STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 18, 2010
v	No. 287470 Wayne Circuit Court
CHOYA ANTHONY TINSLEY, Defendant-Appellant.	LC No. 06-014041-FC

Before: TALBOT, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life imprisonment for the murder conviction and a concurrent prison term of 171 months to 20 years for the assault conviction, to be served consecutively to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arose from the October 20, 2006, shooting death of Charles Mosley and the nonfatal shooting of Mosley's girlfriend, Darlene Russell. Both victims were shot while sitting inside an automobile at a gas station in Detroit. Russell identified defendant as the shooter. According to Russell, defendant and an accomplice previously confronted both of them at Mosley's home on October 1, 2006, and threatened them with guns. Defendant was separately charged with felonious assault and felony-firearm in connection with the October 1 incident.

This case was originally consolidated with the felonious assault case. At a previous trial in July and August 2007, the jury found defendant guilty of felonious assault and felony-firearm in connection with the October 1 incident, but was unable to reach a verdict with respect to the charges in this case, relating to the October 20 incident. Defendant was retried on those charges in May 2008. Defendant presented an alibi defense and argued that witness descriptions of the shooting were inconsistent with his appearance on the date of the offense. The jury found defendant guilty as charged.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant, who was represented by a different attorney at his second trial, argues that defense counsel was ineffective because he did not call several witnesses who testified at his first trial. Because defendant did not raise this issue in a posttrial motion in the trial court, our review is limited to mistakes apparent from the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). Because each of the witnesses in question testified at defendant's first trial, a record of the testimony they could have provided is available, thus permitting review of this issue.

To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied his right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolin*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996). Defendant must also show that the proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Marcus Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Defendant must overcome the strong presumption that his attorney exercised sound trial strategy, *id*. at 368, and show that the failure to call a witness or present other evidence deprived him of a substantial defense, see *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). "A substantial defense is one that might have made a difference in the outcome of the trial." *Id*.

Defendant argues that defense counsel was ineffective for failing to call Shante Jeffries, a 911 operator, to impeach Russell's testimony that she was not asked to identify or provide a description of the shooter during a 911 call that she made immediately after the shooting. At defendant's first trial, Jeffries testified that 911 operators are trained to ask specific questions, including the identity of a crime suspect when a crime is reported. We conclude that the absence of Jeffries's testimony did not affect the outcome of defendant's trial. Jeffries was not the 911 operator who took Russell's call, and she did not have personal knowledge of either the shooting incident or the 911 call that Russell made after the shooting. Although Jeffries stated at defendant's first trial that 911 operators are trained to ask a crime victim to identify or provide a description of a suspect, she admitted that, because of the circumstances, an operator may not have an opportunity to ask that question. Thus, Jeffries's testimony would not have established whether Russell was actually asked if she knew the identity of the gunman. In addition, regardless whether Russell may have been asked that question, there was no evidence of a responsive answer (either a statement that Russell did not know or see the suspect, or a statement identifying or describing the suspect). Thus, there is no basis for concluding that the 911 call had any effect on the jury's verdict. For these reasons, defendant was not prejudiced by defense counsel's failure to call Jeffries as a witness at defendant's trial.

Next, defendant has not overcome the presumption that defense counsel's failure to call defendant's sister, Chakan Tinsley, at the second trial was reasonable trial strategy. Chakan was previously involved in a relationship with the decedent Mosley. Her purpose for testifying would have been to rebut testimony offered by Mosley's daughter, Chelsea, who testified that the relationship between Chakan and Mosley ended on bad terms. At defendant's first trial, however, Chakan also testified that Mosley continued to contact her after they broke up and that he left several threatening messages. Although the prosecutor's theory at trial was that defendant shot Mosley in part because Mosley was pursuing criminal charges in connection with the October 1 assault, that assault was allegedly motivated in part by Mosley's conduct toward defendant's sister Chakan. Chakan's testimony would have done little to support the defense theory of alibi and misidentification, but would have provided an additional motive for defendant to act out against Mosley. Under the circumstances, it was not unreasonable for defense counsel to decide not to call Chakan at defendant's trial as a matter of strategy.

Similarly, defendant has not established that defense counsel was ineffective for failing to call Jeffrey Hicks at defendant's trial. At the first trial, Hicks testified that he witnessed the shooting while inside a van with Mario Jackson, and that defendant was not the shooter. However, Hicks's credibility was impeached, he appeared uncooperative, and evidence was presented suggesting that Hicks had fabricated his testimony. At defendant's second trial, defense counsel called Jackson, who testified to the events that he and Hicks allegedly witnessed, but counsel did not call Hicks. Jackson testified that defendant was not the shooter. Defense counsel had the benefit of the transcript from the first trial to evaluate how the prosecution would cross-examine Hicks if he testified at defendant's trial. Defendant has not overcome the presumption that, given Hicks's credibility problems, defense counsel reasonably decided not to call Hicks at the trial and to instead rely only on the testimony of Jackson.

Likewise, defendant has not established that defense counsel's decision not to call defendant's former attorney was unreasonable. Defendant's attorney would have testified that he met with defendant in his professional capacity on the day after the shooting and that, contrary to witness descriptions of the shooting suspect, defendant had a full facial beard. Defense counsel reasonably may have decided not to call defendant's former attorney because other defense witnesses had testified regarding defendant's appearance on the date of the shooting, and he did not want the jury to draw any negative inferences from the fact that defendant met with his attorney in a professional capacity.

Defendant also argues that defense counsel was ineffective for not requesting a missing-evidence instruction in connection with the prosecution's failure to preserve the recordings of Russell's 911 calls. As further explained in section II, *infra*, a missing-evidence instruction was not warranted because the recordings were not destroyed in bad faith. Regardless, the record discloses that defense counsel requested that the trial court give a missing-evidence instruction in relation to the 911 recordings, but the trial court denied counsel's request. Therefore, this ineffective assistance of counsel claim is without merit.

We also reject defendant's request that this Court remand the case for an evidentiary hearing on defendant's ineffective assistance of counsel claims. Defendant's remand motions have previously been addressed by this Court, and we decline to revisit those decisions. At any rate, because the available record is sufficient to review defendant's claims, a remand is not necessary. See *People v Simmons*, 140 Mich App 681, 685-686; 364 NW2d 783 (1985).

II. MISSING EVIDENCE

Defendant argues that the trial court erred in denying his motion to dismiss the case for failure to preserve the recording of Russell's 911 call after the shooting, and also erred by failing to give a jury instruction that would have allowed the jury to infer that the evidence would have been unfavorable to the prosecution. We disagree.

At an evidentiary hearing on this issue, testimony was presented that the officer in charge initially submitted a request on November 7, 2006, for copies of all 911 calls related to the October 20 shooting. When he did not receive a response to that request, he resubmitted his request on December 7, 2006, but inadvertently listed the incorrect date of November 20 instead of October 20. He did not discover his mistake until several weeks later. He submitted a third request on January 29, 2007, but learned that recordings are automatically purged from the system after 90 days and, therefore, the recordings of any 911 calls on October 20 were no longer available.

This Court reviews a trial court's decision regarding a motion to dismiss for an abuse of discretion. *People v Stephen*, 262 Mich App 213, 218; 685 NW2d 309 (2004). Additionally, "a trial court's determination whether a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion." *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006) (internal citation and quotation marks omitted). To the extent that a question of law is involved, it is reviewed de novo. *Id*.

The prosecution is required to preserve evidentiary material useful to the defendant. *People v Leigh*, 182 Mich App 96, 97-98; 451 NW2d 512 (1989). As explained in *Leigh*:

> [W]hen the state fails to disclose to the defendant material exculpatory evidence, the good or bad faith of the state is irrelevant to a claim based on loss of evidence attributable to the government. . . . Where, however, the state has failed 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, the failure to preserve the potentially useful evidence does not constitute a denial of due process unless a criminal defendant can show bad faith on the part of the police. [*Id.* at 98.]

A defendant also has a due process right of discovery to certain information in the prosecution's possession under *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). This right requires the disclosure of evidence that might lead a jury to entertain a reasonable doubt about the defendant's guilt. *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). The disclosure requirements of *Brady* apply to evidence within the prosecutor's possession regardless of whether the defendant requests the evidence. *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994). This right of disclosure applies to impeachment evidence as well as exculpatory evidence. See *Lester*, 232 Mich App at 281.

> In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any 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. [*Id*. at 281.]

A prosecutor's failure to disclose evidence requires reversal only if the evidence was material. *People v Harris*, 261 Mich App 44, 49; 680 NW2d 17 (2004); *Lester*, 232 Mich App at 281-282.

In this case, the evidence did not show that the police or prosecution failed to preserve or destroyed the 911 recordings in bad faith. Rather, the evidence showed that a request for the recordings was timely made, but that the recordings could not be produced because of a clerical mistake in identifying the correct date, and that the recordings were thereafter purged from the system in accordance with department policy. In addition, the *Brady* rule of disclosure applies only to exculpatory evidence in the prosecution's possession. Here, the evidence showed that the prosecution never possessed the 911 recordings. Moreover, there is no indication that the recordings would have been exculpatory. Russell testified that the 911 operator did not ask her to identify or provide a description of the shooting suspect and that she did not provide that information during her call. Further, independent evidence was presented that, shortly after the shooting, Russell told a responding emergency medical technician that the shooter was the same man who previously appeared at Mosley's home and confronted Mosley with a gun, and she conveyed that same information to an officer who questioned her at the hospital. In light of this evidence, as well as Russell's testimony denying that she gave a description of the shooter to the 911 operator, it is not reasonably probable that the 911 recording, had it been preserved and produced, would have affected the outcome of the trial. Accordingly, the trial court did not err in denying defendant's motion to dismiss.

Further, because the 911 recordings were not destroyed in bad faith, defendant was not entitled to a missing-evidence jury instruction that would have allowed the jury to find that the evidence would have been unfavorable to the prosecution. *People v David Davis*, 199 Mich App 502, 514-515; 503 NW2d 457 (1993).

III. DEFENDANT'S STANDARD 4 BRIEF

Defendant raises several issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, none of which have merit.

A. PROSECUTOR'S CONDUCT

Defendant argues that it was improper for the prosecutor to argue that defendant's accomplice in the October 1 incident was Chivas Dooley, and to also argue that Dooley was the driver of the getaway vehicle after the October 20 shooting. As defendant concedes, he did not object to the prosecutor's arguments at trial and, therefore, this issue is not preserved. Accordingly, to obtain relief, defendant must demonstrate a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999); *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

The prosecutor is permitted to argue the evidence and reasonable inferences from the evidence. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Testimony was presented that Russell identified Dooley as the second person who was at Mosley's house on October 1. Evidence was also presented that defendant and Dooley were together on October 20,

and witnesses testified that after the October 20 shooting, the gunman, whom Russell identified as defendant, was observed entering a moving vehicle that then sped off. Given this evidence and testimony, it was not improper for the prosecutor to argue that Dooley was the person who was with defendant at Mosley's house on October 1, and to further argue that Dooley was the driver of the vehicle that defendant entered after the shooting.

Defendant also argues that the prosecutor elicited false testimony that an arrest warrant had been issued for Dooley in connection with the October 1 incident. A prosecutor's knowing presentation of false testimony may constitute grounds for reversal. *People v Canter*, 197 Mich App 550, 558; 496 NW2d 336 (1992). Defendant relies on a letter from his attorney informing him that, after defendant was convicted, his attorney's investigation revealed that there were no outstanding or pending felony warrants for Dooley. According to the trial testimony, a warrant was obtained for Dooley in connection with the October 1 assault of Mosley, but at the request of the prosecutor's office, it was never executed. Thus, Dooley was never arrested or charged. Evidence that no outstanding or pending felony warrants for Dooley were discovered after defendant's trial does not establish that the trial testimony was false, let alone that the prosecutor knew that it was false. Accordingly, defendant has not established a plain error.

Nor has defendant established plain error with regard to the prosecutor's comments concerning Russell's and Dooley's testimony. The comments were reasonably based on the evidence and inferences arising from the evidence and did not constitute an impermissible disparagement of defense counsel. *Bahoda*, 448 Mich at 282.

B. RES GESTAE WITNESSES

Defendant also argues that he was denied a fair trial by the prosecutor's failure to endorse and call two res gestae witnesses, Lonnie Scott and Johnnie Baldwin. Because defendant did not object to the prosecutor's failure to endorse or call these witnesses, our review of this issue is limited to determining whether plain error occurred that affected defendant's substantial rights. *Carines*, 460 Mich at 763.

MCL 767.40a no longer requires the prosecution to produce all res gestae witnesses. The statute only requires the prosecutor to disclose the names of known res gestae witnesses and to produce those witnesses that it endorses. See *People v Perez*, 469 Mich 418-419, 420; 670 NW2d 655 (2003). The prosecutor must attach a list of known res gestae witnesses to the information and has a continuing duty to disclose the names of further res gestae witnesses as they become known. MCL 767.40a(1) and (2). Where a witness is endorsed, the prosecutor is required to exercise due diligence to produce that witness for trial. *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004). If a witness is not endorsed, a defendant is permitted to call that witness on his own; if a defendant is unable to locate a witness, he may request "reasonable assistance, including investigative assistance, as may be necessary to locate and serve process upon a witness." MCL 767.40a(5).

The record indicates that Scott was identified as a possible witness at defendant's first trial. Thus, defendant had notice of his existence and his possible res gestae status. Further, it is clear that defendant had notice of Baldwin's existence because defendant identified Baldwin as a witness on defendant's witness list for the second trial. However, neither witness was endorsed by the prosecution, so the prosecutor did not have an obligation to call either witness at trial.

Further, there is no indication in the record, nor does defendant assert, that defendant ever requested assistance in producing either Scott or Baldwin for trial. Absent a proper request, the prosecution had no duty to provide assistance in locating or producing the witnesses for trial. Accordingly, defendant has failed to show a plain error.

C. SUPPRESSION OF EVIDENCE

Next, defendant argues that he is entitled to a new trial because the prosecutor intentionally suppressed evidence that may have assisted in his defense. Once again, defendant concedes that this issue was not raised below and, therefore, is not preserved. Therefore, review is under the plain-error doctrine. *Carines*, 460 Mich at 763.

Defendant points to nothing *in the record* in support of his claim that a photograph of the crime scene that was introduced at defendant's first trial was somehow suppressed or lost before defendant's second trial. Furthermore, the record discloses that defendant requested, and the prosecutor agreed to provide, copies of all photographs during discovery. It appears that there was some delay in producing the photographs during discovery, but defendant does not assert that he did not eventually receive this discovery material or explain why he could not have introduced any photographs that were not introduced by the prosecution at trial. On this record, defendant has not established a plain error.

Defendant also complains that the prosecutor failed to disclose that prosecution witness Eric Pringle was offered consideration for his trial testimony. Defendant has submitted an affidavit from Pringle in which he avers that promises were made "concerning some unpaid parking tickets and a job with the Detroit Police Department" in exchange for his testimony at trial. In *People v McMullan*, 284 Mich App 149, 157; 771 NW2d 810 (2009), aff'd ___ Mich ___; 2010 WL 4356354 (2010), this Court observed:

> Under MCR 6.201(B)(5), a prosecutor has a duty to disclose the details of a witness's plea agreement, immunity agreement, or other agreement in exchange for testimony. Similarly, pursuant to *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), the prosecutor must disclose any information that would materially affect the credibility of his witnesses. To establish a *Brady* violation, a defendant must prove
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> "(1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any 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." [Citations omitted.]

At trial, Pringle testified that he was in his vehicle and waiting to turn into the gas station where the shooting occurred. He heard gunshots and saw a man with a gun running away. He gave a description of the man to the police, but never identified defendant as the gunman. In defense counsel's closing argument, counsel argued that Pringle's testimony was not damaging because he never identified defendant as the shooter. Counsel argued that Pringle could identify the shooter, but did not see him in the courtroom, thereby excluding defendant as the shooter.

Even if we were to credit Pringle's affidavit, a new trial is not required. Because Pringle never identified defendant as the shooter, and in fact provided testimony that seemed to exclude defendant as the shooter, there is no reasonable probability that any impeachment of Pringle's testimony would have changed the outcome of this case.

D. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that defense counsel was ineffective for (1) not moving for a mistrial on the basis of the allegedly missing photograph discussed in section III(C), *supra*, and (2) failing to object to the testimony about Dooley's alleged involvement in the case or the alleged arrest warrant for Dooley, as discussed in section III(A), *supra*. As previously discussed, defendant has not established factual support for his claim that the photograph was either lost or suppressed. Further, the prosecutor's remarks about Dooley's alleged involvement were not improper, and the record does not indicate that the testimony regarding an arrest warrant for Dooley was false. Accordingly, defendant has not established that counsel's failure to move for a mistrial, or to object to the challenged testimony, was objectively unreasonable. *Pickens*, 446 Mich at 338.

Defendant also argues that counsel was ineffective for not objecting to the prosecutor's comments during rebuttal argument regarding Russell's identification of defendant as the shooter. The remarks were both responsive to defense counsel's closing argument and supported by testimony that Russell had identified the shooter as the same person who confronted Mosley on October 1, whom Russell identified as defendant. Thus, the remarks were not improper. *Bahoda*, 448 Mich at 282; *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997); *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Because the remarks were not improper, defense counsel was not ineffective for failing to object. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Affirmed.

/s/ Michael J. Talbot
/s/ Patrick M. Meter
/s/ Pat M. Donofrio