

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
December 20, 2011

v

DOURROUGH RUTHERFORD,
Defendant-Appellant.

No. 299614
Wayne Circuit Court
LC No. 10-001529-FC

Before: SAAD, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of armed robbery, MCL 750.529, and sentenced as a third habitual offender, MCL 769.11, to 11-1/2 to 18 years in prison. He appeals as of right. We affirm.

Defendant was convicted of robbing John Bingham. Bingham died a week before trial and his preliminary examination testimony was admitted under MRE 804. Bingham testified that defendant, a stranger, accosted him at a gas station, threatened to shoot him if he did not cooperate, and took money from his pocket. Defendant testified that Bingham had defrauded him several months before the incident and that he took Bingham's money because he "felt like it was mine." He denied being armed with a gun or representing that he was armed.

Although Bingham died a week before trial, defendant was not notified of his death or of the need to use his former testimony until the day of trial. Defendant contends on appeal that the prosecutor's failure to provide timely notice of Bingham's death constituted a denial of due process. Whether a defendant's due process rights were violated is a constitutional question that is reviewed de novo on appeal. *People v Wilder*, 485 Mich 35, 40; 780 NW2d 265 (2010). "[P]reserved allegations of prosecutorial misconduct are reviewed de novo to determine whether the defendant was denied a fair and impartial trial." *People v Akins*, 259 Mich App 545, 562; 675 NW2d 863 (2003).

"There is no general constitutional right to discovery in a criminal case." *People v Elston*, 462 Mich 751, 765; 614 NW2d 595 (2000). "[D]iscovery in criminal cases is constrained by the limitations expressly set forth in the . . . criminal discovery rule promulgated by our Supreme Court, MCR 6.201." *People v Greenfield (On Reconsideration)*, 271 Mich App 442,

447; 722 NW2d 254 (2006). That rule requires notice of the names and addresses of witnesses who may be called at trial, MCR 6.201(A)(1), but is silent regarding notice of a potential witness's death. The rule also requires disclosure of a potential witness's written or recorded statements relating to the case, MCR 6.201(A)(2), and the record shows that defense counsel signed a document acknowledging receipt of the preliminary examination transcript four months before trial. While a defendant has a due process right to obtain certain evidence in the possession of the prosecutor, that right is limited "to evidence that might lead a jury to entertain a reasonable doubt about a defendant's guilt," including exculpatory and impeachment evidence. *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). Bingham's death had no exculpatory or impeachment value and defendant has not explained how it could affect the determination of his own guilt or innocence. A "defendant's general allegations of surprise and prejudice" do not establish that he was denied his right to a fair trial where, as here, defendant has not shown that he would have asserted a different defense had the information been known before trial. *People v Clark*, 164 Mich App 224, 231; 416 NW2d 390 (1987). Accordingly, the untimely disclosure of Bingham's death did not constitute a denial of due process.

Defendant also contends that the untimely disclosure of Bingham's death left trial counsel unprepared for trial, and therefore, counsel's failure to request a continuance deprived him of the effective assistance of counsel. Because this issue was not raised in the trial court, review is limited to errors apparent in the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002)

To establish ineffective assistance of counsel, a defendant must show that:

(1) his trial counsel's performance fell below an objective standard of reasonableness under the 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. [*People v Horn*, 279 Mich App 31, 37-38 n 2; 755 NW2d 212 (2008) (citations omitted).]

Further, "[c]ounsel is presumed to have provided effective assistance, and the defendant must overcome a strong presumption that counsel's assistance was sound trial strategy." *Id.*

"When making a claim of defense counsel's unpreparedness, a defendant is required to show prejudice resulting from this alleged lack of preparation." *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). The defendant "must show that his counsel's failure to prepare for trial resulted in counsel's ignorance of, and hence failure to present, valuable evidence that would have substantially benefited the defendant." *People v Bass (On Rehearing)*, 223 Mich App 241, 253; 565 NW2d 897 (1997), vacated in part on other grounds 457 Mich 866 (1998).

The record shows that defense counsel first learned on the day of trial that Bingham had died and the prosecutor intended to introduce his former testimony. The record also shows that counsel did not request a continuance and specifically stated that he did not want or need one when asked by the court. A criminal case may not be adjourned or continued or delayed except for good cause shown. MCL 768.2; MCR 2.503(B)(1). While the temporary unavailability of a defense witness may constitute good cause, MCR 2.503(C)(2); *People v Tommolino*, 187 Mich

App 14, 18-19; 466 NW2d 315 (1991), Bingham, a prosecution witness, was permanently unavailable. It may have been preferable had Bingham been available to testify in person, but because he had died his presence could not have been secured, and no one could have testified in his stead, had a continuance been granted. Defendant does not dispute that, given Bingham's death, his preliminary examination testimony was admissible under MRE 804(a)(4) and (b)(1). While defense counsel may have been surprised that Bingham's former testimony would be used at trial, he was certainly familiar with that testimony, having represented defendant at the preliminary examination. At the preliminary examination counsel elicited testimony from defendant to refute Bingham's version of their encounter at the gas station. There is nothing in the record to indicate that counsel made a serious error by not requesting a continuance.

Affirmed.

/s/ Henry William Saad
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause