

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT A. BEATON,

Defendant-Appellant.

UNPUBLISHED

April 23, 1999

Nos. 204578; 204742; 205327

Oakland Circuit Court

LC Nos. 96-148147 FH

96-146729 FH

96-149539 FH

Before: Cavanagh, P.J., and Holbrook, Jr., and Whitbeck, JJ.

HOLBROOK, JR., J. (concurring)

I agree with the result reached by the majority. I write separately because I respectfully disagree with the majority's conclusion that evidence relating to a pager and a cellular telephone was properly admitted into evidence in Docket No. 204578. Majority opinion, *ante* at _____. As this Court recently observed, "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." *People v Murrery*, ___ Mich App ___; ___ NW2d ___ (Docket No. 194761, issued 2/12/99), slip op p 4. I believe that with regard to this particular evidence, that line was crossed.

Detective Moilanen opined that the cocaine he found during the search of defendant's vehicle was possessed by the defendant with intent to deliver. Additionally, he explained that his opinion was based in part on the fact that a pager and a cellular telephone was also found during the search. Although Detective Moilanen did indicate that the use of these items is consistent with drug dealing modus operandi, he did so while he was explaining why he believed that defendant possessed the requisite criminal intent. In this context, the testimony about the pager and the cellular telephone amounted to substantive evidence of defendant's guilt, and thus constituted an improper use of drug profile evidence. *Id.* at 5 (observing that "the expert witness should not express his opinion, based on a profile, that the defendant is guilty, nor should he expressly compare the defendant's characteristics to the profile in such a way that guilt is necessarily implied").

However, in light of the overwhelming weight of the properly admitted evidence, I find that erroneous admission of the drug profile evidence did not result in manifest injustice. See *People v Ramsdell*, 230 Mich App 386, 404-405: 585 NW2d 1 (1998).¹

/s/ Donald E. Holbrook, Jr.

¹ In Docket No. 205327, I agree with the majority that the challenged evidence does not constitute drug profile evidence. Majority opinion, *ante* at _____. The items Officer Tomasi indicated supported his opinion on the issue of intent cannot be characterized as innocuous. *Murray, supra* at 3.