

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODERICK MATTHEWS,

Defendant-Appellant.

UNPUBLISHED

September 12, 1997

No. 191013

Ingham Circuit Court

LC No. 94-067843-FH

Before: Gribbs, P.J., and Sawyer and Young, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver 225 or more grams but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii). Defendant now appeals as of right. We affirm.

I

Defendant argues that the trial court improperly allowed “profile” testimony regarding drug trafficking. We disagree. With respect to Sgt. Rojeski, the testimony was not “profile” testimony—it was merely testimony that the quantity of drugs involved was consistent with a drug transaction, not personal use. As for the testimony by Officer Brandman, defendant did not object to this testimony and, therefore, did not preserve this issue for appeal.

II

Defendant also argues that he received ineffective assistance of counsel because trial counsel did not object to the drug profile testimony offered by the two deputies. We disagree. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). 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; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) that the result of the proceeding was fundamentally unfair or unreliable. *People v Stanaway*, *supra* at 687-688; *People v*

Poole, 218 Mich App 702, 718; 555 NW2d 485 (1996). As noted above, defense counsel in fact objected to the testimony of one of the deputies. Although defense counsel did not object to the testimony of the other deputy, it seems unlikely that the outcome of the trial would have been different if an objection had been made, in light of the trial court's admission of the testimony to which defense counsel objected. Therefore, defendant has not overcome the presumption that counsel rendered effective assistance.

III

Defendant next argues that there was insufficient independent evidence linking him to the cocaine that was recovered. We disagree. Defendant's reliance on *People v Lewis*, 178 Mich App 464, 468; 444 NW2d 194 (1989), is misplaced, as that case addressed a situation in which there was no direct evidence linking the defendant to cocaine found inside a house. In the present case, the testimony of a witness who was riding with defendant in the car in which the cocaine was found directly linked defendant to possession of the cocaine. Defendant points out that the witness had the cocaine in her possession at the time of defendant's arrest, and that the witness pleaded guilty to the charge of possession. However, such considerations go to the witness' credibility and the weight that should have been given to her testimony, which are factors that are not properly reviewed by this Court in reviewing the sufficiency of evidence. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992).

IV

Finally, defendant contends that the trial court erred in proceeding with trial while defendant was absent. We disagree. On the morning of the second day of trial, defendant called the court to indicate that he did not have transportation from Grand Rapids to the trial in Lansing. The trial was adjourned, during which time defense counsel unsuccessfully attempted to meet defendant in Grand Rapids. The trial was then adjourned for two days. On the morning of the day that the trial was to resume, defendant was still absent from the courtroom. The court allowed defense counsel approximately forty minutes to contact defendant. During that time defense counsel reported that he telephoned someone who said she believed defendant was home asleep, and that she would attempt to contact defendant through his mother. At the end of the time allotted, the court had not heard from defendant, decided to proceed with trial, and instructed the jury "not to consider [defendant's] absence as evidence of his guilt or his innocence."

A criminal defendant has a statutory right to be present when tried. MCL 768.3; MSA 28.1026; *People v Baskin*, 145 Mich App 526, 544; 378 NW2d 535 (1985). Moreover, the Sixth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides a similar guarantee based on the defendant's right of confrontation. *People v Ewing*, 48 Mich App 657, 659; 211 NW2d 56 (1973); *People v Baskin*, *supra* at 544. "The proper test for determining whether a defendant's absence from a part of a trial requires reversal of his or her conviction is whether there is any reasonable possibility of prejudice." *People v Woods*, 172 Mich App 476, 479; 432 NW2d 736 (1988).

In *People v Swan*, 394 Mich 451, 452; 231 NW2d 651 (1975), the Court held that the defendant had waived his right to be present at trial when he was voluntarily absent from the courtroom after the trial began. The judge waited several hours before adjourning the case and four days later the defendant was still absent, and “testimony was received regarding attempts to locate the defendant.” However, this Court in *People v Woods*, *supra*, held that “[a] valid waiver of a defendant’s presence at trial consists of a specific knowledge of the constitutional right and an intentional decision to abandon the protection of the constitutional right. There can be no waiver if either of these elements is missing” (citations omitted). In *Woods*, the defendant had “barricaded himself in his cell and jammed the lock” and refused to come out of his cell to attend his habitual offender trial. *Id.* at 478. This Court found that although the defendant had voluntarily been absent from trial, he had not waived his right to be present at trial because “the record fail[ed] to disclose whether defendant knew that he had a constitutional right to be present at the trial.” *Id.* at 479.

A number of cases have held that a defendant cannot be presumed to have waived his right to be present at trial based on a silent record. See, e.g., *People v Woods*, *supra*; *People v Springer (On Remand)*, 123 Mich App 203, 206; 333 NW2d 224, rev’d in part on other grounds 417 Mich 1060 (1983); *People v Montgomery*, 64 Mich App 101, 103; 235 NW2d 75 (1975); *People v Ewing*, *supra*. In addition, this Court has held that a defendant could not be presumed to have waived his right to be present at trial on the basis of a sketchy record. *People v Montgomery*, *supra*. However, the case at bar does not present such a record. Rather, it is clear that defendant knew when he was to be in court again after the day he was unable to get a ride, but was not present. The trial court indicated that as follows:

[*The Court:*] You’ve [defense counsel] clearly indicated that you told him to be here at 8:30 on Thursday morning. It is 8:52 on Thursday morning, and Mr. Matthews is not here, and I do not find a comment that he’s home asleep to be a very reassuring comment.

I am willing to wait until 9:15. That’s more than half an hour from the time you placed your call, in fact, it’s close to 45 minutes from the time you placed your call because we broke at 8:34 for that call to occur.

If he has not called by 9:15, we are proceeding in his absence.

We are satisfied that the trial court took all reasonable steps to protect defendant’s constitutional rights. In sum, defendant was aware of his right to be present at trial, as well as when he was obligated to be there. Defendant has proffered no valid reason for his absence or that he communicated to the court or his attorney that he was again unable to attend. Accordingly, the court reasonably concluded that defendant was voluntarily absent from trial and that trial could proceed without him.

Affirmed.

/s/ Roman S. Gibbs
/s/ David H. Sawyer
/s/ Robert P. Young, Jr.