

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID DUANE BREWER,

Defendant-Appellant.

UNPUBLISHED

June 3, 2008

No. 277518

Genesee Circuit Court

LC No. 06-019147-FH

Before: Davis, P.J., and Murray and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of third-degree fleeing and eluding a police officer, MCL 750.479a(3), entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. Facts and Proceedings

Fenton police officer Ellis observed defendant's vehicle disregard a stop sign, and initiated a traffic stop. Ellis ran defendant's name through the LEIN computer, and determined that the plate on defendant's vehicle was stolen, and that a warrant existed for defendant's arrest. Ellis exited his patrol vehicle, intending to arrest defendant. Defendant exited his vehicle, and Ellis told him to place his hands on the vehicle. Defendant did not comply, and began moving toward the open driver's door of his vehicle. Ellis told defendant that he (Ellis) would use pepper spray if defendant did not obey his commands. Defendant started to enter his vehicle, and Ellis sprayed him with pepper spray. Defendant shut the door, and Ellis sprayed defendant a second time by reaching through the window. Defendant drove away from the scene. Ellis pursued defendant's vehicle, but was unable to apprehend defendant.

Detective Rauch took a statement from defendant after defendant was arrested. Defendant stated that he was taking Oxycontin on the day the incident occurred, and that he knew a warrant for his arrest had been issued. Defendant told Rauch that he was nervous about returning to jail, and that when Ellis began to arrest him, he fled the scene.

During closing argument, defense counsel argued that Ellis's conduct rose to a dangerous level without provocation, and that defendant became frightened after Ellis used pepper spray. Counsel asserted that Ellis's conduct caused defendant to flee the scene.¹

Defendant did not request a jury instruction on the defense of duress, and did not object to the instructions as read. The jury found defendant guilty as charged.

The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to four to 20 years in prison. Defendant's sentence was to be served consecutively to the sentence he was serving on parole at the time he committed the instant offense.

II. Analysis

Defendant argues that his trial counsel should have requested a jury instruction on duress. We review jury instructions in their entirety to determine whether the trial court committed error requiring reversal. Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them. Error does not result from the omission of an instruction if the charge as a whole covered the substance of the omitted instruction. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). We review a claim of instructional error de novo. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002).

In this case, defendant failed to request an instruction on duress, but did not specifically state that he approved of the instructions as read. Therefore, review is for plain error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

To be entitled to an instruction on the affirmative defense of duress, a defendant must present sufficient evidence from which a jury could find that: (1) the threatening conduct was of sufficient magnitude to create in the mind of a reasonable person the fear of death or serious bodily harm; (2) the conduct in fact created such fear in the mind of the defendant; (3) the fear or duress was operating on the mind of the defendant at the time of the alleged act; and (4) the defendant committed the act to avoid the threatened harm. *People v McKinney*, 258 Mich App 157, 164; 670 NW2d 254 (2003).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would

¹ During his opening statement, counsel had noted that the questions before the jury would include whether Ellis's conduct caused defendant to become fearful, and whether defendant was justified in acting as he did.

have been different, *id.* at 600, and that the result that did occur was fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Counsel is presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

We reject defendant's argument that the trial court erred by failing to instruct the jury on the defense of duress,² and that his trial counsel rendered ineffective assistance by failing to request an instruction on the affirmative defense of duress. Ellis decided to arrest defendant after learning that the plate on defendant's vehicle was stolen, and that a warrant existed for defendant's arrest. It was after Ellis told defendant to place his hands on his vehicle that defendant moved toward the open driver's door in an attempt to enter the vehicle. Ellis had not sprayed defendant with pepper spray at this time. Defendant continued to attempt to leave the scene after Ellis sprayed him twice with pepper spray. This evidence supported an inference that defendant fled the scene after he learned that he was to be arrested. The evidence was not sufficient to support an inference that fear was operating on defendant's mind when he fled the scene, or that he fled the scene to avoid Ellis's actions. *McKinney, supra* at 164. In fact, defendant admitted as much to Rauch. Furthermore, being sprayed with pepper spray is not threatening conduct sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm. Cf. *People v Gimotty*, 216 Mich App 254, 256; 549 NW2d 39 (1996) (being slapped on head and forced to drive insufficient to cause reasonable person to fear death or serious bodily harm). No plain error occurred. *Carter, supra* at 215.

Because a request for an instruction on duress would, in all likelihood, have been unsuccessful, defense counsel was not required to make a meritless request. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Furthermore, to pursue the defense of duress, defendant would have been required to show that his fault did not cause the circumstances under which he acted as he did. See *People v Terry*, 224 Mich App 447, 453; 569 NW2d 641 (1997). Ellis initiated the traffic stop because defendant disregarded a stop sign. The trial court would have been required to instruct the jury that the situation did not arise due to defendant's own fault or negligence. See CJI2d 7.6(2)(e). It is extremely likely that the defense would have failed even if the trial court had instructed on the defense. Defendant has not shown that but for counsel's error, it is reasonably probable that he would have been acquitted, and that the actual result was unfair or unreliable. *Carbin, supra* at 600; *Odom, supra* at 415.

Affirmed.

/s/ Alton T. Davis
/s/ Christopher M. Murray
/s/ Jane M. Beckering

² The standard instruction on duress is CJI2d 7.6.