

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
May 14, 2013

v

ALPHONSO MITCHELL CLARK,
Defendant-Appellant.

No. 306338
Wayne Circuit Court
LC No. 05-007176-FC

Before: BORRELLO, P.J., and K. F. KELLY and MURRAY, JJ.

PER CURIAM.

Defendant appeals by leave granted¹ the trial court's order denying his motion for relief from judgment. Finding no error warranting reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Gregory Marshall was fatally shot in Detroit on June 17, 2005. Defendant was charged with first-degree premeditated murder, MCL 750.316, 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), MCL 750.227b. He was found guilty on each count, and sentenced as a second habitual offender, MCL 769.10, to life imprisonment without parole for the murder conviction, one to seven-and-one-half years' imprisonment for the felon-in-possession conviction, and two years' imprisonment for the felony-firearm conviction.

In his direct appeal, defendant argued that: 1) there was insufficient evidence to support his conviction; 2) the trial court abused its discretion in admitting a 911 tape; 3) the prosecutor committed misconduct when he elicited testimony regarding a suspected drug transaction between the victim and the defendant; 4) the trial court erred in giving a "lying in wait" jury instruction; and 5) the trial court erred in denying defendant's motion for a mistrial when the jury indicated that it was deadlocked. This Court affirmed defendant's convictions and sentences. *People v Clark*, unpublished opinion per curiam of the Court of Appeals, issued May 31, 2007

¹ *People v Clark*, unpublished order of the Court of Appeals, entered May 17, 2012 (Docket No. 306338).

(Docket No. 267188). Rejecting defendant's challenge to the sufficiency of the evidence at trial, this Court summarized the evidence against defendant:

[T]here was testimony showing that Jones² knew defendant, having seen him 20 to 25 times in the past. Indeed, defendant had been at Jones's home, which is also where the victim resided, several times on the day of the murder. Jones testified that he saw defendant run toward the victim and then shoot him in the back as the victim was attempting to flee. Defendant then shot the victim several more times after the victim had fallen and while he was attempting to rise to his feet. While defendant was wearing a hood, it was not covering his face according to Jones, and Jones had no doubt that defendant committed the murder because he saw defendant's face and was within twenty feet of defendant. Jones also picked defendant out of a photographic lineup. Two other witnesses to the murder, who did not see the gunman's face, did not believe that defendant was the shooter because of his height. But they also described the gunman as wearing clothing, that being dark pants and a dark hooded sweatshirt, which was consistent with the description of defendant's clothing being worn the day of the murder as testified to by numerous other witnesses. Moreover, another witness, defendant's friend, told police that defendant had left her house with her SUV for two to three hours around the time of the crime, and Jones testified that defendant had been driving an SUV shortly before the shooting. The mother of both the victim and Jones testified that defendant had threatened the victim in the past and that the two had an ongoing dispute over drugs. She further testified that defendant called her the day after the shooting because he heard that his name "was in the wind," and he offered her some money, ostensibly because she was in financial need. Finally, defendant's testimony regarding the events that transpired was inconsistent with his statement to police. [*Clark*, unpub op at 2.]

On September 24, 2007, the Michigan Supreme Court denied defendant's application for leave to appeal. *People v Clark*, 480 Mich 893; 738 NW2d 746 (2007).

On October 2, 2008, defendant filed, in propria persona, a motion for relief from judgment, accompanied by both a brief and a supplemental brief. Between the two briefs, defendant argued: 1) prosecutorial misconduct; 2) "newly discovered evidence" of intimidation of witnesses by police; 3) ineffective assistance of trial counsel for failing to make objections, call an expert witness, and investigate the allegation of witness intimidation; 4) and ineffective assistance of appellate counsel for failing to raise these issues in the direct appeal. The trial court denied defendant's motion for relief from judgment, noting that "[d]efendant argues his appellate counsel was ineffective for failing to raise meritorious issues of law on appeal. However, defendant raises and frames the exact same arguments in this motion that his appellate counsel raised on appeal." The trial court failed to address the details of defendant's remaining arguments.

² Terrence Jones, the victim's brother, identified defendant as the shooter.

On April 26, 2010, defendant filed a delayed application for leave to appeal the trial court's denial of his motion for relief from judgment, and, in lieu of granting leave, this Court entered an order remanding to the trial court "for a ruling on the issues raised in defendant's supplemental brief in support of his motion under MCR 6.500, but not addressed by the trial court." *People v Clark*, unpublished order of the Court of Appeals, entered October 29, 2010 (Docket No. 297708).

Following this Court's remand, defendant filed a supplemental brief with the assistance of counsel, again raising issues of witness intimidation by police, prosecutorial misconduct, and ineffective assistance of trial and appellate counsel. The court addressed only defendant's argument that his trial counsel was ineffective for failing to call two witnesses:

[I]n this particular case, I've read both the defendant's Motion for Relief from Judgment as well as the People's response, and . . . defendant asserts various reasons that he ought to be entitled to relief from judgment, and I'm not going to go through each one. But primarily, as counsel's [sic] pointed out, the most significant of the arguments is the claim for ineffective assistance of counsel. . . . in the failure to procure witnesses who were unable to appear at trial.

* * *

[Defendant's trial counsel] actually sent an investigator out to look for these witnesses[,] so . . . he engaged in an effort to procure their attendance here.

Secondly, when they weren't presented, testimony was presented as to those missing witnesses, and [defendant's trial counsel] made an argument in essence shifting liability from [defendant] to those witnesses who failed to appear. As you claim or they claim, that they were concerned that they would be arrested for the murder, which is the identical argument that was advanced by [defendant's trial counsel], that . . . these missing individuals were the actual perpetrators and not his particular client.

Based upon my review of the defendant's Motion for Relief from Judgment and based upon the People's response and based upon my review of the transcript, I do not find that there was ineffective assistance of counsel. [T]hat [defendant's trial counsel] was aware of the circumstances, aware of the evidence, obviously attempted to procure the attendance of the missing witnesses and then made an argument shifting liability to the missing witnesses. And obviously that is a trial strategy move and . . . he was trying to exculpate his client from liability, which is pointing to the empty chairs as to those witnesses who were – who did not testify live.

Clearly . . . that meets the Strickland vs. Washington standard, and the Court does not find that there was ineffective assistance of counsel . . . [T]he Court finds that the defendant is not entitled to relief from judgment in this particular case. The defendant's Motion for Relief from Judgment is denied, all right? You can take the matter up on appeal.

Defendant now appeals by leave granted.

II. ANALYSIS

This Court reviews for an abuse of discretion a trial court's decision on a motion for relief from judgment, and reviews for clear error the trial court's findings of fact supporting its ruling. *People v Swain*, 288 Mich App 609, 628; 794 NW2d 92 (2010). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes or makes an error of law." *Id.* at 628–629 (citation omitted).

MCR 6.508(D) provides:

The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion

(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,

(i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal[.]

* * *

The court may waive the "good cause" requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime. [MCR 6.508(D).]

Therefore, a defendant is only entitled to post-appeal relief from judgment if he can demonstrate good cause for failing to raise the grounds for relief on appeal or in a prior motion, and can demonstrate actual prejudice from the alleged irregularity.³ *People v Watroba*, 193 Mich App 124, 126; 483 NW2d 441 (1992). Good cause warranting relief from judgment can be

³ Because the trial court in this case did not waive the good cause requirement based on the possibility of defendant's innocence, a showing of good cause is required. See *People v Clark*, 274 Mich App 248, 255; 732 NW2d 605 (2007).

established by showing ineffective assistance of appellate counsel. *People v Brown*, 491 Mich 914, 914; 811 NW2d 500 (2012); *People v Kimble*, 470 Mich 305, 314; 684 NW2d 669 (2004); *People v Reed*, 449 Mich 375, 379; 535 NW2d 496 (1995). Actual prejudice exists when, in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal. *Swain*, 288 Mich App at 624.

