

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES CRUMP,

Defendant-Appellant.

UNPUBLISHED

April 23, 2002

No. 228029

Wayne Circuit Court

LC No. 99-010771

Before: Bandstra, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of bribery of a public officer, MCL 750.117, and obstruction of justice, MCL 750.505. The trial court sentenced defendant to concurrent terms of nine months to four years' imprisonment on both counts. We affirm.

Defendant first argues that the prosecutor failed to present sufficient evidence to support his bribery conviction. We disagree. In a criminal case, due process requires that a prosecutor introduce evidence sufficient to justify a rational trier of fact's conclusion that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Warren*, 228 Mich App 336, 343; 578 NW2d 692 (1998), rev'd in part on other grounds 462 Mich 415 (2000). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find the essential elements of the crime proven beyond a reasonable doubt. *Johnson*, supra at 723. However, when considering the proofs in a light most favorable to the prosecution, this Court must avoid weighing the proofs or determining what testimony to believe. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

In MCL 750.117, the Legislature defined the crime of bribery of a public officer as follows:

Any person who shall corruptly give, offer or promise to any public officer, agent, servant or employee, after the election or appointment of such public officer, agent, servant or employee and either before or after such public officer, agent, servant or employee shall have been qualified or shall take his seat, any gift, gratuity, money, property or other valuable thing, the intent or purpose of which is to influence the act, vote, opinion, decision or judgment of such public officer, agent, servant or employee, or his action on any matter, question, cause or

proceeding, which may be pending or may by law be brought before him in his public capacity, or the purpose and intent of which is to influence any act or omission relating to any public duty of such officer, agent, servant or employee, shall be guilty of a felony.

Defendant argues that the evidence was insufficient to show that he offered money or something of value to Officers Anthony O'Rourke and Cyprian Freeman in exchange for their testimony that they could not positively identify Brown. Specifically, defendant argues that O'Rourke and Freeman only inferred such an offer from their conversations with him. However, circumstantial evidence and the reasonable inferences which arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to support defendant's bribery of a public officer conviction. The reasonable inference from (1) defendant's statement to O'Rourke that he would be "taken care of" if he could not identify Brown, (2) defendant's statement to Freeman that he "had a price on his head," and (3) defendant's attempt to misinform O'Rourke and Freeman about an adjournment of Brown's case, is that defendant promised these officers something of value to influence their testimony and/or action in the Brown case. Therefore, defendant's conviction was supported by sufficient evidence.

Defendant next argues that he was denied due process when the prosecution failed to produce a tape recording of O'Rourke's and Freeman's meeting with the Detroit Police Internal Affairs Department, and when the trial court refused to dismiss the charges against defendant based on this failure to provide discovery. Defendant argues that the nondisclosure of the tape before trial so prejudiced his defense that it would be fundamentally unfair to uphold the jury verdict. We disagree.

We review a trial court's decision regarding an appropriate remedy for noncompliance with a discovery order for an abuse of discretion. *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). An abuse of discretion exists only if any unprejudiced person, considering the facts on which the trial court acted, would find no justification or excuse for the ruling. *People v Laws*, 218 Mich App 447, 455; 554 NW2d 586 (1996).

We conclude that defendant's reliance on *People v Pace*, 102 Mich App 522; 302 NW2d 216 (1980), and *People v Taylor*, 159 Mich App 468; 406 NW2d 859 (1987), is misplaced. In those cases, the prosecutor attempted to impeach the defendant with previously undisclosed evidence. In the present case, the undisclosed evidence was never even offered at trial. Defendant also relies on *People v Paris*, 166 Mich App 276; 420 NW2d 184 (1988). However, that case involved a prosecutor's attempt to call a surprise witness who was not disclosed before trial. Moreover, the witness' deposition was taken without notice to the defendant, and this Court concluded that the prosecutor's omissions indicated a deliberate intent to prejudice the defendant's ability to present a defense. *Id.* No such conditions are present in the instant case.

A nonconstitutional violation of discovery requirements does not require reversal unless the defendant establishes that it is more probable than not that the violation was outcome

determinative. *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000), citing *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). An error is outcome determinative if it undermined the reliability of the verdict. *Id.* In determining the reliability of the verdict, this Court should consider the nature of the error in light of the weight and strength of the untainted evidence. *Id.* Based on the strength and weight of the untainted evidence as discussed above, it is not more probable than not that the outcome would have been different if the tape had been produced to defendant before trial.

We conclude that the trial court did not abuse its discretion in denying defendant's motion to dismiss based on the prosecution's noncompliance with discovery. If a party fails to comply with discovery, the trial court has discretion to fashion a remedy, and the exercise of that discretion involves balancing the interests of the courts, the parties, and the public. *Davie, supra* at 598. Defendant presents no argument as to how he was prejudiced. Defendant merely states that defense counsel was frustrated in his efforts to represent defendant and that he would have been better able to cross-examine the prosecution's witnesses, if he had obtained the tape before trial. However, the facts indicate that defendant was not prejudiced by the prosecution's failure to produce the tape. First, the tape was not offered as evidence at trial. Second, there is no evidence that the tape contained anything different than the witnesses' testimony. Third, defendant was aware prior to trial that the witnesses met with internal affairs to discuss defendant's conduct. Fourth, defendant was offered an opportunity to recall and cross-examine the witnesses based on the contents of the tape, an offer which he declined. Based on these facts, the trial court did not abuse its discretion in denying defendant's motion to dismiss his charges.

Defendant next argues that he received ineffective assistance of counsel based on defense counsel's conflict of interest. We disagree. A claim of ineffective assistance of counsel raises a constitutional issue which this Court reviews de novo. *People v Houstina*, 216 Mich App 70, 73; 549 NW2d 11 (1996). To establish a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) that this was so prejudicial as to deny him a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). As for the second element of this test, a defendant must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Id.* at 302-303.

On appeal, defendant argues for the first time that his trial counsel had a conflict of interest because he also represented the police officers' labor union. However, there is no evidence in the lower court record of this representation. Therefore, it is not properly considered on appeal. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Even if this Court were to ignore the deficiency of the lower court record and review this issue, defendant's ineffective assistance claim nevertheless fails. In order to demonstrate that a conflict of interest violated his constitutional rights, a defendant "must establish that an actual conflict of interest adversely affected his lawyer's performance." *People v Smith*, 456 Mich 543, 556-557; 581 NW2d 654 (1998), quoting *Cuyler v Sullivan*, 446 US 335, 350; 100 SCt 1708; 64 L Ed2d 333 (1980).

Defendant has cited no evidence to suggest an actual conflict of interest. The parties in this case were defendant and the people of the state of Michigan, not Officers O'Rourke and Freeman or the Detroit Police Department. Defendant's trial counsel was not representing the opposing party or its witnesses in any way. Nor is there evidence that defense counsel worked

on any cases for the Detroit police officers' labor union which involved Officers O'Rourke or Freeman, who had only worked as Detroit police officers for approximately two years. Additionally, defense counsel vigorously cross-examined O'Rourke and Freeman. Therefore, the record does not support a finding of either an actual or potential conflict of interest, and does not support a finding that the defense was affected in any way as a result of defense counsel's representation of the police officers' labor union.

Affirmed.

/s/ Richard A. Bandstra
/s/ Michael R. Smolenski
/s/ Patrick M. Meter