

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NIKOLL PJETR SUFAJ,

Defendant-Appellant.

UNPUBLISHED

April 28, 2005

No. 253551

Oakland Circuit Court

LC No. 2003-192243-FH

Before: Griffin, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of felonious assault, MCL 750.82, discharge of a firearm in a building, MCL 750.234b, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to concurrent terms of 273 days for the felonious assault and firearm discharge convictions, to run consecutive to two concurrent terms of two years in prison for each felony-firearm conviction.

Defendant's convictions arise out of an incident at an Albanian church festival. Lek (Tony) Sufaj, the complainant, was in a tent dancing in a traditional Albanian dance circle—he was holding hands with Boshko Brahimaj on his left side, and Tom Ulaj on his right side. Joseph Brahimaj was also holding hands to the right of Ulaj. According to the complainant, the Brahimajs, and Ulaj, defendant hit the complainant twice from behind with a gun, causing him to fall to the ground; the complainant did not have a gun. According to the complainant, defendant threatened to kill him between the first and second blows.¹ Defendant aimed the gun at the complainant, but then shot the gun through the roof of the tent and ran away. The complainant sustained two lacerations requiring twenty-five stitches.

¹ This threat was made in apparent reference to “bad blood” between the complainant and defendant: although the complainant and defendant are cousins, the complainant believed that defendant's family had been involved in the 1992 murder of his brother, and defendant believed that the complainant “celebrated” the 2003 murder of *his* brother. Both the complainant and defendant acknowledged a strong Albanian tradition of seeking revenge for wrongs done to family members.

According to defendant, he only hit the complainant with a gun in self-defense after the complainant aimed a gun at him. Defendant maintained that he fired a single gun shot out of fear for his life. After hitting the victim on the head, defendant's gun jammed and fell apart. George Dusja testified that he observed defendant and the victim struggling over an object, but was unsure if it was a gun. The police recovered the gun and a shell casing from the tent, and observed what appeared to be a bullet hole in the top of the tent. The gun was registered to defendant, and defendant later turned in a part of the gun (the slide) to the police.

Defendant first argues that he is entitled to a new trial because the Albanian interpreter was not a qualified expert. We disagree. Because the complainant and other witnesses spoke in broken English, the parties agreed that it would be advisable to have an interpreter available throughout the trial proceedings. The trial court asked the parties how they would like to proceed, and both parties affirmatively agreed to have the interpreter sworn in before opening statements. The interpreter took an oath, albeit inartfully worded, to truthfully answer "such questions as may be put to [her] touching upon [her] qualifications to act as an interpreter in th[e] case." MRE 603. By affirmatively indicating that it was acceptable to swear in the interpreter, defendant implicitly accepted her expert qualifications. MRE 604, 702. Therefore, defendant has waived any objection to the interpreter's qualifications, and any error is extinguished. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000).²

Defendant next argues that the interpreter failed to accurately translate the testimony of various witnesses. Although defendant raised this issue in his motion for a new trial, he failed to object to the accuracy of the interpreter's translation at any time during the trial proceedings; therefore, our review is limited to plain error that affected defendant's substantial rights.³ *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

"An interpreter's function is to translate the relevant statements and responses." *People v Cunningham*, 215 Mich App 652, 656; 546 NW2d 715 (1996). "As a general rule, the proceedings or testimony at a criminal trial are to be interpreted in a simultaneous, continuous, and literal manner, without delay, interruption, omission from, addition to, or alteration of the matter spoken, so that the participants receive a timely, accurate, and complete translation of what has been said." *Id.* at 654. "[A]dequate translation of trial proceedings requires translation of everything relating to the trial that someone conversant in English would be privy to hear."

² Moreover, based on the sworn affidavit of the interpreter, Elvira Bishja, provided by the prosecution in support of its brief in opposition to defendant's motion for a new trial, we are satisfied that she has the educational and professional qualifications necessary to meet the requirements of MRE 604 and 702.

³ Under MCR 6.431(B), the trial court was permitted to grant a new trial on any ground that would support appellate reversal of the conviction or because it believed that the verdict resulted in a miscarriage of justice. Generally, we review a trial court's ruling on a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). However, because defendant has not raised the trial court's decision on that motion on this basis as an issue on appeal, we deem it abandoned. *People v Kent*, 194 Mich App 206, 210; 486 NW2d 110 (1992).

Id. at 654-655. However, “occasional lapses will not render a trial fundamentally unfair.” *Id.* at 654.

Here, the record reveals that throughout trial, the interpreter was only used intermittently, because the witnesses spoke and understood English fairly well. Although there were a few instances of minor lapses in the literal translation of certain witnesses’ testimony, these exchanges were brief and were immediately interrupted by the trial court, pursuant to its responsibility to control the trial proceedings. MCL 768.29; MCR 6.414(A). Indeed, the minor lapses primarily resulted from confusion as to the order in which the attorneys, witnesses, trial court, and interpreter were to speak, as well as the witnesses speaking in both English and Albanian. Moreover, when it appeared that the interpreter was not translating each question and answer, the trial court instructed the interpreter that this was unacceptable and that she had to translate everything literally and could not engage in a private conversation with the witness. The interpreter then translated the witness’ testimony for the jury; therefore, the jury was ultimately apprised of the exchange. These occasional and minor lapses in simultaneous and literal translation did not deprive defendant of his right of confrontation or render the trial fundamentally unfair. *Cunningham, supra* at 654-655. Defendant has failed to establish plain error; therefore, he has forfeited this issue on appeal.

Defendant next argues that he is entitled to a new trial because the prosecutor violated his right to due process by withholding exculpatory information.⁴ Specifically, defendant argues that the prosecution withheld information concerning Lazder Gilaj, a witness to the incident, who allegedly stated that the complainant was holding a gun at the time of the incident, thereby supporting defendant’s claim of self-defense. Whether defendant was denied his due process right to information is a question of law, which we review de novo on appeal. See *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998).

A criminal defendant has a due process right to obtain exculpatory evidence possessed by the prosecutor if it would raise a reasonable doubt as to the defendant’s guilt. *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994), citing *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). Here, however, the record reveals that before trial, defendant specifically listed Lazder Gilaj as a defense witness whom he intended to call at trial. As a result, defendant is unable to prove that he did not possess the evidence or could not have obtained it with reasonable diligence. Consequently, defendant is unable to establish a *Brady* violation. Defendant was not denied due process; therefore, he is not entitled to a new trial on this ground.

⁴ Defendant also raised this issue in his motion for a new trial; however, because he has not raised the trial court’s decision on that motion on this basis as an issue on appeal, we deem it abandoned. *Kent, supra* at 210.

Defendant next argues that the trial court erred in denying his motion for a new trial on the basis of newly discovered evidence. We review a trial court's decision on a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). An abuse of discretion exists only when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001).

For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial. *Cress*, *supra* at 692; MCR 6.508(D).⁵

Defendant first argues that the exculpatory evidence allegedly withheld by the prosecutor constitutes newly discovered evidence. However, as noted above, defendant listed Lazder Gilaj as a defense witness whom he intended to call at trial; therefore, any exculpatory evidence presumably proffered by Gilaj does not constitute newly discovered evidence. *Cress*, *supra* at 692.

Defendant next argues that the proposed testimony of newly discovered witness Leke Koja, that the complainant was holding a gun at the time of the incident, constitutes newly discovered evidence. However, the proposed testimony, as set out Koja's unsworn statement, is merely cumulative and does not warrant a new trial. *Id.* Moreover, our Supreme Court has held that newly discovered evidence that is cumulative, even if it supports the uncorroborated testimony of defendant, does not warrant a new trial. *People v English*, 302 Mich 463, 467-468; 4 NW2d 727 (1942). See also *People v Keiswetter*, 7 Mich App 334, 344-345; 151 NW2d 829 (1967).

Defendant next argues that the proposed recantation testimony of Boshko Brahimaj, as set out in his unsworn statement, that the complainant was holding a gun at the time of the incident, constitutes newly discovered evidence. However, this Court has traditionally regarded recantation testimony as suspect and untrustworthy. *People v Canter*, 197 Mich App 550, 559; 496 NW2d 336 (1992). Moreover, the trial court found that the recantation testimony was not credible, in light of the overwhelming evidence that the complainant was holding hands in the dancing circle at the time of the incident and therefore could not have been holding a gun. Giving "due regard . . . to the trial court's superior opportunity to appraise the credibility of the recanting witness and other trial witnesses," we find that the trial court did not abuse its discretion in denying defendant's motion for a new trial on the basis of the proposed recantation testimony. *Id.* at 560.

Defendant next argues that he was denied the effective assistance of counsel at trial. Defendant raised the issue of ineffective assistance of counsel in his motion for a new trial;

⁵ Defendant supported his motion for a new trial with unsworn statements that did not constitute affidavits under MCR 2.611(D)(1).

therefore, the issue is preserved for review.⁶ *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). However, because the trial court declined to hold an evidentiary hearing, our review is limited to the facts on the record. *Id.* To prove that counsel was ineffective, defendant must show that his counsel's performance was deficient, and that there is a reasonable probability that but for that deficient performance, the result of the trial would have been different. *People v Matuszak*, 263 Mich App 42, 57-58; 687 NW2d 342 (2004).

Defendant argues that defense counsel was ineffective for failing to investigate the case—specifically, for failing to attempt to locate witnesses, and for failing to interview witnesses Joseph and Boskho Brahimaj before trial. When claiming ineffective assistance because of counsel's alleged unpreparedness, a defendant must show prejudice resulting from the alleged lack of preparation. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990).

Defendant fails to identify which witnesses defense counsel was allegedly ineffective for not attempting to locate. And a “defendant may not leave it to this Court to search for a factual basis to sustain or reject his position.” *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001), quoting *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). Therefore, defendant has abandoned this claim of error. Further, there is nothing in the record to support defendant's assertion that defense counsel was unprepared to cross-examine the Brahimajs. To the contrary, it is apparent from the record that defense counsel was familiar with this relatively straightforward case, and adequately cross-examined them. Although defendant lodges a general complaint, he fails to indicate what questions defense counsel failed to ask, or what exculpatory information the answers to the unasked questions could have yielded. Again, a defendant may not leave it to this Court to search for a factual basis to sustain or reject his position. *Traylor, supra* at 464. Further, even if defendant had specified an unasked question, decisions about what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). And because we will not substitute our judgment for that of counsel regarding matters of trial strategy, *Matuszak, supra* at 58, defendant is not entitled to relief on this basis.

Defendant also argues that defense counsel was ineffective for failing to ensure that the interpreter was qualified and sworn as required by the Michigan Rules of Evidence, and by failing to object to continued use of the interpreter, even after translation problems became apparent. However, as noted above, the interpreter met the requirements of MRE 604 and 702, and any minor lapses in translation did not deprive defendant of his right of confrontation or render the trial fundamentally unfair. And because counsel is not required to make a meritless motion or a futile objection, defense counsel was not ineffective for failing to address those issues. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003). Defendant has failed to demonstrate that defense counsel's performance was deficient; therefore, he is not entitled to relief on this issue.

⁶ Because defendant has not raised the trial court's decision on his motion for a new trial on this basis as an issue on appeal, we deem it abandoned. *Kent, supra* at 210.

We affirm.

/s/ Richard Allen Griffin

/s/ Richard A. Bandstra

/s/ Joel P. Hoekstra