STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 18, 2001
v	No. 221186 Oakland Circuit Court
LAVENA DENISE KNOTT, Defendant-Appellant.	LC No. 98-161500-FH

Before: White, P.J. and Cavanagh, and Talbot. JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of resisting or obstructing a police officer, MCL 750.479; MSA 27.747, and failure to display a driver's license on demand, MCL 237.311; MSA 90211. She was sentenced to three months' probation. She appeals as of right, and we affirm.

Defendant first claims that she was denied a fair trial due to the police department's bad faith failure to save the videotape of her arrival at the station where the alleged assault occurred. We disagree. Absent 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). Similarly, the routine destruction of taped police broadcasts where the purpose is not to destroy evidence for a forthcoming trial does not mandate reversal. *Id.* Defendant bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith. *Id.* Loss of evidence of unknown probative value denies due process only when the police acted in bad faith. *People v Leigh*, 182 Mich App 96, 97-98; 451 NW2d 512 (1989), citing *Arizona v Youngblood*, 488 US 51; 109 S Ct 333, 337; 102 L Ed 2d 281 (1988). Evidence which is destroyed intentionally pursuant to departmental policy to save space does not indicate bad faith or an intent to deprive a defendant of evidence. *People v Petrella*, 124 Mich App 745, 753; 336 NW2d 761 (1983), aff'd on other grounds, 424 Mich 221 (1985); *People v Jeffrey Johnson*, 113 Mich App 650, 657; 318 NW2d 525 (1982) (evidence destroyed in accordance with police policy and procedure does not mandate reversal absent intentional misconduct, suppression or bad faith).

In this case, at the hearing on defendant's motion to dismiss, both Lt. Cranston and Sgt. Krause testified, as they did at trial, that the recycling of tapes was a matter of policy and procedure. Angela Enoch testified that, notwithstanding the confusing information she received

from the prosecutor and the police department, she determined that the tapes no longer existed on September 4, 1998, when they were first requested. Hence, the tapes were destroyed as part of the policy and procedure of the police department and not to destroy evidence for a forthcoming trial. *Johnson, supra.* Further, they were destroyed prior to the defense request for them, and defendant failed to meet her burden of showing that the tapes were exculpatory and that they were destroyed in bad faith. *Id.; Leigh, supra.* Accordingly, the trial court did not abuse its discretion in denying defendant's motion to dismiss on the basis of this issue. *People v Adams,* 232 Mich App 128, 138-139 n 10; 591 NW2d 44 (1988). Furthermore, at trial, the trial court found that the police were negligent, but stated that it would instruct the jury that the tapes, if preserved, would have shown what occurred in the sallyport and booking areas. Defense counsel approved that instruction, thereby waiving any alleged instructional error. *People v Carter,* 462 Mich 206, 215; 612 NW2d 144 (2000). Defendant's reliance on *People v Wallace*, 102 Mich App 386, 393; 301 NW2d 540 (1980), and *People v Albert*, 89 Mich App 350; 280 NW2d 523 (1979), does not dictate a different result.

Defendant next claims that she was deprived of a fair trial because the trial court permitted the introduction of irrelevant evidence. We again disagree. This Court reviews the admission of evidence for an abuse of discretion. *People v Starr,* 457 Mich 490, 494; 577 NW2d 673 (1998). Evidence is relevant if it has a tendency to make the existence of a fact of consequence more or less probable. MRE 401. All relevant evidence is admissible, and irrelevant evidence is inadmissible. MRE 402; *Starr, supra,* 497. Even if relevant, evidence may be excluded if its probative value is substantially outweighed by its prejudicial effect. MRE 403; *People v Sabin (After Remand)*, 463 Mich 43, 58; 614 NW2d 888 (2000). However, "it is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place." *People v Sholl,* 453 Mich 730, 741; 556 NW2d 851 (1996).

In this case, defense counsel moved to limit evidence regarding defendant's passenger. The trial court denied the motion but cautioned the prosecutor to avoid any evidence unrelated to what happened on the night in question and to the passenger's arrest. At trial, the prosecutor, as instructed by the court, inquired of Officer Wehby about the passenger on the night in question, and elicited testimony that the passenger was arrested for an altered operator's license and had two valid licenses under different names as well as credit cards and social security cards under two names. No additional information was presented, and there was no abuse of discretion. First, the officer knew immediately, before the vehicle was even stopped, that it was not registered to be driven in the State of Michigan. Then, when defendant stated that she had no driver's license, registration or proof of insurance for the car, the passenger volunteered that it was his car and handed the officer a suspiciously handwritten registration and a license which ultimately proved to be altered. At that point, the officer still had not determined the identity of the vehicle, whether it was stolen or re-tagged. Clearly, at this point, both the driver and the passenger were under suspicion regarding the vehicle. While the officer was able to identify defendant, he was unable to identify the passenger. On cross-examination, defense counsel questioned Officer Wehby about the identity of the passenger and whether Wehby asked defendant about the passenger's identity to which Wehby responded that he did inquire of defendant but she refused to answer.

The reasoning of *Sholl, supra,* applies in this case; the parties were entitled to present an intelligible course of events leading up to the crime. Even if defendant had her driver's license with her, the fact that the vehicle she was driving was not registered in Michigan combined with the passenger's voluntary involvement was all part of the context of the criminal activity which led to defendant being questioned regarding the passenger's identity, her refusal to give the passenger's name and the ongoing escalation of her behavior, which ultimately led to her being charged with resisting or obstructing an officer. The information regarding the passenger's possible counterfeiting and involvement with Nigeria was never presented to the jury, and the prosecutor repeatedly stated to the jury in opening and closing that information regarding the passenger was separate from defendant's case. We find no abuse of discretion. *Starr, supra*.

Defendant lastly claims that she was denied the effective assistance of counsel by defense counsel's failure to object to the allegedly irrelevant evidence regarding the passenger. We again disagree. When a defendant has failed to move in the trial court for either an evidentiary hearing or a new trial, this Court's review is limited to the appellate record. *People v Sabin (On Second Remand),* 242 Mich App 656, 658-659; 620 NW2d 19 (2000). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand),* 235 Mich App 429, 445; 597 NW2d 843 (1999). To establish ineffective assistance of counsel, a defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *Sabin (On Second Remand), supra,* at 659. Defendant must show that her counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, absent counsel's errors, the outcome of the proceedings would have been different. *Id.* Counsel is not required to advocate a meritless position. *People v Snider,* 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant claims only that her counsel was ineffective for failing to object to testimony regarding her passenger. Initially, defendant is simply incorrect. When the prosecutor was cross-examining defendant, he asked about the identity of the passenger, to which counsel objected and the objection was sustained. The prosecutor asked another question regarding the identity of the passenger, to which counsel again objected, but the objection was overruled. As defendant concedes, counsel raised the issue at the start of trial, asking that testimony regarding the passenger be limited, following which the court instructed the prosecutor to limit his questions to the circumstances of what occurred the evening of defendant's arrest. The prosecutor did limit his questioning. Defense counsel did not object when the first witness, Officer Wehby, testified regarding the passenger's identity. However, given the court's instruction to the prosecutor and the prosecutor's adherence to that instruction, it would have been futile if not harmful trial strategy for defense counsel to object at that point. *Snider, supra; Sabin (On Second Remand), supra.* In any event, defendant's theory at trial was that she did not assault the officer, but rather, was harassed, injured and treated badly by the officers, in part because she refused to give the passenger's name. On direct examination, defendant testified as follows:

> *Q.* Do the officers then proceed to ask you information about [the passenger]?
>
> *A.* Yes. After the time span of about 30 minutes while they're preparing, while they're searching the ground, searching the vehicle thoroughly and everything

and [sic] Officer Blendea, he approached the squad car that I was in and he sat in the front and he said [the passenger] says he can post your bail [for the outstanding warrant] as 10 percent is required of 2,000 dollars which would be 200 dollars, do [sic] you have any problems with him posting your bail [sic]and I said no, no, sir, I have no problems with that and he said [sic] okay and then he proceeded to ask me what is your friend's name again and I said [sic] wait a minute, you have his wallet, you have all his ID, I didn't have my driver license and I'm handcuffed, you know, what [sic]do you mean what [sic] is his name? You mean to tell me you don't know your friend's name and I say of course I know his name. Well, we need you to tell us his name and - - -

Q. At that point, do you give them his name?

A. I decided to assert my Fifth Amendment rights and said that my only concerns are concerns that are about what I've done. I don't even know what's [sic] done, so.

Q. Do the officers become upset?

A. Yes.

Q. Do both officers become upset?

A. At this point, it is just Officer Blendea who is upset with me and he makes a very abusive remark towards me. He says 'cause he [sic] *says that okay, I'm going to say you refused to cooperate in our investigation, so your ass is spending the night in jail. And I said wait* [sic] *a minute, I get a phone call. He said oh that fucking phone call shit is for the fucking TV, your ass is going to jail and I said you can't talk to me like that and he exited the vehicle* [Tr III, 134-135].

In short, this was a credibility contest that defendant did not win. The jury did not believe her theory that she did not assault Officer Blendea, but rather was assaulted by the police. Issues of credibility are for the trier of fact. *People v Wolfe,* 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201-1201 (1992). Defendant has failed to show that, but for counsel's error, the result of the proceedings would have been different. *Sabin (On Second Remand), supra,* 659.

Affirmed.

/s/ Helene N. White
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot