

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO LAMONT WILLIAMS,

Defendant-Appellant.

---

UNPUBLISHED

September 30, 2010

No. 291208

Washtenaw Circuit Court

LC No. 08-000538-FC

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ELLIS GAMBLE,

Defendant-Appellant.

---

No. 291289

Washtenaw Circuit Court

LC No. 08-000537-FC

---

Before: MURPHY, C.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

At a joint trial, before separate juries, defendant Antonio Williams was convicted of first-degree premeditated murder, MCL 750.316(1)(a), conspiracy to commit first-degree murder, MCL 750.157a and MCL 750.316(1)(a), unlawful imprisonment, MCL 750.349b, assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a second habitual offender, MCL 769.10, to concurrent terms of life imprisonment for the first-degree murder and conspiracy convictions, 11 to 22-1/2 years for the unlawful imprisonment conviction, and 5 to 15 years for the assault conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Defendant James Gamble was convicted of first-degree premeditated murder, conspiracy to commit murder, felon in possession of a firearm, MCL 750.224f, and felony-firearm. He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent terms of life imprisonment for the first-degree murder, conspiracy, and felon-in-possession convictions, and a consecutive two-year term of imprisonment for the felony-firearm

conviction. Defendant Williams appeals as of right in Docket No. 291208, and defendant Gamble appeals as of right in Docket No. 291289. The appeals have been consolidated for this Court's consideration. We affirm both defendants' convictions and sentences.

Defendants' convictions arise from a March 16, 2008, assault of Dominique Young while she was confined inside defendant Williams's residence, and the subsequent shooting death of Jeremiah Jones.

### I. REQUEST FOR SEPARATE TRIALS

Both defendants argue that the trial court abused its discretion by refusing to order separate trials. Defendants argue that separate trials were warranted because their defenses were antagonistic, in that each contended that the other was the shooter, and because of the "spill-over" prejudice that resulted from certain witness testimony.

Although defendant Williams did not join in defendant Gamble's motion for severance, or file a separate motion for severance, because the trial court decided this issue in response to defendant Gamble's motion, and the trial court's ruling affected both defendants, we shall consider this issue preserved with respect to both defendants. See *People v Griffin*, 235 Mich App 27, 41 n 4; 597 NW2d 176 (1999), overruled in part on other grounds in *People v Thompson*, 477 Mich 146; 730 NW2d 708 (2007). We review a trial court's decision on a motion for severance for an abuse of discretion. MCL 768.5; *People v Hana*, 447 Mich 325, 331; 524 NW2d 682 (1994). A trial court abuses its discretion when it chooses an outcome that is outside the principled range of outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).

Public policy considerations of justice, judicial economy, and administration favor joint trials. *People v Etheridge*, 196 Mich App 43, 52; 492 NW2d 490 (1992). A defendant does not have a right to a separate trial unless he satisfies the requirements of MCR 6.121(C). *Hana*, 447 Mich at 331. With regard to mandatory severance, the Court in *Hana*, 447 Mich at 346-347, stated:

Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision.

"[M]ere finger pointing does not suffice." *Id.* at 355.

Further, antagonistic defenses do not automatically require severance. *Id.* at 348. As the Court explained in *Hana*:

Inconsistency of defenses is not enough to mandate severance; rather, the defenses must be "mutually exclusive" or "irreconcilable." Moreover, "[i]ncidental spillover prejudice, which is almost inevitable in a multi-defendant

trial, does not suffice.” The “tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other.” [*Id.* at 349 (citations omitted).]

Defenses are mutually exclusive “if the jury, in order to believe the core of the evidence offered on behalf of one defendant, must disbelieve the core of the evidence offered on behalf of the co-defendant.” *Id.* at 350 (citation omitted). The risk of prejudice is increased when evidence that the jury should not consider against one defendant, which would not be admissible if that defendant were tried alone, is admitted against a codefendant or when one defendant is denied the opportunity to present essential exculpatory evidence because it would be inadmissible against a codefendant. *Id.* at 346 n 7. However, this risk of prejudice is reduced by proper cautionary jury instructions and is significantly reduced by the use of separate juries, which is a form of partial severance. *Id.* at 351, 360. The risk is reduced even further when the prosecution proceeds on an aiding and abetting theory. *Id.* at 360. “Finger pointing by the defendants when such a prosecution theory is pursued does not create mutually exclusive antagonistic defenses.” *Id.* at 360-361.

The trial court found that severance was not mandated under MCR 6.121(C), or required under MCR 6.121(D), because separate juries would sufficiently protect defendant Gamble’s substantial rights. The use of separate juries is evaluated under the same standard as motions to sever. *Hana*, 447 Mich at 351. “The precise issue is whether there was prejudice to substantial rights after the dual-jury system was employed.” *Id.* at 352. The use of separate juries in this case significantly lessened the risk of prejudice to defendants because each jury was concerned with the culpability of only one defendant, which made the antagonistic nature of defendants’ defenses irrelevant. Also, the prosecution proceeded under an aiding and abetting theory with respect to defendant Williams, further reducing the risk of prejudice. The properly instructed juries could find both defendants liable without any prejudice or inconsistency because an aider and abettor can be held liable as a principal. *Id.* at 361. Therefore, to the extent defendants’ theories of defense were antagonistic, no prejudice warranting reversal occurred because defendants were tried jointly.

Defendants argue that their substantial rights were in fact affected because evidence was presented at trial that, while admissible against one defendant, was either inadmissible or unduly prejudicial as to the other. We disagree. We find no merit to defendant Gamble’s assertion that testimony regarding the earlier assault on Young, which involved only defendant Williams, should have been excluded from his trial because it was irrelevant and prejudicial. We note that defendant Gamble did not object to this evidence at trial. There was evidence that defendant Gamble came into the house while Young was there, and that he did not intervene. The evidence was relevant to explain the later events and show the connection between defendant Williams and defendant Gamble, and to show why defendant Gamble would conspire with defendant Williams to kill Jones when there was no evidence that defendant Gamble had any prior interaction with Jones, the murder victim. The testimony was neither irrelevant nor unfairly prejudicial. Although defendant Gamble contends that the evidence would have been less significant in a separate trial, a defendant is not entitled to severance merely because he may have a better chance of acquittal in a separate trial. “[A] fair trial does not include the right to exclude relevant and competent evidence.” *Id.* at 350, quoting *Zafiro v United States*, 506 US 534, 540; 113 S Ct 933; 122 L Ed 2d 317 (1993).

Defendant Gamble also asserts that he was prejudiced by testimony that defendant Williams told him to “go get the straps” (i.e., guns), which he contends could have been avoided in a separate trial. However, the record indicates that this testimony was immediately stricken from the record and Gamble’s jury was instructed not to consider it. Jurors are presumed to follow their instructions. *People v Unger*, 278 Mich App 210, 253; 749 NW2d 272 (2008). The court’s instruction was sufficient to protect defendant Gamble’s rights. *Hana*, 447 Mich at 351, 360.

Defendant Gamble also contends that he was unfairly prejudiced by testimony associating him with defendant Williams while Williams was expressing his consciousness of guilt. However, other witnesses identified defendant Gamble as one of the men who fled the scene and the city with defendant Williams. Defendant Gamble’s own flight was evidence of his consciousness of guilt. *Unger*, 278 Mich App at 226. The additional evidence relating to Williams added little to the evidence that was already available to the jury. Thus, there was no unfair prejudice.

Defendant Williams complains that he was prejudiced because of testimony elicited from witnesses by defendant Gamble’s counsel. However, “[i]t is not dispositive that the evidence was presented here by counsel for a codefendant, rather than the prosecutor.” *Hana*, 447 Mich at 362. Defendant Williams erroneously asserts that testimony characterizing him as abusive, manipulating, controlling, and intimidating was inadmissible character evidence under MRE 404(a). However, the record discloses that the evidence was offered to show the witness’s bias, which was relevant to the witness’s credibility. See *People v Layher*, 464 Mich 756, 765; 631 NW2d 281 (2001). Evidence that is inadmissible for one purpose may be admissible for another purpose. MRE 105; *People v Yost*, 278 Mich App 341, 355; 749 NW2d 753 (2008). We find no unfair prejudice.<sup>1</sup>

Defendant Williams also asserts that the joint trial adversely affected his choice of defenses. However, the use of separate juries significantly lessened any perceived prejudice in this regard. Opening statements and closing arguments were conducted only before each defendant’s respective jury. Thus, defendant Williams’s jury was not directly exposed to defendant Gamble’s theory of defense.

