

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES MICHAEL KLEE,

Defendant-Appellant.

UNPUBLISHED

November 22, 2005

No. 256833

Jackson Circuit Court

LC No. 04-000126-FH

Before: Donofrio, P.J., and Zahra and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of possession of marijuana with intent to deliver, MCL 333.7401(2)(d)(iii). The trial court sentenced defendant as a fourth habitual offender to a term of 36 to 180 months' in prison. Because both the evidence admitted at trial and the assistance of counsel were sufficient, we affirm.

Defendant first argues on appeal that there was insufficient evidence to convict him of the crime charged because the marijuana was found in a truck that did not belong to him and the testimony linking defendant to the marijuana was either hearsay or the result of coercion. When this Court reviews a claim of insufficient evidence it must "view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999) (citations omitted). A trier of fact may make reasonable inferences from direct or circumstantial evidence contained in the record. *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990), citing *People v Petrella*, 424 Mich 221, 275; 380 NW2d 11 (1985).

To prove possession with intent to deliver under MCL 333.7401(2)(d)(iii) the prosecution must show that the defendant knowingly and illegally possessed a controlled substance meeting the specified weight requirements in the statute, and that he intended to deliver that substance. CJI 12.3. To establish possession, there must be proof that the defendant exercised physical control over the substance, actual possession, or defendant had the right to exercise control over it, constructive possession. *People v Wolfe*, 440 Mich 508, 520; 489 NW2d 748 (1992), modified 441 Mich 1201 (1992); CJI 12.7. This appeal challenges the sufficiency of the evidence supporting the finding that defendant had constructive possession of the marijuana.

The police informant, in this controlled buy stratagem, testified that while he was under police supervision he contacted defendant to purchase two pounds of marijuana. Defendant's brother, who was known to be with defendant at the time, testified that defendant had a portion of the requested weight and obtained the remainder of the marijuana from their other brother. He also testified that he and Richard Janish, the owner of the truck in which the marijuana was found, were essentially along for the ride and were not otherwise part of the plan. Police testimony included defendant's confessed control of the marijuana and defendant's admission that he had used the truck to sell drugs in the past. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude that defendant was in constructive possession of the marijuana because he had the right to exercise control over it. To the extent the evidence is conflicting, it is a question of weight and not sufficiency.

We decline to address whether the confession was a result of coercion or that the informant's testimony was hearsay because defendant failed to provide support for either assertion. An assertion without supporting authority precludes appellate examination of an issue. *Impullitti v Impullitti*, 163 Mich App 507, 512; 415 NW2d 261 (1987). "A party may not leave it to this Court to search for authority to sustain or reject its position." *In re Keifer*, 159 Mich App 288, 294; 406 NW2d 217 (1987).

Defendant also argues that he was denied effective assistance of counsel because his counsel failed to move to suppress evidence obtained as a result of an alleged illegal search and seizure and because counsel gave an inarticulate closing argument. Effective assistance of counsel is presumed and it is defendant's burden to prove otherwise. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). Defendant must establish that counsel fell below an objective standard of reasonableness. *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Additionally, defendant must show that he was prejudiced; or but for counsel's ineffective assistance, there is a reasonable probability that the outcome would have been different. *People v Plummer*, 229 Mich App 293, 307; 581 NW2d 753 (1998).

Defendant asserts that the police illegally searched the truck where the marijuana was found because the police did not have consent or probable cause. However, the truck belonged to Richard Janish, not defendant. Janish gave defendant a ride in the truck free of charge and defendant was not in the vehicle when it was searched. "A passenger who is not present lacks standing to object to a later search of the car." *People v Mayes*, 202 Mich App 181, 197-198; 508 NW2d 161 (1993), citing *People v Jackson*, 71 Mich App 487; 247 NW2d 382 (1976). The evidence fails to suggest that defendant had a reasonable expectation of privacy in Janish's truck, therefore, he cannot assert a Fourth Amendment violation and counsel was not ineffective for failing to so argue because the argument would have been meritless. *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003).

Defendant also argues that the police illegally entered the home of a third party to arrest him, therefore, his counsel should have sought to suppress his post-arrest confession. Although defendant did not own or live at the home where he was arrested, his standing to claim a Fourth Amendment violation stems from his status as an overnight guest of the owner of the house with a reasonable expectation of privacy. *Minnesota v Olson*, 495 US 91, 96-97; 110 S Ct 1684; 109 L Ed 2d 85 (1990). The testimony from witnesses and the police conflicted regarding whether the police had consent to enter the house. Without a suppression hearing it is impossible for us

to determine what the trial court would have decided. Even if defendant's confession had been excluded, he fails to establish prejudice because there was still sufficient evidence to convict him of the crime. Therefore, defendant was not denied effective assistance of counsel on this claim.

Defendant further argues in support of his ineffective assistance of counsel claim that counsel gave an inarticulate closing argument. While one particular portion of counsel's closing argument may have lacked clarity to some, it is clear that counsel was attempting to get the jury to appreciate the other side of the prosecutor's anticipated rebuttal argument with an emphasis on reasonable doubt and the presumption of innocence. Our review of the closing arguments in their entirety reveals, however, that for the most part counsel focused attention on the fact issues with appropriate detail and cogent analysis. We conclude that statements made by defense counsel were a matter of trial strategy. We do not substitute our judgment in matters of trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 382 (2004). The fact that a particular strategy does not work does not render counsel ineffective for using it. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The closing arguments as a whole were articulate and defendant was not prejudiced.

Because there was only one potential error regarding counsel's performance and it was not outcome determinative it is not necessary for us to address defendant's argument that the cumulative affect of counsel's errors resulted in denying him a fair trial.

Affirmed.

/s/ Pat M. Donofrio

/s/ Brian K. Zahra

/s/ Kirsten Frank Kelly