

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUSTIN SCOTT EDMONDS,

Defendant-Appellant.

UNPUBLISHED
February 23, 2016

No. 324869
Genesee Circuit Court
LC No. 14-034495-FC

Before: RONAYNE KRAUSE, P.J., and SAWYER and STEPHENS, JJ.

PER CURIAM.

A jury convicted defendant of armed robbery, MCL 750.529, for which he was sentenced to 7 to 20 years' imprisonment. Defendant appeals as of right, and we affirm.

Defendant was convicted of robbing Kristen Snyder, a gas station clerk in Swartz Creek, on December 21, 2013. The prosecutor presented Snyder's testimony that a man, whom she identified as defendant, entered the station at approximately 3:00 a.m., held a knife to her side, and directed her to remove all the money from the cash register. Snyder testified that she clearly saw defendant's face, which was not covered. Defendant fled, and Snyder contacted the police. Snyder testified that the gas station was robbed again on the night of December 23, by a man whose face was covered with a bandana or scarf. Snyder believed that the same person committed both robberies, and selected defendant from a six-person live lineup. Defendant was charged with committing both robberies. The defense denied that defendant committed the robberies, and suggested that the robberies were concocted. The jury found defendant not guilty of the December 23 robbery.

On appeal, defendant argues that he is entitled to a new trial because tracking-dog evidence was presented at trial and the trial court failed to give the required cautionary jury instruction for that type of evidence, M Crim JI 4.14.¹ We disagree. Before deliberations, the

¹ M Crim JI 4.14 provides:

You have heard testimony about the use of a tracking-dog. You must consider tracking-dog evidence with great care and remember that it has little value as proof. Even if you decide that it is reliable, you must not convict the

parties discussed the jury instructions and, the next day, the following exchange occurred regarding those instructions:

The court: All right, I want to get the instructions and the verdict form completely cleared up before we bring the jury up so both of you I hope have had a chance to review what was compiled after our conference on Friday and I want to be sure you agree, [prosecutor]?

The prosecutor: Yes, your Honor. I reviewed them and I found them to be acceptable and consistent with our most recent conference.

Defense counsel: Likewise. Thank you.

After the trial court instructed the jury, but before the jury was excused to begin deliberations, it asked the parties whether they “wish to have any further conference.” Defense counsel stated, “No, thank you.” After the jury was excused, the court asked the parties whether they would “like to put anything else on the record[.]” Again, defense counsel stated, “No, thank you.” By expressly and repeatedly approving the jury instructions, which did not include M Crim JI 4.14, defendant waived appellate review of his substantive claim of instructional error. *People v Kowalski*, 489 Mich 488, 504; 803 NW2d 200 (2011). Defendant’s waiver extinguished any error, leaving no error to review. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000).

Defendant alternatively argues that defense counsel was ineffective for failing to object to the instructions as given, and failing to request the cautionary instruction on tracking-dog evidence. Because defendant failed to raise an ineffective assistance of counsel claim in the trial court, our review of that claim is limited to mistakes apparent from the record. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012). To establish ineffective assistance of counsel, defendant first must show that counsel’s performance was below an objective standard of reasonableness. In doing so, defendant must overcome the strong presumption that counsel’s assistance was sound trial strategy. Second, defendant must show that, but for counsel’s deficient performance, it is reasonably probable that the result of the proceeding would have been different. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012); *People v Roscoe*, 303 Mich App 633, 644; 846 NW2d 402 (2014). “Reviewing courts are not only required to give counsel the benefit of the doubt with this presumption, they are required to ‘affirmatively entertain the range of possible’ reasons that counsel may have had for proceeding as he or she did.” *People v Gioglio (On Remand)*, 296 Mich App 12, 20; 815 NW2d 589 (2012), vacated in part on other grounds 493 Mich 864 (2012). “[A] reviewing court must conclude that the act or omission of the defendant’s defense counsel fell within the range of reasonable professional conduct if, after affirmatively entertaining the range of possible reasons for the act or omission under the facts

defendant based solely on tracking-dog evidence. There must be other evidence that the defendant is guilty.

known to the reviewing court, there might have been a legitimate strategic reason for the act or omission.” *Id.* at 22-23.

As defendant correctly observes, when tracking-dog evidence has been admitted at trial, the trial court has a duty, even absent a request by counsel, to inform the jury that “tracking dog evidence must be considered with caution; is of slight probative value; and if found reliable, cannot support a conviction in the absence of other direct evidence of guilt.” *People v Perryman*, 89 Mich App 516, 524; 280 NW2d 579 (1979). In this case, the tracking-dog evidence presented at trial was insignificant in the context of the evidence as a whole. Defense counsel reasonably may have determined that a tracking-dog instruction would not be useful to the jury because of the insignificance of that evidence. Defendant has not overcome the presumption that counsel’s failure to request the instruction was objectively reasonable.

Moreover, to the extent that defense counsel erred by failing to request the instruction, defendant was not prejudiced by its absence. As defendant acknowledges, he was convicted of the December 21 armed robbery only. After going to the gas station, a police officer tracked fresh footprints from the gas station to a driveway and, although he summoned a tracking dog, the dog “never picked up a track.” The police went to the door of the residence, not because of any tracking-dog activity, but because Snyder had recognized the robber as a friend of the man who lived at that residence, where the robber sometimes stayed. The police investigated the residence, but defendant was not inside. Thus, there was no incriminating tracking-dog evidence related to the armed robbery for which defendant was convicted. While a tracking dog was also used after the December 23 robbery, and it led from the gas station to the same driveway, the fact that the jury acquitted defendant of that robbery belies defendant’s claim that the jury placed much weight, if any, on that evidence. The record establishes that apart from any tracking-dog evidence, there was ample evidence supporting defendant’s guilt of the December 21 robbery. Snyder testified that on December 21, the robber’s face was not covered, she “saw what his face looked like,” and she was sure and had no doubt that defendant was the person who robbed her on December 21. In contrast, Snyder was less confident in her identification of defendant as the robber on December 23, because his face was covered with a scarf or bandana. In addition, the jury observed surveillance video showing that a robbery actually occurred on December 21, but no such video was shown for the December 23 robbery and defense counsel used that fact, with other evidence, to suggest that Snyder had concocted the robbery. In light of this record, there is no reasonable probability that the result of the proceeding would have been different had the jury received the tracking-dog instruction. Accordingly, defendant’s alternative claim of ineffective assistance must fail.

Affirmed.

/s/ Amy Ronayne Krause
/s/ David H. Sawyer
/s/ Cynthia Diane Stephens