

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DIONICIO ALEMON GONZALEZ,

Defendant-Appellant.

UNPUBLISHED
November 9, 2001

No. 223338
Ingham Circuit Court
LC No. 99-074337-FH

Before: K.F. Kelly, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of delivery of 225 to 650 grams of cocaine. MCL 333.7401(2)(a)(ii). In accord therewith, the trial court sentenced defendant to twenty-five to forty years' imprisonment as a second offense drug offender. MCL 333.7413. The trial court denied defendant's motion for new trial, and he appeals as of right. We affirm.

First, defendant argues that he was denied a fair and impartial trial when the trial judge and prosecutor allegedly engaged in ex-parte communications with a deadlocked jury while in recess. We disagree. Because defendant did not object or bring the matter to the trial court's attention, we review the alleged error under the plain error rule. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain . . . , and 3) the plain error affected substantial rights. The third requirement generally requires a showing of prejudice *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). After a careful review of the record, we find no error. Even if the alleged ex-parte communication occurred, defendant failed to make a firm and definite showing of prejudice. Thus, defendant does not warrant appellate relief on these grounds. *People v France*, 436 Mich 138; 461 NW2d 621 (1990); see also *People v Gonzales*, 197 Mich App 385; 496 NW2d 312 (1992).

Next, defendant argues that he received ineffective assistance of counsel. We disagree. A claim of ineffective assistance of counsel is a constitutional issue. See *People v Rhinehart*, 149 Mich App 172, 174; 385 NW2d 640 (1986). This Court reviews constitutional issues de novo. *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998).

To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional

norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Because it is presumed that trial counsel was effective, defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Specifically, trial counsel's defense – that defendant was expecting a lesser drug of marijuana rather than cocaine – while ultimately ineffective at trial, was valid trial strategy. Merely because a particular defense strategy fails does not definitively indicate that selecting that defense constitutes ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The remainder of the alleged errors cited by defendant are without merit, matters of trial strategy, or inadequately briefed. Indeed, defendant is not entitled to simply assert a position and leave it to this Court to discover the rationale behind them. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997).

Defendant argues next that he was entitled to a new trial because of a newly discovered alibi witness. We disagree.

This Court reviews decisions on motions for a new trial based on newly discovered evidence under a two-prong standard: the trial court's findings of fact are reviewed for clear error, while its ruling on the motion is reviewed for an abuse of discretion. *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1999).

A party seeking a new trial based on newly discovered evidence must satisfy four elements: (1) the evidence itself, and not merely its materiality, must be newly discovered; (2) the evidence must not be merely cumulative; (3) the new evidence would probably cause a different verdict on retrial; and (4) with reasonable diligence the party could not have discovered and produced the evidence at trial. *People v Miller (After Remand)*, 211 Mich App 30, 46-47; 535 NW2d 518 (1995).

We find that the testimony fails because it was not likely to produce a different result on retrial. The trial court evaluated the witness' testimony and found it incredible. We note that the "newly discovered" witness was actually defendant's ex-wife, and mother of his children, to whom he was married at the time of the incident. Until contacted by defendant's appellate attorney, this "witness" claimed that she did have any recollection of the day in question. In light of the overwhelming evidence against defendant and the witness' lack of credibility, the testimony would not produce a different result on retrial. Moreover, with reasonable diligence, defendant should have been able to produce the witness before trial, particularly in light of his claim that she accompanied him when the offense occurred.

Finally, defendant argues that the trial court improperly instructed the jury that defendant had a prior conviction for cocaine distribution. Notwithstanding, a review of the record does not

reveal that the trial court rendered an instruction to that effect. Accordingly, we affirm the trial court's decision denying defendant's motion seeking a new trial.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald