

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 17, 2013

v

TERRANCE WARD,

No. 311961
Wayne Circuit Court
LC No. 10-003443-FH

Defendant-Appellant.

Before: BOONSTRA, P.J., and DONOFRIO and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, second offense, MCL 750.227b. Because evidence that the house involved in this case was vacant was properly admitted, defendant waived any objection to the evidence that the house was a drug house, and defendant was not denied the effective assistance of counsel, we affirm.

Defendant convictions arise out of an incident that occurred on January 1, 2010. Detroit police officers Matthew Bray and Reginald Beasley were patrolling Outer Drive in their scout car when they observed defendant and Isaiah Horn walking down the street. Defendant and Horn looked at the officers and made an abrupt turn up the driveway of a home. The officers got out of their vehicle and followed defendant and Horn up the driveway into the backyard of the home. Both officers observed defendant discard a gun, a baggy of cocaine, and a digital scale in the backyard. Beasley arrested defendant and placed him in the police car. At trial, both defendant and Horn testified that Horn, rather than defendant, possessed the gun, cocaine, and scale and threw the items to the ground. The jury convicted defendant as charged.

Defendant argues that he was denied a fair trial when evidence was admitted that the home involved in this case was a vacant drug house and that his attorney rendered ineffective assistance of counsel for failing to object to the evidence and by eliciting such evidence himself. The record shows that the prosecution elicited testimony from Officer Bray that the house appeared to be vacant. The prosecution did not elicit testimony that the house appeared to be a drug house. Because defense counsel failed to object to the testimony that the house appeared to be vacant, our review regarding the admission of that evidence is limited to plain error affecting defendant's substantial rights. *People v Hawkins*, 245 Mich App 439, 447; 628 NW2d 105

(2001). Under the plain error rule, a defendant has the burden to show that (1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the error affected a substantial right. *People v Cross*, 281 Mich App 737, 738; 760 NW2d 314 (2008). Further, whether a defendant received the effective assistance of counsel is generally “a mixed question of fact and constitutional law.” *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012), quoting *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court’s findings of fact, if any, for clear error and review questions of law de novo. *Heft*, 299 Mich App at 80. Because defendant did not preserve this issue for our review by moving for a new trial or evidentiary hearing in the trial court, our review is limited to mistakes apparent on the record. *Id.*

In order to establish ineffective assistance of counsel, a defendant must show that “(1) defense counsel’s performance was so deficient that it fell below an objective standard of reasonableness and (2) there is a reasonable probability that defense counsel’s deficient performance prejudiced the defendant.” *Id.* at 80-81. “The defendant was prejudiced if, but for defense counsel’s errors, the result of the proceeding would have been different.” *Id.* at 81. “Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). A defendant must overcome the strong presumption that trial counsel’s actions and decisions constituted sound trial strategy. *People v Buie*, 491 Mich 294, 311; 817 NW2d 33 (2012). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

Defendant contends that the testimony that the home appeared vacant was irrelevant and prejudicial to his defense. Generally, all relevant evidence is admissible, and irrelevant evidence is inadmissible. MRE 402. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401; see also *People v Watkins*, 491 Mich 450, 470; 818 NW2d 296 (2012).

In this case, evidence that the house appeared to be vacant was admissible as part of the res gestae of the charged offenses to explain why the police officers stopped their vehicle and followed defendant and Horn up the driveway. “[T]he facts and circumstances surrounding the commission of a crime are properly admissible as part of the res gestae.” *People v Shannon*, 88 Mich App 138, 146; 276 NW2d 546 (1979). On cross-examination, when defense counsel asked Officer Beasley why he stopped the police car, Beasley responded, “[b]ecause it seemed odd. They [i.e., defendant and Horn] looked in our direction, [and] made an abrupt turn towards a vacant house.” Thus, evidence that the house was vacant was admissible to explain the officers’ actions and to provide the complete facts and circumstances surrounding the offenses. Defendant has therefore failed to establish that the admission of the evidence constituted plain error. Further, because the evidence was admissible, defense counsel did not render ineffective assistance by failing to object to the evidence. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) (“Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.”)

