

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEPHANIE LYN CUELLAR,

Defendant-Appellant.

UNPUBLISHED

June 16, 2009

No. 284242

Lenawee Circuit Court

LC No. 07-013394-FH

Before: Jansen, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant was convicted at a jury trial of possession of less than 25 grams of a controlled substance (cocaine), MCL 333.7403(2)(v), and resisting or obstructing a police officer, MCL 750.81d(1). Defendant was sentenced to five years' probation for both convictions, plus 60 days in jail for the controlled substance conviction. Defendant appeals as of right and we affirm. This appeal has been decided without oral argument. MCR 7.214(E).

Sergeant Derek Helinski and Officer Gregory Walsh of the Adrian Police Department entered a bar while in full uniform. Helinski observed Jose Villalobos acting suspiciously, as if he were trying to hide something with his hand. Helinski directed Walsh to watch the booth where Villalobos had been sitting with defendant. Walsh turned toward the booth and saw a white substance in a plastic bag. Walsh suspected that the substance was a narcotic.

Defendant reached for the bag with the suspected narcotics but Walsh instructed her not to touch it. Defendant nevertheless grabbed the bag and walked toward the back of the bar. When Walsh started walking toward defendant, defendant began running. Walsh chased and caught defendant. Walsh put defendant in handcuffs and recovered the bag underneath her jacket, which had fallen to the ground when she was running. The substance in the bag was later tested and confirmed to be cocaine.

Defendant first argues there was insufficient evidence to convict her of resisting or obstructing Officer Helinski. Specifically, she contends that, although she was charged with resisting or obstructing Helinski, all of her interactions were with Officer Walsh.

In analyzing the sufficiency of the evidence, this Court reviews the evidence de novo in the light most favorable to the prosecution. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). We must determine whether a rational trier of fact could have found that the

evidence proved the essential elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748, amended 441 Mich 1201 (1992). Under this deferential standard, “a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict.” *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The evidence clearly established that defendant was acting together with Villalobos¹ and that she aided him in the attempt to hide or conceal the plastic bag containing cocaine from Helinski and Walsh. Every person concerned in the commission of an offense, whether she directly commits the act or aids or abets in its commission, may be prosecuted as if she directly committed the offense, such as in this instance. MCL 767.39.

Moreover, the evidence showed that defendant disobeyed the lawful commands of Walsh, who was working jointly with Helinski to detain Villalobos and who was acting under Helinski’s direct orders. The evidence also established that defendant took the cocaine, concealed it, and attempted to flee the bar. As such, defendant was properly convicted of resisting or obstructing a police officer. MCL 750.81d; see also *People v Ventura*, 262 Mich App 370; 374-376; 686 NW2d 748 (2004).

Defendant also argues that she was wrongfully convicted of a crime with which she was not charged. Specifically, defendant maintains she was charged with *attempted* possession of less than 25 grams of cocaine, but that the jury was instructed on the elements of the completed offense of possession of less than 25 grams of cocaine. Defendant argues that counsel was ineffective for not objecting to the jury instructions.

Defendant did not object to the jury instructions, therefore waiving review.² Defendant further failed to move for an evidentiary hearing or a new trial based on ineffective assistance of counsel in the trial court. Therefore, this Court’s review is limited to errors apparent on the record. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The determination as to whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Findings on questions of fact are reviewed for clear error, while rulings on questions of law are reviewed de novo. *Id.*

“Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise.” *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). “[T]o overcome this presumption, defendant must first show that counsel’s performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms.” *Id.* “Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable

¹ Villalobos was tried separately on charges arising from the incident.

² Counsel’s approval of the court’s jury instructions constituted an affirmative waiver of any instructional error, thereby precluding review. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004).

probability that but for counsel's unprofessional errors the trial outcome would have been different." *Id.* at 663-664.

Defendant misstates what occurred at trial when she claims on appeal that the misdemeanor attempted possession count was amended to charge her with a felony possession count. The parties stipulated that the original Count II, possession *with intent to deliver* less than 50 grams of cocaine, be amended to the lesser included offense of possession of less than 25 grams of cocaine. The parties also stipulated that Count III, attempted possession of less than 25 grams of cocaine, be stricken. Thus, Count III, the misdemeanor attempted possession charge, was not amended upward but was instead dismissed outright.

Counsel was not ineffective. The decision to request or refrain from requesting a lesser offense instruction is a matter of trial strategy. *People v Sardy*, 216 Mich App 111, 116; 549 NW2d 23 (1996). Here, defense counsel's decision to remove the more serious offense—namely, possession with intent to deliver less than 50 grams of cocaine—and to substitute a lesser offense—possession of less than 25 grams of cocaine—was clearly trial strategy.

Affirmed.

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra
/s/ Jane E. Markey