STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 13, 2014
v	No. 313345 Wayne Circuit Court
RICHARD DAVID LEONARD, Defendant-Appellant.	LC No. 12-2803-01

Before: SERVITTO, P.J., and SAWYER and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals by right from his convictions, following a jury trial, of two counts of assaulting, resisting, obstructing, or interfering with a police officer in the performance of his duties, MCL 750.81d(1). Defendant was acquitted of the charge of possession of a controlled substance (marijuana), MCL 333.7403(2)(d). Defendant was sentenced to two years felony probation. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case arises out an incident that took place on the morning of January 29, 2012 in Southgate, Michigan. Officer Szymoniak of the Southgate Police Department testified that he and his partner, Officer Gratz, responded to a "suspicious vehicle call." Szymoniak and Gratz located the vehicle, a van, parked and facing the wrong way, with its left wheel to the curb, on Veronica Street; Szymoniak stated that he observed that the passenger front wheel tire was flat, the rim was damaged, and there was paint transfer on the front quarter panel. Szymoniak stated that the vehicle's condition led him to believe it had been involved in a crash. Szymoniak testified that the vehicle was running and the windows were down; defendant was sleeping in the driver's seat. Szymoniak and Gratz were in full police uniforms but had not activated the emergency lights on the squad car. Szymoniak observed a half-full bottle of whiskey on the floor of the vehicle and could smell alcohol inside the vehicle. Szymoniak believed that defendant may have been drinking and driving and been involved in an accident, and that at that point he had probable cause to arrest defendant on suspicion of drunk driving.

Defendant was awakened by Szymoniak. Defendant told him that his girlfriend lived on Veronica Street and that he had arrived late at night and did not want to go inside because he did not want to wake up his girlfriend or her mother. Szymoniak told defendant not to be a "smart ass." Defendant acknowledged that he had been drinking, but stated that he had begun drinking

after he was parked. Szymoniak asked defendant to step out of the vehicle to do a field sobriety test. Defendant refused and stated the he wanted to call an attorney. Szymoniak told defendant that calling an attorney was "not an option" at that point.

Szymoniak stated that when he attempted to open the driver's side door, defendant said "hey you can't open my car door" and struck Szymoniak's hand with a closed fist. Gratz then used his taser on defendant. The taser did not appear to have any effect; however Szymoniak was able to get the driver's side door open. Szymoniak stated that defendant began yelling and screaming, and kicked him in the chest with his right foot. During the struggle, the door became closed again. Szymoniak also used his taser on defendant, which appeared to have no effect. Szymoniak sprayed his pepper spray inside the vehicle, which also appeared not to have an effect.

Gratz radioed for backup. Gratz testified that during the confrontation, defendant made several attempts to "reach down[;]" Gratz did not know if he was trying to grab the keys in order to flee or trying to find something else. Gratz testified that he was told later that several knives were found in the car. Many additional officers arrived, and defendant was eventually removed from the vehicle, handcuffed, and taken to the police station. Defendant's vehicle was searched, and marijuana, a half-full pint bottle of whiskey, and several knives were recovered.

Defendant testified that he was driving a van belonging to his girlfriend that evening, and that the van had preexisting damage to the front bumper. He testified that he was visiting friends that night, where he drank two beers over the course of the evening. He left his friends' home at approximately 1:00 a.m. and drove to two stores, where he purchased a pint of Jack Daniels whiskey and a small bottle of Diet Coke. Defendant stated that he "clipped the corner of the island" leaving the gas station where he purchased the Diet Coke, causing the damage to the rim and tire. Defendant testified that he intended to refuse a field sobriety test. Defendant denied striking the officers and stated that he was tasered, pepper sprayed, and elbowed by the officers.

During voir dire, defense counsel inquired as to whether any juror thought the defendant was innocent prior to trial. Juror No. 4 replied "Not totally" and elaborated that she felt that way because "he's here in court and there are police witnesses . . . . Because he's here in court today and there is more than one charge and witnesses including police witnesses, I think something happened. Obviously, something happened." A discussion among a few of the jurors about the presumption of innocence followed. The trial court then stated:

> Sir, I think you summed it up. I think, counsel, you are confusing some things here. There is the presumption of innocent [sic] as required bay [sic] law.
>
> Members of the jury, being human, you can think, well, there might be something here or why would we be here. The point of the matter is, is he has to be proven guilty beyond a reasonable doubt. You don't start off by saying, well, he must be guilty and must be shown otherwise. Whatever your thought process might be, foremost in your mind is the presumption of innocent [sic] as required by law.

The trial court asked if the jurors could keep the presumption foremost in their minds. The record indicates that Juror No. 2 responded "Yes." The record shows no verbal response from any other juror. Defense counsel used no peremptory challenges or challenges for cause.

During the trial, when the prosecution first moved to introduce pictures of the knives that were recovered from defendant's van, defense counsel objected:

> [Defense Counsel]: Well, Judge, I would only say one of the foundational requirements they have to meet is that the probative value outweighs the prejudice, and I'm just curious, where is [sic] the actual knives instead?
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> * * *
>
> [Prosecution]: Judge, as an offer of proof, I will tie in, A, the relevancy, as well as the probative value.
>
> THE COURT: I guess right now, in terms of what the relevancy might be, I think that's one matter, but he's just asking where are the real items themselves?
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> * * *
>
> THE COURT: Well, were you objecting to the relevancy of it?
>
> [Defense Counsel]: I think that if they've got the actual things, I say let's see the actual things.
>
> THE COURT: That's all we're concerned about right now.

Later, during the testimony of Gratz, who assisted with the search of defendant's car, the prosecution moved again to admit both pictures of the knives found in defendant's vehicle and the knives themselves. In response to the prosecution's proposed exhibits, defense counsel stated as follows:

> [Defense Counsel]: No, I don't have questions, your Honor. We don't mind if they see them. I do think that they're irrelevant since he's not charged with that. So, I would only object based on relevance, but like I said before, between the pictures of the knives, let 'em see it if you're going to admit it.
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> THE COURT: Counsel, I think that part of the issue here is whether the police were performing their duties and part of what he's testified to and about circumstances as to what person [sic] may or may have in the vehicle, and what their concerns, you know, may be in terms of trying to get folks out of the vehicle for their own safety and performing their duties.
>
> So, certainly if those items are found in the car I think that would justify part of what their reason and conduct may be and the way that they conducted themselves in performing their duties.

Defendant was convicted of two counts of assaulting, resisting, obstructing, or interfering with a police officer in the performance of his duties, MCL 750.81d(1), but acquitted of possession of marijuana, MCL 333.7403(2)(d).[1] This appeal followed. On appeal, defendant argues that he was denied the effective assistance of counsel during voir dire, and that the trial court erred in admitting evidence related to the knives found in defendant's van.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Claims of ineffective assistance of counsel involve mixed questions of law and fact. *People v Gioglio (On Remand)*, 296 Mich App 12, 19; 815 NW2d 589, vacated in part on other grounds 493 Mich 864 (2012). This Court reviews the trial court's findings of fact for clear error, and reviews de novo questions of constitutional law. *Id*. at 19-20. Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant first must show that counsel's performance was below an objective standard of reasonableness. In doing so, defendant must overcome the strong presumption that counsel's assistance was sound trial strategy. Second, defendant must show that, but for counsel's deficient performance, it is reasonably probable that the result of the proceeding would have been different. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011); *Strickland*, 466 US at 687-693. A defendant bears the burden of establishing the factual predicate for a claim of ineffective assistance of counsel. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Because defendant did not raise an ineffective assistance of counsel claim in the trial court or request that this court remand his case for a *Ginther*[2] hearing, our review of this issue is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Defendant argues that he was denied the effective assistance of counsel in failing to remove Juror No. 4, either for cause or with a peremptory challenge, after she made the statement that she did not believe defendant was totally innocent. We disagree.

Counsel's decisions relating to the selection of jurors is generally a matter of trial strategy. *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). Further, jurors are presumed to be impartial and competent to render a verdict. *Id*. at 256. In order to succeed on a claim of ineffective assistance of counsel based on the failure to challenge or remove a juror, a defendant must show that the outcome of the trial would likely have been different had the juror not participated in deliberations. See *Hughes v United States*, 258 F 3d 453, 458 (CA 6, 2001),

[1] Defendant presented to the jury evidence that he possessed a valid identification card as a qualifying patient under the Michigan Medical Marijuana Act, MCL 333.26421 *et seq*., at the time of the incident.

[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

citing *Goeders v Hundley*, 59 F 3d 73, 75 (CA 8, 1995), citing in turn *Smith v Phillips*, 455 US 209, 215; 102 S Ct 940; 71 L Ed 2d 78 (1982).

This Court has stated:

> Perhaps the most important criteria in selecting a jury include a potential juror's facial expressions, body language, and manner of answering questions. However, as a reviewing court, we cannot see the jurors or listen to their answers to voir dire questions. For this reason, this Court has been disinclined to find ineffective assistance of counsel on the basis of an attorney's failure to challenge a juror. [*People v Unger*, 278 Mich App 210, 257; 749 Nw2d 272 (2008) (citations and quotation marks omitted).]

Here, Juror No. 4 made the statement, prior to trial, that she did not "totally" believe in defendant's innocence because of the number of charges and the witnesses. After some discussion, the trial court then reinstructed the jury on the presumption of innocence, and clarified that it was not a requirement that the jury have no impressions or opinions about the case prior to trial, but rather only that the jury be able to keep the presumption of innocence "foremost" in their minds during deliberations. The trial court then asked the jury if they could do that. Although the record only reflects a "yes" response from Juror No. 2, it appears that no jurors answered "no" or otherwise indicated to the trial court that they could not comply with its instruction.

The trial court correctly stated the law. As the United States Supreme Court has stated:

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence present in court. [*Irvin v Dowd*, 366 US 717, 723; 81 S Ct 1639; 6 L Ed 2d 751 (1961).]

Thus, although Juror No. 4 is not on the record before this Court as affirmatively stating that she could apply the presumption of innocence, defendant has not carried his burden of showing that his counsel acted unreasonably in failing to remove Juror No. 4, or that the presence of Juror No. 4 on the jury was prejudicial or outcome determinative. Defendant's counsel appears to have adopted a strategy during voir dire of candor with the jury and having a frank discussion of the difficulties in applying the presumption of innocence. Further, defense counsel stated that he would not remove jurors for being honest. This strategy was not itself objectively unreasonable, and we decline to second guess it with the benefit of hindsight. *People v Williams*, 240 Mich App 316, 331-332; 614 NW2d 647 (2000). Additionally, the trial court inquired of the entire jury if they could apply the presumption of innocence, and accepted the jury's response. Based on the record before this court, we see no reasonable probability that the outcome of the case would have been different had Juror No. 4 been removed. *Johnson*, 245 Mich App at 259; *Strickland*, 466 US at 694.

III. ADMISSION OF EVIDENCE

Next, defendant argues that the trial court erred in admitting evidence of the knives found in defendant's van. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). An abuse of discretion exists if the results are outside the range of principled outcomes. *Feezel*, 486 Mich at 192.

To be admissible, evidence must be relevant. MRE 402; *People v Benton*, 294 Mich App 191, 199; 817 NW2d 599 (2011). 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). Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *Feezel*, 486 Mich at 198. Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury. *People v Murphy* (*On Remand*), 282 Mich App 571, 582-283; 766 NW2d 303 (2009).

Here, the trial court found the evidence to be relevant to explaining the police officers' conduct in dealing with defendant, "in terms of trying to get folks out of the vehicle for their own safety and performing their duties." However, the record indicates that the officers were not aware that there were knives in the vehicle until the car was searched *after* defendant was arrested. Thus, the presence of the knives could not have motivated or informed the officers' conduct in dealing with defendant. Gratz did testify that defendant attempted to "reach down" several times, although he did not know if defendant was trying to grab the keys to the van or something else. Neither Gratz nor any other officer testified to responding to defendant's "reaching down" motions in any particular way; nor did any officer testify to concerns that defendant was attempting to retrieve a weapon. Thus, from the record before this Court, we conclude that evidence that knives were later recovered from the vehicle was irrelevant to any material fact at issue in the case. See *People v Murphy* (*On Remand*), 282 Mich App 571, 580; 766 NW2d 303 (2009) (evidence is admissible as relevant "if helpful in throwing light upon any material point in issue.") (quotation marks and citation omitted).

However, an error in the admission of evidence does not merit reversal unless, after an examination of the entire cause, it appears that it is more probable than not that the error is outcome determinative. *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013). In the instant case, testimony was taken from the officers who searched the van concerning the knives that were recovered, and the knives and pictures of the knives were entered into evidence. Defendant testified concerning the knives, and offered testimony that the knives were two hunting knives, a utility knife, and a pocket knife. Defendant testified that he had been out hunting last month. Defendant also denied reaching for any of the knives during the encounter, and stated that he did not remember that the knives were even in the van. The prosecution did not make reference to the knives in its initial closing argument, and later made only brief reference in responding to defendant's contention during closing argument that the knives had been presented to show that defendant was a bad person.

Further, the jury was presented with a video of the events in question. Officers testified as to their version of the encounter, and defendant testified as to his version. Improperly

admitted evidence must be evaluated "in light of the weight and strength of the properly admitted evidence" in determining whether it was outcome-determinative. *Benton*, 294 Mich App at 199. In light of the properly admitted evidence, including testimony and video evidence, we conclude that any error in the admission of the challenged evidence was harmless.

Affirmed.

/s/ Deborah A. Servitto
/s/ David H. Sawyer
/s/ Mark T. Boonstra