

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JULIUS ROBERT CARTER, SR.,

Defendant-Appellant.

UNPUBLISHED

March 4, 2008

No. 276428

Wayne Circuit Court

LC No. 06-011014-01

Before: Whitbeck, P.J., and Jansen and Davis, JJ.

PER CURIAM.

Defendant Julius Carter appeals as of right from his jury convictions of carrying a concealed weapon¹ and resisting and obstructing a police officer causing injury.² We affirm Carter's convictions but remand for proceedings consistent with this opinion. We decide this appeal without oral argument pursuant to MCR 7.214(E).

I. Basic Facts And Procedural History

At trial, Detroit Police Officer Schmelter testified that, on September 8, 2006, he and his partner, Officer Terri Graves, were in a "semi-marked" police car when they observed a green Ford Aerostar van pull into a party store parking lot. The front passenger was hanging out the window of the moving van. Officer Schmelter pulled into the parking lot. The passenger got out of the van, and Officer Schmelter told him to stop; however, the man continued to walk into the party store. As Officer Schmelter continued to try to speak with the passenger, he noticed that Officer Graves was in foot pursuit of the driver. Officer Schmelter admitted that he did not get a good look at the driver and could not identify him. Officer Schmelter stopped pursuing the

¹ MCL 750.227.

² MCL 750.81d(2) states as follows:

An individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties causing a bodily injury requiring medical attention or medical care to that person is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than \$5,000.00, or both.

passenger, returned to his car, and followed Officer Graves. He lost sight of the two of them and began to search the area. A minute or two later, Officer Graves radioed Officer Schmelter and told him that she had the driver in custody. During a subsequent search of the van, Officer Schmelter found a handgun on the floor between the driver and passenger seats.

Officer Graves testified that as she was getting out of the police car, she saw the driver of the van look at her, exit the van, and begin running. Officer Graves followed, and told the driver to stop. Officer Graves identified Carter, the defendant herein, as the driver. Officer Graves maintained that it was daylight when she first observed Carter. Officer Graves chased Carter for a few blocks but lost sight of him when he ran eastbound in an alley between rows of houses. She saw Carter again “three or four minutes” later when he returned westbound down the alley. She resumed the chase, again directed him to stop, and he finally stopped. When Officer Graves was asked whether it was possible that she had lost the man she had been chasing and then “someone else came along” whom she then arrested, she stated, “No. He looked dead at me.”

Officer Graves also answered affirmatively to the prosecutor’s assertion, “So there’s no don’t (sic) in your mind as far as remembering who it was that’s the same person?” Officer Graves testified that she returned with Carter to the van, where she and Officer Schmelter discovered the weapon. Officer Graves testified that the van was registered to James Howard Jackson, who resided around the corner from where the chase occurred. During cross-examination, she admitted that she did not investigate Carter’s connection, if any, to the van.

Carter testified that he was returning home from a nearby park with friends when Officer Graves arrested him. He denied driving the van, possessing a weapon, or running from Officer Graves at the party store. Carter admitted that he was jogging when Officer Graves ordered him to stop, but contended that he was simply trying to get home more quickly.

Twan Smiley, Carter’s acquaintance, testified that he and Carter left the park and were talking to some women on a corner when they saw two police cars. Four police officers exited the cars and started to look for someone. According to Smiley, he and Carter left the park. Smiley followed Carter and saw him being arrested. Although Smiley tried to inform the officers that Carter was not the person they were looking for, they would not listen to him.

Frederick Williams, a defense witness, stated that he knew Carter by sight, but not by name. According to Williams, he was walking his dogs near the party store when he heard an officer yell for someone to stop. He turned around and saw someone walking away. The person began running from the police after he was again told to stop. Williams maintained that the person he saw was not Carter. On cross-examination, he admitted that he was paying attention to his dogs and did not see where the man the police were chasing went or what he was wearing. He also testified that he and the person the police were chasing were traveling in the same direction, and that the person “turned and looked” at the officer before he began to run. Williams did not see the police arrest Carter.

II. Sufficiency Of The Evidence

A. Standard Of Review

Carter argues that the prosecution presented insufficient evidence to support his convictions. He specifically maintains that the prosecutor presented insufficient evidence of his

identity as the perpetrator. We de novo review a defendant's allegations regarding insufficiency of the evidence.³

B. Legal Standards

We view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.⁴ However, we will not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses.⁵ Satisfactory proof of the elements of the crime can be shown by circumstantial evidence and reasonable inferences arising therefrom.⁶ It is for the trier of fact to determine what inferences fairly can be drawn from the evidence and the weight to be accorded to those inferences.⁷

C. Applying The Standards

Here, Officer Graves testified that Carter was the driver of the van involved in this incident. Officer Graves stated that Carter looked directly at her and that she saw him clearly as she ordered him to stop. Carter admitted at trial that he was jogging when Officer Graves ordered him to stop, but contended that he was simply trying to get home more quickly. When this evidence is reviewed in the light most favorable to the prosecution, a rational trier of fact could find that Carter's identity as the perpetrator was proven beyond a reasonable doubt. While the fact that Officer Graves lost sight of Carter briefly during the foot chase allowed the defense to cast doubt on her recollection, it did not render her identification testimony inadmissible. The prosecution was not required to disprove Carter's theory that he just happened to be out jogging in the same alley down which Officer Graves chased her suspect minutes earlier.⁸ We conclude that there was sufficient evidence to support Carter's convictions.

III. Ineffective Assistance Of Counsel

A. Standard Of Review

Carter argues that trial counsel was ineffective when he failed to obtain an expert witness to testify about the unreliability of eyewitness identifications. Because Carter did not move in

³ *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

⁴ *Id.*

⁵ *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1202 (1992).

⁶ *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

⁷ *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

⁸ *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

the trial court for a new trial or a *Ginther*⁹ hearing, our review of his ineffective assistance claim is limited to mistakes apparent on the record.¹⁰

B. Legal Standards

Effective assistance of counsel is presumed.¹¹ In order to overcome this presumption, the defendant must first show that counsel's performance was deficient under an objective standard of reasonableness.¹² The defendant also must show that the deficiency was so prejudicial that he was deprived of a fair trial "such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different."¹³ 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.¹⁴

Decisions regarding whether to call witnesses are presumed to be matters of trial strategy.¹⁵ The failure to call witnesses constitutes ineffective assistance only if it deprives the defendant of a substantial defense.¹⁶ A substantial defense is one that might have made a difference in the outcome of the trial.¹⁷

C. Applying The Standards

Here, we conclude that Carter cannot show that he was provided ineffective assistance of counsel. First, because our review is limited to the existing record, we find that Carter has not overcome the presumption that counsel might have declined to request an expert witness as a matter of trial strategy. Carter presented the eyewitness testimony of a neighbor, who testified that the person the police were initially chasing was not Carter. However, this individual, who was not well acquainted with Carter, testified that he only caught a brief glimpse of the face of the person who was fleeing from police. Trial counsel could well have thought that any evidence concerning the unreliability of eyewitness testimony would likely have rendered this testimony more suspect than that given by the arresting officer. Moreover, this Court has also held that a decision not to request such expert testimony may be strategic in that, "trial counsel may reasonably have been concerned that the jury would react negatively to perhaps lengthy expert

⁹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

¹⁰ *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).

¹¹ *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

¹² *Id.*

¹³ *Id.* at 663-664.

¹⁴ *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

¹⁵ *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

¹⁶ *Id.*

¹⁷ *People v Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999).

testimony that it may have regarded as only stating the obvious: memories and perceptions are sometimes inaccurate.”¹⁸

In addition, Carter cannot show that the alleged failure to request an expert witness deprived him of a substantial defense. Defense counsel was able to pursue other available methods for attempting to discredit Officer Graves’ identification testimony, including both vigorous cross-examination and the presentation of other eyewitness testimony. In contrast, Carter’s assertions on appeal regarding the necessity of an expert witness are largely speculative. Carter refers to the weaknesses of eyewitness testimony generally and claims that “many courts are beginning to understand and recognize the probative value of admitting expert testimony in this area.” However, he has failed to obtain an affidavit from a proposed expert discussing these issues in the context of this case. Instead, he asks this Court to assume that expert testimony would have been so beneficial to the defense that it likely would have resulted in a different outcome at trial. We decline to do so. We thus find that because Carter has not established the factual predicate for his claim, he is not entitled to relief.

IV. Ministerial Error

While Carter has not raised this issue on appeal, we note that, while resisting and obstructing causing injury was listed as a charge on the initial information, the prosecutor moved to amend the information after the preliminary examination to bind Carter over on the lesser charge of resisting and obstructing.¹⁹ The trial court granted this motion. The information was, in fact, amended. During trial, no testimony concerning officer injury was presented, the jury was charged with determining whether Carter was guilty of simple resisting and obstructing, and the jury found him guilty of this lesser charge. Therefore, the trial court’s judgment of conviction and sentence, which still lists resisting and obstructing causing injury as Carter’s second conviction, contains a ministerial, yet material, error. We remand this case for correction of this error.

Affirmed, but remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Alton T. Davis

¹⁸ *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999).

¹⁹ MCL 750.81d(1) states as follows:

Except as provided in subsections (2), (3), and (4), an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than \$2,000.00, or both.