

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
January 24, 2012

v

CHRISTOPHER LEE ENGEL,
Defendant-Appellant.

No. 301303
Bay Circuit Court
LC No. 10-010198-FH

Before: SAWYER, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of receiving and concealing a stolen firearm, MCL 750.535b, and one count of possession of a firearm during commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to serve consecutive prison terms of 24 months in prison for felony-firearm and 24 to 120 months for receiving and concealing. Defendant appeals as of right, and we affirm.

This case involves a Glock 9 millimeter handgun owned by William Richter, and kept for a few months in the residence he shared with defendant's mother. At one point in time, defendant also lived there. In June 2009, Richter discovered that a handgun was missing. When he questioned defendant about it, defendant denied being involved. However, defendant's ex-girlfriend testified that she saw defendant exchange a gun, which she believed was the gun shown to her at trial, for Oxycodone pills. After the police report had been filed, defendant came to Richter and told him that he knew where the gun was but would need \$400 to get it back. Richter gave defendant \$400 and defendant returned the gun a day or two later.

First, defendant argues he was denied effective assistance of counsel by trial counsel's alleged mishandling of a reference made to defendant's "past." Because defendant did not raise the issue of ineffective assistance of counsel in a motion for a new trial or request an evidentiary hearing, our review is "limited to mistakes apparent from the record." *People v Brown*, 279 Mich App 116, 140; 755 NW2d 664 (2008).

To prove 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 the outcome of the trial would have been different but for counsel's performance. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). There is a presumption of effective assistance of counsel and the burden

is on defendant to prove otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Defense counsel is given broad discretion when it comes to matters of trial strategy. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). As a consequence, a strong presumption exists that the choices made by trial counsel in furtherance of the strategy employed were reasonable. An appellate court should not “substitute [its] judgment for that of counsel on matters of trial strategy, nor . . . use the benefit of hindsight when assessing counsel’s competence.” *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008).

Defendant alleges that the following line of questioning by defense counsel of the investigating police officer amounted to ineffective assistance:

Q. If . . . a citizen reports something . . . as recovered and states that it was misplaced, how often do you continue investigating?

A. Depends on what the item is.

Q. So if the item has been recovered, why would you continue investigating it?

A. Because I know the defendant; I know his past.

Q. So earlier you stated that it was Mr. Richter’s demeanor that caused you to question him, but now it’s because you’re familiar with [defendant’s] past?

A. No, it was because of both.

It is clear from the above exchange that defense counsel did not bring up defendant’s past. Indeed, the officer’s reference to defendant’s “past” appears to be unsolicited. Defense counsel immediately tried to characterize the statement as being inconsistent with the officer’s prior testimony in order to impeach him. An untranscribed bench conference was held, and it appears that the parties and the court discussed the option of giving a cautionary instruction. When asked by the court later if it was true she was not seeking a cautionary instruction, defense counsel responded, “I’m not, your Honor. And for . . . the record, I just believe that it . . . will call more attention to it than the mere fact of them just hearing it.” Given that the officer’s reference was unsolicited and not repeated, counsel’s balancing of the benefits and costs of giving a jury instruction is objectively reasonable trial strategy.

Furthermore, defendant cannot prove that the outcome of the trial would have been different had a cautionary instruction been given. Defendant’s ex-girlfriend testified that she saw Richer’s gun under defendant’s t-shirt just before he exchanged it for “Oxys.” Further, Richter testified that defendant returned the gun after Richter had given him \$400 for that purpose. It is not reasonably probable that giving the jury a cautionary instruction on a general reference to “defendant’s past” would have changed the outcome in light of the evidence.

Next, defendant argues that he was denied a fair trial because the trial court admitted improper and prejudicial lay opinion testimony. Lay testimony in the form of an inference or an opinion is allowed if it is “(a) rationally based on the perception of the witness and (b) helpful to

a clear understanding of the witness's testimony or the determination of a fact in issue." MRE 701. Defendant did not object to the evidence at trial, therefore, we review for plain error affecting substantial rights, "i.e., that the error affected the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

At issue is the following statement made by Richter at trial in response to being asked if defendant knew where Richter kept the handgun: "I'm not sure if he knew for sure, but he found out at one time there—I guess he found out sooner or later it was there." Whether defendant knew where Richter kept the gun was helpful to determine if defendant could have taken it—a fact that was key to determining whether defendant received and concealed a stolen firearm. Further, Richter's statement is rationally based on his perception of the events that took place. Richter was close to defendant and the two had lived in the same residence before the gun went missing. Defendant also told Richter that if he gave him \$400 he could get his gun back, and that is exactly what happened. Because defendant retrieved Richter's gun, which was last seen in the residence they had shared, it would not be irrational for Richter to infer that defendant knew where it was kept. Because the testimony is not improper, there is no plain error. Further, Richter only testified that he believed defendant knew the gun was in the residence, and he qualified it by clearly indicating he was not sure.

In any event, as noted above with respect to defendant's claim of ineffective assistance, defendant cannot establish that the cited testimony affected the outcome of the trial in light of the remaining evidence.

Affirmed.

/s/ David H. Sawyer
/s/ William C. Whitbeck
/s/ Michael J. Kelly