STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellees,

v

DREW STEPHEN RAMSEY,

Defendant-Appellant.

UNPUBLISHED
January 22, 1999

No. 203283
Ingham Circuit Court
LC No. 96-069965 FH

Before: Gage, P.J., and MacKenzie and White, JJ.

PER CURIAM.

Defendant was convicted following a bench trial of possession with intent to deliver 50 to 225 grams of cocaine, MCL 333.7401(1)(2)(a)(iii); MSA 14.15(7401)(1)(2)(a)(iii), possession of a firearm during the commission of a felony, MCL 750.227(b); MSA 28.424(b), felon in possession of a firearm, MCL 750.224; MSA 28.421, and possession of marijuana, MCL 333.7403(1)(2); MSA 14.14(7403). He was sentenced to prison terms of six to twelve years for the possession with intent to deliver cocaine conviction, ninety days for the marijuana possession conviction, 2½ to 5 years for the felon in possession conviction, and a two-year consecutive term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

On January 29, 1996, the manager of the Lansing Motel 6 contacted officer Eric Painter of the Tri-County Metro Narcotics Squad and reported that at least twenty persons an hour were going to a room registered to Preston Rought, suggesting narcotics dealings. Painter, accompanied by three uniformed Lansing police officers, went to the room to do a "knock and talk." Rought, who was with a woman, consented to the officers' entry into the motel room. When they heard a noise and the sound of the toilet flushing, two of the officers walked toward the bathroom area. As they drew their guns, defendant opened the bathroom door, and the officers saw a bag swirling in the toilet bowl. The bag, containing 40.62 grams of cocaine, was seized and defendant was arrested. Painter asked Rought for permission to search the room, and according to Painter, Rought consented. An officer found a bag containing 14.75 grams of cocaine between two tennis shoes by the west bed and a .380 caliber handgun between the mattresses of that bed. One of the officers patted down defendant and found six .380 caliber bullets in his pants pocket. The officers then prepared to take defendant to the police

station. They asked defendant which coat was his; he indicated the coat near the west bed. A search of the coat produced a box of .380 ammunition. One of the officers then asked defendant, who was barefoot, which shoes were his (there were also shoes by the bathroom). Defendant indicated that the tennis shoes by the west bed were his. Painter testified that before leaving the motel room, another individual came to the room and said he was there to buy cocaine from a man with dreadlocks. Defendant was the only man in the room with dreadlocks. Defendant was then taken to the police station, where a bag with marijuana cigarettes was found in his crotch area.

On appeal, defendant first argues that when the two officers moved from the motel room's doorway toward the bathroom, they exceeded the scope of Rought's consent to enter the room. According to defendant, the seizure of the cocaine from the toilet was therefore invalid under the Fourth Amendment, and the cocaine should have been suppressed as evidence. The trial court concluded that the officers had Rought's consent to enter the motel room, which included the area near the bathroom, and that when defendant voluntarily opened the bathroom door, the cocaine in the toilet was within the plain view of the officers.

Consent to search may be limited in scope and may be revoked at any time. *People v Powell*, 199 Mich App 492, 496-497; 502 NW2d 353 (1993). The standard for measuring the scope of consent for Fourth Amendment purposes is that of objective reasonableness – what a reasonable person would have understood by the exchange between the officer and the person giving the consent. *Florida v Jimeno*, 500 US 248; 111 S Ct 1801; 114 L Ed 2d 297 (1991). Here, the officers testified that no one told them to stay away from the bathroom. Furthermore, these events occurred in a small motel room containing two beds and a "four-foot" alcove or hallway by the bathroom door. Defendant's argument that Rought's consent to the entry of four officers was limited to the doorway in such a small room, without any other evidence that Rought attempted to or did limit the scope of the consent, is not persuasive. Furthermore, to protect themselves, police officers have a right to look where they perceive danger inside premises in which they are legally present. *People v Cartwright*, 454 Mich 550; 563 NW2d 208 (1997). Here, the officers heard a noise in the bathroom and moved closer to investigate for their own safety. Accordingly, the trial court did not clearly err in concluding that the officers had valid consent to enter the room, and that they were properly in the area near the bathroom. *People v Goforth*, 222 Mich App 306, 310; 564 NW2d 526 (1997).

The trial court also correctly concluded that the seizure of the cocaine from the toilet was proper under the plain view doctrine. *Harris v United States*, 390 US 234, 236; 88 S Ct 992; 19 L Ed 2d 1067 (1968); *People v Tisi*, 384 Mich 214, 218; 180 NW2d 801 (1970); *People v Jordan*, 187 Mich App 582, 588; 468 NW2d 294 (1991). The plain view doctrine requires that two elements be satisfied. First, the officer's intrusion into the protected area must have been justified prior to the intrusion, and second, the evidence must be obviously incriminatory or contraband. *People v Blackburne*, 150 Mich App 156, 165; 387 NW2d 850 (1986). Here, as discussed above, the officers' position by the bathroom door was lawful. Further, the officers testified that they could see a bag swirling in the toilet from where they stood, and that it was apparent to them that it probably contained drugs. The seizure of the drugs was therefore proper under the plain view exception.

Defendant next argues that statements he made to the police indicating which shoes and coat were his should have been suppressed because they were made in response to police

questioning without benefit of *Miranda* warnings [*Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966)], and that the cocaine found between his shoes and the ammunition found in his coat should therefore have been suppressed as fruit of the poisonous tree. This claim is also without merit. For the purposes of invoking *Miranda*, interrogation means the express questioning, or its equivalent, on the part of the police that the police should know is reasonably likely to elicit an incriminating response from the defendant. *People v Anderson,* 209 Mich App 527, 532-533; 531 NW2d 780 (1995). Because the questions in this case were intended to identify defendant's shoes and coat in order to properly dress him for transportation to the police station, and were not intended to elicit incriminating evidence, they did not constitute a custodial interrogation for the purposes of invoking *Miranda*.

Defendant also claims that there was insufficient evidence presented at trial to sustain his conviction of possession with intent to deliver 50 to 225 grams of cocaine. In reviewing sufficiency of the evidence questions, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994); *People v Partridge*, 211 Mich App 239; 535 NW2d 251 (1995). Here, the evidence indicated that defendant was in control and possession of the cocaine found in the bathroom. There was also evidence that all of the cocaine found in the motel room was of the same color and texture, making it probable that it was all from the same batch and all belonged to one person. The cocaine found by the west bed was in close proximity to other items belonging to defendant, who maintained he was an overnight guest. The woman with Rought was on the east bed when the police arrived, further suggesting that the west bed had been claimed by defendant. Defendant had in his pants pocket ammunition fitting the gun found in the west bed. From this evidence, it was reasonable to infer that the items on or near the west bed – including the cocaine – were defendant's. Circumstantial evidence and the reasonable inferences which arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Truong* (After Remand), 218 Mich App 325; 533 NW2d 692 (1996). Based on this evidence, the trial court did not err in finding that there was sufficient evidence upon which a rational trier of fact could find the elements of possession with intent to deliver 50 to 225 grams of cocaine proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

In his Standard 11 brief, defendant contends that he was denied the effective assistance of both trial and appellate counsel. We first consider his claim that trial counsel's performance was deficient. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). To establish ineffective assistance of counsel, a defendant must demonstrate that trial counsel's performance was objectively unreasonable and that the defendant was prejudiced by counsel's defective performance. *People v Mitchell,* 454 Mich 145, 164; 560 NW2d 600 (1997). A defendant must also overcome the presumption that the challenged action or inaction was sound trial strategy. *People v Johnson,* 451 Mich 115, 124; 545 NW2d 637 (1996).

In this case, even assuming that counsel's performance was objectively unreasonable, defendant cannot establish that he was prejudiced by counsel's performance. To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). Defendant's primary contention is that counsel was ineffective in failing to get the cocaine and gun suppressed as evidence. As indicated above, however, the evidence was properly admitted; there was therefore no prejudice. Defendant also argues that counsel should not have asked if anyone else came to the motel room while the police were present. This was a matter of trial strategy, however, which appears to have been intended to rebut evidence that there were large numbers of people going to the room. *Johnson, supra*. Defendant claims that trial counsel should have demanded the production of the motel clerk as a witness. This, too, was a matter of trial strategy, and the record strongly suggests that her testimony would have been damaging to defendant's case had she been produced as a witness. Defendant further complains that counsel should have objected to the officers' testimony concerning the motel clerk's call reporting large numbers of people visiting the room. Counsel did object, however. Moreover, the testimony was not inadmissible hearsay since it was not admitted to prove the truth of the matter asserted but to show the reason for the presence of the police officers at the motel. See *People v Jackson*, 113 Mich App 620, 624; 318 NW2d 495 (1982). As for defendant's claim of ineffective appellate counsel, again, assuming that counsel's performance was deficient, defendant has not established how he was prejudiced by the attorney's performance. The brief submitted by counsel, based on defendant's work product, adequately identified issues for review and set forth the applicable law. Unfortunately for defendant, none of the issues requires reversal. Because appellate counsel's performance did not deprive defendant of fair appellate proceedings, we decline to order a new appeal in this case.

Affirmed.

/s/ Hilda R. Gage
/s/ Barbara B. MacKenzie
/s/ Helene N. White