In order to warrant reversal, a “defendant ‘must show that the magnitude of the prejudice [resulting from separate juries] denied him a fair trial.’” *Hana*, 447 Mich at 360, quoting *United States v Tootick*, 952 F2d 1078, 1082 (CA 9, 1991). Prejudice requiring reversal exists only where a substantive right of the defendant is violated. *Id.* Here, the evidence that defendants contend was unduly prejudicial either would have been admissible regardless of whether defendants were tried together or separately and was not more prejudicial than probative, or any perceived prejudice was alleviated by appropriate jury instructions. Thus, even with the benefit of hindsight, neither defendant has shown that he was unduly prejudiced by the trial court’s

---

<sup>1</sup> Because defendant Williams has not shown that the evidence was inadmissible, his claim that defense counsel was ineffective for failing to object to the evidence is without merit. *Unger*, 278 Mich App at 256.

decision to try them jointly, before separate juries. Therefore, the trial court did not abuse its discretion in finding that severance was not mandated or necessary. Accordingly, defendant Williams's claim that his defense counsel was ineffective for failing to argue for severance also cannot succeed. *Unger*, 278 Mich App at 254.

## II. DEFENDANT WILLIAMS'S REMAINING ISSUES IN DOCKET NO. 291208

### A. *BATSON*<sup>2</sup> CHALLENGE

Defendant Williams argues that the trial court erred in finding that he failed to establish a prima facie case of purposeful racial discrimination when he challenged the prosecutor's use of a peremptory challenge to dismiss an African-American juror.

Whether a defendant has made a prima facie case of discrimination (the first step) under *Batson* is a mixed question of law and fact. *People v Knight*, 473 Mich 324, 342; 701 NW2d 715 (2005). "A trial judge must first find the facts and then must decide whether those facts constitute a prima facie case of discrimination." *Id.* This Court reviews questions of law de novo and reviews the trial court's findings of fact for clear error. *Id.*

In *People v Bell*, 473 Mich 275, 278-279, 282-283; 702 NW2d 128 (2005), amended 474 Mich 1201 (2005), our Supreme Court summarized the procedure for addressing a *Batson* challenge, in pertinent part, as follows:

In *Batson*, the United States Supreme Court held that a peremptory challenge to strike a juror may not be exercised on the basis of race. The Court set forth a three-step process for determining whether a challenger has improperly exercised peremptory challenges. First, the opponent of the challenge must make a prima facie showing of discrimination based on race.

\* \* \*

To establish a prima facie case of discrimination based on race, the opponent of the challenge must show that: (1) the defendant is a member of a cognizable racial group; (2) peremptory challenges are being exercised to exclude members of a certain racial group from the jury pool; and (3) the circumstances raise an inference that the exclusion was based on race. The *Batson* Court directed trial courts to consider all relevant circumstances in deciding whether a prima facie showing has been made. [Citations omitted.]

Here, the parties do not dispute that defendant Williams satisfied the first two requirements for establishing a prima facie case. With regard to the third requirement, "the trial court must consider all relevant circumstances, including whether there is a pattern of strikes against black jurors [and] the questions and statements made by the prosecutor during voir dire and in exercising his challenges . . . ." *People v Barker*, 179 Mich App 702, 705-706; 446

---

<sup>2</sup> *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).

NW2d 549 (1989), citing *Batson*, 476 US at 97. In this case, two African-Americans were part of the jury venire. One was excused for cause and the other was peremptorily dismissed by the prosecutor. The trial court appropriately examined the circumstances surrounding the prosecutor's use of a peremptory challenge to dismiss the remaining African-American juror in determining whether a prima facie case of discrimination was established. In particular, the prosecutor's questions during voir dire did not suggest a discriminatory intent. Further, the prosecutor did not use a peremptory challenge to immediately dismiss the African-American juror, but rather peremptorily dismissed other non-African-American jurors beforehand. Defendant Williams asserts that the prosecutor's use of a peremptory challenge to dismiss the only remaining African-American juror was sufficient evidence of discrimination, but in *People v Williams*, 174 Mich App 132, 137; 435 NW2d 469 (1989), this Court stated:

The mere fact that the prosecutor used one or more peremptory challenges to excuse blacks from the jury venire is insufficient to make a prima facie showing of discrimination. The mere fact that no member of the defendant's race ended up sitting on the jury is likewise insufficient to make a prima facie showing of discrimination. [Citations omitted.]

