

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
January 31, 2013

v

TION TERRELL,

Defendant-Appellant.

No. 303717
Wayne Circuit Court
LC No. 08-001533-FC

Before: JANSEN, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of assault with intent to murder (AWIM), MCL 750.83, possession of a firearm by a felon (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm) (third offense), MCL 750.227b. Defendant was sentenced to prison terms of 20 to 50 years for the AWIM conviction, 2 to 5 years for the felon-in-possession conviction, and 10 years for the felony-firearm (third offense) conviction.¹ We affirm.

Defendant argues that he was denied the effective assistance of counsel for several reasons. We disagree.

¹ Defendant was convicted of these crimes on May 2, 2008, and was sentenced on December 6, 2010. The delay in sentencing was due to defense counsel's motion to postpone sentencing until he filed a motion for a new trial. The trial court granted defendant's motion for a new trial. However, the prosecution appealed the trial court's order. Defendant had moved for a new trial on the basis of newly discovered evidence. On August 10, 2010, this Court ruled, as a matter of first impression, that a codefendant's post-trial testimony does not constitute newly discovered evidence sufficient to require a new trial when the defendant knew or should have known about the evidence before trial. *People v Terrell*, 289 Mich App 553, 555; 797 NW2d 684 (2010). Accordingly, this Court reversed the trial court's order and reinstated defendant's conviction. *Id.* at 554-555.

This Court reviews for clear error the trial court's findings of fact at a *Ginther*² hearing. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews de novo claims of ineffective assistance of counsel claims, which are questions of constitutional law. *Id.*

A trial court's decision to grant or deny a motion for a new trial is reviewed for an abuse of discretion. A trial court may be said to have abused its discretion only when its decision falls outside the principled range of outcomes. [*People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).]

To demonstrate ineffective assistance of counsel a defendant must show that his attorney's performance fell below an objective standard of reasonableness under prevailing professional norms and that this performance prejudiced him. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). To demonstrate prejudice, the defendant must show the probability that, but for counsel's errors, the result of the proceedings would have been different. *Id.* at 690. Counsel is presumed to be effective and engaged in trial strategy, and the defendant has the heavy burden to prove otherwise. *Id.* Decisions regarding whether to call and question witnesses and what evidence to present are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). "[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). This Court does not second-guess counsel on matters of trial strategy, nor does it assess counsel's competence with the benefit of hindsight. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Counsel is not ineffective for failing to make futile objections or advocate meritless positions. *Id.* at 39-40. What arguments to make in closing and how to cross-examine witnesses involve matters of trial strategy. *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999).

While a defendant may have the constitutional right to the effective assistance of counsel, this does not encompass the right to assistance of counsel in committing perjury. In fact, an attorney's refusal to knowingly assist in the presentation of perjured testimony is not only consistent with his ethical obligations, but cannot be the basis of a claim of ineffective assistance of counsel. [*People v Toma*, 462 Mich 281, 303 n 16; 613 NW2d 694 (2000).]

First, defendant argues that defense counsel was ineffective by denying him the right to testify on his own behalf because defense counsel did not properly examine him regarding the incident. Defense counsel only asked defendant the following questions at trial:

Q. Young man, would you state your name for the record?

A. Tion Terrell.

Q. What is your date of birth?

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

A. 1/20/83

Q. Are you a person?

A. No further questions.

Defendant argues that he discussed his potential testimony with defense counsel and would have testified that Reginald Myers actually shot the victim, Deshawn Evans, twice, and that defendant did not shoot Evans at all. Defendant asserts that he did not agree to the strategy of counsel only asking him limited questions. However, during the *Ginther* hearing, defense counsel asserted that defendant told him the following version of facts regarding the incident: Defendant, Myers, Dana Hudson,³ and Evans were all drug dealers running a major drug organization. Evans had gotten into a fight with Myers earlier in the day, before this incident. After the fight, Evans went to “Twin’s” house and got a nine-millimeter handgun and then got on a bicycle and rode around the corner. At that point defendant saw Evans. Defendant had a .45-caliber gun. Evans then reached for his nine millimeter and was going to kill the person who was coming at him (either Myers or “Manny”). At that point defendant pulled out his .45-caliber gun and shot Evans in the chest. Evans then fell to his knees with the nine millimeter still in his hand. Defendant then walked up to Evans, there was a struggle, and then defendant knocked the nine-millimeter gun out of Evans’s hand. After the gun was out of Evans’s hand, defendant knocked Evans down to the ground. Then another person picked up the nine millimeter and shot Evans in his legs, once or twice.

The trial court found these assertions by defense counsel to be truthful. The trial court did not err in its findings of fact. Defendant’s claim that he was denied the effective assistance of counsel by counsel’s failure to examine him regarding the incident must fail because it is based on counsel’s refusal to assist in the presentation of perjured testimony. See *Toma*, 462 Mich at 303 n 16.

After remand, in light of defense counsel’s above testimony during the *Ginther* hearing, defendant submitted a supplemental brief asserting that defense counsel was ineffective by denying him the defense-of-others defense. Defendant asserts that this defense would not have required testimony from defendant and would not have required perjury. We note that this claim is contradictory to defendant’s assertion that he did not shoot Evans and that he wanted to present this testimony during trial. As a procedural matter, defendant’s attempt to raise this new issue in his supplemental brief after remand is improper because this Court limited defendant’s supplemental brief to the issues raised on remand. *People v Terrell*, unpublished order of the Court of Appeals, entered October 3, 2011 (Docket No. 303717). Nevertheless, defendant has failed to identify any record evidence from which defense counsel could have presented a defense-of-others defense or made such an argument. Defendant’s claim has no merit.

³ Defendant was tried with codefendant, Hudson. Hudson was acquitted of all charges. *Terrell*, 289 Mich App at 556. Another codefendant, Myers, was tried separately and it appears that he was also acquitted.

Next, defendant argues that defense counsel failed to review Evans's medical records. However, this assertion is not supported by the record. Indeed, defense counsel moved for the admission of the medical records, which were admitted by the trial court. Defendant further argues that defense counsel was ineffective by failing to consult and call an expert witness to testify regarding the number of times Evans was shot, as depicted by the medical records, despite the fact that the evidence indicated that only one gun was used and that Evans was shot only twice. Defendant asserts that the medical records indicate that Evans was shot once in the chest and once in the legs, which supported defendant's theory that Myers shot Evans twice with a nine-millimeter gun. However, counsel never asserted this theory. According to defendant, defense counsel deprived him of the defense that only Myers, using a nine-millimeter gun, shot Evans twice, once in the chest and once in the legs.

Evans testified that earlier on the day of October 28, 2007, he and Myers had been in an argument and that Myers had called him a "little b..." Soon after, as Evans was walking toward defendant, Hudson, and Myers, defendant pulled out a gun and said "Manny, don't move."⁴ As Evans continued walking toward defendant, defendant began hitting him in the face and head with a gun. Evans tried to block defendant's hits. Then, as Evans lifted up from blocking defendant, defendant shot him in the chest with a gun. Evans froze and started stepping back and then defendant shot him again in the chest. The second shot in the chest made Evans fall. After Evans fell, defendant ran and got into Hudson's car. Then Myers shot Evans in both of his legs. According to Evans, the gun defendant used was different from the one Myers used. The gun that Myers used was black and silver, and the gun that defendant used was all black. Evans indicated that he was shot twice in the chest by defendant with a .45-caliber, semi-automatic handgun. Evans further testified that Myers shot him with a nine-millimeter gun. Evans heard a total of four shots fired.

During his cross-examination of Evans, defense counsel pointed out that the post-operative report from Evans's medical records showed that Evans was shot only once in the chest. Evans still maintained that he was shot twice in the chest. Evans testified that doctors told him that he was shot twice in his chest. Defense counsel moved for the admission of Evans's medical records as Defendant's Exhibit C, which the trial court admitted.

During cross-examination, Detroit Police Officer Lori Briggs testified that the shell casings recovered from the crime scene were no longer in the possession of the police. Briggs indicated that the two shell casings recovered from the scene were from a nine-millimeter gun. Briggs indicated that she did not see any .45-caliber shell casings at the scene. Briggs indicated that she did not know the caliber of the spent bullet recovered from the scene.

During closing arguments, defense counsel asserted that Evans was lying when he said that he was shot twice by a .45-caliber gun. Defense counsel pointed out the lack of evidence recovered from a .45-caliber gun, "[n]o casing; no bullet; nothing." Defense counsel also asserted that it was beyond belief that someone could survive a shot once or twice in the chest

⁴ Evans's nickname is Manny.

with a .45-caliber weapon. The record reflects that defense counsel indirectly argued that Myers shot defendant with a nine millimeter in the chest, in addition to shooting Evans in his legs.

Defense counsel's decision not to call an expert witness to testify regarding the medical records was a matter of trial strategy. *Rockey*, 237 Mich App at 76-77. Furthermore, defendant's argument that he was denied the defense that Myers shot Evans in the chest and legs is without merit because defense counsel cross-examined Evans regarding what type of gun defendant allegedly used to shoot him in the chest and how many times he was shot in the chest in comparison to what his medical records indicated. Defense counsel also cross-examined Briggs regarding the lack of evidence recovered from a .45-caliber gun, defense counsel directly argued that Myers shot Evans in the legs, and counsel indirectly argued that it was Myers and not defendant who shot Evans in the chest. We perceive no ineffective assistance of counsel in this regard.

Defendant next argues that counsel performed deficiently by failing to request a missing-evidence jury instruction regarding the two missing nine-millimeter shell casings, the spent bullet, and the bloody clothes recovered from Evans. During the *Ginther* hearing, the trial court ruled:

In regard to the missing evidence, the Court had previously ruled in a motion brought by defense counsel, to allow the evidence presented by the prosecution of photographs of the spent shell casing, and that the failure on the part of the Detroit Police Department to have preserved the actual evidence, including the bloody clothing, was not due to their bad faith, but was by accident.

And therefore, the instruction that defense counsel was seeking concerning missing evidence could not and should not have been given.

A defendant is not entitled to a jury instruction regarding missing evidence unless the defendant demonstrates that the prosecutor acted in bad faith. See *People v Davis*, 199 Mich App 502, 514-515; 503 NW2d 457 (1993), overruled on other grounds by *People v Grissom*, 492 Mich 296 (2012). In the present case, defendant failed to show any bad faith involved in the failure to preserve the missing evidence. Therefore, defendant has failed to show that he was entitled to a missing evidence instruction or that he was denied the effective assistance of counsel.

Defendant also argues that defense counsel erroneously allowed jury instruction CJI2d 4.1 to be read regarding defendant's out of court statement, "Manny, don't move," which Evans testified that defendant said to him. The prosecution concedes that this jury instruction was probably inappropriate because defendant's statement was not a confession and was not made to law enforcement. It appears that defense counsel initially objected to this instruction, but then conceded that he was unsure about the instruction and left its use in the trial court's discretion. At any rate, even assuming this instruction was inappropriate, defendant has failed to show how the instruction prejudiced him. Therefore, defendant has failed to show that defense counsel was ineffective in this regard.

Defendant next argues that defense counsel was ineffective by failing to object to the prosecution's comments during closing argument regarding what may have been the reason for the lack of evidence concerning a .45-caliber gun. In addition, defendant argues that the prosecution's comment during closing argument that more than two bullets caused Evans's gunshot wounds was inappropriate because the evidence did not support this conclusion, and therefore, defense counsel was also ineffective by failing to object to this comment. Defendant points to the following statements made by the prosecution:

What else do we know? We know that there are people going and coming from that area. We know from Officer Briggs that she recovered two spent casings.

Well, we know from the medical records and from Mr. Evans' testimony that he had more than two wounds to him. You'll see the wounds as described in the medical records are more than can be caused by two bullets—two fired shots.

We find two shell casings there. But we know that two shots had to have been fired. We know that those injuries caused to Mr. Evans couldn't have been caused by just two shots.

So, we know there must have been other shell casings there. We know there's people going and coming to the scene. We know there's [sic] neighbors coming out to try and comfort; try and assist [M]r. [E]vans.^[5]

We know there's an ambulance arriving at the scene, taking Mr. Evans away. There's a lot of traffic going in and out of there.

We know there's cars pulling up and leaving from Ms. Cureton's account. There's people coming and going from that area.

Does that explain what might have happened, using our common sense and reason? Can we infer maybe someone picked up one of those other one or two shell casings. Maybe they were kicked by someone giving assistance to Mr. Evans.

We cannot conclude that the prosecution committed misconduct by asserting its theory regarding possible reasons for the lack of evidence that a .45-caliber gun was used in this crime. Defendant has failed to show that he was denied the effective assistance of counsel by defense counsel's failure to raise a futile objection to these comments. The prosecution concedes that it misstated that Evans's medical records showed that the wounds were caused by more than two bullets. However, Evans's testimony that defendant pulled out a gun and shot him in the chest is very strong evidence of defendant's guilt. Even considering this statement as prosecutorial

⁵ Glen Norton testified that there were several people in the crime scene area before the police arrived.

misconduct, defendant has simply failed to show that defense counsel's failure to object prejudiced him.

Next, defendant argues that counsel failed to elicit testimony from police officers that Evans's bloody clothes were destroyed and that such testimony could have been used to support the theory that all exculpatory evidence was destroyed. Defendant also asserts that defense counsel was ineffective because he failed to obtain testimony that Myers was tall and skinny, given the testimony of Glenn Norton that he saw a tall and skinny man hit Evans over the head. However, what evidence to present and what questions to ask witnesses are considered matters of trial strategy. *Rockey*, 237 Mich App at 76-77. Defendant has failed to show that defense counsel was not engaged in sound trial strategy, and we will not second guess counsel's decisions on these matters. We perceive no ineffective assistance of counsel here.

Lastly, defendant asserts that counsel was ineffective by postponing sentencing. Defendant was on parole when this incident occurred. Defense counsel moved to adjourn the date of defendant's original sentencing so that he could file a motion for a new trial. The trial court granted defendant's motion, but the prosecution appealed the trial court's grant of the new-trial motion, which was ultimately reversed by this Court. Accordingly, defendant was not finally sentenced until 928 days after his original sentencing date. Defendant argues that counsel's timing of the motion for a new trial was incompetent. He points out that he will now have to serve approximately three additional years in prison, as he was not given credit for his time served given that he was on parole when this incident occurred. Defendant did not raise a motion for resentencing in the trial court on remand.

When a parolee is arrested for a new criminal offense, he is held on a parole detainer until he is convicted of that offense, and he is not entitled to credit for time served in jail on the sentence for the new offense. Instead, a parole detainee convicted of a new offense is entitled to have jail credit applied exclusively to the sentence from which parole was granted. [*People v Stead*, 270 Mich App 550, 551-552; 716 NW2d 324 (2006) (quotation marks and citation omitted).]

While it is true that defense counsel's actions postponed defendant's sentencing, counsel argued that defendant should be given credit for the time he spent in jail from the date of the trial court's grant of the new-trial motion until the date of this Court's reversal of the trial court's decision. We will not assess counsel's performance with the benefit of hindsight. *Horn*, 279 Mich App at 39. Defendant has failed to show that defense counsel rendered ineffective assistance in this regard.

Defendant also argues that the prosecution committed misconduct during its closing argument. We review unpreserved claims of prosecutorial misconduct for plain error affecting the defendant's substantial rights. *People v Fyda*, 288 Mich App 446, 460-461; 793 NW2d 712 (2010).

"Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). "[A] prosecutor

may not argue facts not in evidence or mischaracterize the evidence presented” *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). However, the prosecution is free to argue the evidence and all reasonable inferences arising from it as they relate to the prosecution’s theory of the case. *Dobek*, 274 Mich App at 66.

There was testimony that several people were present in the area of the crime scene before the police arrived. Evans testified that defendant shot him twice in the chest with a .45-caliber gun; however, the police did not recover .45-caliber shell casings from the scene. Therefore, the prosecution’s remark during closing argument that someone may have picked up the .45-caliber shell casings or kicked them aside was an inference fairly drawn from the evidence and supported the prosecution’s theory that defendant shot Evans with a .45-caliber gun. We find no prosecutorial misconduct on these facts.

Defendant further argues that the prosecution committed misconduct by misstating that the medical records showed that Evans’s injuries were caused by more than two bullets. The prosecution concedes that this was a misstatement. After trial, a medical examiner reviewed Evans’s hospital records and emergency reports. At the *Ginther* hearing, the medical examiner opined that Evans sustained two gunshot wounds, one in the chest that went through his back, and one in the legs that went through the right thigh and grazed the left thigh. However, even considering this prosecutorial misstatement, defendant has failed to show that the prosecution’s remarks prejudiced him. Evans testified that defendant shot him twice in the chest and that Myers shot him twice in the legs, regardless of how many times he was actually shot. Whether Evans was shot once in the chest or twice in the chest is not a pertinent distinction given the strong evidence of defendant’s guilt. After all, even one gunshot to the chest is more than sufficient to prove the requisite intent for the crime of AWIM. See *People v Smith*, 89 Mich App 478, 483; 280 NW2d 862 (1979). Defendant has failed to show that this prosecutorial misstatement amounted to plain error affecting his substantial rights.

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Karen M. Fort Hood