STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDY T. STRADLEY,

Defendant-Appellant.

UNPUBLISHED
March 3, 1998

No. 198140
Oakland Circuit Court
LC No. 96-145879-FH

Before: McDonald, P.J., and Sawyer and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of home invasion, second degree, MCL 750.110a(3); MSA 28.305a(3), and of being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. Defendant was sentenced to five to thirty years' imprisonment as an habitual offender. He now appeals as of right and we affirm.

Defendant took a snowblower from a garage in the early morning hours of February 1, 1996. He raises numerous issues upon appeal, none of which have merit.

Defendant first argues that he was denied the effective assistance of counsel because his trial counsel failed to call two res gestae witnesses, who would have resolved inconsistencies in the witnesses' testimony and proved that a res gestae witness had identified the wrong person. We disagree.

To prove ineffective assistance of counsel, defendant must prove that trial counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's error, the outcome of the trial would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Trial counsel is presumed competent, and defendant has the burden of proving that the complained of conduct is not within trial strategy. *Id*. Ineffective assistance of counsel can take the form of failure to call witnesses only if the failure deprives the defendant of a substantial defense. A defense is substantial if it might have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated on other grounds 453 Mich 900 (1996).

We find that the testimony of the two res gestae witnesses would not have made a difference in the outcome of the trial. There was no evidence that the driver of the car chasing defendant or the passenger who was sitting directly behind him observed defendant or saw anything different than what the endorsed witnesses saw. Moreover, based upon the testimony, we find that the trial witnesses had a better view of defendant than did these two witnesses. Accordingly, defendant has failed to overcome the burden of effective assistance of counsel.

Next, defendant argues that the trial court erred in denying his motion to dismiss because the prosecution failed to produce the two res gestae witnesses pursuant to statute.

Pursuant to MCL 767.40a(3); MSA 28.980(1)(3), the prosecuting attorney must provide defendant with a list of the witnesses he or she intends to produce at trial not less than 30 days before trial. The prosecutor has a duty to disclose the names of further res gestae witnesses as they become known. MCL 767.40a(2); MSA 28.980(1)(2). The only relevant inquiry, upon entry of a guilty verdict, is whether the prosecutor's failure to produce the witness resulted in prejudice to the defendant. *People v Jackson*, 178 Mich App 62, 66; 443 NW2d 423 (1989). In the present case, the parties stipulated to waiving the testimony of the two witnesses. Moreover, as discussed above, defendant was not prejudiced by their failure to testify because nothing in the record indicates that either of them saw anything differently than the other witnesses that were called or that they could have identified the driver. Therefore, we find that the trial court did not abuse its discretion in denying defendant's motion to dismiss.

Defendant also argues that the prosecutor improperly shifted the burden of proof to him during closing arguments when she implied that he was guilty because he did not produce any witnesses. However, because defendant failed to object below, appellate review is precluded unless a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *Stanaway, supra* at 687.

When read in context, the prosecutor's comments merely reflected a clarification of defense counsel's closing argument that two witnesses testified that defendant was not the man in the truck. Her comments did not imply that defendant should be found guilty because he presented no witnesses. Therefore, manifest injustice will not result since the comments were not improper.

Defendant also argues that he was denied a fair trial because the trial court denied his motion to dismiss due to pre-arrest delay and did not compel preservation of physical evidence, namely his truck. The threshold test for determining whether a delay constitutes a denial of due process is whether the defendant suffered prejudice. Once the defendant has shown prejudice, the burden of persuasion shifts to the prosecution to show that the reasons for delay were sufficient to justify the prejudice. *People v Reddish*, 181 Mich App 625, 627; 450 NW2d 16 (1989) (citations omitted). In the present case, we do not find how defendant was prejudiced by the one-month delay. Defendant only argues that there was no reason for the delay and presents no evidence of any prejudice to himself as a result of the delay. Thus, the trial court did not abuse its discretion. *People v McCartney*, 72 Mich App 580, 589; 250 NW2d 135 (1976).

Defendant also argues that he was prejudiced because the police did not take into evidence his green colored pick-up truck. We do not find that defendant was prejudiced.

"Unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Arizona v Youngblood*, 488 US 51, 52; 109 S Ct 333; 102 L Ed 2d 281 (1988). We do not find that the truck was material to defendant's case or that there was bad faith on the part of the police in failing to preserve the truck as evidence. Specifically, the police officer described for the jury the pick-up truck in which defendant arrived, which was a different color than that described by two of the witnesses. Therefore, the jury was clearly aware of this fact. Moreover, the officer testified that he never found the blue pick-up truck as described by the two witnesses. We do not find that if the green pick-up truck had been preserved and admitted into evidence, it would have created any reasonable doubt as to defendant's guilt or innocence in light of the fact that the jury was informed as to the color of the truck he drove to the police station for questioning. Finally, defendant does not offer any evidence to indicate that there was bad faith on the part of the police or the prosecution in not producing the truck, and we do not find any. Accordingly, defendant's argument has no merit.

Finally, defendant raises numerous issues regarding the witness' identification of him, only one of which has been preserved for appeal and will be addressed. Specifically, defendant argues that he was denied a fair trial because he was denied counsel at the photographic display. In the case of photographic identification, the right of counsel attaches with custody. *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993). The record shows that the witness reviewed photographs one week after the crime and identified defendant at that time. Defendant was not questioned by the police until some weeks after the identification. Thus, we find that defendant was not in custody when the photographic identification took place and he had no right to counsel.

Affirmed.

/s/ Gary R. McDonald
/s/ David H. Sawyer
/s/ Joel P. Hoekstra