

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

STEVE ADAMS

Defendant-Appellant

UNPUBLISHED

November 27, 2001

No. 224911

Wayne Circuit Court

Criminal Division

LC No. 99-002712

Before: Owens, P.J., and Holbrook, Jr. and Gage, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to thirteen to forty years' imprisonment for the murder conviction and a consecutive, two-year term for the felony firearm conviction. He appeals as of right. We affirm.

Defendant contends that he was denied a fair trial because the prosecutor improperly declined to grant immunity to Tania Gordon, thereby causing her to invoke her Fifth Amendment privilege against self-incrimination and enabling the prosecutor to use her preliminary examination testimony at trial. Specifically, defendant contends that the prosecutor's actions constituted prosecutorial misconduct. However, a prosecutor has broad discretion in determining which charges to bring and when to bring them, and the judiciary is not to usurp that authority. *People v Farmer*, 193 Mich App 400, 402; 484 NW2d 407 (1992). Moreover, a "prosecutor has no duty to grant a witness immunity so that the witness can testify for a defendant, and a defendant cannot compel a grant of immunity." *People v Catanzarite*, 211 Mich App 573, 580; 536 NW2d 570 (1995). Here, there is no basis to conclude that Gordon's preliminary testimony was more favorable to the prosecution than Gordon's trial testimony might have been. Conversely, there is no basis for a conclusion that the prosecutor's refusal to grant immunity resulted in the suppression of exculpatory testimony. We believe that the prosecutor's decision was a reasonable exercise of discretion. Consequently, we are not persuaded that the prosecutor's decision constituted prosecutorial misconduct.

Defendant also contends that the trial court erroneously admitted Gordon's preliminary examination testimony. Specifically, defendant challenges the trial court's conclusion that Gordon was "unavailable" pursuant to MRE 804(a). Generally, a trial court's evidentiary decisions are reviewed for an abuse of discretion. *People v Cain*, 238 Mich App 95, 122; 605 NW2d 28 (1999).

If the prosecution brings about a witness's failure to testify with either threats or actual prosecution, with the intent of preventing the witness's testimony, then the witness will not be deemed "unavailable" pursuant to MRE 804(a). *People v McIntosh*, 142 Mich App 314, 324; 370 NW2d 337 (1985). The "burden is on the prosecution to establish that the witness whose prior recorded testimony is being offered is, in fact, 'unavailable' and that the prosecution has not, either intentionally or negligently, contributed to making the witness unavailable." *Id.* at 327. Again, there is no indication in the record that the prosecution's case benefited from the prevention of Gordon's trial testimony. Moreover, the record is devoid of evidence that the prosecution's denial of immunity was intended to prevent her testimony. In fact, the prosecutor stated that he was surprised by the testimony that suggested Gordon's culpability. In the absence of any evidence suggesting that the prosecutor intentionally, or even negligently, contributed to Gordon's unavailability, we concur with the trial court's conclusion that Gordon was "unavailable" pursuant to MRE 804(a). See also *People v Meredith*, 459 Mich 62, 66; 586 NW2d 538 (1998). In addition, the preliminary examination record supports the trial court's conclusion that defendant had an adequate opportunity to cross-examine Gordon at that hearing. Therefore, the trial court did not abuse its discretion by admitting Gordon's earlier testimony.

Next, defendant argues that he was denied his constitutional right to effective assistance of counsel. Because defendant did not raise this issue in a motion for a new trial or *Ginther*¹ hearing in the trial court, our review of this issue is limited to errors apparent on the record.² *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). To establish ineffective assistance of counsel, defendant must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Here, the record suggests that, although defense counsel was aware of defendant's claim that his car was not running on the date the charged offenses were committed, she was unable to obtain any evidence to support that claim. Thus, it is not apparent from the record that trial counsel failed to adequately investigate or prepare for defendant's case. Further, it is not apparent from the record what advice, if any, counsel gave defendant concerning his right to testify. Therefore, defendant has not demonstrated that counsel was deficient in this regard. Consequently, defendant has failed to overcome the presumption of effective assistance of counsel. *Toma, supra* at 302-303.

Defendant further asserts that he is entitled to, at the very least, a remand for an evidentiary hearing on the issue of his counsel's effectiveness. In *Gonzales v Elo*, 233 F3d 348, 356 (CA 6, 2000), the court opined that a defendant who wants to testify "can reject defense counsel's advice to the contrary by insisting on testifying, communicating with the trial court, or discharging counsel." The *Gonzales* court further opined:

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

² Further, we have not considered the affidavits that defendant has submitted on appeal because they were not presented to the trial court. *People v Canter*, 197 Mich App 550, 556-557; 496 NW2d 336 (1992).

At base, a defendant must “alert the trial court” that he desires to testify or that there is a disagreement with defense counsel regarding whether he should take the stand. When a defendant does not alert the trial court of a disagreement, waiver of the right to testify may be inferred by the defendant’s conduct. Waiver is presumed from the defendant’s failure to testify or notify the trial court of the desire to do so. [*Id.* at 357; citations omitted.]

Here, defendant did not alert the trial court that he desired to testify or that there was any disagreement with defense counsel on this issue. Rather, defendant affirmatively waived his right to testify. As such, we do not believe that defendant is entitled to an evidentiary hearing.

Finally, defendant contends that the trial court erred by failing to ascertain whether defendant knowingly and intelligently waived his right to testify. In *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991), we specifically opined that a trial court is not required to determine that a defendant’s waiver of his or her right to testify was knowing and intelligent. Consequently, defendant’s argument is without merit.

Affirmed.

/s/ Donald S. Owens
/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage