# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>November 20, 2008 |
| v | No. 279238<br>Wayne Circuit Court |
| ROBERT MOORE KEALOHAPAUOLE,<br><br>Defendant-Appellant. | LC No. 06-011077-01 |

Before: Jansen, P.J., and O'Connell and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to concurrent terms of life imprisonment for the murder conviction and 38 to 60 months' imprisonment for the felon-in-possession conviction, to be served consecutively to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

First, defendant argues that the trial court abused its discretion when it denied his motion for an adjournment of trial in order to locate and subpoena a potential eyewitness. We disagree. "No adjournments, continuances or delays of criminal causes shall be granted by any court except for good cause shown . . . ." MCL 768.2. We review a trial court's ruling on a motion for an adjournment for an abuse of discretion. *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000). When deciding whether the trial court abused its discretion, we consider whether the defendant asserted a constitutional right, had a legitimate reason for asserting the right, had been negligent, or had requested previous adjournments. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). A defendant must also show prejudice as a result of the trial court's alleged abuse of discretion in denying an adjournment. *Id.*

Defendant waited until the third day of trial to request an adjournment to secure "key" witnesses. Despite the timing of defendant's request, the trial court granted defendant a one-day continuance, which defendant indicated "was all he needed" to secure the witnesses. On the morning of the fourth day of trial, one potential witness came to court and, in an offer of proof, testified that he did not have any personal knowledge about the charged offense but knew an alleged witness who might come to court and testify. However, he did not reveal the name of the alleged witness or reveal what information the witness could provide. Rather, the essence of his testimony was that he did not know if the eyewitness would actually testify, but he "wanted a

chance to tell him" and "see if he'll come [to court]." Under these circumstances, it was unreasonable to further delay trial in an attempt to locate an unnamed witness who had not come forward and whose testimony was unknown. Even on appeal, defendant has not provided a witness affidavit or identified any evidence establishing the identity of the unnamed eyewitness, what his testimony would have been, or how the testimony might have been helpful. Under these circumstances, the trial court did not abuse its discretion when it denied defendant's request for an adjournment.

We also reject defendant's general claim that the trial court's denial of his request deprived him of his constitutional right to present a defense. Although a defendant has a constitutional right to present a defense, US Const, Am VI; Const 1963, art 1 § 20, he must still comply with procedural and evidentiary rules established to assure fairness and reliability in the verdict. See *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984); *People v Arenda*, 416 Mich 1, 8; 330 NW2d 814 (1982). Here, the trial court did not preclude defendant from presenting a defense; rather, it refused to delay trial for a witness who had not previously been disclosed and whose name, whereabouts, and proposed testimony were unknown.

Next, defendant argues that his trial counsel was ineffective for failing to investigate and subpoena four witnesses. We disagree.[1] The failure to call a supporting witness does not necessarily constitute ineffective assistance of counsel, and there is no "unconditional obligation to call or interview every possible witness suggested by a defendant." *People v Beard*, 459 Mich 918, 919; 589 NW2d 774 (1998). Rather, decisions concerning which witnesses to call are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to call [the] witnesses deprived him of a substantial defense that would have affected the outcome of the proceeding." *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Defendant asserts that he informed his counsel about four witnesses, none of whom were called at trial. Although defendant asserts that the witnesses would have corroborated his version of certain events, he does not identify the witnesses in his brief and he has not provided any independent proof of the substance of their proposed testimony. Furthermore, even if the witnesses would have been called and testified, their testimony would not have provided a

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[1] Because defendant failed to raise this issue in a motion for a new trial or a request for an evidentiary hearing, our review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin* (*On Second Remand*), 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

> Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. To establish ineffective assistance of counsel, a defendant must show that 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).]

substantial defense. Defendant asserts that two male witnesses could have corroborated his testimony that he told people at his house that he heard arguing and gunshots at the victim's home and then ran home. Even if true, such testimony would only establish what defendant purportedly told the witnesses; it would not establish that defendant was not involved in the victim's shooting. Defendant asserts that the witnesses also would have contradicted his girlfriend's testimony that he confessed to the crime. According to defendant's girlfriend, however, defendant confessed to killing the victim when they were alone together in the bed. Thus, neither witness could have provided a substantial defense.

