

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TYRONE LAMONT WILSON,

Defendant-Appellant.

UNPUBLISHED

June 9, 2009

No. 277572

Kalamazoo Circuit Court

LC No. 06-000513-FC

Before: Beckering, P.J., and Wilder and Davis, JJ.

PER CURIAM.

Defendant Tyrone Lamont Wilson appeals as of right his jury trial convictions for first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to life imprisonment for the first-degree murder conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant successfully moved this Court to remand his case for an evidentiary hearing regarding his claims that a discovery violation occurred and his trial counsel was ineffective. After the August 29, 2008, evidentiary hearing, the trial court denied defendant's motion for a new trial premised on those claims of error. In defendant's supplemental brief on appeal, he argues that the trial court made clearly erroneous findings of fact and abused its discretion in denying his motion. We disagree.

I

We first address defendant's discovery violation claim. Because defendant did not object to the third, late-discovered bullet or the January 2007, ballistics report pertaining to the bullet at trial, we review this claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). A court "may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." MCR 6.431(B). We generally review a trial court's factual findings for clear error, and its decision to deny a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

Although there is no general constitutional right to discovery in criminal cases, *People v Elston*, 462 Mich 751, 765; 614 NW2d 595 (2000), MCR 6.201(A)(3) and (6) require mandatory

disclosure “upon request” of an expert’s report and other tangible physical evidence. Defendant made no such request in the case at bar. We therefore find no violation of the discovery rules.

Defendant also argues that a violation under *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963), occurred because exculpatory and material evidence was withheld by the prosecution. There are three instances where a defendant’s constitutional due process right to discovery may be involved:

(1) where a prosecutor allows false testimony to stand uncorrected; (2) where the defendant served a timely request on the prosecution and material evidence favorable to the accused is suppressed; or (3) where the defendant made only a general request for exculpatory information or no request and exculpatory evidence is suppressed. [*People v Tracey*, 221 Mich App 321, 324; 561 NW2d 133 (1997).]

Evidence is material where it is exculpatory evidence that would create a reasonable doubt regarding the defendant’s guilt. *United States v Agurs*, 427 US 97, 104; 96 S Ct 2392; 49 L Ed 2d 342 (1976), overruled in part as stated in *Kowalczyk v United States*, 936 F Supp 1127 (1996). “Favorable evidence is defined as all ‘evidence which * * * might have led the jury to entertain a reasonable doubt about * * * guilt.’” *People v Lane*, 127 Mich App 663, 670; 339 NW2d 522 (1983) (citations omitted).

In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it 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 Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005).]

We conclude that the trial court did not err in finding that a *Brady* violation did not occur. First, the ballistics report and bullet were not favorable to defendant because they did not create a reasonable doubt about his guilt. *Lane, supra*. If anything, they were further evidence contradictory of defendant’s version of the facts because they showed that the bullet was consistent with being fired from defendant’s .32-caliber gun and was located, similar to the other bullets, in the hallway, and not in the stairway where defendant insisted the shooting took place. In fact, this bullet was underneath the carpeting where the victim came to rest.

Second, if, as defendant claims, he did not possess the evidence, he failed to prove that he could not have obtained it with reasonable diligence. Defense counsel conceded at the evidentiary hearing that the prosecutor’s office allowed her to visit the office and view the evidence at any time. The prosecutor testified that he and defense counsel went to his office and reviewed the evidentiary materials after the settlement conference on January 12, 2007, that he had received the ballistics report earlier that week, and that part of his purpose in reviewing the materials with defense counsel was to be sure she was aware of the newly received ballistics

report, the arrival of which obviated the need for yet another adjournment of trial.¹ Further, the record does not support defendant's argument that defense counsel was unaware of the evidence. The prosecutor specifically informed the trial court and defense counsel on the record at the October 9, 2006, motion hearing that another bullet was found at the scene of the shooting by the homeowner when she was pulling up the blood-stained carpeting to clean the area where the victim's body had been found, she gave the bullet to Detective Jeffrey Johnson, and the bullet was being sent to the laboratory for testing:

I would also indicate for the Court, as I indicated to Ms. Converse before the Court took the bench, that I was just informed by Detective Jeff Johnson . . . that while he was serving a witness who owned the home where the shooting actually took place she indicated to him that as she was cleaning an area where the victim's body had been found and where the shooting allegedly took place she found what appeared to be a bullet fragment under the carpet when she pulled the carpeting up. This bullet fragment was given to Jeff Johnson, and he is in the process today of packaging that and sending that to the Michigan State Police laboratory for comparison purposes.

We need to determine whether or not that round came from the weapon fired allegedly by the defendant or whether or not it was a round fired allegedly by the victim in this case.

And I would also state for the Court's benefit that this case does involve the possibility of multiple guns, one belonging to the defendant and one belonging to the victim. There's a possibility that there was a firefight between the two of them. Self-defense may be an issue raised by the defense.

Hence, we need to determine the exact locations of the individuals involved and what rounds belong to what weapon so we can determine who fired what and when and where.

In light of all of these complicated issues, your Honor, I would ask that if the defense motion [for expert witness fees and to adjourn trial] is granted that we at least do adjourn the trial so that all of these things can be wrapped up in a timely manner Also, we not waste resources serving [witnesses] for a week—or a trial in two weeks that would only be adjourned by necessity, nonetheless.

Defense counsel also had the detective's October 6, 2006, police report documenting the discovery of the bullet. On the third day of trial the homeowner, Tawana Simpson, testified about her discovery of the bullet in the corner where the victim was found, which she gave to Detective Johnson, and defense counsel cross-examined her. Defense counsel also cross-examined two other officers/laboratory technicians regarding the bullet on the fifth day of trial.

¹ The trial of this matter began on February 13, 2007.

On the sixth day of trial, defendant offered no objection when Detective Johnson testified about the bullet and it was admitted into evidence. Detective Johnson also testified about the fact that the bullet had been sent to the Michigan State Police laboratory. Further, when Jeff Crump, the firearms examiner, testified about the bullet and the ballistics report that is at issue, defense counsel offered no objection to the evidence or claimed any surprise or lack of disclosure. Although defense counsel later testified at the evidentiary hearing that she was so “shocked” by the evidence she failed to object or request a continuance, the trial court did not err in concluding that her decision not to object was strategic. Defense counsel was an experienced criminal defense attorney, and during Crump’s testimony, an extensive separate record occurred outside the presence of the jury in her attempt to question Crump regarding unrelated matters. Despite this lengthy pause in the trial, defense counsel never raised an objection at that or any other time during trial.

Third, the defendant failed to prove that the prosecutor suppressed the evidence. In fact, defendant conceded that there was no intentional wrongdoing by the prosecutor in this case. The prosecutor clearly disclosed the existence of the bullet at the October 9, 2006, motion hearing, and after he received the ballistics report he asked defense counsel to come to his office following the pre-trial settlement conference to review all the evidence before trial. Further, the ballistics report was introduced without objection at trial.

Finally, defendant has failed to establish that but for the alleged non-disclosure of the ballistics report, a reasonable probability exists that the outcome of the proceedings would have been different. *Carines, supra*. The ballistics report did not constitute crucial evidence in light of all of the other evidence at trial indicating that the shooting occurred in the hallway and that defendant did not shoot the victim under circumstances constituting self-defense or voluntary manslaughter.

Defendant failed to establish any of the four necessary prongs for a *Brady* violation, and consequently, failed to establish that a plain error occurred. *Id.*

II

Next, defendant claims that his trial counsel rendered ineffective assistance because she failed to object to the ballistics evidence, she forgot about this evidence, she failed to present a voluntary manslaughter defense as a result of the evidence, and defendant was thereby deprived of a substantial defense. We review the trial court’s findings of fact for clear error and questions of constitutional law de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Defense counsel’s performance is presumed to be effective, and a defendant bears the heavy burden of demonstrating otherwise. *Id.* at 578. A defendant must show that defense counsel’s performance was deficient according to an objective standard of reasonableness considering the prevailing professional norms. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Defendant must also prove that he suffered prejudice as a result of the deficient performance, such that there is a reasonable probability that, absent the error, the outcome of the trial could have been different. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994). In addition, defendant bears the “burden of establishing the factual predicate for his claim of ineffective assistance of counsel[.]” *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

As discussed, the record does not support a conclusion that the prosecutor failed to advise defense counsel about the bullet and the ballistics report or make both available for inspection; thus, defense counsel had no reason to object to any discovery violation. Further, the record reflects that defense counsel became aware of the bullet at least by October 9, 2006, and went with the prosecutor after the January 12, 2007, settlement conference to review his file and the materials for trial, which at that time purportedly included the ballistics report. Finally, multiple witnesses testified at various points in the trial prior to the introduction of the ballistics report about the bullet, where it had been found, and that it had been sent to the Michigan State laboratory for analysis. Therefore, we conclude that defense counsel's performance fell below an objective standard of reasonableness in allegedly forgetting about the ballistics report. However, defendant has failed to establish that, but for this error, it is reasonably likely that the outcome of the trial would have been different. *Pickens, supra*. As previously stated, the ballistics report did not constitute crucial evidence in light of all of the other evidence at trial indicating that the shooting occurred in the hallway and that defendant did not shoot the victim under circumstances constituting self-defense or voluntary manslaughter.

Next, we find that defendant's contention that defense counsel was ineffective for failing to request a continuance or adjournment or object to the evidence lacks merit. There is no claim by defendant or any other basis upon which to conclude that Crump's report was inaccurate or deficient. Defendant has also failed to show that he suffered any prejudice, *id.*, or explain and support how a continuance would have benefited him. Because the trial court did not err in concluding that there was no discovery violation, defense counsel was not ineffective for failing to raise a meritless objection to an alleged discovery violation or to request an unnecessary continuance. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

We also reject defendant's argument that he suffered prejudice because defense counsel did not present an argument that was consistent with the evidence of the third bullet found in the basement, which clearly negated that the shooting took place on the stairs as testified to by defendant. Defense counsel's decisions regarding what evidence or defenses to present are presumed to be matters of trial strategy, and defendant bears the burden of overcoming this strong presumption; this Court will not substitute its own judgment for defense counsel's judgment. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002); see also *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). The fact that a chosen strategy does not work does not render defense counsel's performance deficient. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Defense counsel's role is "to choose the best defense for the defendant under the circumstances." *Pickens, supra* at 325. Further, "every effort (must) be made to eliminate the distorting effects of hindsight,' and []'the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *LaVearn, supra*, quoting *Strickland, supra* at 689. Where defense counsel is "faced with a choice between two defenses with significant evidentiary problems[,] and decides to "eschew[] the weak defense that offered the possibility of a [less culpable] conviction, in favor of the weak defense that offered the possibility of a complete acquittal and that avoided the ethical problems that would have arisen had the defendant testified that he lacked the intention to kill[,] defense counsel's performance is not deficient. *LaVearn, supra*.

The record reflects that defense counsel investigated the case by speaking with defendant, reviewing the prosecutor's evidence, visiting the crime scene, and obtaining her own experts. Based on the feedback from her ballistics expert, she considered raising a voluntary manslaughter defense, but, she ultimately chose to pursue self-defense and defense of others because defendant insisted on this defense and did not want to pursue voluntary manslaughter. Defendant maintained at all times that he shot the victim in the stairway to protect himself and his friend. The chosen defense therefore followed defendant's own testimony, even though defendant's description of the location of the shootout conflicted with other evidence at trial. Defense counsel chose to pursue a strategy that could have resulted in a complete acquittal instead of culpability for a lesser offense. *Id.* Defense counsel's testimony at the evidentiary hearing revealed that she did not change to a manslaughter theory at trial after the report was revealed because of a strategic trial decision, specifically that she had already set forth the self-defense and defense of others theory during the opening statement. Furthermore, defense counsel did not present a theory that was wholly unsupported by the evidence. The theory was consistent with defendant's own testimony, evidence of the .25-caliber spent casing at the bottom of the steps and the .25-caliber gun near the victim, and some of the witnesses' testimony. Testimony established that the bullets could have been shot from the stairway and ricocheted into the hallway, even though other evidence made this theory unlikely. Defendant nevertheless maintained that the shooting occurred in the stairway and he was never in the hallway, even though he testified after the prosecution presented strong evidence that the shooting occurred in the hallway. Defense counsel could not have asked defendant to lie and testify that he was in the hallway. And, the jury could have chosen to believe defendant over the other witnesses' testimony that he was in the hallway, especially considering that the other witnesses had credibility issues. On the record, the trial court did not err in finding that defense counsel's chosen strategy and decision not to deviate from it did not constitute ineffective assistance of counsel.

Moreover, we conclude that, even if defense counsel had pursued a voluntary manslaughter defense, this would not have affected the outcome of the trial. The jury was instructed on voluntary manslaughter, yet found defendant guilty of first-degree murder. The record does not support that defendant was adequately provoked and acted in the heat of passion without a sufficient lapse of time during which to cool his passions. *People v Tierney*, 266 Mich App 687, 714; 703 NW2d 204 (2005). Rather, the evidence indicated that defendant possessed the gun for some time before the shooting, was aware that the victim and defendant's best friend had a dispute over a woman, and defendant was known to do whatever his best friend asked of him. Defendant then went with his gun to a friend's house where he knew the victim was present. Defendant and his friends first pounded on and kicked the front door of the house for several minutes, yelling and demanding to be allowed inside, and defendant assisted one member of the group in breaking into the house through a window. Defendant then entered and went immediately down the stairs to where the victim was located. There was no evidence that the victim provoked this attack. There is also no evidence that defendant acted in the heat of passion without a reasonable time to cool off when he and his friends drove from Missouri to the friend's house in Kalamazoo and spent several minutes pounding on the door before the shooting. Defendant shot the victim twice from behind, whereafter the victim's shoes were removed and he was robbed of his marijuana and cellular telephone. Defendant ascended the stairs calmly afterwards, and a friend joked with him that defendant had emptied all of the chambers of his revolver. Defendant and the others then fled from police, defendant tried to wash the gunpowder

residue from his hands, defendant threatened the driver of the van in which they traveled that he would shoot her if she did not drive away from the police, and defendant instructed the others not to tell the police anything. On the record, we find no prejudice and defendant has failed to establish that he was deprived of the effective assistance of counsel. *Pickens, supra* at 314.

Affirmed.

/s/ Jane M. Beckering

/s/ Kurtis T. Wilder

/s/ Alton T. Davis