

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOVAN LOUIS-LEBARON MORGAN,

Defendant-Appellant.

UNPUBLISHED

October 1, 2009

No. 287856

Wayne Circuit Court

LC No. 07-004863-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JOVAN LOUIS MORGAN,

Defendant-Appellee.

No. 290125

Wayne Circuit Court

LC No. 07-004863-FC

Before: Sawyer, P.J., and Cavanagh and Hoekstra, JJ.

PER CURIAM.

In Docket No. 287856, defendant appeals as of right his bench trial convictions for carrying a concealed weapon, MCL 750.227, possessing a firearm while committing a felony (felony-firearm), MCL 750.227b, and assault with intent to do great bodily harm less than murder, MCL 750.84. He was sentenced to one to five years in prison for the concealed weapon conviction, two years for the felony-firearm conviction, and three to ten years for the assault with intent to do great bodily harm conviction. We affirm in part, reverse in part and remand.

In Docket No. 290125, the prosecution appeals by leave granted an order granting defendant's motion for new trial. We reverse.

The prosecutor first argues on appeal that the trial court erred in granting a new trial based on destruction of evidence. We agree.

“Whether to grant a new trial is in the trial court's discretion, and its decision will not be reversed absent an abuse of that discretion. An abuse of discretion occurs when the result is

outside the range of principled outcomes.” *People v Brown*, 279 Mich App 116, 144; 755 NW2d 664 (2008) (citation omitted). MCR 6.431(B), authorizes “ ‘a new trial on any ground that would support appellate reversal of the conviction or because [the court] believes that the verdict has resulted in a miscarriage of justice.’ ” *People v Cress*, 250 Mich App 110, 154; 645 NW2d 669 (2002), rev’d on other grounds 468 Mich 678 (2003), quoting MCR 6.431(B).

In this case, a handgun admitted into evidence at trial was not tested for fingerprints.

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) (citation omitted).]

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

Thus, the “Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady*[, *supra*], makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence.” *Cress, supra* at 155. However,

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 result 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 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. [Id. at 155, citing Arizona v Youngblood, 488 US 51, 57-58; 109 S Ct 333; 102 L Ed 2d 281 (1988).]

In this case, as the prosecutor argues, no one knows whose fingerprints were on the gun, and therefore, any evidence that could have been recovered was only “potentially useful.” In fact, throughout his brief, defendant refers to “*potentially* exculpatory evidence.” Accordingly, this case falls under *Youngblood* and not *Brady*, and defendant must show bad faith.

“The presence or absence of bad faith by the [government actor] for the purposes of the Due Process Clause must necessarily turn on the [government actor’s] knowledge of the

exculpatory value of the evidence at the time it was lost or destroyed.” *Youngblood, supra* at 56. “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), quoting *California v Trombetta*, 467 US 479, 488; 1045 S Ct 2528; 81 L Ed 2d 413 (1984). It should also be noted that the police are not under a duty to seek and discover exculpatory evidence. *People v Sawyer*, 222 Mich App 1, 6; 564 NW2d 62 (1997).

In the case at bar, Sergeant Roy Harris, of the Detroit Police Department, discovered a .38-caliber handgun at defendant’s residence on January 12, 2007, while executing a search warrant. While at the scene, he placed the gun into a police property envelope and marked it with an evidence tag. Sergeant Harris admitted that he was not wearing gloves when he searched, and furthermore, he had completed his search at the time the handgun fell out from behind a painting. According to Sergeant Harris, the gun was not preserved for prints because when the gun fell, “it surprised me, and my thing was to make it safe.” He explained that to make the gun safe involves “unloading it, making sure there’s [sic] no rounds left in the cylinder, so there won’t be an accidental discharge.” Although he contradicted himself on cross-examination by saying that the gun still could have been tested for prints, the fact remains that he handled the weapon without gloves.

