STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 2, 2008
v	No. 280233 Alpena Circuit Court
DANIEL GERARD TYMCZYN, Defendant-Appellant.	LC No. 06-001153-FH

Before: O'Connell, P.J., and Smolenski and Gleicher, JJ.

PER CURIAM.

A jury convicted defendant of assaulting, resisting, or obstructing a police officer, MCL 750.81d(1), and trespass, MCL 750.552. The jury found defendant not guilty of attempting to disarm a police officer, MCL 750.479b(2). The trial court sentenced defendant to serve 25 days in jail on the assaulting, resisting, or obstructing a police officer conviction, and five days in jail on the trespass conviction. Defendant now appeals as of right and, because we conclude that there were no errors warranting relief, we affirm. This appeal has been decided without oral argument under MCR 7.214(E).

Defendant's sole argument on appeal is that he was denied the effective assistance of counsel when defense counsel did not request an adverse inference instruction based on a missing video of the incident. Because there was no evidentiary hearing below, our review is limited to errors that are apparent on the record. *People v Wilson*, 257 Mich App 337, 363; 668 NW2d 371, 386 (2003).

In May 2007, defendant attempted to return a lawnmower that he purchased at a Home Depot store. He presented this request to an employee who informed him that the store's records indicated that item had been previously returned. She called for the store manager to aid defendant. The manager conferred with defendant and left to investigate the status of the lawnmower. During the manager's absence, defendant became impatient and his behavior escalated. He yelled obscenities, threatened people, and repeatedly demanded a refund. The manager returned, was unable to soothe defendant, and called the police.

A Michigan State Police Trooper arrived, spoke with defendant, and, at the store manager's request, asked defendant to leave the store. Defendant refused and the officer grabbed defendant's left arm to arrest him. Defendant then became physically aggressive and was subdued by the officer and several bystanders. There was a surveillance camera pointed at the

returns desk area that should have recorded the incident, but the disk containing the recording was ultimately not readable. Defense counsel examined several witnesses that had tried to read the disk. In closing argument, counsel asked the jury to consider that the recording, which was "for some reason" missing, as corroborating defendant's view of the incident.

A defendant has the right to the effective assistance of counsel. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). To establish a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient and (2) that counsel's deficient performance prejudiced the defense. *People v Taylor*, 275 Mich App 177, 186; 737 NW2d 790 (2007). A counsel's performance is deficient if it fell below an objective standard of professional reasonableness. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). The performance prejudiced the defense if it is reasonably probable that, but for counsel's error, the result of the proceeding would have been different. *Id.*

Defendant argues that an instruction like CJI2d 5.12 was required because the video of the incident was missing. In *People v Cress*, 250 Mich App 110, 158; 645 NW2d 669, rev'd on other grounds 468 NW2d 678 (2003), this Court suggested using the following criteria for deciding when to give an adverse inference instruction based on missing evidence:

> [T]he jury may infer that the destroyed evidence would have been adverse to the prosecution if it finds that (1) the government acted in bad faith in failing to preserve the evidence, (2) the exculpatory value of the evidence was apparent before its destruction, and (3) the nature of the evidence was such that the defendant would be unable to obtain comparable evidence by other reasonably available means.

In this case, the evidentiary value of the disk is not apparent. The adverse inference instruction is only proper when the connection between the circumstances of the case and the exculpatory value of the missing evidence is so logical that the fact-finder would be permitted to make the inference that the evidence was unfavorable to the prosecution. *People v Fields*, 450 Mich 94, 105-106; 538 NW2d 356 (1995). Here, there was simply no evidence from which to draw an exculpatory or incriminating inference.

Defendant argues, in part, that an adverse inference instruction would have been appropriate because the prosecutor offered no explanation as to why the disk was blank. This suggestion of bad faith on the part of the prosecution has no substantiation. Extensive efforts were made to view any recording of the incident on this disk. The court even used its technology expert to try to view the DVD. The question of why the disk is blank was unanswered in the record, but there is no evidence that the disk was altered. There is also no evidence that another intact recording of the incident exists. And Home Depot is apparently responsible for the non-existence of a recording of the incident, rather than any bad faith act by the prosecutor. Because the adverse inference instruction was not appropriate in this case, trial counsel cannot be faulted for failing to ask for the instruction. See *People v Riley (After Remand)*, 468 Mich 135, 142; 659 NW2d 611 (2003).

Lastly, it is not reasonably probable that the jury would have decided differently if it had been given an adverse inference instruction. Here, the jury heard complete testimony about the surveillance disk and the attempts to retrieve information from it. The jury was able to consider

the implications of not having a recording of the incident, and they were able to draw inferences about why there was no recording of the incident. Moreover, the jury heard extensive testimony from numerous witnesses to the incident, who were all subject to cross-examination. Based on this evidence, we conclude that—even with the instruction—the outcome would have been the same. Therefore, any error would not warrant relief. See *Jordan, supra* at 667.

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael R. Smolenski
/s/ Elizabeth L. Gleicher