

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LESLIE HURN, JR.,

Defendant-Appellant.

UNPUBLISHED
December 7, 2010

No. 286067
Wayne Circuit Court
LC No. 08-000671-FH

Before: K.F. KELLY, P.J., and WILDER and GLEICHER, JJ.

PER CURIAM.

After a bench trial, the trial court convicted defendant of possessing a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b, and being a felon in possession of a firearm, MCL 750.224f. The court sentenced defendant to five years' imprisonment for the felony-firearm conviction, and a concurrent 24-month term of probation for the felon in possession conviction. Defendant appeals as of right, and we affirm.

Several Detroit police officers recounted at trial their actions in response to a May 2007 early morning dispatch concerning shots fired near the intersection of Capital and Fielding Streets in Detroit. Officer Justin Lyons, one of the first officers to respond, described his observances of four men standing in the front yard of a residence at 12094 Fielding,¹ one of whom drew Lyons's attention when he started "walking away from the group." Officer Lyons identified defendant at trial as the man who had begun to distance himself from the other men present. According to Officer Lyons, "I illuminated [defendant] with the department-issued flashlight, observed the fact that he was carrying a [large hand]gun," which defendant discarded "into a grassy area around . . . a dirt hill" in the yard of 12100 Fielding Street. Officer Lyons walked in pursuit of defendant, and advised other officers who had arrived on the scene of defendant's identity as the handgun possessor and the general location of the handgun defendant had discarded. Officer Ricky Betts testified that at Officer Lyons's direction he recovered near "a mound of dirt in the front lawn of a residential house" a dark-colored, loaded handgun bearing rust and many chips, gouges and scrapes.² Officer George O'Gorman recalled that on the basis of instructions from Officer Lyons, he arrested defendant, and O'Gorman identified defendant at

¹ Officers additionally noticed two females inside a car parked in the driveway of 12094 Fielding.

² Subsequent forensic examination of the handgun yielded no latent fingerprints.

trial as the person he had arrested.³ Defendant testified, denying that he possessed or owned a firearm on the May 2007 date of his arrest, or that he ever saw anyone else holding a weapon on that date.

Defendant initially raises on appeal several ineffective assistance of counsel contentions. Whether a defendant has received the effective assistance of counsel comprises a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review for clear error a trial court's findings of fact, if any, regarding the conduct of defense counsel, while we consider de novo questions of constitutional law. *Id.*

“[I]t has long been recognized that the right to counsel is the right to the effective assistance of counsel.” *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984), quoting *McMann v Richardson*, 397 US 759, 777 n 14; 90 S Ct 1441; 25 L Ed 2d 763 (1970). In *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court held that a convicted defendant's claim of ineffective assistance of counsel includes two components: “First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense.” To establish the first component, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate a reasonable probability that but for counsel's errors, the result of the proceedings would have differed. *Id.* at 663-664. The defendant must overcome the strong presumptions that his “counsel's conduct falls within the wide range of professional assistance,” and that his counsel's actions represented sound trial strategy. *Strickland*, 466 US at 689. A defense counsel possesses “wide discretion in matters of trial strategy.” *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). This Court may not “substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence.” *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (internal quotation omitted).

Defendant first insists that his counsel should have sought appointment of an independent fingerprint expert in light of the discrepancy between Officer Betts's testimony that he saw partial fingerprints on the handgun he recovered and the police forensic examiner's detection of no fingerprints. Defendant submits that “[a] fingerprint that did not match [his] could have exonerated” him. However, defendant has not supplied or pointed to any specific facts substantiating his speculation that an independent fingerprint expert might have uncovered a print on the handgun, let alone a print not belonging to defendant. *People v Hoag*, 460 Mich 1, 8; 594 NW2d 57 (1999) (rejecting ineffective assistance of counsel contentions for which the defendant failed to satisfy his burden to “establish the evidentiary support which excludes hypotheses consistent with the view that his trial lawyer represented him adequately”) (internal quotation omitted); see also *People v Ackerman*, 257 Mich App 126, 455; 667 NW2d 78 (2003) (observing that the “[d]efendant offers no proof that an expert witness would have testified favorably if called by the defense. Accordingly, defendant has not established the factual

³ Officer Betts identified defendant at trial as “one of the individuals the officers were investigating.”

predicate for his claim.”) We thus reject the unfounded complaint that defense counsel should have sought an independent fingerprint expert.

We similarly reject defendant’s suggestion that his trial counsel should have insisted on the presentation of testimony by an additional police officer witness, whose testimony the prosecutor and defense counsel agreed to forego. Again, defendant has offered no absolutely no specification about any matters to which the additional officer would have testified.

Defendant additionally asserts that his trial counsel inexcusably neglected to call as a trial witness on his behalf Stephanie Bryant, to whom defendant had spoken around the time the police arrived on the scene in the early morning hours of May 7, 2007.⁴ In an affidavit, and consistent testimony at a July 2009 evidentiary hearing, Bryant denied having seen defendant in possession of a handgun on May 7, 2007, and insisted to the contrary that she had observed a man named Duane Ruff discard a handgun immediately after the police appeared in the vicinity of the May 7, 2007 party at 12110 Fielding. At the close of the evidentiary hearing, the trial court made the following findings:

In this particular case when trial counsel, Mr. James Parker, testified, it is this Court’s conclusion that Mr. Parker had no real great recollection of this particular case.

* * *

He indicated that he had spent a short time with Ms. Bryant, and he also spent, according to his testimony, a short time with Mr. Ruff, one of the witnesses in the case.

I do think after hearing from Stephanie Bryant, who testified at the Evidentiary Hearing, it is interesting to compare what her proposed testimony would be as opposed to the testimony at trial from Mr. Ruff and from [defendant].

Ms. Bryant indicated that if she were to have been called to testify at trial, she would have testified that the gun that was seized in this particular case was Duane Ruff’s, the person that Mr. Parker indicated was his key witness in the case.

Ms. Bryant . . . would also indicate that Mr. Ruff had thrown the gun into the bushes and that Mr. Ruff had in fact made an admission that it was his gun, and that he had thrown it into the bushes.

And Mr. Ruff had spoken to [defendant] on the phone the night of [defendant’s] arrest when [defendant] had called his home and that Mr. Ruff had

⁴ In May 2009, this Court remanded the case to “the trial court for an evidentiary hearing and decision whether defendant-appellant was denied the effective assistance of counsel,” “limited to the issue whether defense counsel was ineffective for failing to call Stephanie Bryant as a witness at trial.” *People v Hurn*, unpublished order of the Court of Appeals, entered May 25, 2009 (Docket No. 286067).

admitted that it was his gun and that he would come forward and admit it so that [defendant] would not end up . . . convicted or wrongfully accused of this particular matter.

Well, Ms. Bryant's testimony interestingly enough was at odds with the actual testimony that was presented at trial.

Now, it was the expectation of the defense that Mr. Ruff, who was in prison at the time of his testimony, that Mr. Ruff would come forward and admit that the gun was his and that he would in fact acknowledge responsibility and therefore lead to the acquittal of [defendant].

Well, interestingly enough at the trial Mr. Ruff didn't do that. Mr. Ruff got on the stand, and Mr. Ruff's testimony was to the effect that he didn't see [defendant] with a gun. And he was not asked either on direct or on cross-examination whether or not the gun was his. And I think it's a reasonable inference that he was not asked that question by Mr. Parker because he wasn't going to admit at trial that it was his gun.

Next, we had the testimony of [defendant]. Now [defendant], according to the . . . testimony of Ms. Bryant, heard Mr. Ruff indicate that the gun was Mr. Ruff's. That Mr. Ruff had admitted it. That Mr. Ruff had admitted throwing it into the bushes.

But once again at trial . . . defendant . . . did not testify that way and presented a defense that was essentially narrow in terms of the offered testimony, and it was not a testimony that would contradict Mr. Ruff, who was viewed as the star witness for the defense.

[Defendant's] testimony was to the effect that he didn't have a gun. He didn't throw any gun, but he was never asked by Mr. Parker well, do you know who did have the gun? Do you know who threw it?

He didn't answer that, and I think that that was to create in this Court's view a reasonably carefully crafted defense where Mr. Ruff's testimony and [defendant's] testimony would not be in conflict, and I think that grew out of the fact that very clearly Mr. Ruff at the time of the trial testimony was unwilling to acknowledge or say that the gun was his.

Now, Ms. Bryant, if she were to have been called, would have undermined Mr. Ruff's testimony because Ms. Bryant would have gotten on the stand and would have said it was Ruff's gun. Ruff was the one who threw it, and Ruff admitted that it was his.

Our review of the evidentiary hearing transcripts and the trial record reveals ample support for the trial court's findings of fact, which we cannot characterize as clearly erroneous in any respect.

The trial court concluded that defense counsel had pursued a reasonable trial strategy in opting against calling Bryant as a defense witness at trial:

And I think that the decision not to call Ms. Bryant was, in this Court's view, a tactical decision made by Mr. Parker because he viewed that he had three witnesses, one of whom would be support it [sic] in some measure but directly undermining the testimony of one of the other key defense witnesses.

And Mr. Parker in my view was put in a position where he had to walk a tightrope with regard to the defense's presentation in this particular case.

Under the *Strickland* standard the Court is to give deference to tactical decisions that are made by trial counsel during the heat of battle

In this particular case given the fact that Ms. Bryant could have contradicted the star witness, and it could have been difficult to reconcile testimony with the other defense testimony in this case. It would have put the defense, which was one of misidentification, in greater jeopardy.

I do not find that the *Strickland* standard has been met

We find that the trial court correctly concluded that defense counsel selected a reasonable trial strategy when he declined to call Bryant as a defense witness, given that her account of the early morning hours of May 7, 2007 would have conflicted with, and cast doubt on, important defense witness Ruff's trial testimony. Defendant has failed to overcome the presumption that "[d]ecisions regarding what evidence to present and whether to call or question witnesses are . . . matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant next challenges the sufficiency of the evidence proving his identity as the person who possessed the handgun early on May 7, 2007. In defendant's estimation, the varying descriptions of the police officers concerning the number of people in the area of Capital and Fielding Streets that morning, the darkness that enveloped the scene, and the different accounts of Officer Lyons and defendant regarding defendant's attire that morning, all severely undercut the reliability of Officer Lyons's identification of defendant as the individual who held and discarded a handgun. "When determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000) (internal quotation omitted).

The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the . . . verdict. The scope of review is the same whether the evidence is direct or circumstantial. Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. [*Id.* at 400 (internal quotation omitted).]

Officer Lyons testified that on arriving at the scene, he immediately focused his attention on defendant, who had begun to distance himself from the other individuals at the scene, and that he trained his flashlight on defendant, which allowed him to see defendant holding a handgun. This testimony standing alone adequately supported the trial court's finding beyond a reasonable doubt that defendant was the individual who had a firearm. *Nowack*, 462 Mich at 399-400. In rendering a verdict, the court recognized that the case required the court to resolve a "conflict in the evidence between the testimony of the defense witnesses, Mr. Ruff and [defendant] versus the testimony of Officer Lyons." And to the extent defendant criticizes the trial court's finding that Officer Lyons's "testimony as to what he saw and what he then immediately conveyed to the other officers to be accurate and truthful," we will not revisit the court's credibility assessment on appeal. *Id.* at 400.

Defendant further asserts that the delay between the May 2007 issuance of a warrant for his arrest and his eventual arrest in December 2007 deprived him of due process. Defendant did not raise this issue below, so we review it for plain error affecting defendant's substantial rights. *People v Walker*, 276 Mich App 528, 545; 741 NW2d 843 (2007), vac'd in part on other grounds 480 Mich 1059 (2008). An error affects a defendant's substantial rights if it "affected the outcome of the lower court proceedings." *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003). "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant, or when an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Id.*

"A challenge to a prearrest delay implicates constitutional due process rights" *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999). However, "[m]ere delay between the time of the commission of an offense and arrest is not a denial of due process. There is no constitutional right to be arrested. Rather, the guideline is whether the record presents evidence of prejudice resulting from the delay" *People v Patton*, 285 Mich App 229, 236; 775 NW2d 610 (2009), quoting *People v Anderson*, 88 Mich App 513, 515; 276 NW2d 924 (1979).

Before dismissal may be granted because of prearrest delay there must be actual and substantial prejudice to the defendant's right to a fair trial and an intent by the prosecution to gain a tactical advantage. Substantial prejudice is that which meaningfully impairs the defendant's ability to defend against the charge in such a manner that the outcome of the proceedings was likely affected. [*Id.* at 237 (internal quotation omitted).]

"Actual and substantial prejudice requires more than generalized allegations." *Id.* (internal quotation omitted). "An unsupported statement of prejudice by defense counsel is not enough, nor are undetailed claims of loss of physical evidence, witness memory loss, or witness death." *Walker*, 276 Mich App at 546. "If a defendant demonstrates prejudice, the prosecution must then persuade the court that the reason for the delay sufficiently justified whatever prejudice resulted." *Patton*, 285 Mich App at 237.

Not only does defendant's argument constitute an "undetailed claim[] of . . . memory loss," *Walker*, 276 Mich App at 546, it also ignores the specificity level displayed during the trial testimony of defendant and Ruff. Defendant and Ruff remembered standing next to a car parked in the driveway near 12094 Fielding when the police arrived, and both remembered that the car was backed into the driveway. Ruff added that he and defendant had stood on opposite sides of

the vehicle. Both defendant and Ruff also recounted what the police officers at the scene said. After the officers discovered the handgun, Ruff heard one of them say, “[T]ake him [defendant] down for it.” Defendant specifically remembered that the officers initially had asked him to turn down the music in the car and then inquired whether he had any prior convictions. According to defendant, when he admitted that he did have convictions, one of the officers announced that the gun belonged to defendant. Defendant even remembered what he wore that evening. In summary, defendant has entirely failed to satisfy his burden to demonstrate that the prearrest delay in this case prejudiced his due process rights in any fashion.⁵

Lastly, in a one-page argument on appeal, defendant suggests that an audit of the Detroit crime laboratory, which “showed a shocking level of incompetence,” lends “further support for Defendant’s argument that there may in fact have been good fingerprints on the gun and that the analysis by the crime lab was negligent.” Because defendant did not raise this issue before the trial court, we limit our review to an ascertainment whether plain error affected defendant’s substantial rights. *Walker*, 276 Mich App at 545.

A criminal defendant has a due process right to obtain exculpatory evidence possessed by the prosecutor if it would raise a reasonable doubt about the defendant’s guilt. In order to establish a *Brady* [*v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963),] violation, a defendant must prove: (1) that *the state possessed evidence favorable to the defendant*; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005) (emphasis added).]

“MCR 6.201(B)(1) [similarly] requires a prosecutor to provide a defendant with any exculpatory information or evidence known by the prosecutor.” *Id.* at 449.

The Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady*, 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

⁵ To the extent that defendant complains that his trial counsel should have moved for dismissal of the proceedings on the basis of the unconstitutional delay between the issuance of the warrant and defendant’s arrest, this related claim likewise fails because defendant cannot demonstrate any specific prejudice occasioned by defense counsel’s failure to pursue such a motion.

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 Cress*, 250 Mich App 110, 115; 645 NW2d 669 (2002), rev'd 468 Mich 678; 664 NW2d 174 (2003), quoting *Arizona v Youngblood*, 488 US 51, 57-58; 109 S Ct 333; 102 L Ed 2d 281 (1988) (emphasis added).]

In this case, first and foremost defendant cannot show that the prosecutor possessed evidence favorable to him. The police forensic examiner testified that she inspected the gun in conformity with the lab's standard procedure and did not recover any prints. The examiner characterized as common the lack of any identifiable prints on weapons. Although Officer Betts testified at trial about his observation of possible prints on the gun, his testimony does not tend to prove that the prints belonged to any particular person, or even that that any usable prints would exist on the gun. And, even had police detected another person's prints on the gun, this finding would not have automatically exonerated defendant in light of the fact that Officer Lyons testified that he had seen defendant carrying the gun. Thus, even if the police forensic examiner should have found fingerprints, any prints that the examiner ought to have found fall within the category of "potentially useful" evidence. Because defendant on appeal only puts forth allegations of the examiner's *negligent* performance of her duties, and not bad faith, *United States v Garza*, 435 F3d 73, 75-76 (CA 1, 2006) (explaining that an officer's negligent conduct does not equate to bad faith), he simply cannot show that any bad faith processing of potentially useful evidence deprived him of due process.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kurtis T. Wilder
/s/ Elizabeth L. Gleicher