

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
December 13, 2011

v

RANDY SCOTT ANGER,
Defendant-Appellant.

No. 300164
Oakland Circuit Court
LC No. 2007-218338-FH

Before: O'CONNELL, P.J., and MURRAY and DONOFRIO, JJ.

PER CURIAM.

Following a jury trial, defendant appeals by right his convictions of possession of 50 grams or more but less than 450 grams of cocaine, MCL 333.7403(2)(a)(iii), three counts of possession of a controlled substance, MCL 333.7403(2)(b)(ii), and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

Defendant first argues the trial court erred by denying his motion to suppress evidence, claiming that the police's lack of good faith in obtaining the search warrant requires exclusion of the evidence acquired during the search. We disagree.

We review a trial court's findings of fact in a suppression hearing for clear error and review the ultimate decision de novo. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005). "A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *People v Swirles (On Remand)*, 218 Mich App 133, 136; 553 NW2d 357 (1996).

Defendant asserts that the trial court should have excluded the evidence obtained pursuant to a defective warrant because the good faith exception did not apply to the police officers' conduct. Defendant is correct insofar as probable cause must be established in order to issue a warrant; however, the evidence will not automatically be suppressed merely because the supporting affidavit lacked probable cause. *People v Goldston*, 470 Mich 523, 525-526; 682 NW2d 479 (2004). In order to exclude the evidence at trial, a defendant must demonstrate that the police lacked good faith in obtaining or executing the warrant. *Id.* at 543. Defendant argues that the police lacked good faith by: (1) knowingly or recklessly including false information in the affidavit; and (2) unreasonably relying upon a clearly invalid warrant due to lack of probable cause. See *Goldston*, 470 Mich at 531.

The affiant officer testified that when he wrote in the affidavit that defendant had “three priors” for dangerous drugs, he meant that defendant had three prior contacts or arrests for dangerous drugs; he denied attempting to mislead the issuing court into believing that defendant had three prior convictions. The court heard the affiant’s testimony, found him to be credible, ruled that the affidavit did not contain false information, and determined that the affiant did not knowingly or recklessly intend to mislead the issuing court.

We give deference to the lower court’s evaluation of the affiant’s credibility and honesty. See *Williams*, 472 Mich at 313. Although the lower court may have erred by accepting the affiant’s use of the term “three priors,” the error is not determinative of the outcome of this appeal, because the trial court’s credibility determinations were not clearly erroneous. Defendant failed to show that the affiant knowingly or recklessly included false information in the affidavit; thus, defendant has not shown any police misconduct that would overcome good faith and require exclusion of the evidence. *Goldston*, 470 Mich at 531, 542-543.

Additionally, we find that the police did not unreasonably rely on the defective warrant. The police had an objectively reasonable basis to rely on the affidavit, as it contained sufficient indicia of probable cause. *Id.* at 542. The affidavit recited: (1) the affiant’s qualifications and experience in narcotics trafficking; (2) a confidential informant’s statement that he or she had personally witnessed drugs on defendant’s premises within the last 48 hours; and (3) the affiant’s determination that the confidential informant was credible, reliable, and had never provided false or misleading information before. It was objectively reasonable for the police officers to execute the warrant based on the issuing court’s determination of probable cause. This good faith reliance is sufficient to preclude application of the exclusionary rule in this case.

Next, defendant argues that the trial court abused its discretion by admitting drug profile testimony as substantive evidence of defendant’s guilt. We disagree.

The trial court’s admission or exclusion of evidence at trial is reviewed on appeal for abuse of discretion. An abuse of discretion occurs when the trial court’s decision is “outside the range of principled outcomes.” *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010), quoting *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). The court’s qualification of an expert witness is also reviewed for abuse of discretion. See *People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009). A trial court most clearly abuses its discretion when it makes an error of law. *People v Giovannini*, 271 Mich App 409, 417; 722 NW2d 237 (2006). If the trial court committed an error, reversal is not required unless the error more probably than not affected the trial outcome. *People v McLaughlin*, 258 Mich App 635, 650; 672 NW2d 860 (2003).

Drug profile evidence cannot be used as substantive evidence of guilt. *People v Murray*, 234 Mich App 46, 52-53; 593 NW2d 690 (1999). The *Murray* Court created several safeguards to ensure that such evidence is only used for proper, non-substantive purposes. First, the profile evidence must be offered for a proper purpose, such as establishing criminal modus operandi, establishing intent to distribute, or providing background information to the case. Second, the profile evidence cannot be the sole evidentiary basis offered to establish the defendant’s guilt. Third, to ensure that the jury is properly using the profile evidence, the court should usually instruct the jury as to its limited use. Finally, an expert witness cannot state or imply that a

defendant is guilty because he or she fits the profile. *Id.* at 56-58. A police expert may offer his or her knowledge of the drug trade so that the jury can weigh the facts and compare the defendant's conduct to the profile, but the expert cannot state that the defendant's conduct was done in performance of drug trafficking activities. *Id.* at 63.

In the instant case, the bulk of the profile evidence was presented in a proper manner. The drug profile evidence was offered for the purpose of establishing that defendant did not possess the drugs for personal use, but rather held them with the intent to distribute them to others. In addition to the profile evidence, the prosecution presented exhibits (the pre-packaged drugs, digital scales, cash, baking soda, handguns, and kilo press) from which the jury could have found that defendant possessed the requisite intent to distribute the drugs. Although the court did not give the jury a limiting instruction on the proper use of drug profile evidence, the court did read a comparable instruction on the use of expert witness testimony and police officer testimony. These instructions were sufficient to protect defendant from the danger of unfair prejudice presented by the drug profile evidence.

A few individual remarks during the drug profile testimony were outside of the *Murray* standard. However, the admission of these remarks does not require reversal, because the remarks could not have altered the outcome of the case and were thus not unfairly prejudicial to defendant. *McLaughlin*, 258 Mich App at 650. Although defendant was initially charged with possession with intent to distribute, the jury convicted him of the lesser included offense of possession. The jury acquitted defendant of the distribution charges; thus, the inappropriate remarks did not change the outcome of the trial.

Finally, defendant disputes the trial court's decision to permit some officers to offer drug profile testimony without first being qualified as experts. We review this unpreserved issue for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). For an officer to testify as an expert: (1) the officer must be qualified as an expert; (2) the evidence must be useful to the jury in deciding factual matters; and (3) the evidence must be from a recognized discipline. *Murray*, 234 Mich App at 53. To the extent the trial court erred in allowing the officers to testify without qualifying the officers as experts, the error is harmless. Defendant was only convicted of possession, not possession with intent to distribute. Because the drug profile testimony was offered to establish defendant's intent to distribute, defendant suffered no prejudice from the error.

Affirmed.

/s/ Peter D. O'Connell
/s/ Christopher M. Murray
/s/ Pat M. Donofrio