# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>June 19, 2012 |
| v | No. 303941<br>St. Clair Circuit Court |
| BILLY GENE DRAKE,<br><br>Defendant-Appellant. | LC No. 10-002434-FC |

Before: SERVITTO, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree premeditated murder, MCL 750.316(1)(a); assault with intent to murder, MCL 750.83; and possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b. He was sentenced as a third habitual offender, MCL 769.11, to concurrent terms of life in prison for the murder conviction and 40 to 80 years' imprisonment for the assault with intent to murder conviction, to be served consecutive to a two-year term of imprisonment for the felony firearm conviction. We affirm.

Defendant's convictions arise from the June 17, 2010 shootings that claimed the life of Chester Chapman and injured Chester's cousin, Jerry Chapman. The shootings occurred a few hours after an acquaintance of defendant, Travis, was involved in an argument with Jerry's brother, Terry Chapman. The Chapman family was preparing to leave a family member's residence when defendant and Travis walked toward the residence from opposite directions. Witnesses testified that a verbal argument ensued between Travis and Terry, at which point Travis called defendant over to the residence and instructed him to "do it." Although defendant had the gun pointed at another family member's head, Chester and Jerry were both shot. Chester died a short time later as a result of the shooting.

On appeal, defendant first contends that he was denied the effective assistance of counsel because trial counsel did not object to hearsay statements that Travis allegedly made to an investigating officer. Defendant moved this Court for a remand for an evidentiary hearing concerning his ineffective assistance claim, which this Court denied. Because no *Ginther* hearing was held, this Court's review is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). To establish a claim of ineffective assistance of counsel, defendant bears the heavy burden of showing that trial "counsel's

performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

The investigating officer testified that he interviewed Travis and that the information received from the interview was "consistent with the information that we had obtained during our investigation." The officer did not provide any specific statement made during the interview, but instead testified that the information provided by Travis in a general sense was consistent with the overall investigation. This is not specific enough for this Court to find that the officer's testimony fell within the definition of hearsay. While defendant claims that the officer's testimony implies that Travis asserted the identity of the killer, this Court has previously held that "implied assertions" are not hearsay. *People v Jones (On Rehearing After Remand)*, 228 Mich App 191, 207; 579 NW2d 82 (1998), mod in part and rev'd in part on other grounds and remanded 458 Mich 862 (1998). Without citing to a specific assertion, the officer's testimony was not hearsay and any objection would have been overruled. As counsel is not required to advance futile arguments, defendant is unable to show that trial counsel was ineffective for failing to object to the challenged testimony. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

Next, defendant argues that the trial court erred when it denied his request to instruct the jury on voluntary manslaughter. We disagree.

Claims of instructional error involving questions of law are reviewed de novo by this Court. *People v Schaefer*, 473 Mich 418, 427; 703 NW2d 774 (2005). "But 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 quotation omitted).

In a criminal trial, the instructions given to a jury "must include all elements of the charged offenses and any material issues, defenses, and theories if supported by the evidence. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). Manslaughter is a necessarily included lesser offense of murder, and a manslaughter instruction is warranted when a rational view of the evidence would support it. *People v Mendoza*, 468 Mich 527, 539-40, 548; 664 NW2d 685 (2003). While both are intentional killings, voluntary manslaughter is separated from murder because of the absence of malice—in manslaughter the killing occurred as the result of provocation. *Id*. at 540. The provocation necessary to mitigate a homicide from murder to voluntary manslaughter is that which causes the defendant to act out of passion rather than reason. *Id*. at 535.

According to defendant, he was entitled to a manslaughter instruction because he had been provoked by Jerry. It is true that Jerry's guardian indicated that when he was off his medication he would get hostile with people. And, although witnesses described Jerry as becoming agitated and tense during the conflict, there was no evidence that Jerry provoked defendant during the conflict. At most, the witnesses described Jerry as getting "hyped" when he saw Travis arguing with his brother. There was no testimony that Jerry acted in a threatening manner toward Travis, let alone defendant. Instead, the witnesses consistently testified that

defendant simply began shooting when he was instructed to do so by Travis. Without evidence showing that defendant may have been provoked before the shooting, a manslaughter instruction was not rationally supported and the trial court did not abuse its discretion.

Moreover, even if we were to conclude that the jury should have been given a manslaughter instruction, the error would be considered harmless. The jury was allowed to consider second-degree murder, in addition to first-degree murder. However, the jury rejected the intermediate lesser offense and found defendant guilty of the greater offense. Thus, any potential error in failing to give instructions on the lesser offense of voluntary manslaughter would be harmless. See, e.g., *People v Wilson*, 265 Mich App 386, 395-396; 695 NW2d 351 (2005).

Finally, defendant argues that he was denied his right to confront Jerry when the trial court determined that he was unavailable to testify. Although defendant partially raised this issue with the trial court, he only moved to have the assault with intent to murder charge dismissed or a directed verdict granted because Jerry, the victim of that crime, did not testify. Defendant never asked the trial court to compel Jerry to testify. Because objecting on one ground does not preserve an issue for review on an alternative ground, this claim has not been preserved. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). Consequently, we will review it for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999).

Both the Michigan and United States Constitution provide that defendants shall "be confronted with the witnesses against him." US Const Am VI; Const 1963, art 1, § 20. This right "ensures not only a personal examination of the witness, but also that the witness will testify under oath, that the witness will be subject to cross-examination, and that the jury will have the opportunity to observe the witness's demeanor." *People v Rose*, 289 Mich App 499, 513; 808 NW2d 301 (2010).

Prosecutors have a statutory duty to disclose all known res gestae witnesses and all known witnesses that might be called at trial. MCL 767.40a(1). With the court's permission, the list of witnesses that the prosecutor intends to call at trial can be amended to add or remove witnesses if either good cause has been shown or the parties stipulate to such. MCL 767.40a(4); *People v Callon*, 256 Mich App 312, 327; 662 NW2d 501 (2003). If a prosecutor fails to remove a witness from the list, "the prosecutor is obliged to exercise due diligence to produce the witness." *People v Wolford*, 189 Mich App 478, 484; 473 NW2d 767 (1991). "The test for due diligence is whether good-faith efforts were made to procure the testimony of the witness, not whether increased efforts would have produced it." *People v Watkins*, 209 Mich App 1, 4; 530 NW2d 111 (1995).

Here, it is undisputed that Jerry was diagnosed with schizophrenia and had been appointed a guardian. During trial, his guardian advised the court that Jerry had stopped taking medication for his schizophrenia sometime before defendant's preliminary examination and that, as a result, he often made no sense when speaking. The trial court was reluctant to issue a bench warrant and asked for Jerry's family to have him evaluated to see whether he could be forced to testify. Jerry was nevertheless subpoenaed to testify at defendant's trial. However, Jerry did not appear. And, although the prosecutor had asked Jerry's family to get him back on his

medication, the family was ultimately unable to do so. Instead, another court granted a petition to involuntarily commit Jerry.[1]

While it is unclear in the record whether Jerry was removed from the witness list, it was not plain error for the trial court not to issue a bench warrant to compel Jerry's testimony. Had the prosecutor asked to remove Jerry from the witness list, the trial court would have been justified in doing so because of Jerry's mental illness and unavailability. The prosecutor stated, on the record, that Jerry had been brought to his office the week before and had been extremely disheveled and was making no sense. The prosecutor stated that the probate court had issued an involuntary pickup order and that Jerry was being held in the mental health unit. The trial court would have also been justified in concluding that the prosecutor exercised due diligence in securing Jerry's testimony as reasonable attempts were made to gain Jerry's compliance with his medication and to secure his presence at trial. Although a bench warrant could have forcibly secured Jerry's physical presence, the test is not whether increased efforts could have been made. There only has to have been a good-faith effort, which was done in this case.

Further, while defendant could have presented a plausible argument that the trial court should have adjourned the trial after Jerry was committed in order for his mental health to stabilize, defendant does not do so on appeal. Rather, he appears to argue that Jerry should have been brought before the jury in his un-medicated state, ostensibly to provide some kind of context to the jury of how "agitated" Jerry could have been at the time of the shooting. However, testimony shows that he was taking his medication at the time of the shooting. Thus, it is hard to fathom how showing Jerry's personality or taking his disjointed testimony when he was actively suffering from his mental illness could have been relevant to his actions during the day of the shooting when he was not. Moreover, whether Jerry was agitated at the time of the shooting is irrelevant to defendant's trial defense of alibi. Finally, defense counsel agreed with the stipulated jury instruction concerning the reason for Jerry's absence from trial and the fact that Jerry suffered from a mental illness. Under the circumstances, we see no error warranting reversal.

Affirmed.

/s/ Deborah A. Servitto
/s/ Patrick M. Meter
/s/ Karen Fort Hood

[1] While defendant indicates that the trial court relied upon MCR 2.503(C) (adjournment) to excuse the failure of the prosecution to produce Jerry, the trial court only briefly considered the rule as it pertains to the unavailability of a witness. Defendant did not request an adjournment of the trial, and had he done so the request likely would have been futile given that several eyewitnesses testified concerning Jerry's actions immediately prior to the shooting and because neither party asserted or presented evidence showing that Jerry's testimony was material.