Investigator Joseph Rocha, the officer in charge, testified that upon returning to the station after the search, he sent the handgun to the Crime Lab’s firearms unit for processing. Although he wrote on the envelope “hold for prints,” he did not fill out the required paperwork for fingerprint testing because the gun “had already been handled by numerous people without gloves. It was contaminated.” He explained that the lab technicians would do what the paperwork instructed (which was to test fire the weapon and compare results to the spent casings) and not test according to what was written on the envelope. Although Investigator Rocha did later inquire whether prints had been taken, he was told they had not been. He further stated that he was not aware that the trial court ordered fingerprint testing. Thus, in this case, there is no evidence that there was exculpatory fingerprint evidence on the handgun that the police deliberately destroyed, and therefore, defendant cannot show bad faith.

Furthermore, it is clear that the trial court’s order came too late for the gun to be tested for fingerprints. Although their dates differ, both the prosecutor and defendant agree that the Crime Lab test fired the gun at the end of February, and the gun could not be tested for prints afterwards. The judge gave the order at the final conference, which took place a month later, on March 23, 2007. In fact, at the final conference, the prosecutor informed the trial court that he did not know whether the gun had been preserved for prints. The judge acknowledged the possibility that fingerprinting might not be possible when he responded, “look into that within a week and talk to [defense counsel] and tell me whether it’s feasible . . . to do it.”

Even if the failure to preserve the gun (and subsequently test the gun) for fingerprints could be characterized as gross negligence, gross negligence is not equivalent to bad faith. See, e.g., *United States v Garza*, 435 F3d 73, 75-76 (CA 1, 2006). A defendant must show an improper motive. *Id.* Moreover, it should be noted that there is a “‘crucial distinction . . . between failing to disclose evidence that has been developed and failing to develop evidence in the first instance. When the police fail to run any tests, the lack of evidence will tend to injure their case more than defendant’s since the prosecution has the burden of proving guilt beyond a

reasonable doubt.’ ” *People v Coy*, 258 Mich App 1, 22; 669 NW2d 831 (2003), quoting *People v Stephens*, 58 Mich App 701, 705; 228 NW2d 527 (1975).

Finally, although defendant and the trial judge cite the closing of the Detroit Crime Lab as reason for concern, and apparently, reason to find a due process violation, this concern is misplaced. The problem with the crime lab, given the excerpts of Wayne County Prosecutor Kim L. Worthy’s statement and the Michigan State Police audit cited in defendant’s brief on appeal and quoted by the judge during arguments on the new trial motion, is that test results from the crime lab are unreliable. However, *no test results were admitted at defendant’s trial*. The ballistics evidence was suppressed because it came too late for defendant to use, and, as has been exhaustively discussed in the preceding paragraphs, no fingerprint testing was done. In conclusion, then, “[a]bsent the intentional suppression of evidence or a showing of bad faith, a loss of evidence that occurs before a defense request for its production does not require reversal.” *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992). Therefore, the trial court abused its discretion in granting a new trial on the basis of “fairness and doing what’s right and looking at a totality of the circumstances.”

The prosecutor next argues that because the law does not permit a trial court to grant a new trial on its own motion, the judge acted outside his authority by sua sponte granting defendant a new trial after reevaluating the identification evidence. While we do not agree that the trial court acted sua sponte, we find that the trial court cited no ground upon which appellate reversal would occur and did not explain why the verdict resulted in a miscarriage of justice. Rather, the court used an improper totality of the circumstances test and misinterpreted the law.

Pursuant to MCR 6.431(B), “[o]n the defendant’s motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice. The court must state its reasons for granting or denying a new trial orally on the record or in a written ruling made a part of the record.” Moreover, “where the reasons given by the trial court are inadequate or not legally recognized, the trial court abused its discretion.” *People v Leonard*, 224 Mich App 569, 580; 569 NW2d 663 (1997). “In order to determine whether the trial court abused its discretion, we are required to examine the reasons given by the trial court for granting a new trial.” *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999).

It is true, as the prosecutor argues, that “MCR 6.431(B) allows the trial court to order a new trial in a criminal case only when a motion has been brought by the defendant,” *People v McEwan*, 214 Mich App 690, 695; 543 NW2d 367 (1995), but it is undisputed that defendant filed a new trial motion on November 12, 2008. By the plain language of the statute, the trial court was allowed to grant a new trial on any ground supporting appellate reversal or if it found a miscarriage of justice, even though in his motion defendant argued only on the basis of ineffective assistance of counsel and bad faith safekeeping of the gun.

