

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMIE LOPEZ-LORZA,

Defendant-Appellant.

UNPUBLISHED
February 14, 2006

No. 254689
Wayne Court Circuit
LC No. 95-012879

Before: Davis, P.J., and Fitzgerald and Cooper, JJ.

PER CURIAM.

After a 1997 jury trial, defendant was convicted of possessing at least 650 grams of cocaine, pursuant to former MCL 333.7403(2)(a)(i).¹ The trial court sentenced defendant to a then-mandatory term of life imprisonment. Defendant untimely and unsuccessfully pursued a direct appeal of his convictions. Pursuant to a conditional grant of habeas corpus, however, he now appeals his convictions as of right. We affirm.

I

Defendant first contends that the trial court should have granted his motion to suppress the packages containing cocaine that the police obtained from his vehicle because they did not have a warrant, and they lacked probable cause to detain and arrest him. In addressing a defendant's challenge to a trial court's suppression ruling, we review for clear error the court's findings of fact. *People v Oliver*, 464 Mich 184, 191; 627 NW2d 297 (2001). Clear error exists if some evidence supports the trial court's finding, but a review of the entire record leaves this Court with the definite and firm conviction that the trial court made a mistake. *People v Galloway*, 259 Mich App 634, 638; 675 NW2d 883 (2003). We review de novo legal questions, including whether the relevant facts support a finding of probable cause to warrant a valid constitutional search or seizure, and whether to apply the exclusionary rule. *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005); *Walsh v Taylor*, 263 Mich App 618, 628; 689 NW2d 506 (2004).

¹ The current version of MCL 333.7403(2)(a)(i) criminalizes the possession of "an amount of 1,000 grams or more of any mixture containing" an unlawful controlled substance.

The United States and Michigan constitutions protect individuals against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. A search conducted without a warrant generally qualifies as unreasonable unless both probable cause and circumstances establishing an exception to the warrant requirement exist. *People v Snider*, 239 Mich App 393, 407; 608 NW2d 502 (2000). “(I)n light of the exigency arising out of the mobility of the vehicle, law enforcement officers may search an automobile on the basis of probable cause without the issuance of a search warrant.” *People v Garvin*, 235 Mich App 90, 101; 597 NW2d 194 (1999) (quotation omitted). Probable cause is defined as “a reasonable ground of suspicion, supported by circumstances sufficiently strong to warrant a cautious person in the belief that the accused is guilty of the offense charged.” *People v Woods*, 200 Mich App 283, 288; 504 NW2d 24 (1993). When considering whether particular circumstances give rise to probable cause, the reviewing court should examine the officers’ observations in light of their experience and training. *Walsh, supra* at 630 (also reciting the well-established proposition that an officer may have probable cause regarding a suspect’s commission of a crime on the basis of presumptively reliable information conveyed to him by other officers). “Generally, evidence obtained in violation of the Fourth Amendment is inadmissible as substantive evidence in criminal proceedings.” *People v Kazmierczak*, 461 Mich 411, 418; 605 NW2d 667 (2000).

Defendant maintains that the police lacked probable cause to pull over his vehicle, and that they used his alleged traffic violations as a pretext for stopping his vehicle to search it for illegal drugs. The police may not make an arrest or vehicle stop as a pretext to search for evidence of crime. *People v Haney*, 192 Mich App 207, 209; 480 NW2d 322 (1991). But the police may conduct an investigatory stop where they have a “reasonable suspicion” that a crime is afoot or has been committed. *Terry v Ohio*, 392 US 1, 21-22, 30-31; 88 S Ct 1868; 20 L Ed 2d 889 (1968); *People v Dunbar*, 264 Mich App 240, 247; 690 NW2d 476 (2004). To constitutionally stop a vehicle for investigatory purposes, an officer must “have ‘a particularized suspicion, based on an objective observation, that the person stopped has been, is, or is about to be engaged in criminal wrongdoing.’” *People v Peebles*, 216 Mich App 661, 665; 550 NW2d 589 (1996), quoting *People v Shabaz*, 424 Mich 42, 59; 378 NW2d 451 (1985). The totality of the circumstances must be considered when assessing the officer’s suspicion of criminal activity. *Peebles, supra* at 665. Reasonable suspicion that a traffic violation has occurred constitutes sufficient cause to justify the investigatory stop of a vehicle. *Kazmierczak, supra* at 420 n 8; *Peebles, supra* at 665-666.

In this case, our review of the record reveals ample evidence establishing that defendant committed a traffic violation, including (1) testimony by the state troopers who pulled over defendant’s vehicle that they stopped him after observing him commit a traffic violation, specifically crossing a fog lane and driving onto the shoulder of the freeway, and (2) one trooper’s testimony and defendant’s own admission that around the time of the traffic stop he was driving 60 or 61 miles per hour in a 55 mile per hour speed limit zone. An otherwise valid stop of a vehicle for a traffic violation does not become “invalid by the fact that it was a mere pretext for a narcotics search” because a police officer’s “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.” *Whren v United States*, 517 US 806, 812-813; 116 S Ct 1769; 135 L Ed 2d 89 (1996) (internal quotation omitted); see also *Kazmierczak, supra* at 420 n 8 (observing that in light of *Whren*, the involved traffic stop was valid because the officer had observed a traffic violation); *People v Davis*, 250 Mich App 357, 362-364; 649 NW2d 94 (2002) (holding that where the facts established probable cause for an

officer to pull over the defendant's car on the basis of observed traffic violations, the stop was constitutionally valid, and that the defendant's motion to suppress cocaine the officer subsequently found in searching the car was properly denied, irrespective of the defendant's claim that the reasons given by the officer were a pretext for the stop).

Because the troopers had a reasonable and articulable suspicion, as well as probable cause, premised on their personal observations of defendant's commission of a lane violation and his speeding, MCL 257.642(1), MCL 257.627, their stop of defendant's vehicle qualifies as constitutionally permissible, *Dunbar, supra* at 247; *Davis, supra* at 363, despite any alleged subjective motivations the troopers may have harbored in effectuating the stop. *Haney, supra* at 209-211. To the extent that defendant challenges the troopers' veracity, the trial court carefully reviewed the troopers' testimony and noted some discrepancies in the testimony, but the court ultimately concluded that the troopers provided credible testimony concerning the traffic violations that caused them to stop defendant. We must defer to the trial court's credibility determination. *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999).

Defendant also argues that the troopers unlawfully searched his vehicle because his consent to search was invalid. The consent exception to the warrant requirement allows a search and seizure when the consent is unequivocal, specific, and freely and intelligently given. *People v Kaigler*, 368 Mich 281, 294; 118 NW2d 406 (1962); *People v Malone*, 180 Mich App 347, 355; 447 NW2d 157 (1989). The validity of a particular consent depends on the totality of the circumstances. *Galloway, supra* at 648.

Here, the trial court found that defendant consented to the search. The trial court explained that both the troopers involved in the traffic stop of defendant's vehicle had testified that defendant actually gave them consent to search his vehicle, and that the court had "no reason to find [their] testimony incredible on that issue." Because the consent issue turns on whether the troopers or defendant, who denied giving consent to search, testified truthfully, we again defer to the trial court's credibility determination. *Farrow, supra* at 209.

Defendant alternatively argues that he effectively revoked his consent, or that the officers prevented him from having an opportunity to revoke his consent. Defendant raises these specific contentions for the first time on appeal, and these arguments thus are unpreserved. *People v Frohriep*, 247 Mich App 692, 703-704; 637 NW2d 562 (2001). Our review of these unpreserved claims is limited to whether any plain error occurred that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant must establish that (1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the error affected his substantial rights, i.e., affected the outcome of the lower court proceedings. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

A defendant may limit the scope of the consent he gives to search, and also may revoke his consent. *People v Powell*, 199 Mich App 492, 496-499; 502 NW2d 353 (1993). "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect." *Mancik v Racing Comm'r*, 236 Mich App 423, 430; 600 NW2d 423 (1999) (internal quotations omitted). In this case, defendant testified at the suppression hearing that he had inquired of one of the troopers involved in the traffic stop why

the other trooper had begun searching his vehicle without his consent. We reiterate, however, that the trial court expressly found credible the troopers' testimony that defendant voluntarily and unconditionally consented to the search of his vehicle, that the court disbelieved defendant's testimony to the contrary, and that we defer to the court's credibility determination. *Farrow, supra* at 209. Because nothing else in the record tends to support defendant's contention that he revoked his consent, or that the officers deprived him an opportunity to do so, we conclude that defendant has not established outcome determinative plain error. *Carines, supra* at 763-764, 774.

Defendant next argues that the troopers unreasonably exceeded the scope of his consent by conducting an expanded and unduly long search of his vehicle, and that his prolonged detention by the troopers amounted to an unlawful arrest. Our review of the record reveals no indication that the troopers unlawfully detained defendant during their search of his vehicle, or that their search exceeded the scope of defendant's consent.

The troopers who pulled over defendant's vehicle, J. Michael Taylor and Michael Oliver, testified that after defendant gave them his unconditional consent to search the vehicle, trooper Oliver placed defendant in the back seat of the troopers' patrol car. When warranted by the circumstances, an officer may take reasonably necessary steps to maintain control of the situation and protect his safety. *United States v Hensley*, 469 US 221, 235-236; 105 S Ct 675; 83 L Ed 2d 604 (1985). In some situations, an officer conducting an investigatory stop reasonably may place a suspect in the back of the officer's patrol car. *People v Marland*, 135 Mich App 297, 302-307; 355 NW2d 378 (1984). Here, defendant's vehicle was pulled over in the middle of night on the side of the freeway, off the freeway's left shoulder adjacent to the passing lane. The testimony of Taylor and Oliver indicated that defendant was placed in the patrol car for his safety and the safety of the troopers, and so that defendant would receive protection from the cold weather during the search of his vehicle. Oliver recalled that he remained in the patrol car with defendant and checked defendant's license and the vehicle information.

Meanwhile, Trooper Taylor began to search defendant's vehicle. Taylor estimated that he commenced his search of the vehicle within two to three minutes after he and Oliver pulled over defendant, and that his search of the vehicle lasted for approximately ten minutes. Within several minutes (two to seven) after Taylor and Oliver had pulled over defendant, Troopers Clarence Vincent and Robert Hendrix arrived to back up the scene. According to the testimony of Taylor and Vincent, when Vincent showed up, Taylor still was searching defendant's vehicle, and he requested that Vincent assist in the search.² Taylor and Vincent recalled that during the portion of the search that included the vehicle's seating area, the dashboard, the glove compartment and some luggage inside the vehicle, they located nothing illegal. At some point, Taylor left defendant's vehicle to head back toward his patrol car and issue defendant a citation, while Vincent continued the search.

² Hendrix believed that when he and Vincent arrived, Taylor had finished his search of the vehicle.

Shortly thereafter, as Vincent tried to open the front window on the vehicle's passenger side, he noticed that it would lower only partially. Vincent then used a flashlight and his fingers to peer "between the window and the rubber seal," where he observed some "brick shaped packages wrapped in gray duct tape." Vincent testified that he previously had participated "in a traffic stop where there were narcotics . . . hidden in the window well," and that he believed that the packages inside the door of defendant's vehicle likewise contained narcotics. Vincent and Hendrix opened the interior "snap type panel that goes up against the [vehicle] doors," and Vincent removed four packages from inside the front door. Hendrix then located inside a rear passenger-side door four additional packages.³ The testimony of troopers Hendrix, Oliver, Taylor and Vincent indicated that after the brief initial detention of defendant and discussion with him, which lasted two to three minutes, the search of defendant's vehicle encompassed another 10 to 15 minutes. When Vincent announced his discovery of suspected cocaine, Troopers Taylor and Oliver arrested defendant.

In summary, Troopers Taylor and Oliver lawfully performed a traffic stop of defendant's vehicle, and defendant expressed to Taylor and Oliver his unlimited consent for them to search his vehicle. During the lawful search, Trooper Vincent observed that the front passenger window would not lower fully, and, still pursuant to defendant's unconditional consent to the search, Trooper Vincent peered into the window well and noticed the several duct-taped packages. The location of these packages, particularly when viewed in light of Trooper Vincent's past experience, i.e., his prior discovery of narcotics hidden inside a vehicle's door panel, gave him probable cause to believe that the packages located in the window well of defendant's vehicle similarly contained illegal drugs. Therefore, the dismantling of the vehicle was permissible pursuant to the automobile exception, which allows officers to conduct a warrantless search of a vehicle if they have probable cause to believe it contains contraband. *Pennsylvania v Labron*, 518 US 938, 940; 116 S Ct 2485; 135 L Ed 2d 1031 (1996) (explaining that "[i]f a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more"); *California v Carney*, 471 US 386, 390-392; 105 S Ct 2066, 2068-2069; 85 L Ed 2d 406 (1985).

We reject defendant's claim that he endured an unlawful detention. After Troopers Taylor and Vincent pulled over defendant's vehicle, they detained defendant for only a few minutes before he gave his consent to search. *People v Williams*, 472 Mich 308, 317-318; 696 NW2d 636 (2005) (characterizing as reasonable a traffic stop in which the entire encounter between an officer and the defendant took five to eight minutes before the officer obtained the defendant's consent to search his vehicle, and explaining that "[a]n investigatory stop . . . is not so inherently coercive that it renders involuntary consent given during the stop"). Furthermore, the fact that the entire traffic stop and search endured for between 15 and 20 minutes does not render the stop invalid. *People v Chambers*, 195 Mich App 118, 123; 489 NW2d 168 (1992) (observing that a "twenty-minute detention does not transform an investigatory stop into an

³ Taylor recalled that "after the discovery of the initial four kilograms [sic] of suspected cocaine in the door, a screwdriver was used by one of the troopers to remove more and more kilos [sic] from the sliding door."

arrest as a matter of law”). Here, the troopers acted diligently in searching the vehicle pursuant to defendant’s unconditional consent. *Id.*

Consequently, we conclude that the trial court properly denied defendant’s motion to suppress the evidence confiscated from his vehicle. The trial court carefully weighed the testimony given during the suppression hearing. After reviewing the record, we cannot characterize as clearly erroneous the trial court’s finding that the troopers lawfully stopped and searched defendant’s vehicle.

II

Defendant further contends that the trial court improperly admitted drug profile testimony as substantive evidence that he possessed cocaine. Because defendant did not raise this argument or object to the drug profile testimony in the trial court, we review this unpreserved claim only for plain error that affected defendant’s substantial rights. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000); *Carines, supra* at 763.

“[D]rug profile evidence is not admissible as substantive evidence of guilt.” *People v Hubbard*, 209 Mich App 234, 241; 530 NW2d 130 (1995). A qualified expert may, however, properly testify with respect to drug profile characteristics in a manner that “give[s] the trier of fact a better understanding of the evidence or assist[s] in determining a fact in issue.” *People v Murray*, 234 Mich App 46, 53; 593 NW2d 690 (1999) (internal quotation omitted). *Murray* presents four factors that help distinguish “between the appropriate and inappropriate use of drug profile 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 and of 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. . . . [*Murray, supra* at 56-57.]

In this case, first, the prosecutor failed to explain for what basis he intended to offer drug profile testimony by Michigan State Police Detective-Lieutenant Mario Burns, whom the prosecutor never sought to qualify as an expert witness. And during the prosecutor’s closing

argument, he at least once referred to several drug profile elements discussed by Detective Burns and suggested that defendant matched these elements of the profile, i.e., driving in a van from Florida with an older person as cover and drugs stashed in the door frames. Regarding the second element, however, the prosecutor did introduce at trial evidence other than the drug profile testimony that established defendant's guilt, specifically, testimony regarding the traffic stop and the troopers' discovery of cocaine in the door frames of defendant's vehicle, physical evidence consisting of the cocaine itself, and testimony that defendant left his fingerprint on one of the cocaine packages removed from his vehicle. Third, the trial court neglected to read the jury an instruction that cautioned them against using Detective Burns's drug profile testimony as substantive evidence of defendant's guilt. Fourth, some of Detective Burns's drug profile testimony regarding methods of drug trafficking, methods of preparing drugs for distribution, and customary procedures and practices in the drug trade constituted general background for the case, and Detective Burns never expressly opined that defendant must be guilty because he matched the drug profile. But Detective Burns did testify to some specific drug profile details that matched the circumstances of defendant's case, including that Florida served as a source state for cocaine, that drug smugglers brought the majority of narcotics into Michigan in commercial vehicles or passenger cars, that the typical routes for smugglers are major corridors such as I-94 or I-75, that drug couriers typically used vans and sky pagers, and that the hotel where defendant stayed was a known stopping point for drug traffickers. Because defendant drove his van from Florida on I-75 and made a sky page from a hotel frequented by drug traffickers, the drug profile testimony by Detective Burns was intertwined with defendant's case.

A review of the four factors described in *Murray* reveals that the trial court abandoned its obligation to clarify for the jury that the potentially prejudicial drug profile evidence did not amount to substantive evidence of defendant's guilt. The prosecutor also ignored his responsibilities to (1) qualify Detective Burns as an expert witness, (2) offer an appropriate rationale, or any basis, supporting the admissibility of the drug profile testimony, and (3) take care to clearly maintain before the jury the close "distinction between the profile and the substantive evidence." *Murray, supra* at 57. We disapprove of the all around careless treatment of the drug profile evidence in this case, and strongly caution the prosecution and trial courts in the future to more actively and carefully maintain the important distinction between the profile and substantive evidence.

Nonetheless, we do not find that the drug profile evidence challenged by defendant rose to the level of plain error requiring reversal. As already mentioned above, ample properly admitted evidence apart from the drug profile testimony supported defendant's conviction: the troopers involved in the stop and search of defendant's vehicle recounted their discovery of the eight brick shaped packages inside the door frames of defendant's vehicle, the prosecutor introduced into evidence the eight packages, testimony indicated that laboratory testing of the white substance in two of the packages showed that both the packages, weighing over two pounds each, contained pure cocaine, and fingerprint analysis matched at fourteen locations (or minutia) one latent fingerprint discovered on the outside of one of the bricks to the print of defendant's right thumb that the police took at the time of defendant's arrest. In light of this properly admitted evidence, we cannot conclude that defendant actually was innocent of the possession charge, or that the drug profile testimony "seriously affected the fairness, integrity, or public reputation of [the] judicial proceedings." *Carines, supra* at 774. Accordingly, reversal is not warranted.

III

Defendant next argues that the trial court committed instructional error by denying his request to read CJI2d 8.5 on “mere presence,” and by reading the jury supplemental instructions on possession. “Questions of law, including questions of the applicability of jury instructions, are reviewed de novo.” *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003).

This Court reviews jury instructions as a whole to determine whether the trial court committed error requiring reversal. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). The instructions must include each element of the charged offense and must not omit material issues, defenses and theories if the evidence supports them. *Id.* “Even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant’s rights.” *Id.* To warrant the reading of a particular instruction to the jury, there must be evidence to support it. *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988).

Here, CJI2d 8.5 applies only to a defendant charged as an “aider and abettor.” Because defendant was not charged as an aider and abettor of any crime, his argument in this regard must fail as a matter of law. *Johnson, supra* at 804. Nevertheless, we observe that the trial court essentially gave the mere presence instruction when it explained in a supplemental instruction to the jury that “[a] person’s presence by itself at a location where drugs are found is insufficient to prove constructive possession.”

Concerning defendant’s challenge to the trial court’s supplemental instructions, a decision whether to give additional instructions to a deliberating jury, and regarding the nature and extent of those instructions, are matters that fall well within the discretion of the trial court. *People v Perry*, 114 Mich App 462, 467; 319 NW2d 559 (1982). In response to the jury’s second request during deliberations for a definition of “possession,” the trial court constructed a written instruction from the commentary of CJI2d 12.3, which sets forth a definition derived from controlling case law on the topic. Defendant’s argument that the trial court put undue emphasis on the element of possession lacks merit. The trial court simply was responding to the jury’s note, which stated, “[N]eed to know what is law when it comes to possession. We need to have it among us to study.” We conclude that the trial court did not err in responding to the jury’s inquiry by fashioning an instruction drawing from case law that sets forth an accurate definition of “possession.” *Piper, supra* at 648.

IV

Lastly, we address defendant’s argument that he was denied his right to effective assistance of counsel. To properly preserve the issue of ineffective assistance of counsel, a defendant must object to his counsel’s performance in the court below and establish a record of facts pertaining to such allegations. *People v Ginther*, 390 Mich 436; 443; 212 NW2d 922 (1973); *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998). Defendant failed to raise the ineffective assistance of counsel claim before the trial court in either a motion for a new trial or an evidentiary hearing. Therefore, this Court’s review of these ineffective assistance claims is limited to mistakes apparent on the existing record. *People v Wilson*, 257 Mich App 337, 363;

668 NW2d 371 (2003), vacated in part on other grounds, 469 Mich 1018 (2004); *Snider, supra* at 423.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that a reasonable probability exists that, but for counsel's errors, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To show that counsel's performance fell below an objective standard of reasonableness, a defendant must overcome "the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *Id.* at 302. This Court will not "substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Defendant argues that his counsel was ineffective because he failed to (1) raise additional challenges to the troopers' search and seizure, (2) object to improper drug profile evidence, or request a limiting instruction regarding the jury's appropriate consideration of the profile evidence, and (3) request that the trial court read CJI2d 4.1, which would have lessened the prejudicial impact of Trooper Taylor's trial testimony that during the traffic stop, defendant had admitted that he "was following somebody, didn't know the area and may have driven off . . . the left side" of the freeway. Regarding defendant's first ineffective assistance allegation, as discussed already in this opinion, the trial court properly denied defendant's motion to suppress because the facts reflect that the troopers lawfully stopped and searched his vehicle. Because an attorney need not make a meritless motion or a futile objection, defense counsel's failure to raise additional search and seizure challenges does not constitute ineffective assistance. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003). With respect to the drug profile evidence, even assuming that defense counsel unreasonably failed to object or request a cautionary instruction, having reviewed the record and the properly admitted evidence of defendant's guilt, we find no indication that defendant's right to a fair trial was prejudiced, or that a reasonable probability exists that but for counsel's error, the result of his trial would have differed. *Toma, supra* at 302-303.

Affirmed.

/s/ Alton T. Davis
/s/ E. Thomas Fitzgerald
/s/ Jessica R. Cooper