

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERMAINE RAYMOND MOORE,

Defendant-Appellant.

UNPUBLISHED

December 27, 2007

No. 272400

Wayne Circuit Court

LC No. 06-002667-02

Before: Murray, P.J., and Hoekstra and Wilder, JJ.

PER CURIAM.

Defendant was convicted by jury of attempted possession with intent to deliver under 50 grams of heroin, MCL 333.7401(2)(a)(iv), attempted possession with intent to deliver under 50 grams of cocaine, MCL 333.7401(2)(a)(iv), and attempted possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii). He was subsequently sentenced to concurrently serve prison terms of 18 to 60 months for the heroin and cocaine convictions and 12 to 24 months for the marijuana conviction. Defendant appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was present in a “drug house” when police entered to execute a search warrant that described another man as the suspected seller. The first two policemen who entered the home testified that defendant and his co-defendant, Mr. Sims, were seated at a table in the dining room. On the table between the men were marijuana, cocaine, heroin, packaging materials, a large amount of cash, and a scale. Another co-defendant, Mr. McKnight, fled to the kitchen and was found with baggies of cocaine on his person. Other people were in the living room of the home. Defendant was tried with Mr. Sims and Mr. McKnight.

Defendant first argues that the evidence was insufficient to support his convictions for attempted possession with intent to deliver marijuana, cocaine, and heroin because there was no evidence that he knowingly possessed the drugs. This Court reviews sufficiency of the evidence issues de novo in the light most favorable to the prosecution to determine whether a rational trier of the fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). “To convict a defendant of possession with intent to deliver, the prosecution must prove (1) that the recovered substance is a narcotic, (2) the weight of the substance, (3) that the defendant was not authorized to possess the substance, and (4) that the defendant knowingly possessed the substance intending to deliver it.” *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005); see also *People v Wolfe*, 440

Mich 508, 516-517; 489 NW2d 748, amended 441 Mich 1201 (1992). The elements of an attempt are “(1) an intent to do an act or to bring about certain consequences which would in law amount to a crime; and (2) an act in furtherance of that intent which, as is most commonly put, goes beyond mere preparation.” *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993).

When the evidence is viewed in a light most favorable to the prosecution, there is no question that defendant was seated at the table with Mr. Sims when the police entered the home. Both the first and second police officers to enter the home so testified, and defendant’s compliance with the first officer’s order to the ground explains the other officers’ testimony that he was on the floor when they entered. There is also no question that heroin, marijuana, cocaine, a large amount of cash, packaging materials, and a scale were on the table between defendant and Mr. Sims. There were other people on the first floor of the home, but they were in the living room area, not in the dining room. While defendant’s mere presence in the home would not be sufficient to establish possession of the drugs, his presence at the table surrounded by drugs, money, and drug paraphernalia is sufficient to infer that defendant either possessed or attempted to possess the heroin, marijuana, and cocaine, with intent to deliver.

Defendant also argues that the trial court abused its discretion by denying defendant’s motion for severance. Co-defendant McKnight moved for severance at a pretrial conference and the trial court denied that motion, requesting that defense counsels discuss their defenses and file a written motion if necessary. No motion was filed. Defendant’s trial counsel renewed the motion just before the start of trial and the trial court denied that motion as untimely.

Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision.

* * *

Inconsistency of defenses is not enough to mandate severance; rather, the defenses must be “mutually exclusive” or “irreconcilable.” [*People v Hana*, 447 Mich 325, 346-347, 349; 524 NW2d 682 (1994).]

Here, defendant did not provide the court with a supporting affidavit or make an offer of proof that demonstrated prejudice because the motion was denied as untimely on the morning of trial. However, this Court has the benefit of reviewing the co-defendants’ defenses in total. Defendant and Mr. Sims argued that their presence in the home, or even at the table, did not constitute possession of the drugs. Mr. McKnight argued that he possessed cocaine only, and not the other drugs. These defenses are not mutually exclusive; the co-defendants did not argue that they did not possess the drugs because defendant did. Mr. McKnight was the only defendant to testify and he testified that he purchased the cocaine from Mr. Fluker, that he did not know where defendant was when the police entered, and that he did not see Mr. Sims handle drugs that night. Mr. McKnight’s testimony may have assisted defendant because he testified that he did not purchase the drugs from defendant. Defendant has not shown any prejudice from the lack of

severance and he may have even benefited from the joint trial. Because the co-defendants' defenses were not mutually exclusive and defendant has shown no prejudice from the joint trial, the trial court did not abuse its discretion by denying the motion to sever.

Defendant also argues that his counsel was ineffective for failing to file a written motion to sever and because trial counsel stipulated to admission of the search warrant after the prosecution closed its case. This Court was not provided with a copy of the search warrant, and defendant does not specify what about the search warrant was prejudicial. The search warrant may have been helpful to defendant because he did not fit the description of the person listed as the suspected drug seller, and Mr. McKnight testified that Mr. Fluker, whom he purchased drugs from, did fit that description. Admission of the search warrant in this case was a matter of trial strategy, and this Court will not substitute its judgment for trial counsel's in that regard. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Next defendant argues that his counsel was ineffective for failing to file a written motion to sever defendant's trial from his co-defendants. Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). As discussed above, the trial court did not abuse its discretion in denying defendant's motion to sever, and therefore, the motion would have been meritless. Although presumably a written motion for severance would have contained an affidavit detailing the prejudice and need for severance, in finding that the trial court did not abuse its discretion, this Court has the benefit of reviewing the trial transcript for prejudice to defendant. As discussed above, we find no prejudice. Therefore, defendant did not establish that trial counsel was ineffective for failing to file a written motion to sever the codefendants' trials.

Affirmed.

/s/ Christopher M. Murray

/s/ Joel P. Hoekstra

/s/ Kurtis T. Wilder