STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 22, 2005
v JARRETT WADE SWANIGAN, Defendant-Appellant.	No. 257144 Wayne Circuit Court LC No. 04-002842-02

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v ERICK ANTHONY JOHNSON, Defendant-Appellant.	No. 257145 Wayne Circuit Court LC No. 04-0028242-01

Before: Whitbeck C.J., and Talbot and Murray, JJ.

PER CURIAM.

Both defendants appeal as of right their jury trial convictions for first-degree premeditated murder, MCL 750.316(1)(a), three counts of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b. Defendant, Jarrett Wade Swanigan, was sentenced to life in prison for his first-degree murder conviction, 225 months to 50 years in prison for each assault with intent to murder conviction, and two years for his felony-firearm conviction. Defendant, Erick Anthony Johnson, was sentenced to life in prison for his first-degree murder conviction, 225 months to 40 years in prison for each assault with intent to murder conviction, and two years for his felony-firearm conviction.

Defendants were tried jointly by a single jury for offenses associated with a drive-by shooting that occurred outside a club in Detroit. Each defendant makes several arguments on appeal. Swanigan also submits a Standard 4 Brief alleging that he was denied the effective assistance of counsel at trial. We affirm Johnson's convictions and sentences. We remand

Swanigan's appeal on the limited issue of whether the absence of testimony at trial of witness Brandon Gilkey constituted ineffective assistance of counsel.

We begin with the claim made by both defendants that they were denied a fair trial as a result of a prejudicial jury instruction. Defendants failed to object at trial on the same grounds they now assert on appeal; thus, they did not properly preserve this issue for review because they did not afford the trial court an opportunity to address and correct the error. MCR 2.516(C); *People v Carines*, 460 Mich 750, 767; 597 NW2d 130 (1999). We therefore review the claim for plain error. *Carines*, *supra* at 767. To avoid forfeiture under the plain error rule, defendant must initially satisfy a three-part test: (1) there was an error; (2) the error was clear or obvious; and (3) the error impacted substantial rights by affecting the outcome of the proceedings. If these three prongs are satisfied, reversal is then warranted only if the error also resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 763.

Defendants claim that the court improperly shifted the burden of proof at trial when the court gave the following instruction to the jury:

> Now - - and there's been some talk about fingerprints and all that. I just want you to know that both sides, both the People and the defense, can come to court, all sides, can come to court and ask the [c]ourt for an order to do fingerprints and things like that. That's not within the exclusive jurisdiction or control of one witness or one party.

The instruction had not been previously discussed by the court or the parties; rather, it appears to have been a response to an argument made by Swanigan's attorney. During her closing argument, counsel noted a .22 caliber gun found behind the club where the shooting occurred had not been tested for fingerprints. To bolster her theory that the actual perpetrators of the shooting had escaped charges as a result of an incomplete investigation of the crime, the attorney then argued: "With the gun found at the location of this scene and this case of this great magnitude wouldn't it only seem logical that Sergeant Greenleaf would have thought enough to order that this gun be brushed for fingerprints? Wouldn't that have resolved the mystery?"

It is within the trial court's discretion to decide whether a particular instruction is applicable to the facts of the case. *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003). Moreover, a court is empowered to instruct the jury, with or without request by a party, "on a point of law if the instruction will materially aid the jury to understand the proceedings and arrive at a just verdict." MCR 2.516(B)(2). When instructional error is claimed, jury instructions are reviewed as a whole to determine if the trial court made an error requiring reversal. *People v Cain*, 238 Mich App 95, 127; 605 NW2d 28 (1999). Generally, "[e]ven if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id.*, quoting *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). An instruction that the jury may perceive as shifting the burden of proof, however, may violate a defendant's due process rights; further, the effect of such an instruction is not always removed "by other correct instructions given at trial dealing with the presumption of innocence afforded the accused and the state's burden of proving each and every element beyond a reasonable doubt." *People v Wright*, 408 Mich 1, 22; 289 NW2d 1 (1980), citing *Sandstrom v Montana*, 442 US 510, 518 n 7; 99 S Ct 2450; 61 L Ed 2d 39 (1979).

Here, the instruction was not likely to have shifted the burden of proof in the minds of the jury. Contrary, for instance, to the cases just cited, the fingerprint instruction did not create the potential inference that the prosecution need not prove the intent element of an offense. See, e.g., *Wright, supra* at 18-20, 22, 25-26. Rather, here, the .22 caliber gun had not been linked to the shooting and the prosecutor had no obligation to link defendants to the gun. The fingerprinting of the gun merely related to Swanigan's defense theory. The court's instruction, therefore, was no more than a correct statement of the law,[1] which addressed the potential misapprehension that a fingerprint test would have revealed information crucial to the defense and to which the defense otherwise did not have access.

We also note that the court's instructions, as a whole, fairly presented the issues and sufficiently protected defendants' rights. Throughout the instructions, the court regularly noted the presumption of innocence and the prosecutor's burden to prove each element of each offense. Further, albeit in a somewhat unclear manner, the court informed the jury that the fingerprint instruction was not intended to relieve the prosecution's burden of proof. Accordingly, because there was no clear error, reversal is not warranted. *Carines, supra* at 763.

Second, we address Swanigan's claim that the trial court erred when it limited the cross-examination and questioning of two police officers. The issue of whether the trial court properly excluded this testimonial evidence based on its relevancy is preserved for review because Swanigan argued for its admission at trial. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). However, Swanigan did not claim at trial that his confrontation rights had also been violated; his claim of constitutional error is therefore unpreserved and may be reviewed only for plain error. *People v Geno*, 261 Mich App 624, 626; 683 NW2d 687 (2004), citing *Carines, supra* at 763.

With regard to the preserved evidentiary claims, we review a trial court's decision whether to admit evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *People v Walker*, 265 Mich App 530, 533; 697 NW2d 159 (2005). Regardless, a conviction should not be reversed if the trial court's error was harmless. MCL 769.26; MCR 2.613(A). An error is harmless unless the proceedings were prejudicial or the reliability of the verdict was undermined. *People v Mateo*, 453 Mich 203, 211, 215; 551 NW2d 891 (1996). Accordingly, reversal is warranted if it is more probable than not that the error affected the outcome. *People v Young*, 472 Mich 130, 141-142; 693 NW2d 801 (2005).

Here, during cross-examination of the officer in charge of the case, Detroit Police Sergeant Dale Greenleaf, Swanigan's attorney attempted to inquire about statements that had been made to other officers on the night of the shooting. She pointed out that Greenleaf had

[1] Upon request, each party must provide all other parties "a description of and an opportunity to inspect any tangible physical evidence that the party intends to introduce at trial. On good cause shown, the court may order that a party be given the opportunity to test without destruction such tangible physical evidence." MCR 6.201(A)(6).

included these statements in notes he made about his early impressions of the case. The attorney wanted to elicit this information to bolster Swanigan's theory that other potential explanations for the shooting had not been investigated. The court barred questions about these impressions. It only allowed questioning about events within Greenleaf's personal knowledge, MRE 602, and the court required that, if the attorney asked questions containing specific details of potential leads or interviewees, the questions must be linked to facts in evidence. Accordingly, the court did not abuse its discretion; rather, it properly applied the rules of evidence by limiting questions that would have elicited hearsay testimony or allowed the attorney to suggest facts that were not otherwise in evidence.

For similar reasons, the court did not clearly violate Swanigan's confrontation rights. The Confrontation Clause of the Sixth Amendment guarantees a defendant "a reasonable opportunity to test the truth of a witness' testimony." *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). A defendant does not have the right to "admit all relevant evidence or cross-examine on any subject" nor to cross-examine on irrelevant issues. *Id.* "[T]rial judges retain wide latitude . . . to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Id.*, quoting *Delaware v Van Arsdall*, 475 US 673, 679; 106 S Ct 1431; 89 L Ed 2d 674 (1986).

Here, as just discussed, the court properly limited the attorney's questions based on established evidentiary rules. Significantly, the court also allowed for extensive cross-examination and testimony about other elements of the investigation. Thus, Swanigan was afforded ample opportunity to test the truth of Greenleaf's assertion that the shooting was adequately investigated. *Adamski*, *supra* at 138.

The court also did not abuse its discretion when it excluded the testimony of Officer Vannice Ward, a chaperone at the party, regarding the man he expelled from the club one to one and one half hours before the shooting occurred. As was noted by the trial court, there was no other evidence that the man was the shooter, that he had been involved in the altercation in the club that occurred before the shooting, or that he carried a weapon that could be linked to the crimes. The court also noted that, given the large number of people at the party, the testimony was not probative but would merely invite speculation. Thus, we find that the court reasonably excluded the evidence based on lack of relevance. By the same logic, even if the court erred in excluding the testimony because it was marginally relevant, the error was harmless; the minimally valuable evidence was not likely to have affected the outcome of the trial. *Young*, *supra* at 141-142.

Third, we turn to Johnson's claims that prosecutorial misconduct resulted in unfair proceedings. He claims that he was prejudiced both by constant references to his association with a group or gang ("the 8 Mile group") and by a question asked by the prosecutor that suggested Johnson had been in jail. Johnson did not object at trial to the prosecutor's references to the 8 Mile group; this claim is therefore reviewed for plain error. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). Johnson preserved the second claim because his attorney appears to have objected to the implication of the prosecutor's question during a sidebar conversation just after the question was asked. *Id.* We review claims of prosecutorial misconduct on a case-by-case basis, examining the remarks in context to determine whether the defendant received a fair trial. *Id.*

Throughout the trial, the prosecutor regularly asked witnesses whether either defendant was involved with the 8 Mile group. Evidence had shown that the group was involved in an altercation with an opposing group ("the 7 Mile group") inside the club before the shooting took place. The man killed during the shooting, as well as several other men who were standing outside the club in the range of fire, were associated with the 7 Mile group. Further, defendant Johnson and the man who was killed, Bashar Edwards, were seen participating on opposing sides of the altercation. In light of these facts, the prosecutor's questions properly elicited evidence directly relevant to Johnson's motivation to commit the shooting, which arguably arose from the group rivalry during the prior altercation. Evidence of motive is always relevant in a murder prosecution. *People v Sutherland*, 149 Mich App 161, 164; 385 NW2d 637 (1985).

Moreover, any prejudice resulting from the evidence was not unfair. The notion of "unfair" prejudice denotes, in part, a situation in which "a probability exists that evidence which is minimally damaging in logic will be weighed by the jurors substantially out of proportion to its logically damaging effect." *Sclafani v Cusimano, Inc*, 130 Mich App 728, 735; 344 NW2d 347 (1983). Here, Johnson's group membership was referred to in direct relation to his participation in the altercation and to the rival group membership of the men who were shot. Significantly, other evidence of the 8 Mile group's general character or wrongdoings from which the jury could draw irrelevant conclusions was conspicuously absent. During his opening remarks, the prosecutor referred to signs of group association or togetherness. He added, however: "I'm not going to suggest to you that there is any organized gang involved in any various activity other than what we're here today to talk about. What I will say is these two groups 7 Mile and 8 Mile were the core of a dispute inside the [club] and on one side of the dispute were the defendants . . . . They were 8 Mile. Mr. Bashar Edwards was 7 Mile." In his closing remarks, the prosecutor merely noted the "raging hormones" of young men and that the "grouping of young men together often causes them to try to prove their manhood and their toughness."

Accordingly, we find little record evidence to substantiate Johnson's claims, let alone to confirm Johnson's allegation that the prosecutor "deliberately tried to prejudice . . . Johnson's right to a fair trial by injecting the highly inflammatory suggestion that Mr. Johnson was a member of a gang called the '8-Mile'" "[f]rom the first words of his opening statement to his last words at closing." Nor did the prosecutor suggest, as Johnson claims, "that the instant offenses were but part of a continuing course of criminal activity by this gang." Rather, the prosecutor's questions were relevant and his remarks were minimal. They did not constitute clear error or affect the outcome of the proceedings.

Johnson's preserved claim of misconduct concerns a question asked during the cross-examination of Johnson's half brother. The prosecutor asked:

Q. Been seeing [Johnson] all [sic]- - he's been housed as he's housed now?

A. Excuse me?

Q. Have you come downtown to visit him?

A. Yes, sir.

On appeal, Johnson notes the general rule that references to a defendant's prior incarceration are highly prejudicial and therefore inadmissible unless specifically ruled otherwise. See, e.g., *People v Fleish,* 321 Mich 443, 461; 32 NW2d 700 (1948); *People v Spencer,* 130 Mich App 527, 536-537; 343 NW2d 607 (1983); see also MRE 404(b)(1). However, we find these cases largely inapplicable because they address situations where the jury is made aware of a defendant's *prior* incarceration. Here, the oblique reference to current confinement does not create the same concerns that the jury will infer past wrongdoing or ongoing criminal character; rather, it is likely that the jury would presume Johnson was being held for the instant charges.

Accordingly, we agree with the prosecutor that the instant case is more aptly compared to *Estelle v Williams,* 425 US 501; 96 S Ct 1691; 48 L Ed 2d 126 (1976). There, the United States Supreme Court discussed the principle that a defendant should not be compelled to wear prison clothing during trial because the "constant reminder of the accused's condition" may affect the jury's ability to maintain a presumption of innocence of the current charges. *Id.* at 504-505. The prosecutor's question, here, similarly reminded the jury that Johnson was being held in jail for the instant offense. Nonetheless, the reminder does not rise to a level that warrants reversal. The concern stated in *Estelle* focuses on the "constant reminder" of a defendant's "distinctive, identifiable attire" which is "so likely to be a continuing influence throughout the trial that . . . an unacceptable risk is presented of impermissible factors coming into play." *Id.* To the contrary, here the prosecutor's remark was not only a single, isolated event, but it also was arguably unobvious. Johnson was not denied a fair trial as a result of the prosecutor's fleeting reference to Johnson's housing.

Next, Swanigan claims that the trial court erred by admitting the testimony of Lannie Payne, who is the mother of the only witness to directly identify Swanigan as a shooter. On the second day of trial, the prosecutor moved to admit Lannie's statement that her son, Kelvin Payne, identified defendants as the shooters soon after Kelvin returned home on the night of the shootings. Lannie's testimony was offered as evidence of a prior consistent statement intended to rebut Swanigan's allegations that Kelvin had fabricated his testimony to deflect blame from himself. MRE 801(d)(1).

Both defense attorneys objected to Lannie's testimony, but neither attorney asserted the claim Swanigan now makes on appeal that Kelvin's prior consistent statement was inadmissible because it was made after the motive to fabricate arose. Therefore, the objections were not "sufficiently explicit to preserve an appellate theory." *People v Cormandy,* 16 Mich App 517, 520; 168 NW2d 430 (1969). Because Swanigan failed to afford the court the opportunity to address and correct the error, *Carines, supra* at 764-765, the issue is unpreserved and we review for plain error. MRE 103(a)(1); *Knox, supra* at 508; *Aldrich, supra* at 110.

MRE 801(d)(1) defines as non-hearsay certain prior statements made by declarants who testify at trial and who are available for cross-examination concerning the statements. One such category of statements is prior consistent statements, which are "consistent with the declarant's testimony and [are] offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." MRE 801(d)(1)(B). Significantly, a consistent statement that was made after the motive to fabricate arose does not fall into the MRE 801(d)(1)(B) exclusion. *People v McCray,* 245 Mich App 631, 642; 630 NW2d 633 (2001); *People v Rodriquez (On Remand),* 216 Mich App 329, 331-332; 549 NW2d 359 (1996), citing *Tome v United States,* 513 US 150; 115 S Ct 696; 130 L Ed 2d 574 (1995).

Here, Kelvin identified the shooters to Lannie after he returned home from a Coney Island where several men, including both defendants, went after the shooting. The court admitted Lannie's testimony based, in part, on the court's conclusion that Kelvin arguably did not yet have a motive to falsify when he made the statement. Previously, however, during the defense's cross-examination of Kelvin, defense counsel's charge of fabrication explicitly referred to the night of the shooting. Counsel suggested that, when Kelvin arrived at the Coney Island after committing the shooting himself, Kelvin noticed Swanigan and decided to falsely accuse Swanigan because Kelvin and Swanigan had similar hairstyles and similar visible tattoos on their necks. Counsel further suggested that Kelvin also implicated Johnson because Kelvin knew that at least two shooters were involved. Thus, the trial court clearly erred in admitting Lannie's testimony because the charge of recent fabrication, which her testimony was offered to rebut, asserted that Kelvin's motive to fabricate arose before he returned home; although Kelvin had not yet been accused, the charge of fabrication explicitly claimed that he anticipated being accused and perhaps being easily identified because of his noticeable tattoos.

Nonetheless, for the purposes of this appeal, reversal is not required because the error was not likely to have affected the outcome of the proceedings. *Carines, supra* at 763. First, Lannie's testimony was fairly weak: she was obviously potentially biased because she was Kelvin's mother; the jury was aware that Lannie had not been scheduled to testify until after she listened to Kelvin's testimony on the first day of trial; and, most significantly, Lannie never stated defendants' names when asked if Kelvin had told her the names of the shooters. She merely attested that Kelvin had said "[t]he name he called yesterday [at trial]." Second, there was little evidence of Kelvin's guilt and, therefore, of his motive to falsely implicate Swanigan; aside from noting Kelvin's tattoos, defense counsel merely presented two witnesses – a friend and a half brother of Johnson – who stated that Kelvin looked "hyped" or "jumpy" at the Coney Island after the shooting. Accordingly, the admission of Lannie's testimony was unlikely to have impacted the trial. This is particularly true given the other evidence of defendants' guilt, as we will discuss further below.

Next, Johnson claims that a new trial is required based on newly discovered evidence. Johnson cites the affidavit of Brandon Gilkey, who left the club after the shooting in a minivan with another man, Erick Shorter. Kelvin claims to have witnessed the shooting while sitting in the minivan with Gilkey and Shorter. Kelvin then claims to have ridden to the Coney Island with these men. Gilkey attests, however, that Kelvin was not with him and Shorter and, further, that Kelvin was not at the Coney Island later that evening.

"For a new trial to be warranted on the basis of newly discovered evidence, a defendant must show that: (1) the evidence itself – not merely its materiality – was newly discovered; (2) the evidence is not cumulative; (3) the party could not, with reasonable diligence, have discovered the evidence and produced it at trial; and (4) the evidence would make a different result probable on retrial." *People v Cress,* 468 Mich 678, 692; 664 NW2d 174 (2003) (citation and internal quotation marks omitted). Here, with regard to Johnson's case, Gilkey's proffered testimony is, at best, merely useful to impeach Kelvin's testimony. Where new evidence is useful only to impeach a witness, it is generally deemed merely cumulative. *People v Barbara,* 400 Mich 352, 363; 355 NW2d 171 (1977). Johnson also produced little evidence that Gilkey's testimony was not previously discoverable. Gilkey's affidavit, itself, is premised on an acquaintanceship among the defendants, Gilkey and Shorter; Gilkey claims that he and Shorter

"met up with" both defendants at the Coney Island on the night of the shooting. This undermines Johnson's claim that he could not ascertain Gilkey's identity because Kelvin merely referred to "Brandon" at trial.

Most significant to our purposes, there was other evidence of Johnson's guilt. Kelvin was the only witness to positively identify both defendants as the shooter. Kelvin also testified that, earlier in the evening, Johnson had said, "they was [sic] about to pop somebody." At the Coney Island, Kelvin heard Johnson say, "did you see me pop that n-----[?]" However, other evidence established: that Johnson drove a car that met the descriptions several people gave of the car involved in the shooting; that he was a member of the 8 Mile group; and that he was seen taking part in the altercation opposed to another group of men which included Edwards. As a result of the altercation – during which Johnson was seen being physically restrained from fighting – Johnson was expelled from the club and a witness testified that he seemed angry and "hyped" about the altercation. Further, although another witness did not identify either defendant as a shooter at trial, he agreed that when he was previously shown the videotape of the party he had "believed," albeit was not sure, that Johnson was a shooter. This other evidence not only provided independent proof of Johnson's guilt, but it confirmed the credibility of Kelvin's testimony. Accordingly, Johnson has failed to show that Gilkey's testimony would be likely to affect Johnson's convictions on retrial.

Gilkey's testimony, however, may well have had a significant effect on the jury's view of the evidence against Swanigan. It is with this in mind that we address the issues raised in Swanigan's Standard 4 brief. Overall, Swanigan frames his argument as a claim of ineffective assistance of counsel. Such a claim is preserved for review to the extent record evidence exists to support the claim. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Here, Swanigan did not create a supplementary record at a *Ginther* hearing, so review is limited to facts apparent in the appellate record. *Sabin, supra* at 659.

Effective assistance of counsel is presumed and a defendant bears a heavy burden to prove otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). To support a claim of ineffective assistance, a defendant must show: (1) the representation fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for the attorney's error, the result of the proceedings would have been different; and, (3) the resulting proceedings were therefore fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). In evaluating a claim of ineffective assistance, this Court "will not substitute its judgment for that of trial counsel regarding matters of trial strategy, even if that strategy backfired." *Rodgers, supra* at 715.

Swanigan makes various claims that are similar to each of the issues already discussed. Significantly, he claims that his counsel did not sufficiently impeach Kelvin's credibility using, in part, the testimony of Gilkey. Swanigan's claims regarding Gilkey's testimony are distinguishable from Johnson's claims because Kelvin's testimony was much more essential to Swanigan's convictions. Kelvin was the only witness to directly implicate Swanigan in the shooting; Kelvin identified Swanigan as a shooter and claimed that Swanigan removed spent bullet casings from his pocket at the Coney Island. The other evidence against Swanigan merely included testimony that Swanigan was a member of the 8 Mile group, that Swanigan appeared to

have been among the men expelled from the club after the altercation, and that Swanigan was present at the Coney Island at the same time that Johnson was there. Testimony also suggested that Swanigan was somewhat light-skinned, and one witness vaguely testified at one point that both shooters were light-skinned. Because of the weakness of this remaining evidence, further impeachment of Kelvin was likely to have created reasonable doubt in the minds of the jury regarding Swanigan's involvement in the shooting. Further, any negative effects of the admission of Lannie's testimony would also become more significant.

Although decisions concerning whether to call witnesses are presumed to be matters of strategy, *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004), a defendant is also entitled to have his counsel "prepare, investigate, and present all substantial defenses"; a substantial defense is "one that might have made a difference in the outcome of the trial," *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Here, the investigation and impeachment of Kelvin's credibility was crucial to Swanigan's defense. In presenting the defense theory at trial, however, Swanigan's attorney focused on alternate reports that shots had been fired from a cargo van, rather than a Caprice. The attorney failed to address the fact that several witnesses testified they were certain that shooting came from a Caprice. The attorney also failed to squarely address Kelvin's testimony and, in fact, mischaracterized the evidence in her attempts to shed doubt on his credibility.

As merely one example, she characterized Kelvin's testimony as "directly inconsistent with all of the testimony of all of the other witnesses" based on her claims that Kelvin thought there were four people inside the Caprice and that the other witnesses "stated that the Caprice where the shots were coming from only had two witnesses [sic]." However, when asked how many people were in the Caprice, Kelvin had actually testified: "It could have been around four. I'm not too sure." He later added: "I didn't say four. I said it could have been four. . . . I seen [sic] two." This last statement was consistent with his earlier testimony that he had actually only directly witnessed the two defendants in the Caprice. In comparison, other witnesses reported there being about three people in the car, two people in the car, or merely "more than one" person in the car because of the number of shots fired.

Because of this failure to effectively impeach Kelvin, the trial record, on its face, suggests little excuse for the attorney's failure to procure Gilkey as a witness if she knew of his testimony or could have discovered it through reasonable investigation. Although the trial court may determine on remand that Swanigan's trial counsel reasonably concluded Gilkey was not a believable witness, the proffered testimony in Gilkey's affidavit suggests that his absence from trial unreasonably deprived Swanigan of a substantial defense. If, on the other hand, Gilkey was genuinely unknown and not reasonably discoverable, the trial court need not consider whether a new trial is warranted based on the standard for newly discovered evidence because Swanigan did not explicitly raise this issue and, therefore, has abandoned it on appeal.

We affirm Johnson's convictions and sentences. We remand with respect to Swanigan for proceedings consistent with this opinion. We retain jurisdiction over Swanigan's case only.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Christopher M. Murray

Court of Appeals, State of Michigan

ORDER

People of MI v Jarrett Wade Swanigan

Docket No. 257144

LC No. 04-002842-02

William C. Whitbeck, CJ
Presiding Judge

Michael J. Talbot

Christopher M. Murray
Judges

The Court orders this matter REMANDED to the trial court for an evidentiary hearing and decision whether defendant appellant was denied the effective assistance of counsel. The proceedings on remand are limited to this issue as explained in the Court's opinion.

The trial court shall conduct the hearing and make findings of fact and a determination on the record within 35 days after the Clerk's certification of this order. The trial court shall cause the transcript of the hearing to be prepared and filed within 21 days after completion of the proceedings and see that the transcript is promptly transmitted to the Clerk of this Court.

The Court retains jurisdiction and will resume its review of the matter as soon as the proceedings on remand are concluded and the transcript of the proceedings on remand is received.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

DEC 22 2005
Date

Sandra Schultz Mengel
Chief Clerk