

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILIP ANTHONY ANDERSON,

Defendant-Appellant.

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UNPUBLISHED

April 30, 2009

No. 282019

Oakland Circuit Court

LC No. 2007-215936-FH

Before: Murray, P.J., and Gleicher and M. J. Kelly, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(iv), felon in possession of a firearm, MCL 750.224f(2), and two counts of possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b(1). He was sentenced as a fourth-felony habitual offender, MCL 769.12, to concurrent prison terms of 5 to 30 years for the possession with intent to deliver heroin conviction and 3 to 30 years for the felon-in-possession conviction, to be served consecutive to two concurrent five-year terms of imprisonment for the felony-firearm convictions. He appeals as of right, and we affirm.

Defendant was convicted of possessing with intent to deliver 25 packets of heroin that were found inside the hollow of a tree in his stepfather's backyard. Defendant was also convicted of weapons offenses arising from two rifles that were found in the second floor of his stepfather's home. The prosecutor's theory at trial was that defendant lived in the upstairs bedroom of his stepfather's house, and that the heroin found in the tree belong to defendant. Several documents containing defendant's name, and clothing matching defendant's size, were found in the upstairs bedroom.

I. Drug Profile Evidence

Defendant has three arguments relative to drug profile evidence. First he argues that drug profile evidence was improperly used as substantive evidence of his guilt. Second, defendant argues that the prosecutor failed to maintain a clear demarcation between a police officer's factual testimony and expert testimony. Defendant's third argument is that he was prejudiced by the trial court's failure to give a cautionary instruction concerning the proper use of these two types of evidence.

## A. Testimony

Defendant failed to object to the challenged testimony below. Therefore, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

“Drug profile” evidence is an informal collection of otherwise innocuous characteristics that are often displayed by those involved in the trafficking of drugs. *People v Murray*, 234 Mich App 46, 52-53; 593 NW2d 690 (1999). This Court has recognized that drug profile evidence is inherently prejudicial because it suggests that innocent characteristics may be indicative of criminal activity. *Id.* at 53. Therefore, drug profile evidence, in itself, generally cannot be used as substantive evidence of a defendant's guilt. *Id.* at 53, 57. However, drug profile evidence can be used to educate the jury concerning drug trafficking, and to explain the significance of certain evidence. *Id.* at 59-60.

[C]ourts must take into consideration the particular circumstances of a case and enable profile testimony that aids the jury in intelligently understanding the evidentiary backdrop of the case, and the modus operandi of drug dealers, but stop short of enabling profile testimony that purports to comment directly or substantively on a defendant's guilt. [*Id.* at 56.]

Further,

[t]he 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.

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Although . . . the distinction between admissible and inadmissible drug profile evidence is often highly subtle, courts nevertheless must evaluate such evidence carefully in order to determine whether it is being used to explain the significance of otherwise innocuous circumstantial evidence, or rather to demonstrate that the defendant fits the profile and is therefore guilty. [*Id.* at 57-58 (citations omitted).]

A court must determine whether the expert “attempt[ed] to directly tie the profile testimony to defendant's actions or characteristics in a manner that implied defendant's guilt merely because of the connection,” or whether the expert “directly opine[d] on the basis of such characteristics that defendant was a drug dealer.” *Id.* at 61. However, where testimony concerns drug evidence, not innocuous characteristics, the expert can properly analyze the facts of the case and offer an opinion, and doing so is “not offer[ing] innocent characteristics themselves as evidence of guilt.” *Id.* at 62-63. In *Murray*, the Court held that testimony that the quantity and packaging of drugs found indicated an intent to distribute was permissible expert testimony, not drug profile evidence. *Id.* at 54.

In *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999), overruled on other grounds in *People v Thompson*, 477 Mich 146, 148; 730 NW2d 708 (2007), the defendant argued that the trial court improperly allowed a police detective to testify that he observed people entering and leaving a house in a manner that was indicative of drug trafficking. This Court stated:

[T]he detective was testifying in this instance as an expert concerning his impression that drug trafficking was taking place at [that house]. The status of defendant as a drug dealer, and that of [the home] as a drug house, were questions before the jury. Expert testimony concerning indicia of drug trafficking relating to both, which was not within the knowledge of a layperson, aided the jury in resolving those questions. Thus the testimony was not improper drug profile evidence, but rather proper expert testimony concerning material issues. [*Id.* at 44-45 (citations omitted).]

