

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TROY TYREE MANNING, JR.,

Defendant-Appellant.

UNPUBLISHED

June 15, 2004

No. 246535

Oakland Circuit Court

LC No. 2002-184605-FC

Before: Schuette, P.J., and Bandstra and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial conviction for first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life in prison on the murder conviction and two years' imprisonment on the felony-firearm conviction. We affirm.

Defendant was convicted of first-degree murder for shooting and killing Vernita Cohen while she sat in a car outside a restaurant. Defendant admitted that he intended to shoot another individual, John George. At trial, the main issue was whether the requisite premeditation and deliberation were shown to support the first-degree murder charge. George initially told the police that he could not identify the shooter. At the preliminary examination, George also testified that he could not identify the shooter. At trial, George identified defendant as the shooter. George testified that he initially heard five or six shots, and then, as defendant was coming toward him with the gun, they looked at each other momentarily and there was a pause before defendant started shooting at him again. George explained that he did not previously identify defendant because he had been the target of two shootings earlier in the week, and was afraid that if he identified the shooter, he might be targeted again. The trial court found that the elements of premeditation and deliberation were present, based on George's testimony and based on evidence that there was prior animosity between the parties. The trial court concluded that "[t]he decision to eliminate Mr. George took place before this night and was carried out on this night."

The trial court found defendant guilty as charged. Defendant appealed as of right to this Court, and moved for a remand for an evidentiary hearing for further factual development of his claim that following trial, George recanted his trial testimony that identified defendant as the shooter. This Court denied defendant's motion for failure to persuade it of the necessity for remand.

Defendant now argues that he is entitled to a new trial, or, in the alternative, remand for an evidentiary hearing, because George allegedly recanted his trial testimony that identified defendant as the shooter. Where, as here, the trial court has not had the opportunity to decide the issue initially or to determine whether an evidentiary hearing is necessary under MCR 7.211(C)(1), we examine the proffered affidavits under the standard for granting a new trial and determine whether a remand is necessary. In order for a new trial on the basis of newly discovered evidence to be granted, a defendant must show 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 Canter*, 197 Mich App 550, 559; 496 NW2d 336 (1992). “However, where newly discovered evidence takes the form of recantation testimony, it is traditionally regarded as suspect and untrustworthy,” and “Michigan courts have expressed reluctance to grant new trials on the basis of recanting testimony.” *Id.* at 559-560.

Here, in a signed statement attached to his brief, defendant asserts that while George was in prison on a guilty plea for armed robbery, he told defendant that the prosecutor offered him a sentence agreement on the robbery case if he would testify in defendant’s case and “say that he could in fact identify [defendant] as the shooter.” Defendant claims that George told him that he “made up that part of his testimony at trial.” Defendant points to the trial court’s finding that the elements of premeditation and deliberation were proven based on George’s testimony that defendant looked into George’s eyes and momentarily paused before continuing shooting at him, and argues that because George recanted that part of his testimony, it calls into question the trial court’s findings on the elements of premeditation and deliberation.

However, defendant’s signed statement is not itself evidence of George’s recantation. Instead, it is merely defendant’s assertion that George recanted his trial testimony. Additionally, defendant has failed to demonstrate that the allegedly recanted testimony was “newly discovered,” because George testified at the preliminary examination that he could not identify the shooter, and explained his inconsistent testimony at trial. Moreover, the trial court’s findings clearly demonstrate that the momentary pause described by George was only a secondary basis for finding premeditation and deliberation. Therefore, evidence that George recanted his testimony is unlikely to cause a different result at a new trial. Several other witnesses identified defendant as the shooter, and defendant himself admitted that he was the shooter. We conclude that defendant did not make the requisite showing under *Canter, supra*, so as to warrant remand; therefore, defendant is not entitled to relief on this basis.

Defendant next argues that his trial counsel was ineffective for admitting during opening statement and closing argument that defendant was the shooter, and for eliciting testimony from defendant that he intended to kill George. Defendant failed to move for a new trial or *Ginther*¹ hearing below; therefore, our review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). “A defendant that claims he has been denied the effective assistance of counsel must establish (1) the

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different." *Id.* at 659. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

"It is well established that arguing that defendant is guilty of an offense is not necessarily ineffective assistance of counsel." *People v Walker*, 167 Mich App 377, 382; 422 NW2d 8 (1988), rev'd on other grounds in *People v Mitchell*, 456 Mich 693; 575 NW2d 283 (1998). See also *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994). "Where the evidence obviously points to defendant's guilt, it can be better tactically to admit to the guilt and assert a defense or admit to guilt on some charges but maintain innocence on others. Such a tactic may actually improve defendant's credibility and will not be second-guessed." *Id.* Here, it is reasonable for us to conclude from the record that defense counsel employed the accepted trial strategy of admitting defendant's guilt of second-degree murder during his opening statement and closing argument, and eliciting testimony to that effect from defendant, and we will not second guess such a trial strategy. *Id.* Further, the fact that a strategy may not have worked does not mandate a conclusion that the strategy constituted ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Therefore, defendant's claim that he was denied the effective assistance of counsel is without merit.

We affirm.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Jessica R. Cooper