

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ELIJAH ALEXANDER,

Defendant-Appellant.

UNPUBLISHED
February 20, 2001

No. 217191
Wayne Circuit Court
LC No. 94-009957

Before: Zahra, P.J., and Smolenski and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and sentenced to twenty to forty years' imprisonment. Defendant appealed as of right, and this Court affirmed in part but remanded for an evidentiary hearing concerning defendant's claims of ineffective assistance of counsel.¹ Defendant now appeals as of right from the trial court's finding after remand that defendant was not denied the effective assistance of counsel and was not entitled to a new trial. We affirm.

Defendant first contends that he was denied a fair trial and his right to due process because his trial counsel's ineffective assistance deprived him of the opportunity to present an alibi defense. To justify reversal based on the ineffective assistance of counsel, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness under prevailing norms, and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997). A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses. *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999); *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. *Ayres, supra* at 22; *Kelly, supra* at 526. At a post trial evidentiary hearing, a defendant must show that he made a good faith effort to avail

¹ *People v Alexander*, unpublished opinion per curiam of the Court of Appeals, issued April 11, 1997 (Docket No. 186291).

himself of this right to present a defense and that the defense of which he was deprived was substantial. *Kelly, supra* at 526.

At the evidentiary hearing, defendant's trial counsel testified and specifically denied knowledge of any claimed alibi defense. Defendant conversely testified that he had raised the alibi issue with his trial counsel. Defendant first stated that his alibi witnesses were his wife and daughter. On closer questioning from the trial court, defendant told the court that the witness who had testified against him at his preliminary examination approached defendant's wife a month after the examination. The witness allegedly told defendant's wife that he knew that defendant did not commit the crime, but that the police had threatened to charge him with the murder if he did not testify against defendant. Even if this allegation is true, it does not establish an alibi defense for defendant. Moreover, the sole witness at defendant's preliminary examination also testified at defendant's trial that defendant and his brother were the individuals responsible for the murder.

Notwithstanding the above testimony, the trial court gave defendant the opportunity to explain his alibi defense, defendant presented no other testimony at his evidentiary hearing, other than a vague mention of his daughter,² to substantiate the existence of witnesses who would testify that he did not participate in the murder or was somewhere else when the offense occurred. Accordingly, defendant failed to establish that he was deprived of a substantial defense, because he failed to show that any witness would provide an alibi for him. We conclude that even assuming that defendant's trial counsel was deficient for failing to investigate an alibi defense, defendant has not demonstrated that he was prejudiced by this alleged error, and he therefore cannot establish that he was denied the effective assistance of counsel. *Leonard, supra* at 592; *Kelly, supra* at 526.

Defendant next argues that his trial counsel's failure to move to suppress defendant's statement to the police constituted ineffective assistance of counsel. At defendant's trial, Detroit Police Officer Deborah Monti testified that after advising defendant of his constitutional rights, she questioned defendant and took his statement. Officer Monti reduced defendant's statement to a writing, which defendant signed. In the statement, defendant acknowledged the role that he played in the victim's shooting death. Defendant asserts that he was denied the effective assistance of counsel because his trial attorney did not move to suppress the statement, which defendant denies having made, and that this refusal led to a breakdown in communication between defendant and his attorney before and during trial.

At the evidentiary hearing held after remand, defendant's trial counsel testified that during conversations with defendant before trial, it became apparent to him that defendant had agreed to talk to the police, and that therefore a motion to suppress the statement on the basis of involuntariness was inappropriate. According to trial counsel, defendant's claim was not that the statement was involuntary, but that what he told Officer Monti was different than what she had written in the statement. Defendant testified at the evidentiary hearing that he told defense counsel that he did not make the statement and was forced to sign a statement that he did not

² Defendant did not indicate his daughter's age or the substance of what her testimony would be.

make. He also acknowledged at the hearing that he made a statement to the police, however, and admitted that he voluntarily signed the statement.

When a defendant challenges the admissibility of his statements, the trial court must hear testimony regarding the circumstances of the defendant's statement outside the jury's presence. *People v Walker (On Rehearing)*, 374 Mich 331, 337-339; 132 NW2d 87 (1965). Whether the defendant's statement was knowing, intelligent, and voluntary is a question of law that the court must determine under the totality of the circumstances. *People v Snider*, 239 Mich App 393, 417; 608 NW2d 502 (2000). A statement's voluntariness is determined by examining police conduct, while the question whether it was made knowingly and intelligently depends in part on the defendant's capacity. *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). The question whether a statement actually was made, however, represents a question separate from a determination of voluntariness. *People v Weatherspoon*, 171 Mich App 549, 554; 431 NW2d 75 (1988). While the issue of voluntariness is for the trial court to decide, whether the defendant made a statement is a question of fact for the jury to decide. *People v Neal*, 182 Mich App 368, 371; 451 NW2d 639 (1990); *Weatherspoon*, *supra* at 554-555.

In its opinion following the evidentiary hearing, the trial court found that defendant had acknowledged that "he gave the statement freely and voluntarily and that he signed it without coercion." The court further stated, "It is readily apparent from this record that grounds for a motion to suppress the statement did not remotely exist. Defendant did not agree and became upset at counsel's refusal to file a frivolous motion." In light of defendant's acknowledgment that he voluntarily spoke to Officer Monti and signed the statement that she presented to him, these factual findings are not clearly erroneous. MCR 2.613(C); *People v Marsack*, 231 Mich App 364, 372; 586 NW2d 234 (1998). Because the question whether defendant actually made the statement or whether the police fabricated it constitutes a factual question that need not be decided before trial, *Neal*, *supra* at 371; *Weatherspoon*, *supra* at 554, we conclude that counsel was not ineffective for failing to file a pretrial motion to suppress the statement.³ *Leonard*, *supra* at 592.

Lastly, defendant suggests that the trial court erred in denying him a motion for new trial following the evidentiary hearing because the court did not sufficiently review defendant's claim of an alibi defense or his claim that he did not make the statement to the police. Our review of the hearing transcript and the trial court's opinion illustrates that the court considered defendant's

³ We further note that defendant presented no credible evidence, either at trial or during his evidentiary hearing, that he did not actually make the statement, and therefore failed to demonstrate any prejudice arising from his counsel's failure to move to suppress the confession.

contentions. As we have indicated, the trial court did not clearly err in making its findings. Given our holdings regarding defendant's first two issues, we need not further review this claim.

Affirmed.

/s/ Brian K. Zahra

/s/ Michael R. Smolenski

/s/ Hilda R. Gage