“When ineffective assistance of counsel, based on a failure to raise viable issues, is the justification for excusing procedural default, the movant must establish ineffective assistance of counsel pursuant to the standard set forth in [*Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984)], or that some objective factor external to the defense impeded counsel’s efforts to comply with the State’s procedural rule.” *Reed*, 449 Mich at 381 (internal quotation omitted). Under *Strickland*, a defendant establishes ineffective assistance of counsel by showing (1) that “counsel’s representation fell below an objective standard of reasonableness,” and (2) that, “but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 US at 688, 694.

To obtain postappeal relief on the basis on ineffective assistance of appellate counsel, based, in turn, on ineffective assistance of trial counsel, defendant must show (1) that “trial counsel’s performance fell below an objective standard of reasonableness,” (2) that “the representation so prejudiced the defendant as to deprive him of a fair trial,” and (3) that “appellate counsel’s performance fell below an objective standard of reasonableness and was constitutionally deficient.” *Reed*, 449 Mich at 390. “[A]ppellate counsel’s decision to winnow out weaker arguments and focus on those more likely to prevail is not evidence of ineffective assistance. Nor is the failure to assert all arguable claims sufficient to overcome the presumption that counsel functioned as a reasonable appellate attorney in selecting the issues presented.” *Id.* at 391. In this case, “[t]he question is whether a reasonable appellate attorney could conclude that [the ineffective assistance of trial counsel argument was] not worthy of mention on appeal.” *Id.*

A. FAILURE TO OBJECT TO CLOSING ARGUMENTS

Defendant argues that appellate counsel was ineffective for failing to argue in the direct appeal that trial counsel was ineffective for failing to object during the prosecutor’s closing argument. Defendant claims that the prosecutor argued facts that were not in evidence and improperly vouched for two witnesses.

1. FACTS NOT IN EVIDENCE

During closing arguments, the prosecutor argued that the medical examiner testified that the victim was first shot in the back, which contradicted eyewitness Kimberly Jones’ testimony. Defense counsel objected, clarifying that the medical examiner testified that although he numbered the bullet holes in the victim, they were not in any particular order because he could not determine the order in which the bullets entered the victim. The trial court sustained the objection. When counsel again stated that “the first shot was in the back,” defense counsel did not object.

While “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), defendant fails to show how his attorney’s conduct was not trial strategy. Counsel objected once, stated the basis for his objection, and clarified the medical examiner’s testimony. The decision to refrain from interrupting the prosecution’s closing argument again may have been tactical to avoid appearing discourteous to the prosecution, where the objection had already been made and sustained. This Court “will not second-guess matters of strategy or use the benefit of hindsight when assessing counsel’s competence.” *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Regardless, the record does not indicate that result would have been different if defense counsel had repeated his objection, especially in light of the trial court’s instruction to the jury that the statements of counsel are not evidence.

2. VOUCHING

During closing arguments, the prosecutor argued that its key witness “never wavered throughout [his] testimony,” and that Detective Anthony Delgreco is a

better—great man because I’ll tell you what he should have put in that statement: “I did it, me and my gun that I threw in the river,” that’s what he should have said. But he doesn’t[,] because what he’s trying to do is lock out any alibi, lock it out, find out where that car was, find out where Miss Hunter was, find out where [defendant] was, and that’s what he did.

“[A] prosecutor may not vouch for the credibility of his witnesses by implying that he has some special knowledge of their truthfulness. But a prosecutor may comment on his own witnesses’ credibility during closing argument, especially when there is conflicting evidence and the question of the defendant’s guilt depends on which witnesses the jury believes.” *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004) (internal citation omitted). Even if this argument was improper vouching, counsel’s decision not to object may have been a strategic one. Of the two sentences in the quoted paragraph, only the words “better” and “great” refer to credibility or character, and defendant’s trial counsel could reasonably have decided that peppering opposing counsel’s closing argument with objections would have appeared combative, set a bad precedent for his own upcoming closing argument—that is, that it would have given the prosecutor license to make a similar number of obstructive and unmeritorious objections—or that the objection simply lacked merit. Again, this Court does not second-guess trial strategy, and “counsel does not render ineffective assistance by failing to raise futile objections.” *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Accordingly, because counsel’s performance during closing arguments did not fall below an objective standard of reasonableness, defendant cannot show that his appellate counsel was ineffective for omitting this issue from his direct appeal.

B. FAILURE TO CALL AN EXPERT ON EYEWITNESS TESTIMONY

Defendant argues that appellate counsel was ineffective for failing to argue in his direct appeal that trial counsel was ineffective for failing to consult with and obtain an expert on the fallibility of eyewitness testimony. Because only one witness positively identified defendant,

and “the other eyewitnesses gave physical descriptions of the shooter that were different from” defendant, defendant argued that such expert testimony was critical to his case.

“Decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy,” *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008), which this Court will not scrutinize on appeal. In any case, an expert witness called for the purpose of casting doubt on the reliability of all eyewitness testimony would have undermined eyewitness testimony of two other witnesses favorable to defendant. Here, too, trial counsel’s performance did not fall below an objective standard of reasonableness, and defendant cannot show that his appellate counsel was ineffective for omitting this issue from his appeal of right.

C. WITNESS INTIMIDATION

Defendant argues that Detective Delgreco intimidated two witnesses for the defense, Kevin Long and Jerel Dillard, causing their nonappearance at defendant’s trial, and that the two witnesses would have provided exculpatory testimony as to the identity of the shooter, which was the central issue at trial. Defendant argues that his trial counsel was ineffective for failing to timely investigate the cause of the witnesses’ disappearance, and that his appellate counsel was ineffective for failing to raise the issue of witness intimidation in defendant’s direct appeal.

“[A]ttempts by the prosecution to intimidate witnesses from testifying, if successful, . . . amount to a denial of a defendant's constitutional right to due process of law. Threats from law enforcement officers may be attributed to the prosecution.” *People v Canter*, 197 Mich App 550, 569-570; 496 NW2d 336 (1992)

1. JEREL DILLARD

In an affidavit dated February 16, 2008, Dillard said:

On July 17th, 2005, I willingly testified at Alphonso Clark’s (Zo) preliminary examination at the Inkster 22nd District Court. I also received a subpoena [sic] and appeared to [sic] Alphonso Clark’s first day of trial to testify and was appointed an attorney. The day after I appeared to trial, Detective Delgreco came to my house and threatened to put me in jail if I testified at trial. Detective Delgreco informed me that my testimony would help Alphonso Clark get acquitted and give me motive to kill Gregory Marshall [victim]. He also told me if Alphonso Clark got acquitted, I would be charged for the murder of Gregory Marshall and that he would make sure I get [sic] convicted. I did not return to court to testify at Alphonso Clark’s trial because I was scared Detective Delgreco would lock me up. I did not kill Gregory Marshall, nor did I have anything to do with him being murdered.

Dillard did not witness the shooting, but was important to the defense's case because, according to defendant, Dillard "knew the capacity of the victim for violence" based on an incident at Dillard's home in 2005.⁴

While evidence of a person's character or a trait of character is generally inadmissible for the purpose of proving action in conformity therewith on a particular occasion, there is an exception: "[w]hen self-defense is an issue in a charge of homicide, evidence of a trait of character for aggression of the alleged victim of the crime offered by an accused." MRE 404(a)(2); *People v Orlewicz*, 293 Mich App 96, 104; 809 NW2d 194 (2011).

Defendant presented a mistaken identity defense at trial; at no point did he argue self-defense. Assuming that Dillard would have testified to the same course of events as he did during the preliminary examination, testimony concerning the victim's shooting toward Dillard's house would have been relevant to this case only to prove the victim's propensity for violence, and, because no exception applied to the general proscription on character evidence, would not have been admissible. Additionally, Dillard's preliminary examination testimony was read into the record during the defense's case-in-chief, defeating any claim of actual prejudice.

Relatedly, defendant argues that his trial counsel was ineffective for failing to timely investigate Dillard's nonappearance at defendant's trial. Contrary to defendant's assertion that "[n]o record was made . . . as to what actions (if any) defense counsel took to attempt to secure the presence of [Dillard] at trial," his appellate counsel, at the hearing on his motion for relief from judgment, acknowledged that trial counsel "sent a car out looking for" Dillard and Long. Dillard testified at the preliminary examination and was present on the first day of defendant's trial, giving his trial counsel no reason to anticipate that Dillard would not be present during the remainder of the trial. Forced to improvise, trial counsel used Dillard's absence against him in closing argument, suggesting to the jury that Dillard had a motive to kill the victim because the victim shot at Dillard's house. Accordingly, neither trial nor appellate counsels actions fell below an objective standard of reasonableness.

2. KEVIN LONG

In an affidavit dated July 13, 2007,⁵ Long said:

⁴ At the preliminary examination, Dillard testified that in 2005, he was on his porch, when Marshall shot toward Dillard's house while the two were "about eight feet" apart. Dillard said that he closed his front door before Marshall fired, and the bullet "came through the hole" and "went through [his] shirt." He did not call for police or make a police report.

⁵ Long executed a second affidavit, dated August 27, 2009, that elaborated on the details of the shooting and added that "Detective DelGreco told me that a girl in the court told him that I fit the description of the man who shot Gregory Marshall and that he was about to lock me up for the murder."

I witnessed the murder of Greg Marshall on June 17th 2005. I was standing across the street, directly across, from 4029 Irene St. (Greg Marshall's house). The street light was on and was bright enough for me to observe the events as they took place. Do [sic] to the fact [that] the end of the driveway was bright enough, I actually saw the shooter[']s entire front view of the person whom [sic] shot Greg (victim).

The shooter had on a black hooded sweater, with the hood over his head. This person also wore a mask of some type to cover his face. This person was kind of tall and had a thick build, the other clothing was black shorts. The legs of this person was a light[-]skinned black person.

I willingly came to Alphonso Clark's preliminary examination at the 22nd District Court in Inkster to testify to what I witnessed. At which time I was approached by Detective Delgreco in the court house parking lot.

Detective Delgreco informed me that I would be put in jail if I testified about what I witnessed. I told Mr. Burkett (Alphonso Clark's attorney), and he brought it to the attention of Judge Sylvin [sic] James.

In court Detective Delgreco denied threatening to lock me up and Judge Sylvia James did nothing/or simply believed the detective. When court took a short recess I left because I was scared Detective Delgreco would have locked me up if I testified.

At defendant's preliminary examination, Long informed defense counsel, who, in turn, informed the trial court, that Detective DelGreco had threatened Long in the court parking lot that DelGreco would arrest Long for the murder if he testified for defendant. DelGreco told Long that a female witness had just testified and described the shooter as a person matching Long's description. DelGreco denied the allegation of intimidation. After the conversation between defendant's trial counsel and the district court judge, the prosecutor stated that she intended to call Long as a witness, and the district court said that it would appoint counsel for Long. Long, in fact, gave no testimony at the preliminary examination, having later left the courthouse during a recess. When the court reconvened, the prosecution rested, and told the court that "[t]here was a witness that we made reference to before by the name of Kevin Long; I believe he is not present to testify." Asked by the court whether Long had been subpoenaed, the prosecutor said that she did not subpoena him, and defendant's trial counsel did not speak until he called the first witness for the defense.

Defendant's argument that his trial counsel was ineffective for failing to timely investigate Long's abrupt flight from the preliminary examination and nonappearance at trial lacks merit. Long was present at the beginning of the preliminary examination, despite having been subpoenaed by neither party, and left only after telling defendant's trial counsel that DelGreco had threatened him with arrest. Defense counsel "sent a car out looking for [Long and Dillard]," during trial and used Long's absence against him during closing argument, suggesting that defendant was "on trial here today for the clothes that he was wearing," and that Long was dressed similarly in a black sweatshirt and shorts on the night of the shooting. This argument,

and counsel's efforts to locate Long and Dillard, were reasonable trial strategy under the circumstances, and this Court cannot question trial counsel's strategy on appeal. Accordingly, trial counsel's performance did not fall below an objective standard of reasonableness, and defendant cannot show that his appellate counsel was ineffective for omitting this issue from his appeal of right.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray