

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC RAYMONE BROOKS,

Defendant-Appellant.

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UNPUBLISHED

August 13, 2009

No. 282355

Ingham Circuit Court

LC No. 07-000172-FC

Before: Owens, P.J., and Talbot and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of one count of armed robbery, MCL 750.529. Defendant was sentenced, as a habitual third offender, MCL 769.11, to 96 to 240 months with 278 days credit for time served. We affirm.

Defendant argues that the trial court abused its discretion when it denied his motion for a new trial and evidentiary hearing. Specifically, defendant argues that because newly acquired evidence, comprised of cellular telephone records, demonstrates that his conviction was based on false and perjured testimony by the alleged victim, that he is entitled to a new trial. A trial court's decision to grant or deny a motion for a new trial is reviewed for an abuse of discretion. *People v Brown*, 279 Mich App 116, 144; 755 NW2d 664 (2008). A trial court abuses its discretion when its decision is outside the range of principled outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). The trial court's factual findings are reviewed for clear error. MCR 2.613(C); *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

A defendant is entitled to a new trial based on newly discovered evidence if the defendant demonstrates that: (1) "the evidence itself, and not merely its materiality, is newly discovered"; (2) "the evidence is not cumulative"; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial"; and (4) "the new evidence makes a different result probable on retrial." *Cress, supra* at 692. Defendant contends that because his conviction was obtained with false and perjured testimony, the trial court erred in failing to use the test articulated in *Giglo v United States*, 405 US 150; 92 S Ct 763; 31 L Ed 2d 104 (1972). However, this case is distinguishable from *Giglo* because there is no evidence that the prosecutor knowingly presented false and perjured testimony. In fact, on appeal, defendant acknowledges that the prosecutor did not knowingly present false and perjured testimony.

The newly discovered evidence in this case was defendant's cellular telephone record. The trial court concluded that defendant was not entitled to a new trial because it did not believe that the new evidence would have changed the result on retrial. Defendant contended that his cell phone records indicated that the victim phoned defendant after the alleged robbery, contrary to her trial testimony denying any such contact. However, the records put forth by defendant are verified only by defendant's own affidavit as being for his personal cell phone and there is no evidence in the record to substantiate defendant's claims that the identified cell phone numbers belong to the victim and to defendant, respectively.<sup>1</sup> As the trial court observed, even if the records are accepted as accurate, at best this evidence could have been useful to impeach the victim's testimony on this one matter, but did not serve to either substantiate or negate either the victim's or defendant's differing versions of whether an armed robbery or a soured drug deal had occurred. Further, we find that the trial court's conclusion that this evidence could have been discovered and produced with reasonable diligence at the time of trial was not in error.

In the alternative, defendant argues that the trial court erred when it refused to grant his motion for an evidentiary hearing to establish that the victim called him several times immediately following the armed robbery. However, a defendant is not entitled to an evidentiary hearing as a matter of right. See *People v Williams*, 275 Mich App 194, 200; 737 NW2d 797 (2007). Rather, it is defendant's burden to present sufficient evidence to demonstrate that an evidentiary hearing is warranted. *Id.* Because of the uncertainty and lack of verification of the records, the trial court did not err in denying this request. Further, even if the trial court had granted defendant's motion for an evidentiary hearing and defendant was able to present sufficient evidence to support his assertions regarding the phone calls, defendant would still not be able to demonstrate that the evidence could not have been obtained and produced at trial. As such, the trial court did not abuse its discretion in denying the hearing.

Defendant also contends that his trial counsel's failure to obtain his and the victim's cell phone records before trial deprived him of the effective assistance of counsel. The right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. The right to counsel is the right to have counsel effectively assist in the presentation of one's case. *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). The determination of whether a defendant received effective assistance requires a focus on the assistance actually received. *Id.* at 596. Because effective counsel is presumed, a defendant who challenges his counsel's performance bears a heavy burden of overcoming that presumption. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). To succeed on a claim of ineffective assistance of counsel, a defendant must demonstrate (1) trial counsel's actions fell below that of a reasonably competent attorney when objectively viewed and (2) but for trial counsel's unreasonable conduct, there was a reasonable probability the outcome of the trial would have been different. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). Because neither a

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<sup>1</sup> The records indicate they are for cellular services for a "John Doe" who is listed as having a different birth date than defendant.

*Ginther*<sup>2</sup> nor evidentiary hearing was conducted in this case, our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

Contrary to defendant's argument, the trial court did not err when it determined that his counsel's failure to produce the victim's cell phone records at trial did not deprive him of effective assistance of counsel. The record reflects that defendant requested that his trial counsel obtain the victim's cell phone records on August 15, 2007, and that defendant's trial counsel indicated that he would use his best efforts to secure them. However, defendant concedes that he provided counsel with the incorrect phone number. Consequently, defendant has failed to articulate a substantial basis for his argument that he was deprived of effective assistance of counsel because his counsel failed to procure the wrongly identified records.

Finally, defendant contends that he was deprived of a fair trial because of statements made by the prosecutor during closing arguments. Specifically, defendant argues that during closing and rebuttal arguments, the prosecutor indirectly commented on defendant's failure to testify at trial. Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

When viewed in context, the prosecutor's comments did not allude, either directly or indirectly, to defendant's failure to testify at trial. Rather, the prosecutor was challenging the testimony of two witnesses based on the fact that only defendant and the victim had personal knowledge of how the events actually transpired. A prosecutor may argue from the facts in evidence that the testimony of a witness is not credible. *People v Dobek*, 274 Mich App 58, 67; 732 NW2d 546 (2007). We reject the implication that this legitimate challenge to the credibility of these witnesses comprised either a surreptitious or inappropriate comment regarding defendant's exercise of his right not to testify. Consequently, the comment did not comprise misconduct by the prosecutor.

Affirmed.

/s/ Donald S. Owens  
/s/ Michael J. Talbot  
/s/ Elizabeth L. Gleicher

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<sup>2</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).