

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CRAIG JAMES,

Defendant-Appellant.

UNPUBLISHED

October 12, 2001

No. 218735

Muskegon Circuit Court

LC No. 98-042645-FH

Before: Neff, P.J., and Doctoroff and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver less than fifty grams of a mixture containing cocaine, MCL 333.7401(2)(a)(iv), carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a second habitual offender, MCL 769.10, to consecutive prison terms of ninety months to thirty years for the possession with intent to deliver cocaine conviction, 1 to 7-1/2 years for the CCW conviction, and a two-year term for the felony firearm conviction. He appeals as of right. We affirm.

Ineffective Assistance of Counsel

Defendant argues that reversal is required because he was denied the effective assistance of counsel. Defendant's failure to raise this issue by motion for a new trial or an evidentiary hearing limits our review to the existing record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). To warrant a new trial on the basis of ineffective assistance of counsel, defendant must show that his counsel's performance fell below an objective standard of reasonableness such that he was deprived of a fair trial and, but for counsel's errors, the result of the proceeding would have been different. *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000).

First, defendant claims that defense counsel was ineffective for failing to file a pretrial motion to dismiss based on entrapment. We disagree. This issue of entrapment may be raised either before or during trial. See *People v D'Angelo*, 401 Mich 167, 177-178; 257 NW2d 655 (1977). Here, counsel raised the issue of entrapment at trial. Further, we find no clear error in the trial court's decision holding that defendant was not entrapped, *People v Hampton*, 237 Mich App 143, 156; 603 NW2d 270 (1999), and we find no basis in the record to conclude that a different result would have occurred had counsel raised the issue earlier.

Defendant also argues that his counsel should have filed a pretrial motion in limine to preclude or limit the use of MRE 404(b) other acts evidence. However, the record shows that the prosecutor did not introduce any such evidence. Where other acts evidence was inadvertently disclosed during defense counsel's cross-examination, a limiting instruction was promptly given. In addition, defense counsel's elicitation of evidence indicating that defendant also possessed marijuana when he was arrested was a matter of trial strategy, and the fact that the strategy may not have worked does not constitute ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Next, counsel was not ineffective for failing to object to Detective Baker's qualifications as an expert in drug trafficking in Muskegon County. The record clearly demonstrates that Baker was an expert in this field, and the trial court did not abuse its discretion in qualifying Baker as an expert. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). Counsel is not required to argue a meritless motion or make a groundless objection. *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995).

Defendant also claims that defense counsel was ineffective because he did not provide a rational defense to the charge. The evidence disclosed that defendant was caught possessing over eight ounces of crack cocaine, which was wrapped neatly in little baggies, and also possessed various other accoutrements of a drug dealer while he was in the process of selling cocaine to a known cocaine distributor. Defendant provides no indication as to what kind of defense, apart from entrapment and police misconduct or incompetence, counsel could have presented in light of the facts. Again, counsel's pursuit of a defense was a matter of trial strategy, and defendant has not overcome the presumption of sound strategy. *Stewart (On Remand)*, *supra* at 42.

Finally, in light of the facts of the case, we are not convinced that counsel was ineffective when he remarked, during closing argument, that, while defendant may be "guilty of the general allegations" made by the prosecutor, "he's not guilty of the offense that he's charged with." The argument must be considered trial strategy, which we will not second-guess. *Id.* Further, defendant failed to demonstrate that but for his counsel's closing argument, the outcome of the trial would have been different. *Williams*, *supra* at 331.

Drug Profile Testimony

Next, defendant argues that he was denied a fair trial because of improper drug profile testimony. Because defendant did not object to the challenged testimony at trial, this issue is not preserved for appellate review. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Therefore, in order to obtain appellate relief, three requirements must be met: (1) error must have occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" independent of the defendant's innocence. *Id.* at 763.

