

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 15, 2013

v

TAJUAN MARNEZ WILLIAMS,

Defendant-Appellant.

No. 301384
Genesee Circuit Court
LC No. 07-021845 FC

Before: BECKERING, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

Defendant's appeal returns to this Court following our remand for an evidentiary hearing and a ruling on defendant's motion for a new trial. On remand, the trial court denied defendant's motion, finding: (1) the evidence presented in the prison file of a prison informant did not require a new trial; (2) the recorded conversations between the informant and defendant were properly admitted into evidence at trial; (3) the defense was not prejudiced by the prosecution's mid-trial disclosure of an expert witness; and (4) defendant produced no new evidence that required a new trial.

We affirm the trial court's denial of a new trial. In addition, we conclude that defendant has presented no other issues on appeal that warrant reversal of his convictions.

Defendant's convictions arose out of the murder of Janien Cobbin, who had been defendant's girlfriend. In May 2005, Cobbin was shot and killed in her apartment. On the night the police first investigated the murder, defendant and two friends drove to Cobbin's apartment. While defendant and his friends were there, the police requested and received permission to search their car. The police found a handgun in the car and arrested all three men for possession of the gun. Defendant initially waived his right to counsel and told the police that he had attended car races on the night of the murder.

The prosecutor charged defendant with weapons counts but not with murder, because tests showed that the gun found in the car was not the murder weapon. Defendant pleaded guilty to certain weapons counts and was sentenced to two years' imprisonment. Defendant began serving his sentence at the Newberry prison facility, where he met fellow inmate James Hicks.

Hicks and defendant had several conversations. Hicks then contacted authorities and indicated that defendant had made incriminating statements about the murder. Hicks

subsequently agreed to have a hidden recorder placed in his radio. Both Hicks and defendant were transferred to the Muskegon prison facility, where they were made cellmates. For six days their conversations were recorded, including conversations in which Hicks asked defendant about Cobbin. During the recorded conversations, defendant indicated that he had killed Cobbin. The prosecutor subsequently charged defendant with the murder.

Defendant filed several pretrial motions to suppress the prison recordings. The trial court denied the motions. Defendant also filed motions to obtain Hicks's prison file, but the Department of Corrections (DOC) did not produce the file prior to trial. At trial, Hicks and the prosecutor read excerpts of the prison recordings into evidence. Those excerpts included defendant saying, "I blew her mother fucking head off." The prosecutor played a portion of the recordings for the jury and introduced the transcript of the recordings into evidence.

The prosecution also presented expert witness Dan Harris, who testified about using cellular telephone records to identify the location of defendant's telephones at the time of the murder. Defendant objected to Harris's testimony on the ground that the prosecution had not previously identified Harris as an expert witness. The trial court overruled the objection, noting that the prosecution's mid-trial identification of Harris as a witness arose from defendant's objection to another witness's proffered testimony on the issue of cell phone location. Harris then testified that on the night of the murder, defendant's cell phones were in close geographic proximity to Cobbin's apartment. In response to Harris's testimony, defendant presented expert witness Manfred Schenk. Schenk stated that the call detail method used by Harris could not identify the location of a cell phone. Schenk explained that Harris's method could identify the location of the cell tower that handled a particular call, but that there was no direct relationship between the location of the cell tower and the location of a cell phone. Schenk opined that, absent a global positioning chip, the sole accurate method to locate a cell phone during a call is "triangulation"—which was not done in this case.

The prosecution later re-called Harris. Harris acknowledged that the call detail method he used in this case could not identify the precise location of a cell phone. Harris nonetheless testified that defendant's cell phones could not have been at his alibi location (car races) at the time of the murder.

The jury returned guilty verdicts on all three counts against defendant: first-degree murder, MCL 750.316(1)(a); felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony, MCL 750.227b.

After filing his initial appeal, defendant moved to remand the case for development of a factual record on his motion for a new trial. On remand, defendant introduced into evidence Hicks's prison file, which the DOC had produced after trial. Defendant also introduced DOC policy directives and emails regarding efforts to authorize the placement of a recording device in Hicks's radio. Defendant then presented two witnesses: defense cell phone expert Schenk and DOC Administrator Steve Marschke. As noted at the outset of this opinion, the trial court considered the evidence presented on remand and ultimately denied defendant's motion for a new trial.

Returning to this Court after remand, defendant first argues that a new trial is required because the prosecution violated his due process rights by failing to disclose Harris as a witness until mid-trial. In support, defendant maintains that he presented new evidence from expert Schenk on remand. We disagree.

Our Supreme Court identified the proof required to support a motion for a new trial:

For a new trial to be granted on the basis of newly discovered evidence, a defendant must show: (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. [*Cress*, 468 Mich at 692 (internal quotation marks and citation omitted)].

In addition, to prevail on a motion based on newly discovered impeachment evidence, “a material, exculpatory connection must exist between the newly discovered evidence and significantly important evidence presented at trial.” *People v Grissom*, 492 Mich 296, 300; 821 NW2d 50 (2012). To warrant a new trial, the new impeachment evidence “must make a different result probable on retrial.” *Id.* We review for abuse of discretion the trial court’s denial of the motion for a new trial. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). We review defendant’s constitutional claim for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

The testimony defendant presented on remand failed to meet the *Cress* test for newly discovered evidence and failed to fulfill the *Grissom* burden of establishing an “exculpatory connection” between the purportedly new evidence and the conviction. *Cress*, 468 Mich at 692; *Grissom*, 492 Mich at 300. On the first aspect of the *Cress* test, defendant has not shown that Schenk’s testimony was newly discovered. To the contrary, Schenk’s opinion testimony at trial was the same as his opinion testimony on remand: Schenk continued to opine that Harris’s method of locating cell phones was erroneous. Similarly, with regard to the second aspect of the *Cress* test, the record demonstrates that Schenk’s testimony on remand was cumulative of his trial testimony.

Defendant also cannot demonstrate that Schenk’s remand testimony would have made a different result probable, as required by *Cress* and *Grissom*. Defendant argues that Schenk’s trial testimony could not have been fully responsive to Harris’s testimony, because at the time Schenk testified at trial, he had not heard Harris’s testimony. In support, defendant references the notes that the jurors sent to the trial court during jury deliberation. However, the notes sent by the jurors do not establish a likelihood that the jury would have rendered a different result had they heard the testimony Schenk provided on remand. Instead, the notes sent by the jury indicate that cell phone records were a significant evidentiary matter at trial.

The significance of the cell phone records does not warrant reversal in this case. Under *Grissom*, a new trial is appropriate only when a defendant presents newly discovered exculpatory evidence that makes a different outcome probable. *Grissom*, 492 Mich at 300. In this case, Schenk’s trial testimony placed Harris’s testimony in question by challenging the technical validity of Harris’s method. On remand, Schenk reiterated and refined his challenges to Harris’s

method, but Schenk did not raise any new factual issues. Accordingly, Schenk's remand testimony does not establish that a new trial is necessary.

Similarly, defendant has not established that the mid-trial disclosure of Harris as a witness violated defendant's due process rights. Defendant has not established a due process violation under *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). The record suggests that the prosecution had no intention to present Harris as a witness until defense counsel objected to the cell phone location testimony proffered by an earlier prosecution witness. Because there is no indication that the prosecution possessed information concerning Harris that it failed to disclose, defendant cannot establish state or federal due process violations. See *People v Cox*, 268 Mich App 440, 449; 709 NW2d 152 (2005); cf. *Brady*, 373 US at 87. The record thus indicates that there was good cause for the late disclosure, in that the prosecution expected to present the cell phone location testimony through another witness whom the prosecution had disclosed. When there is good cause for late disclosure, a trial court has discretion to allow late endorsement of a witness. *People v Herndon*, 246 Mich App 371, 402-405; 633 NW2d 376 (2001).

Further, the admission of Harris's testimony into evidence was harmless, because defense counsel presented responsive expert testimony from Schenk at trial. Absent any plain error affecting defendant's substantial rights, the introduction of Harris's testimony into evidence does not require reversal of defendant's conviction. *Carines*, 460 Mich at 774.

Similarly, defendant has not shown that his trial counsel was ineffective with regard to the expert witnesses. The Court reviews claims of ineffective assistance of counsel to determine whether counsel made errors and whether those errors were so serious that the result of the trial was unreliable. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). The record demonstrates that defendant's counsel interviewed Harris prior to Harris's trial testimony. At trial, defendant's counsel questioned Harris about his training and cross-examined Harris about the accuracy of Harris's method of locating cell phones. Moreover, defendant's counsel presented expert Schenk to discredit Harris's testimony. In sum, defendant's counsel's performance with regard to the expert witnesses at trial was reasonable. Cf. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed2d 674 (1984).

Defendant next argues that his constitutional rights to due process and confrontation were violated by the DOC's failure to produce Hicks's prison file prior to trial. Defendant maintains that the prison file contained significant evidence defendant could have used to impeach Hicks at trial. According to defendant, the lack of the prison file deprived defendant of his ability to cross-examine Hicks effectively.

We conclude that the information in the prison file was cumulative to the information defendant elicited about Hicks at trial. Hicks plainly acknowledged at trial that he was testifying against defendant in the hope of obtaining a reduction of his own sentence. Hicks also acknowledged he had been deemed a prison "snitch." In addition, defendant's counsel cross-examined Hicks about his criminal record and about inconsistencies in Hicks's testimony.

Further, as the trial court recognized when it denied defendant's motion for a new trial, the key factual issue in this case was whether *defendant's* assertions in the recording were

credible. In contrast, the credibility of Hicks was tangential to the issue of defendant's recorded assertions about the murder. Given that the prison file contained information that was cumulative to the impeachment evidence presented at trial, and that Hicks's trial testimony against defendant was tangential to the issue of defendant's credibility on the recording, the trial court correctly denied defendant's motion for a new trial under *Cress*, 468 Mich at 692. Similarly, because defendant has not demonstrated that the evidence in the prison file could have altered the trial outcome, defendant has not established plain error that would require reversal on constitutional grounds. *Carines*, 460 Mich at 774.

Next, defendant presents constitutional and evidentiary challenges to the admissibility of the prison recordings into evidence. Essentially, defendant argues that the prison recordings were so fraught with constitutional and administrative breaches that the trial court should have excluded the recordings from evidence.¹

When a defendant seeks to exclude evidence on the ground that the State obtained the evidence through a violation of a statute or court rule, the court must determine whether suppression of the evidence is the appropriate remedy for the violation. *People v Hawkins*, 468 Mich 488, 498-500; 668 NW2d 602 (2003); see also *People v Sobczak-Obetts*, 463 Mich 687, 710-711; 625 NW2d 764 (2001). “[W]here there is no determination that a statutory violation constitutes an error of constitutional dimensions, application of the exclusionary rule is inappropriate unless the plain language of the statute indicates a legislative intent that the rule be applied.” *Hawkins*, 468 Mich at 507. When the violation at issue is a merely technical requirement and when suppression of the evidence would serve no deterrent purpose, the court should allow the proponent to introduce the evidence at trial. See *Hawkins*, 468 Mich at 510-512; *Sobczak-Obetts*, 463 Mich at 712.²

¹ In his Standard 4 brief, defendant argues that his conversations with Hicks violated defendant's right to counsel. This argument lack merit. The Sixth Amendment right to counsel attaches only at or after the initiation of adversarial proceedings. See *People v Winters*, 225 Mich App 718, 723; 571 NW2d 764 (1997). At the time of the conversations with Hicks, defendant was not the subject of adversarial proceedings with regard to the offenses at issue in this case.

² Defendant argues in his Standard 4 brief that the prison recordings violated state and federal eavesdropping laws. This argument lacks merit. MCL 750.539c provides in pertinent part that “[a]ny person who is present or who is not present during a private conversation and who willfully uses any device to eavesdrop upon the conversation without the consent of all parties . . . is guilty of a felony.” However, our Supreme Court held in *People v Collins*, 438 Mich 8, 11; 475 NW2d 684 (1991), that police recordings of a conversation with consent of one participant does not violate either the United States or Michigan Constitutions. *Id.* at 11, 40. Moreover, in *Lewis v LeGrow*, 258 Mich App 175, 185; 670 NW2d 675 (2003), the Court analyzed MCL 750.539c and concluded that “a participant in a private conversation may record it without ‘eavesdropping’ because the conversation is not the ‘discourse of others.’” Under *Collins* and *LeGrow*, the prison recording in this case did not violate the state eavesdropping law.

Defendant's contentions regarding the placement of the recording device fail, for two reasons. First, defendant has not established that the DOC failed to follow its administrative rules for placement of the device. DOC witnesses testified that the approval process was informal and that the DOC did not necessarily make or retain records of the approval process. Similarly, the emails submitted by defendant on remand indicate that the DOC appropriately initiated the approval process. Second, even if the DOC did not technically comply with the internal rules governing placement of recording devices, the lack of compliance would not constitute a due process violation. See *Hawkins*, 468 Mich at 512-513. Correspondingly, defendant cannot demonstrate that any technical violation in his transfer from Newberry to Muskegon amounted to a due process violation.³

Defendant also argues that the police lacked probable cause for his original arrest at Cobbin's apartment, and that the police search of the car at the apartment was illegal. However, when defendant pleaded guilty to the weapons counts arising out of the arrest and the search, he waived subsequent challenges to the validity of the arrest and the search. See *People v Williams*, 160 Mich App 738, 739-740; 408 NW2d 540 (1987); see generally *People v Harvey*, 203 Mich App 445, 449; 513 NW2d 185 (1994). Even if the guilty plea did not constitute a waiver, we would conclude that any causal connection between the allegedly invalid arrest on the weapons charges and defendant's subsequent conviction for murder was so attenuated that suppression of defendant's subsequently recorded assertions would not be required. See *People v Frazier*, 478 Mich 231, 252-253; 733 NW2d 713 (2007).

In his Standard 4 brief, defendant challenges the subsequent arrest warrant on the murder charge. He claims that the murder arrest warrant was invalid under the Fourth and Fourteenth Amendments to the United States Constitution. Specifically, defendant contends that the arrest warrant was improperly based on the uncorroborated assertion of the investigating detective. Defendant further contends that the detective failed in a duty to disclose the use of Hicks as a confidential informant, that the trial court failed in a duty to inquire about confidential informants, that defendant's assertions to Hicks lacked indicia of credibility, and that the detective should have informed the trial court that defendant said he had lied about his involvement in the murder.

Defendant has not demonstrated a legitimate challenge to the murder arrest warrant. Probable cause exists when the trial court receives factual allegations that reasonably demonstrate the accused individual committed the offense alleged in the complaint. *People v*

Likewise, we find no violation of the federal wiretapping act, 18 USC 2510 *et seq.* The federal act provides: "It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." 18 USC 2511(2)(c).

³ Defendant asserts that the use of Hicks as an informant violated various federal constitutional protections, including his rights to equal protection, freedom of association, and to be free from cruel and unusual punishment, and from self-incrimination. Defendant provides no persuasive or binding citation to support these assertions. We therefore conclude that defendant has waived these assertions. *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003).

Hill, 282 Mich App 538, 543-544; 766 NW2d (2009), vacated in part on other grounds 485 Mich 912 (2009). This Court will not overturn the issuance of an arrest warrant after a conviction unless a defendant demonstrates a structural defect in the issuance of the warrant. See generally *People v Carines*, 460 Mich at 774. In this case, defendant refers this Court to his original pro se motion challenging the warrant in the trial court. That motion presents no evidence or argument to trigger reconsideration of the warrant. Rather, the motion reiterates defendant's arguments about Hicks's credibility and his challenges to the recording. On appeal, defendant presented no evidence or affidavit to indicate a structural defect in the arrest warrant.

Defendant next argues the trial court erred in refusing to quash the bindover. We disagree. To establish that a crime has been committed, a prosecutor need not prove each element beyond a reasonable doubt, but must present some evidence on each element of the crime. *People v Henderson*, 282 Mich App 307, 312; 765 NW2d 619 (2009). The preliminary examination transcript in this case demonstrates that the prosecutor properly presented sufficient evidence on each element of the charged crimes to support binding defendant over for trial.⁴ In addition, we reject defendant's contention that his counsel was ineffective at the preliminary examination. The transcript indicates that defendant's counsel effectively cross-examined the prosecution's witnesses at the preliminary examination.

Defendant next argues in his Standard 4 brief that the trial judge was biased against him and that his trial counsel was ineffective for failing to move to disqualify the trial judge. We disagree with both arguments. Defendant bases his assertions of bias on the trial judge's rulings and on the judge's anecdotes to the jury during delays in the trial. Disqualification based on bias or prejudice cannot be established merely by repeated rulings against a litigant, even if the rulings are erroneous. *In re Contempt of Henry*, 282 Mich App 656, 680; 765 NW2d 44 (2009). Absent any indication of bias on the part of the trial judge, we cannot find that defendant's trial counsel was ineffective for failing to move to disqualify the judge.

Defendant also argues in his Standard 4 brief that the prosecutor engaged in misconduct during closing arguments. Again, we disagree. Defendant's challenges to the prosecutor's closing argument are based on defendant's contention that the prosecutor misrepresented the facts to the jury. We find no misrepresentation in the prosecutor's closing argument. We note that a prosecutor may, in closing argument, argue the evidence and all reasonable inferences arising therefrom. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Affirmed.

/s/ Jane M. Beckering
/s/ Peter D. O'Connell
/s/ Douglas B. Shapiro

⁴ Defendant appears to contend that the prosecution presented false testimony at the preliminary examination, but defendant provides no affidavits or evidence to support this contention. Accordingly, defendant has failed to properly support his contention.