Defendant also argues that the testimony that the house was a drug house was irrelevant and prejudicial. The record shows that defense counsel and not the prosecution elicited the

testimony that the house was purportedly a drug house. Defendant cannot claim error on the basis of evidence that he intentionally introduced. *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995) (“[A] party cannot request a certain action of the trial court and then argue on appeal that the action was error.”) Defendant’s waiver of his objection to the testimony extinguished any error with respect to its admission. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000).

Defendant next contends that his trial counsel rendered ineffective assistance of counsel by eliciting testimony that the house was a drug house. The record shows that counsel’s elicitation of such evidence constituted sound trial strategy. Defendant’s theory of defense was that Horn, rather than defendant, discarded the gun, cocaine, and scale in the backyard. Defendant’s theory thus hinged on the police officers’ credibility or lack thereof. Defense counsel’s questioning of the officers was aimed at casting doubt on their credibility. Counsel thoroughly cross-examined both officers and pointed out inconsistencies in their arrest reports and trial testimony. Defense counsel questioned Officer Bray, as follows:

Q. Okay. Did you have your gun out?

A. Yes, sir.

Q. Why did you have your gun out at that point?

A. My gun was at the low ready.

Q. Why is my question, sir.

A. Because I believed it to be a narcotic location.

Q. Why did you pull your gun out?

A. Narcotics and firearms go together.

* * *

Q. Officer, given the fact that you had your gun out near a vacant house that you thought narcotics were being sold [sic], didn’t you think by taking your gun out that you were going into a dangerous situation, Officer?

A. Absolutely.

Defense counsel also cross-examined Officer Beasley regarding whether he saw Bray with his gun out and whether Beasley had his gun out. Beasley testified that he did not recall whether Bray had his gun out, that he did not see Bray with his gun out at any point during the incident, that Beasley did not have his gun out while he was walking up the driveway, that he did not pull out his gun when he saw defendant reach into his jacket, and that he did not retrieve his gun from its holster until after defendant had already dropped his gun. Defense counsel also called Calvin Lewis, the officer-in-charge of the case, who testified regarding information

contained in his investigative report, including that police officers had received narcotics complaints from citizens regarding the vacant home.

During closing argument, defense counsel pointed out inconsistencies in the officers' testimony and argued that the testimony was "ridiculous" and "inherently incredible." Counsel argued that it was ridiculous that a police officer near a drug house in southwest Detroit would allow a man to have his back toward him as the man pulled out a gun. Counsel argued as follows:

Amazing. You're going to let this police officer get up here and tell you that this young man in the City of Detroit had his back to a police officer and wouldn't turn around. You're going to let these police tell you? You're going to let them tell you that this man had his back [sic] and pulled a machine gun out and that he didn't pull his gun out? You buy that?

It's ridiculous and inherently incredible. You know it's a lie. Back of his head would have been shot off.

And then he says put your hands up and he doesn't. And that officer allows him to reach in there and pull it out. Where at—what world do we live in? Fantasy world. Fantasy world. Would you think we want to sit around here and back-up the police? This happens every day in Detroit. Oh, it didn't happen in Mr. Robinson's neighborhood, it may not happen where everybody lives. People are dumb in this city and these police are out of control. And they will do whatever they have to do in order to win.

* * *

Now, I tell you this. You believe it, you believe that young man pulled that machine gun out, partner sitting there, gun out, ain't nobody shooting, ain't nobody doing nothing, you believe it, well, you're dead wrong and I don't care what your decision is.

* * *

Their stories don't match, their stories don't make any sense, their stories are inconsistent[.]

Thus, defense counsel relied on the inconsistencies in the officers' testimony in support of his argument that the officers were not credible, and defendant and Horn were credible. Counsel's challenge to the officers' credibility included the fact that the officers purportedly followed defendant and Horn into the backyard of a purported drug house without Officer Beasley having removed his gun from its holster. Therefore, counsel's decision to elicit testimony that the house was a drug house was part of his trial strategy. We will not substitute our judgment for that of counsel regarding matters of trial strategy. *Payne*, 285 Mich App at 190. Accordingly,

defendant has failed to show that counsel's performance fell below an objective standard of reasonableness.

Affirmed.

/s/ Mark T. Boonstra
/s/ Pat M. Donofrio
/s/ Jane M. Beckering