

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VERDELL REESE,

Defendant-Appellant.

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UNPUBLISHED

July 24, 2012

No. 292153

Wayne Circuit Court

LC No. 08-007283-FC

ON REMAND

Before: TALBOT, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

This case has been remanded to this Court for a determination of whether the trial court abused its discretion when it found that John Smith's testimony was irrelevant and denied Reese's motion for a new trial, and whether trial counsel rendered ineffective assistance by failing to interview Smith and/or seek an adjournment so that Smith could be located.<sup>1</sup> We affirm.

Verdell Reese was charged with second-degree murder<sup>2</sup> and in the alternative with voluntary manslaughter<sup>3</sup> in the shooting death of Leonardo Johnson.<sup>4</sup> Reese was tried in a bench trial. This Court, in its original opinion, summarized the trial proceedings as follows:

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<sup>1</sup> *People v Reese*, 491 Mich 127; \_\_ NW2d \_\_ (2012).

<sup>2</sup> MCL 750.317.

<sup>3</sup> MCL 750.321.

<sup>4</sup> Reese was also charged with and convicted of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b.

There were three witnesses to the shooting besides Reese and Johnson: Lakeshia Williams, James Long and John Smith. The trial court found Williams to be credible but characterized Long as being untruthful. Smith did not testify. The evidence primarily relied on by the trial court consisted of Williams' assertion that while walking away from Long's home she passed Johnson walking in the opposite direction and then heard a shot, which she attributed to Reese discharging a gun from his passing vehicle. Williams specifically denied actually seeing who fired the shot and only averred that it came from a vehicle that she identified as belonging to Reese. The direction of the shot was not known as Williams could only indicate she heard the shot behind her after the vehicle passed. Seconds later she heard another shot but could not identify its source or location. Williams saw Johnson continue down the street in the opposite direction toward 2045 W. Grand Boulevard and she continued to walk toward her residence a few houses away. Long places Reese on the porch steps of his home as Johnson approached. Words were briefly exchanged between the men consisting merely of "[W]hat's up with that?" and then Long has Johnson drawing and first firing a weapon with Reese then pulling his gun out and returning fire. Williams indicated she observed someone limping from the porch. Reese was injured and taken to the hospital by Long in Reese's vehicle. This coincides with one of the blood trails observed by evidence technicians at the scene. The second blood trail led through a lot to Johnson, who was found dead on another street.

Based on the trial court's verbal recitation at the end of trial, the above facts were accepted as accurate. The trial court then determined that Reese "did not act in lawful self-defense" and was "clearly . . . the aggressor" finding that Reese "fired the first shot prompting Mr. Johnson to be on guard, prompting Mr. Johnson to pull his weapon on you, prompting you then to pull your weapon on him and no question, this was a shoot-out." The trial court opined that Reese would have been entitled to a claim of self-defense if he had "backed off . . . and made peace."<sup>5</sup>

The trial court found that Reese was the initial aggressor in the incident, and applied the doctrine of imperfect self-defense to convict him of voluntary manslaughter.<sup>6</sup> The trial court also convicted Reese of felon in possession of a firearm<sup>7</sup> and possession of a firearm during the commission of a felony ("felony-firearm").<sup>8</sup> The trial court sentenced Reese as a third habitual offender,<sup>9</sup> to prison terms of eight to 30 years for voluntary manslaughter, one to ten years for

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<sup>5</sup> *People v Reese*, unpublished opinion per curiam of the Court of Appeals, issued September 16, 2010 (Docket No. 292153), slip op, pp 1-2 (footnote omitted).

<sup>6</sup> MCL 750.321.

<sup>7</sup> MCL 750.224f.

<sup>8</sup> MCL 750.227b.

<sup>9</sup> MCL 769.11.

felon in possession of a firearm, and two years for felony-firearm, with credit for 217 days served.

Resse contends that the trial court erred when it found that Smith's testimony was irrelevant and denied Reese's motion for a new trial. We disagree. This Court reviews a trial court's decision to grant or deny a defendant's motion for a new trial for an abuse of discretion.<sup>10</sup> "An abuse of discretion occurs when the result is outside the range of principled outcomes."<sup>11</sup>

Resse argues that he had a right to present a complete defense,<sup>12</sup> including the right to present witnesses in his defense.<sup>13</sup> Reese, however, was not directly denied the right to present a defense or present a witness during trial. Rather, he was denied a new trial to present a witness that neither party called to the stand at trial. Additionally, while Reese cites case law regarding a defendant's entitlement to a new trial based on newly discovered evidence,<sup>14</sup> he does not directly claim on appeal that Smith's testimony constituted newly discovered evidence.

A defendant seeking a new trial based on newly discovered evidence must demonstrate 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."<sup>15</sup> Reese never asserted below that he was unaware that Smith, who was his friend and drove him to the hospital, was nearby when the incident occurred. Rather, Reese argued below that he had newly discovered information that Smith was not served a subpoena to testify at trial and had he been called as a witness, Smith would have testified that no shots were fired from a vehicle at the victim. While Reese argued in his second motion for a new trial that there was newly discovered evidence and prosecutorial misconduct, that motion did not clearly explain the basis for his assertion. As such, Reese failed to demonstrate that Smith's testimony constituted newly discovered evidence.

Review of the record reveals that the trial court's finding that Smith's alleged testimony was inconsistent with the defense theory of the case appears to be based on a misunderstanding of what Reese was claiming the elicited testimony would establish. The misunderstanding by the trial court, however, can be explained by the confusing nature of Reese's second motion for a new trial. The trial court asserted that Smith's testimony would have removed Reese from the scene. The trial court's conclusion was erroneous because it was not claimed that Smith would

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<sup>10</sup> *People v Brown*, 279 Mich App 116, 144; 755 NW2d 664 (2008).

<sup>11</sup> *Id.*

<sup>12</sup> *People v Unger*, 278 Mich App 210, 249; 749 NW2d 272 (2008).

<sup>13</sup> *People v McFall*, 224 Mich App 403, 407; 569 NW2d 828 (1997).

<sup>14</sup> *People v Mechura*, 205 Mich App 481, 484; 517 NW2d 797 (1994).

<sup>15</sup> *People v Terrell*, 289 Mich App 553, 559; 797 NW2d 684 (2010) (citation and quotation omitted).

testify that Reese was not at 2045 Grand, did not shoot Johnson outside that home, or did not drive Smith to the home. Instead Reese argued that Smith would testify that shots were not fired from a vehicle as Smith and Williams walked toward Williams's home. Accordingly, if Smith testified as contended, his testimony would have been contrary to Williams's testimony that she saw Reese's car drive by and then heard a gunshot come from the direction of the vehicle, thus contradicting that Reese was the aggressor.

That notwithstanding, Long also testified that he heard gunshots just before Reese returned, from the direction that Reese came, which Smith's testimony would also have directly contradicted. In that regard, Smith's testimony is confusing as it would have contradicted the only fact that both Williams and Long agreed on, that there was gunfire before the exchange during which Johnson was shot. Therefore, Reese is unable to demonstrate that Smith's testimony would have caused a different result.<sup>16</sup>

Although not addressed by the trial court, Reese is further unable to prove that Smith's testimony could not have been discovered and produced at trial with reasonable diligence.<sup>17</sup> There is no indication in the record that Reese sought assistance or made any effort to ensure Reese's presence at trial. While Reese was prohibited by the conditions of his bond from having contact with potential witnesses, he was not prevented from assisting his attorney to locate Smith. As such, based on the above, Reese's claim that a new trial was warranted based on newly discovered evidence lacks merit.<sup>18</sup>

A new trial may also be granted if the prosecutor deliberately suppressed a witness's identity and statements, the information was requested by the defendant, and "the defense could have significantly used the evidence."<sup>19</sup> Reese argued below that Smith was never personally served, despite the prosecution's claim to the contrary. Reese, however, never claimed that the prosecution withheld any information regarding Smith or his statements, except for the prosecutor's efforts to bring Smith to trial. Reese also failed to assert that he requested additional information regarding Smith and his testimony. Moreover, Reese did not object to or request time or assistance to obtain Smith's presence at trial after being informed that the prosecution would not call Smith as a witness. As such, relief on this basis is not warranted.<sup>20</sup>

The prosecution is required to inform the defendant which witnesses it intends to call and exercise due diligence to produce those witnesses at trial.<sup>21</sup> Here, the prosecution's witness list

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> See *People v Miller*, 211 Mich App 30, 44-45; 535 NW2d 518 (1995).

<sup>20</sup> *Id.*

<sup>21</sup> *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995); *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004).

indicates that either Smith or Williams would be called as witnesses. Therefore, Reese was on notice that the prosecution may not call Smith as a witness. The record further indicates that the prosecution obtained an order for attachment for Smith “to show cause why he should not be required to enter into a recognizance to appear as a witness.” Therefore, there was no reversible error by the prosecution.<sup>22</sup> Because Reese has failed to demonstrate sufficient legal grounds for a new trial,<sup>23</sup> there was no abuse of discretion by the trial court.<sup>24</sup>

Reese also argues that the trial court erred when it denied his request for an evidentiary hearing regarding ineffective assistance of counsel. We disagree. The determination of whether a defendant has been deprived of the effective assistance of counsel is a mixed question of fact and constitutional law. The court must find the facts, and then decide whether those facts constitute a violation of the defendant’s constitutional right to the effective assistance of counsel. A trial court’s findings of fact are reviewed for clear error, while its constitutional determinations are reviewed de novo.<sup>25</sup>

To establish ineffective assistance of counsel, a defendant must show that counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the ‘counsel’ guaranteed by the federal and state constitutions.<sup>26</sup> Counsel’s deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show “a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different,”<sup>27</sup> and that “the result that did occur was fundamentally unfair or unreliable.”<sup>28</sup> Counsel is presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise.<sup>29</sup>

Smith’s testimony would have contradicted Williams’s testimony in narrow areas. Even if Smith had testified, however, the trial court still would have been entitled to find Williams’s testimony credible and rely on it. Assuming arguendo that counsel erred by failing to call Smith as a witness at trial, Reese is not entitled to relief because, as explained above, he has failed to demonstrate that but for the alleged error, the outcome of the proceedings would have been

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<sup>22</sup> *Burwick*, 450 Mich at 289; *Eccles*, 260 Mich App at 388.

<sup>23</sup> *Terrell*, 289 Mich App at 559; *Miller*, 211 Mich App at 44-45; *Burwick*, 450 Mich at 289; *Eccles*, 260 Mich App at 388.

<sup>24</sup> *Brown*, 279 Mich App at 144.

<sup>25</sup> *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008), amended 481 Mich 1201 (2008).

<sup>26</sup> US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001).

<sup>27</sup> *Id.* at 600.

<sup>28</sup> *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

<sup>29</sup> *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

different,<sup>30</sup> and that the result that did occur was fundamentally unfair or unreliable.<sup>31</sup> Therefore, because Reese cannot show prejudice, counsel was not ineffective and reversal is not warranted.

Affirmed.

/s/ Michael J. Talbot  
/s/ Patrick M. Meter  
/s/ Pat M. Donofrio

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<sup>30</sup> *Carbin*, 463 Mich at 600.

<sup>31</sup> *Odom*, 276 Mich App at 415.