STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 28, 2002
v	No. 232242 Wayne Circuit Court
DAWAIN POPE, Defendant-Appellant.	LC No. 00-003536

Before: Neff, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

Defendant was charged with first-degree murder arising out of a gunfight in the city of Detroit. After a jury trial, defendant was convicted of second-degree murder, MCL 750.317, possession of a firearm by a felon, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a third habitual offender to a prison term of twenty-five to forty years for the murder conviction, concurrent with a sentence of two to ten years for possession of a firearm by a felon and a consecutive two-year sentence for felony-firearm. Defendant appeals his conviction by right. We find no error warranting reversal and therefore affirm.

I

Defendant first argues that the trial court erred by finding that the prosecutor and police used due diligence to produce two endorsed witnesses. We disagree. The trial court did not clearly err, *People v Wolford,* 189 Mich App 478, 484; 473 NW2d 767 (1991), and therefore, did not abuse its discretion by allowing the prosecution to strike the witnesses from its witness list and refusing to give a "missing witness" instruction, *People v Snider,* 239 Mich App 393, 422-423; 608 NW2d 502 (2000).

The prosecutor's failure to produce an endorsed witness may be excused by showing that the witness could not be produced despite the exercise of due diligence. *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000); *People v Terrance Cummings,* 171 Mich App 577, 585; 430 NW2d 790 (1988). The trial court found that the police effort had been duly diligent, noting that the witnesses did not have the "usual stable circumstances … in terms of having a house [and] a regular job," and because it appeared that their testimony would "not necessarily be favorable to the defendant," there was no particular motive for failing to produce the witnesses.

Due diligence is the attempt to do everything reasonable, not everything possible, to obtain the presence of a witness. *Id.* On this record, the trial court did not clearly err in its factual finding of due diligence. The investigating officer made numerous attempts to contact the witnesses at their last known addresses that had been confirmed valid by friends and relatives. The officer left calling cards at known addresses, and checked police computer records and area jails, hospitals and the morgue. The record simply does not create a definite and firm conviction that a mistake was made. *People v Hatch*, 156 Mich App 265, 267; 401 NW2d 344 (1986).

Defendant's argument that the police should have notified the prosecutor, so that the prosecutor could notify the defense of trouble finding the witnesses, is without merit. The prosecutor's duty concerning trial witnesses is determined by statute, and no duty as suggested by defendant exists. Rather, MCL 767.40a(5) requires the prosecuting attorney and the police to provide reasonable assistance upon defendant's request to locate and serve process on a witness. MCL 767.40a(5); *People v Gadomski*, 232 Mich App 24, 35-36; 592 NW2d 75 (1998). A defense request for assistance, however, must be made to invoke this duty. *People v Lawton*, 196 Mich App 341, 347; 492 NW2d 810 (1993). A defendant may rely on a diligent effort by the prosecutor and the police to produce an endorsed witness, *Wolford, supra* at 482-484, but not that the witness will actually be produced.

II

Defendant next argues the prosecutor engaged in misconduct that denied him a fair trial by suggesting through her questions that he had intimidated a prosecution witness. We disagree.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Rice (On Remand)*, 235 Mich App 429, 434-435; 597 NW2d 843 (1999). Defendant failed to preserve this claim by timely and specifically objecting to the alleged misconduct. *People v Schutte*, 240 Mich App 713, 720-721; 613 NW2d 370 (2000).

Because the alleged error here was not preserved, our review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To avoid forfeiture there must be (1) an error; (2) the error must be plain (i.e., clear or obvious); and (3) defendant must show prejudice or that the error was outcome determinative. *Id.*; *Schutte, supra* at 720. Reversal is warranted only when plain error results in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *Carines, supra* at 763; *Schutte, supra* at 720.

A defendant's opportunity for a fair trial may be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *Rice, supra* at 438. In this case, the prosecutor by her questions suggested that the witness may have initially lied to the police out of fear that defendant might harm him. However, although the witness answered that he was concerned about his safety if he came forward with information in a murder case, he also testified that defendant did not know where he lived, and on further questioning by defense counsel, testified that he did not lie to the police because he feared defendant.

In *People v Gray*, 466 Mich 44, 46-48; 642 NW2d 660 (2002), our Supreme Court held that a prosecutor need not lay any particular foundation before questioning an alibi witness about

not coming forward before trial because the credibility of an alibi witness should be judged by the factfinder and the witness' reasons for failing to earlier come forward could be challenged by cross-examination. Similarly, in this case, the credibility of the witness was before the jury and it was proper for both counsel to explore any reasons that the witness initially made a statement to the police that was contrary to his trial testimony so that the jury would "have the necessary information to assess the credibility of [the] witness[] and determine the reliability of the evidence presented." *Id.* at 48-49.

Viewed in context, the prosecutor's questions were not plain, clear or obvious misconduct, nor were they outcome determinative, and therefore, did not affect defendant's substantial rights. *Schutte*, *supra* at 720. Further, because the trial court instructed the jury that statements, arguments and questions by lawyers were not evidence on which to base its decision, any prejudice to defendant by the prosecutor's innuendo, not dispelled by defense counsel's cross-examination, was negated. *Id.* at 721-722.

III

Next, defendant argues the trial court committed error warranting reversal by refusing to instruct the jury on flight with regard to the concealment of evidence. We disagree.

In this case, the prosecutor presented a witness who testified that a couple of hours after the shooting resulting in the victim's death, defendant woke him at 3:30 a.m. and asked him to hold onto two rifles, one of which the evidence indicated was the murder weapon. The parties stipulated that the police obtained the weapons from the witness. While discussing instructions, defense counsel stated, "[T]here is an instruction I think that's applicable which would be on flight, running from the police." The prosecutor conceded that "[t]here was evidence on the record that he took the gun over to his cousin's house." The trial court ruled:

> I'm not going to give that instruction there. You can argue that, but I'm not going to give that instruction. I think that it's sometimes confusing. I've seen things that are discussed that causes concern. There's no need to mess up this record with something like that.

Defendant did not object to the trial court's decision and therefore failed to preserve alleged instructional error. MCR 2.516(C); *People v Smith*, 243 Mich App 657, 690; 625 NW2d 46 (2000), remanded on other grds 465 Mich 928 (2001). Alleged instructional error that has not been preserved is reviewed for plain error. *Carines*, *supra* at 761-763, 767; *Smith*, *supra*.

Defendant argues that the court's failure to give the requested instruction was erroneous, relying on *People v Kraai*, 92 Mich App 398, 409; 285 NW2d 309 (1979), for the proposition that there is a difference between evidence showing consciousness of guilt and substantive evidence of guilt. Later decisions by this Court, however, have rejected this distinction. *People v Cutchall*, 200 Mich App 396, 398-399; 504 NW2d 666 (1993), overruled on other grds, *People v Edgett*, 220 Mich App 686, 691-694; 560 NW2d 360 (1996). Moreover, the issue in this case is whether the alleged error affected defendant's substantial rights. *Smith*, *supra* at 690.

The trial court has a duty to instruct the jury on the law applicable to the case. MCL 768.29; MCR 6.414(F); *People v Ullah*, 216 Mich App 669, 677; 550 NW2d 568 (1996). "Instructions must cover each element of each offense charged, *along with all material issues*, defenses, and theories that have evidentiary support." *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999) (emphasis added). To establish prejudice with regard to an omitted or erroneous instruction, the instruction must pertain to a basic or controlling issue in the case or be consequential to the trial outcome. *Carines, supra* at 772-773; *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997). Here, the parties did not view the evidence of concealment to be sufficiently material to be emphasized in their arguments to the jury. Furthermore, the record indicates the prosecutor did not present the evidence to show defendant's post-offense state of mind but rather as direct evidence connecting him to the alleged murder weapon. See *People v Hall*, 433 Mich 573, 582-584; 447 NW2d 580 (1989) (defendant's possession of a sawed-off shotgun, though showing an unrelated offense, was relevant and admissible to show the defendant committed an armed robbery using a similar weapon).

The trial court, when its instructions are reviewed as a whole, sufficiently protected defendant's rights by fairly presenting the issues to be tried and leaving counsel to argue the importance of the evidence at issue. *Ullah, supra*. We find no plain error requiring reversal. *Carines, supra* at 763, 772.

IV

Defendant next argues that the trial court's inadequate inquiry into his request for substitute counsel requires a remand for an evidentiary hearing. A trial court's decision on a motion to appoint substitute counsel is reviewed for an abuse of discretion. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). We find no abuse of discretion.

In Michigan, an indigent defendant is not entitled to select or change appointed counsel upon request. *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973); *Traylor, supra* at 462. Only where a defendant demonstrates good cause and the judicial process will not be unreasonably disrupted may an indigent defendant obtain replacement of appointed counsel. *Id*. "Good cause" may exist when the defendant's appointed counsel "is not adequate or diligent or … is disinterested." *Ginther, supra* at 442. "Good cause" is also demonstrated when a legitimate difference of opinion develops between a defendant and his appointed counsel regarding a fundamental trial tactic. *Traylor, supra* at 462. A bona fide dispute between the defendant and appointed counsel over a substantial defense may also justify appointment of substitute counsel. *Ginther, supra* at 442, citing *People v Williams*, 386 Mich 565, 194 NW2d 337 (1972).

In the present case, defendant's generalized expression of dissatisfaction and lack of confidence in his appointed attorney did not satisfy "good cause" required to appoint substitute counsel, *Traylor, supra* at 463, nor did defendant's allegations that he disliked the way counsel talked to him and that counsel did not see things defendant's way. *People v Meyers (On Remand)*, 124 Mich App 148, 165-166; 335 NW2d 189 (1983). Defense counsel confirmed that he was prepared to represent defendant, suggesting no breakdown in the attorney-client relationship. *Id*. Defendant's indication that he had filed a grievance against counsel, without more, or that counsel had not filed frivolous motions, does not demonstrate good cause because

matters of general legal expertise and strategy fall within the sphere of the professional judgment of counsel. *Traylor, supra* at 463; *People v O'Brien*, 89 Mich App 704, 708; 282 NW2d 190 (1979). We find no basis for a claim of good cause for substitute counsel.

Furthermore, the record supports the trial court's conclusion that appointing substitute counsel mid-trial would have unreasonably disrupted the judicial process. The trial had been adjourned a month earlier, and defendant had not earlier expressed concerns about his counsel to the trial court. Defendant, by his conduct and his expressed concern over frivolous matters, indicated that appointing substitute counsel would not resolve defendant's concerns. The trial court did not abuse its discretion by declining to appoint substitute counsel for defendant.

V

Next, defendant claims he was denied effective assistance of counsel and a fair trial when defense counsel failed to request an instruction on careless discharge of a firearm causing death or injury, MCL 752.861. We disagree.

To establish ineffective assistance of counsel, defendant has the burden of overcoming a strong presumption that counsel's action constituted sound trial strategy. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant must show (1) that his trial counsel's performance fell below an objective standard of reasonableness, and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id*.

Careless discharge of a firearm causing injury or death may be considered a cognate lesser offense of murder. *People v Heflin*, 434 Mich 482, 496 n 10; 456 NW2d 10 (1990); *People v Beach*, 429 Mich 450, 462-463; 418 NW2d 861 (1988). If requested, a trial court is required to instruct on a cognate lesser offense if there is evidence that would support a conviction of the lesser offense. *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991). Moreover, where a defendant admits to conduct that as a matter of law would distinguish the greater offense from the lesser cognate offense, the instruction should not be given. *People v Bailey*, 451 Mich 657, 671; 549 NW2d 325, amended 453 Mich 1204 (1996).

Defendant testified that on the day in question, he heard gunshots coming from the house where the victim was killed, and he returned fire, pulling the assault rifle up and out the window of his car and firing six shots into the air. Defendant described this event as follows:

> At the time I heard the gunshots I was just -- I just returned fire up in the air. They was standing right in the door. I didn't shoot at none of 'em, either one of them. I just turned the gun away and shot in the air.

Thus, according to defendant's version of events, he intentionally fired a rifle six times. None of the gunshots he fired were claimed to be carelessly, negligently or recklessly discharged, and therefore, an instruction on careless discharge of a weapon was unwarranted. *People v Brian Cummings*, 458 Mich 877; 585 NW2d 299 (1998); *Bailey, supra* at 671. Defendant's argument that defense counsel made a serious mistake by not requesting an instruction on careless

discharge is thus without merit. "Trial counsel is not required to advocate a meritless position." *Snider, supra* at 425.

VI

Defendant next claims the trial court erred by refusing to instruct the jury on "imperfect self-defense." Defendant waived this issue by agreeing with the trial court that imperfect self-defense did not apply to this case to mitigate murder to voluntary manslaughter. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

VII

Last, defendant argues that the cumulative effect of trial errors denied him a fair trial. No prejudicial error has been found in this case, and absent the establishment of such errors, there can be no cumulative effect of errors meriting reversal. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Janet T. Neff
/s/ Richard Allen Griffin
/s/ Michael J. Talbot