

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUSTIN DUANE HOWARD,

Defendant-Appellant.

UNPUBLISHED

June 17, 2014

No. 313598

Calhoun Circuit Court

LC No. 2006-000818-FH

Before: STEPHENS, P.J., and HOEKSTRA and METER, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial conviction of one count of possession of a controlled substance with intent to deliver, less than 50 grams, MCL 333.7401(2)(a)(4). Defendant was sentenced as a third habitual offender, MCL 769.11, to a prison term of 18 months to 40 years. For the reasons outlined below, we affirm.

I. BACKGROUND

On March 31, 2005, police officers raided a home on Emmett Street in Battle Creek where they encountered defendant, another adult male and an infant. The house was almost entirely empty. Defendant informed police that he was hired by his girlfriend's mother, who owned the house, to clean up the property. Upon searching the home, officers found a small bag of crack cocaine in a freezer drawer, and a larger bag of crack cocaine and a bag of powder cocaine in a baseball cap in the basement. Police also seized a box of sandwich bags from the basement, many of which had the corners removed, and a pair of cell phones that belonged to defendant.

At trial, expert witnesses testified that defendant's fingerprint had been found on one of the empty sandwich bags, and that the corners of sandwich bags were often removed by drug distributors to package narcotics for sale. Expert witnesses also testified that drug distributors often carried two cell phones, and that after the raid, the voicemail message on one of the phones was changed to warn callers that the phone had been seized by the police. Defendant denied any knowledge of the drugs that were found in the home.

II. SUFFICIENCY OF EVIDENCE

First, defendant argues that there was insufficient evidence to support a finding that he was in possession of the cocaine that was seized by the police. In a criminal case, due process requires that the prosecution introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). This Court reviews the evidence de novo, in the light most favorable to the prosecution, to determine if a rational trier of fact could find that the elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). In doing so, we will not interfere with the finder of fact's role in determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992).

In the absence of physical possession, a conviction for a crime involving possession can be sustained if the evidence is sufficient to establish constructive possession. *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). Mere presence at a location where contraband is found is not sufficient to establish constructive possession, but constructive possession may be established if there is evidence that the defendant had knowledge of the contraband's presence and the right to exercise control over it. *Wolfe*, 440 Mich at 520. A jury may rely on reasonable inferences drawn from circumstantial evidence in order to determine whether or not constructive possession existed. *Hardiman*, 466 Mich at 421-423.

Here, the evidence showed that defendant had access to the house where the drugs were found, that defendant had cleared the house of virtually everything but the drugs, and that defendant's fingerprints were found on a sandwich bag from a box of bags that had their corners removed. Evidence was introduced that sandwich bag corners were routinely used to package narcotics for individual sale. Evidence was also presented that showed that defendant claimed ownership of two cell phones that were recovered from the house, that pairs of cell phones were commonly utilized by drug distributors, and that after the phones were recovered, one of the phones had its voicemail message changed to warn callers that the phone had been seized by the police.

Viewing this evidence in the light most favorable to the prosecution, it is clear that defendant's conviction was not based solely on his mere presence at a location where drugs were found, but also on several pieces of physical and circumstantial evidence that linked defendant to the packaging and distribution of the drugs that were seized.

III. FAIR TRIAL

Next, defendant argues that he was denied his right to a fair trial by the prosecution's presentation of improper "drug profile" evidence. This assertion of error was not preserved below. An unpreserved claim of non-constitutional error is reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant bears the burden of demonstrating that it is more probable than not that the error affected the outcome of the trial, and even on such a showing, reversal is only warranted if, in the reviewing court's discretion, the error resulted in the conviction of an innocent defendant or "seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the

defendant's innocence." *Id.* at 763; see also *People v Blackmon*, 280 Mich App 253, 261; 761 NW2d 172 (2008).

Drug profile evidence is an "informal compilation of characteristics often displayed by those trafficking in drugs." *People v Hubbard*, 209 Mich App 234, 239; 530 NW2d 130 (1995) (citation omitted). Due to the potentially prejudicial nature of such evidence, this Court has identified factors to be considered when deciding to admit such testimony at trial.

Some or all of the following factors may be helpful in distinguishing between the appropriate and inappropriate use of drug profile evidence and thus help to determine the admissibility of such evidence. First, the reason given and accepted for the admission of the profile testimony must only be for a proper use—to assist the jury as background or modus operandi explanation. Attorneys and courts must clearly maintain the distinction between the profile and the substantive evidence, and the former should not argue that the profile has any value in itself; it is only an aid for the jury. Second, the profile, without more, should not normally enable a jury to infer the defendant's guilt. 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. Third, because the focus is primarily on the jury's use of the profile, courts must make clear what is and what is not an appropriate use of the profile evidence. Thus, it is usually necessary for the court to instruct the jury with regard to the proper and limited use of profile testimony. Fourth, 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. Although we acknowledge that 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. [*People v Murray*, 234 Mich App 46, 56-58; 593 NW2d 690 (1999) (internal citations and quotation marks omitted).]

Here, the prosecution's expert testimony concerning the fact that drug distributors frequently carry two cell phones was not presented as substantive evidence of defendant's guilt, but as background for why the police investigated the phones. That investigation established that after the raid one of the phones had its voicemail message changed to warn callers that the phone had been seized by the police. Next, the profile evidence was not the sole evidence of defendant's guilt, as the evidence against defendant also consisted of defendant's constructive possession of the drugs seized and the presence of his fingerprint on a sandwich bag from a box of bags that, it could be reasonably concluded, had been used to package narcotics for sale, as well as the incriminating voicemail warning. Further, the prosecution's expert witness did not express an opinion, based on the profile, that defendant was guilty. We note that no jury instruction was given on the utilization of the drug profile evidence and we can only speculate as

to whether the jury properly applied that evidence. In this case, however, no claim of error has been made based upon the failure to request or give the instruction.

IV. EFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant argues that he was denied the effective assistance of trial counsel when his counsel failed to call the owner of the house, Susan Cross, as a witness. The deprivation of effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859, amended on other grounds 481 Mich 1201 (2008). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

Under both federal and state constitutional law, a defendant in a criminal case has a right to the assistance of adequate and effective counsel. US Const, Am VI; Const 1963, art 1, § 20. In order to prevail under a claim of ineffective assistance of counsel, a defendant must show that counsel's representation fell below professional norms, that there is a reasonable probability that, but for counsel's error, the result of the proceedings would be different, and that the resultant proceedings were fundamentally unfair or unreliable. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007); *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

Trial counsel testified at an evidentiary hearing that defendant never mentioned Cross as a witness who could help his defense. The trial court made a specific fact finding, to which we defer, that no request was made by the defendant that Cross be contacted. Nonetheless, it could be expected that defense counsel would contact those who had an interest in the home to see if they had any information that might prove helpful. Defense counsel admitted that Cross was listed as the owner of the home on a police report. Nonetheless, defendant cannot show the requisite prejudice needed to warrant relief. Cross's testimony at the evidentiary hearing merely corroborated defendant's undisputed testimony that Cross had hired defendant to clean out the house. Cross also testified that defendant had been cleaning out the house for "a good month" before the raid, which contradicted defendant's testimony that he had only been in the house two or three times prior to the raid.

Defendant cannot show that, but for his trial counsel's failure to call Cross as a witness, there was a reasonable probability that he would have been acquitted because the portion of defendant's testimony that was bolstered by Cross's proposed testimony was not in dispute.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Joel P. Hoekstra

/s/ Patrick M. Meter