

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
February 28, 2012

v

KEVIN ANDERSON,

No. 301012
Wayne Circuit Court
LC No. 10-005910-FH

Defendant-Appellant.

Before: GLEICHER, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Defendant Kevin Anderson was convicted of various firearm charges after officers conducting a routine traffic stop saw a revolver sitting in plain view on the passenger seat of his vehicle. Although the trial court improperly admitted certain irrelevant evidence against him, defendant's convictions were ultimately supported by properly admitted evidence. We therefore affirm defendant's convictions and sentences.

In the early morning hours of May 19, 2010, defendant admittedly chose to drive under the influence of alcohol. In full view of two Detroit police officers, he rear-ended another vehicle. The officers instructed defendant to remain parked while they talked to the other driver. Instead, defendant drove away. Another patrol vehicle arrived on the scene and stopped defendant's vehicle less than a mile away. The officers noted that defendant appeared intoxicated so they removed him from the vehicle. At that time, one officer saw a revolver sitting on the passenger seat. Another officer conducted a pat-down search and found an empty gun holster on defendant's person. Defendant claimed that the car belonged to his mother and was used by several relatives. He inexplicably denied that he was wearing a gun holster and claimed ignorance that a gun was in the car. The jury disbelieved defendant's testimony and convicted him of being a felon in possession of a firearm in violation of MCL 750.224f, carrying a concealed weapon without a permit in violation of MCL 750.227, and possession of a firearm during the commission of a felony, second offense, in violation of MCL 750.227b.

I. ADMISSIBILITY OF DEFENDANT'S STATEMENTS AT HOSPITAL

Defendant argues that he was denied a fair trial by the admission of irrelevant and highly prejudicial evidence. Defendant was quite intoxicated at the time of his arrest. Two officers

transported him to Detroit Receiving Hospital to secure a blood toxicology test. Officer Anthony Byrd testified that while defendant sat on his hospital gurney, “he started making comments”:

The suspect repeatedly told me, this ain’t nothing; I’ve killed before; I haven’t done it lately, but I did some killing.

Suspect was concerned about a unit knew what he just did. Suspect stated, yeah, I’m going to make sure I get you, referring to me.

* * *

He - - suspect stated, I’m going to kill someone even if they look like you, again referring to me

Officer Byrd’s partner, Wayne Brown, testified, “I believe he was saying about killing - - killing - - he killed people or something like that.” Brown reiterated, “I believe he was saying something about he killed some people or something like that.”

We agree with defendant that his drunken ramblings to Officers Byrd and Brown were irrelevant and inadmissible to establish the firearm charges levied against him. “A trial court admits relevant evidence to provide the trier of fact with as much useful information as possible.” *People v Cameron*, 291 Mich App 599, 612; 806 NW2d 371 (2011). Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. And evidence that is irrelevant is inadmissible. MRE 402.

The prosecution mischaracterizes defendant’s comments to the officers as threats to prevent their testimony at trial. Defendant’s comments are inapposite of those threats and attempts to dissuade a witness from testifying that have previously been found relevant and admissible by this Court. A defendant’s statements geared at manipulating, threatening or bribing witnesses to prevent their testimony against him are relevant and admissible if they reveal a consciousness of guilt. *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010). The current defendant’s statements were merely drunken rants of a belligerent arrestee who was angry at the officers who held him against his will. Defendant’s comments were in no way geared toward preventing the officers from testifying against him at trial. The comments also revealed no consciousness of guilt to the underlying firearm offenses. Accordingly, the statements were irrelevant. Compare *People v Scholl*, 453 Mich 730, 739-740; 556 NW2d 851 (1996) (the drunken defendant told a third-party that he wanted to shoot the complainant for filing a report against him); *Shaw*, 288 Mich App at 236-237 (the defendant used his past relationship with the complainant to evoke her pity and convince her not to testify); *People v Lytal*, 119 Mich App 562, 573-577; 326 NW2d 559 (1982) (the defendant bribed a fellow inmate witness with cigarettes and candy to secure his promise not to testify); *People v Mock*, 108 Mich App 384, 389; 310 NW2d 384 (1981) (the defendant’s “attempts to induce the complainant to drop the charges” were relevant evidence); *People v Hooper*, 50 Mich App 186, 198-199; 212 NW2d 786 (1973) (the defendant’s pleas to the complainant to drop the charges were admissible as evidence that the defendant was aware his case was “weak”); *People v Hill*, 44 Mich App 308, 318; 205 NW2d 267 (1973), overruled in part on other grounds *People v Mayberry*, 52 Mich

App 450, 451; 217 NW2d 420 (1974) (the defendant “threatened a witness to keep him from testifying); *People v Falkner*, 36 Mich App 101, 108; 193 NW2d 178 (1971), rev’d on other grounds 389 Mich 682; 209 NW2d 193 (1973) (the defendant threatened a witness “that anyone who testified against him would be killed).¹

The prosecution alternatively argues that defendant’s statements were admissible as admissions of a party-opponent under MRE 801(d)(2). MRE 801(d)(2) simply identifies certain out-of-court statements that do not fall within the definition of hearsay. Although not “hearsay,” an admission of a party-opponent remains inadmissible unless it is relevant. As defendant’s statements to the police officers in the hospital were not relevant to the charges levied against him, they were inadmissible regardless of whether they are classified as hearsay.

Although the prosecution presented irrelevant, inadmissible evidence, this error does not warrant relief. Defendant did not challenge the admission of this evidence; in fact, defense counsel questioned Officer Byrd regarding his decision to include defendant’s statements in his police report. Defense counsel later questioned defendant on the stand and he denied making the statements. At a minimum, defendant’s failure to object rendered this an unpreserved error. Such unpreserved evidentiary challenges merit relief only where plain error affected the defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To establish prejudice, the defendant must show “that the error affected the outcome of the lower court proceedings” or “resulted in the conviction of an actually innocent defendant.” *Id.* Given the indisputable evidence that defendant, a former felon without a concealed weapon permit was found alone in a vehicle with a revolver while wearing a gun holster, it is unlikely that the erroneous admission of his drunken ramblings affected the outcome of his trial.

II. ADMISSIBILITY OF DEFENDANT’S REFUSAL TO SUBMIT TO FIELD SOBRIETY AND CHEMICAL TESTS

Defendant challenges the admission of Officer Byrd’s testimony that defendant refused to submit to field sobriety tests or a chemical test to determine his blood-alcohol level, requiring the officer to secure a search warrant for a blood draw. At trial, Officer Byrd testified that defendant smelled of alcohol and had slurred speech. The officers removed defendant from the vehicle because they suspected he was intoxicated. Officer Boyd testified that defendant refused to participate in field sobriety tests at the scene of the traffic stop. He also refused to participate in chemical testing at the police station. As a result, the officers secured a search warrant for defendant’s blood and transported him to the hospital for a blood toxicology screen.

Had the prosecution charged defendant with an alcohol-related offense, this evidence may have been relevant to explain why defendant was transported to the hospital for blood

¹ Defendant also supports exclusion of this evidence under MRE 404(b)(1). That rule precludes the use of other “acts” evidence, not evidence of a defendant’s statements. MRE 404(b)(1) would apply if the prosecution sought to present evidence that defendant had committed the homicides of which he boasted, but cannot be used preclude testimony regarding defendant’s statements about those homicides.

alcohol testing without initial resort to a preliminary breath test or field sobriety tests. The prosecution eschewed drunk-driving charges, however, and pursued only firearms charges. Evidence that defendant refused preliminary sobriety testing did not make it more probable that he committed the charged weapons offenses. Accordingly, the evidence was irrelevant under MRE 401 and inadmissible under MRE 402.

Defendant failed to object to the admission of this evidence and our review is again limited to plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763. Four police officers testified that a gun was removed from the passenger compartment of a vehicle in which defendant was the sole occupant. Defendant was wearing an empty gun holster at the time. There is no reasonable likelihood that defendant's refusal to cooperate with requests for field sobriety or chemical tests to determine his blood-alcohol level was outcome determinative in light of this evidence and relief is unwarranted.

III. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant challenges trial counsel's failure to object to the testimony regarding his threats toward Officer Byrd and the testimony regarding his refusal to engage in preliminary sobriety testing. "To establish a claim of ineffective assistance of counsel[,] a defendant must show that counsel's deficient performance prejudiced the defense." *People v Fyda*, 288 Mich App 446, 450; 793 NW2d 712 (2010). As noted, the challenged evidence was irrelevant and inadmissible. Accordingly, defense counsel should have raised an objection or sought its preclusion. As discussed, however, the erroneous admission of the challenged evidence did not affect the outcome of defendant's trial or result in the conviction of an actually innocent defendant. Defendant cannot establish the necessary prejudice to warrant relief.

IV. DEFENDANT'S STANDARD 4 BRIEF

Defendant raises additional ineffective assistance claims against his trial and appellate counsels in a *pro se* supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4.

