

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL JAMES DENNIS,

Defendant-Appellant.

UNPUBLISHED

May 1, 2007

No. 268540

Oakland Circuit Court

LC No. 2002-182744-FH

Before: Cavanagh, P.J., and Jansen and Borrello, JJ.

PER CURIAM.

Defendant was convicted by a jury of third-degree fleeing and eluding, MCL 750.479a(3), forgery of license documents, MCL 257.257, possession of marijuana, MCL 333.7403(2)(d), and driving while license suspended, second offense, MCL 257.904(3)(a). He was thereafter sentenced as a third habitual offender, MCL 769.11, to eleven months in jail for the fleeing and eluding and forgery convictions, and to 158 days in jail for the possession of marijuana and driving with a suspended license convictions. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's argument on appeal concerns evidence that was not admitted at trial. Defendant originally pleaded no-contest to the charges stemming from this incident. Defendant then absconded before he could be sentenced and a bench warrant was issued for his arrest. Defendant was arrested two years later. Defendant was allowed to withdraw his original plea because the trial court indicated it would not follow the initial sentencing agreement in light of his absconding.

Before trial, the prosecution moved to preclude defendant from mentioning a videotape of his arrest during his trial. Apparently, the police had inadvertently recycled the videotape after defendant entered his plea in this matter. The prosecution felt that any mention of the tape would be prejudicial to its case. Defense counsel did not oppose the prosecution's motion; however, this may have been because defense counsel that was present at this hearing had just made a successful motion to withdraw as counsel. The trial court granted the motion. The issue of the videotape was again raised before the start of trial, at which time new defense counsel made a general objection with respect to the issue of precluding mention of the videotape, but did not support the objection with any argument. The videotape was not mentioned at trial, nor was the jury instructed about the missing evidence.

Defendant first argues that his right to due process was violated by the destruction of the videotape. We disagree.

Whether defendant's right to due process was violated is a question of law. This Court reviews questions of law de novo. *People v Walker*, 234 Mich App 299, 302; 593 NW2d 673 (1999).

The Due Process Clause of the Federal Constitution guarantees certain access to evidence in the context of a criminal prosecution. See *Arizona v Youngblood*, 488 US 51, 55; 109 S Ct 333; 102 L Ed 2d 281 (1988); *People v Cress*, 466 Mich 883; 646 NW2d 469 (2002). In the context of state action involving improper handling of potentially exculpatory evidence, "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." *Youngblood*, *supra* at 58. The existence of bad faith turns "on the [government actor's] knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *United States v Wright*, 260 F3d 568, 571 (CA 6, 2001). "To establish bad faith, then, a defendant must prove 'official animus' or a 'conscious effort to suppress exculpatory evidence.'" *United States v Jobson*, 102 F3d 214, 218 (CA 6, 1996).

Here, defendant has failed to demonstrate bad faith on behalf of the police or the prosecution. The police only recycled the videotape after defendant entered a plea in this case. Defendant's own actions—entering a plea and then absconding for more than two years—contributed to his predicament. Defendant has offered no theory or evidence that would suggest that the destruction of the tape was anything more than a simple error. Defendant has failed to demonstrate "official animus" or "a conscious effort to suppress exculpatory evidence." *Id.* Furthermore, the prosecution stated that the content of the videotape was actually damaging to defendant's case, not exculpatory. Defendant bears the burden of demonstrating error on appeal, *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006), and he has here failed to demonstrate bad faith sufficient to establish a due process violation.

Next, defendant argues that defense counsel was ineffective for failing to request that an adverse inference jury instruction be given. We disagree.

Our review of this issue is limited to mistakes apparent from the record because defendant failed to move for a *Ginther*¹ hearing or a new trial on this basis. *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001). "To demonstrate ineffective assistance of counsel, defendant must show that his attorney's conduct fell below an objective standard of reasonableness and that the representation so prejudiced defendant that he was deprived of a fair trial." *People v Gonzalez*, 468 Mich 636, 644; 664 NW2d 159 (2003). "Effective assistance is presumed, and the defendant bears a heavy burden of proving otherwise." *Rodgers*, *supra* at 714.

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

When the prosecution acts in bad faith, an adverse inference instruction is warranted. *People v Cress*, 250 Mich App 110, 157-158 n 27; 645 NW2d 669 (2002), rev'd on other grounds 468 Mich 678; 664 NW2d 174 (2003). An adverse inference instruction should be given only if

the connection between the circumstances of the case and the inference that the evidence would be adverse is so logical that the factfinder is permitted to make that connection, typically when production of the witness is peculiarly within the power of the party against whom the inference of adverse testimony is sought. [*People v Fields*, 450 Mich 94, 105-106; 538 NW2d 356 (1995).]

Here, defendant has not met his burden of showing that the prosecution acted in bad faith. Further, it is unlikely that counsel's failure to request the instruction affected the outcome of the trial because the inference is permissive, not mandatory, and thus the jury was not required to draw such an inference. *Brenner v Kolk*, 226 Mich App 149, 155-156; 573 NW2d 65 (1997). Also, the trial court had already ruled before the start of trial that the missing videotape could not be mentioned at trial. Therefore, it is highly unlikely that the trial court would have changed its mind and given an instruction contrary to its previous ruling. "[T]rial counsel cannot be faulted for failing to raise an objection or motion that would have been futile." *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Therefore, trial counsel was not ineffective for failing to request an adverse inference jury instruction.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Stephen L. Borrello