In *People v Ray*, 191 Mich App 706; 479 NW2d 1 (1991), we upheld the admission of an expert's testimony (a police officer) that the quality, packaging and price of the crack cocaine found indicated that the defendant intended to sell, rather than personally use, the drug:

Rosenstangel testified that the quantity of crack cocaine found in defendant's possession, the fact that the rocks of crack cocaine were evenly cut, and the selling price of crack cocaine on the street clearly indicated that defendant intended to sell the drugs and not simply use the crack cocaine for personal consumption. Such information was not within the knowledge of a layman, and Rosenstangel's testimony would have aided the jury in determining defendant's intent and, thus, his guilt of the charged offense. The fact that the testimony did embrace the ultimate issue of intent to deliver did not render the evidence inadmissible. [*Id.* at 708. Citation omitted.]

Contrary to defendant's argument in this case, maintaining a clear demarcation between a witnesses' factual testimony and his expert testimony is only "a factor that may ameliorate the risk of jury confusion regarding dual role testimony." *United States v Lopez-Medina*, 461 F3d 724, 744 (CA 6, 2006). It is not error in and of itself.

A review of the challenged testimony in this case reveals that in all but one instance, the police witness did not testify that defendant possessed otherwise innocuous characteristics that are often displayed by drug dealers. Rather, the witness used his knowledge, training, and experience with drug trafficking to explain the meaning and relevance of the noninnocent evidence that was found, i.e., the guns and the drugs.

Defendant recognizes that much of the expert's testimony was proper, but objects on appeal (though none was made at trial) to several passages of the expert's testimony. Specifically, defendant asserts that the expert's testimony that defendant was known on the street for selling "double packs" was testimony regarding defendant's guilt. The testimony was as follows:

Q: Was the defendant known for anything different than a normal bundle?

A: Yes. On the street he was known for, they call them double packs.

Q: What are those?

A: They're basically two bindles in one. He was selling bigger packs.

Defendant also challenges the expert's related testimony that defendant sold "the good stuff" to get repeat customers. In the passage cited, however, the expert actually testified about whether there was evidence of defendant "stepping on it," i.e., diluting the drugs by mixing the drugs with other products to sell more, but in a weaker form:

Q: If a person has a reputation for giving double bindles, meaning twice as much for the money, would that be the type of person who would also step on it?

A: I would say in this case, we didn't find any cutting agent. I think he was buying his stuff from his dealer, breaking it up and selling it. If you sell good stuff, what are you going to do? You're going to cause the customer to come back. He's consistent. He's not going to rip you off. You can trust him. Boom, you know where to get it. You know where to get the good stuff.

Finally, defendant challenges the expert's testimony that his view of the evidence showed that defendant possessed the drugs found in the tree, and that he possessed the drugs with an intent to deliver:

Q: What would your opinion be regarding the ownership of the items in the tree or possession [sic]?

A: Hands down Mr. Anderson.

Q: What about possession with intent to deliver the controlled substances found, do you believe that is possession with the intent to deliver or possess for personal use?

A: Certainly it's with intent to deliver.

Q: And what are some of your basic reasons? I know we talked about some.

A: The scale, the packaging, the quantity and it's basically in more than one spot. All those put together and the weapons, all those put together are pretty classic as far as distribution.

Addressing the challenged testimony in reverse order, the expert's testimony that the packaging, quantity and location of the drugs showed an intent to deliver was properly admitted, as this testimony was quite similar to that approved of in *Ray, supra*. The testimony that defendant possessed the drugs found in the tree is not of the same ilk, as it went beyond just addressing an ultimate issue (i.e. possession), *Ray, supra*, and went directly to whether defendant actually possessed the drugs, *Murray, supra* at 59.

The expert's testimony about whether the evidence showed that the drugs were being "stepped on," or whether instead it was being sold without added substances, is more difficult to decide because it was based upon the expert's specialized knowledge of drug sales, yet it also contained his view about what this defendant did. Although the testimony referring to a generic "he" is not clearly a reference to defendant, the expert stated his answer with a reference to "this case." Thus, we conclude that this testimony went outside the permissible bounds, as it did more than explain the meaning of drug profile evidence, as it related directly to defendant. *Murray, supra*.

We also conclude that the expert's testimony that defendant had a street reputation for selling larger bindles was inadmissible. The testimony not only had no foundation, and the source appears to be either another source (and thus hearsay) or speculation, but it also went beyond an explanation of specific evidence and went directly to whether defendant engaged in certain conduct.

In any event, admission of the inadmissible evidence – or for that matter, all of the challenged testimony – did not constitute plain error affecting substantial rights. *Carines, supra* 763-764. There was sufficient evidence outside of the expert's challenged testimony to find defendant guilty beyond a reasonable doubt.

#### B. Jury Instructions

Defendant is also of the opinion that reversal is required because the trial court failed to instruct the jury concerning the different permissible uses of the witness's factual testimony, and his expert testimony. Defendant did not request a particular cautionary instruction at trial or object to the court's instructions. In fact, defense counsel expressed satisfaction with the instructions, so the instructional issue not only is unpreserved, it is waived. *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002). Even if we consider this issue, however, it does not require reversal.

Claims of instructional error are generally reviewed de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). Even if somewhat imperfect, instructions are not grounds for reversal if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994).

In *Murray, supra* at 57, this Court stated that "because the focus is primarily on the jury's use of the profile, courts must make clear what is and what is not appropriate use of the profile evidence. Thus, it is usually regarded as necessary for the court to instruct the jury with regard to the proper and limited use of profile testimony." *Id.* It is sufficient to instruct the jury that profile evidence must not be used to determine whether the defendant is guilty. *Id.* at 61. In this case, the trial court gave the following cautionary instruction concerning the weight of expert testimony:

You have heard testimony from a witness, Sergeant Wilson, who gave you his opinion as an expert in the field of narcotics trafficking. Experts are allowed to give opinions in court about matters they are experts on.

However, you do not have to believe an expert's opinion. Instead, you should decide whether you believe it and how important you think it is. When you decide whether you believe an expert's opinion, think carefully about the reasons and the facts that he gave for his opinion, and whether those facts are true.

You should also think about the expert's qualifications and whether his opinion makes sense when you think about the other evidence in the case.

In *Lopez-Medina, supra* at 743-744, the court stated that such an instruction would have been sufficient to avoid reversal. We agree and conclude that the trial court's instruction in this case was sufficient to protect defendant's substantial rights and reversal is not required.

## II. Sufficiency of the Evidence

Defendant next argues that the evidence was insufficient to prove that he possessed the drugs and weapons that were seized.

The sufficiency of the evidence is evaluated by reviewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find every element of the crime proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985); see also *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). The resolution of credibility disputes is within the exclusive province of the trier of fact, *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990), which may also draw reasonable inferences from the evidence. *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991).

"The element of knowing possession with intent to deliver has two components: possession and intent." *People v Brown*, 279 Mich App 116, 136; 755 NW2d 664 (2008). In this case, defendant only challenges the element of possession.

Possession may be actual or constructive; actual physical possession is not necessary. *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992). Ownership of the item is also unnecessary. *Id.* at 520. Additionally, because possession can be joint, more than one person can have actual or constructive possession of an item. *Id.* The essential question is whether the defendant had dominion or control over the item. *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995); *Wolfe, supra* at 520-521. Constructive possession may be shown by either direct evidence, or by circumstantial evidence and the reasonable inferences arising therefrom. *Wolfe, supra* at 521, 526; *Brown, supra* at 136-137.

In the present case, the police found male clothing and shoes in the upstairs bedroom. The clothing was of a single size consistent with defendant's size, and the size of the shoes was consistent with defendant's shoe size. The police also found numerous documents in the upstairs portion of the house that contained defendant's name, including court paperwork and a current driver's license. There were no documents bearing anyone else's name, and defendant's name was not on any of the documents discovered on the first floor.

A gun with a scope was found next to the bed. Two swords, a knight's axe, and a machete were also found in the bedroom. A second gun was found in the crawl space of the

sitting room. The sitting room was accessible only through the bedroom, and the sitting room has a window overlooking the backyard from which the tree containing the heroin is visible. There were hundreds of lottery tickets found in both rooms. In the sitting room the police also found sandwich baggies, fingernail size baggies, and a scale. A double bindle of heroin was found in the bedroom dresser, which matched the size and packaging of the heroin bindles that were found in the tree.

Viewed in a light most favorable to the prosecution, the evidence was sufficient evidence to enable the jury to reasonably infer that defendant occupied the second floor of the home, that he had knowledge of and a right to possess the guns and drugs found on the second floor, and that he also possessed the drugs found in the tree. The evidence was sufficient to support defendant's convictions.

### III. Defendant's Standard 4 Brief

Defendant raises several issues in a pro se Standard 4 brief, none of which have merit.

#### A. Failure to Endorse a Witness

Defendant argues that he was deprived of a fair trial because the prosecutor did not endorse the police officers that discovered the heroin in the tree as res gestae witnesses. Because defendant did not raise this issue below, it is not preserved and our review is limited to plain error affecting substantial rights. *Carines, supra* at 763-764.

Contrary to what defendant argues, MCL 767.40a does not require a prosecutor to locate, endorse, and produce all res gestae witnesses. *People v Perez*, 469 Mich 415, 418-419; 670 NW2d 655 (2003); *People v Cook*, 266 Mich App 290, 295; 702 NW2d 613 (2005). Rather, the prosecutor's former duty "has been replaced with an obligation to provide notice of known witnesses and reasonable assistance to locate witnesses on defendant's request." *People v Burwick*, 450 Mich 281, 288-289, 291, 297; 537 NW2d 813 (1995) (emphasis added). The prosecutor must also identify those witnesses he intends to produce at trial. *Id.*

In this case, the record discloses that the prosecutor attached a sheet containing two lists of witnesses to the information filed on August 7, 2007. Defendant does not claim that the name of the SWAT officer who discovered the heroin is not included on that list. Further, if it was not, it was defendant's duty to ask for the prosecutor's assistance in identifying and locating the officer, and it was defendant's decision whether to call the officer to testify at trial. Defendant also fails to explain how the officer's testimony was reasonably likely to affect the outcome of trial. For these reasons, defendant has failed to show a plain error affecting his substantial rights.

#### B. Prosecutorial Misconduct

Defendant argues that the prosecutor's conduct denied him a fair trial. In particular, he contends that the prosecutor improperly introduced out-of-court statements of a confidential informant for their truth, thereby violating his right of confrontation, and then used that evidence during closing argument. He also contends that the prosecutor introduced false and misleading evidence.

## 1. Defendant's Right of Confrontation

Under the Confrontation Clause, US Const, Am VI, a testimonial statement of a witness absent from trial is not admissible for its truth unless the declarant is unavailable and there has been a prior opportunity for adequate cross-examination. *Crawford v Washington*, 541 US 36, 53-56, 59; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

A review of the challenged testimony reveals that a police officer testified regarding the role of confidential informants and search warrants in a police investigation, but the officer did not refer to any out-of-court statements. Similarly, the officer did not disclose any out-of-court statements during cross-examination by defense counsel, or when discussing the credibility of confidential informants. Thus, defendant's right of confrontation was not implicated by the challenged testimony.

However, the testimony that defendant was known on the street for selling double bindles could be considered an out-of-court statement offered for its truth, and therefore would be inadmissible hearsay. Eliciting this testimony was in error, but an error in the presentation of evidence does not automatically result in a finding of misconduct. A finding of "prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Defendant has not shown that the prosecutor acted in bad faith. Thus, this claim of error does not support a finding that the prosecutor engaged in misconduct that deprived defendant of a fair trial.

Regarding the prosecutor's closing argument, defendant correctly observes that "[a] prosecutor may not vouch for the credibility of a witness, nor suggest that the government has some special knowledge that the witness is testifying truthfully." *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). "However, the prosecutor's comments must be considered in light of the defense counsel's comments." *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001). The prosecutor's comments challenged by defendant were responsive to defense counsel's arguments concerning circumstantial evidence, information provided by the confidential informant, and whether there was evidence that defendant was observed selling drugs. The "outside pieces" that the prosecutor referred to, i.e., that surveillance was performed on defendant and that defendant liked double bindles, were already in evidence. Therefore, we find no misconduct. *Id.* at 593.

## 2. False and Misleading Information

A prosecutor may not knowingly use false testimony, and must report and correct perjury committed by a government witness when it occurs. *People v Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001); *People v Lester*, 232 Mich App 262, 276-278; 591 NW2d 267 (1998). However, that certain testimony may be contradicted by other witnesses does not compel the prosecutor to disbelieve his own witnesses and correct their testimony. *Lester, supra* at 278-279; see also *Herndon, supra* at 417-418.

Here, the prosecutor did not refer to false and misleading evidence by asking whether a gun found on the first floor would be reasonably accessible to someone selling drugs on the second floor. The officer testified, during direct and cross-examination that the tree where drugs were found was in the stepfather's backyard and the officer explained the basis for this

conclusion. The fact that defendant's stepfather testified otherwise does not mean that the officer's answer was false or misleading. *Lester, supra* at 278-279; see also *Herndon, supra* at 417-418.

For these reasons, we reject defendant's argument that the prosecutor's conduct denied him a fair trial.

### C. Effective Assistance of Counsel

Defendant's final argument is that defense counsel made several errors that deprived him of the effective assistance of counsel. Because defendant did not raise this issue in a motion for a new trial or request for a *Ginther*<sup>1</sup> hearing, review is limited to mistakes apparent from the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he was not performing as the attorney guaranteed by the Sixth Amendment. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy and must further show that he was prejudiced by the error in question, i.e., that there is a reasonable probability that but for counsel's error, the outcome would have been different. *Id.* at 312-314; *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Defense counsel is not ineffective for failing to make a futile or meritless objection. See *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Defendant argues that defense counsel was ineffective for failing to object to the allegedly improper expert testimony discussed in section I(A), *supra*. However, we have concluded that the testimony was not improper. Thus, an objection would have been futile. Moreover, as discussed in section I(B), *supra*, the trial court's cautionary instruction regarding expert testimony was sufficient to protect defendant's rights. Lastly, we have found no merit to defendant's claims of prosecutorial misconduct discussed in section III(B), *supra*. Because any objection to the prosecutor's conduct would have been futile, defense counsel was not ineffective for failing to object.

Affirmed.

/s/ Christopher M. Murray  
/s/ Michael J. Kelly

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<sup>1</sup> *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).