

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
April 11, 2013

v

DEREK WILLIAM BURKS,  
Defendant-Appellant.

No. 306588  
Wayne Circuit Court  
LC No. 11-002411-FC

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Before: WILDER, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of assault with intent to commit armed robbery, MCL 750.89, felonious assault, MCL 750.82, felon in possession of a firearm (felon in possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant, as a fourth habitual offender, MCL 769.12, to 240 months' to 40 years' imprisonment for the assault with intent to commit armed robbery conviction, two to four years' imprisonment for the felonious assault conviction, three to five years' imprisonment for the felon in possession conviction, and five years' imprisonment for the felony-firearm conviction. The trial court, following a remand order by this Court, denied defendant's motion for a new trial, finding no error in its prior denial of either motions to adjourn or motions to remove a bullet lodged in defendant's body and rejecting defendant's claims regarding ineffective assistance of counsel as well as his prayer for a new trial on newly discovered evidence. For the reasons set forth below, we affirm.

I. NEWLY DISCOVERED EVIDENCE

Defendant first argues the trial court abused its discretion by denying defendant a new trial based on a newly-discovered search warrant. We disagree.

This Court reviews a trial court's decision to deny a motion for a new trial on the grounds of newly-discovered evidence for an abuse of discretion. *People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012). "An abuse of discretion occurs when the trial court renders a decision falling outside the range of principled decisions." *Id.*

Generally, "motions for a new trial on the ground of newly-discovered evidence are looked upon with disfavor." *Rao*, 491 Mich at 279-280 (citations omitted). However, a trial

court may grant a defendant's motion for a new trial on the grounds of newly-discovered evidence, if:

- (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. [*Id.* at 279 (citations and quotations omitted).]

It is the defendant's burden to satisfy the above test. *Id.* at 279. "It is the obligation of the parties to undertake all reasonable efforts to marshal *all* the relevant evidence for that trial." *Id.* at 280 (emphasis in original).

We agree that defense counsel could have discovered the evidence using reasonable diligence. Although defense counsel did not know that the search warrant existed, he did know that defendant drove the car after he had been shot. Defense counsel spoke to defendant's witnesses about his actions following the shooting and therefore could have found defendant's car. According to defendant, the search warrant was readily discoverable inside the car. Defense counsel could have discovered the warrant before trial. Therefore, defense counsel could have "discovered and produced the evidence at trial." *Id.* at 279.

However, the result of the trial would not have been different if defense counsel had the search warrant before trial. The search warrant did not indicate that the police officer conducting the search of the car took anything from the vehicle. Accordingly, even if defense counsel had called that officer to testify about the search, it is unlikely that he would have testified to any exculpatory facts. Defendant's assertion to the contrary is purely speculative. Moreover, the search warrant did not change the prosecution's established chain of custody. The prosecution presented evidence from the evidence and laboratory technicians matching the evidence tag numbers for the blood DNA collected at the scene and tested in the Michigan State Police laboratory. Therefore, defendant failed to meet his burden to demonstrate that the newly-discovered evidence justified a new trial. *Id.*

## II. *BRADY* VIOLATION

Next, defendant argues the prosecution's failure to give defendant the search warrant before trial violated defendant's due process rights. We disagree.

"This Court reviews de novo a defendant's claim of a constitutional due-process violation." *People v Jackson*, 292 Mich App 583, 590; 808 NW2d 541 (2011). The prosecution violates a defendant's due process rights when it fails to disclose any exculpatory and material evidence in its possession, regardless of whether the defendant requests the evidence. *United States v Bagley*, 473 US 667, 676; 105 S Ct 3375; 87 L Ed 2d 481 (1985); *Brady v Maryland*,

373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963); *Jackson*, 292 Mich App at 590-591.<sup>1</sup> “[U]ndisclosed evidence will be deemed material only if it ‘could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.’” *People v Lester*, 232 Mich App 262, 282; 591 NW2d 267 (1998), quoting *Kyles v Whitley*, 514 US 419, 435; 115 S Ct 1555; 131 L Ed 2d 490 (1995).

To establish a *Brady* violation, a defendant must establish:

(1) that the state possessed evidence favorable to the defendant; (2) that he 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 McMullan*, 284 Mich App 149, 157; 771 NW2d 810 (2009), quoting *Lester*, 232 Mich App at 281.]

As discussed above, defense counsel could have obtained this evidence before trial, and the result of the trial would not have been different if defense counsel had the search warrant before trial. *McMullan*, 284 Mich App at 157. Accordingly, defendant failed to establish a *Brady* violation.

### III. INEFFECTIVE ASSISTANCE OF COUNSEL

Next, defendant argues defense counsel provided defendant with ineffective assistance of counsel, because he failed to ask for search warrants during discovery, failed to move for a *Wade*<sup>2</sup> hearing to suppress the witnesses’ in-court identifications, failed to present exculpatory witnesses at trial, and failed to move for the removal of the bullet lodged in defendant’s back. We disagree.

Whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012). This Court reviews the trial court’s factual findings for clear error, and its constitutional determinations de novo. *Id.*

To establish that a defendant’s trial counsel was ineffective, the defendant must prove that, “(1) counsel’s performance was below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different.” *Id.* at 187. A defendant must also establish that the proceedings were fundamentally unfair or unreliable. *Id.*

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<sup>1</sup> See also MRPC 3.8(d) (a prosecutor has a duty to timely disclose all known evidence that tends to negate the defendant’s guilt).

<sup>2</sup> *United States v Wade*, 388 US 218, 240; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

“Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *Id.* Furthermore, “there is a strong presumption of effective assistance of counsel when it comes to issues of trial strategy” because “many calculated risks may be necessary in order to win difficult cases.” *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). This Court will not “second-guess matters of strategy or use the benefit of hindsight” to evaluate defense counsel’s performance. *Id.* Trial counsel is not required to argue a meritless position or raise a futile objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). However, “[t]rial counsel is responsible for preparing, investigating, and presenting all substantial defenses.” *People v Marshall*, \_\_\_ Mich App \_\_\_; \_\_\_NW2d \_\_\_ (Docket No. 297115, issued October 4, 2012) (slip op at 2) quoting *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009).

#### A. Failure to Investigate or Request Search Warrant

Defense counsel’s failure to investigate or request the search warrant, although deficient performance, was not ineffective assistance of counsel. Defendant has the burden to prove that “there is a reasonable probability that, but for counsel’s error, the results of the proceedings would have been different.” *Lockett*, 295 Mich App at 187. As explained above, the result of the proceedings would not have been different if defense counsel’s had investigated or requested the search warrants before trial. Defendant merely speculates that the jury would have believed that the DNA evidence was unreliable because the police had access to defendant’s DNA from a different location.

#### B. Failure to Request a *Wade* Hearing

Defense counsel’s failure to move in the trial court for a *Wade* hearing did not fall below an objectively reasonable standard of performance because a motion to suppress the in-court identifications would have been futile. Defense counsel is not required to make futile motions. *Ericksen*, 288 Mich App at 201.

A motion to suppress one of the eyewitness’s, Domenico Policchio, in-court identification would have been futile. In order to successfully suppress an identification, defendant must show that, given all the circumstances, “the pretrial identification procedure was so suggestive . . . that it led to a substantial likelihood of misidentification.” *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993). “Physical differences among the lineup participants do not necessarily render the procedure defective and are significant only to the extent that they are apparent to the witness and substantially distinguish the defendant from the other lineup participants.” *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). Furthermore, “[p]hysical differences generally relate only to the weight of an identification and not to its admissibility.” *Id.*

Defendant argues that the lineup was suggestive because Policchio knew that the police had already arrested defendant. However, defendant fails to explain the relevance of Policchio’s knowledge. “An appellant’s failure to properly address the merits of his assertion of error constitutes abandonment of the issue.” *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). Defendant has abandoned this argument, because defendant’s arrest is unrelated to whether the officer administering the lineup identified defendant.

Defendant also argues that defendant's lineup picture does not accurately depict his appearance. However, defendant's picture did not "substantially distinguish the defendant from the other lineup participants." *Hornsby*, 251 Mich App at 466. Defendant *and another man* both appeared darker-skinned than the other participants. Furthermore, defendant's argument that defendant did not look like his lineup picture goes to the weight, not the admissibility of the identification. *Id.*

A motion to suppress another eyewitness's, Arnulfo Flores, in-court identification was futile because there was an independent basis for Flores' in-court identification. In-court identifications by the same witness who was subject to the unduly suggestive lineup may still be permissible if there is an untainted, independent basis for the identification. *Kurylczyk*, 443 Mich at 302. Factors that can establish an independent basis include: prior knowledge of the defendant, opportunity for observation during the crime, accuracies and discrepancies between the complainant's prelineup description and the defendant's actual description, identification of another person before the lineup, failure to identify the defendant before the lineup, the lapse of time between the crime and the lineup and various factors relating to the state of the victim. *People v Gray*, 457 Mich 107, 116; 577 NW2d 92 (1998).

Flores saw the man who entered the store in close proximity. Flores was in the front of the store when the man ran into the pizzeria. The man stayed in the pizzeria long enough to demand money and start to come around the counter toward Flores. Although Flores stated that he was scared, he was calm and collected enough to pull his pistol out of his pocket and shoot at the man. Flores was unable to identify defendant in the photographic lineup. However, according to defendant the photograph of defendant that the police used in the lineup did not look like defendant. This is a sufficient independent basis for Flores's in-court identification. *Kurylczyk*, 443 Mich at 302.

### C. Failure to Present Witnesses

Defendant also argues that his counsel was ineffective for failing to call as witnesses Toya Kimbrough, Mary Fortune, and Stephany Gerst. We disagree.

"Decisions regarding whether to call or question witnesses are presumed to be matters of trial strategy. The failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012) (citations and quotations omitted). "A substantial defense is one that might have made a difference in the outcome of the trial." *Chapo*, 283 Mich App at 371 (citations and quotations omitted).

Defense counsel's failure to call the witnesses did not deny defendant a substantial defense because, inter alia, Kimbrough's and Fortune's potential testimony was inadmissible hearsay; accordingly, calling them as witnesses would not have benefited the defense. "Hearsay is an unsworn, out-of-court statement that is offered to establish the truth of the matter asserted. MRE 801(c)." *People v Stamper*, 480 Mich 1, 3; 742 NW2d 607 (2007). Generally, hearsay is inadmissible. *Id.* However, "a statement will not be excluded by the hearsay rule if it is 'a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.'" *People v Barrett*, 480 Mich 125, 131; 747

NW2d 797 (2008) quoting MRE 803(2). “The pertinent inquiry is . . . whether the declarant is so overwhelmed that [h]e lacks the capacity to fabricate.” *People v McLaughlin*, 258 Mich App 635, 659-660; 672 NW2d 860 (2003). Kimbrough and Fortune did not indicate in their affidavits that defendant was frantic or emotionally overwhelmed when he asked them to take him to the hospital. In fact, defendant had the presence of mind to drive his car to Kimbrough’s house after the shooting, and neither woman could tell that he had been shot until he told them.

Moreover, even if the trial court had allowed Kimbrough and Fortune to testify about defendant’s statements following the shooting, none of the witnesses’ testimony would have made a difference in the outcome of the trial. First, Gerst’s testimony that the police did not take defendant’s clothes as evidence is only slightly relevant to defendant’s theory of the case. Second, the prosecution’s case was particularly strong. The prosecution presented DNA evidence that placed defendant at the pizzeria. Two eyewitnesses positively identified defendant. The prosecution also presented evidence that defendant was admitted to a nearby hospital with gunshot wounds shortly after the robbery. In order for the results of the proceedings to be different, the jury would have had to find the DNA, the eyewitnesses, and the hospital evidence unreliable. Furthermore, the jury would have to believe both that defendant told Kimbrough and Fortune the truth that night, and that Kimbrough and Fortune were also telling the truth. This outcome is, in our view, highly unlikely. Accordingly, we conclude defense counsel’s failure to call Kimbrough, Fortune, and Gerst did not make a difference in the outcome of the trial, *Chapo*, 283 Mich App at 371, and therefore defendant’s counsel was not ineffective for failing to call those witnesses.

#### D. Failure to Move for the Removal of the Bullet from Defendant’s Back

Contrary to defendant’s argument, it was reasonable trial strategy for defense counsel not to ask the trial court to order that someone remove the bullet because the bullet had the potential to further implicate defendant in the charged crimes. This Court will not “second-guess matters of strategy or use the benefit of hindsight” to evaluate the defense counsel’s performance. *Odom*, 276 Mich App at 415. For example, in *Rao*, 491 Mich at 291, the Supreme Court held that it was reasonable trial strategy for the defense attorney to not request further x-rays when the evidence “could have revealed . . . evidence that was further implicating.” In this case, given the DNA and eyewitness evidence linking defendant to the crime, it is probable that the bullet would have matched Flores’s gun. Accordingly, in this case, it was reasonable trial strategy for defense counsel to fail to request that the bullet be removed.

### IV. ADJOURNMENT

Finally, defendant argues that the trial court abused its discretion by refusing to grant his oral, pro per motion to adjourn the trial in order to have someone remove the bullet from defendant’s back. We disagree.

“A trial court’s decision whether to grant a continuance is reviewed for an abuse of discretion.” *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002). A motion to adjourn the trial “must be based upon good cause.” *Id.* at 276, citing MCR 2.503(B)(1). “Good cause” factors include “whether defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments.”

*People v Coy*, 258 Mich App 1, 18; 669 NW2d 831 (2003) (citations and quotations omitted). MCR 2.503(C) governs an adjournment when there is an absence of evidence. MCR 2.503(C) provides, in relevant part:

(1) A motion to adjourn a proceeding because of the unavailability of a witness or evidence must be made as soon as possible after ascertaining the facts.

(2) An adjournment may be granted on the ground of unavailability of a witness or evidence only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence.

Even if a defendant can demonstrate good cause and due diligence, this Court will not reverse the trial court “unless the defendant demonstrates prejudice as a result of the abuse of discretion.” *Coy*, 258 Mich App at 18-19.

Defendant failed to show due diligence justifying an adjournment. Defendant was in front of the trial judge on multiple occasions before the day of trial. Defendant was aware that the emergency room doctors did not remove the bullet and could have asked the trial judge or his attorney to have the bullet removed prior to the date of trial, but he failed to do so.

Defendant also failed to show that the trial court’s refusal to grant him an adjournment prejudiced him. The only evidence that the bullet was exculpatory was defendant’s own assertion. Furthermore, the prosecution presented a strong case that defendant was the perpetrator. The prosecution’s case included DNA evidence and multiple identifications by several eyewitnesses placing defendant at the scene. Accordingly, we are unpersuaded that the trial court’s decision not to adjourn so that defendant could have the bullet removed prejudiced him.

Affirmed.

/s/ Kurtis T. Wilder  
/s/ Cynthia Diane Stephens  
/s/ Amy Ronayne Krause