STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 14, 2008
V	No. 278138 Saginaw Circuit Court
MCKINNEY MUSHATT, JR., Defendant-Appellant.	LC No. 06-027522-FH

Before: Hoekstra, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

A jury convicted defendant of one count of possession with intent to deliver 50 or more but less than 450 grams of cocaine, MCL 333.7401(2)(a)(iii), and one count of maintaining a drug house, MCL 333.7405(1)(d). The trial court sentenced him, as a second habitual offender, MCL 769.10, to concurrent terms of 10 to 30 years' imprisonment for the conviction of possession with intent to deliver cocaine, and 24 to 36 months' imprisonment for the conviction for maintaining a drug house. Defendant appeals his convictions and sentences as of right. We affirm.

Saginaw police officers assisted in executing a search warrant at 512 South 14th Street in Saginaw. Defendant was arrested inside the house. The house was owned by defendant's mother, and he and his mother lived across the street at 507 South 14th Street. According to defendant, the house at 512 South 14th was used for storage. During the search, officers found: keys, letters addressed to defendant, tax documents relating to defendant, two rounds of ammunition, a box of shotgun shells, a box of razor blades, a box of sandwich baggies, several glasses and other containers containing a "chalky" substance, a box of baking soda, a digital scale, a microwave plate and suspected crack cocaine.

Defendant testified that during the search, he informed Saginaw Police Detective Mark Walker that there were no drugs in the house. Specifically, defendant testified that he remarked in a sarcastic tone that Walker would not "find a gram of drugs" in the house. By contrast, Walker testified that defendant told him that the chalky substance about to field tested was "nothing but . . . baking soda"; and that if Walker were "to find some crack cocaine in there, it would be because all of the purities had went to the bottom of the cup." Walker further testified that defendant told him that if the police were to find crack cocaine in the house, they "wouldn't find no more than a gram."

Saginaw Police Detective Albert Fong performed a field test on some white residue found on the microwave plate, and testified that the test indicated the presence of cocaine in the residue. Elaine Dougherty, a forensic scientist at the Michigan State Police Bridgeport Forensic Laboratory, tested several samples of suspected cocaine and crack cocaine that were seized during the search. Dougherty's tests indicated that the samples showed the presence of cocaine.

I. Sufficiency of the Evidence

On appeal, defendant first argues that the evidence presented by the prosecution was insufficient to justify his convictions. We disagree.

In reviewing the sufficiency of the evidence, this Court "must consider not whether there was any evidence to support the conviction but whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992) (citations and internal quotation marks omitted). Our Supreme Court has held that in order to prove the former crime of possession with intent to deliver 50 or more but less than 225 grams of cocaine, the prosecutor must prove that "(1) the defendant knowingly possessed a controlled substance; (2) the defendant intended to deliver this substance to someone else; (3) the substance possessed was cocaine and the defendant knew it was cocaine; and (4) the substance was in a mixture that weighed between 50 and 225 grams." *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998). The elements of possession with intent to deliver 50 or more but less than 450 grams of cocaine are the same except that the last element has a range of 50 to 450 grams rather than 50 to 225. Viewed in the light most favorable to the prosecution, the evidence shows that defendant violated the statute.

Defendant argues that the prosecutor did not show that defendant had possession of the drugs seized from the house because his "fingerprints, . . . DNA or [other] biological evidence" were not found on the drugs or in the glasses containing drug residue that were seized from the house. Defendant also argues that the prosecution failed to show that he had possession of the drugs because it could not prove that he had exclusive access to the house, and also because there was no evidence to show that he manufactured the drugs. Defendant's arguments lack merit.

In *Wolfe*, the Court stated that a person need not have had "actual physical possession of a controlled substance to be guilty of possessing it. Possession may be actual or constructive." *Wolfe, supra* at 519-520. Although "a person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession," any of several various factors may be used to establish the additional connection required between a defendant and the drugs. *Id.* at 520. Constructive possession may be found where defendant's presence is established where illegal drugs have been found; where traces of illegal drugs are found on clothing stored in defendant's pickup truck; or where a defendant's presence is established in a "sparsely furnished apartment" that also contains illegal drugs and large sums of money. *Id.* at 521. In short, "constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband." *Id.*

In the instant case, defendant was found in a sparsely furnished house, which defendant testified was used for storage rather than a place to live. Police officers found cocaine in one of the bedrooms, along with gun paraphernalia and cocaine residue on various items in the kitchen. There was evidence that defendant informed officers that if they were to find any crack cocaine,

they would not find more than a gram. Evidence was also presented that defendant told officers that if they were to find crack cocaine in the residue of a cup, it would be because the "purities" had gone to the bottom of the cup, presumably during a cooking process. Based on the foregoing evidence, it was reasonable for the jury to find that defendant had constructive possession of the cocaine. This evidence is sufficient to show the nexus between defendant and the drugs. See, *Wolfe, supra*. This evidence also satisfies the third element of the offense. Defendant's statements to the police indicate that he knew that the substance found by police was crack cocaine.

There was also ample evidence to support a finding as to the second element of the offense. "Intent to deliver has been inferred from the quantity of narcotics in a defendant's possession, from the way in which those narcotics are packaged, and from other circumstances surrounding the arrest." *Wolfe, supra* at 524. In *Wolfe*, the Court noted that "[n]one of the evidence suggested that the cocaine was possessed simply for personal use. No glass pipes or other paraphernalia typically used to smoke cocaine were found. Rather, all of the evidence indicated that the cocaine was possessed with the intent of selling it." *Id.* at 525.

The record in the instant case indicates that glass pipes were not found in the house. However, both Officer Kevin Revard and Detective Walker testified that razor blades were found in the house and confiscated. Detective Walker further testified that some drug users smoke or snort "lines" of cocaine, which they make by using a razor blade to "chop [the crack cocaine] up to the finest as you could possibly get it . . . until it become[s] . . . a real powdery substance." Then using the razor blade, a drug user would form the powder into a thin line and snort it. Significantly, however, Detective Walker did not conclude that defendant was simply a drug user because of the other items seized from the house. Detective Walker testified: "[W]hen you have a box of razor blades, you have your box of [plastic sandwich] baggies, you have your Pyrex jar or baby jar . . . , when you have all of this, to me, that indicates" the selling of drugs, because the glass jars allowed defendant to make crack cocaine, the razor blades allowed him to divide it into smaller quantities, and he could have used the sandwich baggies to package the drugs by weight for sale.

In addition, the digital scale found in the living room also indicated that the drugs found in the house were not for defendant's personal use. Detective Walker testified that digital scales are often found in drug houses "because of the packaging. . . . If you're going to sell quarter-ounces, which is approximately seven grams of crack, if you're going to do quarter-ounces, . . . you'll weight [sic] it, see if it's close." Walker also testified that white powder residue, which the officers believed to be powder cocaine, was found on the scale, indicating that it was used for weighing drugs. Assuming that defendant had possession of the cocaine, it was reasonable for the jury to find that the evidence presented at trial demonstrated that defendant possessed the cocaine with the intent to sell it. See *Wolfe, supra* at 525.

The testimony of Dougherty established the final element of the offense. Daugherty testified that police provided her for testing two substance filled containers seized from 512 South 14th Street. In one container she found 44 grams of a substance containing cocaine. In the other container, a cup, she found 129.5 grams of a substance containing cocaine. Dougherty acknowledged that the substance in the cup was wet when she weighed and analyzed it, which could affect the analysis of the actual amount of cocaine base in the mixture, but not the weight of the mixture itself. The statute prohibits an individual from possessing with intent to deliver

"any mixture containing [a controlled] substance" in "an amount of 50 grams or more." MCL 333.7401(2)(a)(iii). Thus, the specific amount of cocaine in the mixture tested by Dougherty is immaterial to defendant's conviction under the statute, and it was reasonable for the jury to find that Dougherty's testimony established this element beyond a reasonable doubt.

Defendant also argues that there was insufficient evidence to support his conviction of maintaining a drug house contrary to MCL 333.7405(1)(d). In relevant part, MCL 333.7405(1)(d) provides that a person "[s]hall not knowingly keep or maintain a . . . dwelling, building, . . . or other structure or place, that is frequented by persons using controlled substances in violation of this article for the purpose of using controlled substances, or that is used for keeping or selling controlled substances in violation of this article." Defendant emphasizes our Supreme Court's holding in *People v Thompson*, 477 Mich 146, 155; 730 NW2d 708 (2007), that the phrase "keep or maintain" as used in MCL 333.7405(1)(d) "implies usage with some degree of continuity" and that there was no showing of even a single sale of cocaine at 512 South 14th Street.

There is no legal merit to defendant's claim. MCL 333.7405(1)(d) does not apply only to keeping or maintaining a dwelling or building for the sale of a controlled substance but also to keeping or maintaining a dwelling or building "that is used for keeping . . . controlled substances in violation of this article." In this case, regardless of whether the house at issue was used for the actual sale of cocaine, there was sufficient circumstantial evidence to conclude that defendant kept or maintained the house with some degree of continuity as a place to illicitly keep cocaine. Defendant testified that the house was used for storage but that he would occasionally spend time there. From this, a reasonable fact-finder could conclude that defendant used the house with some degree of continuity. Further, there was evidence that items associated with processing powder cocaine into crack cocaine and packaging it for sale were located in the house, including a box of razor blades, baggies, glass jars, and digital scales, along with mixtures containing cocaine. From this evidence a reasonable fact-finder could infer that defendant was using the house with "some degree of continuity," *Thompson, supra* at 155, as a place to keep cocaine while it was being processed for sale (whether at the house or elsewhere).[1]

II. Evidentiary Rulings, Jury instructions, the Conduct of the Prosecutor and Jail Credit

Defendant next argues that he was denied his due process right to a fair trial by improper evidentiary rulings by the trial court, and by the court's failure to appropriately instruct the jury

[1] The *Thompson* Court stated that evidence of using a vehicle only one time to keep or deliver drugs with no other evidence of continuity would be insufficient to support a conviction of violating MCL 333.7405(1)(d). *Id*. at 157-158. However, from the circumstantial evidence of the items used to process cocaine and the amount of cocaine found in the house a reasonable fact-finder could infer that defendant used the house more than once and with some degree of continuity as a place to process cocaine for sale. Thus, there was sufficient evidence to support defendant's conviction of maintaining a drug house.

or to take independent action on errors made by the prosecutor. Defendant also asserts that the court erred by refusing to grant him jail credit for time served prior to sentencing. These claims lack merit.

Defendant takes issue with the admission of Detective Albert Fong's testimony regarding the field tests he conducted on samples of suspected narcotics seized from 512 South 14th Street. Detective Fong's tests indicated that cocaine was present in the residues found on seized items in the house. According to defendant, Detective Fong's testimony was based on "junk science" due to Detective Fong's lack of training as a chemist and the "scientific uncertainty" of the test. In support of his position, defendant cites testimony from Michigan State Police forensic witness Dougherty, who stated that field tests are not definitive.

Defendant's argument must be rejected for at least two reasons. First, Detective Fong did not hold himself out as a chemical expert nor did the prosecutor seek to qualify him as such. Rather, the prosecutor made a point of clarifying during his examination that Detective Fong was not a chemist, but had training as a police officer in conducting a field test. Thus, there could not have been any confusion on the part of the jury as to Detective Fong's basis for making his assertions, the purpose of his testimony, or his qualifications. Second, defendant does not object to Dougherty's testimony, and she asserted that she "ran several different tests, including a color test, a microcrystalline test[,] . . . an infrared spectrophotometry test, and the gas chromatography mass spectrometry [test] on various samples within the case," and concluded that the samples contained cocaine. Thus, even if Detective Fong's testimony was admitted improperly, the same information would have properly been admitted through Dougherty's testimony as an expert witness in the identification of controlled substances. Therefore, Fong's testimony on the field test results did not deprive defendant of his right to a fair trial.

