# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>September 20, 2007 |
| v | No. 269299<br>Genesee Circuit Court |
| BOBBY JAMAR YOUNGER,<br><br>Defendant-Appellant. | LC No. 05-017032-FC |

Before: Borrello, P.J., and Jansen and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of assault with intent to commit murder, MCL 750.83, armed robbery, MCL 750.529, possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. He was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of 30 to 50 years for one assault conviction and 20 to 40 years for the other assault conviction, 20 to 40 years for the armed robbery conviction, and 5 years to 90 months for the felon in possession conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Defendant appeals of right, and we affirm.

Defendant's convictions arise from a shooting incident that occurred on Labor Day in 2004, in front of Debra Wood's house where relatives were gathered for dinner. Garner Wood was shot and severely injured. Another shot was fired at Regina Wood, but she was not hit. Three prosecution witnesses positively identified defendant as the shooter. Defendant asserted that he was not present during the incident and presented two witnesses in support of an alibi defense.

## I. Loss of Evidence

Defendant first argues that he was denied a fair trial by the loss of physical evidence, a baseball cap, because DNA testing of the cap may have exonerated him. Defendant further argues that he was entitled to an adverse inference jury instruction and that counsel was ineffective for failure to make such a request.

Several witnesses testified at trial that the shooter wore a baseball cap. The police recovered a cap from the scene, but a week later it could not be located in the police property room. The cap was lost prior to defendant's motion for discovery and the evidence indicates that

the police and prosecution conducted a search for the missing cap but could not find it. Defendant did not raise this issue below; therefore, we review the issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The failure to preserve evidence that may potentially exonerate a defendant does not constitute a denial of due process unless the police acted in bad faith. *Arizona v Youngblood*, 488 US 51, 58; 109 S Ct 333; 102 L Ed 2d 281 (1988); *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993). An adverse inference instruction need not be given where the defendant has not shown that the prosecutor acted in bad faith in failing to produce evidence. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). In this case, defendant has failed to raise any issue that could have led the trier of fact to find that the baseball cap found at the scene constituted exculpatory evidence. Defendant's assertion that the baseball cap could have contained DNA is speculative for at least several reasons. Thus as mere speculation, we could conclude that the baseball cap fails to qualify as exculpatory evidence. At the very least, defendant's arguments regarding the baseball cap lead us to the conclusion that the baseball cap, was at best, a potentially exculpatory piece of evidence for defendant. In *Youngblood*, *supra*, the United States Supreme Court held:

> The Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady*, makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. Part of the reason for the difference in treatment is found in the observation made by the Court in *Trombetta*, *supra*, at 486, that "[w]henever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed." Part of it stems from our unwillingness to read the "fundamental fairness" requirement of the Due Process Clause, see *Lisenba* v. *California*, 314 U.S. 219, 236 (1941), as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution. We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, *i. e.*, those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. 488 US at 57- 58.

In this case, defendant has been unsuccessful in attempting to produce evidence demonstrating that the police acted in bad faith when they lost the seized baseball cap. In accordance with *Youngblood*, *supra*, we are compelled to hold that defendant cannot demonstrate plain error by the failure of the prosecution to produce the baseball cap for testing. Additionally, because defendant cannot demonstrate that the government acted in bad faith in failing to

produce the evidence, an adverse jury instruction was not warranted. *People v Davis*, *supra* at 515. Consequently, counsel was not ineffective by failing to request such an instruction. See, *People v Mack,* 265 Mich App 122, 130; 695 NW2d 342 (2005).

II. Right of Confrontation

Defendant argues that evidence of a non-testifying witness's identification of defendant as the shooter was improperly admitted through the testimony of Officer Fowlkes. Officer Fowlkes testified that Alvin Hicks told him that the shooter's name was "Bobby" or "Little Bobby." Defendant asserts that his right of confrontation was violated because the declarant, Alvin Hicks, was not previously subjected to cross-examination. Because defendant did not object to this testimony at trial, we review this issue for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763-764.

Under the Sixth Amendment to the United States Constitution, testimonial statements of witnesses absent from trial may not be admitted against a criminal defendant unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005), citing *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). There is no dispute that Hicks was unavailable for trial and had not been previously subjected to cross-examination about his identification of the shooter. Thus, defendant was denied his opportunity for cross-examination of this witness in violation of *Crawford*, *supra*. However, such a finding does not, by necessity, warrant reversal. "[O]nce a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." (*Carines*, *supra* at 763, quoting *US v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993)]. While we find that defendant was denied his opportunity of cross examination, because the testimony was brief and at least three other witnesses positively identified defendant at trial as the shooter, we are not persuaded that the error resulted in the conviction of an actually innocent defendant, nor can we find that defendant's substantial rights were affected. *Carines*, *supra*.

III. Effective Assistance of Counsel

Defendant presents a myriad of ineffective assistance of counsel claims. Because he did not raise these claims in a motion for a new trial, our review is limited to mistakes apparent from the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, a defendant must show that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the result of the proceedings would have been different. *Mack*, *supra* at 129. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Defendant argues that defense counsel was ineffective for failing to interview and call Jaron Brown as an alibi witness. Brown averred in an affidavit that he was present during that

shooting and that defendant was not present or involved. Decisions whether to call or question witnesses are presumed to be matters of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *Id*. In this case, it is apparent that Brown would have presented credibility problems. Witnesses identified Brown as being with defendant and as also being armed with a gun. Additionally, Brown's account of the shooting in his affidavit differed from that of other witnesses at trial. More significantly, defense counsel raised an alibi defense at trial and presented two witnesses in support of that defense. Thus, the failure to call Brown did not deprive defendant of a substantial defense.

We also reject defendant's claim that counsel was ineffective for failing to investigate defendant's case. Defendant bases this claim only on counsel's failure to call Brown as a witness, which we have concluded did not amount to ineffective assistance of counsel.

Defendant also argues that defense counsel was ineffective for failing to file a motion to suppress a photographic lineup, which defendant asserts was unduly suggestive because the witness's identification was tainted by Hicks's influence. However, the suggestiveness of a lineup involves the procedure itself. *People v Kurylczyk*, 443 Mich 289, 306 (Griffin, J.), 318 (Boyle, J.); 505 NW2d 528 (1993). Defendant contends that the identification was tainted by an outside influence, not the procedure itself. Because a motion to suppress would have been futile, counsel was not ineffective for failing to move for this relief. *Mack, supra* at 130. The reliability of the witness's identification at trial was a question for the jury to resolve. *People v Johnson*, 202 Mich App 281, 285-286; 508 NW2d 509 (1993).

Additionally, we reject defendant's assertion that defense counsel was ineffective for failing to move for a *Wade*[1] hearing. The right to a *Wade* hearing stems from a claim that an identification procedure is constitutionally improper. *Johnson*, *supra* at 285. Defendant does not contend that the lineup procedure was constitutionally infirm. Therefore, defense counsel was not ineffective for failing to make a futile motion. *Mack, supra* at 130.

Defendant also argues that defense counsel was ineffective for not objecting to the admission of a photograph of the baseball cap that was recovered from the scene, because it was not established that the cap belonged to defendant. However, the prosecutor did not need to prove that the cap belonged to defendant in order for the photograph to be admissible. At trial, several witnesses testified that the shooter wore a baseball cap and a cap was recovered at the scene. The jury was free to draw reasonable inferences from the evidence. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Defendant also argues that defense counsel should have objected to the photograph because the physical cap, not the photograph, was the best evidence of the cap. However, the best evidence rule only applies to documentary evidence. *People v Leuth*, 253 Mich App 670, 686; 660 NW2d 322 (2002). Accordingly, any objection on this basis would have been futile. *Mack, supra* at 130.

[1] *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

Defendant's claims that defense counsel failed to engage in plea negotiations or request a jury instruction on witness credibility are not supported by the record. The record discloses that defense counsel conveyed the prosecutor's plea offer to defendant, which he rejected, and that the trial court instructed the jury on how to assess witness credibility.

Defendant's remaining ineffective assistance of counsel claims are not properly presented because defendant fails to develop his arguments or identify the factual basis for his claims, and we decline to consider them further for this reason. See *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004) (an appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims). Defendant asserts that defense counsel should have filed a motion for a continuance in order to properly prepare for trial, but defendant does not explain how counsel was unprepared or what else defense counsel could have done had more time been available. Defendant's other ineffective assistance of counsel claims do not provide support for this one because the mere fact that counsel failed to file certain motions does not mean that he did not have time to do so.

Also, defendant asserts that defense counsel failed to adequately attack the credibility of witnesses at the preliminary examination and at trial, but he does not identify specific witnesses or instances in support of this claim. Defendant also fails to explain the basis for his claim that "Defense counsel fail (sic) to file a pre-trial motion for defendant to afford a corporal line-up." Additionally, the extent of defendant's argument that defense counsel was ineffective for failing to move for a directed verdict is that such a motion was warranted because the prosecution's evidence was weak and non-conclusive. Defendant presents no basis for concluding that a motion for a directed verdict would have been successful.

For these reasons, we reject defendant's claim that he was denied the effective assistance of counsel.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Christopher M. Murray