STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 19, 2008
v	No. 257333 Wayne Circuit Court
DUJUAN O'NEAL, Defendant-Appellant.	LC No. 04-002337-01

Before: Zahra, P.J., and White and O'Connell, JJ.

PER CURIAM.

A jury convicted defendant of three counts of felony murder, MCL 750.316(b), three counts of armed robbery, MCL 750.529, three counts of disinterment, mutilation, defacement, or carrying away of human body, MCL 750.160, felon in possession of a firearm, MCL 750.244f, and felony-firearm, MCL 750.227b. The trial court sentenced him to life imprisonment consecutive to two years' imprisonment for felony-firearm conviction. He appeals as of right. We affirm.

I. Basic Facts

This case arose from the November 2002 shooting deaths and ensuing dismemberments of Christopher Kasshamoun, Rany Sharak and Wesam Akrawi in the City of Detroit. The victims were discovered in a two-unit residential complex at 2315 Vermont in the City of Detroit where Jamale Stewart and his girlfriend, Tuwana Chambers, resided. The victims regularly sold Jamale large amounts of marijuana, which Jamale trafficked. Jamale knew defendant as Jason, who had a long-time intimate relationship with Jamale's mother, Felicia Stewart, which ended in 1997 or 1998. Defendant lived in Spring Valley, New York, and would visit Detroit three to five times a year. Around November 15, 2002, defendant traveled to Detroit.

On November 18, 2002, Jamale arranged for the victims to deliver 35 pounds of marijuana to his home the next evening. Jamale intended to pay Sharak $29,000 for past debt and receive additional marijuana to sell. Before the sale, defendant stopped by Jamale's house, and he, Jamale, and one of Jamale's friends went to a car dealership where Jamale test-drove a red Ford Explorer. While test-driving the vehicle, Kasshamoun called and told him he was waiting at Jamale's home. Jamale did not return the vehicle to the dealership, instead opting to meet Kasshamoun.

Inside the home, Kasshamoun gave Jamale marijuana that was wrapped in a garbage bag and Jamale gave Sharak $29,000 cash. As the money was being counted, Jamale left the room to go upstairs and retrieve his own more potent marijuana to smoke with Sharak. Defendant, who had been seated in an adjacent room, followed him upstairs. Once upstairs, defendant stated to Jamale, "Let me lick these niggas." (Jamale indicated that lick means rob). Jamale responded, "No, these are my people." Defendant replied, "I'm your people."

Jamale returned to his seat and continued talking with Sharak. Defendant also returned to his seat in the adjacent room. Jamale had earlier testified that at his home were two .357 revolvers, and that defendant had seen them before and knew their location. Defendant stood up and grabbed a gun lying on a credenza and ordered the men to "get down." Sharak refused, stating, "I'm not getting down man, you can take this shit and you can leave," and defendant grabbed Sharak by the shirt and hit him in the side of the head with the gun. Defendant then forced Sharak by gunpoint to the top of basement steps. Jamale heard a gunshot, saw a flash and heard Sharak fall down the basement steps.

Defendant returned to the living room where Kasshamoun and Akrawi were lying on the ground. Akrawi made a movement and defendant shot him in the head. Kasshamoun began to cry and defendant lifted him to his feet, forced him at gunpoint downstairs where Jamale heard a gunshot. Jamale heard Akrawi make a gurgling sound and saw defendant place a plastic bag over Akrawi's head. Jamale was scared defendant would kill him and helped defendant carry Akrawi to the basement.

Jamale testified that defendant left and returned after 30 to 45 minutes with Home Depot shopping bags containing an electric chainsaw, Shop-Vac, garbage bags and gloves. After defendant returned, Jamale began to clean Akrawi's blood from the living room and defendant began to dismember Kasshamoun's body using the chainsaw. Jamale watched defendant cut off Kasshamoun's arms, but "couldn't take it," and went upstairs. Around this time, Jamale's brother, Ramone, stopped by Jamale's home. Jamale told Ramone to leave but he would not, and defendant, who had come upstairs, asked Ramone to come in, which he did. Jamale explained what had happened to Ramone, who then went to the basement to help defendant. Jamale eventually returned to the basement and saw Kasshamoun's body dismembered. Defendant told him to take the victims' clothes, marijuana and a pistol from the house. He placed the items into garbage bags, which he loaded into the Explorer. Jamale testified that he called a taxi driver friend to follow him.

Chambers arrived at Jamale's house around that time. She saw Jamale, Ramone and defendant, who she described as having "funny color" eyes. She helped clean and later got into the taxi, which followed Jamale in the Explorer until police stopped him. Jamale fled the Explorer on foot and the taxi continued past Jamale and returned to the house. Detroit Police Officer John Furmanski and his partner made the traffic stop and Furmanshi identified Jamale in subsequent lineup. He testified that a search of the Explorer revealed a large amount of marijuana, and a semi-automatic Mack 11 nine-millimeter firearm. Detroit Police Officer Thomas Smith of the Evidence Technicians Unit testified that he processed five garbage bags found in the cargo area of the Explorer. He testified that bags contained 51 items, including bloody clothing, pagers, cell phones, money and identifications of Kasshamoun, Akrawi and Sharak.

The taxi driver dropped Chambers at the Vermont house and later returned with Jamale. When Jamale returned home, defendant, Ramone and Chambers were sitting in the living room. Jamale, defendant, Ramone and Chambers left the house and checked into a hotel off Telegraph Road. Jamale testified that defendant told him he would burn down the Vermont house. He testified that defendant had the $29,000 in his hands at the hotel room. Felicia, testified that she confronted defendant about the money, and defendant replied, "it wasn't supposed to happen like that, he couldn't let all his money get away from him." Felicia also testified that defendant replied, "he couldn't let the money get away. It was about the money, but his intentions really wasn't to kill those people, but it was too much money." Defendant left the hotel, and about six or seven hours later, Jamale saw his house on fire on television. Jamale went to his Aunt's house, and then left for New York. Chambers testified that after the fire she went to Virginia with Felicia and Ericka Cancer. Jamale later returned to Detroit because he did not want to get arrested in New York.

Detroit police officer Michael Parish testified that on November 20, 2002, at around 3:45 a.m., he notified dispatch that the Vermont house was engulfed in flames. Detroit Fire Department fire investigator Dennis Felder testified that investigation revealed the fire at the Vermont house had been intentionally lit with an accelerant. In October 2003 Jamale entered into a plea deal with the Wayne County Prosecutor. The deal required his truthful testimony in the instant case, and, in exchange, he would plead guilty to accessory after the fact and disinterment and a six to ten year' imprisonment sentencing agreement. Also as part of the deal, he pleaded guilty to felony-firearm and served two years' imprisonment consecutive to the previous sentence.

Defendant was arrested in New York and brought to Michigan. On February 9, 2004, Detroit Police Officer Manuel Gutierrez met with defendant. Gutierrez testified that he informed defendant of his *Miranda*[1] rights. He testified that he asked defendant questions and wrote down defendant's answers. Gutierrez testified to the following questions and answers:

> *Q*. Do you recall the incident that occurred on November 19, 2002, involving the murder of three men at 2310 Vermont Street?
>
> *A*. Yes, I do.
>
> *Q*. Did you visit the dealership on that day?
>
> *A*. Yes, I did. I was there with Jamale Stewart, we were looking at cars. Cars are cheaper here than in New York, so I was checking out a Cadillac. I would have bought it but there was something wrong with it.
>
> *Q*. What happened next?
>
> *A*. I hadn't been home in a while, so I visited my family. I went to see my brother and I shot craps with him. . . . I got a call from Jamale Stewart, telling me

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

he wanted me to pick up some things from Home Depot. I didn't think nothing of it cause his family owns property.

Q. How did you get to your brother's house?

A. In the red Explorer. I asked Jamale if he could find someone else, but he said he left his car at the dealership. So, I went to the Home Depot and bought the Shop Vac and chain saw.

I was flirting with the lady at the register and everything. Does that seem like something someone would do after they just killed three people?

Q. What happened next?

A. I drove over to Jamale's moma's [sic] house on Glendale and gave the truck back to Jamale and Ramone Johnson.

Q. What about the items you purchased at the Home Depot?

A. I gave it to them, also.

On cross-examination, Gutierrez testified that defendant indicated he would not sign any statement, and indeed refused to sign the above statement.

Keisha O'Neal, defendant's wife, testified on his behalf. She testified that, in 2002, she and defendant lived together in Spring Valley, New York. She testified that, in November, she and defendant discussed him taking a trip to Michigan to purchase a vehicle. She did not recall the exact date defendant left, but remembered that he was gone three days. She testified that defendant sports a "Jason" tattoo on his right arm.

II. Effective Assistance of Trial

The lower court record includes the evidentiary hearing conducted pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

The denial of effective assistance of counsel is a mixed question of fact and constitutional law, which are reviewed, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 591; 640 NW2d 246 (2002).

The United States and Michigan Constitutions guarantee the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996).

To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id*. at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id*. at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id*. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). [*People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001)].

Defendant bears the heavy burden of overcoming the presumption that counsel's representation was effective. *LeBlanc*, *supra* at 578. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight. *Strickland, supra* at 689 (Internal citation omitted). Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

We conclude that defendant has not established that defense trial counsel provided ineffective assistance of counsel.

A. Discovery material on third day of trial.

Defendant claims that defense trial counsel failed to use information in a federal report to impeach witnesses and to provide an alternate theory of the crime. In regard to the disclosure of the federal report, the following occurred at trial:

> *Prosecutor*. The discovery that was in question earlier during this trial has been reviewed by the Court, as well as sister Counsel. And for further review, there is not only a determination that she has the discovery, but will not be using that discovery. There has been an agreement, also, Josephine Kasshamoun, [wife of Kasshamoun], who has been endorsed by the People as a witness, I believe is being waived at this time. I will not be calling her.
>
> *Trial Court*. Okay?
>
> *Defense Counsel*. That is correct.

Defense trial counsel later claimed at the *Ginther* hearing that her affirmation was an acknowledgment of the trial court's ruling rather than a waiver. She also indicated at the *Ginther* hearing that she entered into the agreement because the trial court would not allow her to use the federal report or question Josephine Kasshamoun in regard to the federal report. However, despite defense trial counsel's subsequent explanation of her statement, the record plainly indicates that she intentionally agreed to relinquish any right in regard to the federal report and

the testimony of Josephine Kasshamoun. The intentional relinquishment of a known right constitutes a waiver, which extinguishes the error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000); *People v Dobek*, 274 Mich App 58, 65; 732 NW2d 546 (2007).

Alternatively, defendant maintains that defense trial counsel was ineffective for waiving the use of the federal report or the testimony of Josephine Kasshamoun. Even assuming defense trial counsel was allowed complete access to the federal report and the testimony of Josephine Kasshamoun, we conclude that not presenting this evidence to the jury would constitute reasonable trial strategy. Although at the *Ginther* hearing defense trial counsel maintained that she would have been effective in impeaching witnesses with the federal report and the testimony of Josephine Kasshamoun, defense trial counsel failed to mention that the federal report, and ostensibly Josephine Kasshamoun's testimony, also contains arguably prejudicial and inculpatory evidence. The federal report indicates a person from New York named Rudy, who was related to Jamal, came to Detroit to kill the victim after Jamal accepted a contract on the victim's life.

Regardless of defense trial counsel's intent, not admitting the federal report or the testimony of Josephine Kasshamoun constituted reasonable trial strategy. While defense trial counsel would have gained a minor advantage in possibly being able to impeach witnesses with the report, testimony that a hit man from New York committed the offenses is particularly prejudicial to defendant. The information in the report is especially prejudicial when considering evidence presented that defendant arrived from New York three days before the murders, that Jamale picked up defendant and rented him a room, and the manner of the offenses. Defendant claims in this regard that there is no evidence that defendant is Rudy. However, there is no dispute that defendant is from New York and has numerous nicknames, including Jason, Friday the 13th and New York. Further, defendant cedes that in questioning witnesses about the federal report, that "the witnesses would likely have denied some of these facts and allegations." Thus, we cannot conclude defense counsel's waiver or failure to present the federal report or the testimony of Josephine Kasshamoun amounted to error so serious that counsel was not performing as the counsel guaranteed by the Sixth Amendment.

B. Written letters from Jamale and Felicia to Ramone

Defendant argues that defense trial counsel was ineffective in failing to use letters by Jamale and Felicia to Ramone, who was in jail, to impeach Jamale and Felicia. Defendant claims that Ramone's August 12, 2003 deposition testimony indicates that Ramone, while in jail, received letters from Jamale and Felicia.

Specifically, defendant claims that letters "can be read to telegraph to Ramone that they are framing [defendant] for the murder[s]." In support, defendant cites a letter from Jamale to Ramone in which he writes, "I did not plan to rob anybody. Jason did[,] not me[,] that might be one the things they ask you." We conclude that the language of the statement does not support defendant's claim of collusion. The statement merely indicates how Jamale would testify at trial, and does not encourage Ramone to lie. Indeed, defendants admits, "there could arguably be other interpretations for [the letters' content.]"

Defendant cites another letter from Jamale to Ramone in which defendant claims Jamale provided instruction to name defendant as the shooter and explain an inconsistent statement:

3) I was scared of [Dujuan], knowing he killed and cut people up.

4) I had been drinking when I gave my statement.

5) On the night it all went down I went over to the house. Jamale was looking so scared so I asked he what was wrong he said nothing come back later I said no tell me what's wrong. I walked pass him and sat down then Jason came by the door area and came here so I went with him downstairs I saw three bodies on the floor so a ran back upstairs. . . .

Again, the above statement is largely consistent with Jamale's testimony at trial and could just as easily be read to explain Jamale's understanding of events rather than Jamale providing instruction to Ramone. Defense trial counsel did not commit a significant error in failing to impeach Jamale with this statement.

Defendant also cites a letter in which Jamale wrote to Ramone: "my lawyer is having a meeting with Big Boy and her to fix what they said." Further, that: "Big Boy and little mama fixing there hook up so with that and both of us on the same page and not against each other we will go home real soon plus I know you didn't do anything and you know I didn't plan to rob or harm anyone." Defendant claims the above statement "could be interpreted to explain to Ramone that all the witnesses were changing their original statements to implicate [defendant] and minimize the involvement of [Jamale] and [Ramone]." Again, defendant's interpretation of the above statement to support a claim of collusion is without support. The statement does not suggest how Ramone should testify and may only indicate that two people had prior inconsistent statements, which Jamale's lawyer attempted to render consistent.

Defendant last claims that the letters urge Ramone to corroborate Jamale's description of events. In support, defendant cites a letter from Jamale to Ramone that stated: "Ray don't make no deal to jam me we are the same blood if you do I will get life do you want to get your little brother life for something I didn't do." Defendant also cites, in this regard, Felicia's letter to Ramone in which she wrote that, "y'all can't fall apart that's what they are banking on you got to stick together don't be the weak link." Here, Jamale's letter to Ramone could merely indicate that Jamale wanted Ramone to be truthful. Further, Felicia's letter to Ramone is vague at best, and need not be construed as evidence of a plot to fabricate testimony.

Further, even assuming that defense counsel improperly failed to impeach witnesses with the above statements, defendant has not shown the existence of a reasonable probability that, but for this error, the result of the proceeding would have been different. Essentially, this impeachment evidence is cumulative to other evidence presented and argued at trial that tended to show that Jamale was not credible. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Here, any additional impeachment of witnesses with the above statement would be marginal evidence of collusion, and thus, defendant has not established ineffective assistance of counsel.

C. Alibi witness Hale

Defendant argues that defense trial counsel was ineffective for failing to present Hale's testimony. Hale testified at the *Ginther* hearing that on November 19, 2002 he was at his

brother's birthday party and saw defendant arrive at around 7:30 p.m. However, when asked if he had "any doubt in his mind that you were with [defendant] on November 19, 2002 after 6 or 7 p.m. when it got dark," Hale replied, "Not unless he was very fast. I think he was there unless he may have went to the store or I went to the store." Further, when asked "when did [defendant] leave," he replied, "They stayed there most of the time I was there. I don't know who left first. I think they may have left first, but it was late."

Defendant has failed to show that had Hale testified at trial the result of the proceedings would have been different. Even in a light most favorable to defendant, Hale's testimony does not secure defendant's alibi. At most, Hale's testimony indicates only that he saw defendant sometime in the evening of November 19, 2002.

D. Ballistics evidence

Defendant argues that defense trial counsel was ineffective in failing to present evidence that a shell found at defendant's house matched the gun found in the Explorer. Ballistics evidence at trial showed that bullet fragments from the victims' bodies were fired from the same weapon, but not the weapon in the Explorer. Defendant claims the omitted evidence would have contradicted the prosecution's theory that Jamale "could not have been involved in the shooting because the bullets did not match his gun." Defendant has failed to show ineffective assistance of counsel in this regard. Even if defense trial counsel presented this evidence, the prosecution could nonetheless maintain that the bullets found in the victims' bodies were not from the gun found in the Explorer. Thus, defendant has failed to show how introduction of this evidence would have changed the result at trial.

E. Impeachment of Bell's testimony

Defendant argues that defense trial counsel was ineffective in failing to call Police Officer Joann Miller to impeach Bell, the Home Depot cashier. Bell testified that she could not remember signing a statement in which she identified a black male between 27 and 28, shoulder length braids and a scar on his neck, as a Home Depot customer around the time of the offense. The described person apparently better described Jamale than defendant. However, defense trial counsel read the statement to Bell, and although Bell still could not remember making the statement, she acknowledged her signature. Contrary to defendant's argument, defense trial counsel adequately impeached Bell with her own signed statement. Thus, defendant has failed to show how further impeachment of Bell would have resulted in a different result at trial.

F. Impeachment of Jamale and Felicia

Defendant claims defense trial counsel failed to impeach Jamale with his guilty plea transcript. The guilty plea transcript expressly states:

> *The Court*. And during that time did you also dismember or mutilate a dead body?
>
> *Jamale*. Yes.

Yet at trial, consistent with his trial testimony, Jamale refused to admit to actually dismembering or mutilating a dead body. The trial court addressed Jamale's refusal, and noted that defense trial counsel had "impeach[ed] the Jamale to pleading to something he didn't do." Thus, further impeachment of Jamale with the guilty plea transcript would be cumulative. Defendant failed to show prejudice in this regard.

Defendant also argues that defense trial counsel failed to impeach Felicia's testimony that defendant admitted to the murders at the hotel, with a prior opposing statement. In the prior statement, she did not mention speaking to defendant or going to the hotel. However, Felicia's failure to indicate that defendant admitted to the murders at the hotel could simply mean that she wasn't asked that question. Defendant has not sustained the heavy burden of proving ineffective assistance of counsel in this regard.

G. Eliciting defendant's nickname, Friday the 13th.

Defendant argues that defense trial counsel was ineffective in eliciting defendant's nickname, Friday the 13th, at trial. Presumably, defendant's nickname is adverse given that the victims in this case were mutilated in a manner consistent with mutilations depicted in the Friday the 13th horror movie franchise. Here, there is no evidence that defense trial counsel knew the witness would attest to defendant's nickname, "Friday the 13th," rather than another nickname, "Jason." Defendant has not shown ineffective assistance in this regard.

H. Cumulative error

This Court reviews this issue to determine if the combination of alleged errors denied defendant a fair trial. *People v Knapp*, 244 Mich App 361, 387-388; 624 NW2d 227 (2001).

> "The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit reversal, but the cumulative effect of the errors must undermine the confidence in the reliability of the verdict before a new trial is granted. Absent a showing of errors, there can be no cumulative effect of errors meriting reversal. [*Dobek, supra* (Citations omitted).]

Here, defendant has failed to show any error, and thus, his claim of cumulative error should be rejected.

III. *Brady*[2] Violation

We initially conclude that defense counsel waived any *Brady* violation in regard to the federal report. As mentioned, *supra*, section II-A, defense trial counsel expressly agreed that "she has the discovery [the federal report], but will not be using that discovery." The intentional relinquishment of a known right constitutes a waiver, which extinguishes the error. *Carter, supra* at 215-216; *Dobek*, *supra* at 65. Here, defense counsel clearly agreed not to use the

[2] *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963)

evidence now claimed to be the subject of a *Brady* violation. Thus, any *Brady* error is extinguished. This Court outlined four factors a defendant must prove to show that the prosecutor violated defendant's due process rights under *Brady* in *People v Fox* (After Remand), 232 Mich App 541, 549; 591 NW2d 384 (1998), including:

> (1) that the state possessed evidence favorable to the defendant, (2) that the defendant did not possess the evidence and could not have obtained it with the exercise of reasonable diligence, (3) that the prosecution suppressed the favorable evidence, and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

In *People v Lester*, 232 Mich App 262, 282-283; 591 NW2d 267 (1998), this court explained that:

> The failure to disclose impeachment evidence does not require automatic reversal, even where, as in the present situation, the prosecution's case depends largely on the credibility of a particular witness. The court still must find the evidence material. Undisclosed evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." Accordingly, undisclosed evidence will be deemed material only if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." In determining the materiality of undisclosed information, a reviewing court may consider any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case.
>
> In general, impeachment evidence has been found to be material where the witness at issue supplied the only evidence linking the defendant to the crime or where the likely effect on the witness' credibility would have undermined a critical element of the prosecutor's case. In contrast, a new trial is generally not required where the testimony of the witness is corroborated by other testimony or where the suppressed impeachment evidence merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable. [Citations omitted.]

Even assuming that defense trial counsel did not waive this claim, defendant has not established error requiring reversal. First, defendant only sought to use the federal report to impeach witnesses. However, at trial, defense trial counsel primarily impeached Jamale and suggested Jamale committed the offenses. Thus, evidence of the federal report would merely furnish an additional basis on which to impeach Jamale, whose credibility has already been shown to be questionable.

In regard to the letters from Jamale and Felicia to Ramone, there is no reasonable probability that the outcome of the proceedings would have been different had the letters been

disclosed to the defense. As explained in section II, *supra*, defendant sought the letters to impeach Jamale's credibility at trial.

Here, defendant cedes that the letters are subject to different interpretations. Further, given that defense trial counsel took every opportunity to challenge Jamale's credibility at trial, there is little adverse effect on the preparation or presentation of defendant's case. In addition, the suppressed impeachment evidence merely furnishes an additional basis on which to impeach Jamale, whose credibility has already been shown to be questionable. Therefore, reversal is not required in this regard.

IV. Waiver of the Federal Report

We again note that the lower court record reflects that defense trial counsel waived the use of discovery material. Again, defense trial counsel expressly agreed that "she has the discovery [the federal report], but will not be using that discovery." See *supra*, Section II-A. The intentional relinquishment of a known right constitutes a waiver, which extinguishes the error. *Carter, supra* at 215-216; *Dobek, supra*. A party may not seek appellate relief based upon an evidentiary error to which he contributed by plan or negligence. *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003). Here, defense counsel clearly agreed not to use the evidence, and thus, any error is extinguished.

In any event, defense trial counsel failed to object to alleged exclusion of the federal report. Accordingly, this Court reviews defendant's unpreserved claim for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). A decision on a close evidentiary question rarely can constitute plain error. *People v Gonzalez*, 256 Mich App 212, 217; 663 NW2d 499 (2003).

Here, the lower court record does not reflect that the trial court suppressed the federal report. As mentioned above, the lower court record indicates an agreement not to use the federal report. The only evidence in support of defendant's claim is defense trial counsel's post-conviction testimony that she was told by the trial court in off-the-record discussions that the trial court would not permit the use of the federal report. However, this statement is nothing more than an indication by the trial court of how it would rule in the event that defendant wanted to use the federal report. The record is clear that defense counsel elected not to use the federal report, so a formal ruling was not necessary.

Further indication that the trial court did not suppress the federal report is found in the defendant's motion for a new trial. There, defendant makes no mention of the federal report. Rather, defendant claims error in regard to the jury selection process, "late disclosure of discovery critical to the defense," and prosecutorial misconduct. In addressing the "late disclosure of discovery critical to the defense" at the hearing, defense trial counsel only mentioned the ballistic report, not the federal report or any information contained in the federal report. Indeed, only after the current defense appellate counsel was assigned to the matter is the word suppression mentioned in regard to the federal report.

Moreover, even if the trial court suppressed the federal report, reversal is not required. Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402. The credibility of witnesses is also a material issue and evidence which shows bias or prejudice of a

witness is always relevant. *Powell v St John Hospital*, 241 Mich App 64, 72; 614 NW2d 666 (2000). MRE 403 provides that, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Here, assuming the trial court suppressed the federal report, the trial court was within its discretion. The federal report's minimal probative value as unsupported impeachment evidence is outweighed by the potential for unfair prejudice. The federal report indicates, for example, that Jamale hired a hitman from New York, possibly defendant, to kill the victims. However, there is no record evidence to support this belief. Thus, the prejudice is obvious in that the federal report contains unsubstantiated beliefs. In addition, the reliability and hearsay in the federal report would lend to confusion of the issues, and even to misleading of the jury. Thus, the trial court would not have abused its discretion in excluding the federal report.

V. Motion for New Trial

Defendant argues that the trial court abused its discretion in denying his motion for adjournment.

This Court reviews the trial court's ruling on defendant's request for an adjournment or a continuance for an abuse of discretion. *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000). We also review the trial court's decision on a motion for mistrial for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572, 628 NW2d 502 (2001).

> A motion for adjournment must be based on good cause. Moreover, MCR 2.503(C) provides:
>
> (1) A motion to adjourn a proceeding because of the unavailability of a witness or evidence must be made as soon as possible after ascertaining the facts.
>
> (2) An adjournment may be granted on the ground of unavailability of a witness or evidence only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence.
>
> Thus, to invoke the trial court's discretion to grant a continuance or adjournment, a defendant must show both good cause and diligence. "Good cause" factors include "whether defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments." Even with good cause and due diligence, the trial court's denial of a request for an adjournment or continuance is not grounds for reversal unless the defendant demonstrates prejudice as a result of the abuse of discretion. [*People v Coy*, 258 Mich App 1, 18-19; 669 NW2d 831 (2003) (Citations omitted).]

Here, defendant has failed to demonstrate prejudice resulting from the trial court's decision to deny his motion for adjournment.

Defendant was arraigned on March 4, 2004, at which time a trial date was set for May 3, 2004. On April 9, defendant requested an adjournment, in part because defense trial counsel had not been provided all discovery material. On April 27, 2004, defense trial counsel picked up additional discovery, including a statement from defendant, which he denied making, and a laboratory analysis of bullets taken from the victims' bodies. On April 30, 2004, defendant filed a motion for adjournment, claiming she needed assistance in evaluating the ballistics report to cross-examine the prosecution's forensic expert. On May 3, 2004, defendant orally requested an adjournment. The trial court conducted a hearing in which defense trial counsel explained her need for adjournment. In regard to defendant's statement, the trial court indicated that an adjournment was not necessary because defendant denied making the statement. In regard to the ballistics evidence, the trial court appeared to agree with the prosecution that defense trial counsel knew of ballistics report, as she mentioned it in the preliminary examination, and it was available for her review for several weeks.

We conclude defendant has failed to establish that the trial court's denial of his motion for adjournment prejudiced him. In regard to defendant's statement, the trial court conducted a *Walker* hearing, but defendant denied making the statement. Defendant consistently denied that he made the statement, and has not shown how additional time would have assisted his defense in this regard. In regard to the ballistics evidence, defendant fails, even on appeal, to demonstrate how an adjournment to allow an expert to evaluate the ballistics report would have aided in the defense. Accordingly, because there is no showing of prejudice resulting from the trial court's decision to deny defendant's motion for adjournment, reversal is not required.

Affirmed.

/s/ Brian K. Zahra
/s/ Peter D. O'Connell