Defendant also alleges that his right to a fair trial was violated by the trial court's refusal to read CJI2d 8.5 to the jury. At the trial, the court noted that the instruction was for crimes involving aiding and abetting, but defendant argued that it was appropriate because defendant's presence in the house was "not sufficient to prove any type of guilt in this matter." The court denied defendant's request to read the instruction, concluding that the instruction was not appropriate.

CJI2d 8.5 provides as follows: "Even if the defendant knew that the alleged crime was planned or was being committed, the mere fact that [he / she] was present when it was committed is not enough to prove that [he / she] assisted in committing it." This instruction is derived from cases involving aiding and abetting. See, *People v Turner*, 125 Mich App 8; 336 NW2d 217 (1983); *People v Davenport*, 122 Mich App 159; 332 NW2d 443 (1982). Defendant does not cite case law that extends CJI2d 8.5 to cases arising under the statute governing possession with intent to deliver, MCL 333.7401.

In *People v Meshell*, 265 Mich App 616, 621-622; 696 NW2d 754 (2005), this Court stated in its analysis of whether the prosecution had presented sufficient evidence to support the defendant's conviction for possession of methamphetamine that "the defendant's *mere presence* where the controlled substance was found is not sufficient to establish possession; rather, an additional connection between the defendant and the controlled substance must be established" (emphasis added). Here, the trial court did not instruct the jury that defendant's presence at the house was not enough to establish possession. However, the trial court did instruct the jury that

"it is not enough if the defendant merely knew about the cocaine. The defendant possessed the cocaine only if he had control of it or the right to control it."

We conclude the trial court did not commit error requiring reversal. The instruction that the trial court gave to the jury sets forth a higher standard than the mere presence instruction of CJI2d 8.5 or *Meshell*. According to the trial court, defendant's knowledge of cocaine in the house was not enough to convict him under the statute. Instead, the court instructed the jury that the prosecution had to show the defendant had control of or the right to control the substance. Thus, any possible error in this regard was harmless.

Finally, defendant argues that the court wrongly denied him jail credit against his sentence for the 92 days he had served prior to his sentencing. At the sentencing hearing, defense counsel asked the court to consider crediting defendant for time served, but the court declined to do so based on the statement of a representative of the Department of Corrections that because "[defendant] was on parole at the time of the offense, . . . he should receive no jail credit." On appeal, defendant argues that jail credit for time served is mandatory under the statute, and that because the possibility exists that the Alabama courts could refuse to credit defendant for the time he had served prior to his sentencing in Michigan, he should receive credit in Michigan.

MCL 769.11b governs credit for time served prior to sentencing, and states as follows:

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence *shall* specifically grant credit against the sentence for such time served in jail prior to sentencing. [Emphasis added.]

Defendant argues that the use of the word "shall" indicates that granting credit for time served is mandatory in Michigan, with no express exception for defendants who have violated their parole.

However, MCL 791.238(2) provides that a prisoner who has violated the conditions of his or her parole shall not be credited for time served from the date of the violation to the date that the prisoner begins serving the remainder of the previously imposed sentence. Accordingly, "[a] parole detainee who is convicted of a new criminal offense is entitled, under MCL 791.238(2), to credit for time served in jail as a parole detainee, but that credit may only be applied to the sentence for which the parole was granted." *People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004). Further, "a defendant who is on parole from a foreign jurisdiction and held in jail on a parole detainer is not entitled under MCL 769.11b to credit on his Michigan sentence for time served in jail before sentencing." *Id.* at 707. Thus, defendant is not entitled to jail credit.