A. TRIAL COUNSEL

Defendant contends that trial counsel was ineffective for failing to challenge his warrantless arrest. "In order to lawfully arrest a person without a warrant, a police officer must possess information demonstrating probable cause to believe that an offense has occurred and that the defendant committed it." *People v Reese*, 281 Mich App 290, 294-295; 761 NW2d 405 (2008) (quotation marks and citation omitted). "Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). This probable cause standard "is a practical, nontechnical conception" judged from the totality of the circumstances before the arresting officers. *Maryland v Pringle*, 540 US 366, 370; 124 S Ct 795; 157 L Ed 2d 769 (2003). The record supports that the officers had probable cause to arrest defendant; the officers effectuated a lawful traffic stop and saw a revolver sitting in plain view on the passenger seat of a vehicle in which defendant was the only occupant.

Defendant's warrantless arrest was legal and any objection by trial court would have been meritless. Counsel was therefore not ineffective for failing to raise this challenge. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant argues that trial counsel should have sought to suppress the gun and holster on the ground that his arrest was illegal. Because defendant's arrest was legal, a motion to suppress based on this ground would have been unsuccessful. Moreover, because the officers were lawfully in a position to observe the gun in plain view, *People v Wilkens*, 267 Mich App 728, 733; 705 NW2d 728 (2005), and the gun holster was found during a lawful search incident to defendant's arrest, *Champion*, 452 Mich at 115-116, the officers could legally seize both items without a warrant. Counsel was not ineffective for failing to raise a futile suppression motion. *Snider*, 239 Mich App at 425.

Defendant claims that counsel was ineffective for failing to challenge his delayed arraignment or to seek suppression of the evidence on the ground that it was obtained as a result of an unreasonable delay between his arrest and arraignment. An arrested person must be taken before a court for arraignment without unnecessary delay. MCR 6.104(A). A delay of more than 48 hours between arrest and arraignment is presumed to be unreasonable, and the prosecution has the burden of demonstrating that extraordinary circumstances necessitated the delay in order to introduce evidence gained during that time. *People v Manning*, 243 Mich App 615, 628; 624 NW2d 746 (2000). The failure to arraign a defendant within the applicable time period may result in the exclusion of evidence gathered *during the delay* unless the delay was necessitated by a *bona fide* emergency or other extraordinary circumstances. *Id.*

Even if defendant was belatedly arraigned, he would not be entitled to relief. The evidence admitted at defendant's trial was gathered contemporaneously with his arrest. There is no record indication that any evidence was gathered during any unreasonable delay between defendant's arrest and arraignment. As such, none of the evidence was excluded under *Manning* and counsel lacked a reason to object. *Snider*, 239 Mich App at 425.

Defendant also suggests that counsel was ineffective for failing to request a fingerprint analysis of the revolver. Counsel's decisions about what evidence to present and how to argue the evidence are matters of trial strategy, which this Court will not evaluate with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Given the evidence in this case, trial counsel could have reasonably determined that performing a fingerprint analysis on the gun would have been injurious to defendant's case. Counsel apparently chose to approach the matter by eliciting evidence that the police did not perform any fingerprint analysis, suggesting the lack of fingerprint evidence. In any event, defendant has not established that he was prejudiced by trial counsel's strategic decision. Even a complete absence of defendant's fingerprints on the gun would not have exculpated him where the gun was found in plain view in a car in which defendant, who was wearing a gun holster, was the sole occupant. Consequently, defendant has failed to establish an ineffective assistance of counsel claim.

B. APPELLATE COUNSEL

We also reject defendant's claim that he was denied the effective assistance of appellate counsel based on counsel's failure to raise the challenges argued in his Standard 4 brief. The test

for ineffective assistance of appellate counsel is the same as that applicable to a claim against trial counsel. *People v Uphaus (On Remand)*, 278 Mich App 174, 186; 748 NW2d 899 (2008). A defendant must show that appellate counsel's omission of an issue fell below an objective standard of reasonableness and prejudiced his appeal. *Id.* "Appellate counsel may legitimately winnow out weaker arguments in order to focus on those arguments more likely to prevail." *Id.* at 186-197. Consequently, appellate counsel's failure to assert all arguable claims is insufficient to overcome the presumption that counsel reasonably selected the issues to be presented. *People v Reed*, 449 Mich 375, 391; 535 NW2d 496 (1995). Because defendant's Standard 4 arguments lack merit, defendant has not shown that appellate counsel's performance was deficient. Defendant also cannot establish prejudice as he was permitted to raise these challenges in his Standard 4 brief, thereby subjecting them to appellate consideration.

Affirmed.

/s/ Elizabeth L. Gleicher

/s/ Patrick M. Meter

/s/ Pat M. Donofrio