As the prosecutor notes, defendant argued in his new trial motion that he was entitled to a new trial because (1) trial counsel was ineffective for failing to call an expert witness, (2) Detroit Crime Lab personnel deliberately destroyed potentially exculpatory evidence, and (3) defense counsel had a conflict of interest. The trial court first ruled that counsel was not ineffective for failing to call an expert witness to rebut the identification testimony because this was a matter of

trial strategy and it would “not have added a substantial defense.” The court added that defendant was not prejudiced by “counsel’s performance or any potential conflict [of interest].”

Nevertheless, the court discussed all of the identification evidence because, as he explained, “what I have to look at here, in light of the rules, is we sit here, you try to look at the totality of the circumstances and the big picture here. I recall the trial, I remember the testimony of the complaining witness, but I cannot ignore the fact – some of the facts that – my memory was refreshed regarding identification, the circumstances.” Specifically, he noted the method used for the photographic array and the inaccurate identification at the preliminary examination. Then, in regard to the ballistics testing and lack of fingerprint testing, the trial court again brought up the statement from Prosecutor Worthy and concluded:

[T]he bottom line is, you know, we have *Brady v Maryland* and other cases, and the thrust of all these decisions is that we’re here about fairness and doing what’s right and looking at a totality of the circumstances here. The Crime Lab is of some importance to me still. The testing of the weapon, I believe, could have and should have been tested for fingerprints prior to going to testing, that there was a court order still that was not complied with. In light of everything that I’ve just addressed regarding *identification, the firearm, the disobedience [sic] of the court’s order*, I’m going to, pursuant to [MCR 6.431(B) and (C)] grant the defendant’s motion for new trial. [Emphasis added.]

The court later added, “I’d be remiss if I didn’t put on the record, this was a close decision and – following what I think the law is. And although I thought it was a pretty fair trial, and I conducted it, and I heard the testimony, there were some issues that I am still concerned about.”

Thus, the court cites three grounds on which it granted a new trial: “*identification, the firearm, the disobedience [sic] of the court’s order.*” It certainly seems, as suggested by the prosecutor, that, first, the trial judge contradicted himself by saying that expert testimony was not necessary to rebut the identification, and then, second, nevertheless changing his mind regarding the weight of the identification evidence.

In *People v Jones*, 203 Mich App 74; 512 NW2d 26 (1993), this Court found that, had the defendant moved for a new trial, it *would* have been proper for the judge to grant the motion, pursuant to MCR 6.431(B), because “[w]hen the judge rendered the second verdict, acquitting defendant, *he indicated that he had been confused at the time of the first verdict because he had misplaced his notes.* Furthermore, the record indicates, he believed the original verdict had resulted in a miscarriage of justice.” *Id.* at 83 (emphasis added). In this case, the trial judge was not confused and did not misplace his notes. In addition, all of the alleged problems with the identification were brought out at trial, including complainant Asaed Alam’s misidentification of his attacker at the preliminary examination, the inconsistencies in Alam’s statement, the timing of the interview, the methods used in compiling the photographic array, and the suggestiveness of the identification procedure. Nonetheless, the judge addressed these issues in his verdict, stating, inter alia, that he understood the “discrepancy and confusion” in Alam’s preliminary examination testimony. Upon his memory being “refreshed” at the new trial motion, however, the court evidently found one reason, not clearly explained, for granting a new trial.

What the court did say, ostensibly acting pursuant to *Brady* and a “totality of the circumstances” analysis, was that the identification, in addition to the gun and the failure to test it for fingerprints, entitled defendant to a new trial. *Brady*, however, does not require a totality of the circumstances test. More importantly, as was discussed above, it is *Youngblood*, rather than *Brady*, which controls in a situation where the state failed “to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the result of which might have exonerated the defendant.” *Cress, supra* at 155, quoting *Youngblood, supra* at 57-58. In such a situation, there is a due process violation only if “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.” *Id.* In this case, there was no showing that exculpatory evidence existed and the court’s order came after the gun had been test fired and thus rendered unpreserved for fingerprinting. Therefore, defendant cannot show bad faith. Furthermore, as also discussed, *supra*, the problems with the Crime Lab cited by the court are relevant for cases where convictions were based on inaccurate test results, and in the case at bar, no test results of any kind were used.

As noted, “[w]here the reasons given by the trial court are inadequate or not legally recognized, the trial court abused its discretion.” *Leonard, supra* at 580. The trial court cited no ground upon which appellate reversal would occur and did not explain why the verdict resulted in a miscarriage of justice, but rather, used an improper totality of the circumstances test. Therefore, the trial court abused its discretion in granting a new trial.

In his appeal, defendant first argues that he received ineffective assistance of counsel and is entitled to a new trial because trial counsel failed to present expert testimony to rebut the identification. We disagree.

“ ‘Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law.’ . . . This Court reviews a trial court’s factual findings for clear error and reviews de novo questions of constitutional law.” *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859, amended 481 Mich 1201 (2008), quoting *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). “[B]ecause the trial court did not hold an evidentiary hearing, our review is limited to facts on the record.” *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

“An accused’s right to counsel encompasses the right to the ‘effective’ assistance of counsel.” *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007), citing US Const, Am VI, Const 1963, art 1, § 20, and *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Generally, to establish ineffective assistance of counsel, a defendant must show that: “(1) counsel’s performance was below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, if not for counsel’s errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable.” *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007), citing *Strickland, supra* at 694.

“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). “[T]his Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel’s competence with the benefit of hindsight.”

People v Matuszak, 263 Mich App 42, 58; 687 NW2d 342 (2004). That a chosen strategy “ultimately failed does not constitute ineffective assistance of counsel.” *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Defendant argues that because no other evidence links defendant to the crime, only expert testimony, and not merely cross-examination, could effectively weaken the identification. Case law does not support this position.

The decision whether to present expert testimony to attack an identification “is presumed to be a permissible exercise of trial strategy.” *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999). In *Cooper*, as in the case at bar, the defendant argued that his attorney provided ineffective assistance by “failing to present expert psychological testimony about how the circumstances of the incident could have impaired [the complainant’s] perception, memory, and ability to recognize the shooter.” *Id.* This Court concluded, however, that the defendant had not overcome that presumption, because “[t]hroughout his cross-examination of [the complainant], trial counsel elicited apparent discrepancies and arguable bases for regarding [the complainant’s] identification of [the] defendant as the shooter to be suspect.” *Id.* Although *Cooper* involved a jury trial, this Court’s observations are still applicable to the case at bar: “[t]rial counsel may reasonably have been concerned that the jury would react negatively to perhaps lengthy expert testimony that it may have regarded as *only stating the obvious: memories and perceptions are sometimes inaccurate.*” *Id.* (emphasis added).

As discussed above, defense counsel vigorously cross-examined Alam regarding his misidentification at the preliminary examination and the inconsistencies in his description of the shooter. Furthermore, defense counsel questioned police methods, namely, interviewing Alam while he was in his hospital bed, with a chest tube, and not determining whether he was on any pain medication. Third, defense counsel alluded to bias in the procedure used by police in compiling the photographic array, namely, that they had defendant placed in the “number two” position, where they “always” place their suspects, and had a follow-up statement with his photo prepared ahead of time. Therefore, because the decision to call expert witnesses is a matter of trial strategy and defense counsel thoroughly cross-examined all of the witnesses, defendant cannot show ineffective assistance of counsel.

Defendant next argues that he did not receive effective assistance of counsel or a fair trial because defense counsel did not argue that the police destroyed potentially exculpatory evidence in bad faith, despite written instructions to test the gun for fingerprinting; and furthermore, defense counsel did not ask for an adverse inference instruction. We disagree.

First of all, defense counsel, *did* argue that police failed to comply with the trial court’s instructions to test the gun for fingerprints, although he did not specifically assert that they did so in bad faith. As discussed in Issue I, however, defendant had no evidence that the police acted in bad faith and the order from the court came after the gun had been rendered unfit for fingerprint testing. Regarding the “written instructions” to which defendant refers, Inspector Rocha testified that while he did write a note on the envelope about holding the gun for prints, he did not fill out the necessary paperwork, upon which the lab technicians rely. Thus, because there was no bad faith, defendant was not entitled to an adverse inference instruction. See *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993) (“[d]efendant has not demonstrated that the prosecutor acted in bad faith in failing to produce the evidence Under the circumstances, the

trial court did not err in declining to give this instruction.”) That is, failing to advocate a meritless position is not ineffective assistance of counsel. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Moreover, defendant cannot show outcome determinative error because the judge did, in fact, agree to an instruction regarding noncompliance with the order. When reminded about the instruction after closing argument, the judge stated, “That’s correct, I recall that. I have that in my notes and highlighted.” Although there was never a discussion regarding what the exact content of the instruction would be, a “judge, unlike a juror, possesses an understanding of the law . . .,” and thus, it is not entirely out of the question that he considered an adverse inference. *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988). Regardless, an adverse inference is permissive, not mandatory, and therefore, even where such an instruction is given, the fact finder is not required to draw such an inference. *Brenner v Kolk*, 226 Mich App 149, 155-156; 573 NW2d 65 (1997).

Defendant further argues, however, that trial counsel should have objected to the destruction of the evidence and requested a favorable instruction on statutory grounds. Defendant relies on MCL 780.655(2), which provides, “[t]he property and things that were seized [pursuant to a warrant] shall be safely kept by the officer so long as necessary for the purpose of being produced or used as evidence in any trial.” Defendant relies on *People v Jagotka*, 232 Mich App 346, 351-355; 591 NW2d 303 (1998) (*Jagotka I*), rev’d in part 461 Mich 274 (1999), where defendant was charged with operating under the influence. This Court concluded, “[t]he thing seized in this case was defendant’s blood, which was destroyed on May 16, 1995 [after testing]. Defendant does not allege any bad faith on the part of the police and does not dispute that the blood was destroyed pursuant to routine departmental procedure. However, because the blood was destroyed, it was not safely kept for the purpose of being produced or used as evidence at trial. Accordingly, we find the statute was violated in this case.” *Id.* at 351.

Defendant concedes that our Supreme Court reversed the decision in *People v Jagotka*, 461 Mich 274, 279; 622 NW2d 57 (1999) (*Jagotka II*). The Court stated: “In this instance, the defendant’s blood was the material seized. However, . . . blood samples themselves are not ‘produced or used as evidence’ at trial. Accordingly, the statute’s requirement that property seized be safely kept for use at trial was not triggered by the blood sample.” *Id.* at 279. The Court further noted, “[w]e therefore do not explore the determination in *In re Forfeiture of \$25,505*, 220 Mich App 572, 579-580; 560 NW2d 341 (1996), that an adverse-inference instruction is an appropriate remedy for a violation of the statute.” *Id.* at 281 n 8.

Defendant argues that the holding in *Jagotka II* applies only to blood samples, and therefore, failure to preserve the gun for fingerprinting in the case at bar was still a violation of the statute, thereby entitling defendant to an adverse inference instruction. We do not find the situation in the case at bar entirely analogous to the issue in *Jagotka I* and *II*. In this case, the gun itself was admitted into evidence. Although the lab did not perform fingerprint testing, no one can say for sure that any such evidence existed. Inspector Rocha testified that the gun had been handled too many times and Sergeant Harris gave conflicting testimony on whether the gun was preserved for fingerprinting, but at the very least, he admitted that he handled the gun without gloves. At any rate, even if failure to preserve the gun for prints is a violation of the statute and an adverse inference instruction is the proper remedy, defendant cannot say that the

lack of an instruction was outcome determinative, *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999), because, as discussed above, (1) an adverse inference instruction is permissive and not mandatory, and (2) the judge did take into account the fact that the police violated his order to test the gun for fingerprints. Therefore, defendant received effective assistance of counsel and a fair trial.

Affirmed in part, reversed in part and remanded for reinstatement of defendant's convictions and sentences. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra