

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

UNPUBLISHED
March 21, 2013

v

ANDREW FRANCIS LASKI,

Defendant-Appellee.

No. 310485
Saginaw Circuit Court
LC No. 09-033263-FH

Before: BORRELLO, P.J., and M. J. KELLY and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals by order of our Supreme Court,¹ a trial court order granting defendant's motion for a new trial. A jury convicted defendant of carrying a firearm with unlawful intent, MCL 750.226, intentional discharge of a firearm from a motor vehicle, MCL 750.234a, carrying a concealed weapon, MCL 750.227, and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The jury acquitted defendant of disturbing the peace, MCL 750.170. The trial court granted defendant's motion for a new trial after the verdict was rendered but before sentencing. For the reasons set forth in this opinion, we affirm.

I. FACTS & PROCEDURAL HISTORY

On or about August 15, 2009, Brian Dupuis engaged in a fistfight with defendant in the parking lot of Heck's Bar in Saginaw. After the fight, Dupuis ran to his home located nearby. Minutes later, a dark-colored Lincoln Navigator and a Chevrolet Lumina pulled in front of his house. Dupuis testified that defendant was seated in the front passenger seat of the Navigator. Dupuis stated that defendant yelled profanity in his direction and then fired a gun into the air several times.

¹ This Court initially denied plaintiff's application for leave to appeal. *People v Laski*, unpublished order of the Court of Appeals, entered July 26, 2012 (Docket No. 310485) (BORRELLO, J., would have granted leave to appeal). Plaintiff then applied for leave to appeal in our Supreme Court and our Supreme Court remanded the case to this Court for consideration as on leave granted. *People v Laski*, 493 Mich 904; 823 NW2d 282 (2012).

Joey Dalton testified that she witnessed the fight in the bar parking lot. She testified that, after the fight, she rode with Shawn Fuller to Dupuis's home. Dalton stated that a dark sport utility vehicle (SUV) and a smaller light-colored vehicle pulled in front of the home. She asserted that she heard "between five and ten" shots fired from the direction of the vehicles, but could not identify any of the vehicles' occupants. Fuller testified that she heard "more than two, [but] less than six" shots fired from the passenger side of the SUV. Fuller stated that she saw defendant in the front passenger seat of the SUV, but could not identify the shooter.

Breanne Primozich testified that she was walking her dog past Dupuis's home on the night of the shooting. She stated that "a darker SUV of some sort and a lighter car had pulled up in front of Brian Dupuis's house." She saw two or three shots from the front passenger of the SUV, but could only describe the shooter as a "[l]arger white male, [wearing a] white shirt." She stated that the shooter shot a handgun with his right hand.

Carrollton Township Police Officer Kip Humpert testified that he was dispatched to Dupuis's home at 1:21 a.m. on August 15, 2009. Humpert stated that he collected shell casings from the road that had been discharged from a .40-caliber semi-automatic pistol. After failing to locate defendant, Humpert was dispatched to a local hospital where defendant had presented with a hand injury. Humpert arrived at the hospital at about 5:30 a.m. where he interviewed defendant. Humpert testified that he "noticed an injury to his right hand that . . . was an indication of a pinching force that would have been done by something very violently." Humpert described for the jury how a shooter's thumb could be injured by improperly firing a semi-automatic pistol. Humpert opined that he thought the injury was consistent with the improper use of a semi-automatic pistol. Humpert testified that he requested that the attending doctor "take a sample from the area around [defendant's] thumb," in order to "have it diagnosed through the lab to see if they could give me information as far as if there was gunpowder residue or what not on his thumb."

At trial, defendant testified that he did not take part in the shooting. Defendant testified that he and Dupuis had engaged in previous physical altercations including an altercation on the night of the shooting. According to defendant, after attempting to recuperate from the altercation on his own, he went to the hospital between 3:30 and 4:00 a.m. Defendant stated that his thumb injury occurred during the scuffle when he dragged his thumb on the asphalt. Defendant testified that he knows how to use firearms, and has experience firing semiautomatic weapons. However, defendant maintained that he does not own a semi-automatic handgun. Defendant stated that he is left-handed and always shoots with that hand.

After defendant was charged, the trial court adjourned the scheduled trial date on four separate occasions. Both parties moved for the fourth adjournment because, defense counsel explained, "apparently there is a lab report that neither I [nor] the prosecutor have." Following the fourth adjournment, the trial court held a final pretrial conference on May 31, 2011. The trial court commented that "there was also an issue of a lab report which I've indicated to counsel in Chambers that needs to be provided to defense no later than the end of business this Friday [June

3, 2011].” The prosecution² did not object or indicate that lab testing had not been conducted. The court scheduled trial for June 7, 2011 and both parties indicated they would be ready for trial at that time.

On the first day of trial, defense counsel indicated that he had not received “the results of a lab test that was taken of [defendant]’s right hand which would have been his shooting hand for traces of nitrate.” The prosecution responded that “the evidence still exists, however, it was never submitted,” and that the “test simply wasn’t conducted for various reasons.” The court noted that it had ordered the lab report to be produced by June 3, 2011, and that the prosecution had nearly two years since the date of the offense to conduct the test. The court granted defendant’s motion, stating “the evidence presumably is exculpatory in nature” and “[t]hat there were multiple orders . . . for discovery.” However, the court found that neither adjournment nor dismissal were appropriate remedies and elected to “fashion a jury instruction appropriate to the circumstance.” A jury was empanelled, and the parties made opening statements.

On the second day of trial, defense counsel moved the trial court for a continuance “so that . . . we can get the nitrate swab and we can actually get that tested and get the results.” The court asked the prosecution whether the test could be completed, and the prosecution responded that it would “see if that can be done.” The court elected to “keep that issue open then until it becomes appropriate.” The court remarked that “[t]his quite frankly is a discovery issue and why the information was never provided I don’t know,” and indicated to the prosecution that “if the lab is willing to do that test immediately . . . it still is an open option for you if that’s what you care to do.” The court stated:

The evidence has not [been provided] despite the court’s order to have the test done because it—the test is argued by the defense is that it would be exculpatory. And not to have the test done is to me tantamount to withholding exculpatory evidence which is what the violation is here. The violation is that you’re holding evidence that’s potentially exculpatory to the defense and by not having the test done it’s clear[ly] prejudicial to the defense. That was the basis for my ruling yesterday, that’s the continued basis here; that as long as you hold that evidence and don’t have the testing done you’re withholding potentially exculpatory information or exculpatory evidence. That clearly is [defendant’s] argument. We don’t know whether it is exculpatory or not but we have [to] consider it potentially exculpatory if the test is not being conducted.

The court ultimately denied defendant’s motion for a continuance.

² We note that three different assistant prosecuting attorneys presented this case to the trial court at some point during the proceedings. The record is unclear as to which prosecuting attorney was responsible for ensuring that the tissue swab was submitted for laboratory testing after the prosecutor’s office represented that it would be submitted for testing. Furthermore, we are unable to glean from the record whether any of the three assistant prosecuting attorneys who appeared on this matter communicated the trial court’s order to have the swab tested to each other.

Following the close of proofs, the trial court instructed the jury as follows:

There's been testimony that a gunshot residue swab was taken from the defendant to determine whether he had fired a firearm. It is the responsibility of the prosecution to produce those results. Since those results have not been produced you may infer that the evidence would have been unfavorable to the prosecutor's case.

During rebuttal, the prosecution argued:

The lab report on the thumb, you may infer that it would be negative to the case. You may infer that it would be negative to the People's case. *But you don't have to infer that, ladies and gentlemen . . .* In order for you to infer that the lab report would somehow exonerate him you would have to completely ignore all the evidence you heard in this case. . . . [Emphasis added.]

After the jury convicted defendant, defendant moved for a new trial and to set aside the jury verdict. Defendant argued that the prosecution's failure to provide the lab report amounted to prejudice and he argued that he was denied the effective assistance of counsel. The trial court ordered the prosecution to have the sample tissue and swab taken around defendant's hand tested for gunshot residue. The test results indicated that, "[n]o gunpowder particles or lead residue were observed on the tissue fragments or on swabs collected from the tissue fragments."

After the results of the test were released, the trial court granted defendant's motion for a new trial. The trial court found that the prosecution's failure to produce the lab report in a timely manner prior to trial resulted in a miscarriage of justice and denied defendant his due process rights. The trial court reasoned that the prosecution had misled the court and defense counsel "into believing that a lab analysis had been conducted, that a report existed, and that it would be provided to defense counsel sufficiently prior to trial." The trial court reasoned that the prosecution had an obligation to provide the report because the prosecution had "consistently maintained a position of providing the report, despite the fact that a report did not exist." The trial court concluded that the prosecution's conduct "precluded the defendant from requesting testing of the evidence before trial." The trial court further reasoned that the jury instruction was an insufficient substitute for the actual laboratory test where the prosecution argued that the jury could "ignore the instruction," and where defense counsel failed to make an "active pursuit" of the issue. The trial court concluded that the lab report was "of a sufficient nature that this Court can say with certainty that a different result could occur if a jury was presented with this additional evidence."

The trial court also concluded that defendant was denied the effective assistance of counsel. This appeal ensued.

II. ANALYSIS

The prosecution argues that the trial court abused its discretion in granting defendant a new trial. We review a trial court's grant of a motion for a new trial for an abuse of discretion. *People v Bennett*, 290 Mich App 465, 481; 802 NW2d 627 (2010). "A trial court abuses its

discretion when its decision falls outside the range of reasonable and principled outcomes.” *People v Waterstone*, 296 Mich App 121, 131-132; 818 NW2d 432 (2012).

A trial court may grant a defendant a new trial “on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice.” MCR 6.431(B). MCL 769.26 provides as follows:

No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire case, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

“Defendants have a due process right to obtain evidence in the possession of the prosecutor if it is favorable to the accused and material to guilt or punishment.” *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994). However, “[a]bsent a showing of suppression of evidence, intentional misconduct, or bad faith, the prosecutor and the police are not required to test evidence to accord a defendant due process.” *People v Coy*, 258 Mich App 1, 21; 669 NW2d 831 (2003); see also *Arizona v Youngblood*, 488 US 51, 58; 109 S Ct 333; 102 L Ed 2d 281 (1988).

In this case, the prosecution contends that the trial court erroneously found that it withheld the lab report and abused its discretion in granting a new trial. The prosecution argues that the lab report was not available and that defendant was not entitled to have the trial court order the prosecution to run a test on the tissue swab. However, the prosecution misconstrues the issue.³ Here, the issue is not whether the prosecution had a legal obligation to run a lab test; instead, the issue is whether the trial court abused its discretion in finding that the prosecution represented that it would perform the test and that its failure to do so amounted to bad faith that resulted in a miscarriage of justice and denied defendant due process. Having reviewed the record, we find that it supports the trial court’s finding that the prosecution acted in bad faith and committed misconduct when communicating with the trial court and defense counsel. Therefore, we cannot conclude that the trial court abused its discretion in determining that a miscarriage of justice occurred that denied defendant his due process rights and warranted a new trial.

Here, the trial court adjourned the trial date four times. The fourth adjournment was granted so that the laboratory report could be obtained. However, following the fourth adjournment, the prosecution failed to submit the tissue swab for testing, yet it did not inform the trial court or defense counsel that there would be no laboratory report. At the final pretrial

³ At oral argument, and for the first time, the prosecution argued that the prosecutors handling the matter may have mistakenly believed that the trial court’s order was in reference to fingerprints rather than the swab taken from defendant’s hand. However, according to the prosecutor, the fingerprints were turned over to defense counsel prior to the preliminary examination. Accordingly, we assign no merit to the prosecutor’s argument.

conference, the trial court indicated that there was an “issue” with the lab report, and the trial court ordered the prosecution to provide a copy of the report to defense counsel within three days. The prosecution did not object to the court’s verbal order and did not inform the trial court or defense counsel that the tissue had not been submitted for testing. Essentially, the trial court was led to believe that based on the representations of the prosecution that the tissue swab had been submitted for laboratory analysis and the trial court had no reason to disbelieve those representations. See *People v Garland*, 286 Mich App 1, 8; 777 NW2d 732 (2009) (a trial court has “no reason not to accept the representations of an officer of the court [who is] bound by a duty of candor to a tribunal”); *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007) (noting that “a prosecutor’s role and responsibility is to seek justice and not merely convict”). Based on the prosecution’s representations, the trial court ordered the lab results be disclosed by a date certain. That date came and went, and the prosecution failed to offer a valid explanation as to why the analysis had not been performed, and instead, simply stated that the failure occurred for “various reason[s].” If the prosecution did not intend to have the tissue swab tested, it should have acted with candor and notified the trial court and defense counsel so that defendant could have had the material tested on his own accord. Instead, the prosecution, whether unintentional or intentionally, made representations to the trial court and defense counsel which misled them both regarding the status of the tissue swab.

