

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
November 22, 2011

v

CHARLES WESTLY GEORGE, JR.,

Defendant-Appellant.

No. 299789
St. Joseph Circuit Court
LC No. 10-016440-FH

Before: WILDER, P.J., and HOEKSTRA and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of unlawful delivery of methamphetamine, MCL 333.7401(2)(b)(1). The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, and as a subsequent offender under the Controlled Substances Act, MCL 333.7413(2), to 10 to 40 years' imprisonment. Defendant's sentence was to be served consecutively to another sentence for which he was on parole. Because we find that defense counsel did not provide ineffective assistance to defendant, we affirm.

Defendant's conviction stems from the sale of a gram of methamphetamine ("meth") to Tina Rothwell, a police informant. Rothwell testified that defendant gave her a gram of meth in exchange for \$100. The transaction occurred in Rothwell's driveway, defendant was sitting in the backseat of a vehicle. Rothwell turned the substance she received from defendant over to the police monitoring the controlled buy as soon as she went back into the house. The entire transaction between Rothwell and defendant was monitored electronically, and the sound and video recordings of the transaction corroborated Rothwell's testimony. The substance defendant gave Rothwell was sent to a laboratory for testing, and the laboratory report verified that the substance was methamphetamine. Defendant testified that although Rothwell paid him, he did not give her any meth. Defendant testified that he never intended to deliver meth to Rothwell, and that he took no steps to obtain meth for her. Defendant indicated that he planned to "rip [Rothwell] off" by taking her money without providing any meth in exchange.

The trial court instructed the jury regarding both the offense of unlawful delivery of methamphetamine and the lesser offense of attempted delivery. Defense counsel objected to the jury instruction on attempt, and argued in his closing that defendant was not guilty of either actual or attempted delivery.

Defendant claims that he was denied effective assistance of counsel because defense counsel argued in his closing against a finding of attempted delivery. We disagree.

“A claim of ineffective assistance of counsel is a mixed question of law and fact. A trial court’s findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo.” *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008) (citation omitted). Because no evidentiary hearing was held, our review is limited to errors apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

“[T]his Court presumes that a defendant received effective assistance of counsel, and the defendant bears a heavy burden to prove otherwise.” *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). “To establish a claim of ineffective assistance of counsel, a defendant must show that his counsel’s performance fell below an objective standard of reasonableness and that counsel’s representation prejudiced him so as to deprive him of a fair trial.” *Id.* To demonstrate defense counsel’s performance fell below an objective standard of reasonableness, defendant must “overcome the strong presumption that his counsel’s action constituted sound trial strategy under the circumstances.” *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). In order to establish prejudice, defendant must show that “but for the error, the result of the proceedings would have been different and that the proceedings were fundamentally unfair or unreliable.” *Garza*, 246 Mich App at 255.

We find that defendant failed to show defense counsel’s performance was deficient. Defense counsel’s argument to the jury that the evidence was not consistent with an attempt conviction constituted reasonable trial strategy. Defense counsel’s decision to argue against a finding of attempt was sound trial strategy because defendant’s own testimony and the rest of the evidence did not support a conclusion that defendant was guilty of attempted delivery of methamphetamine. “The decision to proceed with an all or nothing defense is a legitimate trial strategy.” *People v Nickson*, 120 Mich App 681, 687; 327 NW2d 333 (1982). Moreover, counsel’s performance did not prejudice defendant because the jury was instructed on the offense of attempt, and was thus still able to consider whether an attempt conviction was appropriate. Accordingly, defendant failed to meet his burden of proving he was provided ineffective assistance of counsel.

Affirmed.

/s/ Kurtis T. Wilder

/s/ Joel P. Hoekstra

/s/ Stephen L. Borrello