Further, the fact that the only other African-American in the array was excused for cause is not relevant to the determination whether a prima facie showing of discrimination was made. *Knight*, 473 Mich at 336-337; *Williams*, 174 Mich App at 471.

Considering the "sum of the proffered facts," *Knight*, 473 Mich 336-337, the trial court did not err in finding that defendant Williams failed to establish a prima facie case of purposeful discrimination.

## B. JUROR MISCONDUCT

Defendant Williams argues that a juror's misconduct in creating a Google map of the crime area from his home computer requires reversal. The map was discovered after jury selection, but before trial began. The map was confiscated before it was shown to any other jurors and the trial court instructed the juror in question, and later the remaining jurors, not to conduct their own investigations. Because defendant Williams did not move for a mistrial or object to the manner in which the trial court handled the matter, this issue is unpreserved. We review unpreserved claims of error for plain error affecting a defendant's substantial rights. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

In *People v Budzyn*, 456 Mich 77, 88-89; 566 NW2d 229 (1997), our Supreme Court observed:

A defendant tried by jury has a right to a fair and impartial jury. During their deliberations, jurors may only consider the evidence that is presented to them in open court. Where the jury considers extraneous facts not introduced in evidence, this deprives a defendant of his rights of confrontation, cross-examination, and assistance of counsel embodied in the Sixth Amendment.

In order to establish that the extrinsic influence was error requiring reversal, the defendant must initially prove two points. First, the defendant must

prove that the jury was exposed to extraneous influences. Second, the defendant must establish that these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict. [Citations omitted.]

Here, the juror's home-produced Google map qualifies as an extrinsic influence. But there is no basis for finding a real and substantial possibility that it could have affected the jury's verdict. The map was confiscated before testimony was received and before it was shown to other jurors. Further, the prosecutor introduced a similar map as an exhibit at trial, which the jury was permitted to consider. Therefore, reversal is not required.

### C. AUTOPSY PHOTOGRAPHS

Defendant Williams next argues that the admission of autopsy photographs denied him a fair trial. Defense counsel's affirmative statement that he had no objection to the admission of the photographs waived any claim that the trial court erred in admitting those photographs. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Therefore, we shall consider this issue in the context of defendant Williams's corresponding ineffective assistance of counsel claim.

Because defendant Williams did not raise the issue of ineffective assistance of counsel in the trial court, our review of that issue is limited to mistakes apparent from the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). To establish ineffective assistance of counsel, defendant Williams must show that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

Photographs are admissible if substantially necessary or instructive to show material facts or conditions and their probative value is not substantially outweighed by the danger of unfair prejudice. MRE 403; *Unger*, 278 Mich App at 247; *People v Hoffman*, 205 Mich App 1, 18; 518 NW2d 817 (1994). If photographs are otherwise admissible for a proper purpose, they are not rendered inadmissible merely because they vividly portray the details of a gruesome or shocking accident or crime, even though they may tend to arouse the passion or prejudice of the jurors. *Id.*

In this case, defendant Williams was charged with first-degree premeditated murder and the jury was instructed on both first- and second-degree murder. "In order to convict a defendant of first-degree premeditated murder, the prosecution must first prove that the defendant intentionally killed the victim." *Unger*, 278 Mich App at 223. The photographs were relevant to show intent to kill because they depicted the nature and extent of the victim's injuries. *People v Flowers*, 222 Mich App 732, 736; 565 NW2d 12 (1997). The photographs were also relevant to corroborate the medical examiner's testimony. *Unger*, 278 Mich App at 257. Although defendant Williams asserts that the medical examiner's testimony was alone sufficient to establish intent, the jury is not required to depend solely on the testimony of experts. It is entitled to view the severity and vastness of the injuries itself. *People v Mills*, 450 Mich 61, 72-73; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). We also disagree with defendant Williams's argument that the photographs were unfairly prejudicial due to their gruesome and shocking nature. This argument is principally directed at two photographs. One photo depicts the victim's hand enclosed in a paper bag, but it is not particularly gruesome. The other photo

depicts a small amount of the victim's intestines protruding from an entry gunshot wound. Although that photo is more graphic, it is not unduly prejudicial. We are not persuaded that the photographs were improperly admitted.

In light of our conclusion, defendant Williams's ineffective assistance of counsel claim cannot succeed. Defense counsel is not ineffective for failing to make a futile objection.<sup>3</sup> *Unger*, 278 Mich App at 257.

#### D. SUFFICIENCY OF THE EVIDENCE

Defendant Williams argues that the evidence was insufficient to support his convictions for unlawful imprisonment and assault with intent to do great bodily harm less than murder. We disagree. In reviewing a challenge to the sufficiency of the evidence, this Court reviews the record de novo by viewing the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the charged crimes were proven beyond a reasonable doubt. *People v Harrison*, 283 Mich App 374, 377-378; 768 NW2d 98 (2009).

##### 1. ASSAULT WITH INTENT TO DO GREAT BODILY HARM

"The elements of assault with intent to do great bodily harm less than murder are: '(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder.'" *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005) (emphasis omitted), quoting *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). In this case, defendant Williams only challenges the intent element.

Assault with intent to do great bodily harm is a specific intent crime. *Id.* The defendant must have intended "to do serious injury of an aggravated nature." *Brown*, 267 Mich App at 147 (citation omitted); see also *People v Smith*, 217 Mich 669, 673; 187 NW 304 (1922), and *People v Ochotski*, 115 Mich 601, 608; 73 NW 889 (1898). Intent can be inferred from any facts in evidence, *Unger*, 278 Mich App at 223, 231, including the defendant's acts, the means employed to commit the assault, and the extent of the victim's injuries, although actual physical injury is not a necessary element of the crime. *People v Harrington*, 194 Mich App 424, 430; 487 NW2d 479 (1992); *People v Cunningham*, 21 Mich App 381, 384; 175 NW2d 781 (1970). Use of a weapon is also not a necessary element of the crime; a defendant can use his bare hands. *People v Van Diver*, 80 Mich App 352, 356; 263 NW2d 370 (1977). "Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *Unger*, 278 Mich App at 223.

The evidence showed that defendant Williams was angry when he brought Young into his house. Young and defendant Williams immediately began to fight. After Young hit defendant Williams a few times, he grabbed her by the front of her neck with his hand, threw her

---

<sup>3</sup> We note that the trial court denied defendant Gamble's objection to the admission of the photographs, thereby further demonstrating that any objection by defendant Williams would have been futile.



down on the couch, and held her down by her neck.<sup>4</sup> Young testified that she tried to breathe, but found it difficult to do so. Young also testified that she sustained injuries to her face, including swelling and bruising, from being hit by defendant Williams. The evidence of Williams's emotional state, the testimony describing his conduct, and the injuries to Young, viewed in a light most favorable to the prosecution, was sufficient to enable the jury to reasonably infer beyond a reasonable doubt that defendant Williams assaulted Young, intending to inflict great bodily harm. Thus, the evidence was sufficient to support defendant Williams's conviction for assault with intent to do great bodily harm less than murder.

## 2. UNLAWFUL IMPRISONMENT

Defendant Williams was charged with unlawful imprisonment based on secret confinement and restraint to facilitate the commission of a separate felony, contrary to MCL 750.349b(1)(b) and (c). Subsection (1)(c) provides that a person who knowingly restrains another person "to facilitate the commission of another felony" is guilty of unlawful confinement. Defendant Williams argues that the evidence was insufficient to find that he restrained Young within the meaning of the statute. MCL 750.349b(3)(a) provides:

"Restrain" means to forcibly restrict a person's movements or to forcibly confine the person so as to interfere with that person's liberty without that person's consent or without lawful authority. The restraint does not have to exist for any particular length of time and may be related or incidental to the commission of other criminal acts.<sup>5</sup>

Young testified that defendant Williams grabbed and forced her into his house, after which he closed and locked the door behind him, and then assaulted her. It was reasonable for the jury to infer that defendant Williams's actions were aimed at preventing Young from leaving so that he could assault her. Although defendant Williams alternatively asserts that he locked his door for security because he lived in a high crime area, it is for the jury to determine what inferences may be drawn from the evidence. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). The evidence was sufficient to allow the jury to find that Young's movements were forcibly restricted against her will, which interfered with her freedom of movement. Further, although testimony was presented that no one prevented Young from leaving, Young testified that she was not permitted to leave. All conflicts in the evidence are resolved in favor of the prosecution. *Unger*, 278 Mich App at 222. Further, this Court will not "interfere with the jury's determinations regarding the weight of the evidence and the credibility of the witnesses." *Id.* In sum, the evidence was sufficient to support defendant Williams's unlawful imprisonment conviction based on restraint facilitating the commission of another felony. Therefore, we need

---

<sup>4</sup> Provocation does not mitigate the offense of assault with intent to do great bodily harm. *People v Mitchell*, 149 Mich App 36, 38-39; 385 NW2d 717 (1986).

<sup>5</sup> This statute, which was enacted by 2006 PA 160, differs from the kidnapping statute, MCL 750.349. Because MCL 750.349b(3)(a) specifically provides that restraint "may be related to or incidental to the commission of other criminal acts," defendant's reliance on case law that holds to the contrary with respect to the kidnapping statute is misplaced.

not address whether there was sufficient evidence to convict defendant Williams of unlawful imprisonment under the alternative theory of secret confinement.

### E. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant Williams argues that defense counsel was ineffective for failing to request jury instructions on self-defense, defense of others, and imperfect self-defense. A defendant is entitled to have instructions given if the evidence supports them. *People v Hawthorne*, 474 Mich 174, 182; 713 NW2d 724 (2006). In this case, however, defendant Williams has not overcome the presumption that defense counsel pursued a defense theory of innocence that did not depend on an evaluation of Gamble's actions as a matter of trial strategy. We will not second-guess counsel in matters of trial strategy. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

Furthermore, our review of the record discloses that the evidence did not support the instructions in question. “[T]he killing of another in self-defense is justifiable homicide if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm.” *People v Kurr*, 253 Mich App 317, 320-321; 654 NW2d 651 (2002) (citation omitted). Deadly force may also be used in defense of others, *id.* at 321, which also requires an honest and reasonable belief regarding the imminent threat of harm to a third person, CJI2d 7.21. “Imperfect self-defense is a qualified defense that can mitigate second-degree murder to voluntary manslaughter.” *People v Kemp*, 202 Mich App 318, 323; 508 NW2d 184 (1993). It is available as a defense where the defendant would be entitled to assert self-defense were it not for the fact that he was the initial aggressor and did not sufficiently communicate his withdrawal to the victim. *Id.* In this case, there was no evidence that the victim was armed or posed a danger to either defendant. Thus, the evidence did not support the instructions in question and any request would have been futile. Accordingly, defendant Williams's counsel was not ineffective for failing to request the instructions.

### III. DEFENDANT GAMBLE'S REMAINING ISSUE IN DOCKET NO. 291289

Defendant Gamble argues that he is entitled to a new trial based on newly discovered evidence, that evidence being the identity of a new witness, who allegedly would have identified someone else as the shooter. Because defendant Gamble did not preserve this issue by raising it in a post-conviction motion in the trial court, our review is limited to plain error affecting his substantial rights. *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005).

To be entitled to a new trial based on newly discovered evidence, a defendant must show: “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). Here, defendant Gamble relies on a defense investigator's report of an interview with a witness who claimed that she observed the shooting, and allegedly would have identified someone other than defendant Gamble as the shooter. Because the report is dated January 19, 2009, which is a week before trial began and two weeks before the trial ended, this evidence cannot be considered newly discovered. Further, the report itself is inadmissible hearsay, and defendant Gamble has not submitted an affidavit from the actual witness summarizing her proposed testimony. Thus,

defendant Gamble has not established by competent evidence that a different result would be probable on retrial.<sup>6</sup> Accordingly, defendant Gamble is not entitled to a new trial.

Defendant Gamble alternatively argues that defense counsel was ineffective for failing to call the witness at trial. Because defendant Gamble did not raise an ineffective assistance of counsel claim in the trial court, review of this issue is limited to mistakes apparent from the record. *Jordan*, 275 Mich App at 667. The decision whether to call a witness is a matter of trial strategy and can constitute ineffective assistance of counsel only if the defendant shows that it deprived him of a substantial defense. *Payne*, 285 Mich App at 190. In this case, defense counsel's reasons for not calling the witness are not apparent from the record. Further, because defendant Gamble has not submitted an affidavit from the witness, he has not established the factual predicate for his claim that the failure to call the witness at trial deprived him of a substantial defense. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999) (defendant has the burden of establishing the factual predicate for his claim). Therefore, defendant Gamble's ineffective assistance of counsel claim cannot succeed.

Affirmed.

/s/ William B. Murphy  
/s/ Joel P. Hoekstra  
/s/ Cynthia Diane Stephens

---

<sup>6</sup> In addition, as plaintiff observes, defendant Gamble admitted at his sentencing that he was the lone shooter.