

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN HENRY WALDECK,

Defendant-Appellant.

UNPUBLISHED

September 18, 2007

No. 264613

Oakland Circuit Court

LC No. 2004-194674-FH

Before: O’Connell, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

A jury convicted defendant of operating a motor vehicle under the influence of intoxicating liquor (OUIL), third offense, MCL 257.625(1), and the trial court sentenced defendant to probation for two years, with 183 days to be served in jail. Defendant appeals as of right. We affirm.

Defendant’s conviction arises from a traffic accident that occurred on October 30, 2003. The principal question at trial was whether defendant was intoxicated at the time of the accident. The prosecutor contended that defendant was under the influence of alcohol at the time of the accident, but defendant asserted that the alcohol in his system was consumed shortly after the accident occurred.

I. Motion to Appoint Experts

Defendant first argues that the trial court erred in denying his request to appoint two expert witnesses. MCL 775.15 gives the trial court authority to appoint an expert witness for an indigent defendant on his request. This Court reviews for an abuse of discretion a trial court’s decision regarding an indigent defendant’s request for the appointment of an expert witness. *People v Tanner*, 469 Mich 437, 442; 671 NW2d 728 (2003). An abuse of discretion occurs when the trial court’s decision is outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

[T]o obtain appointment of an expert, an indigent defendant must demonstrate a “‘nexus between the facts of the case and the need for an expert.’” It is not enough for the defendant to show a mere possibility of assistance from the requested expert. “Without an indication that expert testimony would likely benefit the defense,” a trial court does not abuse its discretion in denying a

defendant's motion for appointment of an expert witness. [*Tanner, supra* at 443 (citations omitted).]

The defendant has the burden of showing that he could not safely proceed to trial without such expert assistance. MCL 775.15; *Tanner, supra* at 444.

Defendant requested the appointment of a psychological expert to testify about his condition that caused his breathing problems and a forensic analyst to testify about the unreliability of the Datamaster. With regard to the psychologist, defendant identified an expert to testify that defendant suffered from a post-traumatic stress disorder (PTSD) condition, but presented no indication that she could explain why defendant allegedly consumed alcohol after the car accident. Defendant was able to testify about his condition as well as present other evidence to corroborate the existence of his condition. With regard to a Datamaster expert, defendant did not articulate what procedures Officer Prough allegedly did not follow or how the Datamaster was not working properly. At trial, defendant was able to cross-examine Officer Prough about the protocol for giving tests on the Datamaster, and he also cross-examined Officer Prough and Sergeant Kenneth Meier regarding the reliability and accuracy of the Datamaster. Defendant failed to show why an expert was necessary to protect his rights. Because defendant failed to satisfy his burden of proving that he could not proceed safely to trial without these experts, the trial court did not abuse its discretion in denying defendant's request.

II. Motion to Dismiss

This Court reviews for an abuse of discretion a trial court's decision on a defendant's motion to dismiss. *People v Stone*, 269 Mich App 240, 242; 712 NW2d 165 (2005). Defendant argues that the case should have been dismissed because the police failed to preserve the recording of defendant's 911 call made immediately after the accident. The record discloses that 911 recordings are routinely recycled after approximately 30 days as a matter of department policy. Defendant asserts that, regardless of department protocol, the recording should have been preserved because this was an open case. The failure to preserve evidence that may potentially exonerate a defendant does not constitute a denial of due process unless the defendant shows that the police acted in bad faith. *Arizona v Youngblood*, 488 US 51, 58; 109 S Ct 333; 102 L Ed 2d 281 (1988); *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993). The record discloses that several 911 calls were received to report the accident. Contrary to what defendant argues, there is no indication that either the police or the prosecution was aware that defendant made one of the 911 calls. Because there was no evidence that the police or prosecution knew of the existence of a 911 call from defendant, and because the evidence showed that the recordings were routinely destroyed after approximately 30 days, defendant has failed to show that the evidence was destroyed in bad faith. Accordingly, the trial court did not abuse its discretion in denying defendant's motion to dismiss.

III. Prosecutorial Misconduct

Defendant argues that the prosecutor committed misconduct by referring to defendant's testimony that his office moved in 1983. Defendant did not preserve this issue with an objection to the prosecutor's conduct at trial. This Court reviews unpreserved claims of prosecutorial misconduct for plain error affecting a defendant's substantial rights. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

Defendant testified several times that his office moved in 1983. He testified that after the accident he found a small bottle of vodka under the front passenger seat of his car. He believed that a man who helped him move his office in 1983 had likely left the vodka in the car. Defendant testified that after the accident he had a panic attack and drank the vodka to restore his breathing. The prosecutor commented on the 1983 date in closing argument, noting that defendant's car was made in 1984. In rebuttal, the prosecutor argued that defendant changed the dates to fit his story. There was nothing improper about the prosecutor's argument. The prosecutor accurately summarized defendant's testimony, and a prosecutor is free to argue from the facts that a witness is not worthy of belief. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). Thus, the prosecutor's conduct did not amount to plain error. Further, because the prosecutor's remark was not improper, defense counsel was not ineffective for failing to object. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

IV. Jury Instructions

Defendant asserts that the trial court erroneously refused to give two requested jury instructions. Claims of instructional error are generally reviewed de novo on appeal, but the trial court's determination that a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion. *Dobek, supra* at 82. Jury instructions are reviewed in their entirety, and there is no error requiring reversal if the instructions sufficiently protected the rights of the defendant and fairly presented the issues to the jury. *Id.*

Defendant requested that the trial court give a negative inference instruction regarding the prosecution's failure to produce the 911 audio recording and a Speedway gas station videotape. Such an instruction need not be given where the defendant fails to show that the prosecutor acted in bad faith in failing to produce the evidence. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). Defendant failed to satisfy this burden. The recordings were destroyed as a matter of routine and there was no evidence that the police or prosecution were aware that the recordings existed before they were destroyed. Because defendant failed to show that the evidence was destroyed in bad faith, the trial court did not err in denying defendant's request for a negative inference instruction.

Further, the trial court properly denied defendant's request for a jury nullification instruction. Defendant has no right to such an instruction. *People v Bailey*, 451 Mich 657, 671 n 10; 549 NW2d 325 (1996); *People v St Cyr*, 129 Mich App 471, 473-474; 341 NW2d 533 (1983).

V. Ineffective Assistance of Counsel

Because defendant did not raise this issue in a motion for a new trial, our review is limited to mistakes apparent from the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, a defendant must show that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the result of the proceedings would have been different. *Mack, supra* at 129. Effective assistance of counsel is presumed, and the defendant

bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Defendant argues that his original attorney was ineffective for failing to procure the 911 audio recording or the Speedway gas station surveillance videotape. We disagree.

As this Court explained in *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999):

A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses. Where there is a claim that counsel was ineffective for failing to raise a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial. A substantial defense is defined as one that might have made a difference in the outcome of the trial. [Citations omitted.]

Here, it is not apparent from the record that defense counsel should have had reason to know of the tapes' existence before they were routinely destroyed.

Furthermore, defendant has not shown that he was prejudiced by the failure to preserve the recordings. Defendant argues that the videotape would have been valuable because it would have shown his demeanor, gait, and physical qualities immediately after the accident, which, according to defendant, would have shown that he did not exhibit any outward signs of intoxication. As defendant acknowledges, however, those present immediately after the accident testified at trial that they did not observe any visible signs that defendant was intoxicated. Thus, even if the videotape would have shown that defendant did not exhibit any outwards signs of intoxication immediately after the accident, because the witnesses who observed defendant immediately after the accident testified consistently that they did not observe anything unusual about defendant's demeanor, the failure to preserve the videotape did not deprive defendant of a substantial defense.

Defendant argues that the 911 tape would have shown that he did not exhibit any sign of slurred speech immediately after the accident. As previously explained, however, none of the witnesses who observed defendant immediately after the accident testified that they noticed anything unusual about him, such as slurred speech. Even Officer Prough, who arrived on the scene later, testified that it was the smell of alcohol coming from defendant and the appearance of his eyes (bloodshot and glassy) that alerted him to defendant's possible intoxication. Slurred speech was not identified as a factor pointing to defendant's intoxication. Because there was no claim that defendant's speech was slurred, the failure to preserve the 911 recording for the purpose of showing that defendant's speech was not slurred during the 911 call did not deprive defendant of a substantial defense.

Defendant also argues that trial counsel was ineffective for failing to secure two expert witnesses after the trial court denied his motion to appoint them, and for failing to secure the testimony of Pamela Meldrum after the trial court denied his motion for an adjournment. We find no merit to these issues. Counsel requested appointment of the expert witnesses and also requested an adjournment when Meldrum failed to appear. Defendant has not shown that additional actions by counsel could have successfully produced these witnesses for trial. Further,

the failure to call a witness or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Dixon* 263 Mich App 393, 398; 688 NW2d 308 (2004). At trial, defendant testified about his PTSD condition and explained why it caused him to drink alcohol. Defendant also introduced medical records showing that he had this condition and a defense witness testified that he previously observed defendant having attacks. Meldrum's proposed testimony would have been cumulative to this evidence. Moreover, the principal issue at trial was not whether defendant had this condition, but the credibility of defendant's claim that the condition led him to consume alcohol shortly after the automobile accident. Additionally, defense counsel effectively cross-examined Officer Prough and Sergeant Meier about the protocol, reliability, and accuracy of the Datamaster test. Against this backdrop, the lack of expert testimony did not deprive defendant of a substantial defense.

Accordingly, we find no merit to defendant's ineffective assistance of counsel claims.

VI. Great Weight of the Evidence

Defendant argues that the jury's verdict was against the great weight of the evidence because the witnesses who observed defendant testified that defendant did not show signs of intoxication before Officer Prough arrived and interviewed defendant at the scene. Because defendant did not raise this issue in his motion for judgment notwithstanding the verdict or a new trial, it is unpreserved. Therefore, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A store clerk was the only witness who encountered defendant before defendant claimed to have consumed alcohol after the accident in order to control his breathing. While the clerk testified that he did not notice anything unusual in defendant's demeanor or smell the odor of intoxicants, he also stated that he had only a brief conversation with defendant and did not pay close attention to him. Defendant appears to contend that because the other witnesses who encountered him after the accident also did not notice anything unusual in his demeanor or smell the odor of intoxicants, Officer Prough was either mistaken or lying. However, one witness testified that he was too far away to form an opinion about whether defendant was intoxicated, Elbert Sylvester had lost his sense of smell, and his wife stated that she was not really paying attention to defendant. Officer Prough noticed the odor and determined that it came from defendant. He stated that defendant's eyes were bloodshot and glassy and, after having defendant perform several field sobriety tests, concluded that defendant was under the influence of alcohol. The jury was able to view a police video of defendant's interaction with Officer Prough and performance during the sobriety tests. Defendant's blood alcohol content was .09 approximately one hour after the accident. Defendant testified regarding his version of events.

The responsibility for resolving the conflicts in the evidence and making credibility determinations was for the jury and may not be the basis for granting a new trial. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). The jury's verdict was not against the great weight of the evidence and defendant has failed to establish plain error.

Finally, having found no multiple errors in this case, we reject defendant's contention that reversal is required under a cumulative error theory. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Peter D. O'Connell
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald