

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DESMOND SYLVESTER STRADFORD,

Defendant-Appellant.

UNPUBLISHED

July 15, 2010

No. 290508

Wayne Circuit Court

LC No. 08-007468-FH

Before: TALBOT, P.J., and FITZGERALD and DAVIS, JJ.

PER CURIAM.

A jury convicted defendant of felon in possession of a firearm, MCL 750.224f; possession of a firearm during the commission of a felony, second offense, MCL 750.227b(1); and carrying a concealed weapon, MCL 750.227. The trial court sentenced defendant to prison terms of 2 to 10 years for the felon in possession and CCW convictions, and to a 5-year term for the felony-firearm, second offense, conviction. Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

At approximately 2:30 a.m. on May 18, 2008, Detroit Police Officers Juan Windham and Carl Chunev were en route to investigate a report of gunshots being fired when they saw a burgundy Nissan or Honda that matched the description of one wanted in connection with other crimes. They observed defendant leaning over into the vehicle talking to three individuals inside the car. Windham testified that he saw defendant toss a gun to the ground. He gave inconsistent testimony regarding exactly when he witnessed the toss. Chunev did not see the gun being tossed. He gave inconsistent testimony regarding which of the two officers handcuffed defendant, and regarding whether he saw Windham retrieve the loaded .40 caliber Smith and Wesson.

The trial court originally gave an adverse inference instruction providing for a presumption that a scout car video recording, which was not preserved, would have been favorable to defendant. This instruction was based on an order in defendant's file indicting that a timely request had been made for the videorecording. However, after defense counsel referenced the presumption in her opening statement and the instruction was given, the prosecutor realized that the order in defendant's file bore a different caption and pertained to a different matter. The court reinstructed the jury, advising that a presumption did not arise in favor of the prosecution or defendant.

Defendant first argues that counsel provided ineffective assistance because she did not carefully read the order to discern that it pertained to a different case. Since defendant did not move for an evidentiary hearing on this matter, our review is limited to mistakes apparent on the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). The defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and that the resultant proceedings were fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

We conclude that counsel's failure to review the order to determine whether it pertained to defendant's present case was an error that fell below an objective standard of reasonableness under prevailing professional norms. However, defendant has not established a reasonable probability that he would have been acquitted had counsel timely discovered the error. Had counsel done so, there would have been no entitlement to the adverse inference instruction. Once the adverse inference instruction was taken back, the jury was left with the testimony that it would have considered if the instruction had never been given. Defendant posits that once the correction was made, the jury must have surmised that the evidence was favorable to the prosecution. However, there is nothing to support this assertion. Moreover, generally a jury is presumed to follow its instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Here, the jury was told to disregard the instruction. This did not allow for any inference favorable to the prosecution. Thus, the verdict was based on the evidence that would have been before the jury had the instruction never been given.

Defendant also claims that counsel should have renewed a motion for a mistrial when the error regarding the adverse inference instruction came to light. However, at sentencing the court opined that the absence of the videotape was a very small part of the case. Given this perceived insignificance, it is fair to say that a motion for a mistrial would have been denied. Counsel was not required to bring a futile motion. *People v Brown*, 279 Mich App 116, 142; 755 NW2d 664 (2008).

Defendant next argues that the trial court erred when it advised the jury that the existence of a gun clip inside the car was incidental to the issues before it. "A party may assign as error the giving of or the failure to give an instruction only if the party objects on the record *before* the jury retires to consider the verdict (or, in the case of instructions given after deliberations have begun, before the jury resumes deliberations), stating specifically the matter to which the party objects and the grounds for the objection." *People v Carines*, 460 Mich 750, 767; 597 NW2d 130 (1999)(emphasis added). Here, the objection was posed *after* the jury resumed deliberations. Relief may therefore be granted only to avoid manifest injustice. *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000).

There was one reference to the clip in response to a question that did not call for the response. Defendant asserts that this mention could have implicated another individual in the car as the one who disposed of the gun, and that it may have had bearing on the concealed weapons charge. However, the clip was not mentioned in opening statements or closing arguments.

Neither party assigned it any significance. Moreover, no testimony connected the clip with the gun. Also, although Windham gave confused testimony as to the sequence of events leading up to the disposal of the gun, he stated unequivocally that defendant tossed the gun. Accordingly, the court's statement did not amount to manifest injustice.

Defendant also challenges a statement made during the supplemental instruction regarding the withdrawal of the adverse inference instruction. The court stated that there was no trial evidence establishing that the police car was equipped with a video camera and nothing to indicate that any camera would have been aimed so as to reveal useful information. Counsel objected to the withdrawal of the adverse inference instruction but did not object to these statements. This issue is not preserved and review is therefore for manifest injustice. *Sabin (On Second Remand)*, 242 Mich App at 657. Although the prosecutor acknowledged that there was a working camera on the police car at a pretrial hearing, this evidence never came to light during trial. Moreover, there is in fact nothing to establish that a videorecording would have captured the encounter with defendant and/or that it would have exonerated him. Thus, even if these comments were made in error, they did not result in manifest injustice.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Alton T. Davis