

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOUGLAS FLOYD TULLOS,

Defendant-Appellant.

UNPUBLISHED

March 8, 2007

No. 264364

St. Joseph Circuit Court

LC No. 04-012463-FH

Before: Hoekstra, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Defendant appeals by right from his jury conviction of operating and maintaining a methamphetamine lab in violation of MCL 333.7401c(2)(d). Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 10 to 30 years' imprisonment. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was a passenger in a vehicle in which materials and equipment used for manufacturing methamphetamine was found. After defendant was arrested and placed in jail, the police, acting on a tip, investigated an apartment building parking lot to locate defendant's van that allegedly also contained materials and equipment to manufacture methamphetamine. The police located the van about 100 feet from the occupied apartment building in which they saw a propane tank, a portable gas stove, and a large gray box. After the police verified defendant's ownership of the van, they called defendant at the jail, and he acknowledged ownership of the van and consented to a search of the van. The police obtained access to the van through a broken driver's side window about 24 hours after defendant's arrest. Inside the van, the police found buckets, funnels, tubing, metal fittings, plastic bags, lighter fluid, anhydrous ammonia, and 96 nasal decongestant pills. Based on their experience, the police believed that such items were commonly used to manufacture methamphetamine. The van also contained defendant's personal belongings, such as clothing, which suggested to the police that defendant was living out of his van. No fingerprints were taken from the van.

On appeal, defendant argues that the prosecutor failed to present sufficient evidence of operating or maintaining a drug laboratory for manufacturing methamphetamine because he was in police custody for 24 hours before the police searched his unlocked van, during which time anyone could have placed the equipment in his van. Defendant also argues that no fingerprints were taken from the van or the items found in the van, and that all the items in the van were legal to own. Defendant claims that this denied him due process of law. We disagree.

This Court reviews de novo a challenge to the sufficiency of the evidence. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). Evidence in a criminal prosecution is sufficient if the evidence, when viewed in the light most favorable to the prosecution, would warrant a reasonable juror finding the defendant guilty beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). The prosecution need only prove the elements of the charged offense and need not disprove every reasonable theory of a defendant's innocence. *Id.* at 400.

The evidence was sufficient to establish that defendant violated MCL 333.7401c, which requires proof of (1) possession of a vehicle, building, location, chemical, or equipment with (2) the knowledge that they will be used to manufacture methamphetamine, (3) within 500 feet of a residence, business, school, or church. The prosecution presented evidence of a propane tank having been exposed to anhydrous ammonia, a camp stove, stove fuel, tubes, funnels, buckets, baggies, and 96 decongestant pills inside defendant's van. These items were intermingled with defendant's clothing and other personal property in the van. The van was located in a parking lot within 100 feet of an apartment building. We find that this evidence, viewed in the light most favorable to the prosecution, is sufficient to establish that defendant knowingly possessed in his van equipment used to produce methamphetamine.

Defendant also claims that his defense counsel was constitutionally ineffective when he failed to object to the improper testimony of a police officer that he knew defendant's van from another investigation and that defendant had been arrested and held in custody for another offense since the night before he was arrested for the instant offense. Defendant argues that this testimony was evidence of other crimes, bad acts, or wrongs and inadmissible under MCR 404(b). Defendant maintains that defense counsel should have moved for a mistrial because the admission of this evidence was highly inflammatory and informed the jury that defendant had been involved in a crime spree. Further, defendant contends that a cautionary instruction would not have cured the error because the jury had already heard the testimony.

This Court reviews unpreserved claims of evidentiary error that implicate a defendant's constitutional rights for plain error. *Hawkins, supra* at 447. Whether a defendant has been denied the effective assistance of counsel is both an issue of fact and an issue of constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews findings of fact for clear error and questions of constitutional law de novo. *Id.* Ineffective assistance of counsel occurs when defense counsel's representation falls below an objective standard of reasonable performance and creates a reasonable probability that, but for defense counsel's unreasonable performance, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Defense counsel's representation enjoys a strong presumption of sound trial strategy. *Id.* at 302. The reasonableness of a trial strategy is not assessed in hindsight, and an unsuccessful trial strategy does not constitute ineffective assistance of counsel. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

In this case, defendant consented to the search of his van, in which the police found equipment commonly used for the production of methamphetamine. As a matter of defense strategy, defense counsel argued that defendant did not knowingly possess the chemicals and suggested that someone else could have placed those items in defendant's open van after defendant had been arrested and while he remained in custody. Although this strategy was not

successful, it was reasonable given the facts of this case. The strategy essentially required defense counsel to elicit testimony that defendant had been arrested and held in custody for 24 hours before his unlocked van was searched. Defense counsel was not ineffective for not objecting to the admission of this testimony because this testimony was essential to his defense strategy.

Further, although defense counsel could have objected to a police officer's testimony that he knew defendant's van from a previous investigation, defense counsel was not ineffective for not objecting. The officer's comment was unresponsive to the prosecutor's question, isolated, and non-specific testimony simply stating that he was familiar with defendant's van from another case, not that defendant had committed any particular crime. Further, an objection would have simply highlighted defendant's other criminal conduct.

Based on our review of the record, we conclude that defense counsel did not render constitutionally deficient assistance of counsel because his representation was not objectively unreasonable and because his representation did not prejudice defendant.

We affirm.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Kurtis T. Wilder