

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ELLIOT LEOTIS PILTON,

Defendant-Appellant.

UNPUBLISHED

January 3, 2013

No. 306212

Oakland Circuit Court

LC No. 2008-221114-FC

Before: WILDER, P.J., and METER and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right from his jury-trial convictions of conspiracy to deliver/manufacture 1000 grams or more of cocaine, MCL 333.7401(2)(a)(i); MCL 750.157a(a); delivering/manufacturing more than 1000 grams of cocaine, MCL 333.7401(2)(a)(i); and third-degree fleeing and eluding, MCL 257.602a(3)(a). The trial court sentenced him as a second-offense habitual offender, MCL 769.10, to concurrent prison terms of 15 to 40 years for the drug counts and three to seven years for the fleeing-and-eluding count. We affirm.

Defendant's convictions arose out of an investigation by the Oakland-Macomb Interdiction Team (OMIT) into a tip that a person named Rafael Aguirre was connected with drugs and was in the Roseville Area. OMIT members found Aguirre's gray pickup truck in a Roseville hotel parking lot and suspected that it was used to carry drugs because the dashboard was covered to conceal modifications that could hide drug compartments. OMIT members surveilled the hotel until defendant's white pickup truck came into the hotel parking lot. Aguirre exited the hotel and got into the white pickup truck, where he stayed for a short time, and then got into his own truck. Driving, Aguirre followed defendant out of the parking lot and was followed by a blue Durango. All three vehicles entered I-94 west, exited to I-696 east, and then exited at Greenfield Road. The trucks followed each other closely and did not lose their order despite rush-hour traffic. When they exited at Greenfield Road, OMIT members called for backup from the Southfield police for a traffic stop. Aguirre stopped immediately and his truck was found to contain 10 kilograms of cocaine. Jeffrey Lanum, in the blue Durango, also stopped. Defendant, in the white truck, accelerated rapidly and fled the scene. The police chased him for three miles before they were finally able to ram his vehicle, and they had to shoot at defendant dozens of times before he would exit the vehicle. Defendant had nearly \$12,000 in his vehicle.

At trial, defendant testified as follows: In 1993 or 1994, he received an insurance settlement check, and since then he had been buying houses, fixing them up, and renting them. Lanum, a longtime friend, had contacted him about a rental house. The \$12,000 defendant had with him was from Lanum and was an advance payment for one year's rent. Lanum had rented another property in the past and paid in advance. Lanum directed defendant to the hotel where defendant met Aguirre, to whom defendant was to show the house. Defendant was driving to the house when Southfield police attempted to pull him over. He panicked and fled because he knew Lanum's reputation as a drug dealer and because he had so much cash in his truck. He did not know Aguirre had drugs with him.

I. NEW EVIDENCE

Defendant first argues that he should be granted a new trial because certain evidence of his settlement check was not presented to jurors. Defendant testified that he received the check but, upon cross-examination, he testified that he did not have a copy of the check to present to the jury.

Defendant is not entitled to a new trial based on the discovery of new evidence.¹ New trials can be granted on the basis of newly discovered evidence if a defendant shows:

(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial. [*People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) (internal citations and quotation marks omitted).]

Regarding the first *Cress* requirement, defendant testified that he received a settlement check in 1993 or 1994. He knew of the existence of the check. Therefore, the existence of the check itself was not newly discovered. Second, the evidence was cumulative, considering defendant's testimony that he received the check. Third, using reasonable diligence, defendant could have produced the check at trial; he produced it at sentencing. Finally, in light of the cumulative nature of the proposed evidence and in light of the other evidence of defendant's guilt, defendant has not shown that evidence of the check would make a different result probable on retrial. Defendant is not entitled to a new trial based on the discovery of new evidence.

Further, Michigan law does not allow a circumvention of *Cress* as defendant attempts here. As the Michigan Supreme Court recently stated:

The point is that the law affords a defendant procedural avenues to secure and produce evidence and, under *Cress*, a defendant must employ these avenues

¹ Defendant did not move for a retrial below in connection with this issue. Therefore, the plain-error standard applies. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

in a timely manner because evidence that is known to the defendant, yet not produced until after trial, will not be considered grounds for a new trial. [*People v Rao*, 491 Mich 271, 284; 815 NW2d 105 (2012).]

II. PROSECUTORIAL MISCONDUCT

Next, defendant argues that the prosecutor committed misconduct with its comments in closing regarding defendant's failure to produce the check at trial and that trial counsel was ineffective for failing to object to the prosecutor's comments. In closing arguments, the prosecutor stated that there was no proof that defendant received a \$500,000 insurance-settlement check and that the only evidence of the settlement was defendant's own testimony. Defendant argues that this amounted to a false argument, and prosecutorial misconduct, because knowledge that defendant actually received the check should be imputed to the prosecutor in light of the alleged fact that law enforcement knew of the settlement. On appeal, defendant offers to establish law enforcement's knowledge of the settlement if the matter is remanded for an evidentiary hearing, but he offers no specifics in connection with this offer, and this Court has already denied defendant's motion for a remand based on this issue.

Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010); see also *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Bennett*, 290 Mich App at 475-476. The determination whether a defendant has been deprived of the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court must first find the facts and then decide whether those facts constituted a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

When reviewing prosecutorial-misconduct claims, this Court examines the record and evaluates a prosecutor's remarks in context. *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003). The particular facts of each case dictate whether the prosecutor's remarks were improper. *Id.* The comments are to be read and evaluated in light of the relationship they bear to the evidence admitted at trial and in light of defense arguments. *Id.* A prosecutor may not argue a fact to the jury that was not supported by the evidence, but can argue the evidence and the reasonable inferences that arise from the evidence. *Id.*

Viewed in context, the comments did not constitute prosecutorial misconduct because the comments accurately reflected the evidence. In addition, defendant testified that he received the check in 1993 or 1994. Any reasonable juror could understand why a witness may have trouble producing a copy of a check received over 15 years earlier. Thus, defendant's failure to produce the check at trial and the prosecutor's related comment were not highly prejudicial to him and cannot amount to outcome-determinative plain error. *Carines*, 460 Mich at 763. In addition, there was no showing that defendant was actually innocent or that the fairness, integrity, or

public reputation of judicial proceedings were seriously affected. *Bennett*, 290 Mich App at 475-476.

As noted, defendant argues that his trial counsel was ineffective for failing to object to the alleged prosecutorial misconduct. To establish ineffective assistance of counsel, a defendant must establish that (1) counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012). The defendant must also show that "the attendant proceedings were fundamentally unfair or unreliable." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Trial counsel was not ineffective for failing to object to the prosecutor's comments because the comments were proper and there was no basis for counsel to object. Defense counsel cannot be deemed ineffective for failing to raise a meritless objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Further, defendant cannot establish that, but for his counsel's failure to object to the comments, the results of the proceedings would have been different.

III. EXPERT TESTIMONY

Defendant claims that his trial counsel was ineffective in failing to challenge Sergeant Terrance Mekoski's qualification as an expert in street-level narcotics trafficking and in failing to object to Sergeant Mekoski's testimony regarding a drug-courier profile.

This Court examined the admissibility of expert testimony by police officers concerning drug profiles in *People v Murray*, 234 Mich App 46; 593 NW2d 690 (1999). In *Murray*, *id.* at 52-53, this Court recognized that drug-profile evidence, an informal compilation of characteristics often displayed by those trafficking in drugs, is inherently prejudicial because the profile could suggest that innocuous events were criminal activity. Because of this, "drug profile evidence is inadmissible as substantive evidence of guilt, because 'proof' of crime based wholly or mainly on these innocuous characteristics could potentially convict innocent people." *Id.* at 53; see also *id.* at 54.

However, expert testimony from a police officer is generally allowed "to explain the significance of items seized and the circumstances obtaining during the investigation of criminal activity," and to aid the jury in understanding evidence in drug cases. *Id.* at 53. For such drug-profile testimony to be admissible, "(1) the expert must be qualified; (2) the evidence must serve to give the trier of fact a better understanding of the evidence or assist in determining a fact in issue; and (3) the evidence must be from a recognized discipline." See, generally, *People v Williams (After Remand)*, 198 Mich App 537, 541; 499 NW2d 404 (1993).

Sergeant Mekoski was qualified to testify regarding street-level narcotics. He testified that he had 28 years of police experience and that 21 or 22 of those years were strictly in narcotics. He had been involved in thousands of drug investigations, including thousands of investigations related strictly to cocaine. He went through the Detroit Police Academy, trained with the Michigan State Police Narcotics Enforcement Team, trained with the Drug Enforcement Administration, and did numerous in-service trainings through local, state, and federal agencies. He had bought and sold cocaine in an undercover capacity hundreds of times and was the leader of the OMIT team. Because Sergeant Mekoski was qualified to testify as an expert in street-

level narcotics trafficking, trial counsel did not fall below an objective standard of reasonableness when he stipulated to the qualification. *Ericksen*, 288 Mich App at 201.

In addition, the evidence served to give the trier of fact a better understanding of the evidence or to assist the trier of fact in determining a fact in issue. Sergeant Mekoski's testimony included how drugs come to Michigan and the facts that (1) drugs were often transported in guarded caravans; (2) police worry, when vehicles carrying drugs exit the highway, that they will pull into a warehouse where the police cannot get them without a warrant; (3) "mules" transport drugs from out-of-state and are paid about \$10,000; (4) drugs are kept separately from money due, in part, to forfeiture laws; (5) \$20 bills are prevalent in the drug world; (6) drug dealers often have multiple cellular telephones and often use Boost phones because there is no way to obtain records from Boost phones; (7) based on the amount of cocaine found, the cocaine here was for distribution and not personal use; and (8) in order to buy 10 kilograms of cocaine, trust and communication would have to be built up over time. This testimony would have been helpful to the jury in understanding the evidence presented.

However, caution must be used in the admission of drug-profile testimony. See, e.g., *Murray*, 234 Mich App at 54. *Murray* describes the requisite caution in the following way:

[W]hen the testimony at issue is a drug profile, the expert may not move beyond an explanation of the typical characteristics of drug dealing—in an effort to provide context for the jury in assessing an alleged episode of drug dealing—and opine that the defendant is guilty merely because he fits the drug profile. Such testimony is inherently prejudicial and constitutes an inappropriate use of the profile as substantive evidence of guilt. [*Id.*]

Further, *Murray* adopted a four-part test to assist in determining if drug-profile testimony is used appropriately. *Id.* at 56-58. First, the purpose given for the admission of the drug-profile testimony should be for an explanation of modus operandi or to assist the jury as background information and the prosecutor should not argue that the profile has any value in itself. *Id.* at 56-57. Second, the profile should not be used on its own to infer the defendant's guilt; the prosecution must put forth some additional evidence. *Id.* at 57. Third, the trial court should make clear to the jury the appropriate and inappropriate use of the profile testimony. *Id.* To do so, a special instruction is usually necessary. *Id.* Fourth, the expert witness should not express an opinion that the defendant is guilty based on the profile, nor should the expert expressly compare the defendant's case to the profile in such a way that guilt is implied. *Id.* at 57.

Defendant alleges that Sergeant Mekoski's testimony was inappropriate because he stated that: (1) the \$12,000 in defendant's truck was consistent with drug dealing, (2) traveling in separate cars was consistent with drug dealing, and (3) dealers use several cellular telephones. First, while it was not inappropriate for Sergeant Mekoski to testify, as a way of providing background information, that mules are usually paid around \$10,000 to bring drugs to the Detroit area from out-of-state, he also directly testified that the nearly \$12,000 defendant had in his possession was enough to pay Aguirre (the mule) and Lanum. Further, in rebuttal closing argument, the prosecutor argued that the purpose of the \$12,000 was to give Lanum \$1,500 and to pay Aguirre. The sergeant's testimony and the prosecutor's argument, viewed together,

directly compared defendant's case to the profile in such a way that defendant's guilt was implied, and in that way they violated the tenets of *Murray*.

Sergeant Mekoski further testified that drug dealers have multiple telephones and that they often use Boost mobile telephones because Boost telephones can be purchased at party stores and there is no recordkeeping for these devices. Sergeant Mekoski testified that defendant had two telephones in his truck upon his arrest (neither of which was a Boost telephone) and that defendant may have disposed of a Boost telephone during the chase, because Lanum made or received several calls that day to a Boost telephone and had this Boost number saved under defendant's name in his own telephone. The prosecutor specifically argued that defendant's possession of several telephones, especially a Boost mobile telephone, was evidence of his guilt. The prosecutor stated, "Phone calls [occurred] on a Boost Mobile disposable phone typically used by [p]eople engaged in drug trafficking so that they can't be traced." The sergeant's testimony and the specificity of the prosecutor's argument, again viewed together, appear to have violated the tenets of *Murray*.

Sergeant Mekoski also testified that drug dealers travel in guarded caravans with the drug load in the middle. He stated that this is done so that the load can be protected and the other two vehicles would have the opportunity to perform an illegal maneuver to draw the police away from the vehicle with the drugs. Sergeant Mekoski testified that defendant, Aguirre, and Lanum traveled in that way together. In her closing argument, the prosecutor emphasized that defendant, Aguirre, and Lanum traveled in that way, tailing each other over many miles with no cars getting in between them. Although we find this sub-issue a closer question, it is arguable that this testimony and argument were also improper under the tenets of *Murray*.² Also, particularly significant is the fact that the jury was not issued a cautionary instruction with regard to the profile testimony. See *Murray*, 234 Mich App at 60-61 (discussing the significance of a cautionary instruction).

However, despite any impropriety in the evidence, we note that defendant does not directly argue on appeal that the trial court erred in admitting this evidence or in failing to give a limiting instruction regarding this evidence. Defendant argues only that his trial counsel was ineffective in failing to object to the evidence. As noted, to establish ineffective assistance of counsel, a defendant must establish that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. Counsel's failure arguably did fall below an objective standard of reasonableness. Nevertheless, there was considerable additional evidence of defendant's guilt, aside from the challenged evidence mentioned above. Additional evidence of defendant's participation in the drug offenses included the evidence of everything the police observed on the day in question, including evidence that defendant met and had a short

² The *Murray* Court noted the considerable difficulty in distinguishing proper drug-profile evidence and argument from improper evidence and argument. See, e.g., *Murray*, 234 Mich App at 54-60.

discussion with Aguirre at the hotel, Aguirre had 10 kilograms of cocaine hidden in his truck, and defendant fled from the police in a dramatic fashion. In addition, Lanum testified that defendant intended to engage in the drug business that day and had paid Lanum to accompany him on drug deals and to hold large amounts of money in the past.³ Based on the evidence, we conclude that defendant has not met his burden of demonstrating that, but for counsel's error, the result of the proceedings would have been different. Reversal is unwarranted, and we also decline to revisit the earlier motion for a remand that this Court previously denied.

IV. JURY INSTRUCTIONS

Defendant argues that the trial court erred by not giving a "buyer-seller" instruction and that his counsel was ineffective for failing to request such an instruction. Defendant cites federal case law in support of his argument that, in drug-conspiracy trials, the court must instruct the jury that although the purchase of narcotics for resale is evidence of a conspiracy (especially when there are repeated purchases), a buyer-seller relationship alone is insufficient to prove a conspiracy. See *United States v Mims*, 92 F3d 461, 464-465 (CA 7, 1996).

However, defendant has not cited a binding Michigan case requiring a buyer-seller instruction in such situations. The trial court properly instructed the jury regarding conspiracy. The jury instructions, when reviewed in their entirety, sufficiently protected the rights of defendant and fairly presented the triable issues to the jury and, therefore, there was no plain error requiring reversal in connection with the trial court's failure to provide, *sua sponte*, a buyer-seller instruction. *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007); *Carines*, 460 Mich at 763. Further, trial counsel was not ineffective for failing to make a novel argument unsupported by binding law. *People v Reed*, 453 Mich 685, 695; 556 NW2d 858 (1996).⁴

V. OTHER-ACTS EVIDENCE

Finally, defendant argues that the trial court abused its discretion in admitting other-acts evidence⁵ under MRE 404(b).⁶ We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010).

³ The jury also heard certain appropriate and unchallenged background evidence from Sergeant Mekoski.

⁴ In his appellate brief, defendant argues for a remand in connection with this issue. Once again, we decline to revisit our earlier denial of defendant's motion for a remand.

⁵ Defendant identifies this evidence as Lanum's testimony that defendant sometimes hired him to "watch his back" and Lanum's testimony that he had carried large sums of money for defendant in the past.

⁶ MRE 404(b)(1) provides:

In *Mardlin*, *id.* at 615, the Michigan Supreme Court described the test a trial court must use to determine if evidence is properly admitted under MRE 404(b):

To admit evidence under MRE 404(b), the prosecutor must first establish that the evidence is logically relevant to a material fact in the case, as required by MRE 401 and MRE 402, and is *not* simply evidence of the defendant's character or relevant to his propensity to act in conformance with his character. The prosecution thus bears an initial burden to show that the proffered evidence is relevant to a proper purpose under the nonexclusive list in MRE 404(b)(1) or is otherwise probative of a fact other than the defendant's character or criminal propensity. Evidence relevant to a noncharacter purpose is *admissible* under MRE 404(b) even *if* it also reflects on a defendant's character. Evidence is *inadmissible* under this rule *only* if it is relevant *solely* to the defendant's character or criminal propensity. Stated another way, the rule is not exclusionary, but is inclusionary, because it provides a nonexhaustive list of reasons to properly admit evidence that may nonetheless also give rise to an inference about the defendant's character. Any undue prejudice that arises because the evidence also unavoidably reflects the defendant's character is then considered under MRE 403 balancing test, which permits the court to exclude relevant evidence if its "probative value is substantially outweighed by the danger of unfair prejudice" MRE 403. Finally, upon request, the trial court may provide a limiting instruction to the jury under MRE 105 to specify that the jury may consider the evidence only for proper, noncharacter purposes. [Citations omitted; emphasis in original.]

The trial court properly considered the evidence as instructed by the *Mardlin* Court. In the prosecutor's brief in support of her motion to admit other-acts evidence under MRE 404(b), the prosecutor stated that she was seeking to admit the evidence to show, in part, knowledge and a common system. She anticipated that defendant would claim he knew nothing about the 10 kilograms of cocaine in Aguirre's vehicle. The prosecutor sought to admit Lanum's testimony that defendant dealt in drugs and that he had previously and recently followed defendant to act as a lookout, and had been paid for his work, to show that defendant had knowledge of the cocaine and that he and Lanum had a system to purchase the cocaine. We agree with the prosecutor and conclude that the trial court did not abuse its discretion in finding that the other-acts evidence was logically relevant to the elements of the crime and was not just character evidence.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Further, the trial court did not abuse its discretion in finding that the probative value of the evidence was not outweighed by its prejudicial effect and in allowing the admission of the evidence. Indeed, because the evidence went to the heart of the case and helped to explain the circumstances at hand, its probative value was high. Finally, the trial court also gave a limiting instruction to the jury. Reversal is unwarranted.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher