

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC DELANCY MCCLURE,

Defendant-Appellant.

UNPUBLISHED

December 21, 2006

No. 265374

Wayne Circuit Court

LC No. 02-006338-01

Before: Murphy, P.J., and Smolenski and Kelly, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b. We affirm.

Detroit Police Officers Dabliz and Toler testified that they initiated a traffic stop when they observed defendant run a stop sign. The officers also noticed that the car had a broken taillight and a license plate that was registered to another vehicle. Defendant made a u-turn and, as the officers drove past him, Dabliz shined his flashlight into defendant's car. He noticed defendant acting erratically. After the officers stopped defendant, he told them that his license had been suspended. The officers arrested defendant, and Dabliz told Toler to perform an inventory of the car. Toler found a .38 revolver in the armrest of the car.

Because defendant failed to raise his claims of ineffective assistance of counsel in the trial court in connection with a motion for a new trial or an evidentiary hearing, our review is generally limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). In order to establish ineffective assistance, defendant must establish that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and must show a reasonable probability that the outcome of the proceedings would have been different absent counsel's unprofessional errors. *Id.* at 659. He must also overcome a strong presumption that counsel's actions were strategic. *Id.* We will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Defendant argues that counsel was ineffective for failing to request a fingerprint expert to "present the jury with accurate information about the ability to remove fingerprints from

handguns.” Decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and the failure to call witnesses or present evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). “A substantial defense is one that might have made a difference in the outcome of the trial.” *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Defendant fails to make an offer of proof regarding any missing expert testimony or to explain how expert testimony regarding the recovery of fingerprints from a handgun would have affected the outcome of the trial. We think it unlikely the jury would have greatly benefited from expert testimony that fingerprints could be removed from a weapon. Such a fact is self-evident. In any event, the lack of fingerprints was used, albeit ultimately unsuccessfully, to support defense counsel’s argument that the police, who were wearing gloves during the arrest and search, planted the weapon in the car. We find that defendant has not shown that counsel acted unreasonably or that the outcome would have been different had an expert witness testified on defendant’s behalf.

Defendant also argues that trial counsel presented ineffective assistance when he failed to request that the videotape of the arrest be preserved. However, we find that defendant has not shown that counsel acted unreasonably, or that the outcome of the trial would have been different had counsel requested the videotape of the arrest. First, defendant cannot show that a videotape of the arrest was ever made. According to the testifying officer, the videotape equipment was not completely reliable. No evidence showed that the arrest was actually caught on videotape. Defendant has not presented anything to contradict the officer’s assertion or to otherwise suggest that the arrest was videotaped. Defendant has failed to present any evidence to suggest that the missing videotape would have benefited the defense. It is equally as likely that the tape would have supported the officers’ testimony.

We do not agree with defendant’s characterization of counsel’s arguments as an attempt to cover up his mistake in failing to properly investigate the case and request the preservation of the tape. Counsel used the lack of a tape quite persuasively against the officers, despite the prosecutor’s somewhat successful attempts to curtail the suggestion that the tape was deliberately destroyed as part of a pattern used by the police officers to cover their own misconduct. This argument was coupled with the evidence that the pistol was a Detroit Police issue, whose initial “disappearance” was not explained, and that defendant’s fingerprints were not found on the gun. Defense counsel presented a clear strategy for casting a reasonable doubt in the jurors’ minds. That a strategy does not work does not render its use ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Kirsten Frank Kelly