STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 26, 2013
v	No. 304847 Wayne Circuit Court
BRENTLY O'BRIEN BOHANEN, Defendant-Appellant.	LC No. 10-010742-FH

Before: RONAYNE KRAUSE, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Defendant was convicted by a jury of felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced, as an habitual offender, second offense, MCL 769.10, to five years' probation for both his felon in possession of a firearm and carrying a concealed weapon convictions, and to two years' imprisonment for his felony-firearm conviction. We affirm defendant's convictions and sentences but remand for the ministerial task of correcting his sentencing guidelines score.

Defendant's convictions arise out of an incident where an unmarked police car approached a group of men gathered on the sidewalk at the side of a street in Detroit. One of the members of the group, later identified as defendant, moved to a nearby porch and disposed of what appeared to the police officers to be a handgun. There was some dispute in the testimony as to the exact configuration of the porch and the steps up to the porch. Officers retrieved a handgun from where it appeared to have been thrown. Defendant stipulated that he was ineligible to possess a firearm at the time.

Defendant argues that he was denied the effective assistance of counsel, largely on the basis of his trial counsel's own protestations that he was unprepared for trial and that he had not even talked to defendant. We review ineffective assistance of counsel claims de novo as questions of constitutional law where no relevant facts are in dispute. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The facts that counsel claimed not to be "fully" prepared and had not talked to defendant at the time of trial are concerning. However, we do not find that counsel was ineffective.

Defendant's argument, for all intents and purposes, is that we should not utilize the usual objective test for ineffectiveness, under which we assess the assistance the defendant actually

received and under which a defendant must ultimately show that any error made by counsel is reasonably likely to have affected the outcome of the proceedings. See *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). Rather, defendant contends that this is a case in which we should presume prejudice, pursuant to *United States v Cronic*, 466 US 648, 659-662; 104 S Ct 2039; 80 L Ed 2d 657 (1984). Under the ordinary test, developed in *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), a defendant must show that his attorney's performance fell below an objective standard of reasonableness under prevailing professional norms and this performance prejudiced him. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). In contrast, under *Cronic*, counsel's performance may be so grossly deficient that prejudice is simply assumed; the difference between *Strickland* and *Cronic* "is not of degree but of kind." *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007) (quotation omitted).

"Only when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance at trial." *Cronic*, 466 US at 662. The *Cronic* Court delineated three circumstances under which prejudice is so likely to be found that "the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 US at 658. The circumstances are, (1) where there has been a complete denial of counsel, (2) where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, and (3) where, although counsel is present, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate, without inquiry into the conduct of the trial. These circumstances occur exceedingly rarely. As the United States Supreme Court later explained, "[w]e illustrated just how infrequently the 'surrounding circumstances [will] justify a presumption of ineffectiveness' in *Cronic* itself. In that case, we reversed a Court of Appeals ruling that ranked as prejudicially inadequate the performance of an inexperienced, underprepared attorney in a complex mail fraud trial." *Florida v Nixon*, 543 US 175, 190; 125 S Ct 551; 160 L Ed 2d 565 (2004).

This case does not present any of the extreme and extraordinary situations that under *Cronic* would be *presumed* prejudicial. Defendant was not, in fact, completely denied counsel; rather, at the worst he was only denied fully-prepared counsel. The record shows that trial counsel did, in fact, subject the prosecution's case to meaningful adversarial testing; given that counsel had also represented defendant at the preliminary examination, it is unsurprising that counsel was well-versed with the case, aware that the prosecution depended on eyewitness testimony from police officers, and able to present defense witnesses and cross-examine prosecution witnesses. The case was not complex, and, we note, defendant did file a motion requesting the appointment of new counsel at any point prior to trial. The only even arguable possibility is that counsel had been placed in a situation under which no competent attorney could hope to provide effective representation. An examination of the facts of *Cronic* itself leads to the inescapable conclusion that the instant case did not entail counsel being thrust into an effectively impossible situation for purposes of the test enunciated in *Cronic*.

