

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

V

CLEO P. GILES,

Defendant-Appellee.

UNPUBLISHED

November 27, 2001

No. 223414

Wayne Circuit Court

LC No. 89-004522

Before: K.F. Kelly, P.J., and Hood and Zahra, JJ.

PER CURIAM.

The prosecution appeals by leave granted from an order granting defendant relief from his convictions of first-degree murder, MCL 750.316, assault with intent to commit murder, MCL 750.83, assault with intent to commit armed robbery, MCL 750.89, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court granted defendant a new trial on the basis of its finding that defendant was denied the effective assistance of counsel at trial. We reverse.

I. FACTS

Defendant testified during his bench trial that he shot George Young during the course of a drug transaction. James Lovejoy also suffered six gunshot wounds during the incident. Young died at the scene, but Lovejoy recovered from his wounds. Defendant suffered two gunshot wounds during the exchange of gunfire. While hospitalized for his injuries and under police guard, defendant made a statement to the police.¹ In his statement, defendant claimed that two men had “pulled me over” and, when defendant tried to run away, one of the men grabbed him and shot him. In a subsequent struggle, defendant took a gun out of the other car and shot the man.

Defendant retained Charles Campbell as counsel shortly before his trial. Although Campbell entered his appearance four days before trial and had a conflicting trial scheduled for defendant’s trial date, he failed to request an adjournment. Instead, Neil Leithauser stood in for Campbell as defendant’s trial counsel over defendant’s objection. Although the trial court

¹ Because defendant was unable to move his hands, he did not sign his statement of rights form or his statement, as reduced to writing by the interrogating officer.

expressed anger that Campbell had entered his appearance and failed to request an adjournment when he had a scheduling conflict, the court permitted Leithauser to proceed after Leithauser represented he was familiar with the case and prepared to go forward with the trial. Leithauser did not challenge the admissibility of defendant's statement to the police and it was admitted into evidence at defendant's trial. Defendant was convicted following a bench trial.

II. PROCEDURAL HISTORY

Defendant's first appeal of his convictions, filed May 25, 1990, was dismissed for lack of progress. Thereafter, defendant filed a motion for relief from the trial court's judgment in propria persona before the Detroit Recorder's Court. The Recorder's Court denied defendant's motion and, on June 26, 1996, defendant filed an application for leave to appeal the Recorder's Court order. In lieu of granting defendant leave to appeal, this Court remanded the case to the circuit court for appointment of counsel to file a motion for relief from the trial court's judgment pursuant to MCR 6.500 *et seq.* On August 6, 1999, defendant filed a motion for relief from his conviction. The trial court granted defendant's motion, finding that defendant had good cause for failing to raise the issues previously because his appellate counsel had failed to pursue his case on appeal, causing it to be dismissed for lack of progress. The trial court also concluded that defendant's trial counsel committed errors when he (1) failed to request a *Walker*² hearing challenging the admissibility of defendant's statement, and (2) failed to request an adjournment. The court concluded that defendant's counsel's error entitled defendant to a new trial. The prosecution now appeals by leave granted.

III. STANDARD OF REVIEW

A defendant is entitled to post-appeal relief from a judgment if he can establish entitlement to the relief, demonstrate good cause for any failure to raise the issues where they could have been raised in a prior appeal, and establish that the defendant suffered actual prejudice from the alleged irregularities supporting the claim for relief. MCR 6.508(D). To demonstrate "actual prejudice" in a trial, a defendant must show that either "but for the alleged error, the defendant would have had a reasonably likely chance of acquittal," or "the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case." MCR 6.508(D)(3)(b)(i) and (iii). We review claims for relief from judgment for an abuse of discretion.

The prosecution contends that the trial court abused its discretion when it granted defendant a new trial on the basis of ineffective assistance of counsel. In particular, the prosecution contends that defendant failed to establish that there was any "irregularity" in his trial because the record reveals that defendant's trial counsel was prepared for trial and that the decision not to move for a *Walker* hearing was a matter of trial strategy.³ In general, we review a

² *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

³ The prosecution does not challenge the trial court's conclusion that defendant had good cause for his failure to raise the issue of ineffective assistance in a prior appeal. MCR 6.508(D)(3).

trial court's decision to grant a new trial for an abuse of discretion. *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994); *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). Where the reasons given by the trial court for granting a new trial are inadequate or not legally recognized, the trial court abused its discretion. *People v Leonard*, 224 Mich App 569, 580; 569 NW2d 663 (1997); *People v Bart (On Remand)*, 220 Mich App 1, 15; 558 NW2d 449 (1996). When reviewing a claim of ineffective assistance of counsel, effective assistance is presumed, and a "defendant bears a heavy burden of proving otherwise." *People v Noble*, 238 Mich App 647, 661-662; 608 NW2d 123 (1999). A defendant must not only demonstrate that counsel's performance was deficient, but also that he was prejudiced by the deficiency. *Id.* Accordingly, a defendant must show that, but for his counsel's mistake, the factfinder would not have convicted him. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994); *People v Snider*, 239 Mich App 393, 424; 608 NW2d 502 (2000).

In order to establish that Leithauser was ineffective for lack of preparation, and thus for his failure to request an adjournment, defendant must demonstrate that Leithauser's failure to prepare for trial resulted in counsel's failure to present a defense or challenge to the evidence that might have made a difference in the outcome of the trial. See *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990). The mere fact that Leithauser may have been ill prepared is irrelevant if the lack of preparation did not result in an error that prejudiced defendant. See *People v Truong*, 218 Mich App 325, 339; 553 NW2d 692 (1996); *Caballero, supra* at 642.

IV. ANALYSIS

The only substantive error that defendant argues caused him prejudice was Leithauser's failure to challenge defendant's statement by way of a *Walker* hearing. The prosecution contends that it was a matter of trial strategy for Leithauser to choose to not make a losing motion to suppress defendant's statement to police. This Court will not substitute its judgment for a defendant's trial counsel regarding matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Further, the prosecution contends that defendant is not entitled to relief from judgment, even if the failure to request a *Walker* hearing was not a matter of trial strategy, because the failure to suppress defendant's statement to police did not result in prejudice to defendant. We shall assume, without deciding, that there existed no sound trial strategy for defense counsel's failure to move for a *Walker* hearing. We nonetheless conclude that this failure by defense counsel did not result in error that actually prejudiced defendant.

The trial court noted other compelling reasons to disregard defendant's explanation that he only intended to purchase drugs from Lovejoy and had no intention of robbing or shooting Lovejoy and Young. The court did not believe defendant's claim that he shot Young while Young was lying on top of him because the autopsy report refuted close-range firing. The court further found improbable the theory that defendant and his brother, armed with an assault rifle and handgun respectively, merely intended an inconspicuous drug buy. The court specified that it found Lovejoy's account of the events most credible. Moreover, the court observed that the closed briefcase, which defendant testified contained \$60,000, lay empty at the scene. The court stated:

It is significant to the court, as fact finder, that anyone would have removed such a large sum of money from the briefcase and left it at the scene when it would have been far less conspicuous to take the briefcase with the money in it. The court finds the testimony of the defendant, Giles, to the effect that the briefcase contained \$60,000.00 cash to be unworthy of credit, and rejects it.

The court made clear that “[t]here were numerous reasons to reject Giles testimony,” and determined that defendant intended to rob Lovejoy and Young when he went to the arranged meeting and formed the intent to kill them in the course of the robbery. We conclude that the empty briefcase found at the scene was extremely persuasive circumstantial evidence that defendant carried an assault rifle because he planned to rob Lovejoy and Young, then used the gun when the robbery went badly. Because of the circumstantial evidence of defendant’s guilt and his otherwise undermined credibility, we cannot conclude that the admission of defendant’s statement caused him any actual prejudice. Simply put, even if defendant’s statement was not admitted during the trial, the balance of trial proofs left defendant with no reasonable likelihood of acquittal.⁴

Moreover, we have thoroughly reviewed the trial transcripts and we find no merit in defendant’s general allegation that Leithauser failed to “test the prosecution’s case.” It appears that defendant’s trial counsel made appropriate objections throughout the record. Defendant suggests no basis on which his trial counsel could have challenged the gun residue testing. Therefore, this Court must presume that counsel’s stipulation to the residue analysis was a matter of trial strategy. *Rice, supra* at 445. Because defendant was not denied the effective assistance of counsel by Leithauser’s failure to challenge defendant’s statement, and neither defendant nor the trial court identify any other error resulting from counsel’s lack of preparation, the trial court’s decision to grant defendant a new trial was not supported by adequate reasons and, therefore, was an abuse of discretion. *Leonard, supra; Bart, supra.*⁵

⁴ Nor do we conclude that the irregularity alleged by defendant was so offensive to the maintenance of sound judicial process that the conviction must be vacated.

⁵ Defendant argues, for the first time on appeal, that he was denied his constitutional right to have counsel of his own choosing. We have discretion to review unpreserved constitutional issues. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994). However, this Court will not consider issues raised in a reply brief on appeal, where defendant failed to file a cross-appeal. MCR 7.212(G); *Check Reporting Services, Inc v Michigan Nat’l Bank*, 191 Mich App 614, 628; 478 NW2d 893 (1991). Furthermore, the issue is also precluded from review because it is outside the scope of the prosecution’s application for leave to appeal. MCR 7.205(D)(4). Therefore, the issue of whether defendant was denied his right to counsel of his own choosing is not properly before this Court.

Reversed.

Judge Kelly concurs in result only.

/s/ Harold Hood

/s/ Brian K. Zahra