

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
February 19, 2013

v

MICHAEL RODELL FORD,
Defendant-Appellant.

No. 306016
Wayne Circuit Court
LC No. 10-007015-FH

Before: CAVANAGH, P.J., and SAWYER and SAAD, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of possession with intent to distribute 5 to 45 kilograms of marihuana, MCL 333.7401(2)(d)(ii), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced, as a second habitual offender, MCL 769.10, to one to seven years' imprisonment for the possession conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

This case arises from a police raid on a house in Detroit on June 18, 2010. Defendant argues that a plea agreement between a codefendant, Lawrence Bryant, and the prosecution violated his right to due process of law. We disagree.

“In order to preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object.” *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). A letter to the Attorney Grievance Commission from defendant's first appointed trial counsel, dated December 3, 2010, copies of which were sent to the trial court and to the prosecution, objected to the condition of Bryant's plea agreement that prohibited him from testifying at defendant's trial. However, because the issue was apparently never directly before the trial court, the court did not have an opportunity to address and rule on it. Accordingly, this issue is not preserved for appellate review. “Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights.” *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011).

“The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial.” *Brown*, 294 Mich App at 382. No prosecutorial misconduct occurred with respect to the stricken condition of Bryant's plea agreement because the condition was withdrawn and acknowledged as such in three discrete proceedings. Further, as the trial court observed, defendant did not support his motion for a new trial with “any evidence that Mr.

Bryant would have testified that the drugs and guns found at the residence were Mr. Bryant's and not Mr. Ford's." To the contrary, defendant's trial counsel informed the court that Bryant "want[ed] no part of trying to assist the defense." Defendant's trial counsel was aware that she had the ability to subpoena Bryant, but did not do so.

On the other hand, there was substantial evidence of defendant's guilt. Defendant was arrested in a house in close proximity to 9.916 kilograms of marijuana, three guns, and a large amount of cash. The trial court, sitting as the finder of fact, found defendant's "testimony . . . to be incredible and unbelievable." Accordingly, defendant can show neither plain error, nor that the plea agreement condition affected his right to a "fair and impartial trial," *Brown*, 294 Mich App at 382.

Defendant next argues that his trial counsel, who was appointed approximately two weeks before defendant's trial began, was ineffective for failing to seek an adjournment in order to subpoena Bryant to testify on defendant's behalf. Again, we disagree.

"Whether [a] defendant was denied the effective assistance of counsel presents a mixed question of fact and constitutional law. We review for clear error a circuit court's findings of fact. We review de novo questions of constitutional law." *People v Vaughn*, 491 Mich 642, 650; 821 NW2d 288 (2012).

The United States and Michigan Constitutions guarantee criminal defendants the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Meissner*, 294 Mich App 438, 459; 812 NW2d 37 (2011). "To establish ineffective assistance of counsel, defendant must first show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Uphaus*, 278 Mich App 174, 185; 748 NW2d 899 (2008).

Defense counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," *Vaughn*, 491 Mich at 670, and is given "wide discretion in matters of trial strategy," *People v Odom*, 276 Mich App 407-415; 740 NW2d 557 (2007). Decisions concerning whether to call or question witnesses are presumed to be matters of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The failure to call a witness "only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense," *id.*, i.e., a defense that might have affected the outcome of the trial, *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009).

Defendant was not deprived of his right to effective assistance of counsel. As explained above, defendant put forth no evidence in support of his contention that Bryant's testimony would have exculpated defendant. In fact, defendant's trial counsel informed the court that Bryant "want[ed] no part of trying to assist the defense." Defendant's trial counsel was aware that she had the ability to subpoena Bryant. According due deference to trial counsel's decision not to call him as a witness, this Court must conclude that she had a strategic reason for not doing so, such as the risk of hearing answers to her questions that would not have assisted, or, worse, prejudiced her client.

After cross-examining each of the prosecution's seven police officer witnesses, defendant's trial counsel sought earnestly to introduce the very same information defendant argues on appeal should have been heard—that the guns and marihuana belonged to Bryant—by questioning Daniel C. Waszak, defendant's first appointed attorney, but the statement was excluded as hearsay. Defendant testified that he knew that there was marihuana in the house in which he was arrested, but not guns. The trial court, as the finder of fact, chose not to believe defendant. Because defendant cannot show that "his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms," *Uphaus*, 278 Mich App at 185, he cannot overcome the presumption that he received effective assistance of counsel. Therefore, the trial court did not err in denying defendant's motion for a new trial on the basis of ineffective assistance of counsel.

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Henry William Saad