STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

DAVID ARIEL HAMMOND,

Defendant-Appellant.

UNPUBLISHED
September 28, 2004

No. 246536
Oakland Circuit Court
LC No. 2002-184887-FH

Before: Fitzgerald, P.J., and Neff and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction, following a jury trial, of possession of less than fifty grams of a controlled substance with the intent to deliver, MCL 333.7401(2)(a)(iv). Defendant was sentenced as a second-offense habitual offender to two to thirty years' imprisonment. We affirm.

Defendant was a passenger in a car being driven by his girlfriend, Shantia Cox. Officers McCormick and Jagielski ran a Law Enforcement Information Network (LEIN) check on Cox's car after Cox changed lanes without signaling, which revealed that the license plate on Cox's car belonged to another car[1]. Therefore, they stopped the car. When the officers determined that Cox's license had been suspended, Officer McCormick asked defendant his name so that he could determine whether defendant had a valid license and, thus, could take over as the driver of the car. Defendant responded that his name was Brian Derrick Williams. However, a LEIN check did not produce a person by that name and, instead, indicated that the name was similar to an alias that had been used by a person for whom a felony arrest warrant had been issued.

After noticing several similarities between defendant and the warrant, and after Cox told Officer Jagielski defendant's real name, which matched the name listed in the warrant, the officers decided to arrest defendant. According to Officers McCormick and Jagielski, McCormick felt a hard object in defendant's crotch area during the pat down and defendant immediately turned around and grabbed McCormick's wrist. Thereafter, defendant continued to

[1] Cox testified that she had previously owned another car and had switched the license plate from her former car to the car she was driving at the time of the stop.

struggle with the officers and attempted to run away. During the struggle, Officer Jagielski verbally warned defendant to stop struggling and attempted three different "pain compliance" techniques, all of which were unsuccessful. Eventually, defendant and the officers fell to the ground. According to McCormick, a bag containing cocaine "popped out" of defendant's pants and into his hand at that time. The officers also testified that they had used pepper spray at some point in an attempt to stop defendant from struggling.

Defendant presented an independent witness who testified that he saw the officers pull defendant out of the back of the police car and slam him against it. The witness testified that one of the officers then reached into defendant's back pocket with a closed fist and produced a little white object. Thereafter, one of the officers kneed defendant in the stomach, and the other officer then punched defendant in the stomach. The witness stated that he did not see defendant attempt to assault, threaten, or resist the officers in any way before this happened.

Defendant first asserts that the trial court erred by not instructing the jurors that they did not have to unanimously agree that defendant was not guilty of possession with intent to deliver before considering the lesser offense of simple possession, or instruct them that they could consider the lesser offense of possession merely if they could not agree as to the principal charge of possession with intent to deliver. Defendant also asserts that his trial counsel was ineffective for failing to object to the trial court's improper instructions.

Because counsel did not object to the instructions, our review is limited to plain error that affected substantial rights and we will reverse only if the unpreserved error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003); *People v Taylor*, 252 Mich App 519, 523; 652 NW2d 526 (2002). Defendant's claim that he was denied the effective assistance of counsel is a question of constitutional law subject to de novo review. *In re CR*¸ 250 Mich App 185, 197; 646 NW2d 506 (2002).

The manner in which trial courts must instruct jurors to consider principal charges and lesser offenses was originally set forth by our Supreme Court in *People v Handley*, 415 Mich 356, 361; 329 NW2d 710 (1982) and is now encompassed in CJI2d 3.11(5)[2]. Although the trial

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[2] CJI2d 3.11(5) states:

> In this case, there are several different crimes that you may consider. When you discuss the case, you must consider the crime of [*name principal charge*] first. [If you all agree that the defendant is guilty of that crime, you may stop your discussions and return your verdict.] If you believe that the defendant is not guilty of [*name principal charge*] or if you cannot agree about that crime, you should consider the less serious crime of [*name less serious charge*]. [You decide how long to spend on (*name principal charge*) before discussing (*name less serious charge*). You can go back to (*name principal charge*) after discussing (*name less serious charge*) if you want to.]

court did not comply with our Supreme Court's mandate in *Handley* by delivering an instruction similar to CJI2d 3.11(5), we conclude that its failure to do so does not amount to plain error in the present case. The present case is distinguishable from those relied upon by defendant because it does not involve an instance where the trial court instructed the jurors that they must first either acquit or fail to convict defendant of the greater offense before considering the lesser offense and, moreover, does not involve an instance where the trial court either stated or implied that they must do so unanimously. Instead, after stating that defendant was charged with possession with the intent to deliver and the elements of that charge, the trial court instructed the jurors that they "may also consider the lesser charge" of possession. The trial court's instructions did not have the effect of requiring the jurors to first determine, unanimously or otherwise, that defendant was not guilty of possession with intent to deliver before considering the lesser offense of simple possession. Indeed, despite first instructing the jury on the charged offense of assault with intent to deliver, the trial court's instructions did not even expressly require the jurors to consider that charge before considering the lesser offense. Instead, the trial court's instructions implied to the jurors that they could consider them equally. Defendant has failed to show that the erroneous instructions resulted in his conviction despite his actually being innocent or that they seriously affected the fairness of his trial.

In order to prevail on his claim of ineffective assistance of counsel, "defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted." *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). The second prong, prejudice, requires that defendant demonstrate a probability of a different outcome sufficient to undermine the confidence in the outcome that actually resulted. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001), quoting *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Although we believe that defendant correctly asserts that it was objectively unreasonable for his trial counsel not to object to the trial court's omission of the proper instruction to ensure that jurors properly understand the manner in which they are to consider principal charges and lesser offenses, we nonetheless hold that defendant has not borne the burden of establishing prejudice. Specifically, defendant's assertion of prejudice is based solely on his contention that, because no instruction complying with *Handley* was given, some jurors may have been confused or misled and may have compromised their verdict. Defendant essentially argues that the trial court effectively removed the lesser offense from the jury's consideration.

However, no indication of juror compromise appears in the record, nor does any indication that the jurors did not understand the order in which they were to consider the charges or believed that they had to unanimously acquit defendant of the charged offense before considering the lesser offense. Defendant seeks to fulfill his burden of establishing prejudice by asking this Court to presume that such compromise occurred merely based on the fact that he was convicted of the greater, rather than the lesser, offense. However, the trial court specifically instructed the jurors that they were not to compromise, and the jurors are presumed to have followed this instruction. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Further, our Supreme Court has indicated that convictions should not be automatically reversed based on an error in jury instructions when there is no record evidence of juror compromise. *Id*. at 485. We conclude that defendant cannot meet his burden of establishing that he was prejudiced by his

trial counsel's failure to object to the omission of the instruction when there is no record evidence of jury compromise.

Defendant next asserts that the prosecutor violated the res gestae witness statute, MCL 767.40a, by not listing officer Medici, the officer who handled a dog that swept Cox's car for the presence of drugs. Apparently, Medici had the dog conduct the sweep of Cox's car after McCormick and Jagielski left the scene, and did not prepare a police report because the dog did not indicate that drugs had been in the car.[3] However, the prosecutor apparently received a copy of a "run sheet" the day before trial, which is prepared by the police dispatch and lists the names of all the officers that indicated that they would respond to the scene and indicates that the car had been swept by a dog. When confronted with the "run sheet," Officers McCormick and Jagielski both testified that they were unsure as to whether the car had, in fact, been swept by a dog. Moreover, Michael Pieroni, who was the officer in charge of the case and who prepared the witness list, initially testified that he did not know whether a dog had swept the car. Despite acknowledging that the "run sheet" referenced a dog sweep, Pieroni stated that he did not have access to the "run sheet" at the time he prepared the witness list. Thus, he prepared the witness list based on the police reports he had received from officers at the scene, and had not received one from a dog handler.

However, during further cross-examination, Pieroni testified that he called Officer Medici during a break in proceedings and that Medici informed him that he had conducted a dog sweep of the car and that the dog had not alerted to the presence of drugs. Defendant asserts that the prosecution's failure to list Medici as a res gestae witness or list him on its witness list hindered his defense because defendant asserted during trial that he had never possessed the cocaine. Instead, focusing on the testimony of his independent witness that one of the officers reached into his pocket with a closed fist, defendant asserted that the police officers planted the drugs on him after he had gotten out of the car. During trial, defendant elicited testimony from Jagielski and Pieroni that dogs can sometimes detect that drugs have been in a car even though the drugs are no longer there and, thus, asserts that having Medici testify that the dog did not indicate that drugs had been in the car would have furthered his theory.

First, we note that defendant has not properly preserved this issue for appeal. In order to preserve an assertion that the prosecution has not complied with MCL 767.40a, a defendant must move for a new trial or a post-trial evidentiary hearing. *People v Dixon*, 217 Mich App 400, 409; 552 NW2d 663 (1996). In the present case, defendant did neither, and instead merely stated at trial after the jury began deliberating that he objected to Medici's not being named on the witness list and renewed this objection at the sentencing hearing. Thus, this issue was neither raised before, nor addressed by the trial court. Therefore, because defendant did not properly preserve this issue, our review is limited to plain error.

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[3] We question the procedure of declining to prepare a report where nothing "of value" to a criminal prosecution is found by the dog. It is obvious that the failure to find evidence can be a significant fact in itself and may be of benefit at trial to either the prosecution or the defense. Because a report is not filed, the fact that a search was conducted may never come to light and hence the entire res gestae of the offense may not be revealed.

MCL 767.40a(1) requires the prosecutor to attach a list of all witnesses that he might call at trial as well as "all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers." "A res gestae witness is a person who witnesses 'some event in the continuum of a criminal transaction' and whose testimony will 'aid in developing a full disclosure of the facts.'" *People v Calhoun*, 178 Mich App 517, 521; 444 NW2d 232 (1989). We conclude that Medici is a res gestae witness because he conducted the dog search of Cox's car, witnessed the results, and his testimony would aid in fully disclosing the factual findings of the police investigation.

Under MCL 767.40a, the prosecutor does not have a duty to produce res gestae witnesses; he only has a duty to list known witnesses and provide the defendant, upon request, with reasonable assistance in locating witnesses. *People v Burwick*, 450 Mich 281, 288-289; 537 NW2d 813 (1995). While the prosecutor did not have a duty to produce Medici as a witness at trial, the prosecutor did violate his duty to list Medici as a res gestae witness. Despite the prosecutor's assertion that neither he nor Pieroni knew that Medici had conducted the sweep, MCL 767.40a requires the prosecutor to list "all res gestae witnesses known to the prosecuting attorney *or investigating law enforcement officers*." Under the plain language of the statute, Medici's name was required to be listed on the witness list attached to the information regardless of whether the prosecutor himself or Pieroni knew his name or were aware that he conducted the sweep because Medici was an investigating law enforcement officer rather than a witness that was not related to the police department.

Nonetheless, the omission of Medici's name from the witness list does not warrant a reversal of defendant's conviction. The appropriate remedy for a violation of MCL 767.40a is to remand the case to the trial court for an evidentiary hearing to determine, in part, whether the witness' absence at trial was prejudicial to the defendant. *Calhoun*, *supra*, at 521-523. However, we believe that remand for an evidentiary hearing is not warranted because, based on the evidence and testimony introduced at trial, defendant cannot establish that he was prejudiced by the absence of Medici's name from the witness list. First, when confronted with the "run sheet" and the fact that it indicated that a dog had swept the car, Pieroni offered to call Medici and have him testify at trial so that he could answer defense counsel's questions as to whether Cox's car had in fact been swept by a dog and, if so, whether the dog had detected that drugs had been in the car. However, despite being given this opportunity, defense counsel did not request that Medici testify.

Further, as stated above, officers at trial testified that dogs can sometimes detect that drugs have been in a vehicle even if they are no longer there. Additionally, after calling Medici, Pieroni testified that Medici had told him that he had, in fact, swept Cox's car with a dog and that the dog had not indicated that drugs had been in the car. Thus, aside from having had the opportunity to question Medici during trial, which he did not capitalize upon, defense counsel was able to elicit testimony that police dogs are sometimes able to detect that drugs have been in a vehicle even though the drugs are no longer there, that a dog had swept Cox's vehicle, and that the dog had not indicated that drugs had been in the car. Therefore, although defendant is correct in asserting that Medici's name should have been listed on the prosecution's witness list, he has not shown that Medici would have offered any testimony relating to the dog sweep in addition to that which was actually presented at trial. Consequently, we conclude that defendant has failed

to show that the prosecutor's failure to list Medici resulted in his being prejudiced and, therefore, that the error was harmless.

Defendant's final assertion is that the trial court erroneously scored OV 19 at fifteen points. Under MCL 777.49(c), OV 19 is to be scored at fifteen points where the court finds that defendant "used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services." In the present case, the trial court appears to have based its determination that defendant had interfered with, or attempted to interfere with, the administration of justice by providing a false name to the police and struggling with the officers during their attempt to frisk him, resulting in their application of the "pain compliance" techniques and using pepper spray.

Defendant asserts that the phrase "interfere with, attempt to interfere with, or that results in the interference with the administration of justice" refers only to conduct aimed at undermining the judicial process, i.e., court or similar proceedings, and, thus, does not apply to conduct interfering with police activities. In support of his assertion, defendant relies on this Court's holding in *People v Deline*, 254 Mich App 595; 658 NW2d 164 (2002). However, in *People v Barbee*, 470 Mich 283; 681 NW2d 348 (2004), our Supreme Court recently disapproved of our decision in *Deline,* and held that the trial court in that case had appropriately scored OV 19 where the defendant had provided a false name to police officers during a traffic stop. In doing so, our Supreme Court specifically held that "Conduct that occurs before criminal charges are filed can form the basis for interference, or attempted interference, with the administration of justice, and OV 19 may be scored for this conduct where applicable," *id*., at 288. Thus, based on *Barbee*, coupled with the fact that defendant in the present case provided the officers with a false name and the officers testified that he resisted their efforts to frisk him, we conclude that the trial court properly scored OV 19 at fifteen points.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Janet T. Neff
/s/ Jane E. Markey