

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD ALLEN WOLFE, JR.,

Defendant-Appellant.

UNPUBLISHED
December 1, 2005

No. 256441
Oakland Circuit Court
LC No. 2003-188385-FH

Before: Whitbeck, C.J., and Saad and O’Connell, JJ.

PER CURIAM.

The jury convicted defendant of possession with intent to deliver fifty or more but less than 450 grams of cocaine, MCL 333.7401(2)(a)(iii), carrying a concealed weapon (“CCW”), MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b.¹ The trial court sentenced defendant to a prison term of ten to twenty years for the possession with intent to deliver cocaine conviction, and eighteen days for the CCW conviction, to be served consecutive to a two-year prison term for the felony-firearm conviction. He appeals of right, and we affirm defendant’s convictions and sentences.

I. Facts

On May 18, 2002, Pontiac Police Officers Charles Janczarek and Michael Miller observed defendant speeding and driving erratically. Defendant straddled traffic lanes, nearly struck two parked cars, and abruptly turned into an alley with a steep incline and rough, rocky pavement. Defendant’s car hit the top of the incline, and stopped. Defendant got out of the car, dropped a cell phone, and staggered toward the officers. Janczarek observed that defendant’s eyes were bloodshot, and that his breath smelled of alcohol. Miller asked defendant if he had been drinking, and defendant replied that he had consumed seven or eight beers during the previous four hours.

The officers conducted a pat-down search of defendant and found plastic bags full of Vicodin pills, a rolled-up twenty-dollar bill, more than \$3,000 in cash, and a small quantity of

¹ An additional charge of operating a vehicle while impaired, MCL 257.625(3), was dismissed.

cocaine. Janczarek administered a horizontal gaze nystagmus test, which is a field sobriety test in which the officer checks for involuntary eye movements while the suspect follows the officer's finger with his eyes. Defendant's eyeballs jerked, indicating that he was intoxicated. Janczarek did not offer any other field sobriety tests, because the pavement in the alley was too rough and uneven for the walk-a-straight-line or stand-on-one-leg tests. Janczarek did not have the equipment for performing a Breathalyzer test, and he did not call for the equipment because time was of the essence. Janczarek arrested defendant for operating a vehicle under the influence of alcohol.

Janczarek searched defendant's car and found a duffle bag containing 73.68 grams of cocaine, a type of scale commonly used in drug dealing, and a revolver.

Before trial, defendant moved to suppress the evidence found in the duffle bag and contended that the search was illegal because the officers lacked probable cause to arrest him. The trial court determined that the officers had probable cause to arrest defendant for driving under the influence of alcohol, and therefore denied his motion to suppress.

On the second day of trial, defendant attempted to call two witnesses to testify that other persons had access to defendant's car shortly before the police discovered the contraband. The trial court did not permit these witnesses to testify, because they were not identified on defendant's pretrial witness list.

At trial, defendant claimed that the duffle bag and its contents belonged to his girlfriend's ex-husband. He testified that he was living with his girlfriend, Shelly Wallace, when her ex-husband was released from prison and reconciled with her. Defendant left Wallace's house and moved in with a friend. Several of his friends helped him move his possessions out of her house, and he believed one of them inadvertently put the duffle bag in his car. On redirect examination, after the prosecutor attempted to elicit discrepancies in defendant's theory, defense counsel asked defendant whether he knew if the police had questioned Wallace. Defendant replied, "I know that they haven't." On recross examination, the prosecutor asked defendant whether he had spoken with Wallace, suggesting that he could not know whether the police had questioned her because he no longer had contact with her. Defendant replied, "Me and Shelly are still friends. If they had spoke to her, she would have said something to me." The following exchange ensued:

Q. Are you still friends now?

A. Yeah.

Q. Even after she tried to evict you in – last year?

A. Yes.

Q. Okay. You're – even after she lodged charges against you for assault and got a PPO against you, you're still friends?

Defendant moved for a mistrial, arguing that the last question was impermissible under MRE 404(b). The prosecutor responded that defendant's testimony opened the door to these matters, and made them relevant to his credibility. The trial court denied the motion.²

II. Analysis

A. Motion to Suppress

Defendant says that the trial court erred in denying his motion to suppress the evidence found in the duffle bag. We review de novo a trial court's ultimate decision on a motion to suppress. *People v Beuschlein*, 245 Mich App 744, 748; 630 NW2d 921 (2001). However, we review the trial court's underlying findings of fact for clear error. *Id.*

The United States and Michigan Constitutions protect individuals against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. Generally, evidence obtained in violation of the Fourth Amendment is inadmissible as substantive evidence in criminal proceedings unless the police conduct falls under one of the established exceptions to the warrant requirement. *People v Kazmierczak*, 461 Mich 411, 418; 605 NW2d 667 (2000). A search incident to an arrest is one of these exceptions, because the arrest itself establishes the authority to search. *People v Eaton*, 241 Mich App 459, 461-462; 617 NW2d 363 (2000). A search incident to an arrest is valid only if the arrest is lawful. *Id.* at 463. When conducting a search incident to a lawful arrest, the police may search the arrestee and the area within his immediate control, including the passenger compartment of an automobile the arrestee occupied contemporaneous with the arrest, and any containers within the passenger compartment. *Id.*

Defendant maintains that the search was not valid because Janczarek lacked probable cause to arrest him. The police may arrest an individual without a warrant if a felony has been committed and there exists probable cause to believe that the defendant committed the felony or if the defendant committed a misdemeanor in the officer's presence. MCL 764.15. Probable cause is found when the facts and circumstances within an officer's knowledge are sufficient to warrant a reasonable person to believe that an offense had been or is being committed. *People v Dunbar*, 264 Mich App 240, 250; 690 NW2d 476 (2004).

Here, a reasonable person could conclude that defendant committed the offense of driving under the influence of alcohol, because he was speeding and driving erratically, he staggered when he walked, he admitted drinking seven or eight beers in the past four hours, and he failed the horizontal gaze nystagmus test. These factors were sufficient to establish probable cause to arrest defendant, even without additional field sobriety tests or a Breathalyzer test. Accordingly, the trial court did not err in denying defendant's motion to suppress.

B. Witnesses

Defendant claims that the trial court violated his constitutional right to present a defense when it denied his request to present two witnesses not named on his pretrial witness list. We

² Defense counsel initially requested a curative instruction, but later withdrew his request out of concern that it would draw more attention to the prosecutor's question.

review de novo preserved claims of constitutional error. *People v Garza*, 469 Mich 431, 433; 670 NW2d 662 (2003).

Both the United States and Michigan Constitutions guarantee a defendant the due process right to present a defense, including the right to present witnesses. US Const, Am XIV; Const 1963, art 1, §§ 17, 20. “Just as an accused has the right to confront the prosecution’s witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a *fundamental* element of due process of law.” *People v Hayes*, 421 Mich 271, 278-279; 364 NW2d 635 (1984), quoting *Washington v Texas*, 388 US 14, 19; 87 S Ct 1920; 18 L Ed 2d 1019 (1967) (emphasis supplied by Michigan Supreme Court). Nonetheless, “[i]t is well settled that the right to assert a defense may permissibly be limited by ‘established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.’” *People v Toma*, 462 Mich 281, 294; 613 NW2d 694 (2000), quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973).

In *Taylor v Illinois*, 484 US 400; 108 S Ct 646; 98 L Ed 2d 798 (1988), the United States Supreme Court held that a state court could permissibly preclude defense witnesses from testifying where the defendant failed to identify them in response to a pretrial discovery request. *Id.* at 401-402, 415-417. Although the Supreme Court rejected the state’s argument that preclusion of a witness in these circumstances may never offend the Sixth Amendment, it also rejected the defendant’s argument that the Sixth Amendment absolutely bars the preclusion of testimony by a witness not disclosed during discovery. *Id.* at 409-410. The Court found it “neither necessary nor appropriate . . . to attempt to draft a comprehensive set of standards to guide the exercise of discretion in every possible case.” *Id.* at 414. The Court specifically commented, however, on two factors that warrant preclusion: where the defendant wilfully failed to disclose the witness in order to gain a tactical advantage, and where compliance with the discovery rule is simple. *Id.* at 415. Regarding the latter factor, the Court stated:

The simplicity of compliance with the discovery rule is also relevant. As we have noted, the Compulsory Process Clause cannot be invoked without the prior planning and affirmative conduct of the defendant. Lawyers are accustomed to meeting deadlines. Routine preparation involves location and interrogation of potential witnesses and the serving of subpoenas on those whose testimony will be offered at trial. The burden of identifying them in advance of trial adds little to these routine demands of trial preparation. [*Id.* at 415-416.]

The simplicity of compliance factor is relevant here, and justifies the trial court’s decision. Defendant argues that his noncompliance is excusable because he changed attorneys during the course of discovery. The trial court issued a pretrial discovery order on May 27, 2003, that required both parties to provide witness lists fourteen days before trial, which was originally scheduled for August 28, 2003. The prosecutor made a discovery demand pursuant to MCR 6.201 on June 12, 2003. Defendant’s substitute counsel, who represented him at trial, entered an appearance on June 20, 2003. The trial court issued a second pretrial discovery order on November 18, 2003, that again required the parties to provide witness lists fourteen days before the rescheduled trial on January 12, 2004. However, the parties agreed at a pretrial hearing to postpone trial until March 2004. Defense counsel and the prosecutor stated that they would contact each other to discuss witnesses and exhibits. Defense counsel thus had ample

time to investigate the case, identify and disclose witnesses, and to review prior counsel's actions and correct any deficiencies. Therefore, we find no merit in defendant's excuse that substitute counsel did not assume the case until a year after the incident.

Defendant argues in the alternative that his attorneys' failure to provide the names of the witnesses deprived him of the effective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). Unless a defendant claiming ineffective assistance of counsel moves for a new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), this Court's review must be limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Here, defendant did not raise this issue in an appropriate motion in the trial court and it is not apparent from the record how these witnesses would have testified at trial. Thus, we cannot determine whether defendant can satisfy both prongs of the ineffective assistance of counsel test. Therefore, appellate relief on this ground is not warranted.

C. MRE 404(b) Evidence

Defendant argues that the trial court erred in denying his motion for a mistrial. We review a trial court's decision to deny a motion for a mistrial for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). A mistrial should be granted for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant asserts that he was irreparably prejudiced when the prosecutor questioned him about Wallace's filing of assault charges and seeking a PPO against him. Defendant argues that the prosecutor's questioning violated MRE 404(b), which excludes evidence of prior bad acts to prove a person's character, but permits the admission of such evidence for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system. The evidence must be offered under something other than a character or propensity theory, it must be relevant under MRE 402, and the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403. *People v Knox*, 469 Mich 502, 509-510; 674 NW2d 366 (2004).

Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). Generally, all relevant evidence is admissible, unless otherwise provided by law, and evidence which is not relevant is not admissible. MRE 402; *Aldrich, supra*. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403; *Aldrich, supra*.

Viewed in context, the prosecutor's question was permissible under these rules. The prosecutor did not raise the assault charge and PPO to attack defendant's character, but rather to challenge an aspect of the defense theory. In an effort to shift blame to Wallace's ex-husband, defendant attempted to bolster his defense by stating that the police never questioned Wallace. Defendant then tried to bolster that assertion by stating that he would have known if the police had questioned Wallace, because she was still his friend and therefore would have told him. Defendant's testimony made his relationship with Wallace relevant to his defense, and the prosecutor's question was relevant to undermining that defense. Therefore, considered in context, the question was not improper, and the trial court did not abuse its discretion in denying defendant's request for a mistrial.

Affirmed.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Peter D. O'Connell