In *Cronic*, the respondent and two others were indicted in federal court for their roles in a massive and complex "check kiting" fraud scheme. *Cronic*, 466 US at 650. The respondent's original counsel withdrew shortly before trial, and the trial court appointed a young and relatively inexperienced attorney as replacement counsel. The new counsel had never conducted any kind of jury trial, let alone a jury trial involving a significant amount of complexity, and was

afforded a meager 25 days to prepare for a trial that had already been under preparation by the government for 4½ years. The respondent was convicted of 11 of the 13 charges brought against him. The Court of Appeals reversed the conviction on ineffective assistance of counsel grounds, concluding not that counsel had made errors at trial but that that the circumstances of the representation hampered counsel so much that no showing of prejudice was needed. *Id*. The United States Supreme Court agreed that such circumstances could exist, but it concluded that they had not existed in that case. *Id*. at 661. In contrast, the United States Supreme Court did find prejudice presumed in a case where counsel was appointed immediately before the start of trial with the defendants facing a possible death sentence, the attitude of the community was hostile, and the defendant was in danger of mob violence. *Powell v Alabama*, 287 US 45, 51, 58–59; 53 S Ct 55; 77 L Ed 158 (1932).

The fact that counsel here was not "fully" prepared and had not communicated with defendant for three months are not the kind of circumstances envisioned by *Cronic* under which no lawyer could provide the kind of effective assistance required by the Constitution. We therefore conclude that *Cronic* is inapplicable to this case, and defendant's claim of ineffective assistance of counsel is properly analyzed under the more usual test set forth in *Strickland*.

As noted, the critical underpinning of the *Strickland* test for effectiveness of counsel is whether counsel was objectively ineffective and defendant was actually prejudiced. Counsel is presumed to be effective and engaged in trial strategy, and the defendant has the heavy burden to prove otherwise. *Armstrong*, 490 Mich at 290. Decisions regarding whether to call and question witnesses and what evidence to present are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). In order for defense counsel's unpreparedness to result in ineffective assistance of counsel, "[i]t must be shown that the failure resulted in counsel's ignorance of valuable evidence which would have substantially benefited the accused." *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990). This Court does not second-guess counsel on matters of trial strategy, nor does it assess counsel's competence with the benefit of hindsight. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Counsel is not ineffective for failing to take futile actions. See *Id*. at 40-41.

As discussed, counsel did in fact cross-examine witnesses, present defense witnesses, make objections, and raise a motion for a directed verdict. Nothing on the record suggests incompetence or ignorance, and defendant has failed to establish that there was evidence of which counsel was ignorant that would have substantially benefited him. *Caballero*, 184 Mich App at 642. Defendant contends that trial counsel failed to subpoena witnesses; failed to admit into evidence a picture of the porch at or on which he disposed of the handgun, which he marked as a defense exhibit; was not fully prepared to cross-examine the prosecution's witnesses; and failed to engage in the research necessary to impeach one officer's assertion that the porch steps must later have been changed.[1] However, decisions regarding whether to call and question

[1] As noted previously, there was some dispute as to whether the porch steps went straight or to the side, and defendant attempted to use that conflict for impeachment purposes.

witnesses and what evidence to present are presumed to be matters of trial strategy. *Rockey*, 237 Mich App at 76-77. Defendant does not indicate what witnesses should have been subpoenaed or why their testimony would have changed the outcome of the trial. The record is silent as to the other matters, and we will not speculate thereon, but we note that trial counsel in fact elicited testimony from other officers to the effect that the stairs were different.[2] Defendant has failed to establish that defense counsel was not engaged in trial strategy. *Rockey*, 237 Mich App at 76-77.

Next, defendant argues that the trial court erred by denying defendant's motion for a mistrial. Defendant contends that the verdict was contaminated by the accidental provision to the jury of an arrest report document that had not been admitted into evidence. A trial court's decision to deny a motion for a mistrial is reviewed for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). We find no abuse of discretion.

"During deliberations, the jury may only consider the evidence that was presented to [it] in open court." *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). The jury room must be kept free of evidence not admitted during trial, the presence of which, if prejudicial, would vitiate the verdict. *People v Keeth*, 63 Mich App 589, 593; 234 NW2d 717 (1975). An improper submission of an exhibit to a jury during its deliberation, not properly admitted into evidence, mandates reversal if the error may have operated to substantially injure the defendant's case. See *Budzyn*, 456 Mich at 88-89. However, if the substance of the objectionable exhibit was presented to the jury during trial, this Court has found that the improper exhibit did not impair a defendant's rights. *People v Allen*, 94 Mich App 539, 543-544; 288 NW2d 451 (1980).

Defense counsel argued that the jury could have been tainted by viewing the arrest report, especially given that this trial turned on the credibility of the witnesses. The prosecution argued that the jury viewing the report was harmless error because everything in the report, other than possibly defendant's address, was admitted into evidence through live testimony. The trial court ruled that the report itself does not contain anything in addition to what was testified to. Accordingly, the trial court found that it was merely cumulative and denied defendant's motion for a mistrial. This finding is consistent with the record showing that the parties and the trial court reviewed the police report before the trial court ruled that it was cumulative to the testimony. In the trial court, defendant failed to identify any information in the report that he believed was not cumulative. On appeal, defendant only speculates that the report may have contained information about which Duncan did not testify. We find such speculation insufficient to meet defendant's burden of proof. Additionally, our review of the report also finds it merely cumulative at the most; the information therein is so minimal we find it unlikely that it even would have been deemed corroborative of testimony adverse to defendant. Thus, defendant has failed to show that the police report prejudiced him. Therefore, defendant has failed to show that the trial court abused its discretion by denying his motion for a mistrial.

[2] Defendant also raises assertions regarding defense witness Nathaniel Jenkins testifying about certain statements made by some of the officers. Because the trial court ruled those statements inadmissible hearsay, attempting to elicit the supposed testimony would have been futile.

Lastly, defendant argues that the trial court erred by scoring 10 points for OV 19. "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v Phelps*, 288 Mich App 123, 135; 791 NW2d 732 (2010) (quotation marks and citations omitted). "The interpretation and application of the legislative sentencing guidelines, MCL 777.1 *et seq.*, involve legal questions that this Court reviews de novo." *People v Bonilla-Machado*, 489 Mich 412, 419; 803 NW2d 217 (2011). This Court will affirm a trial court's decision regarding sentencing scoring where there is evidence existing to support the score. *Phelps*, 288 Mich App at 135. We agree with defendant.

"Offense variable 19 is threat to the security of a penal institution or court or interference with the administration of justice or the rendering of emergency services." MCL 777.49. Ten points should be scored if "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). Interference with the administration of justice may include interference with law enforcement officers. *People v Barbee*, 470 Mich 283, 277-288; 681 NW2d 348 (2004). However, we perceive no evidence in the record from which it could be determined that defendant attempted to interfere with the officers here—even assuming defendant knew that the plain-clothes officers in an unmarked car even were police officers. The record only reveals that defendant ran away upon sight of them and deposited a handgun next to the porch of a house. While immediate flight from the police may be sufficiently "suggestive of" of wrongdoing to constitute reasonable suspicion to justify further investigation, it is "not necessarily indicative of wrongdoing." *Illinois v Wardlow*, 528 US 119, 124-125; 120 S Ct 673; 145 L Ed 2d 570 (2000). Furthermore, while "[f]light, by its very nature, is not 'going about one's business,'" it is also not per se wrongful; it merely justifies further investigation. *Id*. Significantly, defendant received no order to remain where he was or otherwise not do what he did.

We conclude that defendant did not attempt to interfere with the administration of justice. Consequently, the trial court erred in scoring OV 19 at 10 points.[3] As scored, defendant's total OV score was 15 points; without scoring OV 19, it would have been 5 points. According to the Sentencing Grid for Class E Offenses, MCL 777.66, defendant's minimum sentence range, as a second habitual offender, MCL 777.21(3)(a), for his felon in possession of a firearm and carrying a concealed weapon convictions was calculated at 10 to 28 months. Properly scored, his minimum sentence range for his felon in possession of a firearm and carrying a concealed weapon convictions would have been calculated at 7 to 28 months.

However, irrespective of whether OV 19 was scored at 10 points, the upper limit of defendant's minimum sentence range under the sentencing guidelines remains unchanged; and of course his statutory maximum sentence also remains unchanged. Defendant's mandatory sentence for felony-firearm is also unchanged. Significantly, other than his felony-firearm sentence, defendant was sentenced to probation, an intermediate sanction rather than

[3] We note that at sentencing, the prosecutor who stood in for the trial prosecutor expressed a belief that "it doesn't appear that that should be a ten" but deferred to the trial court.

incarceration. Therefore, if defendant's sentence was permissible with OV 19 scored at 10 points, it remains permissible. Under either scoring scenario, the upper limit of his minimum sentence is greater than 18 months and the lower limit is less than 12 months, so he is eligible for an intermediate sanction. MCL 769.34(4)(c). Ordinarily, we would be required to remand for resentencing if defendant's sentencing guidelines were erroneously scored or if defendant's sentence was based on inaccurate information. *People v Jackson*, 487 Mich 783, 791-793; 790 NW2d 340 (2010). However, defendant's sentence was obviously not based on the guidelines calculation at all, but rather the trial judge's determination that probation was a more appropriate sanction. Consequently, we find that defendant's sentence was not in any real sense "based on inaccurate information," and so there was no error in defendant's sentence.

Defendant's convictions and sentences are affirmed. We remand for the ministerial task of correcting defendant's sentencing guidelines score. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Deborah A. Servitto