

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASMENE ARNAYE CLAY,

Defendant-Appellant.

UNPUBLISHED

May 11, 2004

No. 247394

Saginaw Circuit Court

LC No. 02-021827-FH

Before: Murray, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from her jury trial convictions for possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), possession of marijuana, MCL 333.7403(2)(d), maintaining a drug house, MCL 333.7405(d), and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to 180 days' jail for the cocaine conviction, two days' jail for the marijuana conviction, two days' jail for the maintaining a drug house conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

I. Material Facts

On March 8, 2002, a search warrant was executed at 2702 South Jefferson for narcotics. At the time the search warrant was executed, defendant and a small child were present in the house. Several documents were in defendant's name and indicated her residency at 2702 South Jefferson, including a receipt from Consumers Energy, a Team One Credit Union joint account between defendant and Gwendolyn Clay, and a cellular telephone bill in defendant's name. In the master bedroom, there were two containers on the dresser, one containing a number of small Ziploc bags containing marijuana, and the other containing a number of empty Ziploc bags. Also on the dresser was a small pile of unpackaged marijuana, some currency, and a single-edge razor blade. An unloaded handgun¹ and four rounds of .357 ammunition were located in the dresser along with two hand-held scales and defendant's driver's license. A large sum of

¹ The handgun located in the drawer had been reported as stolen in 2001.

currency was located in a dresser drawer. In the bottom of the dresser, Detective Mark Garabelli located a piece of suspected crack cocaine, weighing approximately 5.41 or 5.5 grams.

Detective Gary May spoke with defendant on the day the search warrant was executed. Defendant indicated that all the drugs were in the southeast bedroom of the house, along with the firearm and money. Defendant also admitted that the drugs and weapon were hers. Defendant affirmatively stated that she used marijuana, and that she also sold a small amount of marijuana on the side. Regarding the firearm, defendant stated that it was not registered to her, and that it was given to her by a friend for protection because she had previously been robbed.

Following laboratory analysis, it was determined that there were 1.01 grams of marijuana, along with another unidentified amount of marijuana that was not analyzed. Additionally, upon analysis, it was determined that there were 5.41 grams of cocaine.

Rafiki Laury testified that, on approximately March 7 or 8, 2002, defendant resided at 2702 South Jefferson with defendant's child and the child's father, Micah Washington. Defendant moved in with Laury at one point because defendant was having problems with Washington, and defendant could not get him to move out of the house. Defendant returned to her home the night of March 7, 2002.

Defendant testified that she had a dispute with Washington in March 2002, and that she attempted to evict him. Defendant began staying with Laury on March 5, 2002, and stayed with her approximately three or four days. According to defendant, Washington² used the right side of the dresser. Defendant further testified that the money and firearm found in the dresser were not hers. Defendant admitted that the marijuana found on the dresser was hers, and also admitted that she smoked marijuana at the time the search warrant was executed. Defendant denied using cocaine, and further denied that the cocaine was hers. Defendant then denied maintaining a drug house, or that she or Washington sold drugs from her house. Defendant admitted that she informed May of the location of the marijuana, but denied informing him that there were other drugs and a firearm inside the dresser. Defendant testified that she did not know why there were extra Ziploc bags, numerous sets of scales, and a razor blade in or on her dresser.

II. Analysis

A. Drug Profile Evidence

Defendant first argues that the trial court committed reversible plain error by permitting Garabelli to testify regarding drug profile evidence. We disagree.

Defendant failed to raise a timely objection to Garabelli's testimony at trial; therefore, this issue has not been properly preserved for appellate review. MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 110, 113; 631 NW2d 67 (2001). An unpreserved issue is reviewed

² However, no residency papers were located for Washington, defendant never mentioned Washington at the time the search warrant was executed, and Garabelli testified that he did locate any men's clothing in the house or in the dresser.

for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). In order to establish plain error and avoid forfeiture of an unpreserved issue, a defendant must show that (1) an error occurred, (2) the error was plain, i.e., “clear or obvious,” and (3) the plain error affected defendant’s substantial rights by prejudicing the outcome of the trial. *Id.* at 763.

Defendant contends that Garabelli, permitted to testify as an expert in the field of packaging and delivering drugs, testified beyond the scope of his expertise. Defendant further contends that, since she maintained her innocence at trial, there was a possibility that she would not have been convicted if Garabelli had not testified that defendant was “guilty” of operating a “typical drug house.”

In determining whether drug profile evidence should be admitted, a court should consider the following factors:

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. [*People v Williams*, 240 Mich App 316, 320-321; 614 NW2d 647 (2000), citing *People v Murray*, 234 Mich App 46, 56-57; 593 NW2d 690 (1999).]

Much of the complained of testimony (regarding the purpose and significance of reinforced doors, razor blades, and plastic bags near the drugs to the delivery of drugs) was not within the knowledge of the average person, and was offered as background or modus operandi evidence (relating to the issues of delivery and maintaining a drug house³) and not as substantive evidence of guilt. However, Garabelli also testified that it was his expert opinion that defendant’s residence was a “typical drug house.” Based on the *Murray* factors, Garabelli’s opinion testimony that defendant’s residence was a drug house was improper.

Regardless of whether the admission of the evidence was erroneous, defendant has failed to demonstrate that the admission of the evidence affected her substantial rights, e.g., prejudiced the outcome of the trial. *Carines, supra*. Here, there was substantial other evidence supporting

³ The maintaining a drug house statute instructs, “A person . . . [s]hall not knowingly keep or maintain a store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place, which is resorted to by persons using controlled substances in violation of this article for the purpose of using these substances, or which is used for keeping or selling them in violation of this article.” MCL 333.7405(d).

defendant's convictions, including evidence that marijuana and cocaine were found in defendant's dresser, defendant's admission to Garabelli and May that there were drugs on her dresser, numerous items utilized for drug packaging and distributing found adjacent to the drugs, and defendant's admission at trial that the marijuana was hers. Accordingly, defendant has failed to demonstrate a plain error affecting her substantial rights.

B. Field Test Evidence

Defendant also contends that she should be afforded a new trial because May was improperly permitted to testify regarding the results of a chemical field test. We disagree. Defendant properly preserved this issue by raising a timely objection to May's testimony therefore, this evidentiary issue is reviewed for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

At trial, May testified that field test kits are chemically activated by the presence of narcotics, and that a field test was performed on some of the items found in defendant's house, which tested positive for the presence of marijuana and cocaine. Defendant contends that the results of the field test were introduced to the jury without any evidence of the validity or reliability of the test, or that the test was properly performed and that May was qualified to administer the test.

Regardless of whether the trial court abused its discretion in admitting May's testimony, we find that any error would be harmless. A nonconstitutional error, even if preserved, is not grounds for reversal unless it affirmatively appears more probable than not that it was outcome determinative. *People v Krueger*, 466 Mich 50, 54; 643 NW2d 223 (2002); *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Here, Sheila Smith, of the Michigan State Police Forensic Laboratory, testified without objection (prior to May) as an expert witness in the field of narcotics and dangerous drugs. Upon conducting several methods of analyses on the plant material, "chunky" material, and "crystal" material submitted to Smith in connection with this case, Smith affirmatively determined that the plant material was marijuana, that the "crystal" material was cocaine, and that the "chunky" material was not a controlled substance. Since there was ample expert testimony regarding the content of the substances retrieved from defendant's house aside from May's testimony, reversal is unwarranted because the admission of the field test testimony was not outcome determinative. *Krueger, supra; Lukity, supra.*

Affirmed.

/s/ Christopher M. Murray
/s/ Janet T. Neff
/s/ Pat M. Donofrio