

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID PETROCCA,

Defendant-Appellant.

UNPUBLISHED

July 16, 2002

No. 229443

Oakland Circuit Court

LC No. 00-172006-FH

Before: Holbrook, Jr., P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Defendant was convicted by a jury of third-degree fleeing or eluding a police officer, MCL 750.479a(3), and resisting or obstructing a police officer, MCL 750.479. He was sentenced to twelve months' probation. He appeals as of right. We affirm.

Defendant argues that trial counsel was ineffective. Because there is no indication in the record that defendant raised the issue of ineffective assistance of counsel in an appropriate motion in the trial court, our review of this issue is limited to mistakes apparent from the record. *People v Randolph*, 242 Mich App 417, 422; 619 NW2d 168 (2000). When asserting a claim of ineffective assistance of counsel, the burden is on the defendant to show that counsel made serious errors that prejudiced the defense and deprived the defendant of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). There is a strong presumption that counsel's conduct was reasonable. *Id.* This Court will not substitute its judgment for that of trial counsel in matters of trial strategy. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). Further, this Court will not assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Here, defendant contends that counsel was ineffective by failing to call defendant's neighbor, who allegedly would have testified that he heard tires screeching and saw police cars pull up to defendant's residence, and that none of the police cars had their lights or sirens activated. Defendant asserts that trial counsel intended to introduce the neighbor's testimony but failed to take appropriate steps to advise him that he should appear. Even accepting defendant's assertions as true, the credibility of the neighbor as a witness is not apparent from the record. Further, the neighbor did not observe either of the alleged crimes and his purported testimony that the police cars were not flashing lights or using sirens in the subdivision was cumulative to the testimony of defendant and defendant's sister. Defendant has not established that counsel's alleged error prejudiced the defense. *Mitchell, supra.*

Defendant also contends that counsel was ineffective in failing to challenge, at a pretrial proceeding, whether the police cars were “clearly marked.” Although defendant asserts that this issue should have been raised in a motion before trial, defense counsel did raise the challenge in his motion for a directed verdict and the trial court determined that the adequacy of the police car markings was a question for the jury. There is no indication that a pretrial motion would have produced a different result. Thus, defendant has not shown that defense counsel’s alleged error prejudiced the defense. *Id.*

Defendant also argues that the trial court abused its discretion in admitting into evidence a videotape reenactment of the police chase route. Evidence is generally admissible if it is relevant, MRE 401, and if its probative value is not “substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” MRE 403. Photographic evidence is admissible if it is substantially necessary or instructive to show material facts or conditions. *People v Anderson*, 209 Mich App 527, 536; 531 NW2d 780 (1995). Here, upon questioning by the trial court, the officer testified that the videotape “fairly and accurately” depicted the police Camaro as it appeared while looking out the back window of another car, that it showed the route that the officer testified to, that it depicted the lights and siren that the officer testified were activated, but that it did not show the speeds that the officer testified to. The appearance of the police Camaro as it was pursuing a vehicle was at issue in this case, and the video showing what the Camaro looked like with lights and sirens activated would have been instructive to the jury. We find no abuse of discretion.

Finally, defendant contends that he was denied a fair trial because of prosecutorial misconduct. Prosecutorial misconduct issues are decided case by case. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). This Court considers alleged prosecutorial misconduct in context to determine whether it denied defendant a fair and impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). A prosecutor may not infringe on a defendant’s right not to testify, and a defendant has no burden to produce any evidence, but once a defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995).

During closing argument, defense counsel referred to the police officers in this case as “cowboys” with “too much adrenaline.” In response, the prosecutor made the remarks challenged on appeal, arguing to the jury that it was common sense that the police had to have some reason for going to defendant’s house, and that defendant had not given any reasonable explanation. Defense counsel objected and the trial court stopped the comments and remarked that “you can’t shift the burden of proof.”

In his trial testimony, defendant admitted seeing a blue Camaro at some point, but testified that to his “knowledge” he was not speeding, that he had no idea he was being followed by a police car, that he saw no lights and heard no siren. It was not unreasonable for the prosecutor to ask the jury to consider why, under those circumstances, several police cars converged at defendant’s house and followed him inside. Even if the jury had accepted defendant’s version of the events at the house, the question why the police were there remained. The burden of proof was not shifted by the prosecutor’s suggestion that defendant’s version of events did not make sense. When a defendant makes an issue legally relevant, the prosecutor is

not prohibited from commenting on the improbability of the defendant's theory or evidence. *Id.* Defendant was not denied a fair trial because of the prosecutor's remarks.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Kathleen Jansen

/s/ Kurtis T. Wilder