STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDREW CLARK,

Defendant-Appellant.

UNPUBLISHED
January 28, 2014

No. 312848
Wayne Circuit Court
LC No. 12-004041-FH

Before: METER, P.J., and JANSEN and SAAD, JJ.

PER CURIAM.

Defendant appeals by right his bench-trial convictions of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and possession of a firearm by a felon (felon-in-possession), MCL 750.224f. Defendant was sentenced as a second habitual offender, MCL 769.10, to two years in prison for the felony-firearm conviction and two years' probation for the felon-in-possession conviction. We affirm.

Defendant's sole argument on appeal is that trial counsel rendered ineffective assistance by (1) failing to file a motion to preserve the dash-cam video from the arresting officer's patrol car, and (2) failing to establish ownership of the Ford Taurus, the car defendant occupied at the time of his arrest. We disagree.

Because defendant did not move for a new trial or an evidentiary hearing in the trial court, our review is limited to mistakes apparent on the record. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012).

Both the United States Constitution and the Michigan Constitution provide the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. "There is a presumption that defense counsel was effective, and a defendant must overcome the strong presumption that counsel's performance was sound trial strategy." *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011). To prove a claim of ineffective assistance of counsel, a defendant must establish (1) that counsel's performance fell below an objective standard of reasonableness and (2) a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). Further, "[b]ecause the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *People v Carbin*, 463 Mich 590, 600; 623

NW2d 884 (2001). In evaluating a claim of ineffective assistance of counsel, "[w]e will 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 Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008).

"Decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matter of trial strategy." *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Further, "[d]efense counsel's failure to present certain evidence will only constitute ineffective assistance of counsel if it deprived defendant of a substantial defense." *People v Dunigan*, 299 Mich App 579, 589; 831 NW2d 243 (2013). A substantial defense is one that might have made a difference in the outcome of the trial. *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009).

Defendant has failed to establish the factual predicate for his claim and has failed to overcome the presumption that counsel's actions constituted sound trial strategy. There is no evidence that a dash-cam video existed. Nor is there any evidence that trial counsel failed to request such a video from police. Further, there is no mention in the lower court record concerning the ownership of the Ford Taurus. As noted earlier, our review in this case is limited to mistakes apparent on the record. *Heft*, 299 Mich App at 80. The errors alleged by defendant are not apparent from the record because neither the existence of a video, nor evidence of the vehicle's ownership, was ever mentioned during trial.

Moreover, defendant has failed to show how he was deprived of a substantial defense. Again, defendant has failed to show that a dash-cam video ever existed, and if it did, whether it would have corroborated his testimony that the police "snatched" him out of the vehicle. Defendant also cannot show how additional evidence concerning the ownership of the vehicle would have changed the outcome of his trial. The weapon was discovered on defendant's person, not elsewhere in the vehicle. Thus, evidence regarding the ownership of the vehicle likely would not have affected the outcome of the proceedings. Because defendant cannot establish the factual predicate for his claim of ineffective assistance of counsel and cannot show how he was deprived of a substantial defense, his claim of ineffective assistance of counsel fails.

Affirmed.

/s/ Patrick M. Meter
/s/ Kathleen Jansen
/s/ Henry William Saad