STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GERALD ANTONIO BUSH,

Defendant-Appellant.

UNPUBLISHED
August 26, 2010

No. 291170
Wayne Circuit Court
LC No. 08-016254-FH

Before: K. F. KELLY, P.J., and WILDER and GLEICHER, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of nine months to five years for the felon in possession and carrying a concealed weapon convictions, and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant argues that he is entitled to a new trial because trial counsel was ineffective. We disagree. In the absence of an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), this Court's review is limited to errors apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). "Generally, to establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009).

At trial, defendant's theory was that the police planted a gun on him during a traffic stop. The basis of defendant's first claim of ineffective assistance occurred after defense counsel asked Sergeant Harris, "This wasn't a dropsy gun, was it?" Sergeant Harris initially responded by asking, "Do I have to answer that, Your Honor?" The court stated, "Go ahead. He asked the question. Answer it any way you need to." Sergeant Harris then testified:

> Sir, I take my job very seriously as a police officer. I do it with great distinction, I do it with great honor, I do it with great pride. I have a family that I have to support and I have parents – excuse me. I have parents that are very

> proud of me and a son who looks up to me. So, I would never play dropsy guns because when everything is said and done, it's a person's freedom that is on the line, as well as my integrity to do my job and my ability to look myself in the mirror every day. That's the answer to that question.
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> Nor would I condone it, nor would I allow it, not as a police officer and not as a sergeant. And my job as a police officer and also as a sergeant is to root out people that would do things that way. When one person do [sic] that, it affects everybody that wear [sic] this badge and it compromises my integrity to do my job.

Defense counsel then asked Sergeant Harris, "So my question is you do know what the dropsy gun is, correct?" Sergeant Harris responded affirmatively. Defendant argues that defense counsel was ineffective for not objecting or moving to strike Sergeant Harris's answer as non-responsive, and that the answer "diverted the jury from the issue of guilt or innocence and damaged the defense."

Sergeant Harris's answer was not totally responsive to defense counsel's question. But in light of the trial court's instruction to Sergeant Harris to "[a]nswer any way you need to," an objection by defense counsel would have been futile. Further, trial counsel's decision to ignore the answer rather than object was a matter of trial strategy, and defendant has not overcome the presumption of sound strategy. *People v Ullah*, 216 Mich App 669, 685; 550 NW2d 568 (1996).

Defendant next argues that defense counsel was ineffective for agreeing to stipulate to the contents of a video recording from the police squad car at the time of defendant's arrest, rather than show the actual recording. Defense counsel agreed to the stipulation after the actual recording could not be played because of technical difficulties. The parties stipulated that the video did not show the incident that the officers described. Defense counsel's decision to stipulate to what the recording depicted rather than attempt to solve the technical difficulties was a matter of trial strategy. The stipulation advanced the purpose of informing the jury that the video did not show what the officers had described. Furthermore, because the jury was aware of what the video would show, defendant cannot demonstrate a reasonable probability that the result would have been different had the jury seen the actual video.

Finally, there is no merit to defendant's argument that trial counsel was ineffective for failing to object to Sergeant Raymond Evans's testimony that, to his knowledge, no fingerprints were recovered from the gun. Contrary to what defendant argues, this testimony was not hearsay because it did not involve an out-of-court statement. MRE 801(c). Thus, any hearsay objection would have been futile. Furthermore, the only aspect of the testimony that was arguably damaging to the defense was Sergeant Evans's assertion that it was very uncommon to obtain a fingerprint from a weapon. However, that testimony did not involve a matter of expert opinion under MRE 702, but rather a statement of fact based on Sergeant Evans's personal experience of having submitted "[h]undreds" of weapons for fingerprint testing, with only one having come back with prints. Because the testimony was not improper, defense counsel was not ineffective for failing to object.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kurtis T. Wilder
/s/ Elizabeth L. Gleicher