

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACK ROBERT COOPER,

Defendant-Appellant.

UNPUBLISHED

April 14, 2005

No. 251531

Kent Circuit Court

LC No. 02-007764-FC

Before: Judges Neff, P.J., and White and Talbot, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529, and was sentenced as a habitual offender, fourth offense, MCL 769.12, to a term of seventeen to forty years' imprisonment. He appeals as of right. We affirm.

Defendant was convicted of robbing a Dairy Queen restaurant in Grand Rapids. The store employees could not positively identify the perpetrator because he covered his face with a child's sweatshirt. The police found the sweatshirt in the restaurant's parking lot and DNA was detected on portions of the sweatshirt that matched defendant's DNA. The sweatshirt was also identified as belonging to a relative of defendant's girlfriend.

Defendant argues that his due process rights were violated because the trial court denied defendant's motion to suppress the DNA evidence despite the fact that the police destroyed the sweatshirt before trial. "Whether defendant's right to due process was violated is a question of law. This Court reviews questions of law de novo." *People v Walker*, 234 Mich App 299, 302; 593 NW2d 673 (1999). We review the trial court's findings of fact for clear error. MCR 2.613(C).

In order to prevail on his argument, defendant was required to show that the police acted in bad faith.

The Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady* [*v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963)], makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to

tests, the results of which might have exonerated the defendant. . . . We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that 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. [*People v Huttenga*, 196 Mich App 633, 642-643; 493 NW2d 486 (1992), quoting *Arizona v Youngblood*, 488 US 51, 57-58; 109 S Ct 333; 102 L Ed 2d 281 (1988).]

Defendant bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith. *People v Ricardo Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992).

In this case, DNA testing was conducted on two samples of the sweatshirt, which were cut out from the sweatshirt. Those samples were not destroyed and were still available for testing at the time of trial. But the remaining portion of the sweatshirt was destroyed after a police detective mistakenly included it on a list of property that could be destroyed. The trial court did not clearly err in finding that the sweatshirt was inadvertently included on the list and that its destruction was not in bad faith. Further, defendant has not shown that the evidence might have been exculpatory. As the trial court observed, the samples taken from the sweatshirt were not destroyed and were still available for further testing. DNA found on those samples matched defendant's DNA and, even if DNA could have been found on the destroyed portion of the sweatshirt, that would not have eliminated defendant as a suspect. Accordingly, the trial court did not err in denying defendant's motion to suppress the DNA evidence.

Defendant also argues that the evidence was insufficient to convict him of armed robbery because the prosecution failed to prove that he was the person who committed the charged offense. Defendant's argument is premised on his claim that the DNA evidence should have been suppressed. Because we have concluded that the DNA evidence was admissible, defendant's argument lacks merit. Although the store employees could not positively identify defendant as the perpetrator because the perpetrator was wearing a mask, defendant's physical characteristics matched those of the perpetrator, and DNA that matched defendant's DNA was detected on a sweatshirt that was found in the store parking lot and was identified as having been worn as a mask by the perpetrator. Additionally, defendant's girlfriend's great niece, whom defendant and his girlfriend often visited, identified the sweatshirt as belonging to her. Viewed in a light most favorable to the prosecution, the evidence was sufficient to identify defendant as the perpetrator beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-515; 489 NW2d 748 (1992).

Next, defendant argues that trial counsel was ineffective. In order for this Court to reverse defendant's conviction due to ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced defendant that he was denied his right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant

must show that there was a reasonable probability that, but for his counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996). The burden is on defendant to establish factual support for his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant argues that the trial court improperly foreclosed the rereading of testimony when responding to questions from the jury and that counsel was ineffective for failing to object. The record discloses that the trial court was not asked to reread testimony, but was asked specific questions about an expert witness' testimony that were not specifically addressed in her testimony. The trial court responded that it was not in a position to answer the jury's questions. Because the jury did not request a rereading of the expert's testimony, counsel was not ineffective for failing to object to the trial court's response on this basis.

Defendant argues that counsel was also ineffective for not requesting an instruction on a lesser included offense. But defendant does not identify what lesser offense instruction should have been requested. Furthermore, defendant's theory at trial was that he was not involved in the offense. Thus, a request for an instruction on a lesser offense would have been inconsistent with defendant's theory of defense. Defendant has not overcome the presumption that counsel's decision not to request a lesser included offense instruction was sound trial strategy. *Tommolino*, *supra* at 17.

Defendant also argues that counsel should have objected to the admission of photographs of the sweatshirt because the probative value of this evidence was substantially outweighed by the danger of unfair prejudice. MRE 403. The photographs were probative because they enabled witnesses to identify the sweatshirt as the same sweatshirt that was worn by the perpetrator, and which belonged to a relative of defendant's girlfriend. Defendant has not demonstrated how the photographs were unduly prejudicial under MRE 403. Because any objection to the evidence on this basis would have been futile, counsel was not ineffective for failing to object. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Lastly, defendant argues that counsel was ineffective for not requesting a lineup. We disagree. Each of the store employees admitted at trial that they could not positively identify defendant as the perpetrator. We fail to see how a lineup could have aided defendant in this situation. Instead, counsel chose to cross-examine the police detective at trial about the failure to conduct a lineup, suggesting that this shed doubt on defendant's identity as the perpetrator. On this record, defendant has not shown that counsel's decision not to request a lineup was either objectively unreasonable or prejudicial.

For these reasons, defendant has failed to establish that counsel was ineffective.

Affirmed.

/s/ Janet T. Neff
/s/ Helene N. White
/s/ Michael J. Talbot