

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL GLEN HATTON,

Defendant-Appellant.

UNPUBLISHED

August 16, 2002

No. 231692

Crawford Circuit Court

LC No. 00-001813-FH

Before: Kelly, P. J., and Saad and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of delivery of marijuana, MCL 333.7401(2)(d)(iii), and conspiracy to deliver marijuana, MCL 333.7401(2)(d)(iii), MCL 750.157(a). He was sentenced as an habitual offender, third offense, MCL 769.11, to a prison term of thirty-five to ninety-six months. Defendant appeals as of right. We affirm.

I. Basic Facts and Procedural History

Defendant's son, Michael James Hatton (Hatton), was a prison inmate at Camp Lehman. In July 1999, Hatton was classified as a minimum-security prisoner and was assigned to a work crew supervised by Department of Corrections officer Emmet Dunlow, Jr. Officer Dunlow's crew was assigned to perform work for the City of Grayling at the Grayling Cemetery. The Department of Corrections kept a trailer at the site to house tools needed by the inmates to perform their duties. Dunlow noted that Hatton typically was the last one out of the van at the cemetery and did not assist in preparing the tools for use. Dunlow became suspicious when Hatton suddenly became eager to be the first one out of the van when the crew arrived at the cemetery and was unusually interested in hooking up the tool trailer to the van. Dunlow requested that Officer Denley monitor Hatton's telephone calls because Dunlow suspected that Hatton was dealing with contraband. Later that same day Denley began monitoring Hatton's telephone calls.

Officer Denley testified that on October 5, 1999, he listened to and later made a tape of two conversations between Hatton and family members. Those conversations were primarily between Hatton and his grandmother and Hatton and his mother. Based on the content of those conversations, Officer Denley reviewed the Camp's telephone logs and discovered that Hatton made a call to one of the two numbers that he contacted on October 5. Denley was able to listen to the earlier recorded conversation on October 3, 1999, between Hatton and defendant (his

father). After listening to the conversations, Denley believed that some sort of contraband had been placed in the Grayling Cemetery. Denley alerted his supervisors, who contacted the Michigan State Police.

On October 6, 1999, Dunlow met at the cemetery with officers from the Michigan State Police. Officers recovered two small cylindrical containers from inside a cinder block upon which the tool trailer's tongue was resting. The two containers were dime coin tubes wrapped in plastic and then wrapped in black electrical tape. Inside each of the coin tubes was approximately 9 to 10 grams of marijuana. Fingerprints found on the inside sticky surface of the black electrical tape matched defendant's fingerprints.

Defendant testified that the conversation between he and his son that was played to the jury concerned his promise to deposit money in his son's account at the camp. He also testified that he was working out of town as a truck driver on October 5, 1999. A representative of the trucking company testified that company records showed that defendant was off-duty from 12:00 a.m. on October 4, 1999, until 2:00 p.m. on October 5, 1999, a period of 38 hours. Defendant was on duty from 2:00 p.m. until 5:00 p.m., driving from his home in St. Helens, Michigan, to Coopersville, Michigan.

During the trial, the prosecutor introduced defendant's visitor application to establish that defendant and his son had a relationship and to establish defendant's address. Included in this document was defendant's answer to the question, "Have you ever been convicted of a felony?" Defendant answered, "Yes," and indicated that the conviction was in December of 1993 in Roscommon for "Del. Marj." Defense counsel did not object to the admission of the document.

The day after the document was published to the jury, defense counsel informed the trial court that the above-referenced statement should have been redacted from the document and that he and the prosecutor reached an agreement to redact the statement in the event the document was again published to the jury. Defense counsel informed the trial court that he did not want any specific instruction on this point. He explained that he felt a general instruction would be preferable to a specific instruction that underscored the inadmissible evidence that was later redacted from the exhibit.

After deliberations, the jury convicted defendant as charged.

II. Ineffective Assistance of Counsel

Defendant argues that he was denied the effective assistance of trial counsel by his attorney's failure to redact inadmissible evidence of a prior conviction from the visitor's application and the subsequent failure to move for a mistrial on the basis of the improperly admitted evidence. We disagree.

To establish 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. *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000). A 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. *Id.* Furthermore, effective assistance of counsel is presumed, and the defendant bears

a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Assuming that defense counsel erred by failing to move to redact the statement in the document regarding defendant's prior conviction for delivery of marijuana prior to its publication to the jury, the question is whether counsel's failure to object fell below an objective standard of reasonableness such that, but for counsel's error, the result of the proceedings would have been different. In deciding this question, we must be mindful of the heavy burden placed upon a defendant in establishing a claim of ineffective assistance of counsel, as well as of the constitutional notion that a defendant is not entitled to a perfect trial, only a fair trial. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994).

In this instance, the visitor application was admitted for the specific purpose of establishing the relationship between defendant and his son as well as defendant's address. After establishing a foundation for admission of the document, the only questions asked of the witness were, "[w]ho is applying for visitation?" and "[i]s there an address . . . and phone number?" No further questions were asked. The questioning was brief, and no testimony was elicited regarding any other information contained in the document. Further, testimony was elicited from defendant himself that he had been to prison. Thus, the jury learned by way of properly admitted evidence that defendant had a prior conviction. Given these circumstances, it is unlikely that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Henry William Saad
/s/ Michael R. Smolenski