

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STACIE LYNN MUNDAY,

Defendant-Appellant.

UNPUBLISHED

January 14, 2000

No. 213776

Grand Traverse Circuit Court

LC No. 98-007526 FH

Before: Sawyer, P.J., and Gribbs and McDonald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of delivery and conspiracy to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), MCL 750.157(a); MSA 28.354(1). The trial court sentenced defendant for two to twenty years' imprisonment on each conviction. Defendant appeals as of right and we affirm.

Defendant argues that she received ineffective assistance of counsel at trial for several reasons. For a defendant to successfully establish a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's error, she would have been acquitted. *People v Stanaway*, 446 Mich 643; 687-688; 521 NW2d 557 (1995). There is a strong presumption that counsel's decisions were a matter of sound trial strategy. *Id.* at 687. Because there is no lower court ruling regarding ineffective assistance of counsel, this Court's review is essentially, de novo, limited to mistakes apparent on the record below. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

First, defendant contends that defense counsel should have either sought to limit Lorrie Ann Huffman's written statement to the police to its relevant portions for impeachment purposes, not questioned her regarding this statement, or at the very least, not introduced it into evidence. According to defendant, by questioning Huffman about her statement and admitting it into evidence, the prosecution was able to ask Huffman about other irrelevant portions of her statement. Second, defendant maintains that defense counsel should have known through proper investigation and discovery that defense witness, Karen Ramsey, had prior contacts with the police. Defendant reasons that had defense

counsel obtained this information, he could have limited the admission of this information or not called her as a witness so that the prosecution would not have been able to use this information and attack the witness' credibility at trial. Finally, defendant claims that defense counsel should have requested an addict-informer instruction, CJ2d 5.7, so that the jury would have been able to more closely examine the credibility of Huffman's testimony.

In regard to her first two arguments, defendant has failed to overcome the strong presumption that defense counsel's decisions were sound trial strategy. *Id.* Huffman was the primary witness against defendant. Defense counsel's decision to impeach Huffman with her written statement and to introduce it into evidence to attack her credibility was a matter of trial strategy. *People v Stacy*, 193 Mich App 19, 24; 484 NW2d 675 (1992). In addition, defense counsel called Karen Ramsey as a witness to attack the credibility of Huffman. This, too, was a matter of trial strategy. *People v Mitchell*, 454 Mich 145, 162; 560 NW2d 600 (1997). Further, although defense counsel may not have known about Ramsey's prior involvement with the police, defense counsel did attempt to limit the admission of this particular information. Finally, defendant's argument, that defense counsel's performance was deficient for failure to request an addict-informer instruction is not supported by the record; counsel requested the instruction.

Even if defense counsel's performance fell below an objective standard of reasonableness, defendant failed to provide evidence that had defense counsel not made these decisions, the outcome of the case would have been different. *Stanaway, supra*. There was strong circumstantial evidence to support defendant's convictions and the errors of which defendant complains were not particularly prejudicial. Under these circumstances, we conclude that defendant was not deprived of the effective assistance of counsel.

Defendant next argues that the trial court abused its discretion by admitting finger scales and a vial containing cocaine residue into evidence. To the extent that defendant claims that these items were inadmissible under MRE 404(b)(1) and MRE 401, this claim is unpreserved for review because defendant failed to establish that plain error occurred at trial regarding these claims. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant did, however, argue that these items were inflammatory; that is, their probative value was substantially outweighed by the danger of unfair prejudice under MRE 403, and the trial court disagreed. We review a trial court's decision to admit or exclude evidence for a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). We conclude that the probative value of the items was not substantially outweighed by the danger of unfair prejudice under MRE 403. These items had strong probative value because, as the trial court correctly determined, they indicated that it was likely that cocaine was being distributed from the home of defendant and Rezendes. Further, these items created little, if any, risk of unfair prejudice against defendant. The trial court did not abuse its discretion in allowing the evidence.

Defendant finally argues that Huffman's testimony, that Rezendes told her on the phone that defendant would deliver cocaine to her in a parking lot of a bar, was hearsay under MRE 801(d)(2)(E). Specifically, defendant argues that Huffman's testimony regarding this statement by Rezendes was

hearsay because there was no independent proof before this testimony that defendant conspired with Rezendes to deliver cocaine to Huffman. Defendant reasons that, excluding this statement, there was insufficient evidence to support her conviction for conspiracy to deliver cocaine. As stated previously, we review a trial court's decision to admit or exclude evidence for a clear abuse of discretion. *Starr*, *supra* at 494.

Under MRE 801(d)(2)(E), a statement is not hearsay if it is "a statement by a coconspirator of a party during the course of and in furtherance of the conspiracy on independent proof of the conspiracy." *People v Cotton*, 191 Mich App 377, 392; 478 NW2d 681 (1991); *People v Gay*, 149 Mich App 468, 470; 386 NW2d 556 (1986); *People v Moscara*, 140 Mich App 316, 319; 364 NW2d 318 (1985). The standard of proof for establishing independent proof of a conspiracy is a preponderance of the evidence. *People v Vega*, 413 Mich 773, 782; 321 NW2d 675 (1982). After reviewing the record in this case, we conclude that the trial court properly determined that Huffman's testimony regarding what Rezendes told her over the telephone was not hearsay under MRE 801(d)(2)(E); there was independent proof of a conspiracy between defendant and Rezendes before her testimony. As the trial court correctly determined, there was strong circumstantial evidence that a conspiracy existed because Huffman testified that she called Rezendes to purchase cocaine, and that defendant delivered it to her the same day.

Affirmed.

/s/ David H. Sawyer

/s/ Roman S. Gibbs

/s/ Gary R. McDonald