STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 20, 2014
v	No. 317371 Wayne Circuit Court
THEODORE RAYMOND KENDRIX, Defendant-Appellant.	LC No. 12-006220-FH

Before: BORRELLO, P.J., and WILDER and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his convictions, following a jury trial, of entry without breaking, MCL 750.111, and possession of burglar's tools, MCL 750.116. We affirm.

I

On June 2, 2012, three units of the Detroit Public Schools Police Department responded to a breaking and entering alarm at Sherrill School. The school had been closed for a number of years. When the police officers arrived, they set up a perimeter and discovered the point of entry was a first-floor window on the southeast side of the building. They could also see what appeared to be two flashlights moving on the second floor. After entering the first floor of the building, the officers heard banging noises coming from above. Once upstairs, they observed two individuals leave a classroom together and walk toward a staircase.

One of the officers used a different set of stairs to return to the first floor. He said that he watched the two individuals walk past him while talking. He then turned on his flashlight, identified himself as a police officer, and told both men to get down. The officer identified one of the men as Ebony Sykes and the other as defendant. The officer said that Sykes put his hands up and dropped a bag, but defendant took off running. Defendant was apprehended, and both he and Sykes were arrested. The police recovered a hammer, a pry bar, two screwdrivers, some sharp-edged knives, 20 drill sockets, and some drill bits from the scene.

On the first day of trial, defense counsel stated on the record to the trial court that he had just learned Sykes had moved to Arizona. He explained that Sykes was "a star witness that [was] supposed to testify as to who was in there, why he was in there and so forth," and stated that he was "an essential part" to defendant's defense. He said that if the case had not been adjourned

three times, Sykes would have been available to testify. He moved to dismiss the case because of Sykes's absence. Defense counsel told the trial court that he had subpoenaed Sykes, but the court found Sykes had not been served because defense counsel sent the subpoena by first-class mail instead of certified mail and because there was no acknowledgement of service. The court expressly found that Sykes's absence did not prejudice defendant because Sykes was a codefendant and the court could not "conceive" of him testifying in contravention of his Fifth Amendment rights.

Defendant nevertheless offered testimony from Norman Miller, who lives near the school and is a cousin of the mother of defendant's children, that defendant was only in the neighborhood to give Miller an estimate to remodel his basement. Miller testified that he and defendant saw Sykes enter the school through the window, defendant went to chastise Sykes personally, as opposed to calling the police, and defendant wanted to offer Sykes a home improvement job. Defendant argued to the jury that he did not intend to steal anything.

II

Defendant first argues that there was insufficient evidence to convict him of possession of burglar's tools. Challenges to the sufficiency of the evidence are reviewed de novo. *People v Lockett*, 295 Mich App 165, 180; 814 NW2d 295 (2012). "This Court resolves all conflicts regarding the evidence in favor of the prosecution, and '[c]ircumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime.' " *Id*., quoting *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005).

To convict a defendant of possession of burglar's tools, the prosecution must prove beyond a reasonable doubt that (1) the defendant knowingly possessed (2) a tool or implement adapted or designed for forcing or breaking open any building, room, vault, safe or other depository (3) in order to steal money or other property (4) with the intent to use or employ the tool to force entry to steal money or other property. MCL 750.116. Moreover, every person who aids and abets the commission of a crime may be convicted and punished as if he directly committed the offense. MCL 767.39.

> To support a finding that a defendant aided and abetted a crime, the prosecutor must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. . . . [*People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995), overruled in part on other grounds *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001).]

The tools in Sykes's bag—including a hammer, a pry bar, screwdrivers, sharp-edged knives, drill sockets, and drill bits—could have been used to commit a burglary, and from the testimony that there was a banging noise coming from the second floor where Sykes and defendant were seen, a reasonable trier of fact could infer that defendant and Sykes in fact used some of the tools with this intent. The facts that Sykes and defendant entered a closed school, after midnight, and without permission also constituted circumstantial evidence of their intent to

use the tools to burglarize the school. See *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). Further, defendant's flight when the officer stopped the men in the school and told them to get down evidenced his consciousness of guilt. See *People v Unger*, 278 Mich App 210, 226; 749 NW2d 272 (2008). Although defendant offered evidence that he went inside the school to offer Sykes a job and not with the intent to steal anything, determinations regarding questions of fact and the credibility of witnesses are left to the trier of fact, *People v Lemmon*, 456 Mich 625, 636; 576 NW2d 129 (1998), and we must resolve all conflicts in the evidence must be resolved in favor of the prosecution. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005).

III

Defendant next argues that defense trial counsel was ineffective for failing to properly subpoena Sykes as a witness. "[A] defendant must move in the trial court for a new trial or an evidentiary hearing to preserve the defendant's claim that his or her counsel was ineffective." *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266, 273 (2012). Here, there was no motion for new trial or for an evidentiary hearing, so the issue is unpreserved. "However, the absence of a motion for new trial or an evidentiary hearing is not fatal to appellate review where the details relating to the alleged deficiencies of the defendant's trial counsel are sufficiently contained in the record to permit this Court to reach and decide the issue." *Id.*

The right to counsel guaranteed by the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, is the right to the effective assistance of counsel. *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996).

> To prove that defendant received ineffective assistance of counsel, he must show (1) "that counsel's performance was deficient in that it fell below an objective standard of professional reasonableness" and (2) that there is a reasonable probability that the outcome of the trial would have been different but for counsel's performance. [*People v Roscoe*, 303 Mich App 633, 643-44; 846 NW2d 402, 409 (2014) (citations omitted).]

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). The defendant has the burden of establishing the factual predicate for his claim—evidentiary support is required to exclude "hypotheses consistent with the view that [defendant's] trial lawyer represented [defendant] adequately." *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999), quoting *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973).

Failure to properly subpoena a witness is akin to failing to call a witness or present a defense. "Decisions regarding whether to call or question witnesses are presumed to be matters of trial strategy." *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). "[T]his Court will not second-guess counsel regarding matters of trial strategy, and even if defense counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight." *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Here, however, we see no strategic reason for failing to properly subpoena a witness that

is, by defense counsel's own admission, a "star witness." Accordingly, defense counsel's performance appears to have fallen below an objective standard of reasonableness under prevailing professional norms. *Frazier*, 478 Mich at 243.

However, defendant has failed to establish that he was prejudiced by the error. Although defense counsel characterized Sykes as a "star witness," the record is devoid of any indication of what Sykes's testimony would have consisted of had he been properly subpoenaed. Accordingly, defendant fails to establish that the result of the proceeding would have been different had counsel acted differently. *Id.*

IV

Defendant next argues that he was denied his due process right to a fair trial because the police disposed of or otherwise destroyed the evidence recovered from the scene. He also argues that the trial court abused its discretion in denying his motion to dismiss the charges on the basis that this evidence was lost or destroyed. Defendant's contention that he was deprived due process of law presents a constitutional question subject to review de novo. *People v Wilder*, 485 Mich 35, 40; 780 NW2d 265 (2010). "This Court reviews a trial court's ruling regarding a motion to dismiss for an abuse of discretion." *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1998). A court abuses its discretion when it chooses a result that is outside the range of reasonable and principled outcomes. *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007).

Absent intentional suppression or a showing of bad faith, a loss of evidence that occurs before a defense request for its production does not require reversal. *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992). The defendant bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith. *Id.*

Here, unrebutted police testimony established that the evidence was disposed of because (1) the property room was small, (2) the evidence had been stored there longer than six months, (3) an officer who handled the evidence asked the officer in charge if he could dispose of it, (4) the officer in charge believed that the evidence was no longer needed because Sykes's case had been resolved, and (5) the officer who actually disposed of the evidence did not act with ill will or bad faith. Furthermore, although defendant speculates that the items disposed of were not burglary tools and that the evidence could have been exculpatory, defendant provides no evidence to establish this assertion. Consequently, defendant has not overcome his burden to show bad faith or that the evidence was exculpatory, and, therefore, we conclude that the trial court did not abuse its discretion by denying defendant's motion to dismiss and defendant was not denied a fair trial.

Next, defendant argues that defense counsel was ineffective for failing to request an adverse inference jury instruction because the police had disposed of the evidence. Absent a showing of bad faith, a defendant is not entitled an adverse inference jury instruction. *People v Davis*, 199 Mich App 502, 514; 503 NW2d 457 (1993), overruled on other grounds in *People v Grissom*, 492 Mich 296; 821 NW2d 50 (2012). Because the record does not show the police acted in bad faith, defense counsel cannot be faulted for failing to request an unwarranted jury instruction. See *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005), quoting *People*

v Snider, 239 Mich App 393, 425; 608 NW2d 502 (2000) ("Counsel is not ineffective for failing 'to advocate a meritless position.' ").

Affirmed.

/s/ Stephen L. Borrello
/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens