

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID MICHAEL MCCANN,

Defendant-Appellant.

UNPUBLISHED

April 10, 2012

No. 301796

Macomb Circuit Court

LC No. 2010-003134-FH

Before: WILDER, P.J., and O'CONNELL and WHITBECK, JJ.

PER CURIAM.

Following a jury trial, defendant appeals by right his conviction of assault with intent to do great bodily harm, MCL 750.84. We affirm.

Defendant's conviction arose out of an incident between patrons outside a Burger King restaurant in Warren. Defendant's companion had exchanged words with the complainant, who was holding a golf club. Witnesses testified that the situation escalated; there was conflicting testimony about whether the complainant hit defendant's companion with the golf club. At some point, defendant knocked the complainant to the ground outside the restaurant, causing the complainant to sustain head and face lacerations that required stitches. Defendant maintained that he had acted in self-defense or in defense of his companion. The restaurant had a security camera that could have recorded the incident. The police, and defendant, and his companion, each returned to the restaurant to attempt to obtain a security camera recording. No recording was available.

Defendant first argues that his trial counsel was ineffective by consenting to jury instructions that omitted an instruction on the burden of proof for self-defense, by failing to request an adverse inference jury instruction, and by failing to move to dismiss on the basis that the police and the prosecution had not preserved evidence with exculpatory potential. Defendant preserved these arguments for appeal by filing a motion for a hearing under *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

"Whether a defendant received ineffective assistance of trial counsel presents a mixed question of fact and constitutional law." *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011), citing *People v Grant*, 470 Mich 477, 481; 684 NW2d 686 (2004). For preserved claims of ineffective assistance of counsel, we review the trial court's findings of fact for clear error. *Armstrong*, 490 Mich at 289. Clear error exists where the reviewing court is left with a

definite and firm conviction that the lower court made a mistake. *Id.*, citing *People v Burrell*, 417 Mich 439, 449; 339 NW2d 403 (1983).

Determining whether a defendant's trial counsel was ineffective requires conducting a two-step inquiry. First, "the defendant must show that counsel's performance fell below an objective standard of reasonableness." *Armstrong*, 490 Mich at 290, citing *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "In doing so, the defendant must overcome the strong presumption that counsel's assistance constituted sound trial strategy." *Armstrong*, 490 Mich at 290, citing *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). Second, "the defendant must show that, but for counsel's deficient performance, a different result would have been reasonably probable." *Armstrong*, 490 Mich at 290, citing *Strickland*, 466 US at 694-696.

We turn first to defendant's contention that his counsel was ineffective regarding the jury instructions. Defendant's counsel consented to instructions that did not include CJI2d 7.20, which reads: "The defendant does not have to prove that [he/she] acted in self-defense. Instead, the prosecutor must prove beyond a reasonable doubt that the defendant did not act in self-defense." Defendant contends that the absence of the CJI2d 7.20 instruction warrants reversal. We disagree.

"A criminal defendant is entitled to have a properly instructed jury consider the evidence against him." *People v Dupree*, 486 Mich 693, 712; 788 NW2d 399 (2010), quoting *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). If a defendant introduces evidence supporting self-defense, he is entitled to a jury instruction on self-defense. See *Riddle*, 467 Mich at 124. The "prosecution bears the burden of disproving the . . . defense of self-defense beyond a reasonable doubt." *Dupree*, 486 Mich at 709. However, a trial judge "is not obliged to charge specifically that the burden was upon the people to prove that the [offense at issue] was not done in self-defense." *People v Brown*, 34 Mich App 45, 47; 190 NW2d 701 (1971), citing *People v Hunley*, 313 Mich 688, 695; 21 NW2d 923 (1946).

In this case, the trial court properly apprised the jury of the prosecution's burden of proof. The court gave the jury specially crafted instructions regarding self-defense, albeit without CJI2d 7.20. Accordingly, defense counsel's representation did not fall below an objective standard of reasonableness with regard to CJI2d 7.20. Moreover, even assuming, arguendo, that defendant's counsel's consent did fall below an objective standard of reasonableness, the inclusion of CJI2d 7.20 would not likely have changed the outcome of the trial. The trial court instructed the jury that the prosecution had the ultimate burden of proof. Defendant's counsel was therefore not ineffective for consenting to jury instructions that omitted CJI2d 7.20.

Similarly, the lack of an adverse inference instruction does not indicate ineffective assistance of counsel in this case. In *People v Davis*, 199 Mich App 502, 514; 503 NW2d 457 (1993), this Court addressed circumstances under which an adverse inference instruction is appropriate in a case concerning exculpatory evidence. The Court explained that a trial court need not give an adverse inference instruction when evidence cannot be located, because there is no indication of prosecutorial bad faith in failing to produce that evidence. *Id.* at 515. Here, the evidence at issue was not within the prosecutor's control, because the police were unable to

recover a security camera recording. The adverse inference instruction was thus not appropriate, and it was reasonable trial strategy for defendant's counsel to not request it.

Given the lack of proof that a video tape existed, defense counsel was not ineffective for declining to present a motion to dismiss for failure to preserve evidence. In *Arizona v Youngblood*, 488 US 51, 57-58; 109 S Ct 333; 102 L Ed 2d 281 (1988), the United States Supreme Court held that the government's failure to preserve potentially exculpatory evidence violates a criminal defendant's due process rights, provided that the defendant can show bad faith on the part of the government. However, the Michigan Supreme Court has held that, "[f]or due process purposes, there is a crucial distinction between failing to disclose evidence that has been developed and failing to develop evidence in the first instance." *People v Anstey*, 476 Mich 436, 461; 719 NW2d 579 (2006). In cases that involve a "defendant's right to *develop* potentially exculpatory evidence not in the government's possession . . . the bad-faith test in *Youngblood* is inapplicable." *Id.* (emphasis in original). Indeed, in such cases, the police have "no constitutional duty to assist a defendant in developing potentially exculpatory evidence." *Id.*

Here, the police were unable to recover a video tape that may have recorded the incident. A Warren police officer testified at trial that she attempted to obtain the tape, but was unable to do so. An investigating detective testified at the preliminary examination that his effort to obtain the tape was fruitless. Accordingly, because the police never had possession of the tape, the police were under no duty to assist defendant in developing this "potentially exculpatory evidence," and no due process violation occurred.

Defendant next argues that his conviction should be reversed because the prosecutor committed misconduct by improperly bolstering her witnesses' credibility and improperly denigrating the defense witnesses' credibility. We disagree. The ultimate inquiry when evaluating a claim of prosecutorial misconduct is whether the prosecutor's actions denied the defendant his right to a "fair and impartial trial." *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutors are generally "afforded great latitude regarding their arguments and conduct at trial." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008), citing *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). "[Prosecutors] are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *Unger*, 278 Mich App at 235, citing *Bahoda*, 448 Mich at 282.

The credibility of witnesses was a central dispute in this case. "A prosecutor may comment on his own witnesses' credibility during closing arguments, especially when there is conflicting evidence and the question of defendant's guilt depends on which witnesses the jury believes." *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Accordingly, the prosecutor could reasonably argue that certain witnesses were neutral and had no incentive to lie.

Defendant next argues that the prosecutor improperly denigrated his witnesses when she argued that five areas of defendant's case were inconsistent with the truth. Reviewing the relevant portions of the record, and given that this case turned on the credibility of witnesses, we conclude that there was sufficient evidence on each of these points to allow the prosecutor to present arguments about these witnesses' credibility.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Peter D. O'Connell
/s/ William C. Whitbeck