

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTJUAN TERREL OWENS,

Defendant-Appellant.

UNPUBLISHED

September 11, 2007

No. 271064

Wayne Circuit Court

LC No. 06-002549-01

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of possession with intent to deliver less than 50 grams of cocaine, MCL, 333.7401(2)(a)(iv); possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and contributing to the neglect or delinquency of a minor, MCL 750.145. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Detroit Police Department Narcotics Bureau officers searched a home pursuant to a warrant. A handgun was found lying on a table. Defendant's 13-year-old nephew was found in the second-floor hallway. After the officers entered the home, defendant ran to the furnace in the basement and placed a plastic bag inside near the burner. An officer confiscated cocaine from under the furnace. Some of the cocaine was loose, while some was in small, knotted plastic baggies. Some cocaine had been partially burned, and could not be recovered. The total weight of the recovered cocaine was 12.18 grams. Approximately one-half gram of the recovered cocaine was contained in three baggies. An officer opined that, in his experience, the drugs were for distribution rather than personal use because no one would keep that quantity of cocaine for personal use. He also found the packaging of the cocaine to be appropriate for distribution. Another officer testified that, after defendant was arrested, he told the police that he knew of the cocaine and the gun in the house. However, defendant denied possessing either.

We review a defendant's allegations of insufficiency of the evidence de novo. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). We view the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id.* However, we will not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1202 (1992). Satisfactory proof of the elements of the crime can be shown by circumstantial

evidence and reasonable inferences arising therefrom. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). It is for the trier of fact to determine what inferences can be fairly drawn from the evidence and the weight to be accorded to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The elements of possession with intent to deliver less than 50 grams of cocaine are that: (1) the recovered substance is cocaine, (2) the cocaine is in a mixture weighing less than 50 grams, (3) the defendant was not authorized to possess the substance, and (4) the defendant knowingly possessed the cocaine with the intent to deliver it. *Wolfe, supra* at 516-517.

The elements of felony-firearm are: (1) the possession of a firearm, (2) during the commission of or the attempt to commit a felony. MCL 750.227b; *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Possession may be actual or constructive, and may be proved by circumstantial evidence. *People v Burgenmeyer*, 461 Mich 431, 437; 606 NW2d 645 (2000), reh den 461 Mich 1289 (2000). A person can have constructive possession if the firearm is known to the person and is reasonably accessible to him. *Id.*

Defendant argues that the prosecution presented insufficient evidence to support his conviction of possession with intent to deliver less than 50 grams of cocaine because only proof of possession was established. We disagree.

Intent to deliver may be inferred from “the quantity of narcotics in a defendant’s possession, from the way in which those narcotics are packaged, and from other circumstances surrounding the arrest.” *Wolfe, supra* at 524. Here, the jury could reasonably infer from the evidence presented that defendant was the only adult present in an untenanted house used primarily for drug sales. When defendant saw the police, he immediately fled and went directly to the basement, where he attempted to destroy a quantity of cocaine that officers testified was more than would normally be possessed by one who only intended to personally use the cocaine. Some of the cocaine that was recovered was packaged consistently with the intent to sell it to individual users. Further, defendant admitted that he knew that the gun and cocaine were present in the house. The prosecution was not required to disprove defendant’s apparent theory that he was only trying to hide or destroy his own personal narcotics and fortuitously happened to choose a location where other individuals had planted other quantities of cocaine. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). When viewed in a light most favorable to the prosecution, the evidence supported a conviction of possession with intent to deliver.

The evidence presented was also sufficient to support defendant’s conviction of felony-firearm. Defendant was first discovered within easy access to the handgun, which lay on a table in the room near him. Thus, at the time defendant was discovered, he at least constructively possessed the handgun at the same time he possessed the cocaine. *Burgenmeyer, supra*. The evidence was sufficient to support the felony-firearm conviction.

Defendant next argues that the prosecutor presented insufficient evidence to support his conviction for contributing to the neglect or delinquency of a minor. We disagree.

MCL 750.145 provides:

Contributing to neglect or delinquency of children--Any person who shall by any act, or by any word, encourage, contribute toward, cause or tend to cause any minor child under the age of 17 years to become neglected or delinquent so as to come or tend to come under the jurisdiction of the juvenile division of the probate court, . . . whether or not such child shall in fact be adjudicated a ward of the probate court, shall be guilty of a misdemeanor.

The intent of this statute is to prohibit individuals from contributing to a minor's delinquency so that the minor does not come within the jurisdiction of what is now the family division of the circuit court. *People v Owens*, 13 Mich App 469, 476; 164 NW2d 712 (1968). Defendant argues that the prosecutor presented insufficient evidence of this offense because there was no direct evidence that defendant encouraged his nephew's presence at the house, or that his nephew's presence at the raid contributed towards or tended to cause him to become neglected or to come under juvenile court jurisdiction. However, the fact that defendant's nephew was not actually charged with or adjudicated guilty of a crime does not equate to a lack of sufficient evidence to convict defendant under MCL 750.145. We have held that the statute was designed to prevent conduct "which would *tend to cause* delinquency and neglect as well as that conduct which obviously *has caused* delinquency and neglect." *Id.* at 479 (emphasis in original). Thus, "prior adjudication of delinquency by the juvenile court is not a prerequisite to defendant's conviction." *Id.* Here, the jury could have inferred from the circumstantial evidence that defendant knew and approved of his nephew's presence in the home, where defendant's sole purpose was to sell cocaine. Defendant's actions placed his nephew in danger of, at the least, being charged with loitering in a place of illegal business under MCL 750.167(1)(j). We find that the prosecution presented sufficient evidence to support defendant's conviction for contributing to neglect or delinquency of a minor.

Defendant also argues that the prosecutor denied him a fair trial by improperly seeking to admit evidence that he intended to sell the cocaine through inadmissible "profile" evidence presented by the officer who testified that the quantity and packaging of the cocaine supported a finding that the cocaine was not for personal use. Defendant raises a corollary objection that defense counsel was ineffective for failing to object to the introduction of this evidence. We review unpreserved claims of prosecutorial misconduct for plain error affecting the defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Defendant's ineffective assistance claim is not preserved for appeal because defendant neither moved for a new trial nor a *Ginther*¹ hearing in the trial court. *People v Armendarez*, 188 Mich App 61, 73-74; 468 NW2d 893 (1991). Unpreserved claims of ineffective assistance of counsel are limited to errors that are apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). To establish ineffective assistance of counsel, a defendant must show that counsel's performance "fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

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

A “prosecutor’s good-faith effort to admit evidence does not constitute misconduct.” *Ackerman, supra*. Contrary to defendant’s contention, the officer’s testimony did not constitute improper drug profile evidence. “Drug profile” evidence is generally inadmissible as substantive evidence of a defendant’s guilt. *People v Hubbard*, 209 Mich App 234, 241; 530 NW2d 130 (1995). This type of inadmissible evidence is “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; 593 NW2d 690 (1999). This type of evidence is inadmissible because these characteristics could apply “equally to innocent individuals as well as to drug dealers.” *Id.* Here, however, the challenged evidence was not of this type. Instead, the officer’s knowledge of the drug trade was used to help the jury understand the significance of the quantity and packaging of the cocaine at issue. Expert police testimony regarding the quantity of drugs found and the packaging is permitted to show that the defendant intended to sell the drugs and not simply use them for personal consumption. See *People v Stimage*, 202 Mich App 28, 29-30; 507 NW2d 778 (1993); *People v Ray*, 191 Mich App 706, 708; 479 NW2d 1 (1991). Defendant cannot show that the prosecutor committed misconduct in introducing this evidence, or that counsel was ineffective for failing to object to its introduction. See *Ackerman, supra* at 455 (Counsel does not render ineffective assistance by failing to raise futile objections).²

Affirmed.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder

² We note that the prosecutor did not move to qualify the officer as an expert witness at trial. Defendant did not object to this omission, and there is no plain error in the prosecutor’s omission. A police officer may testify as an expert on drug-related law enforcement by virtue of his training and experience. *People v Williams (After Remand)*, 198 Mich App 537, 542; 499 NW2d 404 (1993). Given the officer’s testimony with respect to his experience in the area of narcotics, he was qualified to testify about the significance of the cocaine’s packaging and quantity, even if that testimony embraced an ultimate issue to be decided by the jury. *Stimage, supra*; MRE 704. Consequently, defendant cannot demonstrate any prejudice that would support a finding of ineffective assistance. *Toma, supra*.