Drug profile evidence may not be admitted as substantive evidence of a defendant's guilt. However, an expert witness may explain the significance of seized contraband or other items of personal property, as long as the witness does not move beyond an explanation of the typical

characteristics of drug dealing to opine that the defendant is guilty because he fits the drug profile. *Murray, supra* at 54. In *Williams, supra*, this Court summarized the factors to be considered in distinguishing between appropriate and inappropriate use of drug profile evidence:

First, the drug profile evidence must be offered as background or modus operandi evidence, and not as substantive evidence of guilt, and the distinction must be carefully maintained by the attorneys and the court. Second, something more than drug profile evidence must be admitted to prove a defendant's guilt; multiple pieces of profile do not add up to guilt without something more. Third, the trial court must make clear to the jury what is and is not an appropriate use of the drug profile evidence by, e.g., instructing the jury that drug profile evidence is properly used only as background or modus operandi evidence and should not be used as substantive evidence of guilt. Fourth, the expert witness should not be permitted to express an opinion that, on the basis of the profile, the defendant is guilty, and should not expressly compare the defendant's characteristics to the profile in a way that implies that the defendant is guilty. [*Id.* at 320-321.]

To the extent that police witnesses are permitted to “express the opinion or state the belief or conclusion” that the defendant is guilty, the testimony is admitted in error. *Id.* at 321.

We conclude that the admission of the drug profile evidence in this case amounted to plain error. The witness, Detective Baker, “move[d] beyond an explanation of the typical characteristics of drug dealing” and opined that the evidence confiscated from defendant indicated that he possessed the cocaine with the intent to deliver. *Murray, supra* at 54. As in *United States v Quigley*, 890 F2d 1019 (CA 8, 1989), there was specific reference to defendant. *Id.* at 1023-1024. Baker was permitted to conclude that the evidence found on defendant's person, as well as the evidence *not* found on his person, indicated that defendant was a drug supplier. No distinction between “background” and “substantive” evidence was maintained or presented to the jury, nor did the court instruct the jury about the proper use of this evidence. *Murray, supra* at 57. The evidence was impermissibly offered as substantive evidence of guilt.

Nevertheless, we conclude that the erroneous admission of this evidence did not affect defendant's substantial rights, considering the overwhelming evidence of defendant's guilt. See *United States v Williams*, 957 F2d 1238, 1242-1243 (CA 5, 1992) (finding that the erroneous admission of drug profile evidence, under facts much more egregious than this case, was harmless because of the overwhelming evidence of the defendant's guilt). Further, the plain error here clearly did not result in the conviction of an actually innocent defendant or seriously affect the fairness, integrity or public reputation of the judicial proceedings. *Carines, supra* at 763. Therefore, reversal is not required.

Jury Instructions

Next, defendant argues that reversal is required because of instructional error. We disagree. Defense counsel failed to preserve this issue by either requesting the omitted instructions or objecting to the instructions given. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Accordingly, defendant must show a plain error that affected his substantial rights. *Carines, supra* at 763.

As noted previously, a limiting instruction should have been given regarding the limited purpose of the drug profile testimony. *Murray, supra* at 57. However, given the overwhelming evidence of defendant's guilt, the absence of such an instruction did not affect defendant's substantial rights or otherwise warrant reversal. *Carines, supra*.

Defendant also argues that the court's failure to instruct the jury in accordance with CJI2d 4.1 and 4.11 requires reversal. Because the record suggests that defense counsel may have purposefully declined to request these instructions as a matter of strategy, reversal is not warranted on the basis of this unpreserved issue. *Carines, supra*. Further, defendant has not overcome the presumption of sound trial strategy and, therefore, has not demonstrated that counsel was ineffective. *Stewart (On Remand), supra* at 42.

Sentencing

We find no merit to defendant's claim that the trial court failed to satisfy the articulation requirement during sentencing. MCR 6.425(D)(2)(e). The trial court's reference to the sentencing guidelines when imposing a sentence within the guidelines was sufficient to satisfy the articulation requirement. *People v Bailey (On Remand)*, 218 Mich App 645, 646-647; 554 NW2d 391 (1996).

We further find that the trial court did not abuse its discretion in sentencing defendant. The court sentenced defendant at the high end of the guidelines for the possession with intent to deliver cocaine offense, and defendant has not demonstrated any unusual circumstances to indicate that his sentence is disproportionate. *People v Piotrowski*, 211 Mich App 527, 532; 536 NW2d 293 (1995).

Finally, defense counsel was not ineffective for failing to request that the court consider the legislative sentencing guidelines, MCL 769.34(1) and (2). Because defendant's offense was committed before January 1, 1999, the Legislative guidelines do not apply. *People v Babcock*, 244 Mich App 64, 71-72; 624 NW2d 479 (2000).

Affirmed.

/s/ Janet T. Neff
/s/ Martin M. Doctoroff
/s/ Kurtis T. Wilder