STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES NATHANIEL GHOLSTON,

Defendant-Appellant.

UNPUBLISHED
March 25, 1997

No. 188019
Recorder's Court
LC No. 95-001394

Before: Wahls, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Defendant was charged with committing murder during the commission or attempted commission of a breaking and entering into a dwelling, MCL 750.316; MSA 28.548, premeditated murder, MCL 750.316; MSA 28.548, and possessing a firearm during the commission or attempted commission of a felony, MCL 750.227b; MSA 28.424(2). He was granted a directed verdict on the felony-murder charge. Defendant was convicted, following a bench trial, of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony. He was sentenced to life imprisonment on the second-degree murder conviction, to be served consecutively to a two-year sentence for the felony-firearm conviction. He appeals as of right. We affirm.

On December 26, 1994, defendant told Janesse Gray that he believed his girlfriend, Shannon Seltzer, the codefendant[1], was pregnant with his child. Defendant indicated that he did not want Seltzer to have another child because she did not properly care for her child from a previous relationship, who was in the custody of her father, the victim. Defendant then indicated that he planned to retrieve the child that night from the victim's house. Soon thereafter, defendant and Gray were picked up by Seltzer. Defendant instructed Seltzer to drive to the victim's house but, first, to drive by "Little Willie's" house to get more "manpower."

According to Gray, at approximately 2:00 a.m., they arrived at the victim's home. Gray and Seltzer walked to the porch and knocked on the door while defendant walked in circles on the grass. Gray saw defendant draw a black handgun and run onto the porch. At that point, Gray ran to the van

to escape the scene. As Gray ran to the van, she observed Little Willie shoot a gun at the victim's house from his car. When Gray left the victim's house, Little Willie followed her, leaving defendant and Seltzer behind.

The victim's wife testified that, upon going to the front door, they saw a woman in the driveway and defendant on the porch. Defendant said that Seltzer wanted to see the victim. The victim's wife said that she saw a silver handgun in defendant's hand. The victim then pulled his wife away and directed her to go upstairs and call the police. As she walked upstairs, she heard Seltzer ask to see the child. The victim said that the child was not there. The victim's wife retrieved the phone, brought it to the stair landing and called 911. She then saw defendant shoot the gun through the door in the direction of her husband. She testified that defendant then kicked in the door and entered the house followed by an unidentified armed man. The victim's wife ran up the stairs to call the police again. She heard more gunshots. Seltzer then entered the room and took the phone. At some point, the victim's wife went back downstairs and saw her husband lying on the floor bleeding through the nose and trying to breathe. The victim died from a single gunshot wound to the chest. The victim's wife is unaware of who shot her husband.

According to Gray, defendant and Little Willie argued about who actually shot the victim. Both took credit for the murder. Defendant told Little Willie that Little Willie had shot him in the hand and the back of the leg rather that the victim. Following that conversation, defendant, codefendant and Gray drove to another person's home where John Maynard patched up defendant's hand and leg.

Defendant first argues that the trial court erred when it denied his motion for a new trial based upon newly discovered evidence. We disagree. A trial court's decision regarding a motion for a new trial based on newly discovered evidence will not be reversed absent an abuse of discretion. *People v Miller (Aft Rem),* 211 Mich App 30, 47; 535 NW2d 518 (1995).

To warrant a new trial based upon newly discovered evidence, the defendant must demonstrate: (1) that the evidence is in fact in "new;" (2) that the new evidence is not merely cumulative of evidence previously presented at trial; (3) that the evidence was not discoverable and available for production at trial upon an exercise of due diligence; and, (4) that production of the evidence would probably have caused a different result at trial. *Id.* at 46-47.

Defendant submitted the affidavit of Tanisha Williams, who was subpoenaed and appeared at defendant's trial but was never called to testify. Williams averred that John Maynard had bragged about killing the decedent. This Court, however, has held that evidence is not newly discovered where, as here, the witness proffering the evidence was available to defendant prior to trial and defense counsel chose not to question the witness. See *Heshelman v Lombardi,* 183 Mich App 72, 82; 454 NW2d 603 (1991); *Kroll v Crest Plastics, Inc,* 142 Mich App 284, 291-292; 369 NW2d 487 (1985). The trial court therefore did not abuse its discretion in denying defendant's motion for a new trial on this basis.

Defendant also submitted the affidavit of Seltzer, his codefendant and girlfriend, who chose not to testify at trial and was acquitted. Seltzer likewise averred that defendant was present at the scene of the homicide, but that another person bragged about killing the decedent. We agree with defendant's assertion that the evidence was "new" at the time that Seltzer was acquitted because she had previously chosen not to testify. We, however, disagree that it requires a new trial where defendant failed to exercise due diligence to obtain the evidence at trial before the completion of the trial. *Miller, supra*. Seltzer was acquitted before defendant's closing argument and, therefore, her testimony could have been obtained had defendant moved to reopen his proofs in order to present the testimony.

Moreover, any error in this regard is harmless where, as the trial court indicated, the admission of the new evidence would not have changed the result. Even if we assume arguendo that it was the other person who fired the shots, there was sufficient evidence to support defendant's conviction. One who procures, counsels, aids, or abets the commission of an offense may be prosecuted, convicted, and punished as if he directly committed the offense. *People v McCray*, 210 Mich App 9, 13; 533 NW2d 359 (1995). The codefendant's affidavit does not negate the testimony that defendant planned to go to the victim's residence to take the child, that defendant went to the victim's residence, that defendant possessed a handgun, and that defendant shot the handgun through the front door of the residence in the direction of the victim. Accordingly, the trial court did not abuse its discretion when it denied defendant's motion for a new trial on this basis.

Defendant next argues that the trial court abused its discretion when it denied his motion for a *Ginther*[2] hearing to test the validity of his claim that defense counsel was ineffective for failing to call Williams as a witness at trial and failing to sever the trials of the defendants. We disagree. Generally, in order to claim ineffective assistance of counsel, an evidentiary hearing is a prerequisite for appellate review. A court, however, need not grant an evidentiary hearing where the details of the deficiency are apparent in the record. See *People v Ford,* 417 Mich 66, 113; 331 NW2d 878 (1982); *People v Michael Anthony Williams,* 391 Mich 832 (1974).

In this case, an evidentiary hearing was unnecessary because the critical facts are undisputed and are apparent from the record. It is evident that defense counsel failed to move to sever the trials of defendant and his codefendant, and that defense counsel failed to call Williams to testify. Furthermore, the substance of Williams' testimony, that she heard another person state that he shot and killed the victim, was submitted to the trial court in an affidavit at defendant's motion for a new trial. Although the lower court's record is devoid of defense counsel's reasons for deciding not to move to sever or call the proposed witness, it is obvious that defendant cannot establish that defense counsel was ineffective. As the trial court stated at the hearing on defendant's motion, "there's no showing [that] there was ineffective assistance of counsel; just a decision made." Accordingly, we conclude that the trial court did not err in denying defendant's request for a *Ginther* hearing, and we will address the merits of defendant's ineffective assistance of counsel claim based on the record before us.

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger,* 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish

ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id*. A defendant must also overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendant's claim that defense counsel was ineffective for failing to move to sever the trials of the defendants is without merit. Severance is mandated only when a defendant demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. *McCray, supra* at 12. Severance is required where the defenses are mutually exclusive or irreconcilable. *Id*. Here, the defenses of the defendants were not mutually exclusive. Both defendants consistently claimed that neither shot the decedent and neither was aware that there was going to be a shooting. Because the defenses were consistent, it was not error for defense counsel to choose not to move to sever. Defense counsel is not required to argue a frivolous or meritless motion. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

We further find that defense counsel was not ineffective for choosing not to call Williams to testify. We initially note that the decision to call witnesses is a matter of trial strategy, and this Court will not second-guess defense counsel's trial strategy. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Moreover, defendant failed to allege or offer any evidence that, but for defense counsel's action, the outcome of his trial would have been different. Had defense counsel called Williams, her testimony would not have exculpated defendant where it was immaterial whether defendant's bullet hit the decedent because the trial court found that defendant was guilty of second-degree murder either as the principal shooter or as an aider and abettor. *McCray*, *supra*.

Defendant next argues that the trial court erred in departing from the guidelines sentence range of ninety-six to three hundred months' imprisonment and sentencing defendant to life imprisonment without adequately stating its reasons on the record and on defendant's sentencing information report (SIR). Again, we disagree. When a trial court departs from the minimum sentencing guidelines, it is required to state its reasons both on the record and on defendant's SIR. MCR 6.425(D)(1).

In this case, the trial court wrote on defendant's SIR that it believed that the guidelines range was "grossly inadequate [for this] . . . cold-blooded murder." In addition, contrary to defendant's claim, the trial court adequately stated its reasons for departure on the record. The trial court indicated that it relied upon various reasons that are unaccounted for in the guidelines. The court referred to defendant's use of a handgun, that the incident was unprovoked by the victim, that the victim was shot and killed while in his own home, that others need to be deterred from carrying and using handguns, and the psychological impact on society when a person is killed in his or her own home. We conclude that the trial court adequately articulated its reasons for sentencing defendant outside the guidelines range. We finally conclude that defendant's

sentence was proportional to the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Affirmed.

/s/ Myron H. Wahls
/s/ Harold Hood
/s/ Kathleen Jansen

[1] Codefendant, Shannon Seltzer, was charged with committing murder during the commission or attempted commission of a breaking and entering into a dwelling, MCL 750.316; MSA 28.548, premeditated murder, MCL 750.316; MSA 28.548, and possessing a firearm during the commission or attempted commission of a felony, MCL 750.227b; MSA 28.424(2). The felony-firearm charge was dropped prior to trial. She was granted a directed verdict on the felony-murder charge. She was subsequently acquitted of all remaining charges.

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