Although the prosecution claims that it did not mislead the court and defendant, it is clear from the record that both defense counsel and the trial court believed that the prosecution had submitted the tissue for testing and that a lab report would be furnished to the defense in a timely manner. In particular, at the pretrial conference, the trial court ordered the prosecution to furnish the defense with a lab report within three days after the conference. The short time deadline demonstrates that the trial court believed that the tissue swab had been tested and that the prosecution was in possession of a lab report regarding the testing. Moreover, in its order granting a new trial, the trial court, which discussed the lab report in chambers with the prosecution and defense counsel at the pretrial conference, indicated that the prosecution agreed to provide a copy of the lab report to the defense. Specifically, the court explained:

No mention was made by the People at that time that not only was there no report, but that a test of the swab was never conducted. The Court and defense counsel were clearly misled into believing that a lab analysis had been conducted, that a report existed, and that it would be provided to defense counsel sufficiently prior to trial.

Based on our review of the record, it strikes us as less than forthright to now argue that the prosecution never represented that the analysis had been conducted and would be provided to the defense, and we decline to condone what appears to have been a lack of candor by the prosecution toward the tribunal. See *Garland*, 286 Mich App at 8; *Dobek*, 74 Mich App at 63.

In addition to properly finding that the prosecution misled both the tribunal and defense counsel, the trial court did not abuse its discretion in finding that the prosecution’s ongoing misrepresentations amounted to a miscarriage of justice that warranted a new trial. As noted, the prosecution’s bad faith and lack of candor was ongoing. The prosecution had over two years to test the tissue swab, and its representations to the trial court led the judge to believe that the swab was tested or would be tested. However, the prosecution waited until the first day of trial to

inform the court that, “for various reason[s],” the tissue had not been tested. This resulted in a miscarriage of justice and it denied defendant his due process right to a fair trial. The United States Supreme Court has explained that, “[u]nder the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense.” *California v Trombetta*, 467 US 479, 485; 104 S Ct 2528; 81 L Ed 2d 413 (1984). In this case, the prosecution’s misconduct denied defendant a meaningful opportunity to present a complete defense. The prosecution failed to notify defendant that it would not have laboratory analysis performed on the tissue swab. In doing so, the prosecution denied defendant his opportunity to be heard with respect to the lab report. Defendant’s convictions arose solely from the illegal discharge of a firearm. The only direct evidence of defendant’s guilt was the testimony of Dupuis, an individual with a documented history of animosity toward defendant. None of the other prosecution witnesses could identify the shooter. Moreover, the trial court determined that the laboratory report was “of a sufficient nature that this Court can say with certainty that a different result could occur if a jury was presented with this additional evidence,” and it found that a miscarriage of justice occurred because defendant was “not allowed to present exculpatory evidence that has the potential to result in a different verdict.” While we may have reached a different conclusion, our review is not dependent on what we would have done given the situation, but rather, whether the trial court’s ultimate decision fell outside the range of “reasonable and principled outcomes.” *Waterstone*, 296 Mich App at 131-132. Here, considering that the trial court sat through the trial and was in a better position to evaluate the prejudicial impact of the prosecution’s conduct in relation to the weight of the evidence and the credibility of the witnesses, we cannot conclude that the court’s decision to grant a new trial fell outside the range of reasonable and principled outcomes. *Id.*

In addition, although the trial court provided a jury instruction, the instruction did not cure the taint of the prosecution’s misconduct. Here, the court informed the jury that it “*may*” infer (emphasis added) that the laboratory result would have been unfavorable to the prosecution. During rebuttal, the prosecution stated that the jury could infer that the lab test would have been unfavorable, but further stated, “*you don’t have to infer that*, ladies and gentlemen . . . In order to infer that the lab report would somehow exonerate him you would have to completely ignore all the evidence you heard in this case. . . .” (Emphasis added).⁴ Thus, based on the wording of the instruction, and given the prosecution’s rebuttal argument, the jury could have inferred that the laboratory report was favorable to the prosecution, when, in reality, the results of the laboratory report were clearly unfavorable to the prosecution’s case. Therefore, on this record, we cannot conclude that the trial court abused its discretion in finding that the jury instruction failed to cure the taint of the prosecution’s misconduct.

⁴ The prosecution argues that “[t]he instruction’s inference was permissive, and the prosecutor was permitted to comment on its nature.” However, the prosecution misconstrues the issue with respect to the jury instruction. The issue is not whether the prosecution could comment on the instruction, rather, the issue is whether the instruction cured the taint of the prosecution’s misconduct. As noted above, we conclude that it did not.

Finally, as noted above, the prosecution argues that defendant was not entitled to have the trial court compel the prosecution to submit the tissue swab for testing because a prosecutor cannot be compelled to perform discovery for the defense. The prosecution cites *Coy*, 258 Mich App at 21, in support of its position. We note that the prosecution did not timely raise this objection in the lower court when the trial court ordered it to provide a copy of the laboratory report to the defense. Instead, on the first day of trial, the prosecution noted, “case law would say that if the prosecutor has done something deliberate, something malicious . . . than that would be punishable to the prosecution. However, that wasn’t the case here.” The prosecution’s failure to properly raise this issue in a timely manner failed to preserve it for appellate review. See *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994) (“As a general rule, issues that are not properly raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances”). The prosecution’s failure to timely raise this argument in the lower court is significant because, if the prosecution was of the opinion that the trial court could not compel it to have the tissue tested, waiting until the first day of trial to disclose that position was, at best, misleading. The prosecution essentially denied the trial court the opportunity to rule on the issue, denied defendant the opportunity to obtain the tissue swab and have it tested, and harbored its position as an appellate parachute. See *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000) (“Counsel may not harbor error as an appellate parachute”). Furthermore, the prosecution’s conduct was tantamount to judicial sandbagging, which this Court has previously refused to condone. Specifically, in *People v Terrell*, 289 Mich App 553, 569; 797 NW2d 684 (2010), this Court declined to characterize evidence as “newly discovered” when it had been available to the defendant during trial because to do so would have negated the defendant’s duty to engage in due diligence to secure the evidence and would have effectively condoned “defendant’s attempt at judicial sandbagging.” Similar to a defendant’s duty to act with due diligence to secure available evidence, the prosecution has a duty to advance its positions in the lower court so that the court has the opportunity to make a ruling that will allow both parties to adapt their trial strategies accordingly. Here, the prosecution did not advance the argument in the trial court that it did not have a duty to test the tissue swab for the defense. Instead, it represented that the tissue had been tested. The prosecution cannot now claim that the trial court did not have authority to order that the tissue be tested, because that would encourage judicial sandbagging. Accordingly, we conclude that the prosecution’s argument with respect to *Coy*, 258 Mich App at 21, is not properly before this Court and is devoid of legal merit.⁵

More importantly, as discussed in detail above, the prosecution misconstrues the issue in this case. The issue here is not whether the prosecution had a duty to perform discovery on defendant’s behalf; rather, the issue is whether the prosecution acted in bad faith and whether that conduct resulted in a miscarriage of justice when it represented that it would have the tissue swab tested and would furnish a copy of the lab report to defendant in a timely manner. While a prosecutor generally does not have a duty to test evidence for the defense, such duty can arise

⁵ For the same reason, we find it immaterial under the circumstances of this case that the trial court’s directives were not formalized into a written order. The prosecution could not properly mislead the trial court into believing that it would comply with its directives, only to later argue that it did not need to comply because the directives were not in written form.

upon a showing that the prosecution suppressed evidence, engaged in intentional misconduct, or acted in bad faith. *Coy*, 258 Mich App at 21. Here, as discussed above, the prosecution engaged in intentional misconduct or acted in bad faith by not acting with candor toward the tribunal and the defense. The prosecution led the trial court and defense counsel to wrongly believe that it had submitted the tissue swab for laboratory analysis when in fact it had not done so, thus denying defendant the opportunity to have the material tested on his own accord.

In sum, we conclude that the trial court did not abuse its discretion in finding that a miscarriage of justice occurred that warranted a new trial. Given our conclusion, the prosecution's argument with respect to ineffective assistance of counsel is moot and we decline to address it.

Affirmed.

/s/ Stephen L. Borrello
/s/ Michael J. Kelly
/s/ Mark T. Boonstra