STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID LEE STARKS,

Defendant-Appellant.

UNPUBLISHED
April 28, 1998

No. 196691
Van Buren Circuit Court
LC No. 96-009782

Before: Gribbs, P.J., and Murphy and Gage, JJ.

PER CURIAM.

Defendant David Lee Starks was tried jointly with codefendant Sarah Prewitt, and defendant was convicted as charged of delivery of at least 50 grams but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), conspiracy to deliver at least 50 grams but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii); MCL 750.157a; MSA 28.354(1), and possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Defendant appeals as of right. We affirm.

Defendant argues that he was denied the effective assistance of counsel. We disagree. In order to prevail on a claim of ineffective assistance of counsel, defendant must show that his trial counsel's performance was deficient and that the deficiency resulted in prejudice to defendant in the outcome of the case. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). To show a deficiency in performance, defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy. *Id*. at 687. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987); *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987).

Defendant's first claim of ineffective assistance is that his counsel failed to object on hearsay grounds to statements made by codefendant Prewitt, and later provided in police officer Lucas' testimony. Defendant argues that the statements were inadmissible under MRE 801(d)(2)(E), because there was insufficient independent evidence of a conspiracy to bring the statements within that rule.

Even assuming arguendo that defendant is correct, we find that the evidence was admissible as a statement against interest.

MRE 803(b)(3 provides for admission of a statement:

> which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

The rule in MRE 803(b)(3) is typically applied where the declarant makes a statement inculpating himself. However, in this case, the question is whether Prewitt's statements which inculpated both Prewitt and defendant are admissible under the same rule. We conclude that they are. See *People v Poole*, 444 Mich 151, 153-154; 506 NW2d 505 (1993). While Prewitt's statements in the present case were made to a police officer, Prewitt was not aware that Lucas was an officer and spoke to him at her own initiative as an acquaintance. The statements were made without prompting and concerned dealings with cocaine, which would subject her to criminal liability.
The statements were clearly against her penal interest, and a reasonable person in her position would not have made them if she did not believe them to be true. MRE 804(b)(3

Because Prewitt's out-of-court statements were admissible under a hearsay exception, there was no need for defense counsel to object to their admission; to do so would have been futile. We find no deficiency in counsel's performance for failing to object to these statements. *People v Tullie*, 141 Mich App 156, 158; 366 NW2d 224 (1985).

Defendant also argues that counsel was ineffective for raising an issue during cross-examination, thereby opening the door on redirect examination by the prosecution to testimony which would otherwise have been inadmissible. There is no merit to this claim.

In determining whether trial counsel's performance was deficient, a simple reasonableness test should be applied in consideration of all the circumstances. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674, 294 (1984). The Court's "scrutiny of counsel's performance must be highly deferential . . . [and] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id*. Here, without the benefit of hindsight and the knowledge that the witness was going to give a nonresponsive answer, it cannot be said that counsel's conduct was unreasonable.

Next, defendant contends that there was insufficient evidence in this case of intent to deliver and of conspiracy. We find these claims meritless. There was evidence here from which one could infer that defendant attempted to dispose of a quantity of cocaine by flushing it down a toilet before he was arrested, and police found a scale of a type commonly used in the sale of drugs, marked money that was used in an earlier undercover transaction, and a large amount of money in defendant's possession. An intent to deliver could be inferred from this evidence. As to conspiracy, there was evidence that

codefendent contacted defendant before each large drug purchase and that codefendant drove to the house where defendant lived and was later arrested to pick up the drugs each time the undercover officer arranged a purchase. Viewing the evidence in a light most favorable to the prosecution, we find that a reasonable trier of fact could have found that the elements of the charged crimes were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992).

Defendant next argues that his conspiracy conviction should be reversed because of the trial court's error in instructing the jury on this charge. We disagree. Because defendant failed to object to the instruction below, appellate review is waived absent manifest injustice. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). We find no manifest injustice here. In any case, there is no merit to defendant's claim that the jury was not adequately instructed that the cocaine must have been delivered to a third person. Reading the instructions as a whole, the trial court repeatedly instructed the jury that the crime of delivery requires the intent to deliver the cocaine "to someone else".

Finally, defendant argues that the jury verdict form was incorrect and resulted in erroneous convictions. Defendant first argues that the form resulted in an incorrect conviction of conspiracy. There is no merit to this claim. A jury's verdict is "not void for uncertainty if the jury's intent can be clearly deduced by reference to the pleadings, the court's charge, and the entire record." *People v Rand*, 397 Mich 638, 643; 247 NW2d 508 (1976). Here, where the jury was repeatedly and thoroughly instructed as to the elements of conspiracy, the jury verdict is not void because of the typographical error reading "conspiracy with *David Lee Starks*" on the verdict form. Reviewing the record as a whole, it is clear that the jury understood that defendant was charged with conspiring with codefendent Prewitt rather than with himself.

Defendant also argues that for the charge of possession with intent to deliver cocaine, according to the verdict form, the jury intended only to convict defendant of simple possession, and therefore, his conviction must be reduced to simple possession. We disagree. The trial court adequately instructed the jury regarding the charge of possession with intent to deliver, and advised them that their verdict could be either guilty of possession with intent to deliver cocaine, guilty of only possession of cocaine, or not guilty. The trial court also properly instructed the jury regarding the issues it needed to resolve in making their determination. Viewing the record as a whole, we are satisfied that the jury understood the verdict form choices, "guilty as charged", "possession of less than 50 grams", or "not guilty", and that it intended to find defendant guilty of possession with intent to deliver cocaine. *Id.*

Affirmed.

/s/ Roman S. Gribbs
/s/ William B. Murphy