

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MIRIAM L. LINDSEY,

Defendant-Appellant.

UNPUBLISHED

January 16, 1998

No. 198141

Oakland Circuit Court

LC No. 95-143308-FH

Before: Hoekstra, P.J., and Wahls and Gribbs, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii); MSA 14.15(7401)(2)(d)(iii). She was sentenced to two years' probation. Her sentence was enhanced as an habitual offender, second offense, MCL 769.10; MSA 28.1082. Defendant appeals as of right and we affirm.

Defendant first argues that there was insufficient evidence to support her conviction of possession with intent to deliver marijuana. We disagree. When reviewing the sufficiency of the evidence in a bench trial, this Court views the evidence in the light most favorable to the prosecution in order to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). A conviction for possession with intent to deliver requires proof beyond a reasonable doubt that defendant intended to distribute a controlled substance. MCL 333.7401; MSA 14.15(7401).

An intent to deliver may be proven by circumstantial evidence and may properly be inferred from the amount of controlled substance possessed by the defendant. *People v Ray*, 191 Mich App 706, 708; 479 NW2d 1 (1991). In this case, a total of 75 grams of marijuana was found in defendant's home, having a street value of over \$1,000. In addition, there was evidence that the marijuana was found in several different locations in defendant's home and in a variety of different packages. Other items associated with an intent to sell were also confiscated, including a pager and a

gram scale of the type commonly used to weigh narcotics. Finally, a witness testified that she overheard defendant state that she did not sell marijuana out of her house, but did sell it in front of the courthouse or across the street from the courthouse. Although defendant denied making the statement, questions of credibility are left to the trier of fact. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988). We find sufficient evidence to justify a rational trier of fact in determining that defendant had an intent to sell the marijuana.

Defendant also argues that she received ineffective assistance of counsel at trial. However, because defendant failed to move for a new trial or for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), our review is limited to mistakes apparent on the record. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995).

The right to counsel encompasses the right to effective assistance of counsel. *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). However, there is a strong presumption that assistance of counsel was effective. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). In order to establish that a defendant has been denied the effective assistance of counsel, defendant must show that the performance of counsel fell below an objective standard of reasonableness under prevailing professional norms, and that the representation was so prejudicial that defendant was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). The representation is prejudicial when a reasonable probability exists that, absent the deficiency in representation, the outcome of the proceedings would have been different. *Id.* at 314.

Defendant argues that defense counsel's failure to enter a prescription for marijuana into evidence constituted ineffective assistance and prejudiced the outcome of the case. However, there is nothing in the record to indicate that defendant possessed a valid prescription for marijuana at the time of the offense. Indeed, the trial court specifically stated at sentencing that defendant did not have a valid prescription. Defendant now seeks to introduce new evidence of a prescription, an actual prescription form, which she argues defense counsel should have introduced at trial. However, it is not part of the lower court record and we will not consider it. In any event, we note that the date of the prescription form is September 6, 1996, one day *after* defendant was sentenced. Defense counsel obviously cannot be found deficient for failing to produce evidence that did not exist.¹

Defendant also argues that defense counsel's failure to call defendant's physician as a witness constituted ineffective assistance and prejudiced the outcome of the case. Defendant argues that the testimony of the physician would have demonstrated that the purpose of defendant's use of marijuana was to suppress severe epileptic seizures. The decision to call a witness is a matter of trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). We will not second-guess matters of trial strategy. *People v Barnett*, 163 Mich App 331, 338; 441 NW2d 378 (1987). Even if defendant's doctor had recommended that she use marijuana, such a recommendation would not have excused her possession with intent to deliver.

Thus, defendant was not deprived of a substantial defense that would have affected the outcome of the proceedings.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Myron H. Wahls

/s/ Roman S. Gibbs

¹ We also note that defendant has not cited any authority for the proposition that a doctor can legally prescribe marijuana in Michigan.