STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 20, 2004
v	No. 245267 Wayne Circuit Court
JOHNNY JEROME WILLIAMS, Defendant-Appellant.	LC No. 02-001592

Before: Jansen, P.J., and Meter and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for felony murder, MCL 750.316(1)(b), assault with intent to commit murder, MCL 750.83, two counts of armed robbery, MCL 750.529, and felony-firearm, MCL 750.227b. He was sentenced to two years' imprisonment on the felony-firearm count and four concurrent terms of life imprisonment on the other counts, to be served consecutively to the felony-firearm sentence. We reverse and vacate one of defendant's convictions for armed robbery on double jeopardy grounds and affirm the judgment in all other respects.

Defendant claims the trial court abused its discretion in denying his motion to reopen proofs to allow an alibi witness to testify. We agree but find that the error was harmless. This Court reviews a trial court's decision on a motion to reopen proofs for an abuse of discretion. *People v Collier*, 168 Mich App 687, 694; 425 NW2d 118 (1988).

In *Collier, supra* at 694, the trial court denied the defendant's request to reopen proofs for a character witness who arrived just after the defense rested and before closing arguments. The witness was the only potential source of proper character evidence for the defendant in a case that hinged on the defendant's credibility. *Id.* This Court held that the witness's testimony would have been a great asset to the defendant, and because no disruption to the court or prejudice to the prosecution would have occurred, the trial court's refusal to reopen the proofs was an abuse of discretion. *Id*. at 694-697.

Similarly, Jowana Caleb arrived at the courthouse just after the defense rested, but before closing arguments. The prosecution had been notified that she would testify and had no objection. Caleb was expected to support defendant's alibi defense. Nevertheless, the trial court denied defendant's request to reopen the proofs, and gave no reason. It cited no prejudice to the

prosecutor, no undue advantage to defendant, and no unwarranted disruption. This constituted an abuse of the trial court's discretion.

However, we find that the trial court's refusal to reopen proofs was harmless because the evidence of defendant's guilt was overwhelming. The refusal of a trial court to reopen proofs to allow a defense witness to testify is subject to harmless error analysis. *People v Solomon*, 220 Mich App 527, 535; 560 NW2d 651 (1996). Because the possible effect of additional testimony on the jury is uncertain, the prosecutor must establish that the exclusion of the additional testimony was harmless beyond a reasonable doubt. *Id.* at 538. Overwhelming evidence of guilt meets this standard. *Id*.

First, defendant's victim testified that defendant shot him. The victim's credibility was heightened by the fact that he accused defendant while lying seriously wounded in a pool of his own blood, believing he was about to die. Dying declarations have a high indicia of reliability. *People v Malone*, 445 Mich 369, 402 n 12; 518 NW2d 418 (1994). Second, the testimony of defendant's two alibi witnesses was inconsistent with that of defendant. Defendant testified that he went to sleep around 10:00 p.m. on the night of the shootings. One of defendant's alibi witnesses testified that defendant was awake playing video games as late as 1:00 a.m., and the other testified that defendant was still awake at 3:00 a.m. Defendant testified that he left the house at 10:00 a.m. the next morning, but one witness testified that defendant was still asleep in bed at noon. One witness testified that he told "everybody" that defendant was with him on the night of the shootings, but did not know what time of day the shootings occurred or what day of the week it was. Another witness testified that the witness who arrived late was not even in the same house as defendant on the night of the shootings. Finally, defendant has not shown that Caleb's testimony was material. Defendant's own witness, testified that Caleb was not even in the same house as defendant on the night of the shootings, but, instead, in the house next door. Defendant made no offer of proof, nor did he submit an affidavit describing what Caleb's testimony would have been. Similar facts and circumstances were held to indicate a lack of materiality in *People v McFall*, 224 Mich App 403; 569 NW2d 828 (1997).[1] In light of the compelling testimony of the victim, the contradictory testimony of defendant and his alibi witnesses, and the failure of defendant to make even a prima facie showing by affidavit or offer of proof that the absent witness testimony would not have been cumulative; we conclude that the court's refusal to reopen proofs was harmless beyond a reasonable doubt. See *Solomon*, *supra* at 538.

Next, defendant claims he was denied effective assistance of counsel by his attorney's failure to effectively communicate the details of a plea agreement. We disagree.

When reviewing defendant's claim of ineffective assistance of counsel, our review is limited to the facts contained on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650

[1] A defendant must show that the testimony sought is both material and favorable to the defense. *McFall*, *supra* at 410-411 (concerning the securing of a witness in another state by compulsory process under the Uniform Act, MCL 767.91 *et seq*.) citing *United States v Valenzuela-Bernal*, 458 US 858, 873; 102 S Ct 3440; 73 L Ed 2d 1193 (1982).

NW2d 96 (2002). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). In order for this Court to reverse due to ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant that he was denied the right to a fair trial. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). "Prejudiced" means that there was a reasonable probability that the outcome of the proceeding would have been different if defendant's counsel had not erred. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Although failure to adequately communicate a plea offer may constitute ineffective assistance of counsel, defendant must prove by a preponderance of the evidence that an offer was made, that his attorney failed to communicate the offer, and that he was prejudiced, i.e., that he would have accepted the offer. *People v Robert Williams*, 171 Mich App 234, 241-242; 429 NW2d 649 (1988); see also *People v Carter*, 190 Mich App 459, 462, 476 NW2d 436 (1991), vacated on other grounds, 440 Mich 870 (1992). The fault of defendant's attorney was not a failure to communicate a plea offer that defendant would have accepted, but a failure to communicate additional details that made the offer objectionable. When defendant learned the actual terms of the offer, he refused it. Since defendant has not shown that he would have accepted the plea, his claim of ineffective assistance must fail because defense counsel's failure to effectively communicate the terms of the plea agreement did not affect the outcome of the trial. See *Toma, supra* at 302-303.

Next, defendant claims that the trial court erred in instructing the jury as it omitted part of the jury instruction that told the jurors to consider lesser offenses if they could not agree on the more serious charges. Because defendant did not object to the instructions, we decline to review this issue. *People v Handley*, 415 Mich 356, 360; 329 NW2d 710 (1982).[2] Alternatively, defendant claims that his counsel was ineffective for failing to object to the jury instructions. However, defense counsel's failure to object to the jury instructions did not seriously affect the fairness of the proceedings, *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), because the court's instructions, viewed as a whole as they must be, *People v Dabish*, 181 Mich App 469, 478; 450 NW2d 44 (1989), did not suggest to the jurors that they had to reach unanimous agreement on the principal charges before considering the lesser included offenses. The trial court correctly informed the

[2] Regardless, the trial court's omission of part of the jury instruction did not seriously affect the fairness of the proceedings because the instructions, when viewed as a whole, did not suggest to the jurors that they had to reach unanimous agreement on the principal charges before considering the lesser offenses. See *People v Dabish*, 181 Mich App 469, 478; 450 NW2d 44 (1989). The trial court did instruct the jury as follows: "You may find the defendant guilty of all, any one or any combination of these crimes, guilty of a less serious crime as I've explained before[,] or not guilty." This instructions imparted to the jury the understanding that they were free to arrive at any verdict merited by the evidence. There was no indication that acquittal of the principal charges was a condition for consideration of the lesser offenses. As such, defendant was not deprived of proper consideration by the jury of the lesser offenses and no plain error or manifest injustice occurred.

jurors that they could deliberate as long as they wished on both the principal and lesser included offenses. These instructions were sufficient to inform the jury that they could turn to the lesser offenses if they could not agree on the more serious offenses. *Handley*, *supra* at 361. Therefore, defendant was not prejudiced by his trial counsel's failure to object to omission of the section of the jury instruction. See *Toma*, *supra* at 302-303.

Finally, defendant argues that his conviction for both armed robbery and felony murder violated double jeopardy where the armed robbery was the predicate felony. We agree, see *People v Harding*, 443 Mich 693, 711-712; 506 NW2d 482 (1993), and the prosecution concedes that defendant is correct. Accordingly, one of defendant's armed robbery convictions must be vacated.

We reverse and vacate defendant's second conviction and sentence for armed robbery and affirm defendant's convictions and sentences in all other respects.

/s/ Kathleen Jansen
/s/ Patrick M. Meter
/s/ Jessica R. Cooper