

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD CLEAVE DOUGLAS,

Defendant-Appellant.

UNPUBLISHED

July 2, 1996

No. 167218

LC No. 93-061558-FC

Before: Doctoroff, C.J. and Hood and Gribbs, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to cause great bodily harm less than murder, MCL 750.84; MSA 28.279, felonious assault, MCL 750.82; MSA 28.277, carrying a concealed weapon, MCL 750.227; MSA 28.424, and two counts of felony-firearm, MCL 750.227b; MSA 28.424(2). Defendant subsequently pled guilty to habitual offender-third, MCL 769.11; MSA 28.1083. He was sentenced to concurrent terms of five to twenty years, two to eight years, and three to ten years. Defendant was also sentenced to two two-year terms for felony-firearm, to be served concurrently to each other and consecutive to defendant's other sentences. We affirm.

Defendant challenges on appeal the trial court's denial of his motion for a new trial. Defendant asserts that the evidence clearly showed that prosecution witness Fouse perjured herself at trial and at the subsequent hearing on defendant's allegations of perjury. We do not agree.

The discovery that testimony introduced at trial was perjured may be grounds for a new trial. *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994). In order to merit a new trial on the basis of such a discovery, a defendant must show that the evidence (1) is newly discovered, (2) is not merely cumulative, (3) would probably have caused a different result, and was not discoverable and producible at trial with reasonable diligence. *Id.* A trial court's ruling of a motion for a new trial is reviewed for an abuse of discretion. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993).

In this case, the only evidence of perjury came from the witness' ex-husband. The ex-husband testified that witness Fouse said she was going to testify against defendant in an attempt to keep her brother-in-law out of jail. The ex-husband testified that Fouse later told him that she had made a deal with police to testify against defendant in exchange for her brother-in-law's freedom. The ex-husband could not recall whether Fouse had indicated whether she would testify truthfully until he was confronted with his previous affidavit. The ex-husband was also uncertain as to when the conversations with Fouse took place, and seemed to suggest that the conversations took place over approximately 15 months. Some of the dates when the conversations supposedly took place were several months after the conclusion of defendant's trial. A police witness testified that attempts to help Fouse's brother-in-law failed before defendant's trial and that Fouse testified even though no leniency was given to her brother-in-law. Fouse testified that she asked the authorities to help her brother-in-law in exchange for her testimony. She also testified that defendant had committed the crimes at issue.

The trial court determined that the ex-husband's testimony was incredible and that there was no evidence that Fouse's testimony was perjured. The newly discovered evidence would not have made a different result on retrial probable, and we find no abuse of discretion. *People v Miller (After Remand)*, 211 Mich App 30, 54; 535 NW2d 518 (1995).

Defendant also contends that the trial court erred in finding that the prosecution had exercised due diligence in attempting to locate a missing res gestae witness. We do not agree. The test for due diligence is whether good faith efforts were made to procure the testimony of the witness, not whether increased efforts would have procured it. *People v Watkins*, 209 Mich App 1, 4; 530 NW2d 111 (1995).

Here, an officer testified that he went to the witness' last known address, talked to the new tenants, and learned that they did not know the witness' whereabouts. The officer testified that all attempts to contact the witness by telephone had been unsuccessful. The prosecution informed the trial court that it had also attempted to locate the missing witness by questioning known friends and acquaintances of the witness. Finally, the prosecution noted that its witness unit had contacted local hospitals and probation officers. The record supports the trial court's finding that the prosecution made a good faith effort to locate the witness, and the trial court's finding of due diligence was not clearly erroneous.

Defendant also argues, in propria persona, that his counsel was ineffective for failing to move for a directed verdict of acquittal. We do not agree.

Defendant failed to move below for an evidentiary hearing as required by *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Thus, this Court's review is limited to deficiencies apparent in the record. *People v Armendarez*, 188 Mich App 61; 468 NW2d 893 (1991) To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the alleged deficiencies were prejudicial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Tommolino*, 187 Mich App 14; 466 NW2d 315 (1991).

The record in this case does not support defendant's claim. We will not substitute our judgment for that of counsel regarding trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). The evidence presented at trial was more than sufficient to support defendant's convictions, and a motion for directed verdict would have been unsuccessful. Defense counsel is not obliged to bring a futile motion. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Counsel was not ineffective in this case.

Finally, defendant contends that he was deprived of a fair trial because of the prosecutor's "factually incorrect arguments". Because there was ample evidence of defendant's guilt, there is no merit to defendant's claim that the prosecution violated its duty to seek justice when it brought charges against defendant. The record does not support defendant's claim that Detective Novakoski intimidated a defense witness by "throwing" a gun in the witness' lap in the courtroom while the prosecutor was present. Defendant argues that the prosecution improperly suggested that a witness was perjuring herself, that the prosecution improperly argued that a defense witness and defendant conspired to divert blame for the shooting from defendant to the witness, and that the prosecution improperly bolstered a complainant's testimony. Defendant does not cite specific instances of misconduct, and, having reviewed the record, we find no manifest injustice.

Affirmed.

/s/ Martin M. Doctoroff

/s/ Harold Hood

/s/ Roman S. Gribbs