STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 23, 2010
v	No. 293146 Monroe Circuit Court
PATRICK FITZGERALD PICKETT, Defendant-Appellant.	LC No. 08-037116-FH

Before: FITZGERALD, P.J., and MARKEY and BECKERING, JJ.

PER CURIAM.

Defendant Patrick Fitzgerald Pickett was convicted of possession of marijuana with intent to deliver, MCL 333.7401(2)(d)(*iii*), and driving with a suspended license, MCL 257.904(3)(a), following a jury trial. The trial court sentenced defendant to three years of probation for the possession conviction, with the first year to be served in county jail, minus credit for time served, good time credit, and, upon eligibility, 90 days in the Probation Residential Center, and to 93 days in jail for the driving with a suspended license conviction, to be served concurrently with the other sentence. Defendant's driver's license was suspended for one year, and he was required to pay various fines and costs. He appeals as of right. We affirm.

I

In the early morning hours of August 5, 2008, while on highway patrol, Michigan State Police Officer Lance Powell observed a Ford Explorer traveling southbound on I-75. The officer later determined that defendant was the driver. No one else was in the vehicle. Defendant was driving at approximately 60 mph, just above the posted minimum speed, and repeatedly changed lanes without signaling. Officer Powell directed defendant to pull over, approached the driver's side of the vehicle, and asked for a driver's license. Defendant produced a state identification card. He informed the officer that the vehicle belonged to his mother-in-law, that he had just dropped his brother off, and that he was driving between Detroit, Michigan and his home in Toledo, Ohio. Officer Powell learned, after conducting a search on the LEIN system, that defendant's driver's license was suspended and that there was a warrant out for his arrest for an unpaid traffic ticket. The officer then arrested defendant. Additional officers arrived on the scene to assist. Officer Mickey Parling opened the driver's side door of the vehicle and immediately smelled marijuana. He then retrieved two plastic bags containing what he believed was marijuana from the trunk or tailgate area of the vehicle. It was later determined that the bags contained a little over one pound of marijuana each.

At trial, defendant testified that on August 4, 2008, he drove to Detroit to have his car serviced. Because his car would not be ready immediately, he borrowed his mother-in-law's vehicle. He had an old friend with him. They then picked up defendant's brother, Malcolm Jordan. Jordan put shopping bags in the tailgate area of the vehicle. Sometime on the night of August 4 or early morning of August 5, defendant dropped off his friend and Jordan. Defendant saw Jordan take some bags with him, although defendant was unsure how many bags Jordan had initially placed in the vehicle and how many he retrieved. No one else placed any items in the tailgate area of the vehicle. Defendant testified that he did not know that there were narcotics in the vehicle and that he would not have driven the vehicle had he known. He further testified that Jordan had previously spent time in jail for possession of narcotics.

II

Defendant first argues that the evidence presented at trial was insufficient to support his conviction for possession of marijuana with intent to deliver. We disagree.

When reviewing the sufficiency of the evidence in a criminal case, we must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). "Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of a crime." *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005).

To establish that defendant committed the charged offense, the prosecution had to prove that "(1) defendant knowingly possessed a controlled substance, (2) defendant intended to deliver the controlled substance to someone else, (3) the substance possessed was marijuana and defendant was aware that it was, and (4) the marijuana was in a mixture that weighed less than five kilograms." *People v Williams*, 268 Mich App 416, 419-420; 707 NW2d 624 (2005), citing MCL 333.7401(2)(d)(*iii*) and *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998).

Defendant argues that he never had possession of the marijuana and that he was not even aware it was in the vehicle. Possession of a controlled substance may be either actual or constructive. *People v Wolfe*, 440 Mich 508, 520; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). "Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband." *Id*. at 521. The defendant's presence, by itself, at a location where contraband is found is insufficient to prove constructive possession. *Id*. at 520. "Instead, some additional connection between the defendant and the contraband must be shown." *Id*. "The essential question is whether the defendant had dominion or control over the controlled substance." *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995).

Here, the circumstantial evidence presented at trial, viewed in the light most favorable to the prosecution, was sufficient to establish that defendant had constructive possession of the marijuana. Defendant points out that the police failed to conduct a fingerprint analysis of the bags of marijuana; therefore, there was no direct evidence that he ever handled the bags. Defendant does not, however, dispute that he was the sole occupant of the vehicle when the police discovered the marijuana. Defendant asserted at trial that Jordan likely left the bags of marijuana in the vehicle, but defendant admitted that if he had items worth thousands of dollars,

such as the bags of marijuana in this case, he would never abandon them. Further, according to police testimony, there was a strong smell of marijuana in the vehicle. Defendant testified that marijuana has a distinct smell that he would recognize. This evidence was sufficient for a rational trier of fact to conclude, beyond a reasonable doubt, that defendant was aware that the bags of marijuana were in the vehicle and that he had dominion or control over them.

The evidence presented at trial, viewed in the light most favorable to the prosecution, was also sufficient to conclude that defendant had the requisite intent to deliver the marijuana. "'Deliver' or 'delivery' means the actual, constructive, or attempted transfer from 1 person to another of a controlled substance . . . ." MCL 333.7105(1). The "intent to deliver may be proven by circumstantial evidence and also may be inferred from the amount of controlled substance possessed." *People v Ray*, 191 Mich App 706, 708; 479 NW2d 1 (1991). According to Lieutenant Steven Schook's testimony, the amount of marijuana found in this case, which was just over two pounds, was not consistent with personal use. He testified that in the amount of time it would take one person to use just one pound of marijuana, it would lose its potency. He further testified that the marijuana found was most likely hydroponic marijuana, which is worth $700-800 per ounce or $2,500-3,000 per pound. The high monetary value of the marijuana indicates that defendant intended to sell it. See *id*. Additionally, Lieutenant Schook testified that if marijuana is intended for personal use rather than for sale, paraphernalia such as rolling papers or a pipe is typically found with the marijuana. No such paraphernalia was found in this case. Considering this evidence, a rational trier of fact could conclude, beyond a reasonable doubt, that defendant intended to deliver the marijuana.

Accordingly, we hold that there was sufficient evidence to support defendant's conviction for possession of marijuana with intent to deliver.

III

Defendant next argues that the trial court improperly admitted Lieutenant Schook's testimony. We disagree.

At trial, defense counsel objected to the portion of Lieutenant Schook's testimony regarding "source cities" for narcotics, particularly his mention of Detroit and Toledo. Defense counsel argued that the testimony was irrelevant and prejudicial. The trial court overruled the objection. To the extent that defendant's argument on appeal was preserved at trial, the issue must be reviewed for an abuse of discretion. See *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). A preserved, evidentiary error is not a ground for reversal unless it is more probable than not that the trial court's error in admitting the evidence was outcome determinative. See *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). To the extent, however, that the issue was not preserved, it must be reviewed for plain error affecting defendant's substantial rights, "i.e., that the error affected the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Under the plain error rule, reversal is required only if the error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings, independent of the defendant's innocence. *Id*.

According to defendant, the entirety of Lieutenant Schook's testimony was improperly admitted because expert witness testimony on general drug trafficking theories is not admissible

as substantive evidence of guilt. Initially, we note that although Lieutenant Schook testified regarding his credentials and experience working on narcotics investigations, he was never officially recognized by the trial court as an expert witness. It is arguable, however, as defendant asserts, that the prosecution intended to use the lieutenant's testimony as expert witness testimony. On appeal, the prosecution treats the testimony as if it was recognized and admitted by the court as expert witness testimony.

Defendant's primary argument on appeal is that Lieutenant Schook's testimony constituted drug profile evidence that was improperly used as substantive evidence of his guilt. "Drug profile evidence is essentially a compilation of otherwise innocuous characteristics that many drug dealers exhibit . . . ." *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). Drug profile evidence is not admissible as substantive evidence of a defendant's guilt. *People v Hubbard*, 209 Mich App 234, 241; 530 NW2d 130 (1995). Thus, an expert witness is not permitted to testify that, "on the basis of the profile, the defendant is guilty," or to "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, 321; 614 NW2d 647 (2000). In controlled substance cases, however, the prosecution may elicit expert testimony from police officers to explain the significance of items seized and typical characteristics of drug dealing or "the modus operandi of drug dealers" in order to aid the jury's understanding of the evidence. *Murray*, 234 Mich App at 52-54, 56, 61-63 (holding that testimony about a general procedure for buying and selling drugs and that the quantity and packaging of drugs found indicated an intent to distribute was permissible expert testimony, not impermissible drug profile evidence); see also *Ray*, 191 Mich App at 708 (holding that a police officer's testimony about the quantity of cocaine in the defendant's possession, the way the cocaine rocks were evenly cut, and the street price of cocaine was admissible to aid the jury in determining the defendant's intent).

Here, Lieutenant Schook first testified about drug trafficking in general. He explained that Detroit, as well as cities such as Chicago, Illinois and New York, New York are known as a "source cities," meaning that they are the primary cities in the United States where narcotics are obtained. Once large amounts of narcotics are broken down in source cities, smaller amounts are sent to cities such as Toledo to be resold. Lieutenant Schook did not testify that because defendant was traveling between Detroit and Toledo, he intended to sell the marijuana found in the vehicle. Defendant's intent was a question before the jury. The lieutenant's testimony concerning indicia of drug trafficking, which was not within the knowledge of a layperson, simply aided the jury in understanding the evidentiary backdrop of the case and resolving that question. See, e.g., *People v Griffin*, 235 Mich App 27, 44-45; 597 NW2d 176 (1999), overruled in part on other grounds *People v Thompson*, 477 Mich 146, 148; 730 NW2d 708 (2007) (holding that testimony that a detective observed people entering and leaving a house in a manner indicative of drug trafficking assisted the jury in determining whether the defendant was a drug dealer and whether the house was a drug house). The remainder of Lieutenant Schook's testimony also aided the jury in determining whether defendant intended to sell, rather than personally use, the marijuana. As indicated, he testified that possessing two pounds of marijuana is not consistent with personal use, explaining that in the amount of time it would take one person to use just one pound of marijuana, it would lose its potency. He further testified that if marijuana is intended for personal use, paraphernalia such as rolling papers or a pipe is typically found with the marijuana, and no paraphernalia was found here. According to the lieutenant, the marijuana in this case was likely hydroponic, explaining that hydroponic marijuana has a distinct

odor and comes in one-gallon bags. He further explained that hydroponic marijuana has a high level of THC and sells for $700-800 per ounce or $2,500-3,000 per pound, which is significantly more than other marijuana. Such information was not within the knowledge of a layperson, and Lieutenant Schook's testimony would have aided the jury in determining defendant's intent. The fact that the testimony embraced the ultimate issue of intent did not render the testimony impermissible drug profile evidence. See *Ray*, 191 Mich App at 708. Lieutenant Schook did not testify, and the prosecution did not argue, that because defendant exhibited certain innocuous characteristics, he was guilty of possession with intent to deliver. Rather, the lieutenant explained the significance of items seized and the modus operandi of drug dealers, which was permissible. See *Murray*, 234 Mich App at 52-54, 56, 61-63; *Ray*, 191 Mich App at 708. Accordingly, there was no error in the admission of the testimony.

Defendant further asserts that Lieutenant Schook's testimony "was based upon mere speculation and theory and generalities" and, therefore, "could not have qualified as expert witness testimony." Again, we disagree. MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Thus, "[t]o be admissible, expert testimony must comply with a three-part test. First, the expert must be qualified. Second, the evidence must provide the trier of fact a better understanding of the evidence or assist in determining a fact in issue. Finally, the evidence must be from a recognized discipline." *People v Coy*, 258 Mich App 1, 10; 669 NW2d 831 (2003) (citations omitted). Lieutenant Schook testified that he is a detective lieutenant currently assigned to the OMNI narcotics team and that he has been involved in narcotics investigations as a supervisor for 15 years. He provided a detailed explanation of his experience and indicated that he also had over ten weeks of narcotics training. Although defendant asserts that the lieutenant's testimony was improperly based on mere theory and generalities, in controlled substance cases, expert witnesses may testify about drug trafficking in general, if it aids the jury's understanding of the evidence. See *Murray*, 234 Mich App at 52-54, 56, 61-63. Here, Lieutenant Schook's testimony assisted the jury in understanding the significance of the evidence and determining defendant's intent. See *id*.; *Ray*, 191 Mich App at 708.

The trial court properly admitted Lieutenant Schook's testimony.

IV

Defendant argues that the trial court erred in failing to sua sponte instruct the jury on the lesser-included offense of simple possession or, in the alternative, that his trial counsel was ineffective for failing to request the instruction. We disagree.

We review unpreserved claims of instructional error for plain error affecting the defendant's substantial rights. *People v Martin*, 271 Mich App 280, 353; 721 NW2d 815 (2006),

aff'd 482 Mich 851 (2008). An instruction on a necessarily included lesser offense "is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser-included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). A necessarily included lesser offense is one that must be committed as part of the greater offense. In other words, the greater offense would include all the elements of the lesser. *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001). In *People v Gridiron*, 185 Mich App 395, 400-401; 460 NW2d 908 (1990), vacated on reh on other grounds *People v Gridiron*, 190 Mich App 366; 475 NW2d 879 (1991), amended on other grounds 439 Mich 880 (1991), a panel of this Court concluded that because it is impossible to commit the crime of possession with intent to deliver without also having committed the crime of possession, possession is a necessarily included lesser offense of possession with intent to deliver. See *Cornell*, 466 Mich at 361.

In arguing that the trial court erred in failing to sua sponte instruct the jury on the offense of simple possession, defendant points out that during deliberations, the jury asked two questions regarding possession. In the first question, the jury asked: "Are we able to divide Count 1, possession controlled substance from delivery, slash, manufacture?" The trial court and attorneys for both parties agreed that the jury was likely inquiring whether it could separate the terms delivery and manufacture. The court then asked the jury to clarify the question. In the second, clarifying question, the jury asked if it could "separate possession of controlled substance from delivery, slash, manufacture." Attorneys for both parties agreed to have the court instruct the jury that it was required to find all elements beyond a reasonable doubt. Although it appears that the jury was inquiring about finding the possession element without finding the intent to deliver element, a rational view of the evidence would not support a finding that defendant possessed the marijuana but did not intend that it be delivered. Lieutenant Schook's testimony regarding the amount and high monetary value of the marijuana, as well as the lack of paraphernalia found in the vehicle, indicated that defendant intended to sell the marijuana. Because a rational view of the evidence would not support a conclusion that defendant possessed the marijuana without intending to deliver it, the trial court committed no error in failing to instruct the jury on simple possession. See *Cornell*, 466 Mich at 357.

Moreover, even if the trial court erred in failing to instruct the jury on the lesser-included offense of simple possession, reversal would not be required. Defendant did not focus his defense on the intent to deliver element of the offense. Rather, defendant asserted that he never possessed the marijuana and generally disputed the weight of all the evidence presented against him. Thus, defendant presented his central claim to the jury, which the jury rejected. Under the circumstances, we cannot conclude that the trial court's failure to sua sponte instruct the jury on an undeveloped incidental claim resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. See *Carines*, 460 Mich at 763.

Defendant alternatively argues that his trial counsel was ineffective for failing to request a jury instruction on simple possession. A claim of ineffective assistance of counsel should be raised by a motion for a new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Because defendant failed to raise this issue in a motion for a new trial or a *Ginther* hearing, our review of this issue is limited to the existing record. *Id*.

To establish ineffective assistance of counsel, defendant must show that defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and denied him a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). Furthermore, defendant must show that, but for defense counsel's error, it is likely that the proceeding's outcome would have been different. *Id*. at 146. Effective assistance of counsel is presumed; therefore, defendant must overcome the presumption that defense counsel's performance constituted sound trial strategy. *Id*.

In this case, defense counsel may have elected not to request a lesser-included instruction as a matter of trial strategy, and we will not second-guess counsel on matters of strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Defendant's theory of the case was that he never possessed the marijuana, and if the jury believed that theory, it would have acquitted him. Whereas, if the jury were given the option of simple possession as well as possession with intent to deliver, it may have found defendant guilty of the lesser offense as a compromise verdict. Moreover, as indicated, defendant cannot establish that the trial court's failure to instruct the jury on simple possession likely affected the outcome of the case. See *Henry*, 239 Mich App at 146. Accordingly, defendant's ineffective assistance of counsel claim must fail.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Jane M. Beckering