

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACK LARUE BLACKAMORE,

Defendant-Appellant.

UNPUBLISHED

February 26, 2009

No. 283487

Cass Circuit Court

LC No. 07-010290-FC

Before: Donofrio, P.J., and K. F. Kelly and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), resisting or obstructing a police officer, MCL 750.81d(1), possession of marijuana, MCL 333.7403(2), and operating a vehicle with a suspended license, MCL 257.904(1)(b). Defendant appeals only his conviction for possession with intent to deliver less than 50 grams of cocaine. Because the evidentiary and instructional issues lack merit and the trial court properly instructed the jury, defendant's claim of ineffective assistance of counsel also fails. We affirm.

After leaving a known drug house, defendant was found in possession of six individually wrapped rocks of crack cocaine. Mark Burkett, a Cass County Sheriff's Deputy, was one of the arresting officers and was also qualified as an expert witness on narcotics dealing. Burkett testified that it would be unusual for a drug user to possess six rocks of cocaine for personal use. He opined that the quantity of drugs defendant possessed indicated an intent to deliver. On cross-examination, defendant testified that if a drug addict used six rocks of cocaine in a short period of time, it would likely result in an overdose. On redirect examination, Burkett opined that defendant was a street-level dealer who acquired the drugs from a mid-level dealer.

On appeal, defendant argues that Burkett's opinion testimony that he (defendant) was a street-level dealer was based on improper drug-profile evidence. This issue is not preserved because defendant did not object to Burkett's testimony at trial. MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Accordingly, we review the issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764, 597 NW2d 130 (1999).

Generally, the term "drug profile" evidence refers to evidence of usually innocuous characteristics that police believe to be indicative of drug-related activities, such as the use of

papers, the possession of large quantities of cash, and possession of tools such as razor blades and lighters used to package drugs for sale. *People v Murray*, 234 Mich App 46, 52-53; 593 NW2d 690 (1999). Drug-profile evidence is not admissible as substantive evidence of 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). Expert testimony is admissible, however, to aid the jury in intelligently understanding the evidence in controlled substance cases and “to explain the significance of items seized and the circumstances obtain[ed] during the investigation of criminal activity.” *Murray, supra* at 53.

Here, Burkett testified that a drug user’s purchase of six rocks of crack cocaine from a crack house fits the profile of a street-level dealer. Indeed, defendant opened the door to this testimony by suggesting on cross-examination that a drug addict who was able to buy six rocks of crack cocaine might use them all at once or within a short time, because of the addictive nature of the drug. Burkett refuted this suggestion by testifying that drug-house operators utilize street-level dealers. Burkett’s testimony was admissible for the limited purpose of helping the jury understand that buying six rocks of crack cocaine from a crack house was more consistent with dealing drugs than using them. *Murray, supra* at 53. The prosecutor stated in his closing argument that the police considered defendant a street-level drug dealer because he had six baggies of cocaine, which was “not consistent with one person using drugs,” but rather was “consistent with a drug dealer.” This argument was clearly aimed at addressing and countering defendant’s assertion that his behavior was consistent with personal drug use. Moreover, Burkett’s description of defendant as a street-level dealer was not the only evidence of defendant’s guilt. Burkett testified on direct examination that the quantity of drugs itself indicated that defendant intended to deliver the packages rather than use them all himself. Other officers familiar with drug transactions in southwestern Michigan corroborated this testimony. Accordingly, Burkett’s testimony did not constitute plain error affecting defendant’s substantial rights.

Defendant also argues that the trial court erred in failing to instruct the jury on the limited use of Burkett’s testimony, and in failing to give a special instruction regarding Burkett’s dual-role as an expert witness and a police officer. Because defendant affirmatively stated that he had no objections to the court’s jury instructions, any claim of instructional error was waived. See *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). In any event, the primary purpose of the challenged testimony was not substantive, but rather to refute defendant’s suggestion that a drug user is likely to buy six rocks of crack cocaine to be used within a short period of time. The omission of a limiting instruction did not affect defendant’s substantial rights.

We also reject defendant’s argument that reversal is required because the trial court failed to give an instruction distinguishing between Burkett’s dual role as both a fact witness and an expert witness. See *United States v Lopez-Medina*, 461 F3d 724, 743-745 (CA 6, 2006). The trial court instructed the jury that a police officer’s testimony should be evaluated by the same standards as any other witness. It also instructed the jury to determine whether an expert’s opinion was credible and reliable. After reviewing the record, we conclude that the trial court’s instructions were sufficient to protect defendant’s substantial rights.

Finally, defendant argues that defense counsel was ineffective for failing to object to the alleged evidentiary and instructional errors discussed above. To establish ineffective assistance of counsel, a defendant must show (1) that his attorney's performance was objectively unreasonable in light of prevailing professional norms, and (2) that, but for his attorney's error or errors, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Werner*, 254 Mich App 528, 534; 659 NW2d 688 (2002). Here, defendant has not established an evidentiary error, nor has he established that he was prejudiced by the trial court's jury instruction. Accordingly, he cannot establish a claim for ineffective assistance of counsel.

Affirmed.

/s/ Pat M. Donofrio
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering