

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARLTON JERMAINE SIMMONS,

Defendant-Appellant.

UNPUBLISHED

September 16, 2003

No. 239770

Oakland Circuit Court

LC No. 01-180275-FH

Before: O’Connell, P.J., and Jansen and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to three months to four years’ imprisonment for the possession with intent to deliver conviction, and a consecutive term of two years’ imprisonment for the felony-firearm conviction. We affirm.

Seven officers of the Oakland County Sheriff’s Department Narcotics Enforcement Team executed a search warrant at defendant’s residence. Detectives Sean Jennings and Jerry Niedjelski were the first and second officers to enter the home. During the subsequent search of defendant and the residence, the police recovered a certain quantity of marijuana, three handguns and accompanying ammunition, a digital electronic scale, \$745, a bulletproof vest, and several documents bearing defendant’s name.

At trial, Jennings and Niedjelski were qualified as experts in the field of “narcotics investigation.” During Niedjelski’s direct examination, the prosecutor asked, “What is the specific or what is the significance of” the \$745. Niedjelski responded, “That marijuana was being sold from that residence and that was the proceeds, being that they’re in [\$]10 and \$20 denominations and in close proximity.” Defense counsel objected to this testimony and moved to strike the answer pursuant to *People v Murray*, 234 Mich App 46; 593 NW2d 690 (1999). After discussing the issue outside the presence of the jury, the trial court instructed the jury as follows: “The objection is sustained, members of the jury, the testimony is ordered stricken, you’re to disregard it. The officer can tell us what he found, he can tell us the characteristics and his experience, but he can’t tell us his conclusion.”

Soon thereafter, as the prosecutor attempted to solicit opinion testimony from Niedjelski regarding the marijuana found, the following exchange occurred:

Prosecutor: Detective Niedjelski, based upon your training and experience and based upon the evidence that you found in this case, did you form an opinion about the marijuana that you found.

Witness: Yes.

Prosecutor: What is that opinion?

Witness: That the marijuana was for sale.

Prosecutor: Could you tell the ladies and gentlemen of the jury what your opinion is based upon?

Witness: Based upon the denominations of cash found in the drawer, the sandwich baggies, the scale, and the affect [sic] that there were no usable means for method of ingestion, ingesting the marijuana. Marijuana is typically smoked. There were no pipes, there were no bongos, and there were no papers. It was strictly articles that would be used to put together to make a sale.

When defense counsel raised a drug profile objection to this last response, the trial court responded, “This officer can tell us what the characteristics might be, but he cannot tell us his—and the jury cannot receive that evidence as substantive evidence. Counsel, I’m warning you, don’t do that.”

Later, the prosecutor attempted to solicit expert opinion testimony from Jennings regarding the items found during the raid. Jennings responded that:

[t]he items in that location, the marijuana, the scales which are used to weigh out the marijuana, the money which is found in close proximity to the marijuana, which was in small denominations, consistent with the drug trade, the packaging material found in the same drawer with the marijuana and the money, the packaging with the marijuana that matched the packaging material found on the scene, with my experience and training, that this marijuana was possessed with the intent to deliver.

Defense counsel again objected, and the trial court sustained the objection and struck the answer. The prosecutor continued:

Prosecutor: Could you explain the significance of the marijuana that was found based upon your opinion of possession versus possession with intent to deliver?

Witness: Meaning the marijuana which was possessed with all these other items, the scale, the packaging material, the money, all located on close proximity to each other, as well as the packaging material that the marijuana was already located in and that matches the sandwich baggies that were in that drawer, it draws me to that conclusion.

Prosecutor: What conclusion?

At this point, defense counsel objected again and the trial court excused the jury. After hearing from both counsel, the trial court noted that Jennings' answer had not "point[ed] to the defendant." The trial court then overruled the objection, stating, "[t]his isn't drug profiling." The prosecutor then asked Jennings whether he formed an opinion regarding the marijuana found in this case, and Jennings responded, "Yes. It is my opinion that the marijuana found in this case was possessed with the intent to deliver, based on all the evidence that was recovered and located from the scene." Defense counsel objected, and the trial court sustained the objection.

After Jennings finished his direct testimony, defense counsel moved for a mistrial, arguing that "despite [the court's] . . . ruling the first time around with" Nijedelski, Jennings had "gone on and four times more said the same thing." Defense counsel argued that it was "going to be difficult if not impossible for the jury to disregard" the challenged testimony. The trial court denied the motion, concluding that Jennings' testimony had not "crossed the bounds," and that any problems associated with the testimony had been dealt with.

After the witnesses concluded their testimony and while the jury was deliberating, the trial court supplemented the record on the motion for mistrial:

Here, Detective Jennings testified that based on his opinion the evidence recovered, the marijuana found in this case was possessed with intent to deliver. The Court finds no irregularity that prejudiced defendant's rights or impaired his ability to receive a fair trial.

Detective Jennings' opinion was based on substantive evidence in the case, not on profile evidence. The record – the evidence recovered, specifically, the amount of marijuana recovered, coupled with the cash and weapons and the various other accoutrements of a drug dealer showed that the defendant possessed the marijuana with the intent to deliver it. Possession of marijuana does not qualify as innocuous activity. . . .

Detective Jennings based his opinion, underscored, on this evidence. He did not testify that the defendant is guilty because he meets a profile. The fact that Detective Jennings offered his opinion that the marijuana found in this case was possessed with intent to deliver is not impermissible either, because experts are allowed to testify about an ultimate issue. . . .

Wherefore, it is hereby ordered defendant's motion for a mistrial is denied.

Defendant's sole argument on appeal is that the trial court abused its discretion in denying his motion for mistrial because he was denied a fair trial when Nijedelski and Jennings offered drug profile evidence as substantive evidence of defendant's guilt. We disagree.

