STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 20, 2002
v	No. 237826 Macomb Circuit Court
JAYNE KIMBERLY SCHWERIN, Defendant-Appellant.	LC No. 00-002542

Before: Kelly, P.J., and Jansen and Donofrio, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), possession of marijuana, MCL 333.7403(2)(d), and maintaining a drug house, MCL 333.7405(d). She now appeals as of right. We affirm.

On appeal, defendant first claims that there was insufficient evidence to support her conviction for possession with intent to deliver cocaine. When reviewing a challenge to the sufficiency of the evidence, this Court views the evidence in a light most favorable to the prosecution to determine whether the evidence presented at trial, together with all reasonable inferences therefrom, was sufficient to allow a rational trier of fact to find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-515; 489 NW2d 478, amended 441 Mich 1201 (1992).

To support a conviction for possession with intent to deliver less than fifty grams of cocaine, the prosecution must prove four elements: "(1) that the recovered substance is cocaine, (2) that the cocaine is in a mixture weighing less than fifty grams, (3) that defendant was not authorized to possess the substance, and (4) that defendant knowingly possessed the cocaine with the intent to deliver." *Id*., pp 516-517. Defendant does not dispute the first three elements, but argues that the prosecution failed to present evidence sufficient to establish beyond a reasonable doubt that she possessed the cocaine with the intent to deliver. We disagree.

The record in this case indicates that the police began to conduct surveillance of defendant's home after it was suspected of being the site of drug trafficking. Defendant lived in the house with her son and three other individuals, Dwight Anderson, Anderson's girlfriend, and Jessie Oliver. While conducting the surveillance, the police saw Oliver and another man get into a van registered to Anderson, which was parked in defendant's driveway. The police followed

the van to two residential locations, where the passenger got out of the van and conducted "quick exchanges" with the residents. According to the police, these exchanges were typical of drug sales. As a result, the police conducted a "trash pull" at defendant's house, seizing four bags of trash containing plastic baggies, which tested positive for cocaine residue, along with crack pipes and other drug paraphernalia. Defendant admitted that she discarded this trash.

Thereafter, police executed a search of defendant's home. In the utility closet, which was Oliver's bedroom, the police found a glass stem, which is commonly used to smoke crack cocaine. In a hallway closet, the police found a razor blade and more drug paraphernalia. In one of the bedrooms that had numerous items of women's clothing, the police found what appeared to be two aerosol spray cans whose bottoms had been screwed off. Inside these cans, the police found cocaine and a bag of marijuana. On the bed, the police found a plate with a razor blade that tested positive for cocaine residue. In the bedroom closet, the police also found more cocaine.

"Possession with intent to deliver can be established by circumstantial evidence and reasonable inferences arising from that evidence, just as it can be established by direct evidence." *Wolfe, supra*, 440 Mich 526. A person need not have physical possession of a controlled substance to be found guilty of possessing it. *Id.* at 519-520. "Possession may be either actual or constructive, and may be joint as well as exclusive." *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998). The essential question is whether the defendant had dominion or control over the controlled substance. *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995).

Viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence to establish that defendant possessed the cocaine with the intent to deliver. As the trial court noted, defendant owned the home and had "the care and custody and control of the place." Further, drugs and drug paraphernalia were found throughout the house, including the common areas, supporting the inference that defendant had access to and control over the drugs. In addition, defendant admitted to throwing away the trash containing the drug paraphernalia. A person's power to dispose of a controlled substance has been held to establish a link between that person and the substance. *Wolfe, supra*, 440 Mich 521.

In addition to showing that defendant possessed the cocaine, the prosecution also presented sufficient evidence that defendant intended to deliver the cocaine. Actual delivery is not required to prove a defendant's intent to deliver. *Id.*, p 524. "Intent to deliver can be inferred from the quantity of the controlled substance in the defendant's possession and from the way in which the controlled substance is packaged." *Fetterley, supra*, 229 Mich App 518. Here, the police uncovered twenty baggies that tested positive for cocaine residue. The police also found razor blades, often used by drug dealers to cut rocks of cocaine into smaller pieces for sale, which tested positive for cocaine residue. In addition, the police observed Oliver leave defendant's home and perform "quick exchanges," which are typical of drug sales. These facts are sufficient to establish that defendant intended to deliver cocaine. Therefore, the prosecution presented sufficient evidence to establish beyond a reasonable doubt that defendant possessed with the intent to deliver less than fifty grams of cocaine.

Defendant next argues that her conviction for possession with the intent to deliver was against the great weight of evidence. A new trial based on the weight of the evidence should be

granted only where the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow it to stand. *People v. Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998); *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001).

Defendant sought to show that she did not possess the cocaine by claiming that the drugs belonged to Anderson and his girlfriend. Defendant testified that Mullet, the conservator of a trust fund set up for her son, introduced her to Anderson. Defendant claimed that Anderson occasionally stayed at her house while he did some home repairs for her. According to defendant, Anderson's girlfriend stayed with her because defendant was scared of sleeping in the house with only her son. According to defendant, when she called Mullet and told him that she thought Anderson and his girlfriend might be involved in drugs, Mullet told her to kick them out. Defendant also claimed that the drugs were primarily located in Anderson and his girlfriend's bedroom and that she stayed in the bedroom where no drugs were found. However, Mullet, in his testimony, denied that he introduced Anderson to defendant and claimed that he did not even know Anderson. Mullet also denied that he had a conversation with defendant about evicting Anderson and his girlfriend from the house.

In support of her claim that her conviction for possession with the intent to deliver was against the great weight of evidence, defendant also offered the testimony of her son, Duane, and his friend, Andre Anderson, Dwight Anderson's grandson. Duane testified that defendant often slept in his bedroom and not in the bedroom where most of the drugs were found. Andre Anderson testified that when he stayed overnight at defendant's house on the two occasions, defendant slept in her son's room or on the couch in the living room. On cross-examination, however, Andre Anderson revealed that defendant promised him a sum of money if she was acquitted.

Given the strength of the evidence against her in this case, defendant's conviction for possession with intent to deliver less than fifty grams of cocaine was not against the great weight of the evidence. *Lemmon, supra,* 456 Mich 642.

Finally, defendant argues that she was denied the effective assistance of counsel because her attorney failed to object to Mullet's testimony. Defendant argues that Mullet's testimony violated the attorney-client privilege and that she was harmed because this testimony was very damaging. We disagree.

Because defendant has not moved for a new trial or requested an evidentiary hearing on this issue, our review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was objectively unreasonable and that counsel's defective performance prejudiced the defendant. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Prejudice sufficient to warrant reversal of a defendant's conviction has been defined as prejudice that "affect[s] the outcome of the trial." *People v Pickens*, 446 Mich 298, 332; 521 NW2d 797 (1994).

Here, defendant's claim of ineffective assistance of counsel must fail because defendant cannot establish that Mullet's testimony violated the attorney-client privilege. First, Mullet was

not acting as defendant's attorney. Because defendant never communicated with Mullet to secure legal advice, her communications with Mullet were not privileged. *People v Compeau*, 244 Mich App 595, 597; 625 NW2d 120 (2001). However, even assuming arguendo that defendant' communications with Mullet were privileged, defendant, by testifying about the substance of these communications, waived any such privilege. *McCarthy v Belcher*, 128 Mich App 344, 348; 340 NW2d 848 (1983). Because there was no privilege to assert, defense counsel had no basis to object to Mullet's testimony. A defendant's claim of ineffective assistance of counsel cannot be based on his counsel's failure to make a meritless motion. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Therefore, defendant was not denied the effective assistance of counsel.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Pat M. Donofrio