal, defendant also attacks the credibility of Detective Lewis's statement by pointing out that Detective Lewis did not mention anything about seeing defendant sell drugs in the search warrant affidavit that Detective Lewis prepared before the search. However, the absence of any such statement in the affidavit pertains only to the credibility of Detective Lewis's statement, not its admissibility. Defendant could have cross-examined Detective Lewis regarding any perceived inconsistency regarding his statement and the affidavit, but did not do so. Indeed defense counsel reasonably may have decided that such cross-examination was unnecessary in light of the later clarifying testimony, or decided not to do so as a matter of trial strategy to avoid either highlighting the statement or opening the door to further examination regarding the affidavit.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Peter D. O'Connell
/s/ Michael J. Talbot