STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 2, 2010
v	No. 286957 Wayne Circuit Court
ANGELO LAMONT WISE, Defendant-Appellant.	LC No. 07-021351-FC

Before: Servitto, P.J., and Fort Hood and Stephens, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of first-degree felony-murder, MCL 750.316; armed robbery, MCL 750.529; felon in possession of a firearm, MCL 750.224f; carrying a concealed weapon, MCL 750.227; and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life imprisonment for the first-degree murder conviction, 50 to 75 years' imprisonment for the armed robbery conviction, 5 to 20 years' imprisonment for the felon in possession and for the concealed weapon convictions, and two years' imprisonment for the felony-firearm conviction. Defendant was sentenced as a fourth habitual offender, MCL 769.12. We affirm.

FACTS

In the early morning hours of September 9, 2007, defendant went to an abandoned house in the City of Detroit. Matthew McMullen and Cordell Coleman had been selling narcotics out of the home for some time, and defendant apparently purchased narcotics from McMullen. Defendant, whom McMullen was familiar with from prior drug transactions and because he resided only a few doors from McMullen's mother, returned to the home a second time that morning with a gun and robbed McMullen and Coleman of their money, drugs, and other items. During the robbery, defendant shot and killed Coleman.

A. DUE DILIGENCE UNDER MCL 767.40a

Defendant argues that he is entitled to a new trial because the trial judge improperly excused the prosecution from producing an endorsed witness, Freddie Simmons, at trial. We disagree.

Normally, a trial court's determination of due diligence is reviewed for an abuse of discretion. *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004). However, unpreserved claims, such as this one, are reviewed for plain error, which means defendant has the burden to show that (1) an error occurred, (2) the error is plain or obvious; and, (3) the error affected a substantial right. *People v Cross*, 281 Mich App 737, 738; 760 NW2d 314 (2008).

Under MCL 767.40a, the prosecution must notify a defendant of all known res gestae witnesses and all witnesses that the prosecution intends to produce at trial. *People v Cook*, 266 Mich App 290, 295; 702 NW2d 613 (2005). "A prosecutor who endorses a witness under MCL 767.40a(3) is obliged to exercise due diligence to produce that witness at trial." *Eccles*, *supra* at 388. But "[t]he inability of the prosecution to locate a witness listed on the prosecution's witness list after the exercise of due diligence constitutes good cause to strike the witness from the list." *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000).

Before trial, Simmons was apparently in jail and the prosecutor made arrangements to have Simmons brought to court to testify. However, prior to jury selection, the prosecution informed the trial court that Simmons was no longer in custody and that several attempts to serve a subpoena had been unsuccessful. The trial judge thus agreed to sign a witness detainer order, and Simmons was located and brought to court by the police. Simmons was not called to testify that first day, and though Simmons was ordered to return the following day, he failed to appear.

After the trial was adjourned on the second day, Officer Sullivan, with the assistance of witness Matthew McMullen, spent the next several hours, until 9:00 p.m., actively trying to locate Simmons. Additionally, both a special unit based out of the Detroit Police Department's Northeastern District and the Fugitive Apprehension Team attempted to locate Simmons. All of these attempts were unsuccessful. Even a cell phone number that the police got from Simmons's mother did not prove helpful when the person answering it hung up once the police caller identified himself.

Defendant failed to prove that the trial court's determination that the prosecution exercised due diligence was erroneous, let alone how it would have been a "plain or obvious" error. Defendant maintains that the prosecution should have done more to secure the presence and testimony of Simmons. However, due diligence is an attempt to do everything reasonable, not everything possible, in obtaining the presence of a witness. *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988). As such, defendant failed to prove how the police efforts on behalf of the prosecution were plainly unreasonable.

B. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Defendant argues, in his Standard 4 brief, that he was denied the effective assistance of counsel at trial. We disagree.

The determination of 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). The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to the effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* Our review of this unpreserved issue is

limited to errors apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

Defendants have the guaranteed right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Aceval (On Remand)*, 282 Mich App 379, 386; 764 NW2d 285 (2009). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc*, *supra* at 578. Generally, to establish an ineffective assistance of counsel claim, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Davenport*, 280 Mich App 464, 468; 760 NW2d 743 (2008). However, such performance must be measured without the benefit of hindsight. *Bell*, *supra* at 698; *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant first argues that his trial counsel was ineffective when she failed to properly cross-examine or impeach the medical examiner's testimony, which supposedly differed from the examiner's written report. The argument is meritless. Although not introduced at trial, the medical examiner's report was admitted at the preliminary examination. The salient portion described the bullet's path into the victim, Coridell Coleman, as being "rightward, upward, [and] backward." Dr. Boguslaw Pietak testified regarding the bullet's trajectory as follows:

> *A.* [I]n this particular case the wound track was from front to back, left to right and backward. . . .
>
> * * *
>
> *Q.* Okay. And in an upward fashion –
>
> [*Defense Counsel:*] Objection, your Honor.
>
> [*Prosecutor:*] It wasn't upward[?]
>
> [*Defense Counsel:*] This Doctor didn't testify to upward. He said front to back, left to right, backwards. Unless I missed it.
>
> *Q.* Did you?
>
> *A.* I believe I said upward.
>
> *Q.* I thought so. Okay. Well, let me ask you, was there an upward – in this gunshot wound, the track, you described it in an upward direction?
>
> *A.* Yes, I did.
>
> *Q.* And what is it made from?
>
> *A.* It's made from the point of the entrance wound to the point where the bullet was recovered. It was higher up in the body.

It is clear from the record that the trial testimony did not differ from the contents of the report. At both proceedings, the path of the bullet was ultimately described as rightward, backward, and upward. Dr. Pietak removed any confusion or misunderstanding at trial as to the bullet's path by testifying that he thought he had said "upward." Thus, defendant fails to show how there was any inconsistency upon which to impeach. Furthermore, defense counsel actually did, to some extent, successfully impeach the doctor's testimony by getting the doctor to admit that he could not provide an actual angle of that upward path. Accordingly, defendant failed to show how his trial counsel failed to perform at an objective standard of reasonableness under prevailing professional norms.

Defendant next argues in his Standard 4 brief that his trial counsel failed to have the medical examiner's report admitted into evidence. This argument is meritless as well. Decisions regarding what evidence to present are matters of trial strategy that will not be second-guessed by this Court. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Moreover, for the same reasons outlined above, the report did not differ from Dr. Pietak's trial testimony; thus, it would not have had the impeaching impact that defendant appears to desire. Accordingly, trial counsel was not ineffective in failing to get the contents of the report before the jury.

Third, defendant argues that his trial counsel was ineffective when she failed to object to numerous instances of prosecutorial misconduct. Defendant's argument can be summarized as such: McMullen was lying on the witness stand when he described defendant as shooting Coleman; thus, since the prosecutor was actively using and relying on this perjured testimony, the prosecutor engaged in misconduct. Prosecutors may not knowingly use false testimony, and prosecutors have a duty to correct false evidence. *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998). However, there is nothing in the record to suggest that McMullen lied on the witness stand and, even if he was lying, that the prosecution knew the testimony was false. Moreover, the fact that McMullen had not been entirely truthful when first questioned by police was addressed at length during the trial. Therefore, counsel's objection would have been futile, and counsel's failure to make a meritless objection does not constitute ineffective assistance of counsel. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Fourth, defendant argues that he was deprived of the effective assistance of trial counsel when his trial counsel failed to conduct a thorough investigation and failed to interview Simmons and McMullen. There is nothing in the lower court record to suggest what trial counsel would have uncovered if a different investigation had taken place. Similarly, there is nothing in the lower court record to suggest what an interview with McMullen or Simmons would have yielded. Therefore, this argument fails.

Fifth, defendant argues that his trial counsel should have called defense witnesses. Specifically, defendant claims that Angela Smith and Tracy Payne were two witnesses who would have established that at 3:00 a.m., the alleged time of the shooting, defendant was with them. Defendant's argument fails for several reasons. First, there is nothing in the record to support defendant's claim of how these witnesses would have testified. Second, counsel's decisions regarding calling or questioning witnesses are presumed to be matters of trial strategy. *Rockey, supra* at 76. The prosecution produced a statement that defendant made to the police where defendant admitted to getting into a struggle with McMullen over the gun when it

accidentally discharged, shooting Coleman. It is simple enough to understand why defense counsel would not want to call witnesses that would completely undermine the description of the event that defendant already told the police.

Sixth, defendant argues that trial counsel was ineffective by failing to investigate facts surrounding the evidence classification process of the now-closed Detroit Police Firearms Unit (DPFU). Once again, there is nothing in the record to suggest what such an investigation would have uncovered; therefore, defendant's claim fails. Moreover, there were no testing results from the DPFU that were admitted into evidence. All that was stated was that the 0.32 caliber casing found at the scene was consistent with being manufactured by a company in Brazil. The same report indicated that submission of a suspected weapon would be necessary for possible association with the casing. Thus, even if there were some inherent or systemic flaws with the evidence classification process used by the DPFU, they would have been irrelevant to this case since no meaningful testing results were derived from any DPFU testing.

C. OMITTED JURY INSTRUCTIONS

Defendant also argues in his Standard 4 brief that the trial court erred in not providing jury instructions pertaining to manslaughter, self-defense, and "lost evidence." We disagree.

A trial court must instruct the jury with respect to necessarily included lesser offenses *upon a request for such instructions* so long as "the charged offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Smith*, 478 Mich 64, 69; 731 NW2d 411 (2007). Here, first, no such request was made. Second, a rational view of the evidence would not support any lesser-included manslaughter instruction, whether voluntary or involuntary.

For voluntary manslaughter, the killing must have been an intentional killing in the heat of passion caused by adequate provocation. *People v McMullan*, 284 Mich App 149, 156; 771 NW2d 810 (2009). The evidence presented at trial was that defendant intentionally shot Coleman during an armed robbery. There was no evidence of any heat of passion or adequate provocation to support the offense of voluntary manslaughter.

The relevant elements of involuntary manslaughter consist of (1) the unintentional killing of another, without malice, and (2a) while doing some unlawful act not amounting to a felony or (2b) while negligently doing some lawful act.[1] *People v Herron*, 464 Mich 593, 604; 628 NW2d 528 (2001). Defendant relayed to the police, during his custodial interrogation, that McMullen produced a gun and attempted to rob *him* when a mutual struggle over the gun caused it to accidentally fire, shooting Coleman. Even if one considers defendant's version of events, it clearly does not implicate either prong of involuntary manslaughter. Defendant struggling over a gun that was brandished by McMullen would not have been an unlawful act, and the act would not have been negligent. Thus, defendant would not have been responsible at all for Coleman's

[1] A third basis for involuntary manslaughter, which is not implicated in this case, exists where the death was the result of the negligent omission to perform a legal duty. *People v Herron*, 464 Mich 593, 604; 628 NW2d 528 (2001).

death.[2] A manslaughter instruction would not have been appropriate under any version presented at trial, and there was no error by failing to give the instruction.

Likewise, no error was introduced when a self-defense instruction was not provided. Self-defense necessarily requires that a defendant acted intentionally, but the circumstances justified his actions. *People v Heflin*, 434 Mich 482, 503; 456 NW2d 10 (1990). The only two views of the evidence have defendant either (1) intentionally killing Coleman during a robbery without any justification or (2) participating in a struggle where Coleman was unintentionally killed. Since no reasonable view of the evidence would support a justified, intentional killing, there was no error in failing to provide the self-defense instruction.

Defendant also maintains that he should have been given a "lost evidence" instruction. He does not specify what instruction he believes he should have been given. Presumably, he is referencing the instruction that "where the prosecution fails to make reasonable efforts to preserve material evidence, the jury may infer that the evidence would have been favorable to defendant." *People v Davis*, 199 Mich App 502, 514-515; 503 NW2d 457 (1993). However, this instruction is only applicable when the prosecution acted in bad faith in failing to produce the evidence. *Id.* at 515. Here, defendant offers nothing in his brief to support a finding of bad faith on the part of the prosecution or the police with respect to the missing bullet. The bullet was recovered during the autopsy and was lost sometime afterward. Without any proof of bad faith, there was no error in failing to provide this instruction.

D. PROSECUTORIAL MISCONDUCT

Defendant alleges that five specific instances of prosecutorial misconduct deprived him of a fair trial. We disagree.

Generally, claims of prosecutorial misconduct are reviewed de novo. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). The test is whether a defendant was denied a fair and impartial trial due to the actions of the prosecutor. *Rodriguez*, *supra* at 30. However, unpreserved claims are reviewed for plain error, which means defendant has the burden to show that (1) an error occurred, (2) the error is plain or obvious, and (3) the error affected a substantial right. *Cross*, *supra* at 738. Reversal is warranted only "if the defendant is actually innocent or the error seriously undermined the fairness, integrity, or public reputation of the trial." *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006). Where a timely jury instruction would have been adequate to cure any defect, reversal is unwarranted. *Ackerman*, *supra* at 449.

[2] It is important to note that the jury *was* instructed that if this accident theory was true, then defendant should be acquitted of murder.

Defendant first argues that the prosecutor made improper remarks during opening statement when the prosecutor said, "[Defendant] has plead [sic] not guilty to those crimes." Defendant maintains that this statement went beyond the scope of permissible opening statements because it was not confined to the issues in the case, such as what evidence the prosecutor believes will be admitted during the trial. A prosecutor's remarks are evaluated in the context of the evidence presented and in light of defense arguments. *Rodriguez*, *supra* at 30. However, defendant fails to show how this statement deprived him of a fair trial. Aside from the fact that the statement was undeniably true, the prosecutor was merely explaining the criminal judicial process to the jury, i.e. that juries settle disputes. He then commented that defendant was charged with certain crimes, and defendant denied he was guilty. In the prosecutor's own words, "Therefore, there's a dispute." There was no prosecutorial misconduct in this statement, let alone any conduct that deprived defendant of a fair trial.

Defendant next argues that the prosecutor misled the jury when he mischaracterized the testimony of Dr. Pietak. Specifically, defendant claims that the prosecutor "boxed the witness" into testifying that the trajectory of the bullet had an upward component. This argument lacks merit as well. It is well established that "prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The in-court exchange was presented, *supra*, Part B. The prosecutor thought he heard Dr. Pietak state "upward" with regard to the description of the bullet path. After defense counsel's objection, the prosecutor asked Dr. Pietak to clarify if there was an upward component. Dr. Pietak thought he stated upward previously and confirmed in now-unambiguous terms that the bullet traveled in an upward path through Coleman's body. Dr. Pietak then went into more detail regarding this conclusion, explaining that the bullet was retrieved from a "higher" location than the entrance wound. Again, defendant has failed to show how the questioning was improper or how it denied him a fair trial.

Defendant next argues that the prosecutor knowingly relied on the perjured testimony of McMullen in seeking defendant's convictions. This issue was addressed, *supra*, Part B, in the context of defendant's claim of ineffective assistance of counsel. As noted earlier, there was nothing on the record to suggest that McMullen lied on the witness stand and, even if he was lying, that the prosecution knew the testimony was false. Thus, there was no misconduct, and defendant was not denied a fair trial.

Next, defendant argues that the prosecutor intentionally wanted to mislead the jury by combining the photographs that were taken by an evidence tech team at 4:20 a.m. with those that were taken by a different evidence tech team at 4:30 p.m. Even if for some reason various photos that were taken at the different times were commingled, however, it is not clear how this would have confused the jury,[3] nor is it clear that the prosecutor was not using good-faith efforts to get the evidence admitted. The jury is fully capable of looking at the exhibits and seeing what

[3] In fact, any confusion would have *benefited* defendant because any discrepancy between the photos and the various testimony (that no casing was seen or found in the morning, but the ejected casing was discovered in the afternoon) would have added suspicion surrounding the police conduct.

actually is represented in the photographs without relying on what any witness or prosecutor has to say in that regard. See *Schreiner v American Cas Co*, 1 Mich App 43, 48; 134 NW2d 383 (1965) (stating that jurors have the same opportunity to form opinions as witnesses from viewing photographs). Accordingly, defendant was not denied a fair trial, and his argument fails.

Last, defendant argues that the prosecution committed misconduct by having Officer Brett Sojda of the Michigan State Police testify. Once again, a prosecutor's good-faith efforts to admit evidence cannot constitute misconduct. *Noble*, *supra* at 660. Here, the prosecution originally had Officer David Pauch on its witness list. But, at trial, the prosecutor and defense counsel stipulated to allow Officer Sojda's report and findings in lieu of Officer Pauch's testimony. Defendant has failed to show how the prosecutor was not acting in good faith. Moreover, defendant's stipulation waived any claim of error regarding the appropriateness of having Officer Sojda testify. *Begin v Michigan Bell Telephone Co*, 284 Mich App 581, 585; 773 NW2d 271 (2009). Thus, defendant's claim of prosecutorial misconduct fails.

E. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Defendant argues that he was denied the effective assistance of appellate counsel. We disagree.

"[T]he test for ineffective assistance of appellate counsel is the same as that applicable to a claim of ineffective assistance of trial counsel." *People v Uphaus (On Remand)*, 278 Mich App 174, 186; 748 NW2d 899 (2008). Hence, defendant must prove that appellate counsel's decision to not raise certain claims (1) fell below an objective standard of reasonableness and (2) prejudiced his appeal. *Id.* Defendant has shown neither.

Appellate counsel may legitimately ignore weak or frivolous arguments in order to focus on genuine arguments that are more likely to succeed. See *id.* at 186-187. Here, the issues that defendant wanted raised, as noted in his Standard 4 brief and addressed on appeal, *supra*, Parts B-D, were not meritorious. There was little legal principle behind all of defendant's Standard 4 issues, including the ineffective assistance of trial counsel claim. As such, it is clear that appellate counsel's decision to not pursue these other claims, including not moving for a *Ginther*[4] hearing, did not fall below an objective standard of reasonableness.

Furthermore, defendant was not prejudiced by appellate counsel's failure to pursue these other claims. Even if appellate counsel did raise these other claims, the efforts would have been unsuccessful. In other words, failing to follow up on defendant's Standard 4 claims, even if characterized as falling below an objective standard of reasonableness, did not affect the disposition of defendant's convictions. Defendant also mentions in his amended Standard 4 brief that appellate counsel should have assisted him in procuring the lower court's transcripts. However, from defendant's Standard 4 brief, it appears that the transcripts were eventually provided since excerpts were attached to his brief. As a result, defendant cannot prove that he

[4] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

suffered any prejudice. Therefore, defendant's claim of ineffective appellate counsel assistance fails.

Affirmed.

/s/ Deborah A. Servitto
/s/ Karen M. Fort Hood
/s/ Cynthia Diane Stephens