STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 29, 2005
v	No. 256445 Oakland Circuit Court
CORY ALLEN RICHARDSON, Defendant-Appellant.	LC No. 04-195162-FH

Before: Smolenski, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant appeals by right his conviction for possession of marijuana with intent to deliver, MCL 333.7401(2)(d)(iii), entered after a jury trial. Defendant was sentenced to a ninety-day jail term and probation, with credit for twenty-three days served. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

At trial, the prosecutor presented testimony that Pontiac police officers found nine individual packets of marijuana, or "dime bags,"[1] in defendant's pocket. Inside a plastic baggie, an officer found nine smaller plastic "corner tie" bags, each containing approximately one gram of marijuana. No other paraphernalia was found in the home. The officer, who was qualified as an expert witness in narcotics without objection, testified that, in his opinion, the packaging of the marijuana was consistent with an intent to sell. Defendant testified that the marijuana was for personal use.

In order to show that he is entitled to relief on the ground that defense counsel rendered ineffective assistance, defendant must show that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 595-596; 623 NW2d 884 (2001); *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Carbin, supra* at 600, quoting *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Defendant bears the burden of overcoming the presumption that counsel's

[1] These bags are apparently named dime bags because they cost $10 each.

performance constituted sound trial strategy. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003); *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

First, defendant argues that trial counsel rendered ineffective assistance by failing to challenge two potential jurors for cause. We disagree.

In general, the decision to challenge a juror is a matter of trial strategy. We have discussed in detail the factors involved in reaching this complex decision and the great deference involved in reviewing that decision. *People v Robinson*, 154 Mich App 92, 95; 397 NW2d 229 (1986) ("Our research has found no case in Michigan where defense counsel's failure to challenge a juror or jurors has been held to be ineffective assistance of counsel. We cannot imagine a case where a court would so hold, and we do not so hold in this case."). "An attorney's decisions relating to the selection of jurors generally involves matters of trial strategy" that this Court "normally declines to evaluate with the benefit of hindsight." *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001).

Both jurors unequivocally stated that they could arrive at a decision based on the evidence presented, rather than their personal connections with other law enforcement officers. Defendant has presented nothing to refute this assertion. Given the fact that jurors are presumed to be impartial, *id*. at 256, we find that defendant cannot show that counsel acted unreasonably, or that the outcome of the trial would have been different had counsel challenged the jurors.

Next, defendant argues that counsel provided ineffective assistance because she declined to make an opening statement and did not ask the trial court to provide the jury with defendant's theory of the case. We disagree.

Defendant essentially maintains that defense counsel must always provide a strong opening statement, and supports this claim with reference to articles showing the effectiveness of an opening statement. However, waiver of an opening statement is a subjective decision on the part of trial counsel that can rarely, if ever, be the basis of a successful claim of ineffective assistance. *People v Pawelczak*, 125 Mich App 231, 242; 336 NW2d 453 (1983). We have also held that, where defense counsel gives a complete closing argument and is given a full and fair opportunity to comment on the case and the evidence, a defendant cannot show prejudice by the lack of an opening statement. See, e.g., *People v Buck*, 197 Mich App 404, 413-414; 496 NW2d 321 (1992), rev'd in part on other grounds sub nom *People v Holcomb*, 444 Mich 853 (1993). Here, counsel provided a concise but complete explanation of defendant's position and the deficiencies of the prosecutor's case in her closing argument. We find no error requiring reversal in counsel's decision not to give an opening statement.

Nor do we find merit in defendant's claim that he was prejudiced by defense counsel's decision to waive a theory of the case instruction by the trial court. This was not a case that was factually or legally complex. The only disputed issue was whether the evidence supported a finding that defendant intended to sell the marijuana he possessed. Defendant's position was appropriately summed up by counsel's closing argument, "my client had the marijuana in his pocket because it was for personal use" and that he did not intend to sell the marijuana. This theory comported with defendant's testimony and was supported by the remainder of counsel's closing arguments. Under the circumstances, defense counsel's decision not to request a

separate instruction on defendant's theory of the case was not an error requiring reversal. *People v Seabrooks*, 135 Mich App 442, 450-451; 354 NW2d 374 (1984).

Affirmed.

/s/ Michael R. Smolenski
/s/ Bill Schuette
/s/ Stephen L. Borrello