STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 24, 2012
v	No. 301191 Kalamazoo Circuit Court
DREW CARTER, III, Defendant-Appellant.	LC No. 2010-000548-FC

Before: HOEKSTRA, P.J., and MARKEY and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for assault with intent to do great bodily harm less than murder, MCL 750.84; possession of a firearm during the commission of a felony, MCL 750.227b; and carrying a concealed weapon, MCL 750.227. For the reasons set forth in this opinion, we affirm.

On March 21, 2010, defendant entered the victim's apartment. The victim, fearing that defendant intended to kill him, left the apartment and retrieved a stick and a can of mace from his car. The victim also called 911. Defendant then exited the victim's apartment, at which point, the victim sprayed defendant with mace. The victim testified that defendant then drew a gun and shot the victim in the arm before fleeing. When the police arrived, the victim told them that defendant shot him and that there were letters written by the victim's wife, Teikesha Sistrunk[1] that proved that this shooting was part of a plan to kill the victim.

On September 17, 2010, defense counsel moved to adjourn the trial. The parties addressed this motion at the October 1, 2010, settlement conference before the trial court. Defense counsel stated that he felt unprepared and anticipated difficulties in the procurement of defense witnesses. The trial court denied the motion to adjourn, noting that defendant was responsible for the alleged lack of preparation and that the defense still had sufficient time to prepare for trial.

> *The Court:* I'm not going to adjourn the trial right now. I think that there's certainly time to prep. . . . [W]e've got the weekend. . . . I realize the

[1] Defendant is the nephew of Teikesha.

> predicament that [defense counsel is] in . . . but if your client fails to, I guess, provide you with witnesses until five days before the trial or four days before the trial. I don't know why [defendant] didn't provide those names before hand [sic] or the name.
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> *The Court:* [W]e have a trial on Tuesday. The case has been pending for awhile [sic]. It's a serious charge. I don't find a good reason to adjourn it based on the information that I've been provided. . . . It looks like there's [sic] been a couple appointments, that for whatever reason have been missed, and I don't see a reason why [defendant] would miss a meeting with an attorney, especially three of them.

On October 4, 2010, one day before defendant's trial, the prosecutor learned that the police had preserved a three minute tape containing three 911 telephone calls relating to defendant's alleged shooting. This tape included the 911 call that the victim made, as well as a 911 call made by the victim's son, Erik Sistrunk Jr. The prosecutor obtained this tape from the police and gave a copy of it to defense counsel the next morning. Defense counsel again requested that the trial court grant an adjournment on the basis of this new discovery and potential "witness issues." Defense counsel stated that he had listened to the 911 tape one or two times and had reviewed it once with defendant, but counsel requested more time to thoroughly review the tape. Defense counsel also stated that some of the defense witnesses lived in Indiana and were not under subpoena, and it was possible that some of these witnesses might not appear when called to testify. The prosecutor opposed an adjournment, and said he would stipulate to the tape's admissibility if defense counsel so desired. The trial court refused to grant an adjournment, stating that the evidence on the tape would not come in, if at all, until the next day, which would allow defense counsel enough time to review it with defendant. The trial court also noted that the "trial date had been set for quite some time" and that the defense had ample time to arrange for the witnesses, all of whom were defendant's relatives, to be present.[2] The trial court denied the motion to adjourn.

Defendant first argues that he was denied the effective assistance of counsel because his trial counsel failed to interview or produce Erik Sistrunk, Jr. as a defense witness or move to admit the 911 telephone call from Erik Jr. Because we denied defendant's motion to remand for an evidentiary hearing, our review of defendant's claim is limited to plain errors apparent in the record. *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008).

"The right to counsel guaranteed by the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, is the right to effective assistance of counsel." *In re CR*, 250 Mich App 185, 197; 646 NW2d 506 (2001) (quotation omitted). "[T]his Court presumes that a defendant received effective assistance of counsel, and the defendant bears a heavy burden to prove otherwise." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). "To establish a claim of ineffective assistance of counsel, a defendant must show that his counsel's

[2] During the trial, defendant played the portion of the tape that was the victim's 911 call. The portion of the tape that was Erik Jr.'s 911 call was not played during the trial.

performance fell below an objective standard of reasonableness and that counsel's representation prejudiced him so as to deprive him of a fair trial." *Id.* To establish prejudice, "defendant must show that, but for the error, the result of the proceedings would have been different and that the proceedings were fundamentally unfair or unreliable." *Id.* Moreover, "defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel[.]" *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant argues that if his trial counsel had interviewed and produced Erik Jr. as a witness or admitted Erik Jr.'s 911 call, the jury would have heard evidence that the victim was the aggressor and that defendant shot the victim in self-defense. Defendant supports his claim by citing to an affidavit of his appellate counsel, which he attached to his brief on appeal. However, this Court considers only the facts and evidence contained in the lower record. *Horn*, 279 Mich App at 38. Absent appellate counsel's affidavit, there is no indication of what efforts trial counsel took to interview Erik Jr. or what evidence would have come forth through Erik Jr.'s testimony or his 911 call. Accordingly, defendant fails to establish the requisite "factual predicate" for his ineffective assistance of counsel claim. *Hoag*, 460 Mich at 6.

Defendant next argues that the trial court denied him his right to present a defense by erroneously denying defendant's requests for an adjournment. Defendant preserved this issue for appeal by moving for an adjournment. *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000). "This Court reviews the grant or denial of an adjournment for an abuse of discretion." *Id.* "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

"[A] request for an adjournment must be by motion or stipulation made in writing or orally in open court based on good cause." MCR 2.503(B)(1). "An adjournment may be granted on the ground of unavailability of a witness or evidence only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence." MCR 2.503(C)(2). "[T]o invoke the trial court's discretion to grant a continuance or adjournment, a defendant must show both good cause and diligence. . . . Even with good cause and due diligence, the trial court's denial of a request for an adjournment or continuance is not grounds for reversal unless the defendant demonstrates prejudice as a result of the abuse of discretion." *People v Coy*, 258 Mich App 1, 18-19; 669 NW2d 831 (2003).

Defendant's first request for an adjournment was premised on a need to prepare and to procure witnesses. The trial court properly denied defendant's request for an adjournment on the basis that defendant had not shown due diligence. *Id.* "A trial court's determination of due diligence will not be overturned on appeal absent an abuse of discretion. That determination is a factual matter, and the court's findings will not be reversed unless clearly erroneous." *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). In this case, the trial court noted that defendant had months to work with trial counsel to prepare for trial and procure potential witnesses, but defendant failed to attend all but one of his scheduled meetings with trial counsel. On these facts, the trial court did not abuse its discretion in finding a lack of due diligence. *Id.*

Defendant's second request for an adjournment was based on defense counsel learning of the existence of 911 tapes the day before trial. Here, defendant appears to show good cause and

due diligence in regards to the newly discovered 911 tape. See *Coy*, 258 Mich App at 18-19. The tape was not referenced in the police report and there was no evidence that defendant's negligence lead to its late discovery. However, a showing of good cause and due diligence does not require the trial court to grant the adjournment request, but merely "invoke[s] the trial court's discretion to grant a continuance or adjournment[.]" *Coy*, 258 Mich App at 18. The trial court found that an adjournment was unnecessary because defense counsel had already reviewed the three minute tape and would have adequate time to review it further without an adjournment. We find this a close question, however, given that defendant ultimately admitted a portion of the tape (containing the victim's 911 call) at trial and played it for the jury, we cannot conclude that the trial court's denial of an adjournment "falls outside the range of reasonable and principled outcomes[,]" and thus was not an abuse of its discretion. *Unger*, 278 Mich App at 217. Moreover, defendant has failed to direct this Court to any evidence contained in the record which could lead us to conclude that an adjournment would have enabled defendant to produce additional valuable evidence or altered his theory of defense. Thus, defendant fails to demonstrate the requisite prejudice. See *Lawton*, 196 Mich App at 348.

Defendant's final argument is that the trial court violated due process by admitting the hearsay statements of Teikesha and Ruthi Hoskins ("Grannie") and by failing to give a limiting jury instruction. Defendant preserved his hearsay claim regarding Teikesha's written statements, i.e., the letters, by objecting at trial to their admission on the ground that they were inadmissible hearsay. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). We review defendant's preserved claim for an abuse of discretion. *Id*. However, defendant's additional arguments on appeal that the letters were irrelevant and unduly prejudicial are unpreserved as his objection at trial did not specify these grounds. *Id*. We review defendant's unpreserved claim for plain error affecting defendant's substantial rights. *People v Conley*, 270 Mich App 301, 305; 715 NW2d 377 (2006).

"'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is not admissible unless it meets one of the exceptions provided by Michigan's evidentiary rules. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). MRE 803(3) is an exception to the hearsay rule, and it provides that "[a] statement of the declarant's then existing state of mind, emotion, [or] sensation" is not excluded by the hearsay rule. MRE 803(3) applies even where the declarant's mental state is not at issue. *People v King*, 215 Mich App 301, 309; 544 NW2d 765 (1996); *People v Fisher*, 449 Mich 441; 537 NW2d 577 (1995).

The prosecution sought to admit the letters that the police found in the victim's car. Teikesha wrote these letters to her family a few months before the March 21, 2010, shooting, but the victim intercepted the letters and read them. The letters indicated that Teikesha wanted the victim dead.

> Momma, I know that part of me likes [the victim] and the rest of me just wants to kill the hell out of him. I say to myself all the time, I should have just let [defendant] take his ass out, but with those nosey neighbors it wasn't worth it.

* * *

> I've asked him why did you cry and beg me to come back if you wasn't going to change, but I know this like I've told him, keep talking and your mouth will get shut for you.

At trial, defense counsel objected to the admission of the letters on the grounds that they were testimonial and inadmissible hearsay under *Crawford v Washington*, 541 US 36, 59; 124 S Ct 1354; 158 L Ed 2d 177 (2004). The prosecutor argued that the letters were not testimonial under *Crawford* and that they met the state of mind hearsay exception under MRE 803(3), as they evidenced Teikesha's then existing animosity toward the victim and their marriage. The prosecutor argued that these letters were relevant to show the extent of the marital discord and defendant's motive for murder. The trial court found that the letters were not testimonial under *Crawford*, and admitted the letters under MRE 803(3).

> *The Court:* I don't find that the information in the letters is testimonial in nature. The letters outline [Teikesha's] feelings. I do believe that they fall under 803(3), that existing mental emotion or physical condition.
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> *The Court:* [T]he court finds that at the time the declarant [Teikesha] wrote the letters, she was outlining her then existing mental or emotional feelings or state of mind . . . . [P]ortions of these letters are relevant to fact – or to this case.

Teikesha's written statements about her feelings toward the victim and their marriage constituted statements of Teikesha's "then existing state of mind, emotion, [or] sensation" under MRE 803(3). *Fisher*, 449 Mich at 450-451 (holding that where the declarant wrote in her journal describing her feelings toward her husband and their marriage, these hearsay statements were admissible "because they satisfy the exception to the hearsay rule" under MRE 803(3)). The letters were relevant to the case, as evidence of the marital discord and defendant's motive for shooting the victim. *Fisher*, 449 Mich at 450-451. Moreover, this probative value was not "*substantially outweighed* by the danger of unfair prejudice[.]" *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995) (emphasis in original); *People v Riggs*, 223 Mich App 662, 704-705; 568 NW2d 101 (1997) (holding that declarant's letter, which evidenced "marital discord between [the victim] and defendant was relevant to motive and more probative than prejudicial"). Defendant has failed to show that the trial court abused its discretion or committed a plain error by admitting the letters. *Aldrich*, 246 Mich App at 113; *Conley*, 270 Mich App at 305.

We additionally find that defendant affirmatively waived appellate review of his remaining arguments as to Grannie's hearsay statement and the trial court's jury instructions. "[W]aiver is the intentional relinquishment or abandonment of a known right." *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quotation omitted). A defendant affirmatively waives an issue where defense counsel states that he has no objection or otherwise expresses satisfaction with the court's ruling. *Carter*, 462 Mich at 214-216. See also, *People v Kowalski*, 489 Mich 488, 505; 803 NW2d 200 (2011). In this case, defendant affirmatively waived his hearsay claim regarding Grannie's statement where defense counsel seemingly indicated that he had no hearsay objection and believed the testimony was admissible. See, *Kowalski*, 489 Mich at 504-505; *Carter*, 462 Mich at 214-216. Defendant also affirmatively waived his claim regarding the jury instruction where defense counsel never requested a limiting

jury instruction or objected to the trial court's failure to give one, but instead expressed satisfaction with the given instructions. In Kowalksi, 489 Mich at 504, our Supreme Court stated: "Thus, by expressly and repeatedly approving the jury instructions on the record, defendant waived any objection to the erroneous instructions, and there is no error to review." Thus, there is no error for this Court to review.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Stephen L. Borrello