

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES GARY RENAUD,

Defendant-Appellant.

UNPUBLISHED

April 18, 2006

No. 258574

Oakland Circuit Court

LC No. 04-196584-FH

Before: Fort Hood, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

Defendant was convicted of operating a vehicle under the influence of liquor, third offense, MCL 257.625(9)(c), and driving while license suspended, second offense, MCL 257.904(3)(b). He was sentenced as a fourth habitual offender, MCL 769.12, to 46 months to 15 years in prison for the operating a vehicle under the influence of liquor, third offense conviction, and 180 days in prison for the driving while license suspended, second offense conviction. He appeals as of right. We affirm.

Defendant first argues that he was denied his constitutional right to the effective assistance of counsel. We disagree.

When reviewing a claim of ineffective assistance of counsel, when an evidentiary hearing is not previously held, this Court's review is limited to the facts contained on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). As a matter of constitutional law, this Court reviews the record de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show that: (1) counsel's performance was below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To show that counsel's performance was below an objective standard of reasonableness, defendant must overcome the strong presumption that his counsel's actions constituted sound trial strategy under the circumstances. *Id.* at 302. A trial counsel's decisions concerning which questions to ask a witness, what evidence to present and whether to call or question witnesses are presumed to be sound trial strategy. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Failure to present additional evidence only constitutes ineffective assistance of counsel when it deprives the

defendant of a substantial defense that would have affected the outcome of the proceedings. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Counsel does not render ineffective assistance by failing to raise futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

In regard to defendant's argument that his trial counsel was ineffective for failing to object to the prosecutor's question to defendant asking if defendant thought that eyewitness Billy Adams had a motive to lie, we conclude that defendant's argument fails. A prosecutor may inquire into a witness's opportunity and motive to fabricate his own testimony. *People v Buckey*, 424 Mich 1, 15; 378 NW2d 432 (1985). However, a prosecutor may not ask a defendant to comment on the credibility of other witnesses. *Id.* at 17. A defendant's opinion on the credibility of other witnesses is not probative because "matters of credibility are to be determined by the trier of fact." *Id.* Here, the prosecutor's question, "[d]o you know of any reason that [Adams] would lie and state that he saw you crash, and that he came upon you immediately and saw you in the driver's seat?," was an improper inquiry asking defendant to comment on the credibility of Adams. *Id.* at 17. However, as was the case in *Buckey*, *supra*, the prosecutor's improper inquiry did not result in unfair prejudice to defendant. *Id.* at 17. In this case, the inquiry did not result in unfair prejudice because the jury was instructed that it, not defendant, was to determine the credibility of the witnesses. Thus, we fail to discern how defendant was harmed by the aforementioned question. Therefore, any objection by defense counsel on the ground that the aforementioned question was an improper inquiry into defendant's opinion of Adams's credibility, would have been futile. Moreover, an objection on the aforementioned ground may have drawn more attention to defendant's answer; and thus, we must presume that defense counsel's failure to object on the aforementioned ground was sound trial strategy, which defendant has failed to rebut. Therefore, defendant was not denied his right to the effective assistance of counsel on the ground that his trial counsel failed to object to the aforementioned improper inquiry by the prosecutor. *Toma*, *supra*, p 302; *Ackerman*, *supra*, p 455.

In regard to defendant's standard 4 brief argument that his trial counsel was ineffective for failing to file a motion to reconsider defendant's previously denied motion for the appointment of an expert witness, when Judge Andrews took over for Judge Morris, we conclude that defendant's argument fails. On a motion for reconsideration, a trial court in a criminal case may reconsider and modify, correct or rescind any order it concludes was erroneous. *People v Jones*, 203 Mich App 74, 80; 512 NW2d 26 (1993). As discussed below, Judge Morris did not err when she denied defendant's motion for a court appointed expert witness. Therefore, the trial court would not have granted the aforementioned motion to reconsider, *Jones*, *supra*, p 80, and, any motion would have been futile and, in turn, defendant was not denied his right to the effective assistance of counsel when his trial counsel failed to file the aforementioned motion for reconsideration. *Toma*, *supra*, pp 302-303; *Ackerman*, *supra*, p 455.

In regard to defendant's standard 4 brief argument that he was denied his right to the effective assistance of counsel when his trial counsel failed to present evidence that he did not own the Intrepid, we conclude that defendant's argument fails. Defendant has failed to establish what evidence shows that he does not own the Intrepid. Furthermore, defendant did not need to own the Intrepid to be convicted of the crimes charged against him. MCL 257.625(9)(c); MCL

257.904(3)(b). Finally, defendant has done nothing to rebut the presumption that defense counsel's failure to present evidence that defendant did not own the Intrepid was sound trial strategy. Therefore, defendant's argument in this regard fails. *Rocky, supra*, p 76.

In regard to defendant's standard 4 brief arguments that he was denied his right to the effective assistance of counsel when his trial counsel failed to use Adams's preliminary examination testimony to impeach Adams's contradictory trial testimony, failed to recall Adams to the stand to impeach his testimony with "police report UD-10," and failed to use Jane Farnell's (defendant's passenger) booking photo showing her wearing a black leather coat to impeach Adams's testimony that he thought Farnell was wearing a blue jean jacket, we conclude that defendant's arguments fail. Using police officer testimony that roads were wet on the night in question and a police report stating the same, would have minimal impeachment value in regard to the fact that Adams did not testify to the weather conditions on the night in question. Furthermore, we conclude that Adams's preliminary examination testimony that he spoke with Farnell and Farnell's booking photo showing her wearing a black leather coat have minimal impeachment value in regard to Adams's trial testimony that he believed Farnell was wearing a blue jean jacket. Therefore, we conclude that defendant has failed to establish that his trial counsel's performances in the aforementioned instances fell below an objective standard of reasonableness, and thus, defendant was not denied his right to the effective assistance of counsel in the aforementioned instances. *Toma, supra*, pp 302-303.

Finally, in regard to defendant's standard 4 brief argument that he was denied his right to the effective assistance of counsel when his trial counsel failed to file a timely motion for a new trial on the grounds that the case was so "close," we conclude that defendant's argument has been abandoned. Defendant's argument is vague, unsupported by the record and unsupported by any legal theory or basis. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow." *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).

Defendant next argues that he is entitled to a new trial based on newly discovered evidence consisting of alleged correspondence between defendant and Farnell, in which Farnell allegedly admits that she was the driver of the vehicle on the night in question, and a booking photograph of Farnell depicting her in a black leather jacket. We disagree. Defendant failed to properly preserve this issue by moving for a new trial based upon newly discovered evidence brought before the trial court. MCR 2.611; MCR 2.612; *People v Darden*, 230 Mich App 597, 605-606; 585 NW2d 27 (1998). Therefore, we will review this issue for plain error which affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 773; 597 NW2d 130 (1999).

A motion for a new trial based on newly discovered evidence may be granted upon a showing that: (1) the evidence itself, and not merely its materiality, is newly discovered; (2) the evidence is not merely cumulative; (3) the evidence is such "as to" render a different result probable on retrial; and (4) the defendant could not with reasonable diligence have produced it at trial. *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998). Newly discovered

evidence is not grounds for a new trial when it would merely be used for impeachment purposes. *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993).

Defendant's standard 4 brief argument that he should be granted a new trial on the basis that the "newly discovered" booking photo of Farnell, which shows her wearing a black leather jacket, could be used to impeach Adams's testimony that he believed that Farnell was wearing a blue jean jacket, fails. Even in the unlikely event that defendant were to establish that the aforementioned booking photo was "newly discovered," would render a different result probable on retrial, and that defendant could not with reasonable diligence have produced it at trial, defendant's argument would still fail because the only use of the evidence would be to impeach Adams's testimony. As discussed above, newly discovered evidence is not grounds for a new trial when it would merely be used for impeachment purposes. *Davis, supra*, p 516. Therefore, defendant's argument in this regard fails.

Likewise, defendant's argument that he should be granted a new trial on the basis that the "newly discovered" correspondence from Farnell would establish that defendant was not driving, and thus, establish defendant's innocence in regard to the charges at hand, fails. Here, the unverified and unsigned correspondence that is allegedly from Farnell, which is not a part of the lower court record and cannot be considered by this Court,¹ suggests that Farnell was the driver of the vehicle on the night in question. Even if we were to consider this evidence and assume that it was a verified statement, defendant's argument in this regard would still fail because the correspondence in question would not present a basis to warrant a new trial. Defendant has presented no evidence of due diligent attempts to obtain Farnell's testimony regarding the information contained in the correspondence; and thus, defendant has not established that the information could not have been discovered and produced at trial. Furthermore, we conclude that the inclusion of the correspondence would not lead to a different result at trial because it would be in direct contradiction to Adams's eyewitness testimony that defendant was driving the vehicle and Farnell was in the passenger seat; and furthermore, defendant admitted that he attempted to start the Intrepid that according to Chatterson was partially on the road. Under Michigan law this action is enough to convict defendant of operating a vehicle under the influence of liquor. MCL 257.625(1); MCL 257.35a. Therefore, defendant's argument in this regard fails. *Lester, supra*, p 271.

Moreover, defendant has not established that Farnell would incriminate herself and testify that she was the driver of the vehicle, and defendant's argument that the correspondence itself could be admitted into evidence as a statement against interest is unsupported by the law. Though Farnell would be considered "unavailable" pursuant to MRE 804(a) if she were to invoke her privilege against self-incrimination, MRE 804(a)(1), the correspondence would still fail to meet the statement against interest hearsay exception because the correspondence would tend to expose Farnell to criminal liability, would be offered to "exculpate" defendant, and the trustworthiness of the correspondence was not supported by any corroborating evidence, MRE 804(b)(3).

¹ See *People v Taylor*, 383 Mich 338, 362; 175 NW2d 715 (1970).

Defendant next contends that Judge Morris abused her discretion when she denied defendant's motion for a court appointed expert witness. We disagree. We review a trial court's decision whether to grant an indigent defendant's motion for the appointment of an expert witness for an abuse of discretion. *People v Tanner*, 469 Mich 437, 442; 671 NW2d 728 (2003).

Expert testimony may be received when it is necessary or helpful to the trier of fact in making a conclusion on a material issue. MRE 702; *People v Wilson*, 194 Mich App 599, 602; 487 NW2d 822 (1992). There is not a universal rule that an indigent defendant is entitled to an expert for every scientific procedure. *People v Leonard*, 224 Mich App 569, 581; 569 NW2d 663 (1997). Other than psychiatric experts, a defendant is entitled to the appointment of an expert at public expense only if he cannot otherwise proceed safely to trial without the expert. *Id.* at 581-582. A defendant must show a nexus between the facts of the case and the need for an expert. *Id.* at 582.

Here, defendant requested that the court appoint an accident reconstruction expert witness. However, whether and how the accident in question occurred is irrelevant to whether defendant was driving while intoxicated and without a valid license. The fact of the matter is that an eyewitness was following the car, approached the car after it went off the road to see if everyone was alright, saw defendant in the driver's seat of the car, saw defendant try to start the car, smelled a strong odor of intoxicants, and noted that defendant's speech was slurred and that defendant was stumbling when he was walking. Furthermore, the police gave defendant a blood test that revealed that he was legally drunk, and the parties stipulated that defendant did not have a valid license at the time of the incident. We conclude that having an expert appointed to reconstruct the accident itself would not help the jury determine the material issues of whether defendant was intoxicated or was driving the vehicle. Defendant failed to provide a nexus between the facts of the case and a need for an accident reconstruction expert. Thus, Judge Morris did not abuse her discretion when she denied defendant's motion for a court appointed expert witness. *Leonard, supra*, pp 581-582.

Defendant's fourth issue on appeal is that he was denied his constitutional right to a fair trial through misconduct of the prosecutor. We conclude that defendant has abandoned this issue on appeal because he has failed to adequately develop his arguments in this regard.

Defendant failed to properly preserve his prosecutorial misconduct claim by questioning the alleged prosecutorial improprieties before the trial court. *People v Nimeth*, 236 Mich App 616, 625; 601 NW2d 393 (1999). This Court generally reviews an unpreserved claim of prosecutorial misconduct for plain error which affected the defendant's substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Reversal is merited only if plain error caused the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings regardless of the defendant's innocence. *Id.*

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial because of the actions of the prosecutor. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Furthermore, if fundamental fairness requires a defendant to have a copy of a police report, and the defendant has made a reasonably specific request for the police report, such request should be granted. *People v Denning*, 140 Mich App 331, 333; 364 NW2d 325 (1985). If the prosecution refuses to honor a defendant's discovery request after learning

that one of its witnesses gave false testimony on a material point at the preliminary examination, such refusal can constitute error requiring reversal. *People v Thornton*, 80 Mich App 746, 750; 265 NW2d 35 (1978).

Here, defendant claims that the prosecutor committed misconduct that denied him a fair and impartial trial when the prosecutor allegedly failed to honor defendant's discovery requests for the police report regarding his accident and subsequent arrest, and booking photograph of Farnell. Though the lower court record establishes that defendant made a general discovery request that would include all police reports and possibly the booking photograph of Farnell, because defendant has failed to establish that his discovery requests were not honored, defendant's arguments in this regard are vague, unsupported by the record and unsupported by any legal theory or basis, and thus, are abandoned. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow." *Kevorkian, supra*, p 389. Therefore, we conclude that defendant has abandoned this argument.

Defendant's final issue on appeal is that the prejudicial effect of the cumulative errors in this case mandate reversal and remand for a new trial. We disagree.

This Court reviews this issue to determine if the combination of alleged errors denied defendant a fair trial. *People v Knapp*, 244 Mich App 361, 387-388; 624 NW2d 227 (2001). Reversal is warranted only if the effect of the errors was so seriously prejudicial that the defendant was denied a fair trial. *People v Werner*, 254 Mich App 528, 544; 659 NW2d 688 (2002).

The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors would not merit reversal, but the effect of the errors must have been seriously prejudicial to warrant a finding that the defendant was denied a fair trial. *LeBlanc, supra*, p 591; *Ackerman, supra*, p 454. Absent the establishment of errors, there can be no cumulative effect of errors meriting reversal. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

As discussed above, defendant has not established the occurrence of any errors. Therefore, there can be no cumulative effect of errors that would merit reversal. *Mayhew, supra*, p 128. Furthermore, the evidence clearly established that defendant was legally intoxicated and did not have a valid license at the time Adams saw him drive off the road and crash into some trees. Therefore, we conclude that even if it were found that defendant has established errors, it could not be found that the cumulative effect of the errors was seriously prejudicial to warrant a finding that defendant was denied a fair trial. Thus, reversal would not be required. *LeBlanc, supra*, p 591.

Affirmed.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Patrick M. Meter