Defendant further argues that refusal to award him jail time violates the Double Jeopardy and Due Process Clauses. However, any jail time that is not credited to defendant does not implicate the instant sentences, but the sentence underlying the paroled offense. In *People v Watts*, 186 Mich App 686, 687 n 1; 464 NW2d 715 Mich App (1991), the defendant argued that "that he was denied credit for time served for the parole violation." Indeed, the "prosecutor apparently agree[d] with this because he urges that we order that defendant be given credit for

forty-seven days served against the sentence he was serving while on parole." *Id*. Despite the prosecution's concession, this Court held that "we obviously have no jurisdiction to enter an order affecting that case because it is not before us." *Id*. The same is true here, and defendant's claimed violations of the Double Jeopardy and Due Process Clauses do not implicate the sentences imposed in the instant case, only the sentence underlying the paroled offense. We reject defendant's claim that the denial of jail credit against the instant sentences violated his right to Double Jeopardy and Due Process Clauses.

Defendant next claims that he is entitled to reversal due to prosecutorial misconduct. Defendant argues that information elicited from prosecution witnesses was irrelevant and prejudicial, in violation of MRE 402 and 403. According to defendant, Officer Dean Kaufman's testimony concerning the items seized by the officers during the search was irrelevant because the items were not effectively linked either to defendant or the drugs found in the house. Specifically, defendant objects to Kaufman's testimony about the ammunition, shotgun shells, police scanner, and night vision instrument found during the search. Defendant also objects to statements made by the prosecutor arguing that the police scanner worked and seeking to explain why a person in possession of cocaine would have a police scanner, and also why defendant did not have a large amount of money on his person at the time of his arrest.

Issues of prosecutorial misconduct are considered on a "case-by-case basis by examining the record and evaluating the remarks in context, and in light of defendant's arguments." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The propriety of a prosecutor's remarks depends on all the facts of a case. *People v McLaughlin*, 258 Mich App 635, 644; 672 NW2d 860 (2003).

MRE 403 states that evidence, even if relevant, "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]" It is not clear in what way defendant believes the evidence of the non-drug related items prejudiced him. While it is plausible that a jury might have been tempted to think less favorably of defendant based on the gun paraphernalia and police scanner that were found in the house, defendant does not show that such a circumstance in fact changed the outcome of the case. Other evidence submitted at trial was more than sufficient to justify defendant's conviction: the rocks of crack cocaine found in the bedroom, cocaine residue on various items found in the kitchen, white powder residue on the digital scale, plastic sandwich baggies found on the living room table, and defendant's own statements that the officers would find only a small amount of cocaine in the house. Thus, defendant fails to show that any prejudice which may have resulted from the admission of the evidence to which defendant objects on appeal made his conviction more likely than it would have been had the evidence been excluded.

Next, defendant argues that some of the statements made by the prosecutor during his closing argument were improper and prejudicial. In his brief on appeal, defendant cites the following statements as objectionable:

> Now, do we know if the police scanner worked at the time or not? We don't. Are there batteries in it? Yes, there are. And if you look at the photographs, . . . upside down next to [the scanner] is a pack of 24 EverReady batteries. . . . So did it work at the time or not? I don't think the officers testified

> that they knew whether it did or not, but it's there, and the batteries are there. I would suggest to you it's in a condition that it is operable.

The defense strategy centered on defendant's claim of ignorance regarding the drugs found in the house. Defendant also claimed that he did not know to whom the police scanner belonged.

In determining whether the prosecutor's statements constituted misconduct, this Court must consider his "remarks in context, and in light of defendant's arguments." *Thomas, supra* at 454. We conclude it was not unreasonable for the prosecutor to challenge defendant's assertion that he knew nothing about the police scanner by putting forth the possibility that the scanner was in working order, and that when considered in combination with the drugs found in the house, the jury could draw the conclusion that defendant was engaged in drug trafficking. In addition, defense counsel was able to counter this argument during his closing statement, telling the jury that it was not illegal to purchase or own a police scanner, nor was there any evidence that defendant had used it. In addition, defense counsel noted that the scanner was found in the "southwest bedroom" of the house, nowhere near defendant's location in the living room. Thus, the prosecutor's argument that the scanner was operable likely was not particularly prejudicial.

Similarly, the prosecutor's statements regarding the amount of money found on defendant were a proper response to defense counsel's assertion that drug sales were occurring in the house. According to defendant, if the drugs found in the house were worth large sums of money as the prosecutor asserted, defendant should have had more money than the $55 that was found on his person; instead, no large sums were found in the house. Defense counsel argued that despite the prosecutor's "recitation as to how much money all this stuff is, that there's transactions going on . . . no large sums of money [were] found in that house. No large sums of money found on [defendant], which is the most important part. $55." The prosecutor responded to this argument with an analogy to the "beginning of the sales day" at a small business, noting that a small amount was more likely to be in the coffers in the morning, but by the close of the day it might have "[t]housands of dollars." Similarly, the prosecutor stated,

> If you're running a dope house, do you start the day with thousands of dollars in cash? No, that doesn't sound reasonable. Do you start the day with thousands of dollars worth of product . . . to sell? Now that sounds reasonable. How many . . . TV sets does Sears start the sales day with? How many do they end up with at the end of the day? You start with lots of product, you end with little product. You start with little cash, you end up with lots of cash. You need to look at this as the business that the defendant has created.

The prosecutor's remarks were in response to defense counsel's argument that the small amount of cash found on defendant indicated that he was not engaged in drug trafficking. Although defendant objects that "this was all speculation on the prosecutor's part" and there was no evidence regarding a typical sales day for a drug dealer, these comments, in context, are not inappropriate. See *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989) (finding no error in a prosecutor's reasonable response to defense argument). The prosecutor's analogy relating the evidence found in the house—a small amount of cash, and a large amount of drugs—to the sales day of a typical business was not improper or so prejudicial that it violated defendant's right to a fair trial.

Finally, defendant claims that he was denied the effective assistance of counsel by his trial counsel's failure to move to suppress the statements defendant made to Detective Walker while under arrest, or to object at trial to the prosecutor's various instances of alleged misconduct. In order "to find that a defendant's right to effective assistance of counsel was so undermined that it justified reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must further demonstrate 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 Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001) (citations and emphasis omitted). Furthermore, effective assistance of counsel is presumed, and defendant bears a "heavy burden" of proving otherwise. *Id.*

Our Supreme Court has held that there is a strong presumption that trial counsel's actions constituted sound trial strategy under the circumstances. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). In the instant case, defense counsel's failure to move to suppress the statements made by defendant while he was handcuffed and waiting in the living room of 512 South 14th Street during the police search may reasonably have been a part of his trial strategy. During his testimony, defendant offered an explanation as to these statements:

> *Q* [DEFENSE COUNSEL]. [D]id Detective Walker talk to you at all . . . about any drugs that was [sic] found in the kitchen?
>
> *A.* Well, no. We didn't talk about no drugs in the kitchen. They come out the bedroom because I wasn't . .. near the kitchen. . . . I was in the living room near that bedroom. And they come out the bedroom with some – talking, you know, like, look, look. I'm like, that ain't no drug, because I – I'm just knowing this can't be no drugs, you know, I'm like, that ain't no drugs. That's what I said.
>
> *Q*. All right.
>
> *A.* And you know, being sarcastic, I told him, I said, you can look all you want, you won't find a gram of drugs in here.

Defendant's assertion that his statement regarding the amount of drugs the officers were (or were not) likely to find in the house offers an explanation for Detective Walker's testimony that defendant had acknowledged that there were drugs in the house. Further, defendant's explanation also fits within his broader defense at trial—namely, that he was ignorant of the drugs in the house and of any drug sales that were happening therein. Thus, it is not clear that it was not a part of defense counsel's trial strategy not to object to Detective Walker's statements. The admission of the statements afforded defendant an opportunity to defend himself and to explain them in a way that fit within his broader defense strategy.

Defendant also objects on appeal that trial counsel failed to object to the various statements made by the prosecutor that defendant alleges constituted misconduct. As discussed above, the remarks that defendant objects to did not constitute prosecutorial misconduct. There

was no need for defense counsel to object, as counsel is not required to raise objections that lack merit. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Thus, defendant cannot overcome the presumption of effective assistance of counsel.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra