STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL LOGAN,

Defendant-Appellant.

UNPUBLISHED
December 4, 2007

No. 273402
Oakland Circuit Court
LC No. 2006-207338-FH

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

PER CURIAM.

Defendant appeals as of right from his jury-based convictions of possession with intent to deliver less than 50 grams of, respectively, heroin and cocaine, MCL 333.7401(2)(a)(*iv*), for which the trial court sentenced defendant, as a fourth habitual offender, MCL 769.12, to serve concurrent terms of imprisonment of 46 months to 30 years. For the reasons set forth in this opinion, we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. Facts.

The prosecutor presented evidence that the police executed a search warrant for a motel room in Ferndale, in February 2006, and there discovered defendant sleeping on a bed, along with an aerosol can whose false bottom contained heroin and cocaine. A police witness testified that defendant told him that he was selling drugs because Detroit police officers were threatening to kill members of his family if he did not sell drugs. Defendant took the stand at his trial and reiterated his theory of duress. Defendant testified that while he was in prison, he encountered some fellow inmates, including one who told him he had relatives, including a son, with the Detroit Police Department who sold drugs. According to defendant, these inmates offered to involve him in that business when he won parole, but when defendant declined, the offer turned into threats against his family. Defendant continued that he sought assistance from federal authorities, as well as Michigan's attorney general, but that when the inmates issued a plausible threat against defendant's sister, defendant agreed to work for them.

Defendant admitted that the heroin and cocaine were in the motel room with him, but denied that they were in the aerosol can. Defendant testified that the drugs belonged to another person, and that he neither possessed nor intended to sell them.

An agent with the Federal Bureau of Investigation testified in rebuttal that he had investigated defendant's allegations, but could neither locate any inmate or Detroit police officer whose name corresponded to that given by defendant, nor otherwise verify any of defendant's other allegations concerning a plot between prison inmates and Detroit police officers to traffic in illegal drugs.

The trial court instructed the jury on the affirmative defense of duress. The jury found defendant guilty as charged. On appeal, defendant argues that his convictions must be reversed because his defense of duress was unrebutted, and, alternatively, because he was convicted without effective assistance of counsel.

II. Duress.

"A successful duress defense excuses the defendant from criminal responsibility for an otherwise criminal act because the defendant was compelled to commit the act; the compulsion or duress overcomes the defendant's free will and his actions lack the required *mens rea*." *People v Luther*, 394 Mich 619, 622; 232 NW2d 184 (1975). Once a defendant has presented evidence of a valid duress defense, the prosecutor bears the burden of disproving it beyond a reasonable doubt. See *People v Mendoza*, 108 Mich App 733, 739; 310 NW2d 860 (1981).

Defendant argues that the prosecutor failed to present sufficient evidence to rebut the duress defense. Whether the prosecutor presented sufficient evidence to support a verdict of guilty is a question of law, calling for review de novo. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). In reviewing a sufficiency claim, the appellate court must view the evidence in the light most favorable to the prosecution. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

Again, the prosecutor called an F.B.I. agent as a rebuttal witness, who testified that he investigated defendant's allegations about drug dealer inmates allied with members of the Detroit Police Department, but could find no corroboration of any of it. Defendant does not address that rebuttal testimony directly, let alone explain why it did not constitute a complete rebuttal of his duress theory, but instead merely asserts that, "the prosecution failed to successfully rebut the presumption of duress."

We conclude that the rebuttal testimony in this instance provided the jury with a basis for discrediting defendant's entire duress theory. The jury was free to believe the rebuttal testimony and to disbelieve defendant's own assertions. See *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998) ("It is the province of the jury to determine questions of fact and assess the credibility of witnesses.").

Because the prosecutor presented sufficient evidence to disprove defendant's theory of defense, defendant's challenge to the sufficiency of the evidence must fail.

III. Assistance of Counsel.

"In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel's performance was objectively unreasonable and (2)

whether the defendant was prejudiced by counsel's defective performance." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant argues that his trial lawyer was ineffective because he did not request a jury instruction on the lesser included offense of simple possession. A defendant pressing a claim of ineffective assistance of counsel must overcome a strong presumption that counsel's tactics were matters of sound trial strategy. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). Although an instruction on simple possession would have allowed for the possibility that defendant might have been convicted of a less serious offense, it also would have made it all the easier for the jury to find him guilty. That defense counsel elected to strive for acquittal, at the expense of mitigating the conviction to simple possession, was sound strategy.

Moreover, in setting forth his affirmative defense of duress, defendant testified that he had agreed to act as a drug seller. Although defendant testified that he was not engaged in such sales on the occasion of his arrest, that alternative theory of innocence was marginalized in favor of a heavy emphasis on the duress theory. An instruction on simple possession would have emphasized the alternative theory that was wholly incompatible with the highlighted theory of duress. Sound strategy in not seeking such an instruction is thus apparent. We will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Defendant also argues in passing that counsel was ineffective for failing to request an instruction to the effect that when material evidence in control of a party is not produced at trial, the opposing party is entitled to an adverse inference instruction. See *People v Davis*, 199 Mich App 502, 514-515; 503 NW2d 457 (1993). However, this brief assertion fails to specify what evidence defendant is referring to, and includes no allegation that the prosecutor acted in bad faith in any event. See *id.* Moreover, defendant did not deny that heroin and cocaine, and some drug paraphernalia, were in the motel room with him on the occasion in question, but instead attempted to offer innocent explanations for how that came to be. For these reasons, we must reject defendant's claim of ineffective assistance of counsel.

Affirmed.

/s/ Bill Schuette
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher