

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
November 29, 2011

v

WILLIAM JAMES HASTINGS,

Defendant-Appellant.

No. 299960
Jackson Circuit Court
LC No. 04-000690-FH

Before: TALBOT, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's order denying his motion for relief from judgment. We affirm.

Defendant was convicted following a jury trial of first-degree murder, MCL 750.316, and sentenced to life imprisonment. He appealed his conviction as of right and moved the trial court for a new trial. The motion was based on newly discovered evidence: the confession of Thomas Mowrer that he and another man committed the murder for which defendant was convicted. The trial court denied that motion, and this Court subsequently affirmed the conviction, and the trial court's denial of defendant's motion for new trial.¹ In December 2009, defendant moved for relief from judgment, arguing that he was denied the effective assistance of trial and appellate counsel and denied due process. The trial court denied the motion, and defendant now appeals by leave granted.

We review for an abuse of discretion a trial court's grant or denial relief from judgment and for clear error any findings of fact supporting the trial court's decision. *People v McSwain*, 259 Mich App 654, 681; 676 NW2d 236 (2003). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes . . . or makes an error of law." *People v Swain*, 288 Mich App 609, 628-629; 794 NW2d 92 (2010).

¹ *People v Hastings*, unpublished opinion per curiam of the Court of Appeals, issued November 16, 2006 (Docket No. 262698), lv den 478 Mich 914 (2007), recon den 480 Mich 864 (2007).

Motions for relief from judgment are governed by MCR 6.500 *et seq.* Under MCR 6.508(D), the defendant has the burden of establishing that he is entitled to relief. The trial court may not grant relief to the defendant if the motion:

- (1) seeks relief from a judgment of conviction and sentence that still is subject to challenge on appeal pursuant to subchapter 7.200 or subchapter 7.300;
- (2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision;
- (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).]

The “good cause” requirement of MCR 6.508(D)(3)(a) can be established by proving ineffective assistance of counsel. *People v Kimble*, 470 Mich 305, 314; 684 NW2d 669 (2004).

First, defendant argues that the trial court abused its discretion by denying relief based on his claim of ineffective assistance of appellate counsel because the claim established good cause under MCR 6.508(D)(3). The trial court was generally precluded from granting relief from judgment based on defendant’s claims of ineffective assistance of trial counsel and instructional errors pursuant to MCR 6.508(D)(3) because the alleged grounds for relief could have been raised in defendant’s appeal by right. But the trial court could have granted relief if defendant established “good cause for failure to raise such grounds on appeal . . .” and “actual prejudice from the alleged irregularities that support the claim of relief.” MCR 6.508(D)(3)(a) and (b). Defendant argues good cause is established because appellate counsel was ineffective in pursuing his appeal by right. We disagree.

“[T]he test for ineffective assistance of appellate counsel is the same as that applicable to a claim of ineffective assistance of trial counsel.” *People v Uphaus (On Remand)*, 278 Mich App 174, 186; 748 NW2d 899 (2008). To establish a claim of ineffective assistance of counsel, the defendant must establish that (1) his counsel’s performance fell below an objective standard

of reasonableness under the prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's error, the outcome of the proceedings would have been different. *Id.* at 185. In the context of an appeal, "defendant must show that his appellate counsel's decision not to raise a claim of ineffective assistance of trial counsel fell below an objective standard of reasonableness and prejudiced his appeal." *Id.* at 186. Defendant must overcome a strong presumption that counsel's performance constituted sound strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant did not demonstrate that he was denied effective assistance of appellate counsel because he did not show that appellate counsel's representation was deficient. Defendant's only argument that appellate counsel's performance was deficient is that appellate counsel failed to raise his claims of ineffective assistance of trial counsel and instructional errors in his appeal by right. "Appellate counsel may legitimately winnow out weaker arguments in order to focus on those arguments more likely to prevail." *Uphaus*, 278 Mich App at 186-187. The failure of appellate counsel to assert all arguable issues in an appeal is insufficient to overcome the presumption that counsel functioned as a reasonable appellate attorney in selecting the issues to be presented. *People v Reed*, 449 Mich 375, 391; 535 NW2d 496 (1995). Moreover, defendant did not show that appellate counsel's failure to raise the ineffective assistance of trial counsel and instructional error claims in the appeal by right affected the outcome. Defendant failed to overcome the strong presumption that counsel's performance constituted sound strategy. *Carbin*, 463 Mich at 600. Thus, defendant did not demonstrate good cause to warrant relief from judgment. MCR 6.508(D)(3)(a). For this same reason, defendant also failed to establish "actual prejudice" under MCR 6.508(D)(3)(b).

Defendant next argues that the trial court abused its discretion by denying relief from judgment based on his claims of innocence. We disagree. Defendant forwards three arguments: 1) that his conviction was factually incorrect, 2) that under MCR 6.508(D)(3) there was a significant possibility of his innocence, and 3) that the federal "actual innocence" exception would have enabled the trial court to consider the merits of his constitutional claims regarding ineffective assistance of counsel and instructional error that were otherwise procedurally barred.

Defendant's primary argument concerning his claims of innocence is that the trial court should have reassessed the validity of Mowrer's confession when he evaluated defendant's innocence claims. In defendant's appeal by right, this Court concluded that the trial court did not err in finding that Mowrer's confession was false. *Hastings*, unpub op at 3. This Court further found that there was "no clear error in the trial court's conclusion that, despite Mowrer's apparent lack of motive to confess falsely, Mowrer's confession was simply too inconsistent to be credible and therefore was insufficiently trustworthy." *Id.* Defendant's claims of innocence are solely based on evidence pertaining to Mowrer's confession. The trial court properly followed the law of the case regarding Mowrer's confession because the issue was previously determined, and no new facts were alleged. *People v Kozyra*, 219 Mich App 422, 433; 556 NW2d 512 (1996); *People v Mitchell*, 231 Mich App 335, 340; 586 NW2d 119 (1998).

Accordingly, we conclude that the trial court did not abuse his discretion in denying relief from judgment based on defendant's substantive innocence claim. MCR 6.508(D)(2) precludes

relief because defendant's claim is based on Mowrer's confession, an issue that has already been decided adversely to defendant in his appeal by right.

The trial court also did not abuse its discretion in denying relief based on defendant's claim under MCR 6.508(D)(3) that there was a significant possibility of his innocence. This Court has determined that the undefined phrase "significant possibility" standard of MCR 6.508(D)(3) is a higher standard than the "actual prejudice" standard of MCR 6.508(D)(3)(b)(i). *Swain*, 288 Mich App at 639. The *Swain* Court also found no meaningful distinction between the "significant possibility" standard and the "actual innocence" standard developed in federal habeas corpus jurisprudence to avoid procedural default. *Id.* "To satisfy the 'actual innocence' standard, a defendant 'must show that it is more likely than not that no reasonable juror would have found [the defendant] guilty beyond a reasonable doubt.'" *Id.* at 638, quoting *Schlup v Delo*, 513 US 298, 327; 115 S Ct 851; 130 L Ed 2d 808 (1995).

Defendant failed to show that there was a significant possibility of his innocence. As discussed, the law of the case doctrine barred reconsideration of the veracity of Mowrer's confession. Based on the evidence Mowrer's confession was false and untrustworthy, in addition to all of the evidence presented at trial, defendant was unable to "show that it [was] more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup*, 513 US at 327; see also *Swain*, 288 Mich App at 639. Consequently, the trial court could not waive the good cause requirement of MCR 6.508(D)(3)(a), and MCR 6.508(D)(3) precluded granting relief based on defendant's claims of ineffective assistance of counsel and instructional error.

For the same reasons, the trial court did not abuse its discretion in denying relief based on defendant's "gateway" claim of actual innocence based on federal law. "According to the United States Supreme Court, a defendant may have an otherwise barred constitutional claim arising from his or her trial heard on the merits in a federal habeas action if the defendant can make a 'gateway' showing of actual innocence." *Swain*, 288 Mich App at 636-637, citing *Schlup*, 513 US at 314-315; *Herrera v Collins*, 506 US 390, 404; 113 S Ct 853; 122 L Ed 2d 203 (1993); *House v Bell*, 547 US 518, 536-537; 126 S Ct 2064; 165 L Ed 2d 1 (2006). As noted: "To satisfy the 'actual innocence' standard, a defendant 'must show that it is more likely than not that no reasonable juror would have found [the defendant] guilty beyond a reasonable doubt.'" *Swain*, 288 Mich App at 638, quoting *Schlup*, 513 US at 327.

Defendant failed to make the necessary gateway showing of actual innocence for the trial court to overlook the procedural bars to considering the merits of his constitutional claims. As previously discussed, defendant was unable to show a "significant possibility" of innocence. Thus, he also failed to make the gateway showing of "actual innocence." See *id.* at 638-639.

Moreover, even considering the merits of defendant's claims of instructional error and ineffective assistance of counsel, defendant was not entitled to relief.

Defendant's claims of instructional error have no merit. First, defendant argued that the causation instruction based on CJI2d 16.1(2) was erroneous because it improperly directed a

verdict of guilt. Although the Sixth and Fourteenth Amendments prohibit directed verdicts of guilt in criminal jury trials, *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994), the instruction did not do so. We read jury instructions in their entirety to determine if error requiring reversal occurred. *Id.* “Instructions which are somewhat imperfect are acceptable, so long as they fairly present to the jury the issues to be tried and sufficiently protect the rights of the defendant.” *Id.* When the instructions are read as a whole, it is clear that CJI2d 16.1(2) did not require the jury to convict defendant if they believed Cook died by strangulation, which, as the trial court observed, was undisputed at trial. Second, defendant abandoned his claim that the flight instruction denied him due process because he provided no support for his argument. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006). “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.” *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Moreover, the instruction properly informed the jury that flight “can result from factors other than guilt, and it [was] for the jury to determine what caused the defendant to flee.” *People v Taylor*, 195 Mich App 57, 63; 489 NW2d 99 (1992). Lastly, the instruction regarding the witness Theresa Merrifield did not instruct the jury to consider whether Merrifield had a deal or expected a deal for testifying before it could assess her credibility. When this instruction is read in context, it simply does not have the meaning defendant claims. The instruction merely informed the jury of various factors it could consider when deciding whether to believe Merrifield’s testimony, and, in fact, the instruction directed the jury to cautiously examine the testimony because Merrifield was a drug addict. Therefore, the instruction fairly presented to the jury the issues being tried and sufficiently protected defendant’s the rights. *Gaydosh*, 203 Mich App at 237.

Defendant’s claims of ineffective assistance of counsel also lack merit. As previously discussed, defendant was not denied effective assistance of appellate counsel because appellate counsel’s performance was neither deficient nor prejudicial. *Uphaus*, 278 Mich App at 185-187. In addition, trial counsel’s representation was neither deficient nor prejudicial to defendant. Trial counsel has “great discretion in the trying of a case—especially with regard to trial strategy and tactics.” *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994). Trial counsel’s decisions regarding “what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy,” which this Court will not assess on the basis of hindsight. *People v Rocky*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). The fact that the strategy defense counsel chose did not work does not constitute ineffective assistance of counsel.” *People v Williams*, 240 Mich App 316, 332; 614 NW2d 647 (2000).

Defendant failed to establish that defense counsel’s investigation and presentation of evidence of his innocence at trial was deficient. Defendant’s argument is based on the fact that defense counsel did not discover and present evidence of Mowrer’s confession. Defendant waived this argument because he argued below in his motion for new trial based on newly discovered evidence that he could not, using reasonable diligence, have discovered and produced evidence of the confession at trial. See *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003). Furthermore, on this record, defendant did not overcome the strong presumption that defense counsel’s performance regarding the investigation of Mowrer constituted sound trial

strategy. *Carbin*, 463 Mich at 600. Defendant concedes that defense counsel investigated but claims that his investigation was inadequate. Defense counsel's decision to forego further investigation was not deficient where counsel could not locate Mowrer, who denied to the police he was involved in the murder, and when the evidence did not support that Mowrer confessed murdering Cook to an inmate who provided that information to defense counsel. See *Strickland v Washington*, 466 US 668, 691; 104 S Ct 2052; 80 L Ed 2d 674 (1984) (a decision not to investigate must be assessed for reasonableness based on all the circumstances, "applying a heavy measure of deference to counsel's judgments"). Defense counsel's decisions regarding the presentation of evidence at trial are presumed to be strategic, *Rockey*, 237 Mich App at 76, and defendant did not provide evidence that counsel's strategy was unreasonable.

Additionally, defendant's argument that defense counsel's performance was deficient for failing to interview Mowrer post-trial and move for a new trial was prejudicial because it "left the task to [appellate counsel]" has no merit. It is purely speculative that Mowrer would have confessed to defense counsel if he had interviewed him. Defense counsel could not move for a new trial based on Mowrer's confession when Mowrer had not confessed to him. Defense counsel's performance was not prejudicial because defendant cannot show the existence of a reasonable probability that but for his failure to interview Mowrer and move for a new trial, the result of the proceedings would have been different. *Uphaus*, 278 Mich App at 185.

As discussed, the jury instructions were proper. Defense counsel's failure to futilely object was not deficient. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant also did not demonstrate that defense counsel's failure to object to his claims of prosecutorial misconduct was inadequate because defendant's claims of prosecutorial conduct are without merit. Defendant alleged that the prosecutor improperly presented evidence regarding defendant's possession and use of large amounts of cocaine, his unemployment, and his reputation for violence. The evidence was relevant under MRE 401, and defendant cannot argue on appeal that this evidence was prejudicial and denied him a fair trial because he also introduced and used this evidence. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). Furthermore, this Court previously ruled that the presentation of evidence of defendant's violent tendencies did not constitute prosecutorial misconduct. *Hastings*, unpub op at 2.

Likewise, defense counsel's performance was not deficient for eliciting evidence regarding defendant's violent tendencies when he questioned a detective about evidence that had already been presented. Defense counsel's decision regarding the questioning of witnesses is presumed a matter of trial strategy. Defendant did not meet his heavy burden of overcoming the strong presumption that this trial strategy was sound. *Carbin*, 463 Mich at 600; *Rockey*, 237 Mich App at 76. Defense counsel used the evidence that defendant had no assault convictions and that his ex-wife had a conviction for assaulting him to counter the evidence that had already been presented regarding his violent tendencies. Defendant misreads the record regarding the presentation of evidence of his controlled substance conviction and incarceration. The prosecutor, not defense counsel, elicited this evidence on cross-examination.

Finally, defense counsel's stipulation as to the victim's time of death did not constitute

deficient performance. Defendant did not overcome the presumption that defense counsel's trial strategy was sound. *Carbin*, 463 Mich at 600. Defense counsel stipulated that the entomologist's report indicated that the date of death was July 27, 2002, not that the date of death was July 27, 2002. Defendant did not overcome the presumption that this was reasonable trial strategy where the entomologist's testimony would have included graphic details regarding the victim's body.

We affirm.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey