

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWAYNE D. HUDSON,

Defendant-Appellant.

UNPUBLISHED

April 19, 2002

No. 230893

Wayne Circuit Court

LC No. 99-011328

Before: Zahra, P.J., and Neff and Saad, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for second-degree murder, MCL 750.317, felonious driving, MCL 752.191, and operating a motor vehicle while his license was suspended or revoked, MCL 257.904(1). We affirm defendant's convictions, but remand this case to the circuit court for resentencing.

This case involves an automobile accident resulting in a death. The defense theory was essentially that defendant was the passenger, not the driver of the car that caused the accident.

I

Defendant first contends that his right to a fair trial was prejudiced by the failure of the prosecution to provide him with an unedited audiotape of the dispatch radio reports relevant to his crimes, a copy of the EMS report from the unit that transported defendant to the hospital, and the failure to preserve defendant's vehicle for inspection. Defendant argues that because the prosecution's failure to provide him with these items violated his right to a fair trial, it was error for the trial court to deny his motion to dismiss.

Because defendant's argument is essentially that the prosecution's failure to comply with his discovery requests prejudiced his right to a fair trial, the standards used to determine when a defendant's due process rights have been violated by incomplete discovery is the proper framework under which to analyze this issue. This Court has indicated that "[a] criminal defendant has a due process right of access to certain information possessed by the prosecution." *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). This due process right applies to all evidence which might lead a jury to entertain a reasonable doubt about the defendant's guilt. *Id.* In order to establish such a violation, a defendant must show:

(1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself 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. [*Id.* at 281-282.]

In this case, none of the requested evidence meets all these criteria, and therefore, defendant is not entitled to relief from his convictions.

A

The audiotape was not material to defendant's case. "Undisclosed evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 282. The unedited audiotape was not material under this test because the edited version admitted at trial established the fact which defendant sought to establish with an unedited tape. According to defense counsel's argument during the motion to dismiss, the unedited tape was necessary in order to support her argument that there was not sufficient time between the initial and second pursuits of defendant's vehicle for defendant and the other party to have switched places so that defendant was driving when the fatal accident occurred. However, arguing to have the tape admitted, defendant asserted that "The tape sounds as though everything was happening together." Furthermore, there was testimony from police officers who established the time lapses between the initial and second pursuits. We also note that no request was made for an unedited version of the audiotape until the trial had begun. Thus, because the edited audiotape established the facts as consistent with defendant's theory of the case, an unedited tape, at best, would have done the same. We cannot conclude, therefore, that the unedited tape would have changed the outcome. Defendant is not entitled to relief.

B

Nor was the vehicle inspection material to defendant's case. Defendant sought to inspect the vehicle in order to take photographs and determine if blood or other identifying evidence could be retrieved from the windshield where, according to defendant, there appeared to have been a shattering pattern consistent with a head-on collision. Because, according to defendant, he had not suffered any injuries consistent with his head hitting the windshield, he wished to argue that he could not have been driving when the collision occurred. The inspection was not material, however, because defendant was not prevented from making this argument. Indeed, defense counsel specifically questioned one of the police officers using a photo which showed the shattering pattern in the windshield, and defendant's medical records were admitted at trial. Defense counsel specifically argued that the lack of injuries to defendant's head was proof that he was not driving. Further, no request to inspect the vehicle was made until trial had commenced. Thus, because defendant was not prevented from making this argument, further inspection of the automobile was not material to his case. Defendant is not entitled to relief on this basis.

C

Finally, with regard to the EMS report, it was never in the prosecution's possession, and therefore, the prosecution's failure to provide this report was not a violation of defendant's due process rights. As noted above, in order to constitute a deprivation of due process, the requested evidence must have been in the state's possession. *Id.* at 281. Here, the prosecution asserted and defendant agreed that the report was not part of the prosecution's file and that defendant had a burden to obtain the report from the private EMS company which had transported defendant to the hospital. Thus, because the state never possessed this evidence, there was no denial of due process in the prosecution's failure to disclose it.

II

Defendant next contends that the trial court erred when it refused to instruct the jury that the flight of the second person in defendant's vehicle after the accident was evidence of that person's guilty conscience. Even assuming that the trial court's decision was error, reversal is not required. Even if somewhat imperfect, instructions do not require reversal if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Brown*, 239 Mich App 735, 746; 610 NW2d 234 (2000). Here, even if the jury had been so instructed, and even if the jury believed that the other person in the vehicle had a guilty conscience, the jury may have believed that the other person's guilty conscience was a result of fleeing from the police initially. Moreover, evidence that the other person in the car had fled the scene of the accident was presented during trial and defendant made the argument to the jury that that person fled because he was driving. Indeed, the argument made during closing argument was stronger than any proposed instruction would have been because the standard instruction on flight is equivocal about whether evidence of flight is evidence of guilt. CJI2d 4.4. Therefore, because the argument was more forceful as it was made by defendant, no error occurred.

III

Defendant next asserts that the trial court erred when it scored offense variable 3 (OV3). However, no objection was made to this error at sentencing or before this appeal. This issue is therefore waived. MCR 6.429(C); MCL 769.34(10); *People v Harmon*, 248 Mich App 522, 530; 640 NW2d 314 (2001). Nevertheless, defendant also contends that his trial attorney rendered ineffective assistance of counsel by failing to challenge the scoring of the offense variable. Accordingly, appellate review of the scoring issue, as it relates to ineffective assistance of counsel, is appropriate. *Id.*

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Noble*, 238 Mich App 647, 661-662; 608 NW2d 123 (1999). In order for this Court to reverse on the basis of ineffective assistance of counsel, defendant must show that his counsel's performance fell below an objective standard of reasonableness and so prejudiced defendant that he was denied the right to a fair trial. *Id.* at 662.

In this case, neither party disputes that error occurred. Defendant was scored 100 points for OV3, even though the instructions state that 100 points is proper "if death results from the commission of a crime *and homicide is not the sentencing offense*" (emphasis added). Michigan Sentencing Guidelines (April 1999 ed), p 19. In this case, homicide was the sentencing offense;

therefore, the score was not properly assessed against defendant. The question is whether defense counsel's failure to object to this error requires remand for resentencing. We conclude that it does.

Defendant's counsel's error falls below the objective standard of reasonableness. Even a brief review of the points scored on defendant's sentencing information report would have revealed this scoring error. The failure to discover this error is even more egregious when it is considered in light of defense counsel's challenge of the scoring of other variables.

The error affected defendant's guidelines range. However, defendant's minimum sentence falls within either range. Ultimately, however, defendant is entitled to resentencing. Had the guidelines been accurately scored, resulting in a lower recommended guidelines range, the trial court may well have issued a lesser sentence. In fact, while defendant's sentence falls fifteen months from the low end of the erroneous guideline range, his sentence is more than seventy months from the low end of the correct guideline range. Such a difference establishes prejudice from the defense counsel's error. Defendant is entitled to resentencing.

We affirm defendant's convictions, but vacate his sentence and remand for resentencing. We do not retain jurisdiction.

/s/ Brian K. Zahra

/s/ Janet T. Neff

/s/ Henry William Saad