

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BENJAMIN WAYNE KOPP,

Defendant-Appellant.

UNPUBLISHED

October 17, 2006

No. 261508

Kent Circuit Court

LC No. 04-007708-FH

Before: Sawyer, P.J., and Wilder and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his conviction, following a jury trial, for bringing contraband into a correctional facility in violation of MCL 800.281(3). Because the trial court properly instructed the jury on the charged offense, and defendant was not deprived of either a fair trial or effective assistance of counsel, we affirm.

On July 22, 2004, defendant reported to the Grand Rapids Correctional Center to serve three days of jail time for missing a required drug test. Upon his arrival, he was searched for contraband and 1.05 grams of marijuana was discovered in his shoe. At trial, defendant acknowledged that the marijuana was in his shoe, but he testified that he had not worn the shoes in more than 28 months, did not know that the marijuana was in his shoe when he reported to the correctional center, and was “shocked” when it was discovered. Defendant was ultimately found guilty of the charged offense and sentenced as an habitual offender, fourth offense, MCL 769.12, to 12 to 240 months’ imprisonment.

Defendant first argues on appeal that the trial court erred when it instructed the jury that, in order to convict him of bringing contraband into or onto a correctional facility, the jury need not find that defendant knowingly, intentionally or willfully possessed the marijuana that was found. We disagree.

Claims of instructional error are reviewed de novo. *People v Milton*, 257 Mich App 467, 475; 668 NW2d 387 (2003). A trial court is required to instruct the jury on the law applicable to the case and to present the case to the jury in a clear and understandable manner. *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001). “Even if the instructions are somewhat imperfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant's rights.” *People v Aldrich*, 246 Mich App 101, 124; 631

NW2d 67 (2001). Questions of statutory interpretation are similarly reviewed de novo. *Title Office, Inc v Van Buren County Treasurer*, 469 Mich 516, 519; 676 NW2d 207 (2004).

The pertinent statute, MCL 800.281(3), states that “[e]xcept as provided in section 2 [regarding medical prescriptions], a person shall not bring any alcoholic liquor, prescription drug, poison, or controlled substance into or onto a correctional facility.” We decline defendant’s invitation to amend the statute to read “[e]xcept as provided in section 2, a person shall not *knowingly* bring any alcoholic liquor, prescription drug, poison, or controlled substance into or onto a correctional facility.”

As this Court explained in *People v Norman*, 176 Mich App 271, 274; 438 NW2d 895 (1989):

In resolving disputed interpretations of statutory language, it is the function of the reviewing court to effectuate legislative intent. If the language of the statute is clear and its meaning unambiguous, a common-sense reading of the statute will suffice and no interpretation is necessary. We find the language of the statute which proscribes the possession of liquor in prison [and as here, of controlled substances in correctional facilities], MCL 800.281; MSA 28.1621, to be clear and unambiguous. Therefore a common-sense reading of the statute will suffice.

In *Norman*, this Court stated, “[c]onspicuously absent from this language [of MCL 800.281(3), quoted above] are words such as ‘knowingly,’ ‘wilfully’ and ‘intentionally’ . . .” *Id.* at 275.

In *People v Ramsdell*, 230 Mich App 386, 391-392; 585 NW2d 1 (1998), this Court analyzed MCL 800.281(4), which is identical to MCL 800.281(3) in structure, but states that “[e]xcept as provided in section 2, a prisoner shall not possess any alcoholic liquor, prescription drug, poison or controlled substance.” This Court held that the statute required only that the prosecutor establish that the defendant was a prisoner and that he possessed a controlled substance. *Id.* It explained:

In enacting the statute, the Legislature straightforwardly set out two, and only two elements of the crime. First, a prosecutor must prove beyond a reasonable doubt that the defendant is, in fact, a “prisoner.” Second, a prosecutor must prove beyond a reasonable doubt that the defendant “possessed a controlled substance (or other item proscribed by MCL 800.281[4]; MSA 28.1621[4]), i.e., that the defendant had actual physical control of the controlled substance. It is undisputed on the record that the prosecutor in this case proved both of these elements beyond a reasonable doubt. There were no other elements for the prosecutor to prove. The word ‘knowingly’ is absolutely absent from the statute as enacted by the Legislature and signed into law by the Governor. [*Id.* at 392.]

The same unequivocally is true with respect to MCL 800.281(3). The statute sets forth two, and only two, elements of the crime: first, that defendant possessed a controlled substance, i.e., he had actual physical control over the controlled substance, and second, that he brought that controlled substance into or onto a correctional facility. It is undisputed that the prosecutor proved both of these elements in the instant case. There is no question that marijuana is a

controlled substance, and that the Grand Rapids Correctional Center is a correctional facility within the meaning of this statute. And, defendant acknowledges that the marijuana was in his shoe when he reported to the facility. The prosecution was not required to prove that defendant's actions in carrying the marijuana into the correctional center in his shoe were knowing, willful or intentional. *Id.* Therefore, the trial court's jury instructions were not erroneous.

Defendant next argues on appeal that he was deprived of a fair trial when the prosecutor introduced highly prejudicial and irrelevant information regarding the program in which defendant was participating and his positive and missed drug tests, for which he was required to serve time in the correctional center. Because defendant did not object to the introduction of this testimony at trial, we review the prosecutor's conduct for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To warrant reversal, defendant must establish the existence of a clear or obvious error that affected the outcome of his trial. *Id.*

Here, defendant admitted that he brought marijuana into the correctional facility (albeit unknowingly) when he reported to serve time. Absent any other evidence, defendant still admitted the essential elements of the crime. We therefore conclude that, even if the prosecutor's conduct in providing the underlying details of his confinement was improper, defendant cannot meet his burden of proving that the error affected the outcome of his trial.

Finally, defendant argues on appeal that his trial counsel was ineffective for failing to object to the asserted instances of prosecutorial misconduct and by failing to argue for jury nullification. On the record before this Court, we disagree.

To establish ineffective assistance of counsel, defendant must show that his attorney's representation fell below an objective standard of reasonableness under prevailing professional norms; that, but for his counsel's errors, there is a reasonable probability that the results of his trial would have been different; and that the proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

At trial, defendant acknowledged that there was marijuana in his shoe when he reported to the correctional center. Defendant asserted that he lacked knowledge that the marijuana was present and did not intend to bring it to the correctional facility. However, as set forth above, neither knowledge nor intent is an element of the instant offense. Rather, to convict defendant, the prosecution was only required to establish that defendant possessed contraband, which he brought into a correctional facility. Given that defendant admitted the two requisite elements of the charged crime, he cannot establish that trial counsel's failure to object to testimony relating to defendant's drug program, the results of defendant's drug tests, defendant's prior record, or information that defendant was reporting to the facility to serve three days for a missed drug test, prejudiced him in any way.

Additionally, we note that, contrary to defendant's assertion, his trial counsel sought jury nullification. "Jury nullification is the power to dispense mercy by nullifying the law and

returning a verdict less than that required by the evidence.” *People v Demers*, 195 Mich App 205, 206; 489 NW2d 173 (1992).

In his closing argument, defense counsel acknowledged that he could not argue that defendant did not intend to bring contraband into the facility because intent was not an element of the offense. Defense counsel subsequently argued that defendant did not know that marijuana was in the shoe and did not intend to bring the marijuana into the correctional facility. He then asked the jury for “justice.” We find that the argument was tantamount to a request for jury nullification. Further, even if it was not, we find the decision whether to seek jury nullification is a matter of professional judgment as to trial strategy, which this Court will not second-guess. See, e.g., *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *People v Strong*, 143 Mich App 442, 449; 372 NW2d 335 (1985).

Affirmed.

/s/ David H. Sawyer
/s/ Kurtis T. Wilder
/s/ Deborah A. Servitto