

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLARENCE COUNTRYMAN,

Defendant-Appellant.

UNPUBLISHED

April 12, 2005

No. 252502

Wayne Circuit Court

LC No. 03-004438-01

Before: Whitbeck, C.J., and Zahra and Owens, JJ.

PER CURIAM.

A jury convicted defendant of possession with intent to deliver less than five kilograms of marijuana, MCL 333.7401(2)(d)(iii), and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to three years' probation for the possession with intent to deliver less than five kilograms of marijuana conviction, and to two years' imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

I. Basic Facts and Proceedings

On March 25, 2003, officers from the Detroit Police Department obtained a warrant to search a house located on Beaconsfield in the city of Detroit for narcotics. The police executed the search warrant the next day. During the execution, Officer Sharon Johnson, who was charged with securing the outside of the house, saw defendant attempting to exit a rear window and discard a weapon and a box. She announced to the other officers that defendant had a gun, and ordered defendant back inside the house. Defendant complied with the order. Johnson then confiscated a loaded .38 Smith and Wesson gun near the window. Officer Keith Marshall, who was also assigned to outside security, heard Johnson and responded to her location. Marshall confiscated the box that defendant discarded, and found seventeen plastic packets, each containing approximately one gram of marijuana.

Officers inside the dwelling also heard Johnson and moved toward the back of the house, where they found defendant and another person in the kitchen. Numerous empty Ziploc bags were found throughout the house. Defendant had in his possession \$130 in small bills.

II. Lesser Included Offense Jury Instruction

Defendant first argues that the trial court committed error requiring reversal in refusing to instruct the jury on the lesser included offense of possession of marijuana. We disagree.

A. Standard of Review

Defendant preserved, by timely objection, the trial court's refusal to instruct the jury on possession of marijuana. *People v Fletcher*, 260 Mich App 531, 558; 679 NW2d 127 (2004). This Court reviews de novo preserved claims of instructional error. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253, rem'd 467 Mich 888; 653 NW2d 406 (2002).

In addition, harmless error analysis is applicable to instructional errors involving necessarily included lesser-offenses. *People v Cornell*, 466 Mich 335, 361, 646 NW2d 127 (2002). The instant case involves nonconstitutional error that has been preserved by defendant's request for the lesser included instruction.

A preserved, nonconstitutional error is not a ground for reversal, unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative. Stated another way, the analysis focuses on whether the error undermined reliability in the verdict. Therefore, to prevail, defendant must demonstrate that it is more probable than not that the failure to give the requested lesser included . . . instruction undermined reliability in the verdict. [*Cornell, supra* at 363-364 (internal citations omitted).] “[I]t is only when there is substantial evidence to support the requested instruction that an appellate court should reverse the conviction.” *Cornell, supra* at 365. [T]his ‘substantial evidence’ standard for determining whether reversal is required on the basis of instructional error differs from the standard for determining whether the error occurred,” “because more than an evidentiary dispute . . . is required to *reverse* a conviction; pursuant to MCL 769.26, the ‘entire cause’ must be surveyed.” *Id.* at 365-366 (emphasis in original).

B. Analysis

In *Cornell*, our Supreme Court held that, “under MCL 768.32, a lesser offense instruction is appropriate only if the lesser offense is necessarily included in the greater offense. *People v Nickens*, 470 Mich. 622, 626; 685 NW2d 657 (2004). “Necessarily included lesser offenses are offenses in which the elements of the lesser offense are completely subsumed in the greater offense.” *Id.* quoting *People v Mendoza*, 468 Mich. 527, 532 n 3, 664 NW2d 685 (2003). Thus, an instruction on a lesser offense is proper where “all the elements of the lesser offense are included in the greater offense, and a rational view of the evidence would support such an instruction.” *Id.* quoting *Mendoza, supra* at 533. These principles apply equally to misdemeanor lesser offenses and felony lesser offenses. *Cornell, supra* at 354.

The elements of possession of marijuana are: (1) the defendant possessed a controlled substance, (2) that the substance was marijuana, and (3) that the defendant knew the substance in his possession was marijuana. *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998); MCL 333.7403(2)(d). The elements of possession with intent to deliver marijuana are: (1) the defendant knowingly possessed marijuana, (2) the defendant intended to deliver this

substance to someone else, (3) the substance possessed was marijuana, and defendant knew it was marijuana, and (4) the substance was in a mixture that weighed a specific weight. *People v Delongchamps*, 103 Mich App 151, 160; 302 NW2d 626 (1981); MCL 333.7401(2)(c); CJI2d 12.3. Because it is impossible to commit the crime of possession with intent to deliver marijuana without having committed the crime of possession of marijuana, possession of marijuana is a necessarily included lesser offense of possession with the intent to deliver marijuana. *Cornell, supra* at 361.

