

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
March 20, 2014

v

DARRYL KELLY,

No. 314095
Kalamazoo Circuit Court
LC Nos. 2012-000475-FH;
2012-000918-FH

Defendant-Appellant.

Before: GLEICHER, P.J., and HOEKSTRA and O'CONNELL, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of driving while license suspended, MCL 257.904(1); fleeing and eluding, MCL 257.602a; and resisting arrest, MCL 750.81d.¹ For the reasons stated in this opinion, we affirm.

Defendant's convictions arise from two separate incidents, one occurring in March 2012 and one occurring in April 2012. In March, Officer Eric Reiber, who was familiar with defendant, saw defendant driving a red vehicle and noticed that he was not wearing his seatbelt. Reiber initiated a traffic stop. Defendant stopped, and Reiber got out of his car. As he walked to defendant's vehicle, defendant drove away, turned onto another street, then left the vehicle and ran away on foot. Reiber shouted at defendant to stop running, and defendant looked back but continued to run.

In April, Reiber recognized defendant again driving the red vehicle and initiated a traffic stop. Defendant accelerated his vehicle, pulled into Anishia Hubbard's driveway, and ran away after jumping over a fence. Reiber attempted to talk to defendant and told him to stop running, but defendant only looked back and continued to run. Hubbard, who was outside at the time, testified that it was not defendant driving the car and said that she informed "an officer" that the

¹ Defendant was charged with the same three crimes in two separate files, the first file was in regard to conduct occurring in March and the second file was in regard to conduct occurring in April. One jury trial was held in August regarding both files, and defendant was convicted of all three crimes in both cases. He now appeals his convictions from both of the lower court files.

driver was a different person. Reiber testified that Hubbard did not tell him that defendant was not the driver, and that he was certain defendant was the person driving the car that day. The vehicle was impounded, and defendant was eventually arrested. Defendant was tried by a jury, and convicted as previously stated. He now appeals as of right.

On appeal, defendant first argues that he was denied effective assistance of counsel because trial counsel failed to use a patrol car recording, in which Reiber said, “I think it’s Darryl Kelly, not 100 percent sure, I’ll have to look him up again,” to impeach Reiber’s identification of defendant as the driver. In establishing ineffective assistance of counsel, a defendant “bears a heavy burden” to justify reversal. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). First, the defendant “must show that counsel’s performance was deficient.” *Id.* at 600, quoting *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). In other words, defendant must first show that “counsel’s performance fell below an objective standard of reasonableness.” *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Second, “the defendant must show that the deficient performance prejudiced the defense,” and “[t]o demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different.” *Carbin*, 463 Mich at 600. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*, quoting *Strickland*, 466 US at 694.

Assuming defendant’s description of the recording is accurate, we find that trial counsel was not objectively unreasonable.² *Pickens*, 446 Mich at 338. “[D]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, which we will not second-guess with the benefit of hindsight.” *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004) (quotation marks and citations omitted). Introduction of the recording would have confirmed that Reiber suspected it was defendant driving the vehicle and would have prompted further questioning on what happened thereafter when Reiber looked up defendant’s photograph to confirm his identification. Moreover, Reiber would likely have testified that he confirmed defendant was driving the car. Thus, defendant has not overcome the strong presumption that trial counsel exercised sound trial strategy or that any error was prejudicial to his case; thus, he has failed to demonstrate ineffective assistance of counsel. *Carbin*, 463 Mich at 600.

Defendant next argues that his trial counsel was ineffective for failing to rehabilitate Hubbard after Reiber testified that he did not speak to Hubbard at the scene, and Hubbard testified that she spoke to “an officer.” Defendant argues that counsel was objectively unreasonable for failing to introduce a video from another officer’s patrol car that showed Hubbard speaking with an officer.

² We note that the portion of the recording that defendant maintains trial counsel should have introduced is not part of the record. However, the prosecution concedes that defendant’s description of the recording is accurate, and this Court denied defendant’s remand request. Accordingly, under these circumstances, we assume for purposes of analysis that defendant’s representations about the recording are accurate.

Again, assuming that the recording shows Hubbard talking to an officer,³ we conclude that trial counsel was not objectively unreasonable for failing to introduce the evidence for rehabilitation purposes. Reiber's statement did not impeach Hubbard's testimony because his statement did not contradict her testimony that she spoke to "an officer." Hubbard could have spoken to another officer who arrived at the scene. Thus, the video may have simply confirmed the fact that Reiber and Hubbard's testimony was consistent. Thus, defendant has not overcome the strong presumption that trial counsel exercised sound trial strategy. Moreover, in light of the other evidence supporting defendant's convictions, defendant has not demonstrated that any error affected the outcome of the proceedings. Thus, defendant has failed to meet his burden of establishing ineffective assistance of counsel. *Carbin*, 463 Mich at 600.

Defendant next argues that the prosecution improperly commented on his prearrest silence when it stated, "[t]he defendant never came forward and said 'I didn't do it,' there is nothing to change the officer's mind."

"A defendant's constitutional right to remain silent is not violated by the prosecutor's comment on his silence before custodial interrogation and before *Miranda*[⁴] warnings have been given." *People v McGhee*, 268 Mich App 600, 634; 709 NW2d 595 (2005) (citation omitted). Thus, a prosecutor may comment on silence that took place before police contact. *Id.*

In this case, the prosecution's comment referenced defendant's prearrest silence before any form of custodial interrogation took place and before *Miranda* warnings were given. Thus, the comments were proper. Defendant also argues that counsel was ineffective for failing to object to the comment. Because the comment did not constitute misconduct, defense counsel was not ineffective for failing to object. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Defendant finally argues that trial court sentenced him on the basis of inaccurate information, alleging that the trial court erroneously believed that it could permit his participation in the special alternative incarceration program under MCL 791.234a.

A defendant has "the right to the use of accurate information at sentencing." *People v McAllister*, 241 Mich App 466, 473; 616 NW2d 203, 207 (2000). In this case, the Presentence Investigation Report (PSIR) stated that "it appears [defendant] is eligible for placement," in reference to the special alternative incarceration program. This statement was a statement of opinion, not fact, and thus, the statement was not factually inaccurate. *People v Lucey*, 287 Mich App 267, 276; 787 NW2d 133 (2010); *People v Spanke*, 254 Mich App 642, 649; 658 NW2d 504 (2003). Moreover, while the trial court indicated that it did not object to defendant's placement in the program, nothing in the record supports the conclusion that the trial court considered the placement option in sentencing defendant. Where the "trial court did not rely on the challenged information in the PSIR in sentencing defendant, resentencing is not required." See *Spanke*, 254

³ This recording is similarly not part of the record.

⁴ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Mich App at 650. Defendant also argues that he was denied effective assistance of counsel when trial counsel failed to advise the trial court that defendant was ineligible for the program. However, because resentencing is not required, *id.*, defendant has not met his burden of showing that “the result of the proceeding would have been different.” *Carbin*, 463 Mich at 600.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Joel P. Hoekstra
/s/ Peter D. O’Connell