

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 12, 2013

v

ERIC JERMAINE HALL,

Defendant-Appellant.

No. 296860
Wayne Circuit Court
LC No. 09-021353-FC

Before: M.J. KELLY, P.J., and WILDER and FORT HOOD, JJ.

PER CURIAM.

A jury convicted defendant of first-degree premeditated murder, MCL 750.316(1)(a), felon in possession of a firearm, MCL 750.224, and possession of a firearm during the commission of a felony, MCL 750.227b, and acquitted defendant of two additional counts of assault with intent to murder, MCL 750.83. The trial court sentenced defendant to life imprisonment for the murder conviction and a 30-day probationary term for the felon-in-possession conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant and codefendant Antonio Revis were tried jointly, before the same jury, in connection with the June 22, 2009, shooting death of Karnell Alexander. According to witnesses, Alexander was on a street with Elajah Williams and Gwen Johnson when defendant jumped out of a van and shot Alexander. Alexander died from multiple gunshot wounds. A firearms examiner determined that shell casings collected from the scene were all fired by the same weapon. Williams and Johnson both identified defendant as the shooter. Alexander's girlfriend, Shimere Duncan, testified that she arrived at the scene shortly after Alexander was shot and was able to speak to him. When Duncan asked Alexander, "Who did this to you?," he responded, "Tone and E." According to witnesses, defendant was known as "E" and Revis was known as "Tone." Alexander then said, "E shot me."

Defendant presented an alibi defense at trial. Defendant's mother Mildred Wilson, his girlfriend Tamesha Thompson, and his sister Sharee Day all testified that defendant was at Wilson's house on the east side of Detroit at the time of the shooting.

As previously indicated the jury convicted defendant of first-degree premeditated murder and the two firearm offenses in connection with Alexander's shooting death but acquitted him of

two counts of assault with intent to commit murder involving Williams and Johnson. The same jury acquitted Revis of all charges.

After defendant filed this appeal, this Court granted his motion to remand for an evidentiary hearing on his claim of ineffective assistance of counsel. Defendant claimed in that motion that he was actually at a block party on Brentwood Street at the time of the shooting, and had informed defense counsel of the party and witnesses who could confirm his presence there, but that defense counsel refused to contact those witnesses or investigate the Brentwood alibi because it would place defendant too close to the location of the shooting. According to defendant, defense counsel instead fabricated the alibi theory that was presented at trial and persuaded his mother, girlfriend, and sister to testify falsely at trial in support of that alibi.

Judge Vonda Evans initially presided over the evidentiary hearing on remand, but later recused herself. Before her recusal, Judge Evans disallowed several proposed defense witnesses because their proposed testimony either exceeded the scope of the remand proceedings or would be inadmissible hearsay. Her replacement, Judge Carole Youngblood, refused to begin the hearing anew, but did allow defendant to recall several witnesses who had previously testified before Judge Evans. Following the hearing, Judge Youngblood denied defendant's motion for a new trial based on ineffective assistance of counsel, finding that defendant's claims that trial counsel knowingly participated in the presentation of a fabricated alibi defense and refused to investigate defendant's "true alibi" were not credible.

I. EXTRANEOUS INFLUENCE UPON THE JURY

Defendant first argues that the presence of additional sheriff's deputies inside the courtroom during trial denied him a fair trial. Defendant contends that the additional security presence constituted an extraneous influence on the jury and undermined his presumption of innocence. Because defendant did not object to the presence of extra security in the courtroom during trial, or otherwise raise this issue, the issue is unpreserved. Therefore, to be entitled to appellate relief, defendant must demonstrate plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant has the burden of demonstrating that an error occurred, that the error was plain (i.e., clear or obvious), and that he was prejudiced by the error (i.e., that the outcome was affected). *Id.*

The trial court ordered the presence of additional security personnel because of disturbances that had occurred between witnesses and spectators at the trial. In *Unibar Maintenance Serv, Inc v Saigh*, 283 Mich App 609, 627; 769 NW2d 911 (2009), this Court stated:

