STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 17, 2009
v	No. 281049 Grand Traverse Circuit Court
LEE ALLEN HAYES, Defendant-Appellant.	LC No. 07-010313-FC

Before: Sawyer, P.J., and Servitto and M. J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction following a jury trial of possession with intent to deliver less than 50 grams of cocaine within 1,000 feet of a school, MCL 333.7410(3), and conspiracy to deliver less than fifty grams of cocaine, MCL 750.157a and MCL 333.7401(2)(a)(*iv*). Defendant was sentenced by Grand Traverse Circuit Court Judge Thomas Power on September 28, 2007, as a habitual offender fourth offense, MCL 769.12, to consecutive terms of 3½ years to 20 years in prison for conspiracy and 3½ to 40 years in prison for the possession with intent to deliver. We affirm.

Defendant first argues that he was denied a fair trial because the jury received an inaccurate instruction on the elements of possession with intent to deliver less than 50 grams of cocaine within 1,000 feet of a school. The trial court instructed the jury on the charge as follows:

> To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt: First, that the Defendant knowingly possessed a controlled substance. Second, that the Defendant intended to deliver this substance to someone else. Third, that the substance possessed was cocaine and the Defendant knew it was cocaine. Fourth, that the substance was in a mixture that weighed less than 50 grams. And fifth, that the Defendant possessed the substance on or within 1000 feet of school property. It is not necessary that the Defendant knew he was within 1000 feet of a school. And sixth, that the Defendant was at least 18 years of age.

Before closing arguments, the trial court reviewed the instructions to be given and defense counsel agreed that the above instruction accurately reflected the parties' discussions. Defense counsel again verified the accuracy of the instructions after the trial court had read the

instructions to the jury. Thus, this issue has been waived. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

Alternatively, defendant argues that he received the ineffective assistance of trial counsel when counsel agreed to the above instruction. In order to prevail on a claim of ineffective assistance of counsel, defendant must show: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). In addition, defendant must also overcome a strong presumption that counsel's actions were the product of sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Jury instructions must clearly present the case and the applicable law to the jury, including all elements of the charged offense. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). An error in instructing on the elements of the crime is of constitutional dimension. *People v Carines*, 460 Mich 750, 761; 597 NW2d 130 (1999). However, a defendant cannot establish error by extracting piecemeal portions of the jury instructions, which should be read as a whole. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Even imperfect jury instructions will not serve as a basis for reversal if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Clark*, 274 Mich App 248, 255-256; 732 NW2d 605 (2007).

CJI2d 12.3 is a general instruction for unlawful possession of a controlled substance with intent to deliver. It states is relevant part as follows:

> First, that the defendant knowingly possessed a controlled substance.
>
> Second, that the defendant intended to deliver this substance to someone else.
>
> Third, that the substance possessed was _____ and the defendant knew it was.
>
> Fourth, that the substance was in a mixture that weighed *(state weight)*. [Ordinals, footnotes, and brackets omitted.]

It seems clear that the instruction given on possession with intent to deliver less than 50 grams of cocaine within 1,000 feet of a school simply added two elements—on age and distance from school property—to this general instruction.

Defendant argues that the jury was improperly instructed on the second element of the charged offense for possession with intent to deliver within 1,000 feet of a school when the trial court said that defendant had to have intended to deliver the cocaine to "someone else," rather than "someone else within 1,000 feet of a school area." MCL 333.7410(3) states as follows:

> An individual 18 years of age or over who violates section 7401(2)(a)(*iv*) by possessing with intent to deliver to another person on or within 1,000 feet of

> school property or a library a controlled substance described in schedule 1 or 2 that is either a narcotic drug or described in section 7214(a)(*iv*) shall be punished, subject to subsection (5), by a term of imprisonment of not less than 2 years or more than twice that authorized by section 7401(2)(a)(*iv*) and, in addition, may be punished by a fine of not more than 3 times that authorized by section 7401(2)(a)(*iv*).

Subsections (2) through (6) were added to MCL 333.7410 by 1988 PA 12. Looking at these subsections as a whole, it is clear that the intent of the 1988 legislation was to deter drug trafficking near or on school property[1] by those 18 years old or over. Subsections (2) through (4) increase the penalties provided for the underlying sale or possession drug crimes based upon the age of the violator and the distance from school property. Thus, the requisite intent of the crime in issue is the intent to deliver to someone "on or within 1,000 feet of school property." It is not sufficient that a defendant would have possessed the drug within 1,000 feet but intended to deliver the drug to someone outside the proscribed zone. Accordingly, because the instruction given was in error and the error was plain given the statutory language, an objection to the proposed and delivered instruction would not have been meritless. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Nonetheless, a review of the record shows that the result of the proceedings was unlikely to change even if the court had given a correct instruction. The woman who carried the drugs on her person for defendant testified that defendant asked her to travel with him to Traverse City in order to "make money" and to carry several bags of cocaine, which the woman placed in the area of her crotch. The woman described one drug sale completed in the middle of a road and noted that defendant instructed her to bring the cocaine with her when they left the motel room they went to after this first transaction. The parties stipulated that where defendant and the woman then drove to was within 1,000 feet of school property. The owner of the home at this location had been arrested earlier in the day on drug charges. Given this evidence, defendant cannot establish that he was actually innocent of the crime in issue or that the integrity of the proceedings was compromised. *Carines*, *supra* at 763.

Finally, defendant argues that he is entitled to a corrected presentence investigation report. This asserted error was also unpreserved and is thus reviewed for plain error affecting substantial rights. *Id.*

Because the Department of Corrections (DOC) makes significant decisions based on information contained in a PSIR, a defendant is entitled to have an accurate PSIR forwarded to the DOC. *People v Norman*, 148 Mich App 273, 274-275; 384 NW2d 147 (1986). However, defendant does not assert that the challenged information is inaccurate. Rather, defendant argues that the disputed information is irrelevant. Moreover, he does not assert that his substantial

[1] " 'School property' means a building, playing field, or property used for school purposes to impart instruction to children in grades kindergarten through 12, when provided by a public, private, denominational, or parochial school, except those buildings used primarily for adult education or college extension courses." MCL 333.7410(6)(b).

rights were affected by the inclusion of this information in the PSIR. As such, defendant fails to meet his burden under the plain error rule. *Carines*, *supra* at 763.

Affirmed.

/s/ David H. Sawyer
/s/ Deborah A. Servitto
/s/ Michael J. Kelly