Defendant further asserts that two female witnesses would have testified that they heard defendant and his girlfriend argue about the paternity of her unborn child, which would have corroborated defendant's testimony that she testified falsely against him because he broke up with her after learning that he was not the father. However, defendant's girlfriend testified regarding the timeline of their relationship, including that she was pregnant when she moved in with defendant, and that defendant had always known that he was not the father of her unborn child. Also, the paternity issue was explored at trial, so the jury was aware of its potential impact on the girlfriend's testimony. Further, defendant's suggestion that his girlfriend was testifying against him because he did not want anything more to do with her was contradicted by defendant's admission that he wrote a letter to his girlfriend when he was in custody in which he expressed his love for her. Accordingly, counsel's failure to call these witnesses did not deprive defendant of a substantial defense.

Finally, the proposed testimony would do nothing to counteract the testimony of two independent eyewitnesses who were familiar with both defendant and the victim. Both witnesses testified that defendant and the victim were involved in an altercation approximately one week before the shooting. On the day of the shooting, the two men heard several gunshots, saw the victim stumble outside and fall, and went outside to assist him. During that time, the victim identified defendant as the shooter. As neighbors waited with the victim for an ambulance, they saw defendant return and shoot the victim two more times. This testimony corroborated defendant's girlfriend's testimony that defendant confessed to killing the victim, as well as the details of the offense. Defendant testified that he had no problems with either eyewitness, and he provided no reason to explain why they would offer false testimony against him. Given these circumstances, there is no basis to conclude that there is a reasonable probability that the jury's verdict would have been different if defense counsel had introduced the proposed testimony.

Defendant also argues in propria persona that defense counsel was ineffective for failing to locate and subpoena several eyewitnesses who could have supported his defense.[2] On appeal, defendant has submitted his own affidavit and affidavits from two individuals indicating that they would have provided testimony favorable to the defense. Because these affidavits were not presented below, they are not part of the existing record. MCR 7.210(A)(1); *People v Wiley*, 112 Mich App 344, 346; 315 NW2d 540 (1981). Furthermore, they do not support defendant's request for a remand for an evidentiary hearing on this issue. MCR 7.211(C)(1)(a)(*ii*).

[2] Once again, because defendant failed to raise this issue in the trial court, our review is limited to mistakes apparent on the record. *Ginther*, *supra*; *Sabin*, *supra*.

In her affidavit, Keaosha Kealohapauole averred that she heard defendant's girlfriend tell defendant that he was not the father of her unborn child, and that after defendant told his girlfriend "they were done," his girlfriend remarked that defendant "was gonna get his and that she was the wrong one to mess with." Again, defendant's girlfriend's motives for testifying were fully explored at trial. Further, she did not provide the principal testimony linking defendant to the charged shooting. Accordingly, there is no reasonable probability that, but for counsel's failure to secure Keaosha's testimony, the jury's verdict would have been different.

Quashela Kealohapauole averred in her affidavit that she and defendant went to the victim's house to obtain marijuana and, after defendant entered the walk-in porch, she heard gunshots and saw defendant jump from a window. She claimed that she immediately "pulled off" and went to defendant's house, and defendant returned before she and a friend left to find him. This testimony would place defendant at the victim's residence at the time of the shooting, but it would not exonerate him because Quashela admittedly did not have sight of him at the time the shots were fired. Further, because Quashela left after seeing defendant jump through a window, her testimony would have no bearing on the testimony of the two independent witnesses who testified that the victim identified defendant as the shooter and that they saw defendant return and shoot the victim two more times. Given these circumstances, there is no reasonable probability that Quashela's testimony would have affected the jury's verdict.

Defendant has not provided witness affidavits for Daniel Andre, Ebony Smith, Crystal Banks, and Mark Spears, or identified any evidence of record establishing that they could have provided testimony favorable to the defense that may have affected the outcome of trial. Defendant's unsupported assertion that these witnesses would have supported his defense is insufficient to establish his assertion of error. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Finally, defendant argues in propria persona that an affidavit from his girlfriend recanting her trial testimony that defendant admitted killing the victim constitutes newly discovered evidence entitling him to a new trial or an evidentiary hearing on this issue. We disagree.

To obtain a new trial based on newly discovered evidence, a defendant must demonstrate the following: "(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) (internal citation omitted).

New evidence in the form of a witness's recantation testimony has traditionally been regarded as suspect and untrustworthy. *People v Barbara*, 400 Mich 352, 362-363; 255 NW2d 171 (1977). This Court has repeatedly expressed reluctance to grant a new trial on the basis of such evidence. *People v Canter*, 197 Mich App 550, 560; 496 NW2d 336 (1992). As previously indicated, defendant's girlfriend's motives for testifying and her possible coercion were fully explored at trial. Further, her testimony was not the sole crucial evidence against defendant. For these reasons, the alleged new evidence does not make a different result probable on retrial. Accordingly, neither a new trial nor an evidentiary hearing is warranted.

Affirmed.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Donald S. Owens