

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
November 20, 2012

v

TIMOTHY EUGENE SAMPSON,

Defendant-Appellant.

No. 304808
Oakland Circuit Court
LC No. 2010-234899-FH

Before: JANSEN, P.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession with intent to deliver ecstasy, MCL 333.7401(2)(b)(i), and possession of marijuana, MCL 333.7403(2)(d). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to 6 to 40 years for possession with intent to deliver ecstasy and 54 days for possession of marijuana. We affirm.

I. FACTUAL BACKGROUND

Defendant was the passenger of a van that police suspected of being involved in recent thefts. The police executed a traffic stop and smelled marijuana. The police called a canine unit and the dog alerted on the passenger seat of the vehicle. Two bags of marijuana were located between the passenger seat cushion and the bottom plastic molding. A search of defendant's person revealed a bag of red and blue ecstasy pills in "corner tie" bags, which defendant told police were Flintstone vitamins. The police also discovered \$883 in defendant's pocket, consisting of three \$1 bills, one \$10 bill, one \$20 bill, one \$50 bill, and eight \$100 bills. A canine alerted on the money, indicating that there was narcotic residue.

Defendant was arrested and taken to jail. After arriving at the jail, he was asked to remove his socks and shoes. A police officer testified that defendant was attempting to hide his sock when another bag of red, blue, and yellow pills fell out from the sock. In total, 55 pills of ecstasy were confiscated from defendant in 11 individual bags.

According to the police officers involved with defendant's arrest, defendant did not seem intoxicated in any way. However, defendant and his fiancé claimed that he was highly intoxicated on the night in question. Defendant also claimed that before getting into the van, he did not have any marijuana or ecstasy on his person and he had no memory of how they were

found in his pocket, shoe, or under his seat. Defendant claimed that the money in his pocket came from a withdrawal from a bank a couple of days before the incident. Defendant was convicted of possession with intent to deliver ecstasy and possession of marijuana and now appeals.

II. SUFFICIENCY OF THE EVIDENCE

A. Standard of Review

Defendant argues that there was insufficient evidence to sustain his conviction of possession with intent to deliver ecstasy. “Due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact to conclude that the defendant is guilty beyond a reasonable doubt.” *People v Tombs*, 260 Mich App 201, 206-207; 679 NW2d 77 (2003). This Court reviews “de novo a challenge on appeal to the sufficiency of the evidence.” *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). “In determining whether the prosecutor has presented sufficient evidence to sustain a conviction, an appellate court is required to take the evidence in the light most favorable to the prosecutor” to ascertain “whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt.” *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010) (internal quotations and citations omitted). “All conflicts in the evidence must be resolved in favor of the prosecution and we will not interfere with the jury’s determinations regarding the weight of the evidence and the credibility of the witnesses.” *People v Unger*, 278 Mich App 210, 222; 749 NW2d 272 (2008).

B. Analysis

“To be convicted of the charge of possession with intent to deliver, the defendant must have knowingly possessed a controlled substance, intended to deliver that substance to someone else, and the substance possessed must have actually been [ecstasy] and defendant must have known it was [ecstasy].” *People v Johnson*, 466 Mich 491, 499-500; 647 NW2d 480 (2002); see also MCL 333.7401. The prosecution has the burden of proving each element of the crime beyond a reasonable doubt. *People v Mette*, 243 Mich App 318, 330; 621 NW2d 713 (2000). There was sufficient evidence from which a reasonable jury could have found that the prosecution had proven each element of possession with intent to deliver ecstasy beyond a reasonable doubt.

Possession may be established through evidence of actual or constructive possession. *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). The ecstasy pills in this case were found on defendant, in his pocket and sock. Accordingly, a reasonable jury could have found that this constituted actual possession, as defendant had “physical control” over the pills. *People v Flick*, 487 Mich 1, 15; 790 NW2d 295 (2010). Defendant, however, insists that even if this constituted possession, it was not knowing possession because he was intoxicated, anyone could have placed the pills in his clothing, and he consistently disavowed any knowledge of how the pills came to be in his possession. An initial inconsistency with this argument is that while defendant denied any knowledge of how the pills came to be in his possession, he also told the police that the pills were Flintstone vitamins. A police officer at the jail also testified that when defendant was removing his socks, he attempted to “hide” his sock that contained the ecstasy pills. A reasonable jury could have concluded that defendant’s furtive behavior and false

statement implied that he knew the ecstasy pills were in his possession and he was attempting to prevent the police from discovering them. Hence, drawing all inferences in favor of the prosecution, there was sufficient evidence “of dominion or right of control over the drug with knowledge of its presence and character.” *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003) (internal quotations and citation omitted).

There also was sufficient evidence that defendant had an intent to deliver the pills. Because of the difficulty in proving an actor’s intent, “intent to deliver may be proven by circumstantial evidence[.]” *People v Ray*, 191 Mich App 706, 708; 479 NW2d 1 (1991). Relevant factors include “the quantity of narcotics in a defendant’s possession,” “the way in which those narcotics are packaged,” “and other circumstances surrounding the arrest.” *People v Wolfe*, 440 Mich 508, 524; 489 NW2d 748 (1992). Defendant had 55 ecstasy pills in his possession. Moreover, the pills were packaged in separate bags secured by corner ties, further demonstrating that the pills were not solely for personal consumption. Since only minimal circumstantial evidence is necessary to establish intent to deliver, a rational trier of fact could have found beyond a reasonable doubt that based on the quantity and packaging of the pills, defendant had an intent to distribute.

Lastly, there was sufficient evidence that the pills confiscated from defendant were ecstasy. Defendant claims that because the prosecution failed to offer the laboratory report into evidence, there was insufficient evidence that the pills were ecstasy. This argument is specious. First, the trial court admitted the ecstasy pills and pictures of the pills into evidence. Further, during his testimony, defendant actually acknowledged that the pills found in his pocket were ecstasy:

Q. So in those thirty-five minutes somehow you stuff Ecstasy in your pocket, correct?

A. No, I didn’t stuff anything in my pocket.

Q. Well, something happened, Ecstasy got stuffed in your pocket, right?

A. Right.

Q. Okay, and something happened when you got Ecstasy stuffed inside your shoe too, right?

A. Right.

Hence, while defendant certainly disputed the prosecution’s theory of how the ecstasy pills came to be in his possession, he acknowledged that the pills were ecstasy. Finally, defense counsel, on the first day of trial, recognized that the pills were ecstasy through his consent to the admission of the Michigan State Police Forensic Science Division’s laboratory report. Therefore, there was sufficient evidence to support defendant’s conviction of possession with intent to deliver ecstasy.

III. EXPERT TESTIMONY

A. Preservation & Standard of Review

An issue is not preserved for appellate review if it is not raised before, addressed by, and decided by the lower court. *People v Metamora Water Service, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Since defendant failed to object to the disputed expert testimony, this issue is not preserved for appellate review. An unpreserved claim is reviewed only for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). Under a plain error analysis, an error must have occurred, it must be plain (i.e., clear or obvious), and it must have affected substantial rights. *Id.* at 763. An error affects substantial rights when it prejudiced the defendant, meaning it affected the outcome of the proceedings. *Id.* Moreover, a reviewing court must use its discretion when deciding whether to reverse, as a “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 763-764, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

B. Analysis

In order to admit expert testimony at trial, the trial court must find that the proffered evidence meets the following 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) (internal quotations and citations omitted). Defendant disputes all three of these elements regarding Police Officer Corey Bauman’s testimony. We find no plain error in the trial court’s decision to admit Officer Bauman’s testimony.

Defendant argues that Officer Bauman should not have been qualified as an expert in narcotic trafficking because he did not have expertise in ecstasy trafficking, drug trafficking, and the majority of his testimony was only pertinent to the specific facts of this case. However “an overly narrow test of qualifications” is not required. *People v Haywood*, 209 Mich App 217, 225; 530 NW2d 497 (1995). Officer Bauman testified that he had been a police officer for 14 years, he had spent six years working undercover partly with the DEA, and he had received extensive training from the DEA including training involving ecstasy. Officer Bauman also testified that he had participated in more than 1,000 drug investigations including ones involving ecstasy, he had purchased ecstasy undercover, he was trained to identify ecstasy packaged for sale, he was trained to identify the difference in quantity in ecstasy for personal use and ecstasy for sale, and he had been qualified as an expert in narcotics trafficking in other courts. Considering this exhaustive list of qualifications and expertise regarding drugs and ecstasy, there was no plain error in finding that Bauman was a qualified expert.

Defendant also argues that the second and third prong of MRE 702, namely, helpfulness to the jury and a recognized discipline, were not met because Officer Bauman’s testimony was predominantly drug profile testimony. “Drug profile evidence has been described as an informal compilation of characteristics often displayed by those trafficking in drugs.” *People v Murray*,

234 Mich App 46, 52; 593 NW2d 690 (1999) (internal quotations and citation omitted). Drug profile evidence may be admissible due to its probative value in providing background or modus operandi information, although it may be inadmissible if prejudicially used as substantive evidence of guilt. *Id.* at 54-55. While defendant now presents a lengthy argument regarding why Officer Bauman's testimony was inadmissible drug profile evidence, he failed to offer any of these arguments at trial. Thus, even if it was plain error to admit Officer Bauman's testimony, defendant has the burden of demonstrating that his substantial rights were violated. See *Carines*, 460 Mich at 763-765. Defendant has not made this showing. Even without Bauman's testimony, the evidence of defendant's guilt was overwhelming: the ecstasy pills were found in defendant's pocket and sock, defendant acknowledged that the pills were ecstasy, there were a large number of pills, the pills were placed in individual bags, and defendant attempted to conceal the pills. Thus, defendant has failed to demonstrate that the outcome of the trial would have been different, that any alleged error "resulted in the conviction of an actually innocent defendant," or that it affected "the fairness, integrity or public reputation of judicial proceedings." *Carines*, 460 Mich 750, at 764-765 (internal quotations and citation omitted).

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Preservation & Standard of Review

In order to preserve the issue of ineffective assistance of counsel, a defendant must make a motion in the lower court for a new trial or for a hearing pursuant to *People v Ginther*, 390 Mich 436, 444; 212 NW2d 922 (1973). *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). Since there is nothing on the record indicating that either of these two motions occurred, this issue is not preserved for appellate review.

Whether a defendant received effective assistance of counsel is a mixed question of fact and law, as a "trial court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). A trial court's factual findings are reviewed for clear error, and questions of constitutional law are reviewed de novo. *Unger*, 278 Mich App at 242. When reviewing a claim of ineffective assistance of counsel that has not been preserved for appellate review, a reviewing court is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

B. Analysis

In order to establish a claim for ineffective assistance of counsel, a defendant must first demonstrate that "counsel's representation fell below an objective standard of reasonableness," which requires a showing "that counsel's performance was deficient." *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). A defendant must then demonstrate that "the deficient performance prejudiced the defense," which "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial . . ." *Id.* at 687. The Court has held that this second prong is asking whether "there was a reasonable probability that the outcome of the trial would have been different had defense counsel" adequately performed. *People v Grant*, 470 Mich 477, 496; 684 NW2d 686 (2004).

Even assuming that trial counsel's performance was deficient in failing to object to the challenged portions of Officer Bauman's testimony, defendant's claim of ineffective assistance of counsel is to no avail because he failed to demonstrate there was a reasonable probability that the outcome of the trial would have been different. As discussed in the context of drug profile evidence, the evidence of defendant's guilt was overwhelming and included finding a large number of ecstasy pills in separate packaging on defendant's person. Therefore, even if trial counsel had objected, defendant cannot demonstrate that there was a reasonable probability that the result of trial would have been different.

V. CONCLUSION

There was sufficient evidence presented from which a reasonable jury could have found defendant guilty of possession with intent to distribute ecstasy beyond a reasonable doubt. There also was no plain error in admitting Officer Bauman's testimony at trial and defendant was not denied constitutionally effective counsel when defense counsel failed to object to Officer Bauman's testimony. We affirm.

/s/ Kathleen Jansen
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan