

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JON W. GUMBLE,

Defendant-Appellant.

UNPUBLISHED

October 26, 2001

No. 221263

Oakland Circuit Court

LC No. 86-075225-FC

Before: Doctoroff, P.J., and Murphy and Zahra, JJ.

PER CURIAM.

The history of this case is expansive and the procedural aspects are somewhat complex. Defendant was charged with open murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b, for the May 24, 1986, murder of Lee Garretson, Jr. Defendant's first jury trial took place in 1987, and he was convicted of second-degree murder, MCL 750.317, and felony-firearm. Defendant was sentenced to forty-eight to eighty years for the murder conviction, and to a two-year consecutive term for the felony-firearm conviction. Defendant appealed as of right and this Court reversed defendant's convictions and remanded for a new trial. *People v Gumble*, unpublished opinion per curiam of the Court of Appeals, issued September 12, 1989 (Docket No. 112617).

Defendant's second jury trial was held in February 1990. During trial, defense counsel repeatedly failed to adhere to rulings made by the trial court and a mistrial was declared. Defendant's third jury trial was held in May 1990. Defendant was convicted of voluntary manslaughter, MCL 750.321, and felony-firearm. Defendant was sentenced to six to fifteen years for the manslaughter conviction and a two-year consecutive term for the felony-firearm conviction.

While his appeal of right was pending, defendant filed a motion to remand with this Court seeking a remand for the purpose of filing a motion for a new trial based on newly discovered evidence. After appealing this Court's denial of his motion, our Supreme Court ordered the matter decided on the merits or remanded to the trial court for the motion for new trial. The matter was remanded to the trial court. Pursuant to a subsequent order by the Supreme Court, this Court decided the merits of defendant's appeal as of right and affirmed defendant's convictions and sentences. *People v Gumble*, unpublished opinion per curiam of the Court of Appeals, issued August 25, 1995 (Docket No. 131623). Defendant's motion for a new trial

based on newly discovered evidence was later heard and denied by the trial court. Defendant appealed the denial of his motion and this Court remanded for an expanded evidentiary hearing and further factfinding. *People v Gumble (After Remand)*, unpublished opinion per curiam of the Court of Appeals, issued May 2, 1997 (Docket No. 191372).

On remand, the trial court held a two-day evidentiary hearing and denied defendant's motion for a new trial. Defendant filed a claim of appeal with this Court on August 3, 1999. In an order dated September 30, 1999, this Court dismissed the claim of appeal for lack of jurisdiction, finding the April 14, 1999, order denying the motion for new trial a postjudgment order not appealable as a matter of right. Defendant filed a motion for rehearing and this Court, on its own motion, vacated its September 30, 1999, order dismissing the case, treated the claim of appeal as if it were an application for delayed appeal, and granted the application. This Court limited defendant's issues on appeal to those raised on remand. We reverse.

In order to prevail on a motion for a new trial based upon newly discovered evidence, a defendant must demonstrate that (1) the evidence itself, not merely its materiality, is newly discovered, (2) the evidence is not merely cumulative, (3) the evidence is such as to render a different result probable on retrial, and (4) the defendant could not with reasonable diligence have produced it at trial. *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998). We review a trial court's decision on such a motion for an abuse of discretion. *Id.*

Defendant contends that Jerry Mayberry's confession and the Kelly Ridenour-Archdale police report meet the requirements of the above formulated standard. In *People v Gumble (After Remand)*, unpublished opinion per curiam of the Court of Appeals, issued May 2, 1997 (Docket No. 191372), this Court held:

A review of the hearing and court's findings leads us to conclude the court acted prematurely in denying the motion. We disagree with the prosecutor's contention the evidence was not newly discovered or was discoverable and producible at trial with reasonable diligence. *People v Davis*, 199 Mich App 502; 503 NW2d 457 (1993). It is true defendant consistently maintained Mayberry and another individual, Billy Beaumont were involved in an armed robbery of his home on the night of the murder. Nonetheless, contrary to the prosecutor's assertions, it would not have benefited defendant's case to call either man at trial because both denied involvement at that time. It is not the fact defendant alleges these men were involved in the murder that is newly discovered. Instead it is the later confession suggesting their involvement that constitutes new evidence. Nor do we believe the evidence was merely cumulative. The evidence constituted direct support of defendant's theory of defense and was not presented by other means during trial. *People v Machura*, 25 [sic] Mich App 481; 517 NW2d 797 (1994).

The more difficult question is whether introduction of Mayberry's confession would probably have caused a different result. Although we are generally skeptical of confessions made by prison inmates who seemingly have nothing to lose by confessing to a crime committed by another, we note in this case Mayberry was informed before giving the confession that implicating himself

in the robbery could result in his prosecution for felony-murder and a resulting prison sentence of life without the possibility of parole.

Nonetheless, were this the only “new evidence” proffered by defendant we would not be able to say the court abused its discretion in denying the motion. However, defendant also offers the discovery of a statement made by Kelly Ridenour, Beaumont’s former girlfriend, to the police. In this statement Ridenour informed the police Beaumont told her he and Mayberry robbed defendant’s home using masks and a gun and that she was shown the masks. The trial court appears to have determined Ridenour’s statement was not corroborative of defendant’s theory because Beaumont allegedly told her he shot the victim and this version conflicts with defendant’s position he shot the victim believing him to be one of the robbers. We do not believe this conflict in the stories renders Ridenour’s statement unconvincing or incredible. It is not uncommon for offenders to brag and exaggerate about offenses committed. In fact it is often an offender’s description of his crime to another that helps lead the police to the offender. We cannot say Mayberry’s confession supported by Ridenour’s statement may not have lead to a different outcome at trial without a better record of Ridenour’s proposed testimony. This is especially true in light of the fact the jury convicted defendant of the lesser crime of manslaughter rather than the charged crime of second[-]degree murder. However, because it was never determined below whether defendant was in possession of Ridenour’s statement prior to trial or the exact nature of the proposed testimony by Ridenour, we remand for a full evidentiary hearing on the newly discovered evidence in which Ridenour is to be called to testify.

Defendant contends that Ridenour’s testimony constituted direct support for defendant’s theory of the case. Her testimony confirmed that William Beaumont intended to rob defendant or the victim, that Beaumont and Mayberry wore masks and carried a long gun and that defendant fired a shot while in the bedroom. The trial court, however, held that it found the prosecutor’s testimony persuasive that she disclosed the Ridenour report to defendant. The court further stated:

Although there are unanswered questions such as why Ms. Ridenour was not called at trial, why the prosecutor never followed up on potential charges against Mr. Beaumont, why Officer Bailey^[1] never mentioned his discussions with Ms. Ridenour at trial. The Court does find that the police report regarding Ms. Ridenour and the information she had was not withheld from the Defendant before his second trial. And consequently, the Court does deny the Motion for New Trial. [Footnote added.]

Mayberry’s *confession* to his participation in events on the night in question was newly discovered evidence that was not cumulative and could not have been produced at trial with

^[1] Detective Sergeant Donald Bailey investigated the case.

reasonable diligence on the part of defendant. This Court held previously, however, that it could not find that the trial court abused its discretion in denying defendant's motion based only on Mayberry's confession. Ridenour's testimony clearly corroborated defendant's theory of the case. The question is whether defendant was in possession of the Ridenour police report before the second trial.

Although the credibility of defendant's counsel's testimony is diminished by his professional record, this Court believes that several factors lend credence to counsel's claim that he did not have possession of the report. First, Ridenour was not called to testify even though her testimony would have corroborated defendant's statement to the police and could have served as independent verification of a Mr. Deaton's potential testimony had defense counsel put him on the stand.² Second, neither the Waterford Police Department nor the prosecutor's office ever adequately followed up the potential charges against Beaumont and Mayberry, despite the statements of defendant, Ridenour and Deaton which indicated that the two intended to rob the victim on the night of the incident. At trial and at the evidentiary hearing the investigating officers and the prosecutor respectively testified that they elected to undertake no further investigation of these statements because this defense theory did not precisely coincide with the information received and observed at the scene. However, the physical evidence so heavily relied on by the police and the prosecutor's office to discount the Beaumont and Mayberry theory is far from dispositive. Third, during defendant's trial Detective Sergeant Bailey was asked who he interviewed in connection with his investigation and he never mentioned Ridenour. And finally, Ridenour was interviewed over two years after the incident. It is conceivable that this last report did not find its way into the prosecutor's possession.

Given these factors, this Court now finds that the introduction at trial of Ridenour's statement and/or testimony, in combination with Mayberry's jailhouse confession, would probably have caused a different result. As noted by this Court previously, this conclusion is also supported by the fact that the jury convicted defendant of the lesser crime of manslaughter rather than the charged crime. However, such a conclusion does not automatically lead to a finding that the trial court abused its discretion in denying defendant's motion for a new trial. We are, in fact, in a difficult position of having to consider this question given that the trial court had the better opportunity to judge the credibility of witnesses at the evidentiary hearing. See, e.g., *People v Canter*, 197 Mich App 550, 559-560; 496 NW2d 336 (1992). In light of this unenviable task, we instead resolve the question whether defendant is entitled to a new trial on the following alternative ground, understandably and appropriately raised by defendant.

In this appeal from the trial court's ruling following the evidentiary hearing, defendant raises for the first time an additional claim alleging that *if* the prosecution did turn over the Ridenour statement before defendant's third trial, his trial counsel was ineffective for failing to

² Detective Sergeant Bailey testified at defendant's third trial that he took a report from a Mr. Deaton and his wife on the night of the incident. Deaton informed Bailey that the couple lived with Beaumont and that Beaumont and Mayberry discussed robbery plans the night of the shooting. Defense counsel testified at the evidentiary hearing that although aware of this report, he elected not to call Deaton because he was imprisoned at the time of trial and, in light of the alleged absence of corroboration, would not have been a good witness.

call Ridenour as a witness. Assuming, for the purpose of resolving this issue, that the trial court did not abuse its discretion and that the prosecution did provide the statement ahead of defendant's third trial, we agree that during that proceeding defendant suffered ineffective representation.

To prove a claim of ineffective assistance of counsel a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny the defendant a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). On the issue of deficient performance, a defendant must overcome the strong presumption that counsel's assistance constituted sound trial strategy. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Prejudice denying a fair trial is demonstrated when it may be concluded that there exists a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* at 302-303.

The decision whether to call a witness is generally considered trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to call the witness deprived the defendant of a substantial defense that would have affected the outcome of the trial. *Id.* As implied by our preceding skepticism regarding the factors related to the issue of possession of Ridenour's statement, we believe that effective representation of defendant ought to have involved calling both Ridenour and Deaton as witnesses. Notwithstanding the apparent determination by the police and prosecution that the information these individuals provided was inconsistent with other evidence, and thus wholly irrelevant, we think it clear that their likely testimony would have provided immense support for defendant's theory of the case. Again assuming the possession of Ridenour's statement, we find it inconceivable that competent defense counsel would elect not to present this significant evidence.

Accordingly, we conclude that defendant has defeated the presumption of sound trial strategy. *Toma*, *supra* at 302. In addition we conclude that a deficiency of performance of this magnitude prejudiced defendant. *Id.* at 302-303. Even without Mayberry's confession, which was only later secured, we find it reasonably probable that the introduction of Ridenour's statement and related testimony would have brought a different result in defendant's third trial. Given this resolution, we need not address defendant's additional claims.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Martin M. Doctoroff

/s/ William B. Murphy