Jurors are to consider only the evidence presented to them in open court. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). In order to establish that extraneous facts not introduced into evidence influenced the jury and requires a new trial, a defendant must show (1) that the jury was an [sic] exposed to an extraneous influence and (2) that the influence "created a real and substantial possibility [it] they could have affected the jury's verdict." *Id.* at 89. With respect to the second element, a defendant must "demonstrate that the extraneous

influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict.” *Id.*

In *Holbrook v Flynn*, 475 US 560, 568-569; 106 S Ct 1340; 89 L Ed 2d 525 (1986), the United States Supreme Court rejected the defendant’s claim that the deployment of extra security in a courtroom during a trial was inherently prejudicial. In that case, the courtroom contained four uniformed state troopers, two deputy sheriffs, and six members of the trial court’s regular security staff for a trial that involved six codefendants. *Id.* at 564, 570. The Court explained that a reviewing court should only look at the situation as presented to the jury to determine whether what they saw was so inherently prejudicial that it posed a risk to the defendant’s right to a fair trial. Where the practice followed is not inherently prejudicial and the defendant fails to show actual prejudice, relief is not available. *Id.* at 572.

In this case, the record discloses that five additional deputies were stationed in the courtroom to prevent problems with witnesses, but the record does not indicate that the jury was provided with any information about why the extra security was necessary or even that the amount of security in the courtroom was something out of the ordinary. We find no basis for concluding that the additional security presence was so inherently prejudicial that it posed a risk to defendant’s right to a fair trial, or that defendant was actually prejudiced by deputies’ presence. Indeed, the fact that the same jury acquitted codefendant Revis of all charges supports the conclusion that the jury was not adversely influenced by presence of the added security. Accordingly, defendant has not shown a plain error or that his substantial rights were affected.

II. DYING DECLARATION

Defendant argues that Alexander’s hearsay statements to his girlfriend, identifying defendant as his shooter, should not have been admitted at trial because there was an insufficient foundation to admit the statements under the dying declaration exception to the general prohibition against hearsay. Because defendant did not object to this testimony at trial, review is limited to plain error affecting defendant’s substantial rights. *Carines*, 460 Mich at 763.

“Hearsay is defined as an out-of-court statement offered in evidence to prove the truth of the matter asserted.” MRE 801(c); *People v Tanner*, 222 Mich App 626, 629; 564 NW2d 197 (1997). Subject to certain exceptions, hearsay is generally not admissible as substantive evidence. MRE 802; *Tanner*, 222 Mich App at 629. One exception to the prohibition against hearsay is MRE 804(b)(2), which provides:

In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant’s death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

Defendant argues that Alexander's statements did not qualify for admission under this exception because Alexander did not believe that death was imminent when he made the statements. In support of this argument, defendant relies on testimony indicating that, after Alexander was shot, he assured bystanders that “he gonna be all right.”

In *People v Siler*, 171 Mich App 246, 251; 429 NW2d 865 (1988), this Court discussed the requirement that the declarant be conscious of his impending death in order for a statement to qualify as a dying declaration. This Court stated:

“Consciousness of death” requires, first, that it be established that the declarant was in fact *in extremis* at the time the statement was made and, secondly, that the decedent believed his death was impending. But, it is not necessary for the declarant to have actually stated that he knew he was dying in order for the statement to be admissible as a dying declaration.

In *Siler*, this Court held that the victim’s statement qualified as a dying declaration where he had called for emergency assistance and stated that he had been stabbed in the heart and needed an ambulance right away. He repeated his request for an ambulance three times and told the police to hurry. *Id.* at 251-252.

In *People v Stamper*, 480 Mich 1, 4-5; 742 NW2d 607 (2007), our Supreme Court held that a four-year-old’s statement was admissible as a dying declaration and rejected the defendant’s argument that the young child could not consciously be aware of his imminent death. The Court held that “[i]f the surrounding circumstances clearly establish that the declarant was *in extremis* and believed that his death was impending, the court may admit statements concerning the cause or circumstances of the declarant’s impending death as substantive evidence under MRE 804(b)(2).” *Id.* at 4.

The testimony in this case established that Alexander had sustained a gunshot wound to his chest and was experiencing significant blood loss when he made the statement. The testimony also indicated that he was having breathing problems, was talking in a low voice, and was uncomfortably hot and removed some of his clothing. These circumstances support that Alexander would have been aware that he was *in extremis* and believed that his death was impending when he made his statements. Although testimony indicated that Alexander attempted to assure bystanders that he was “gonna be all right,” the testimony also indicated that everyone was screaming and that Alexander wanted to calm everyone down. Alexander’s statement that he was going to be all right was consistent with that purpose and thus should not be dispositive of whether he had a conscious belief that death was impending when he spoke to Duncan. Because the record contains an adequate factual foundation for finding that Alexander’s statements identifying defendant as his shooter qualified as dying declarations, defendant cannot establish any plain error.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that the trial court erred in denying his motion for a new trial on the issue of ineffective assistance of counsel. Whether defendant was denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews the trial court’s factual findings for clear error, and its constitutional determinations de novo. *Id.* To establish ineffective assistance of counsel, defendant must show that counsel’s performance fell below an objective standard of reasonableness and that the representation so prejudiced defendant that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must 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). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

A. SHIMERE DUNCAN'S TESTIMONY

Defendant argues that counsel was ineffective for failing to object to Shimere Duncan's testimony regarding Alexander's statement identifying defendant as the shooter. Defendant argues that counsel should have challenged Duncan's testimony on the basis that Alexander's statement to her did not qualify as a dying declaration. In light of our conclusion in section II, *supra*, that the record contains an adequate factual basis to admit the statements as a dying declaration under MRE 804(b)(2), any objection on that ground would not have been successful. Counsel is not ineffective for failing to pursue a futile motion or objection. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

B. SEPARATE JURIES

Defendant also argues that trial counsel was ineffective for not requesting a separate jury or separate trial from codefendant Revis. Defendant argues that he was prejudiced because codefendant Revis's attorney established through cross-examination that some eyewitnesses may have seen only one shooter, who was defendant. The trial court rejected this argument because defense counsel had no way of knowing before trial how codefendant Revis's attorney intended to question the witnesses. We agree.

MCR 6.121(C) provides that severance of trials is mandatory where a defendant makes "a showing that severance is necessary to avoid prejudice to substantial rights of the defendant." A trial court is only required to grant separate trials under this rule when a defendant provides a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced by a joint trial and that severance is necessary to remedy the prejudice. *People v Cadle (On Remand)*, 209 Mich App 467, 469; 531 NW2d 761 (1995); see also *People v Hana*, 447 Mich 325, 346, 349; 524 NW2d 682 (1994). In order to meet this standard, defenses must not be merely inconsistent, but must be mutually exclusive or irreconcilable. *Cadle*, 209 Mich App at 469.

MCR 6.121(D) also provides that a trial court has discretion to order separate trials

on the ground that severance is appropriate to promote fairness to the parties and a fair determination of the guilt or innocence of one or more of the defendants. Relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of defendants or the complexity or nature of the evidence, the convenience of witnesses, and the parties' readiness for trial.

Defendant has not established that defense counsel had a sufficient basis for requesting a separate jury or trial under either of these rules. Defendant's reliance on codefendant Revis's counsel's cross-examination of witnesses at trial could not have supported this request because

there was no showing that counsel had any reason to anticipate how those witnesses would be questioned. Accordingly, the trial court did not err in ruling that defense counsel was not ineffective for failing to move for separate juries.

C. DEFENSE INVESTIGATION AND ALIBI DEFENSE

Defendant's primary argument is based on defense counsel's alleged conduct of refusing to investigate defendant's "true" Brentwood Street alibi and instead urging his mother, sister, and girlfriend to present a false alibi placing defendant at his mother's home in Oak Park at the time of the shooting.

A lawyer's knowing presentation of false testimony violates ethical standards for the practice of law. *People v LaVearn*, 448 Mich 207, 217; 528 NW2d 721 (1995); see also *Macomb Co Pros v Murphy*, 233 Mich App 372, 386; 592 NW2d 745 (1999), rev'd on other grounds 464 Mich 149 (2001) (it is a conflict of interest for an attorney to encourage his client to offer perjured testimony to have a better chance of winning at trial because the attorney is acting in his own interests) and MRPC 1.7.

At the evidentiary hearing on remand, defendant, defendant's mother Mildred Wilson, and defendant's girlfriend Tamesha Thompson all testified that they falsified the alibi defense that was presented at trial at the suggestion of defense counsel. Conversely, trial counsel adamantly denied that defendant or anyone else ever informed him of the alleged Brentwood Street alibi. Counsel maintained that the only alibi claim that was ever mentioned to him before trial was that defendant was at his mother's house at the time of the shooting. Resolution of this issue came down to a credibility contest between the proffered defense witnesses and defense counsel. The trial court resolved this issue in favor of defense counsel's testimony. The court found that Wilson's and Thompson's recantation of their trial testimony, and their evidentiary hearing testimony about concocting a false alibi at defense counsel's urging, was not credible because they had demonstrated a willingness to lie under oath in court. The court also found that defense counsel had no personal reason to ask any witnesses to lie and there was no reason to risk his professional license by doing so. In addition, the court noted that the testimony of the various Brentwood alibi witnesses was inconsistent. Lastly, the court observed that a defense investigator, Miguel Bruce, who had no prior relationship to defense counsel, testified that no one mentioned to him during his investigation that defendant was on Brentwood Street at the time of the shooting.

The trial court had the superior ability to judge the credibility of the witnesses who appeared before it. This Court generally defers to a trial court's findings regarding witness credibility. *People v Smelley*, 285 Mich App 314, 334; 775 NW2d 350 (2009), vac'd in part on other grounds 485 Mich 1023 (2010). In addition to having personally observed the testimony of defense counsel, defendant, Thompson, Wilson, and Wilson's boyfriend James Richardson, the trial court provided other plausible reasons for discrediting the testimony of the defense witnesses. Defendant has not demonstrated that the trial court clearly erred in resolving this credibility dispute in favor of defense counsel.

Defendant raises additional claims related to the adequacy of defense counsel's investigation. A defense attorney's failure to perform a reasonable investigation can constitute

ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). However, the failure to call witnesses or present evidence constitutes ineffective assistance of counsel only if it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). A substantial defense is one that might have made a difference in the trial's outcome. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Although defendant complains that defense counsel was ineffective for failing to investigate defendant's telephone records to determine whether they could support an alibi defense, defendant has never produced any actual records. Without providing the records or other competent evidence indicating what the records would show, defendant cannot demonstrate that counsel's failure to investigate the records deprived him of a substantial defense.

Defendant also argues that the trial court erred by failing to address his claim that trial counsel was ineffective for failing to contact and investigate witnesses Cellus Camper, Jason Edwards, and Terrell Reese. These were witnesses who were not permitted to testify at the evidentiary hearing. However, defendant's own testimony at the evidentiary hearing establishes that these witnesses could not have supported an ineffective assistance of counsel claim. According to defendant's testimony, he spoke to all three persons after he was convicted and had been sentenced to prison. Defendant knew each person before then, but claimed that he only learned that they allegedly had information related to this case after he met them in prison. Because defendant failed to establish any basis for concluding that defense counsel had a reason to know before trial that any of these witnesses had an apparent connection to or knowledge about this case, there is no basis for concluding that counsel's failure to contact or interview them was objectively unreasonable. Thus, defendant cannot show ineffective assistance of counsel on this basis.

We also agree with the trial court that the proposed testimony of these three witnesses exceeded the scope of this Court's remand order. When an appellate court remands a case with specific instructions, it is improper for a lower court to exceed the scope of that order. *People v Russell*, 297 Mich App 707, 714; 825 NW2d 623 (2012). This Court's remand order provided that proceedings on remand were limited to the issue raised in defendant's motion to remand. Defendant's motion to remand was limited to the issue of ineffective assistance of counsel. As indicated, the proposed testimony of Camper, Edwards, and Reese could not support an ineffective assistance of counsel claim but instead is more properly characterized as newly discovered evidence. Thus, the trial court correctly concluded that the proposed testimony exceeded the scope of this Court's remand order.

IV. ALLEGED PERJURED TESTIMONY

Defendant argues that he is entitled to a new trial because witness Gwen Johnson presented perjured testimony at trial when she identified defendant as the shooter.¹ He further

¹ Although defendant also generally asserts that witnesses Williams and Duncan all falsely identified him as the shooter at trial, his analysis of this issue is directed only at Johnson.

argues that the trial court erred in precluding him from offering the testimony of Camper at the evidentiary hearing on remand in support of this claim. We disagree.

In *People v Gratsch*, 299 Mich App 604, 619-620; 831 NW2d 462 (2013), this Court observed:

A defendant's right to due process guaranteed by the Fourteenth Amendment is violated when there is any reasonable likelihood that a conviction was obtained by the knowing use of perjured testimony. *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009). Accordingly, a prosecutor has an obligation to correct perjured testimony that relates to the facts of the case or a witness's credibility. *People v Lester*, 232 Mich App 262, 277; 591 NW2d 267 (1998). When a conviction is obtained through the knowing use of perjured testimony, a new trial is required "only if the tainted evidence is material to the defendant's guilt or punishment." *Aceval*, 282 Mich App at 389. So whether a new trial is warranted depends on the effect the misconduct had on the trial. *Id.* at 390. "The entire focus of [the] analysis must be on the fairness of the trial, not on the prosecutor's or the court's culpability." *Id.*

At the evidentiary hearing on remand, defendant sought to call Camper, the brother of Johnson, to offer his testimony that after defendant was convicted, Johnson told him that she had lied at trial about defendant being the shooter. Judge Evans refused to permit Camper's proposed testimony because (1) the purpose of the testimony exceeded the scope of this Court's remand order and (2) the testimony was not substantively admissible as evidence.

We agree with the trial court that the issue whether Johnson perjured herself was beyond the scope of this Court's remand order. As previously indicated, defendant's motion to remand was based on ineffective assistance of counsel and this Court remanded the case to the trial court limited to that issue. Camper's testimony sought to introduce evidence of events that occurred after defendant was convicted and, accordingly, did not relate to the issue of ineffective assistance of counsel. Defendant does not contend that defense counsel was aware of Johnson's alleged perjury at the time of trial. Camper's proposed testimony is more in the nature of newly discovered evidence. Because defendant's motion to remand was limited to the issue of ineffective assistance of counsel and the proposed testimony did not relate to that issue, the trial court correctly concluded that the proposed testimony exceeded the scope of this Court's remand order. *Russell*, 297 Mich App at 714. Accordingly, there was no error in refusing to permit Camper's proposed testimony on this basis.

Moreover, even if the merits of this issue are considered, defendant has not shown that Camper's testimony was otherwise admissible. Defendant contends that Johnson's hearsay statements to Camper were admissible as a statement against interest under MRE 804(b)(3), which allows admission of the following statements of an *unavailable* declarant:

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not

have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

As the trial court noted, there was no showing that Johnson was not available to testify. Furthermore, as applicable to this case, in order for Johnson's alleged hearsay statement to be admissible under MRE 804(b)(3), it was necessary that her statement tend to subject her to criminal liability and, because the statement was being offered to exculpate defendant, it was necessary that corroborating circumstances clearly indicate the trustworthiness of the statement. According to Camper's affidavit, Johnson told him that she "made a [sic] honest mistake" about whether defendant was the shooter and that the police caused her to make a false identification. Johnson's characterization of her trial testimony as an "honest mistake" would not tend to subject her to criminal liability for perjury. Further, defendant does not identify any corroborating circumstances that clearly indicate the trustworthiness of the statement. Accordingly, the trial court did not err in alternatively ruling that Camper's proposed testimony on this subject was not substantively admissible. Because defendant failed to provide competent evidence that Johnson's testimony at trial was false, he is not entitled to appellate relief with respect to this issue.

V. JUDGE EVANS'S DISQUALIFICATION

Defendant argues that, after Judge Evans recused herself before completing the evidentiary hearing on remand, her successor, Judge Youngblood, erred by refusing to restart the hearing anew and make her own rulings regarding the admissibility of proposed witness testimony in support of defendant's motion for a new trial.

It is possible that Judge Youngblood incorrectly understood her role in the proceeding. This Court remanded the case not only for the purpose of developing a factual record, but also for the trial court to make findings of fact and a determination on the record. That function required the trial court to personally hear and observe the witnesses in order to properly evaluate their credibility. In particular, defendant's claims about the falsified alibi defense were the subject of competing witness testimony for which credibility determinations were required. We agree with defendant that, in light of Judge Evans's recusal, Judge Youngblood should have revisited Judge Evans's prior evidentiary rulings to eliminate any possible taint related to Judge Evans's inability to fairly decide the case. See *Meagher v Wayne State Univ*, 222 Mich App 700, 718; 565 NW2d 401 (1997) (noting that successor judges are empowered to modify prior decisions "to reflect a more correct adjudication" of the parties' rights).

However, we conclude that reversal is not required. While Judge Youngblood may have misunderstood her role at the outset of the hearing, she later personally heard the testimony from the crucial witnesses offered in support of defendant's fabricated alibi claim, including defendant, defense counsel, defendant's mother, defendant's girlfriend, and defendant's mother's boyfriend. Defendant's claim of ineffective assistant of counsel was dependent upon the credibility of these key witnesses. Judge Youngblood, having had the opportunity to personally observe the testimony and demeanor of these witnesses, did not clearly err in finding that their testimony was not credible. Further, we have considered Judge Evans's evidentiary rulings and

determined that they were legally correct. Accordingly, defendant is not entitled to reversal on this basis.

Affirmed.

/s/ Michael J. Kelly
/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood