STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 16, 2012
v	No. 306516 Bay Circuit Court
MARK JAMES GEBHARDT, Defendant-Appellant.	LC No. 10-010946-FH

Before: FITZGERALD, P.J., and METER and BOONSTRA, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(*iii*), and sentenced to two years' probation. Following his conviction, defendant moved for a new trial based on ineffective assistance of counsel and insufficient evidence. The trial court denied the motion. Defendant appeals as of right. We affirm.

I. BASIC FACTS

While driving northbound on I-75, defendant and his girlfriend, Theresa MacKenzie, were stopped by State Trooper James Moore. During the traffic stop, Trooper Moore located approximately twelve to thirteen ounces of marijuana in the trunk of MacKenzie's vehicle. Moore testified that, upon asking defendant about the marijuana, he stated that "he . . . went down to Flint and he . . . bought the marijuana himself; and, that he was going to be sharing it with his girlfriend, Ms. MacKenzie."

MacKenzie testified that she believed it was legal to purchase the marijuana that day because she had submitted an application fee for the State of Michigan to certify her as a patient and caregiver for purposes of the Medical Marihuana Act, MCL 333.26421 *et seq*. She explained that the only reason there were twelve to thirteen ounces instead of the two-and-a-half ounces allowed per person was because "winter was coming and I knew the roads were gonna be bad . . . ."

At trial, during direct examination, defense counsel asked defendant, "Who put the marijuana in the back of the car?" Defendant responded, "when I got in the car it was in the back seat, so I put it in the trunk." During closing argument, the prosecuting attorney stated,

"The defendant possessed the marijuana only if he had control of it . . ." and "[he] picked it up; he controlled it; he moved it; he possessed it." The jury found defendant guilty as charged.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant claims his counsel at trial was constitutionally ineffective because she elicited a damaging admission from him upon direct examination. We disagree. We review a trial court's decision to deny a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691, 664 NW2d 174 (2003). An abuse of discretion occurs only "when the trial court chooses an outcome falling outside [the] principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law." *People v McCauley*, 287 Mich App 158, 162; 782 NW2d 520 (2010), lv app held in abeyance 792 NW2d 331 (2011). This Court reviews the trial court's findings of fact for clear error, and questions of constitutional law de novo. *McCauley*, 287 Mich App at 162.

To establish a claim of ineffective assistance of counsel, a defendant must satisfy a two-part test, showing that the performance of counsel fell below an objective standard of reasonableness, and that it prejudiced the defendant to such an extent as to deny a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). In order to show prejudice, a defendant must show that, if counsel had not made the error, there is reasonable probability that the result of the proceedings would be different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Additionally, there is a strong presumption that counsel's performance constituted sound trial strategy, which the defendant must overcome. *Id.* at 687.

Decisions on how to question witnesses are presumed to be matters of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Defense counsel asked defendant who put the marijuana in the back of the car. This question appears intended to provide support for defendant's defense that the marijuana was not his. However, defendant responded that he moved the marijuana from the back of the car to the trunk. That answer went beyond the scope needed to properly respond to the question posed. Had defendant confined his answer to the scope of what counsel asked, he would not have incriminated himself. We decline to second-guess defense counsel's strategic choice with the benefit of hindsight. *Id.* Further, in addition to defendant's own admission, Trooper Moore testified that "all [defendant] would tell me was that he bought the marijuana and that he was gonna be sharing it with his girlfriend." Because other testimony at trial implicated defendant for possessing marijuana, defendant cannot demonstrate a reasonable probability that, but for defense counsel's question, the outcome of his trial would have been different. *Stanaway*, 446 Mich at 687-688. Therefore, the trial court's decision to deny the motion for new trial fell within the principled range of outcomes and thus did not constitute an abuse of discretion.

II. SUFFICIENCY OF THE EVIDENCE

Next, defendant claims that due process requires vacating his conviction because the prosecution presented legally insufficient evidence to prove that he possessed with the intent to distribute the recovered marijuana. We disagree. A challenge to the sufficiency of the evidence

to support a conviction raises a question of law, which we review de novo. *People v Medlyn*, 215 Mich App 338, 340-341; 544 NW2d 759 (1996).

To convict a defendant of possession with intent to deliver a controlled substance, MCL 333.7401, the prosecution must prove that the recovered substance is a narcotic, that the substance was of at least the quantity specified by the charge, that the defendant was not authorized to possess the substance, and 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 (1992), amended 441 Mich 1201(1992). The primary components of the offense are possession and intent. *Wolfe*, 440 Mich at 519. Physical control of the substance is not necessary to prove possession, as possession may be either actual or constructive. *People v Harper*, 365 Mich 494, 506-507; 113 NW2d 808 (1962). The defendant need not be the true owner of contraband in order to possess it. *People v Mumford*, 60 Mich App 279, 282-283; 230 NW2d 395 (1975). Further, only minimal circumstantial evidence is required to prove intent, because of the difficulty in proving an actor's state of mind. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

Defendant argues that the only evidence that he possessed marijuana was elicited through the error of defense counsel at trial. However, defendant cites no authority for the proposition that evidence admitted because of defense counsel's allegedly improvident questioning loses any competence for that reason. Additionally, Moore testified that defendant told him that he bought the marijuana. A rational jury could conclude based on the evidence presented at trial that defendant possessed the marijuana.

Defendant also asserts that the evidence does not establish that he intended to distribute the marijuana, because no evidence was presented at trial of typical indications of intent to distribute, such as individual packing of the drug for resale or possession of a large quantity. See *Wolfe*, 440 Mich at 523. We disagree. "'Deliver' or 'delivery' means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship." MCL 33.7105(1); see also *People v* Williams, 268 Mich App 416, 422; 707 NW2d 624 (2005). Trooper Moore's testimony at trial included the following:

> I spoke to him about the suspected marijuana and whether or not it was his. And in talking to him, he told me that it was his; that he, in fact, went down to Flint and he . . . bought the marijuana himself; and, that he was going to be sharing it with his girlfriend, Ms. MacKenzie. . . . I tried to ask him additional questions, but all he would tell me was that he bought the marijuana and that he was gonna be sharing it with his girlfriend.

On the basis of this testimony, a jury could reasonably find that defendant knowingly possessed the marijuana, and had the intention of delivering it to MacKenzie. Additionally, possession of a large amount of marijuana permits the inference of an intent to deliver. *People v Peterson*, 63 Mich App 538, 547; 234 NW2d 692 (1975). Thus, in light of the minimal evidence necessary to prove intent, *McRunels*, 237 Mich App at 181, a rational jury could infer from the quantity, and

from defendant's own statements, that he intended to deliver the marijuana. Therefore, the trial court did not abuse its discretion by denying defendant's motion for a new trial based on insufficient evidence.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter
/s/ Mark T. Boonstra