

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARMONDO JACKSON,

Defendant-Appellant.

UNPUBLISHED

October 22, 2020

No. 350539

Wayne Circuit Court

LC No. 16-009220-01-FC

Before: SWARTZLE, P.J., and JANSEN and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right the trial court’s order denying his motion for a new trial or evidentiary hearing. We affirm.

I. FACTS AND PROCEDURAL BACKGROUND

This case is before this Court after a remand to the trial court for it to explain why it denied defendant’s motion for a new trial or evidentiary hearing. This Court has previously described the facts concerning this case:

This case arises out of the murder of Maurice Varner (“Varner”). Defendant recruited Blade [Durant] and [Timothy] Sims to assist him in killing Varner because defendant’s cousin, Jeffrey Jackson, would pay them \$25,000 to do so. Blade and Sims hid in the basement of the abandoned house next door to the house of defendant’s fiancée, Kamille Durant (“Kamille”). Defendant returned to the abandoned home with Varner, and led Varner into the basement. Sims jumped out of his hiding and hit Varner in the back of the head with a crowbar. Blade and defendant each hit Varner in the head with a two-by-four piece of lumber before Blade struck him in the neck with a hatchet. Defendant then took the hatchet from Blade and repeatedly hit Varner in the neck until Varner died. The three men wrapped Varner in a rug, put him in Kamille’s car, and drove to an alley, where they dumped Varner’s body. [*People v Jackson*, unpublished per curiam opinion of the Court of Appeals, issued March 19, 2019 (Docket No. 339924), p 1.]

After defendant was convicted and sentenced, he appealed to this Court. While defendant's appeal was pending, he sought production of several transcripts from December 2016 and January 2017, related to Sims's pleading guilty to second-degree murder. The relevant transcript of December 5, 2016, contains statements by Sims in which he states defendant did not bring the victim to the abandoned house where the murder occurred, and indicating only Sims and Blade were involved in the murder.

Defendant filed a motion for a new trial or evidentiary hearing on the basis of the plea-hearing transcript. Defendant asserted a new trial was required because the plea-hearing transcript constituted newly-discovered evidence, and that an evidentiary hearing was necessary to determine why defense counsel failed to obtain the transcript. In response, the prosecution argued the transcript was not newly discovered, only newly available, and that defendant and defense counsel knew about the transcript before his trial. Further, the prosecution asserted defense counsel was not ineffective for failing to obtain the transcript because there was no reasonable probability it would have affected the outcome of defendant's trial.

The trial court denied defendant's motion for a new trial or evidentiary hearing without explanation. On appeal to this Court, defendant argued, in part, that the trial court abused its discretion by denying his motion for an evidentiary hearing and a new trial without providing any reason for the denial. This Court agreed. This Court concluded "the trial court abused its discretion when it denied defendant's motion for a new trial without stating its reasons for doing so." *Jackson*, unpub op at 2. Moreover, this Court explained that although "a trial court is not required to state its reason for denying a motion for an evidentiary hearing[.]" because the trial court had to provide an explanation for denying the motion for a new trial on remand, it should also provide an explanation for denying the motion for an evidentiary hearing "so that this [C]ourt can adequately review the trial court's exercise of its discretion." *Id.* Thus, this Court affirmed in part (the admissibility of photographs introduced at trial), but remanded "for the trial court to articulate its reasons for denying defendant's motion for a new trial." *Id.* at 4.

After remand, the trial court held a hearing on defendant's motion for a new trial or evidentiary hearing. The parties argued consistent with their previously-submitted briefs. The trial court denied defendant's motion for a new trial or an evidentiary hearing, finding the plea-hearing transcript was not newly discovered evidence because "it was known to all the parties." The trial court noted defendant had approximately six months before his trial to obtain the transcript, and defendant called Sims as a witness at trial (although Sims "exercised his 5th amendment rights after consulting with his attorney"). Further, the trial court stated that the transcript was "not such as to render a different result" on retrial, explaining that the evidence presented at trial demonstrated defendant *was* involved in the murder. Specifically, the trial court relied on: (1) Blade's testimony that he, Sims, and defendant murdered the victim; (2) Kamille saw Blade, Sims, and defendant carry a dead body from the abandoned house to the trunk of her car; (3) Raymond Bridges, a fellow inmate with defendant, overheard defendant make incriminating statements; (4) cellular telephone record analysis showed defendant was in the area of the murder and where the body was eventually found; and (5) defendant denied involvement in the murder. The trial court also concluded there was no reasonable probability the outcome of defendant's trial would have been different had defense counsel ordered or produced Sims's plea-hearing transcript at trial.

II. NEW TRIAL OR EVIDENTIARY HEARING

Defendant first argues the trial court abused its discretion when it denied his motion for a new trial on the basis of newly discovered evidence. We disagree.

This Court reviews a trial court's decision on a motion for a new trial for an abuse of discretion. *People v Cress* 468 Mich 678, 691; 664 NW2d 174 (2003). "An abuse of discretion occurs when the trial court renders a decision falling outside the range of principled outcomes." *People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012).

"For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (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." *Cress*, 468 Mich at 692 (quotation marks and citation omitted). The defendant bears the burden of satisfying all four elements of this test. *Rao*, 491 Mich at 279. "[E]vidence is not newly discovered if the defendant or defense counsel was aware of the evidence at the time of trial," even if the evidence was unavailable at the time of trial. *Id.* at 281-282. A codefendant's testimony may constitute newly-discovered evidence if the defendant was not aware of the testimony at the time of trial, but, if the defendant knew or should have known about the codefendant's testimony before or during trial, a new trial is not available under the test for newly discovered evidence. *People v Terrell*, 289 Mich App 553, 567, 570; 797 NW2d 684 (2010), overruled in part on other grounds by *People v Grissom*, 492 Mich 296, 320; 821 NW2d 50 (2012). "[N]ewly available evidence does not constitute newly discovered evidence sufficient to warrant a new trial . . ." *Terrell*, 289 Mich at 570.

The trial court did not abuse its discretion in denying defendant's motion for a new trial because the transcript of Sims's plea hearing was not newly discovered evidence. In his motion for a new trial or evidentiary hearing, defendant acknowledged he "asked his trial counsel to obtain the plea and sentencing transcript of Sims" and "was informed the transcripts were missing." The record also establishes that defense counsel tried to obtain the plea-hearing transcript several months before defendant's trial began. In early January 2017, a month after Sims's plea hearing, and over five months before defendant's trial began, the trial court entered a stipulation and order for the production of a transcript for Sims's plea hearing. The order states this issue "c[a]me before the Court upon Defendant's Motion and Order for Production of Transcript of Plea Proceeding for Timothy Terrell Sims, Case No. 16-008236-02 on December 5, 2016." Further, at a mid-January 2017 pretrial hearing, the trial court asked defense counsel whether "we received a transcript from the plea proceedings with regards to Mr. Sims." In response, defense counsel stated, "Not yet, but I think I'm going to be able to get that soon." Defense counsel also noted that she spoke with defendant the day before the pretrial hearing and that he was aware "[o]f everything." Because defendant and defense counsel were aware of Sims's plea hearing at trial (and for several months beforehand), given that he was a witness at defendant's trial, requested it be transcribed, and were informed it was missing, it does not constitute newly-discovered evidence justifying a new trial. *Rao*, 491 Mich at 281-282. Simply because the transcript of Sims's plea hearing was produced after defendant's trial does not mean it was newly discovered evidence but, rather, newly available. And because "newly available evidence does not constitute newly discovered evidence sufficient to warrant a new trial," the trial court did not abuse its discretion in denying defendant's motion for a new trial on the basis of newly discovered evidence. *Terrell*, 289 Mich at 570.

Even if the transcript of Sims's plea hearing was newly discovered evidence, it would not have made a different result probable on retrial. *Cress*, 468 Mich at 692. As the prosecution notes, significant evidence was presented demonstrating defendant was involved in the murder of the victim. Records showed defendant's cellular telephone was located near the murder scene and where the victim's body was dumped about the time of the crime, and when the body was moved. Blade testified defendant told Blade and Sims to assist in killing the victim, and also described defendant's actions at the time of the murder. Kamille, defendant's girlfriend, testified the victim owed defendant money, and defendant suspected the victim had broken into a family member's truck and stolen items. Moreover, Kamille testified that defendant admitted to beating the victim to death and described defendant's instructions to dispose of the victim's body using a rug. Monique Lewis, Kamille's aunt, testified that defendant asked for a rug she had at her house and that he, Sims, and Blade left in Kamille's car with the rug in late July 2016. Kamille testified she saw defendant "put plastic bags all over the [victim]" and that Blade and Sims "put[] on gloves and they rolled the man in the carpet" defendant took from Lewis. Moreover, Bridges testified he was an inmate in the same jail as defendant and that he overheard defendant calling people and asking them to assist in cleaning up the murder scene. Therefore, even if the transcript was newly discovered evidence, it would not have made a different result probable at trial, and the trial court did not abuse its discretion in denying defendant's motion. *Cress*, 468 Mich at 692.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also argues that defense counsel was ineffective because she failed to obtain transcripts from a codefendant's plea hearing in which he stated defendant was not present at the murder scene. We disagree.

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012) (citation omitted). "To establish an ineffective assistance of counsel claim, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Id.* Additionally, a defendant "must also show that the result that did occur was fundamentally unfair or unreliable." *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the [trial's] outcome." *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "Trial counsel is responsible for preparing, investigating, and presenting all substantial defenses." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). "A substantial defense is one that might have made a difference in the outcome of the trial." *Id.* (quotation marks and citation omitted). "The failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome." *People v Grant*, 470 Mich 477, 493; 684 NW2d 686 (2004).

After a thorough review of the record before us, we conclude that defense counsel's performance was not deficient. Despite defendant's claims to the contrary, defense counsel attempted to obtain the transcript of Sims's December 5, 2016 plea hearing. Approximately five months before defendant's trial, the trial court entered a stipulation and order for the production of a transcript for Sims's plea hearing after defendant's motion for production of that transcript. And, at a January 2017 pretrial hearing, defense counsel indicated she had not yet received the plea-hearing transcript but believed she would "be able to get that soon," and noted that defendant was

aware “[o]f everything” going on with his case. Further, in his motion for a new trial or evidentiary hearing, defendant acknowledged he “asked his trial counsel to obtain the plea and sentencing transcript of Sims” and “was informed the transcripts were missing.” And although defense counsel would have had the opportunity to cross-examine Sims when he was called as a witness by the prosecution, she was unable to do so because Sims asserted his Fifth Amendment right against self-incrimination. Thus, because the record demonstrates that defense counsel attempted to obtain the plea-hearing transcript, her performance did not fall below an objective standard of reasonableness under prevailing professional norms. *Lockett*, 295 Mich App at 187. As a result, defense counsel was not ineffective.

Moreover, even if we were to have concluded that defense counsel’s performance was deficient, defendant has failed to show any resulting prejudice. Had Sims’s statement at his plea hearing, that defendant did not bring the victim down into the basement of the abandoned house where the murder occurred, then presented at trial, there is no reasonable probability that, but for defense counsel’s error, the result of defendant’s trial would have been different. The evidence presented at trial overwhelmingly demonstrated defendant was present at the scene of the murder and actively participated in killing the victim and disposing of his body. Given the overwhelming evidence of defendant’s involvement in the murder of the victim, even if the transcript of Sims’s plea hearing was presented at trial, there is no reasonable probability the outcome would have been different. As a result, even if defense counsel’s performance was deficient, defendant has failed to establish he was prejudiced by the performance. *Id.* Therefore, the trial court did not abuse its discretion in denying defendant’s motion for an evidentiary hearing.

Defendant also argues defense counsel’s performance was deficient because she failed to obtain casino surveillance videos and text messages from defendant’s cellular telephone demonstrating “his girlfriend’s famil[y]’s motives and intentions to lie on defendant,” and personal issues at home interfered with defense counsel’s ability to focus on defendant’s case. Defendant has abandoned these arguments.

“It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.” *People v Bass*, 317 Mich App 241, 276; 893 NW2d 140 (2016) (quotation marks and citations omitted). Rather, “[t]he appellant himself must first adequately prime the pump; only then does the appellate well begin to flow.” *Id.* (quotation marks and citations omitted).

Beyond stating that defense counsel failed to obtain video and text message evidence, and had issues at home that affected her ability to focus on defendant’s case, defendant provided no further analysis or argument of those arguments. Instead, most of defendant’s ineffective-assistance-of-counsel argument in his Standard-4 brief is dedicated to defense counsel’s failure to obtain the transcript of Sims’s plea hearing. Because defendant simply left it to this Court to “discover and rationalize the basis for his clauses” and “unravel and elaborate for him his arguments,” defendant has abandoned his additional arguments. *Id.* Therefore, we decline to address them.

Affirmed.

/s/ Brock A. Swartzle

/s/ Kathleen Jansen

/s/ Stephen L. Borrello