# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIANT EUGENE KERNELL,

Defendant-Appellant.

UNPUBLISHED
October 2, 1998

No. 201540
Ottawa Circuit Court
LC No. 96-019988 FH

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Before: Cavanagh, P.J., and Murphy and White, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of discharging a firearm at a dwelling, MCL 750.234b; MSA 28.432(2), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to consecutive terms of one to four years' imprisonment for the discharge of a firearm at a dwelling conviction, and two years' imprisonment for the felony-firearm conviction. We affirm defendant's convictions, but remand for correction of an error in the judgment of sentence.

I

As an initial matter, we note that there appears to be an error on the judgment of sentence. According to the judgment of sentence, defendant was convicted of MCL 750.234a; MSA 28.431(1), which prohibits against discharging a weapon from a vehicle. However, our review of the record indicates that defendant was actually charged with and convicted of discharging a firearm at a dwelling in violation of MCL 750.234b; MSA 28.432(2).[1] Accordingly, we remand for the limited purpose of correcting the judgment of sentence.

II

Defendant argues that he was denied effective assistance of counsel when defense counsel allowed an audiotape[2] to be played to the jury without first listening to the contents of the tape. A defendant who claims that he has been denied the effective assistance of counsel must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing

professional norms, and (2) a reasonable probability exists that, in the absence of counsel's

unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom *Michigan v Caruso*, 513 US 1121 (1995).

Because defendant failed to move for a *Ginther*[3] hearing or a new trial based on ineffective assistance of counsel, this Court's review is limited to errors apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). After carefully reviewing the record, we conclude that reversal is not required.

During trial, the prosecution played an audiotape of the police interrogation of defendant. After approximately ninety minutes, the following colloquy occurred:

Q. Do you want to take a polygraph test?

A. That I did not do it. I now [sic] that.

Q. Would you be willing to take a polygraph test?

A. What the hell is a polygraph test?

Q. A lie detector test.

A. Damn.[4]

Q. Maybe tomorrow.

[Defense Counsel]: Objection. May we approach?

At this point, the jury was removed. After some discussion, the parties agreed that the rest of the tape would not be played for the jury. The jury was then brought back in, and the trial court informed it that the contents of the balance of the tape were either cumulative or inadmissible.

Defendant contends that he was denied a fair trial by his counsel's failure to thoroughly review the audiotape before trial and make appropriate pretrial motions to redact all references to a polygraph. We agree that defense counsel was careless at best. However, in order to find ineffective assistance of counsel, we must find not only that counsel's performance was seriously deficient,[5] but also that a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. See *Pickens, supra*. In the portion of the audiotape heard by the jury, defendant repeatedly denied knowing anything about the shooting. Defendant also stated that he and the complainant were not at odds, and he had no reason to shoot at the latter's house. As discussed more thoroughly below, the evidence was sufficient to support defendant's convictions. We are not persuaded that, had the brief reference to the polygraph not occurred, a reasonable probability exists that the jury would have acquitted defendant.

Defendant also argues that his trial counsel was ineffective for refusing to request a curative instruction. However, defense counsel elected not to ask the trial court to provide a curative instruction because he was uncertain whether the jury had even heard the reference to the polygraph, and he did not want to draw any undue emphasis to it. We conclude that defendant has not overcome the presumption that the challenged action constituted sound trial strategy. See *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

III

Defendant next argues that his due process right to a fair trial was violated because the jury heard defendant's tape-recorded refusal to take a polygraph examination. We disagree. Results of a polygraph are inadmissible at trial, but not all references to polygraphs constitute error requiring reversal. *People v Barbara*, 400 Mich 352, 405; 255 NW2d 171 (1977); *People v Rocha*, 110 Mich App 1, 8; 312 NW2d 657 (1981). To determine whether reversal is required, a court should consider: (1) whether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted. *Id*.

In the instant case, defense counsel made a timely objection but did not request a curative instruction. The references to the polygraph were apparently inadvertently presented to the jury.[6] The mention of the polygraph was brief and did not indicate whether such a test was actually taken. The prosecutor did not argue that defendant's refusal to take a polygraph examination indicated consciousness of guilt. After considering the *Rocha* factors, we do not find that the reference to a polygraph examination denied defendant a fair trial. Cf. *People v King*, 215 Mich App 301; 544 NW2d 765 (1996).

IV

Finally, defendant next asserts that there was insufficient evidence presented at trial to support his convictions. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime. *People v McKenzie*, 206 Mich App 425, 428; 522 NW2d 661 (1994).

After carefully reviewing the record, we conclude that sufficient evidence was presented at trial to support defendant's convictions. The complainant testified that in the early morning hours on May 27, 1996, someone discharged a firearm multiple times at his home. Juan Cantu testified that, shortly before the shooting, he saw defendant in the area driving a maroon car slowly and with the headlights off. Cantu heard defendant tell Raul Reyes that he was looking for the complainant because he blamed him for a shooting at defendant's house just a few days earlier. Veronica Cordova testified that on the night of the shooting, defendant had been driving her maroon 1984 Oldsmobile Cutlass Ciera; this car

had previously sustained front-end damage in a collision, and the headlight frame had consequently been replaced. The replacement had been purchased at U-Wrench-It. After the shooting, the police found a headlight frame lying on the roadway just east of the complainant's residence. An employee of U-Wrench-It testified that the frame had been purchased at that establishment; he also stated that the frame would fit a 1982-1984 Oldsmobile Cutlass Ciera. The day after the shooting, defendant and his girlfriend went to U-Wrench-It and purchased a headlight frame for an Oldsmobile Cutlass Ciera.

Considering the above evidence in a light most favorable to the prosecution, a reasonable factfinder could conclude that defendant was the person who had shot at the complainant's house, and that the headlight frame found at the scene had come off when defendant's car ran into the curb as he was shooting. Accordingly, sufficient evidence was presented to support defendant's convictions.

IV

Defendant's convictions are affirmed; however, we remand for the limited purpose of correcting the judgment of sentence.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Helene N. White

[1] MSA 750.234a; MSA 28.431(1) provides:

> Except as provided in subsection (2) or (3), an individual who intentionally discharges a firearm from a motor vehicle . . . in such a manner as to endanger the safety of another individual is guilty of a felony, punishable by imprisonment for not more than 4 years, or a fine of not more than $2,000, or both.

MSA 750.234b; MSA 28.432(2) provides:

> Except as provided in subsection (3) or (4), an individual who intentionally discharges a firearm at a facility that he or she knows or has reason to believe is a dwelling or an occupied structure is guilty of a felony, punishable by imprisonment for not more than four years, or a fine of not more than $2,000, or both.

The Felony Information alleges that defendant "did intentionally discharge a firearm at a facility he knew or had reason to believe was a dwelling or an occupied structure; contrary to MCL 750.234a [sic]." At the preliminary examination, the court concluded "[T]here's sufficient circumstantial evidence here for the Court to bind over on the charge of discharging a firearm at a residence, that the defendant knew or had reason to believe was a dwelling." The trial court instructed the jury as follows:

> The defendant is charged with intentionally discharging a firearm at a dwelling or occupied structure. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt. First, that the defendant discharged a

> firearm. Second, that he did so intentionally, that is, on purpose. Third, that he did so at a facility that he knew or had reason to believe was a dwelling or an occupied structure."

[2] In his brief on appeal, defendant refers to a videotape, but in fact only the audio portion of defendant's interrogation appears to have been recorded.

[3] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

[4] The trial transcript indicates that defendant said "Damn" at this point; however, both parties agree that defendant's actual response was "Hell no."

[5] Because of our resolution of this issue, we do not address whether defense counsel's performance fell below an objective standard of reasonableness. See *Pickens, supra*.

[6] Defendant does not argue on appeal, and did not argue below, that the prosecution was deliberately attempting to introduce inadmissible references to the polygraph test.