The element distinguishing possession with the intent to deliver marijuana possession of marijuana is the “intent to deliver.” Here, the evidence presented at trial reflects no real dispute concerning whether the person that possessed the marijuana, whether that person was defendant or someone else present in the house, intended that the marijuana be delivered to others. The record clearly reflected that marijuana was being sold from the house. Indeed, even as the police were executing the search warrant, a person approached and attempted to purchase narcotics at the house. In addition, numerous Ziploc bags were found throughout the house, and the box that defendant discarded out the window contained marijuana that trial testimony established was packaged in Ziplocs for delivery to others. Also, the existence of the gun that defendant discarded out the window suggests it was a drug house.

Though defense counsel questioned whether the above evidence established the “intent to deliver” element beyond a reasonable doubt, there was no dispute in regard to the existence of the above evidence. Moreover, a rational view of the evidence does not support the argument that defendant possessed the marijuana but did not intend that it be delivered. This argument is belied by undisputed evidence that marijuana was being sold from the house, that the marijuana found at the house was packaged for delivery (not personal use), and that defendant possessed \$130 in small bills, which is consistent with drug trade. Thus, we conclude that the trial court did not err in refusing to instruct on the lesser included offense of possession of marijuana.¹

III. Refusal to Reopening the Proofs

Defendant last argues that he was denied his constitutional right to the effective assistance of counsel when defense counsel failed to make a motion to reopen the proofs to allow defendant to testify and that the court erred when it failed to sua sponte reopen the proofs to allow defendant to testify. We disagree.

¹ Even assuming that the trial court erred in refusing to instruct on lesser included offense of possession of marijuana, we would conclude that reversal is not required. To establish that an error is not harmless, a defendant must demonstrate that it is more probable than not that the failure to give the requested lesser included misdemeanor instruction undermined reliability in the verdict. *Cornell, supra* at 364. Here, defendant did not focus his defense on the “intent to deliver” element, but generally disputed the weight of all the evidence presented against him. Thus, defendant presented his central claim to the jury, which the jury rejected. Under the circumstances, we cannot conclude that trial court’s refusal to instruct the jury on an undeveloped incidental claim could have undermined reliability in the jury verdict. *Cornell, supra* at 364.

A. Standard of Review

When reviewing a claim of ineffective assistance of counsel, when an evidentiary hearing is not previously held, this Court's review is limited to the facts contained on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002); *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2002). This Court reviews for plain error affecting substantial rights defendant's unpreserved claim that trial court erred in refusing to reopen the proofs and allow defendant to testify. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

B. Analysis

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness, and (2) that there is a reasonable probability 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). To show that counsel's performance was below an objective standard of reasonableness, a defendant must overcome the strong presumption that his counsel's actions constituted sound trial strategy under the circumstances. *Id.* at 302. Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

We reject defendant's claim that he was denied the effective assistance of counsel because his counsel failed to move to reopen the proofs to allow him to testify. The record does not support defendant's argument that he only waived his right to testify because "his attorney gave him an impression that he had no choice." Defendant, on three occasions, stated that on the record that it was his decision not to testify. Thus, the record only reflects that defendant knowingly made a decision not to testify, and therefore, defendant has failed to establish that he was denied the effective assistance of counsel. *Toma, supra*, at 302-303.

We also reject defendant's claim that the trial court erred in not sua sponte reopening the proofs to allow defendant to testify. Defendant relies on *Solomon, supra*, where this Court found that the trial court abused its discretion when it failed to honor a defendant's request to reopen the proofs, when there was no indication that the defendant waived his right to testify and there was no indication that the prosecution would have suffered any surprise or prejudice if the defendant was allowed to testify. *Solomon, supra*, at 533-535. Here, although defendant's statement that "I got to say what I got to say now," could be regarded as a request to reopen the proofs to allow him to testify, and there was no indication that the prosecution would have suffered any surprise or prejudice if defendant was allowed to testify at this point, *Solomon* is distinguishable. Defendant gave no clear indication that he wanted to reopen the proofs and he did clearly indicate that he voluntarily decided to waive his right to testify. Moreover, the trial

court, after hearing defendant suggest that he would like testify, stated: “I want to know on this record was it your own decision that you not testify in this case.” Defendant replied, “Yes. Yes. Yes.” Given that defendant expressly waived his right to testify, defendant has failed to show that plain error affecting his substantial rights.

Affirmed.

/s/ William C. Whitbeck

/s/ Brian K. Zahra

/s/ Donald S. Owens