A trial court's decisions to admit evidence and to deny a motion for mistrial are reviewed for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 406; 633 NW2d 376 (2001); *People v Ortiz-Kehoe*, 237 Mich App 508, 514; 603 NW2d 802 (1999). "A mistrial should be granted only for an irregularity that results in prejudice to the defendant and impairs his ability to get a fair trial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

“Drug profile evidence is essentially a compilation of otherwise innocuous characteristics that many drug dealers exhibit Such evidence ‘is inherently prejudicial to the defendant because the profile may suggest that innocuous events indicate criminal activity.’” *Murray, supra* at 52, quoting *United States v Lim*, 984 F2d 331, 334-335 (CA 9, 1993). While drug profile evidence is not admissible as substantive evidence of a defendant’s guilt, it is admissible as background or modus operandi evidence. *Murray, supra* at 53-54. “However, when the testimony at issue is a drug profile, the expert may not move beyond an explanation of the typical characteristics of drug dealing . . . and opine that the defendant is guilty merely because he fits the drug profile.” *Id.* at 54.

As noted, hereinbefore, in sustaining defendant’s objections to the challenged testimony, the trial court repeatedly had the testimony stricken, offered a curative instruction, and once admonished the prosecutor in front of the jury not to pursue this line of questioning. Further, the trial court instructed the jury at the close of proofs as follows: “At times during the trial I have excluded evidence that was offered or stricken testimony that was heard. Do not consider those things in deciding the case. Make your decision only on the evidence that I have let in and nothing else.”

It is presumed that the jury followed all of the court’s instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Therefore, we believe that reversal is not warranted because the trial court’s prompt actions, with regard to the challenged testimony of Niedjelski and Jennings, obviated any potential unfair prejudice, and because the jury was specifically admonished not to consider the stricken testimony. *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999). Additionally, assuming the impropriety of the challenged testimony, given the weight of the admitted evidence, defendant has failed to establish that he was deprived of a fair trial resulting in a miscarriage of justice. *Id.*

This issue is complicated to a degree by the trial court’s “supplementation to the motion for mistrial.” In this ruling from the bench, which addressed Jennings’ proffered opinions regarding defendant having possessed the marijuana with the intent to deliver, the trial court concluded that “Jennings’ opinion was based on substantive evidence in the case, not on profile evidence.” This ruling seems to contradict the trial court’s prior rulings sustaining defendant’s objections to the following two portions of Jennings’ testimony:

The items in that location, the marijuana, the scales which are used to weigh out the marijuana, the money which is found in close proximity to the marijuana, which was in small denominations, consistent with the drug trade, the packaging material found in the same drawer with the marijuana and the money, the packaging with the marijuana that matched the packaging material found on the scene, with my experience and training, that this marijuana was possessed with the intent to deliver.

Yes. It is my opinion that the marijuana found in this case was possessed with the intent to deliver, based on all the evidence that was recovered and located from the scene.¹

In any event, we agree with the trial court's supplemental ruling that these two instances of opinion testimony did not violate the prohibition against using drug profile evidence as substantive evidence of guilt. Jennings did not testify that defendant was guilty because he fit an identified profile consisting of a list of innocuous items. Rather, Jennings' testimony attempted to explain, based on his expertise in narcotic trafficking, the significance of the items found during the search of defendant's residence. This is proper expert testimony even though it touched on an ultimate issue for the jury.² MRE 704 ("Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."). Under this same analysis, even though not addressed in the trial court's supplemental ruling, Niedjelski's challenged testimony was proper expert testimony to the extent he was asked to offer an opinion based on specific evidence found at defendant's residence rather than on a hypothetical drug profile. Further, as noted, hereinbefore, any improper statements by Niedjelski or Jennings were cured by the trial court's sustaining objections, striking testimony, and instructing the jury not to consider testimony that was stricken. See *Graves, supra* at 486.

Therefore, we conclude that defendant has not established that the trial court abused its discretion in denying his motion for mistrial. *Ortiz-Kehoe, supra* at 514. In addition, defendant has not established an irregularity that impaired his ability to get a fair trial. *Wells, supra* at 383.³

¹ Three drug profiling based objections were raised to Jennings' testimony. The first was sustained, the second overruled, and the third sustained. The admitted testimony consisted simply of a list of the various items found at defendant's residence. However, the other two statements, quoted in the above text, did address the issue of possession with intent to deliver. We believe that the trial court was addressing the propriety of the first and third statements in its supplemental ruling from the bench.

² In the first statement quoted above, Jennings did identify the "small denominations" of money found in the dresser as being "consistent with the drug trade." We do not believe that this singular reference transformed the entire statement into impermissible substantive evidence of defendant's guilt. In addition, the objection to this testimony was sustained and the testimony stricken. Furthermore, the jury was not present to hear the court's supplemental ruling. Under these circumstances, defendant has not established that any alleged error resulted in prejudice or impaired his ability to get a fair trial. See *Haywood, supra* at 228.

³ To the extent that defendant's argument on appeal touches upon the issue of prosecutorial misconduct, this Court need not address it because of defendant's failure to raise, articulate and support such an argument. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). As such, we decline to address the issue. Even if defendant had not abandoned this issue, we would nonetheless find no basis for reversal as to any claim of prosecutorial misconduct. Any claim of prosecutorial misconduct was regarding attempts, by the prosecution, to retrieve profile opinion evidence from
(continued...)

Affirmed.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Karen M. Fort Hood

(...continued)

Niedjelski and Jennings. We already determined that the challenged testimony that was elicited from Niedjelski and Jennings did not impair defendant's right to a fair and impartial trial (i.e. defendant was not prejudiced by the statements), and, as such, reversal is not required. See *Watson, supra* at 586-588.