STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAURICE L. WILLIAMS,

Defendant-Appellant.

UNPUBLISHED
January 11, 2002

No. 222179
Wayne Circuit Court
LC No. 99-001213

Before: Saad, P.J., Bandstra, C.J., and Whitbeck, J.

PER CURIAM.

Defendant Laurice Williams appeals as of right from a jury conviction of first-degree murder[1] and possession of a firearm during the commission of a felony.[2] The trial court sentenced Williams to consecutive terms of life imprisonment for the murder conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

I. Basic Facts And Procedural History

This case arises out of an argument that occurred in late January 1999 in a parking lot at the Parkwood apartment complex in Belleville. The argument escalated, ultimately resulting in Tever Scarbrough's death from multiple gunshot wounds. Keshia Penny, Scarbrough's friend, witnessed the argument. She identified one of the men fighting with Scarborough as Nicholas Stewart, who is Williams' cousin, and said that a third man was present but that she did not know him. After the argument, Penny watched as the men walked away from each other and Scarbrough drove off in his car. Stewart acknowledged that he and Williams were present for the argument.

Later that morning, Williams and Stewart, who had a very close relationship, were at the Parkwood Apartments looking for marijuana. Their search led them to Darrell Noblin's apartment. Noblin was cleaning a gun, which Williams reportedly asked if he could borrow because he wanted to rob some people. According to Williams, Noblin agreed that he could take

[1] MCL 750.316(1)(a).

[2] MCL 750.227b.

the gun. According to Noblin, he told Williams and Stewart that there was a gun under the couch cushion, but did not see them take the gun.

At approximately 10:30 a.m., Scarbrough returned to the apartment complex, arrived at Penny's apartment, and asked Penny to page someone for him. While she complied, Scarbrough went to the window and began yelling at someone outside the building. Penny recalled hearing the person yelling at Scarbrough reply, "I don't like the way you rollin' through here muggin' my cousin." According to Penny, Scarbrough then went downstairs. When he got outside, he removed his glasses and hat, and put them on a car. Scarbrough then approached the same two men (apparently Stewart and the man Penny could not identify) whom she had seen arguing with him earlier. Penny she believed that Scarbrough was about to fight with the man she could not identify. This third man with Stewart pulled out a gun, aimed it at Scarbrough's chest, and shot him. Penny ran to the telephone and attempted to call 911, but the number was busy. As she attempted to call again, she heard another shot. Some time later, the police brought Stewart past Penny's apartment. She tried to attack Stewart, yelling "where's your cousin?" At trial, however, Penny did not identify Williams as the man with Stewart; instead, she stated, "that's not him."

Three other residents of the Parkwood Apartment complex also witnessed either the first or second gunshot. The first witness, Jill Penna, said that between 11:00 a.m. and 11:30 a.m. that morning she saw three men arguing in the parking lot. Penna saw a man wearing a dark coat with yellow trim pull out a gun and shoot another man in the chest. When the wounded man stood up and attempted to walk away, the shooter shot him again in the face. The second witness, Cheryl Beaty, stated that she heard the first gunshot and looked out her window to see two young men standing over another man. The man in the street got up and started to walk away when one of the other men shot him. Beaty identified the down jackets two men wore as blue or black. The third witness, Richard Lutz, recounted the event similarly, stating that he was in his kitchen when he heard the first gunshot. He looked out the window and saw two people standing over a third person. According to Lutz, the shooter pranced around the victim, took aim, and shot the victim again. Lutz believed that the shooter's coat as dark with light trim.

Stewart's testimony in this matter was, to say the least, inconsistent. At the preliminary examination or in his initial statement to the police, Stewart implicated Williams as the shooter and said that he was wearing a dark blue and yellow reversible coat. At trial, Stewart stated his earlier testimony was false and that Williams did not shoot Scarbrough. After the prosecutor informed him about the penalty for perjury, Stewart testified again that Williams was the shooter. Stewart later recanted again, finishing with the story that another man, Andrew Dickson, was the shooter. Stewart finally testified that four men – Stewart, Williams, Dickson and Scarbrough – were involved in both arguments, but Dickson was the one who shot Scarbrough. Stewart testified that Dickson wore the blue and gold coat. He further testified that all three men ran to Dickson's apartment in the Parkwood complex after the shooting and Dickson offered him and Williams $5,000 each not to tell that he was the shooter. Stewart admitted he had never told anyone that Dickson was the killer.

Williams also said Dickson was the murderer. Williams testified that, after the first confrontation with Scarbrough, Dickson went to return a page. Only then, according to

Williams, did he and Stewart go to Noblin's apartment to obtain the gun. Williams claimed that, after leaving Noblin's apartment, they met Dickson and showed him the gun. Dickson wanted to buy the gun, so he held on to it. As the three men were walking to Stewart's apartment, they passed Penny's apartment, at which time Scarbrough began yelling at Dickson from the window. Scarbrough then came down from the apartment and walked toward Dickson. Williams claimed that he watched as Scarbrough removed his hat and glasses, then began circling Dickson. Dickson then pulled out a gun and shot Scarbrough in the chest. Williams watched Dickson shoot Scarbrough again, and then all three men ran to Dickson's girlfriend's apartment. At the apartment, Dickson reportedly offered Williams and Stewart $5,000 each to keep quiet. Williams stated that he hid in a closet at the apartment because he was on bond and was afraid his grandmother would lose her money if his bond was revoked. Until trial, Williams admitted, he did not tell anyone Dickson was the shooter, claiming he was living by the street code of silence. During his direct examination and again on cross-examination, Williams also testified about a notice of alibi filed in his case.

According to their testimony, when the police arrived soon after the shooting, they found Scarbrough in the parking lot. He had been shot in the chest and the head and later died from those wounds. The police discovered Williams hiding in a closet in one of the Parkwood apartments. According to the police, several other individuals were also in the apartment, including Dickson, but no one else was hiding. Also in the apartment, the police found a dark blue and yellow jacket reversed to show the yellow side. The police also found gloves and a gun under one of the couch cushions. The police arrested Williams and later determined that the bullets that killed Scarbrough had been fired from the gun found under the couch cushion. Officer Ernie Thornsbury of the Van Buren Township Police Department testified that Stewart identified Williams as the shooter. Detective Mark Abdilla, also with the Van Buren Township Police Department, testified that while he was transporting Williams, Williams told him his cousin, apparently Stewart, should have shut his mouth, and that both his cousin and Noblin were "dead."

During trial, the trial court held a due diligence hearing concerning three witnesses that the prosecution had endorsed on its witness list, but did not produce at trial. The three witnesses, Dickson, his girlfriend Danielle Jones, and Roman Whitfield, who was present in the apartment when Williams was arrested. Detective Abdilla testified regarding the efforts he made to find each of the witnesses. The trial court found that the prosecution had shown due diligence because the police had made a good-faith effort to find the witnesses.

After his conviction, Williams moved in this Court for a remand, seeking an evidentiary hearing pursuant to *People v Ginther*[3] and this Court granted the motion. The trial court held the required *Ginther* hearing and found that Williams' attorney's performance was not prejudicial, therefore he was not denied the effective assistance of counsel.

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

II. Ineffective Assistance Of Counsel

A. Standard Of Review

Williams claims he was denied the effective assistance of counsel guaranteed by the Sixth Amendment because his trial attorney questioned him about his notice of alibi. We review constitutional questions de novo,[4] a standard that is particularly relevant in this case because the legal test we apply to ineffective assistance of counsel issues does not requires us to defer to the trial court to any extent.

B. Legal Standards

As this Court explained in *People v Knapp*,[5]

> To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). The defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

C. The Notice Of Alibi And Defense Strategy

MCL 768.20 requires a defendant charged with a felony to give notice to the prosecution if he intends to present an alibi as a defense at trial. Substantively, the notice of alibi must

> contain, as particularly as is known to the defendant or the defendant's attorney, the names of witnesses to be called in behalf of the defendant to establish that defense. The defendant's notice shall include specific information as to the place at which the accused claims to have been at the time of the alleged offense.[6]

Williams provided a notice of alibi to the prosecution indicating that his mother and grandmother dropped him off at the Parkwood complex at about 11:00 a.m. on the day of the shooting. Ostensibly, the purpose of their testimony was to demonstrate that he was not wearing a jacket that day and, therefore, did not match the shooter's description. At trial, defense counsel

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[4] See *People v Conat*, 238 Mich App 134, 144; 605 NW2d 49 (1999).

[5] *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001).

[6] MCL 768.20(1).

questioned Williams about his notice of alibi to give him an opportunity to explain why his mother and grandmother were offered as alibi witnesses. Defense counsel did so, he said, because he believed the prosecution would be entitled to use the notice of alibi to impeach Williams on cross-examination.

Williams contends that when the defense voluntarily elects not to present an alibi defense at trial, despite a timely notice, the prosecution may not refer to the pretrial notice, nor may the prosecution impeach any defense witnesses with any inconsistencies between their testimony and the proposed alibi. Further, he contends, once the defense chooses not present the alibi to the jury, the prosecution may not comment on the absence of the witnesses listed on the notice. This view may find some support in several pre-1990 opinions.[7] However, any doubt concerning whether a prosecutor may use the notice of alibi to impeach a defendant's credibility when his testimony is inconsistent with the alibi notice was put to rest *People v McCray*.[8] In *McCray*, which was decided after the parties filed their briefs in this case, the defendant testified at trial in a manner that was inconsistent with his notice of alibi, in which he asserted that he was not at the scene of the shooting.[9] Relying on *People v Von Everett*,[10] the trial court allowed the prosecutor to impeach the defendant.[11] This Court affirmed, stating:

> We conclude that the holding in *Von Everett* is not limited to situations where a defendant testifies regarding an inconsistent alibi. Rather, as a party-opponent admission, the notice of alibi may be used to impeach defendant's credibility at trial when his testimony is inconsistent with the contents of the alibi notice.[12]

As in *McCray*, Williams' trial testimony was inconsistent with his notice of alibi because at trial he stated that he had slept at the Parkwood complex the night before the shooting, calling into question why his mother and grandmother would have to give him a ride there. As a matter of law, defense counsel was correct in his belief that the prosecutor would be able to use the notice of alibi to impeach Williams. Defense counsel's tactic, allowed Williams to explain the notice to lessen the impact of cross-examination. This sound trial strategy is not subject to second-

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[7] See, e.g., *People v Hunter*, 95 Mich App 734, 739; 291 NW2d 186 (1980) ("We conclude that any reference made to the filing of a notice of alibi prior to the defendant's actually putting forward an alibi defense constitutes an impermissible comment on the defendant's right to remain silent."). But see MCR 7.215(I)(1) ("A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals . . . .").

[8] *People v McCray*, 245 Mich App 631, 636-637; 630 NW2d 633 (2001).

[9] *Id.* at 635.

[10] *People v Von Everett*, 156 Mich App 615; 402 NW2d 773 (1986).

[11] *McCray, supra* at 637.

[12] *Id*. at 636-637.

guessing on appeal.[13] Consequently, Williams has failed to prove that his attorney acted defectively, making it unnecessary to examine whether he demonstrated prejudice. Thus, he is not entitled to relief.[14]

III. Missing Witnesses

A. Standard Of Review

Williams argues that the trial court erred by finding that the prosecution exercised due diligence to produce three witnesses to testify at trial. "A trial court's determination of due diligence is a factual matter and the court's findings will not be reversed unless clearly erroneous."[15]

B. Due Diligence

"Due diligence is the attempt to do everything reasonable, not everything possible, to obtain the presence of res gestae witnesses."[16] "Whether the prosecution made a diligent, good-faith effort to produce missing witnesses is an evaluation that depends on the particular facts of each case."[17]

In this case, the evidence clearly supported the trial court's finding that the prosecution, aided by the police, exercised due diligence in attempting to have Jones and Whitfield appear at trial. The officer in charge of the case had attempted to serve Jones with a subpoena at her apartment, only to learn that she had been evicted. He could not find a forwarding address for her and a LEIN check only revealed the apartment from which she had been evicted as her address. Though he checked several other sources of information, his efforts to find her failed. With respect to Whitfield, Whitfield apparently attempted to evade the police from the start. He had no identification when he was in the apartment at the time the police arrested Williams, so the police were not sure of his real name. The apartment he gave as his address had never been rented to him and its previous tenants had been evicted. The two people the police were able to locate who had known Whitfield did not know his whereabouts. Like the search for Jones, despite using other avenues of investigation, the police simply could not find Whitfield.

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[13] *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

[14] Williams also claims that, because his trial counsel was ineffective, the trial court erred in denying his motion for a new trial when it concluded that he had failed to prove that his trial counsel's performance prejudiced him. However, because we conclude that there is no merit to his constitutional challenge, there are no grounds to reverse his conviction on the basis of his argument regarding the motion for a new trial because it relies on the same adequate performance by counsel.

[15] *People v Wolford*, 189 Mich App 478, 484; 473 NW2d 767 (1991).

[16] *People v George*, 130 Mich App 174, 178; 342 NW2d 908 (1983) (citations omitted).

[17] *People v Dye*, 431 Mich 58, 67; 427 NW2d 501 (1988).

The police efforts to find Dickson were different, however. A LEIN entry listed an address for him in East Lansing. Though an officer attempted to call him at that location for two weeks, the officer never visited the location, asked the East Lansing police to determine if he was there, or mailed a subpoena to that address. The prosecution concedes these efforts fell short of the standard for due diligence, and we agree.

Despite the fact that at trial Williams and Stewart – in at least one of the versions of his testimony – accused Dickson, for the first time, of being the perpetrator, the record does not reveal the prejudice to Williams that is necessary before we can reverse his conviction.[18] The prosecution did not rely on previous testimony from Dickson at trial; therefore, Williams was not denied his right to confront a witness at trial.[19] Williams was also able to present his defense that Dickson committed the killing.[20] Moreover, the evidence against Williams was strong and contradicted his testimony that Dickson was the shooter.[21] Williams and Stewart both admitted they were present for the altercation resulting in Scarbrough's death. Although Williams and Stewart testified that four men, including Dickson, were involved in the altercation, all disinterested witnesses saw only three men, including Scarbrough, involved in the incident. Therefore, we conclude that the error was harmless.[22]

Affirmed.

/s/ Henry William Saad
/s/ Richard A. Bandstra
/s/ William C. Whitbeck

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[18] *People v Pearson*, 404 Mich 698, 725; 273 NW2d 856 (1979).

[19] See, generally, *People v Smith*, 243 Mich App 657, 681-682; 625 NW2d 46 (2000).

[20] See, generally, *People v Toma*, 462 Mich 281, 319; 613 NW2d 694 (2000).

[21] See, generally, *People v Elston*, 463 Mich 751, 766; 614 NW2d 595 (2000).

[22] *Pearson*, *supra* at 725; *George*, *supra* at 179.