STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DALE RAY MUNSON,

Defendant-Appellant.

UNPUBLISHED
December 17, 2002

No. 236885
Oakland Circuit Court
LC No. 01-177915-FH

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

PER CURIAM.

Defendant appeals as of right his convictions of resisting and obstructing a police officer, MCL 750.479, and reckless driving, MCL 257.626, entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Police officers testified that they received information that a suspected narcotics dealer would be conducting a transaction at a strip mall on a specific date. The officers conducted surveillance in plain clothes, with their badges worn around their necks, and they drove unmarked vehicles. The officers observed the dealer enter a vehicle driven by defendant. Defendant drove to the strip mall. The officers attempted to block defendant's vehicle with their vehicles, and one officer stood in front of defendant's vehicle. Defendant drove into and over a pole, and left the parking lot at a high rate of speed. Other vehicles were required to take evasive action to avoid being struck by defendant's vehicle. A marked police vehicle activated its lights and siren and joined the unmarked vehicles in a pursuit of defendant's vehicle. Defendant stopped his vehicle, and subsequently was forced to the ground and handcuffed. The officers denied that they struck defendant while attempting to restrain him.

A defense witness testified that she followed defendant's vehicle to the mall. She stated that when defendant's vehicle entered the parking lot several vehicles surrounded it. She saw nothing that identified the occupants as police officers. The witness maintained that the officers hit defendant as he was being handcuffed.

Defendant testified that he agreed to drive the suspected dealer to the mall to meet a friend. Defendant asserted that when he reached the mall parking lot a vehicle attempted to block his path. He maintained that he did not see a neck badge or anything else that identified the occupants as police officers; however, he saw one occupant of the vehicle brandish a gun. Defendant left the mall parking lot and stopped on a side street. Shortly thereafter several

vehicles, including a marked police unit, came to the scene. The marked unit did not have its lights and siren activated. Defendant stated that officers approached his vehicle, dragged him out, and started beating him. He denied that he resisted or refused to comply with the officers. Defendant stated that as he was being beaten, he heard an officer yell that a camera should be deactivated. He stated that he left the mall parking lot because he feared for his life. Defendant denied that multiple vehicles attempted to block his path in the mall parking lot, and denied that a person stood in front of his vehicle.

The trial court denied defendant's request that the jury be instructed on the defense of duress. The court noted that defendant argued he took the action he did because he believed that his life was in danger, and that the jury could find him not guilty of reckless driving on that ground. The jury found defendant guilty of the charged offenses.

Duress is an affirmative defense that may be asserted when the crime was committed to avoid a greater harm. *People v Mary Lemons*, 454 Mich 234, 245-246; 562 NW2d 447 (1997). The defendant must present a prima facie case of the elements of the defense. *Id.* at 246. The defendant must show that: (1) the threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm; (2) the conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant; (3) the fear or duress was operating on the mind of the defendant at the time of the alleged act; and (4) the defendant committed the act to avoid the threatened harm. *Id.* at 247. The threat must have arisen without the negligence or fault of the defendant. *Id.* Once a defendant successfully raises the defense, the prosecution has the burden of proving beyond a reasonable doubt that the defendant did not act under duress. *People v Terry*, 224 Mich App 447, 453-454; 569 NW2d 641 (1997).

A trial court must provide a requested instruction regarding a defense if the evidence supports it. *Lemons, supra,* 250. We review a claim of instructional error de novo. *People v Marion,* 250 Mich App 446, 448; 647 NW2d 521 (2002).

A person who drives a vehicle upon a highway or other place open to the public, including a place designated for the parking of motor vehicles, with "willful or wanton disregard for the safety of persons or property is guilty of reckless driving." MCL 257.626.

Defendant argues that the trial court erred by declining to instruct the jury on the defense of duress. We find it unnecessary to determine whether the trial court erred in failing to give a duress instruction because defendant suffered no prejudice. Jury instructions are reviewed in their entirety, and where the court fails to give a requested instruction, this Court must determine whether the failure seriously impaired a defendant's ability to effectively present a given defense. *People v Kris Aldrich*, 246 Mich App 101, 125; 631 NW2d 67 (2001). Defendant testified that an unmarked vehicle forced him into a post,[1] which would negate any willful or wanton conduct, and defendant testified that his driving after hitting the pole was not reckless, which would eliminate a necessary element of the duress defense under *Lemons.* The trial court's failure to instruct the jury on the defense of duress did not seriously impair defendant's ability to present a defense. No error requiring reversal occurred.

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[1] Defendant testified that "a vehicle came from here and forced me into this post here."

Defendant next argues that counsel rendered ineffective assistance at trial by failing to procure a copy of the videotape that would have been produced in the taping unit of the marked police vehicle. He asserts that if such a tape existed, its production would have resulted in an acquittal because it would have supported his contention that the police officers beat him. We disagree.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the Sixth Amendment. *Id.* Counsel's deficient performance must have resulted in prejudice. *Id.* To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id.* Counsel is presumed to have afforded effective assistance, and a defendant bears the heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant has not produced an affidavit or offer of proof to support his contention that an actual tape existed, or that a tape once existed and was destroyed. Without some showing that an actual tape existed, defendant cannot demonstrate that counsel's failure to attempt to procure it was a serious error. Furthermore, defendant cannot demonstrate prejudice. *Carbin*, *supra*. Defendant has not overcome the presumption that counsel rendered effective assistance. *Rockey*, *supra*.

Affirmed.

/s/ Donald S. Owens
/s/ William B. Murphy
/s/ Mark J. Cavanagh